



## Determination 2013/018

### Regarding the refusal to issue a code compliance certificate and the issue of a notice to fix for a 10-year-old house with monolithic cladding at 38 Pendennis Point, Porirua



#### 1. The matters to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The parties to the determination are:
- the joint owners of the house, L Giles (“the applicant”), and T Giles
  - Porirua City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 This determination arises from the decisions of the authority to refuse to issue a code compliance certificate and to issue a notice to fix for a 10-year-old house because it was not satisfied that the building work complied with certain clauses<sup>2</sup> of the Building Code (First Schedule, Building Regulations 1992). The authority’s concerns regarding compliance of the building work relate primarily to the weathertightness of the claddings.

<sup>1</sup> The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at [www.dbh.govt.nz](http://www.dbh.govt.nz) or by contacting the Ministry on 0800 242 243.

<sup>2</sup> 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.

1.4 The matter to be determined<sup>3</sup> is therefore whether the authority was correct in its decisions to refuse to issue a code compliance certificate and to issue the notice to fix.

1.5 In deciding this, I must consider:

**1.5.1 Matter 1: The external building envelope**

Whether the external building envelope of the house complies with Clause B2 Durability and Clause E2 External Moisture of the Building Code. The building envelope includes the components of the systems (such as the monolithic cladding, the windows, the roof cladding and the flashings), as well as the way the components have been installed and work together. I consider this in paragraph 6.

**1.5.2 Matter 2: The remaining code requirements**

Whether the house complies with other relevant Building Code clauses identified in the authority's inspection of 3 February 2011 (refer paragraph 3.4), namely E3 Internal Moisture, F4 Safety from falling, G9 Electricity, and G11 Gas as an energy source. I consider these clauses in paragraph 7.

**1.5.3 Matter 3: The durability considerations**

Whether the building elements in the house comply with Clause B2 Durability of the Building Code, taking into account the age of the building work. I consider this in paragraph 8.

1.6 In making my decision, I have considered:

- the submissions of the parties
- the report of the property inspection company (“the inspection company”) engaged by the applicant to inspect the house
- the report of the registered building surveyor (“the building surveyor”) engaged by the applicant to report on the external wall cladding
- the reports of the expert commissioned by the Ministry to advise on this dispute (“the expert”)
- the other evidence in this matter.

## **2. The building work**

2.1 The building work consists of a detached house on a level site in a high wind zone for the purposes of NZS 3604<sup>4</sup>. The house is two-storeys-high in part and is assessed as having a moderate weathertightness risk (see paragraph 6.2).

2.2 Construction is generally conventional light timber frame, with concrete foundations and floor slab, monolithic wall cladding, aluminium joinery and 30° pitch pressed

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<sup>3</sup> Under sections 177(1)(b) and 177(2)(d) of the Act

<sup>4</sup> New Zealand Standard NZS 3604:1999 Timber Framed Buildings

metal tile hipped and gabled roofs with eaves of about 600mm overall. Lower roofs form lean-tos against upper walls on all elevations.

- 2.3 The monolithic wall cladding is a proprietary flush-finished fibre-cement cladding system that consists of 7.5mm thick fibre-cement sheets fixed directly through the building wrap to the framing, and finished with an applied textured coating system.
- 2.4 A timber sample from the bottom plate was sent by the expert for testing and no timber preservative was detected. The expert noted no evidence of timber treatment and, given the date of framing installation in 2001, I consider that the wall framing of this house is not treated.

### 3. Background

- 3.1 The authority issued a building consent (No. ABA 10643) on 30 March 2001 under the Building Act 1991. I have not seen a copy of the building consent.
- 3.2 The authority carried out various inspections during construction, including pre-line inspections in June 2001. The authority carried out a final inspection on 8 April 2002 and the 'code compliance certificate checklist' identified that the 'top bathroom, was unfinished and noted 'owner away until Nov 2002.'
- 3.3 The authority re-inspected the house on 21 April 2004, limiting its inspection to the upper bathroom and noting 'bathroom complies ref previous inspection'. Although the inspection record notes that the work met 'the requirements of the New Zealand Building Code', no code compliance certificate was issued for the house as no formal application had been made.
- 3.4 I have seen no records of correspondence until the applicant prepared to sell the property in 2011 and a code compliance certificate was sought. The authority inspected the house on 3 February 2011. The "scope of inspection sheet" listed a number of items relating to the wall cladding requiring attention and the following additional items (relevant code clauses in brackets):
- Laundry – seal holes through wall & fix the tub (E3)
  - Seal under WC pans to bathrooms & ensuite (E3)
  - Fit restrictor stays to window sash above bath & in main bedroom (F4)
  - Fix, seal, fit flanges and insulate pipes under [external gas water heater] (E2, G12)
- 3.5 The authority also photographed cladding defects identified during its final inspection and ticked as 'failed' the following areas on the exterior (in summary):
- Flashings – windows/doors
  - Flashings – roof
  - Cladding ground clearance
  - Spouting and downpipes
  - Penetrations – flashings.

- 3.6 In a letter to the owners dated 3 February 2011, which the authority considered to be notice under section 95A of the Act, the authority noted that ‘it was apparent that a number of defects exist with the external envelope which we consider do not comply with Clauses B2 and E2 of the New Zealand Building Code 1992’ and a code compliance certificate could therefore not be issued. The authority also noted that it had been advised that a determination would be sought and therefore a notice to fix would not be issued until that process was complete.

### **3.7 The notice to fix**

- 3.7.1 In a subsequent letter to the owners dated 24 July 2012, the authority noted that as no more information had been received, there was ‘no option but to follow the requirements of the Building Act and issue you with the attached Notice to Fix.’

- 3.7.2 The authority attached a notice to fix, also dated 24 July 2012, which stated in the ‘Particulars of Contravention or Non-Compliance’ that the exterior cladding system ‘does not comply Clauses B2 and E2 of the New Zealand Building Code 1992’. The notice also stated that the applicants must:

Engage an independently qualified expert to report on all aspects of the existing external cladding system as a whole including the condition of the underlying timber substrate. The expert must identify the type of cladding system installed and provide a remedial plan to address any issues on non-compliance that may be identified.

- 3.7.3 The notice also referred to the qualifications required of an acceptable expert and noted that a building consent would be required for cladding remediation work.

- 3.8 I note here that neither the notice to fix nor the letter to the applicant advising of the refusal of a code compliance certificate mentions Clauses E3, F4, G9, or G11 and does not identify any non-compliant building elements relating to those clauses. The authority has submitted that these clauses were considered ‘relatively minor’ and ‘easily resolved’ and were therefore noted on a “standard site instruction” only (refer paragraph 3.4).

### **3.9 The inspection company’s report**

- 3.9.1 The applicant engaged a property inspection company (“the inspection company”), which visited the house to carry out thermal imaging and non-invasive moisture testing. A third visit was made to carry out invasive moisture testing and an undated report was submitted titled ‘Invasive Moisture Test’.

- 3.9.2 The report included various photographs, including of moisture meter readings taken through interior linings and skirtings. The photos show long probes inserted into holes drilled into the framing, with no indication of the depths of those readings. All readings were below 16% and the report concluded that:

...this home is not now and never was a leaky home.

As it is now 10+ years old there are some maintenance issues that need to be addressed on this home, but again it is what you expect for any house of the some age and construction method with children onsite.

- 3.9.3 Correspondence between the authority and the inspection company followed, with the authority questioning the experience of the company in the field of cladding systems. The authority also notified the applicant that a report from a registered building surveyor was expected, as had been stated in the notice to fix.
- 3.10 Meetings and telephone discussions with the applicant followed, without resolution.
- 3.11 The building surveyor's report**
- 3.11.1 The applicant engaged a registered building surveyor who visited the house on 23 and 24 October 2012. The building surveyor noted some inadequate cladding clearances, cladding damage and cracks to some sheet joints due to the lack of vertical control joints, unsealed junctions at the bottom of apron flashings and windows not installed to manufacturer's recommendations.
- 3.11.2 The building surveyor took invasive moisture readings in three locations into bottom plates, noting that these varied from 14% to 18% which the surveyor described as 'within the usual or normal range'. The surveyor also took non-invasive readings through the soffits, noting a high reading next to the downpipe from the upper roof on the east elevation – resulting from a leak at the gutter outlet above.
- 3.11.3 The building surveyor concluded that the 'aspects of non-compliance with clause E2' identified during his inspections did not show signs of affecting weathertightness of the house. The surveyor recommended that the authority reconsidered issuing the code compliance certificate and include his survey report on the property file for reference by future owners of the house.
- 3.12 On 25 October 2012, the authority notified the applicant that the reports on the condition of the cladding had been reviewed and the building surveyor's report had confirmed that 'the cladding system does not comply with the manufacturers installation requirements.' The authority was therefore satisfied that because the building work was not in accordance with the building consent and the manufacturer's requirements it did not comply with the Building Code and the notice to fix would remain in force.
- 3.13 Further correspondence followed between the parties without resolution and the Ministry received an application for a determination on 5 November 2012.

## **4. The submissions**

- 4.1 The applicant forwarded copies of
- the final inspection record
  - the letter and notice to fix dated 24 July 2012
  - the undated report from the inspection company
  - some other correspondence with the authority.

4.2 In response to the application for determination the authority provided a submission by way of a letter dated 15 November 2012. The authority outlined the background to the situation following its final inspection on 3 February 2011, noting that the inspection identified that the ‘cladding system as a whole does not comply with the manufactures (sic) specifications and does not comply with Clauses B2 and E2’ and that aspects of the building do not comply with Clauses F4 and E3. The authority also stated that ‘as no energy certificates have been provided we have been unable to confirm compliance with Clauses G9 [Electricity], G10 [Pipes services] and G11 [Gas as an energy source].’ (I assume Clause G10 referred to gas work that is already considered in Clause G11, the determination will not therefore consider compliance with Clause G10.)

4.3 The authority noted in its submission that it had provisionally accepted a proposal on 11 February 2011 from ‘a highly respected weathertightness expert’ who planned ‘to inspect the building, identify and report on the defects and provide a remedial plan’. As no action was taken, the notice to fix was issued and two subsequent reports were received. The authority noted it had:

...stated to all parties that the Notice to Fix was issued in accordance with the Building Act 2004 and that the evidence that has been provided to date is not considered adequate to confirm compliance and lift the Notice to Fix or to issue a Code Compliance Certificate.

4.4 The authority forwarded copies of

- the consent drawings and specification
- the inspection records
- photographs taken during the final inspection on 3 February 2011
- the letter and notice to fix dated 24 July 2012
- undated reports from the inspection company and the building surveyor
- various other correspondence and information.

#### **4.5 Responses to the first draft determination**

4.5.1 A draft determination was issued to the parties for comment on 23 January 2013. The draft concluded that there was insufficient information available to the determination to form a view as to compliance with Clauses E3 and F4, but that the external building envelope did not comply with Clauses E2 and B2 and confirmed the authority’s decision to refuse to issue a code compliance certificate.

4.5.2 The applicant responded by way of a letter dated 4 February 2013. The applicant commented on the actions of the authority and queried why a code compliance certificate was not issued after the authority carried out the 2004 inspection (refer paragraph 3.3) and also why non-compliant items identified in 2011 inspection had not been raised during the 2004 inspection.

4.5.3 The applicant also noted that matters related to Clauses E3, F4, G9 and G11 had not been included in the notice to fix, and expressed the view that it was unreasonable for the authority to include them now (refer paragraph 4.2). The applicant provided

copies of the energy works certificates. The applicant questioned how the authority could assess the building under the Act when it was consented under the former Act.

4.5.4 The authority responded to the draft determination in a letter dated 7 February 2013. The authority also referred to a claim filed under the Weathertight Homes Resolution Service (“WHRS”) for the house and that the authority’s view was that the house would meet the eligibility requirements under the WHRS Act. The authority considered the WHRS process ‘took an entirely different approach’ with respect to the assessment of compliance ‘and what may be an acceptable means of rectification’. The authority submitted that:

- a modification of Clause B2.3.1 was not appropriate in this instance
- a code compliance certificate could not be issued in the absence of energy works certificates. The submission referred to a guidance document issued by the Ministry which states that energy work certificates ‘must’ be included with an application for a code compliance certificate
- a notice to fix cannot be withdrawn and replaced with a section 95A notice when the building work concerned does not comply with the Building Code. The authority sought guidance on this matter.

## **4.6 Responses to the second draft determination**

4.6.1 I considered the submissions made on the first draft determination and amended the determination as I considered appropriate. I also engaged the expert to revisit the property to provide me with further information on compliance with Clauses E3 and F4 (refer paragraph 5.9).

4.6.2 A second draft determination was issued to the parties for comment on 22 February 2013. The draft concluded that the building work did not comply with Clauses E3, F4, E2 and B2 and confirmed the authority’s decision to refuse to issue the code compliance certificate.

4.6.3 The authority responded to the second draft in a letter dated 6 March 2013. The authority clarified some of the background to the matters and noted an error made in the recording of its earlier submission. The authority reiterated that

- it does not consider that a modification of Clause B2.3.1 is appropriate in this instance, due to the cladding not being installed in accordance with the manufacturer’s instructions as well as the lack of maintenance carried out
- it maintains the view that the report provided by the expert for the determination ‘should align more closely’ with a report than an expert would complete as part of the WHRS process. The authority requested a copy of any report completed under the WHRS process and that the relevant findings from such a report be included in the determination to provide a ‘more comprehensive and detailed list of the remedial work required’ (I have responded to this in paragraph 6.4.6)

- 4.6.4 The authority also sought an explanation of why I consider the items listed in paragraph 5.6.2 to be ‘adequate’, and indicated it considered the withdrawal of the notice to fix would not be appropriate ‘when the previous [95A] notice and notice to fix were not complied with’.
- 4.6.5 In respect of the energy works, the authority noted that they had formed part of the consent and submitted that
- performance to date does not necessarily indicate it will continue to perform into the future
  - the Electricity Regulations 1997 and Gas Regulations 1993 required certification; any judgements on the performance of those systems against the requirements of the Building Code without proper verification should not be relied on given ‘the consequences of failure, the principles and purposes of the Building Act and the requirement that no other Act or Regulation may be contravened when carrying out the functions required under the Building Act.’
- 4.6.6 The applicant responded in a letter dated 14 March 2013 with a submission that reiterated views expressed earlier. The applicant also enclosed photographs of remedial work carried out including the fitting of window stays, sealing of toilet pans, lagging of gas pipes, flashings installed to pipe penetrations in the laundry, and work to the ensuite lining and ceiling. (I note here that the determination decision can only take account of the building work as it was when the authority made its decisions to refuse to issue the code compliance certificate and to issue the notice to fix).

## 5. The expert’s report

- 5.1 As mentioned in paragraph 1.6, I engaged an independent expert to assist me. The expert is a member of the New Zealand Institute of Building Surveyors. The expert inspected the house on 20 November 2012 and provided a report dated 4 December 2012. The expert noted that the authority’s photographs together with the cladding reports on the building provided additional detailed information.
- 5.2 The expert described the construction quality as ‘typical of period’, noting that the wall cladding was due for maintenance and re-painting, with some joint cracking and damage.
- 5.3 The expert observed that windows and doors had been face-fixed against the fibre-cement backing sheets prior to applying the coating system. The expert noted that there was no sign of seals behind the flanges, with the textured coating taken over the jamb junction and onto the top of the head flashing – impeding drainage from the cladding above the windows. The expert also noted that some sealant had been applied to the ends of the head flashings, although this was deteriorating in places.
- 5.4 The expert removed a small section of cladding at the bottom plate on the north elevation where the cladding was hard up against the foundation wall, observing that the timber appeared to be firm and intact despite light staining. The expert sent the sample for laboratory testing and analysis found no evidence of timber preservative.



## 5.5 Moisture levels

- 5.5.1 The expert inspected the interior of the house and took non-invasive moisture readings; noting no evidence of moisture penetration. The expert also noted that repairs had been made to the gutter outlet from the upper roof on the east elevation, where the building surveyor had previously noted high moisture levels in the soffit.
- 5.5.2 The expert took non-invasive readings through the wall cladding, along with six invasive moisture readings into the framing at sample locations considered to be at particular risk of moisture penetration. The expert noted the following:
- 18% in bottom plate at broken cladding to the north west corner (non-invasive)
  - 22% at crack between upper window heads (non-invasive)
  - 22% at foundation cut-out to north family room wall (invasive)
  - between 18% and 24% in bottom plate on north kitchen wall (invasive)
  - 22% under the jamb/sill junction to the north dining wall (invasive)
- 5.5.3 Moisture levels above 18% generally indicate that external moisture is entering the structure and investigation is needed. I note that only one invasive moisture reading was taken from the west and south elevations, with no readings to the east elevation.

## 5.6 The external envelope

- 5.6.1 Commenting specifically on the external envelope of the house, the expert noted that:
- cracking has occurred to the cladding at several locations along most elevations
  - the bottom edges of fibre-cement backing sheets are unsealed
  - windows are face-fixed against fibre-cement backing sheets, with no seals behind jamb flanges and the coating applied after the window installation
  - some penetrations through the cladding are insufficiently sealed
  - the unsealed ends of some apron flashings

### General maintenance

- the cladding is due for re-painting, with cracks at some backing sheet joints
  - some downpipe fixings require attention
  - lower corners and edges of cladding are damaged, exposing fibre-cement
  - sealants at the ends of head flashings are deteriorating
  - there are cracks in the coating at some jamb flange/cladding junctions.
- 5.6.2 The expert made the following additional comments:
- Although a section of the north cladding is not offset from the foundation, the raised moisture level is likely to have resulted from unsealed fibre-cement bottom edges allowing moisture to wick into the cladding and into the bottom plate.

- Although the meter box lacks a head flashing, the top is sheltered beneath the eaves and there is no indication of associated moisture entry.
- Although some cladding clearances are less than the current acceptable solution E2/AS1, these are at well drained surfaces sheltered by eaves and considered generally satisfactory.
- Although wall cladding butts against the top of head flashings, due to the shelter from the eaves this is unlikely to lead to moisture penetration.

5.6.3 The expert concluded that the cladding was allowing low levels of moisture into the framing, although there was no sign of significant framing damage, adding:

The cladding would appear to have been largely compliant with clause E2 from [construction] and is likely to have provided compliance with E2 for most of its service history.

5.7 A copy of the expert's report was provided to the parties on 19 December 2013.

5.8 The authority responded to the expert's report in letter dated 8 December but received on 11 January 2013. The letter referred to additional compliance matters raised in its February 2011 inspection. The authority noted that the cladding had not been installed as required by the manufacturer, that it did not comply with Clauses B2 and E2, and it 'requires repairs and repainting' and that a modification of Clause B2.3.1 was not appropriate. The authority considered the expert's investigation should provide:

a more detailed report in keeping with the WHRS format which also detailed the work needed to repair the defects and the estimated cost to do that work would provide greater transparency to all parties.

## 5.9 Supplementary report

5.9.1 The expert was requested to undertake a further site visit to assess the remaining items identified in the 2011 inspection (refer paragraph 3.4). The expert visited the site again on 6 February 2013 and provided a report dated 7 February 2012.

5.9.2 The expert made the following observations:

### Clause E3

- Two water pipes penetrating the wall lining below the laundry tub require sealing.
- The junction between the toilet pan and floor to the two upstairs toilets require sealing. The downstairs pan has had sealant applied and complies.

### Clause F4

- Restrictor stays are lacking in most but not all upper level opening windows.

### Clauses G9, G11, G12

- Energy works certificates had been provided by the applicant and appended to the report

- Insulation has been installed to the gas water heater pipes and external penetrations have been sealed.

### **Clause E2**

- Spreaders to the lower two gutters yet to be installed, however there was no indication of moisture ingress in this respect.

## **6. Matter 1: The external building envelope**

6.1 The evaluation of building work for compliance with the Building Code and the risk factors considered in regards to weathertightness have been described in numerous previous determinations (for example, Determination 2004/1).

### **6.2 Weathertightness risk**

6.2.1 This house has the following environmental and design features, which influence its weathertightness risk profile:

#### **Increasing risk**

- the house is in a high wind zone
- the house is two-storeys high in part with some complex roof junctions
- the walls have monolithic cladding fixed directly to the framing
- the external wall framing is unlikely to be treated to provide resistance to decay if it absorbs and retains moisture

#### **Decreasing risk**

- the wall cladding is sheltered by eaves.

6.2.2 Using the E2/AS1 risk matrix to evaluate these features, the elevations are assessed as having a moderate weathertightness risk rating. If details shown in the current E2/AS1 were adopted to show code-compliance, a drained cavity would be required for all elevations. However, this was not a requirement at the time of construction.

### **6.3 Weathertightness performance**

6.3.1 Taking account of the expert's report and the comments in paragraph 5.6.1, I conclude that further investigation and/or remedial work is necessary in respect of the following areas:

- the apparent lack of vertical control joints in walls longer than 5.4m
- the lack of spreaders to downpipes from upper roofs
- for the face-fixed windows and doors, the unsealed jamb flanges
- maintenance of the wall cladding to attend to:
  - deteriorating paint and coating finishes, cracks and damage
  - unsealed/unpainted bottom edges of fibre-cement

- lack of or deteriorating sealants to penetrations head flashings ends and some apron flashings
- loose downpipe fixings
- additional investigation to confirm the expert's conclusion as to the level of moisture penetration into and condition of the untreated framing.

6.3.2 I note that the expert did not comment on vertical control joints and the significance of their absence or otherwise will depend on results of additional moisture testing.

6.3.3 I also note the expert's comments as outlined in paragraph 5.6.2 and accept that these areas are adequate in these particular circumstances. In response to the authority's request I note that although the items do not comply with the Acceptable Solutions, the expert has identified mitigating features that I consider allow those items to comply with the performance requirements of the Building Code.

## **6.4 Weathertightness conclusion**

6.4.1 I consider the expert's report establishes that the current performance of the flush-finished fibre-cement cladding is not adequate because there is evidence of moisture penetration into the timber framing in some areas. Consequently, I am not satisfied that the house currently complies with Clause E2 of the Building Code.

6.4.2 In addition, the building envelope is also required to comply with the durability requirements of Clause B2. Clause B2 requires that a building continues to satisfy all the objectives of the Building Code throughout its effective life, and that includes the requirement for the house to remain weathertight. Because the cladding faults will allow continue to allow the ingress of moisture in the future, the building work does not comply with the durability requirements of both Clause E2 and B2.

6.4.3 Because the identified cladding faults occur in discrete areas, I am able to conclude that satisfactory investigation and rectification of the items outlined in paragraph 6.3.1 will result in the external envelope being brought into compliance with Clauses B2 and E2 of the Building Code.

6.4.4 I am satisfied that this house does not comply with the Building Code and that the authority made an appropriate decision to refuse to issue a code compliance certificate.

6.4.5 The expert has commented on the lack of maintenance to this house. 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. The Ministry 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).

6.4.6 The authority contends (refer paragraphs 4.6.3 and 5.8) that the expert's report should more closely follow a WHRS report as the latter details 'the work needed to repair the defects and the estimated cost ...'. This is outside my jurisdiction under the Act in terms of the decision I am required to make under section 188 which in this instance concerns the authority's decision to refuse to issue the code compliance

certificate and the issue of the notice to fix. The purpose of the WHRS Act is to assess and remediate buildings that are allowing water ingress.

- 6.4.7 In response to the applicant's view that the authority should be assessing the building against the former Act (refer paragraph 4.5.3), I note that the section 436 of the Act requires an authority to assess a building consent issued under the former Act against the provisions of the Building Code that were in force at the time the consent was issued. I note that in respect of the cladding, the provisions of Clause E2 External moisture have not changed significantly in the period since the consent was issued.

## **7. Matter 2: Remaining code requirements**

- 7.1 The authority's submission (refer paragraph 4.2) included additional code clauses as identified in the authority's inspection of 3 February 2011. I note that those items were not included in the notice to fix; however verification is required that these items comply before a code compliance certificate can be issued.

- 7.2 Taking account of the observations noted in the expert's supplementary report I conclude that the building work did not comply in respect of:

- the two water pipes penetrating the wall lining below the laundry tub (E3)
- the junction between the toilet pan and floor to the two upstairs toilets (E3)
- the lack of restrictor stays to upper level opening windows (F4).

### **7.3 The energy works certificates**

- 7.3.1 Copies of energy works certificates in respect of Clause G9 and G11 have been provided as evidence this work is code compliant.
- 7.3.2 The authority has submitted that an application for a code compliance certificate must be accompanied by an energy works certificate, and in this case 'as no energy certificates have been provided [the authority has] been unable to confirm compliance with Clauses G9, ... and G11'.
- 7.3.3 Energy work is self-certifying, and I note that an energy works certificate would not be able to be required if the work concerned did not form part of the consent. I also note that the absence of an energy works certificate does not of itself mean that the building work does not comply with the performance requirements of the Building Code.
- 7.3.4 While section 94(3) of the Act says that failure to provide an energy works certificate is 'sufficient reason' to refuse to issue a code compliance certificate, the absence of a certificate does not prevent a code compliance certificate from being issued. I remain of the view this provision allows the authority to apply this requirement as it considers appropriate.
- 7.3.5 The authority has expressed concerns that it would be inappropriate for it to assess the Building Code compliance of energy work in the absence of the relevant certificates under the Plumbers, Gasfitters, and Drainlayers Act 2006 or the

Electricity Act 1992 as to do so would be a breach of the provisions of those Acts. However, there is nothing in those Acts that prevents an authority assessing the Building Code compliance of energy work and deciding whether or not to issue a code compliance certificate. Given the extremely narrow range of energy work that requires a building consent (see section 43(2) of the Act) I expect this issue is likely to arise very infrequently. If an authority were in a position to make its own assessment of whether particular energy work complied with the relevant provisions of the Building Code that would in no way affect the owner's obligations under those other Acts to ensure gasfitting or electrical work under those Acts has been properly certified.

- 7.3.6 The guidance referred to by the authority in paragraph 4.5.4 is in respect of consents and code compliance certificates issued under the Act. The work concerned was consented under the former Act and the provisions of section 436 apply in respect of the issue of a code compliance certificate.

## **8. Matter 3: Durability considerations**

- 8.1 The authority has concerns about the durability, and hence the compliance with the Building Code, of certain elements of the building taking into consideration the completion of the house during 2002.
- 8.2 The relevant provision of Clause B2 of the Building Code requires that building elements must, with only normal maintenance, continue to satisfy the performance requirements of the Building Code for certain periods ("durability periods") "from the time of issue of the applicable code compliance certificate" (Clause B2.3.1).
- 8.3 In previous determinations (for example Determination 2006/85) I have taken the view that a modification of this requirement can be granted if I can be satisfied that the building complied with the durability requirements at a date earlier than the date of issue of the code compliance certificate, that is agreed to by the parties; and that if there are matters that are required to be fixed they are discrete in nature.
- 8.4 Because of the extent of further investigation required into the condition of the timber framing and therefore to parts of the building's structure, and the potential impact of such an investigation on the external envelope, I am not satisfied that there is sufficient information on which to make a decision about this matter at this time.

## **9. Notification under section 95A and issue of a notice to fix (section 164)**

- 9.1 The authority has sought clarity on the matter of the relationship between the requirement to give reasons for a refusal to issue a code compliance certificate (section 95A) and the issue of a notice to fix under section 164 of the Act. The authority is of the view that a notice to fix cannot be withdrawn when building work does not comply with the Building Code, and that an authority is obligated to issue a notice to fix where there is non-compliance with the Building Code. The authority also stated that the notice to fix was issued 'when the owner failed to carry out any

remedial work [in response to the notice issued under section 95A] and opted not to seek a determination’.

- 9.2 If an owner requests a code compliance certificate then an authority is obliged to follow the provisions of section 95A, which in the normal course of events is likely to include an inspection and a detailed assessment of the building work concerned. Section 95A of the Act states that if an authority refuses to issue a code compliance certificate, it:
- ... must give the applicant written notice of—
  - (a) the refusal; and
  - (b) the reasons for the refusal.
- 9.3 An authority has the power to issue a notice to fix where the authority considers on reasonable grounds an owner is contravening or failing to comply with the Act or Building Code (s164(1)(a)). A notice to fix is an enforcement notice that requires a person to carry out work to remedy a breach of the Act or Code (s164(2)(a)), specifies a time period for doing so (s165(1)(b)) and may be enforced by a prosecution for failing to comply with the notice (s168). The offence is a serious one involving a significant fine, and reflects the main purpose of a notice to fix, which is to ensure compliance and provide effective penalties for those that do not comply.
- 9.4 The requirement that an authority provide reasons in writing for refusing to issue a code compliance certificate under section 95A provides an owner with notice of the further work required in order to obtain a code compliance certificate. The notice provides an owner with the opportunity to consider what work they want to undertake, how they will undertake that work and who will undertake it. While an authority must be satisfied on reasonable grounds that the building work complies with the Building Code before issuing a code compliance certificate, the reasons under section 95A are simply that, the reasons for the refusal.
- 9.5 In my view, an authority will not normally issue a notice to fix at the same time as issuing written notice under section 95 unless the particular circumstances warrant it. The issue of a notice to fix should not necessarily be seen as an expected sequential step in the regulatory process following the issue of a notice under section 95A. In addition, the processes under sections 95A and 164 should not be dealt with by simply rolling them together, automatically issuing a notice to fix and including the reasons for the refusal in the notice to fix, without considering why it is necessary to issue a notice to fix.
- 9.6 The common practice for authorities inspecting building work during the construction phase is to identify any work that does not comply with the consent and/or the Building Code and to issue a site notice requiring the work to be remedied. If the site notice is not complied with a notice to fix will usually be the appropriate response. Similarly, on a final inspection when an authority refuses to issue a code compliance certificate the usual response should be the provision of a notice with reasons for the refusal under section 95A. Then, if an owner fails to carry out the work that will be the appropriate time for an authority to consider whether to issue a notice to fix.

9.7 There will of course be some circumstances when it will be appropriate to issue a notice to fix at the same time as refusing to issue a code compliance certificate. For example, if the breach is significant, the building work is unsafe or is likely to become unsafe, or there have been repeated breaches by the owner of the Act or Building Code. However, in these circumstances, there are particular requirements of the Act in respect of the issue of a notice to fix that must be satisfied. For example, an authority must consider on reasonable grounds that a person is contravening or failing to comply with the Act or regulations. The authority's belief that the Act or regulations are being contravened will require some specific evidence in support of that belief.

## **9.8 The issue of the notice to fix**

9.8.1 The notice to fix was issued on 24 July 2012 and cited non-compliance with Clauses E2 and B2. The authority has submitted that the notice was issued over a year after the inspection of 3 February 2011 that identified non-compliance (refer paragraph 3.4) as the authority was not aware of any action taken to remedy the non-compliant building work or of any application for a determination disputing the authority's refusal.

9.8.2 I note that the notice to fix (and the refusal to issue a code compliance certificate) did not include all the clauses that the authority considered were non-compliant, but the authority has submitted those clauses omitted were 'considered relatively minor and could easily be resolved'. I disagree with the authority; when the authority issued the notice to fix the most obvious matter for inclusion in the notice would have been the breach of Clause F4 given its obvious safety related implications. As it was, the authority issued the notice to fix only in respect of non-compliance with Clauses B2 and E2 but then failed to set out any particulars of the breach of those provisions. The notice simply stated that the exterior cladding system "does not comply with Clauses B2 and E2 of the Building Code" and was not adequate to inform the owner of the particular building work that does not comply with the Building Code.

## **10. What happens next?**

10.1 Taking into account my conclusions on the compliance of the building work, the items that do not comply and the level and extent to which they do not comply, I am of the view that the authority should modify the notice to fix. While not an exhaustive list, this determination identifies some specific areas that need to be addressed (refer paragraph 6.3.1). The notice should also refer to any further defects that might be discovered in the course of investigation and rectification, but not specify how those defects are to be fixed. It is not for the notice to stipulate directly how the defects are to be remedied and the house brought to compliance with the Building Code.

10.2 The applicant can then produce a response, to either the modified notice to fix, in the form of a detailed proposal for the remediation of the non-compliant matters. It is strongly suggested this proposal is produced in conjunction with a competent person with suitable experience in weathertightness remediation. In view of the background to this determination, I suggest that the parties agree on a mutually acceptable person



to undertake the investigations and prepare the proposal for the authority's consideration.

- 10.3 The applicant has submitted that some remedial work has been undertaken to remedy items of non-compliance identified in the draft determination (refer paragraph 4.6.6). The authority will need to satisfy itself as to the compliance of the remedial work when it considers the issue of the code compliance certificate.
- 10.4 Any outstanding items of disagreement can be referred to the Chief Executive for a further binding determination.

## **11. The decision**

- 11.1 In accordance with section 188 of the Building Act 2004, I hereby determine that at the time of the authority's decisions to refuse to issue the code compliance certificate and to issue the notice to fix the building work did not comply with the Building Code that was in force at the time that building consent was issued in respect of Clauses E2, B2, E3, and F4, and accordingly I confirm the authority's decision to refuse to issue a code compliance certificate.
- 11.2 I also determine that the authority correctly exercised its powers in issuing a notice to fix, but that the notice to fix is to be modified as outlined in paragraph 10.1 of this determination.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 22 April 2013.

John Gardiner  
**Manager Determinations and Assurance**