



Determination 2014/055

Regarding the issue of a notice to fix for building work carried out to a house at 21 Santa Monica Place, Manukau, Auckland

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 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 owner of the subject property, A. Devi (“the applicant”)
- Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

1.3 This determination arises from a notice to fix issued by the authority for building work carried out without consent. The applicant had installed a new cladding over the top of existing cladding to the upper story with the understanding it was exempt building work under Schedule 1.

1.4 The matter to be determined² is therefore whether the authority was correct to issue the notice to fix.

1.5 In making my decision, I have considered the submissions of the parties, the report of the independent expert engaged by the Ministry (“the expert”), and the other evidence in this matter.

1.6 The relevant sections of the Act and clauses of the Building Code are set out in Appendix A.

2. The building work

2.1 The building was originally constructed in 1997-1998 and a code compliance certificate was issued on 11 June 1998. It is three storeys, in part, and is a light timber frame construction with texture coated fibre-cement wall cladding direct-fixed to framing on the upper floors and brick veneer to the lower floor. The hipped roofs are clad with prefinished metal tiles and the joinery is aluminium. The site is located in a high wind zone and medium corrosion zone in terms of NZS 3604.

2.2 Various alterations were made to the house between 2001 and 2013.

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

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

- 2.3 At some time in 2013, plywood overlay cladding was fixed to the outside of most of the fibre-cement cladding to the upper level. The joinery was moved outward to enable the ply to be fitted behind the window flanges. No application for building consent was made; the owner considered the works to be ‘cosmetic’ and exempt under Schedule 1.

3. Background

- 3.1 On 20 March 2013 the applicant had an inspection carried out by a building surveyor; the surveyor took a number of moisture readings (non-invasive) and provided a report titled “moisture test” (“the building report”). The report notes all readings were below 20%. (I note here that although the report provides a list of the general locations where the readings were taken, it does not identify the specific locations, such as bottom plates or below joinery, nor does it relate the locations of readings to any high risk features of the building design or construction).
- 3.2 At some time in 2013 the over-cladding was installed to the upper level of the house.
- 3.3 On 13 February 2014 the authority carried out a site visit and observed the plywood cladding had been installed without consent.
- 3.4 On 3 April 2014 the authority wrote to the applicant, noting the building work that had been carried out and that no consent had been obtained. The authority advised that a certificate of acceptance could be applied for, and that if works were required to bring the cladding into compliance with the Building Code a building consent would be required.
- 3.5 The applicant disputed that consent was required for the cladding work that had been carried out and wrote to the authority on 12 May 2014 setting out that view. (I note the letter is marked as received by the authority on 23 May 2014).
- 3.6 On 8 July 2014 the applicant wrote again to the authority, disputing that consent was required.
- 3.7 On 11 July 2014 the authority issued a notice to fix (No. 4847) which stated the particulars of contravention as

Contrary to [section] 40 of the Building Act, the following building works have been undertaken without first obtaining a building consent

- Fixing of new external wall cladding to the external walls of existing house

The notice stated that to remedy the contravention or non-compliance, the applicant must either:

- Remove all the unauthorised building work: OR
- Pursue any other option that may be available to you to make the aforementioned structure fully compliant in accordance with the Building Act 2004 and regulations under the Act.

- 3.8 The Ministry received an application for a determination on 3 September 2014.

4. The submissions

- 4.1 The applicant provided copies of the following documents in support of the application:
- The notice to fix No. 4847.
 - Schedule 1 (version prior to 28 November 2013)

- The building report, dated 20 March 2013
 - Correspondence between the parties
- 4.2 In the covering letter to the application, the applicant set out the background to the issue and noted that as the building report identified that the cladding had been performing to date the applicant believed the overlay cladding work was exempt under Schedule 1.
- 4.3 The authority acknowledged the application but made no submission in response.
- 4.4 A draft determination was issued to the parties for comment on 21 October 2014.
- 4.5 Both parties accepted the draft without further comment in responses received on 3 November 2014.

5. The expert's report

- 5.1 As described in paragraph 1.5, I engaged an independent expert, who is a member of the New Zealand Institute of Architects. The expert visited the property on 9 September 2014 and provided a report on 2 October 2014 which was copied to the parties the same day.
- 5.2 The expert noted the following:
- The ply overlay is glued and screwed to the fibre-cement sheet, with nails in some places above window heads and at the base and elsewhere. The fixings pass through the fibre-cement.
 - The windows were moved outward by the thickness of the ply and no air seals were installed.
 - The original window head flashings were reused.
- 5.3 The expert considered the ply overlay as more than cosmetic due to the re-fixing of the windows and the use of nails and screws which penetrate the fibre-cement cladding. The correct re-sealing of windows, correct flashing details, and sealing of fixings that penetrate the existing cladding are essential to the weathertightness of the cladding; these elements are functional rather than cosmetic.
- 5.4 The expert's report went on to comment on the construction details, the performance of the original cladding, and the likely compliance of the cladding with the overlay in place. As the notice to fix was issued in respect of not obtaining a building consent, I have not summarised the expert's findings regarding compliance of the building work (refer also paragraph 6.5).

6. Discussion

- 6.1 Schedule 1 of the Act provides for some building work to be exempt from the need for a building consent to be obtained. Schedule 1(a) that was current at the time the building work was carried out, and on which the applicant relied, stated that a building consent was not required in respect of:
- (a) any lawful repair and maintenance using comparable materials, or replacement with a comparable component or assembly in the same position, of any component or assembly incorporated or associated with a building, ... except –
 - (iii) repair or replacement (other than maintenance) of any component or assembly that has failed to satisfy the provisions of the Building Code

for durability, for example, through a failure to comply with the external moisture requirements of the building code;

- 6.2 The building work carried out in this case was not a repair or maintenance using comparable materials, nor replacement with a comparable component or assembly. The addition of the overlay was an alteration of the cladding system and is not building work that falls within the exemptions set out in Schedule 1; accordingly a building consent was required. As the building work required consent I am of the view that the authority was correct to issue the notice to fix.
- 6.3 Section 96 of the Act makes provision for the issue of a certificate of acceptance in certain circumstances; one of these is where ‘a building consent was required but not obtained’. In these circumstances an authority may, on application, issue a certificate of acceptance if it is satisfied ‘to the best of its knowledge and belief’ that the work complies with the Building Code.
- 6.4 While the authority may have been of the view that the work was not compliant and a certificate of acceptance was unlikely to be issued had one been sought, the notice to fix could have included reference to the owner applying for a certificate of acceptance. It is important in issuing a notice to fix that owners understand the options available to them under the Act.
- 6.5 Section 17 of the Act requires that all building work must comply with the Building Code to the extent required by the Act, whether or not a building consent is required in respect of that building work. The expert’s report indicates that there are issues that need to be addressed in order to bring the building work into compliance with the Building Code. The applicant should address the compliance of the building work with particular attention to the items identified in the expert’s report.

7. The decision

- 7.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the building work carried out without consent having been obtained was building work that required consent, and accordingly I confirm the authority’s decision to issue the notice to fix No. 4847.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 10 November 2014.

John Gardiner
Manager Determinations and Assurance

Appendix A: The relevant legislation

A.1 The relevant sections of the Act

17 All building work must comply with building code

All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.

96 Territorial authority may issue certificate of acceptance in certain circumstances

(1) A territorial authority may, on application, issue a certificate of acceptance for building work already done—

(a) if—

- (i) the work was done by the owner or any predecessor in title of the owner; and
- (ii) a building consent was required for the work but not obtained; or

Schedule 1 Exempt building work (this version replaced on 28 November 2013)

1 A building consent is not required for the following building work:

- (a) any lawful repair and maintenance using comparable materials, or replacement with a comparable component or assembly in the same position, of any component or assembly incorporated or associated with a building, ... except –
- (iii) repair or replacement (other than maintenance) of any component or assembly that has failed to satisfy the provisions of the Building Code for durability, for example, through a failure to comply with the external moisture requirements of the building code;