



Determination 2016/030

Regarding the authority's requirement for a named timber remediation expert in relation to a building consent for the recladding of a house at 5B Kapil Grove, Khandallah, Wellington

Summary

This determination considers the authority's exercise of its powers in respect of conditions on a building consent for the partial recladding of a house relating to the possibility of timber framing requiring remediation.

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 this determination are:
 - the owners of the property, A & E Verschoor (“the applicants”)
 - Wellington City Council, carrying out its duties as a territorial authority or building consent authority (“the authority”).
- 1.3 The determination arises from the decision of the authority to issue a building consent for alterations that included the partial recladding of a house; the consent was subject to certain requirements in respect of timber remediation (refer paragraphs 2.2 to 2.5). The applicants considered the authority was taking a ‘blanket’ approach and the requirements were in effect conditions on the consent that were not reasonable in the circumstances.
- 1.4 The matter to be determined² is therefore the authority’s exercise of its powers of decision in respect of the requirements included in the addenda to the issued building consent.

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

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

2. The building work and background

- 2.1 A building consent application was lodged on 23 November 2015 for alterations to the existing house. The alterations included the removal of existing upper level monolithic fibre-cement cladding and recladding in weatherboards.
- 2.2 I have not seen any correspondence from the authority with requests for further information; however, the applicants provided a “draft quality assurance plan” prepared by the designer to the authority on 22 February 2016, which I assume to be in response to a request from the authority. It was noted that the plan would be implemented ‘if the upper level framing or other structural elements are seen to be affected by the ingress of water or moisture, when the existing cladding is removed’.
- 2.3 On 26 February 2016 the applicants provided the authority with a copy of an agreement titled “Timber remediation, quality assurance ...”. The scope of services included defining the level of timber replacement and ensuring replacement and treatment is completed as described, and recording of replacement on consent drawings for provision to the authority.
- 2.4 On 29 February 2016 the authority issued building consent No. 345440 for the alterations. An addendum to the consent listed the inspections required, identified the restricted building work, and listed the documentation required before a code compliance certificate could be issued. The list of inspections included the following:

Building inspections

...

Strip off: As arranged at the pre-commencement meeting to undertake strip off inspections as required. The inspections to take place after the building paper has been removed and prior to any timber remediation being undertaken.

...

Third party inspections

Quality assurance plan.

- 2.5 The building consent also included “Guidance to the consent”, which in a section titled “Quality assurance” stated:

Approval of this building consent is on the basis of the following quality assurance measures being undertaken during construction:

The Quality Assurance programme submitted is to be used on site.

Weather tightness expert: Timber remediation [named provider]

It was also noted that major changes to the scope of the re-cladding work covered in the consent may need an amendment to the consent.

- 2.6 The applicants subsequently questioned the authority with regard to a timber remediation expert being required to attend a pre-commencement meeting, and requested the authority explain why it considered the circumstances in this case were different to that contemplated in Determination 2015/025³, and on what grounds the authority requested the quality assurance programme and involvement of a timber remediation expert.

³ *Determination 2015/025 Regarding conditions on a building consent for the recladding of a house at 5 Clutha Avenue, Khandallah, Wellington, Ministry of Business, Innovation and Employment (29 May 2015)*

2.7 In an email on 23 March 2016, the authority advised that the timber remediation expert's attendance was not required, noting that:

The timber remediation expert who is suitably experienced and qualified **will only need to be involved** if the structure has **evidence of failure found during the strip off inspections**. (At this point the existing cladding is removed and the timber framing can be assessed.)

2.8 On 24 March 2016 the authority provided an amended copy of the building consent, with the item on quality assurance removed from the inspections section (refer paragraph 2.4), and the section titled "Quality assurance" in the "Guidance to the consent" amended as follows:

Approval of this building consent is on the basis of the following quality assurance measures being undertaken during construction:

Strip off inspection: If at the strip off inspection the [authority] assess the timber framing and failure of the timber is evident, from is (*sic*) at this point a suitably experienced and qualified Weather tightness expert needs to be involved to advise of the timber remediation requirements on site.

Nominated Weather tightness experts is: [named]

Major changes may need an amendment to the consent. ...

2.9 In a further email on 5 April 2016 the authority acknowledged that the building consent had been sought as a cosmetic re-clad, but noted that there was no documentation to support the applicant's statement that the existing cladding had performed adequately. Accordingly, the authority considered that:

To satisfy [the] reasonable grounds [test in section 49⁴, the authority] are requesting not as a condition but as part of the consent addenda a suitably experienced and qualified person to be involved **if the structure has evidence of failure found during the strip off inspections**. ...

2.10 The Ministry received the application for determination on 13 April 2016.

3. The submissions

3.1 The applicants provided a submission with the determination application, noting that they felt 'forced into having a quality assurance plan', and they did not get an answer from the authority as to why their circumstances were any different to that contemplated in Determination 2015/025. The applicants state that the work is being carried out for cosmetic reasons, and they are concerned the authority is applying a blanket approach to re-cladding work and treating the proposed work in this case as if it is being done because of weathertightness issues.

3.2 The applicants provided copies of the following documents:

- Some correspondence between the parties.
- The approved building consent.
- The quality assurance plan.
- The construction specification and plans, stamped as approved by the authority.

⁴ In this determination references to sections are to sections of the Act, and references to clauses are to clauses of the Building Code.

- 3.3 The authority acknowledged the determination application on 18 April 2016 and provided a submission on the matter (in summary):
- No documentation was supplied with the building consent application regarding the performance of the existing cladding or any damage that may have occurred to the underlying substrate and timber framing as a result of moisture ingress.
 - The authority 'is unable to satisfy reasonable grounds of the Building Code clauses B1 and B2'.
 - In order to be satisfied as to compliance, the authority is requesting, not as a condition but as part of the consent addenda, that a timber remediation expert be involved if the structure has evidence of substantial failure after the existing cladding is removed.
- 3.4 The authority noted that the addendum to the building consent that was provided with the determination application was superseded, and provided a copy of the current addendum (refer paragraph 2.8).
- 3.5 On 26 April 2016 the applicants advised that the authority had carried out a site inspection and the applicants noted their concerns about comments made by the authority's inspector regarding weathertightness.
- 3.6 A draft determination was issued to the parties for comment on 13 June 2016.
- 3.7 The applicants accepted the draft without further comment in a response received on 16 June 2016.
- 3.8 On 24 June 2016 the authority requested an extension of time in which to respond to the draft. The authority's submission was received on 1 July 2016. The authority accepted the draft, noting that 'the addendum is modified with the removal of the named timber remediation expert, and reissued'.

4. Discussion

- 4.1 The Act states that conditions can be placed on a building consent, but only in relation to those specifically required by the Act under sections 67, 73, 75, 90, and 113.
- 4.2 However, it is not uncommon for authorities to include conditions on a building consent as a means to make up for inadequate and deficient documentation provided in support of a building consent application.
- 4.3 The onus is on the applicant to provide the appropriate level of information when the consent is lodged to enable the authority to consider compliance with the Building Code and subsequently approve or refuse the consent.
- 4.4 In guidance to building consent authorities⁵, the Ministry has previously acknowledged that restricting the use of consent conditions to the ones provided for under the Act does not always work in the 'real world', and suggested that those requirements not provided for under the Act be communicated in a separate section clearly identified as advisory notes.

⁵ Refer BCA Update April 2010

- 4.5 Previous determinations have also discussed the inclusion of conditions in building consents. In Determination 2012/079⁶, in regards to a consent condition requiring specific fire engineering design for roof venting requirements in a warehouse building, I stated:
- 5.4.1 I accept that it is common practice for building consents to be accompanied by notes and conditions. It is my view that this practice is acceptable, provided the conditions are used appropriately to highlight specific areas for attention, and are used to clarify aspects of the building work and the processes that relate to it.
- 4.6 In Determination 2014/064⁷ I further expanded on this, noting:
- 5.10.10 In my view the wider context of this statement in Determination 2012/079 makes it clear the 'condition' relates to compliance with the Building Code or a Building Consent.
- 4.7 Determination 2015/025 involved the recladding of an existing building and the authority's requirement for a quality assurance plan in respect of timber remediation. In that determination I considered that the consent included the requirements set out under the section titled "Quality Assurance" as conditions of the consent. I hold the same view in this case: from the background it appears that the quality assurance plan was a requirement to the granting of the consent, and the original addenda makes it clear the consent was granted on the basis of the quality assurance requirements, meaning it has the same effect as a condition on the consent.
- 4.8 The circumstances of this case are similar to 2015/025, in that the proposed building work is an alteration subject to section 112 of the Act and the quality assurance requirements relate to the *possibility* of the underlying substrate or timber framing requiring remediation. At paragraph 5.3.1 of Determination 2015/025 I stated:
- ...remediation of existing building elements cannot be required unless under particular circumstances ... [those being]... if the damage to the underlying structure is such that the new building work would not comply with the requirements of the Building Code, or the damage is such that the building has become dangerous or insanitary as defined in the Act. However, *if* there has been moisture ingress I suggest it would be prudent to address any effects of that moisture ingress on the existing building elements and that the recladding work presents an opportunity to do so.
- 4.9 In this case, based on the documents supplied to the determination to date, it appears there was no weathertightness assessment report to support the applicants' view as to the performance of the existing cladding. I acknowledge that in considering the consent application the authority may have had concerns regarding the performance of the existing cladding and any damage that may have occurred to the underlying substrate and timber framing as a result of moisture ingress. In considering this issue in Determination 2015/025, I stated:
- 5.3.4 In respect of the building work for which consent was sought and taking into account the application of section 112, any concerns regarding the underlying substrate and structure to which the new cladding was to be fixed should have been addressed by way of a request for further information. Relevant information would include the intended process for investigation of any damage that may have been caused should the removal of existing uncover any evidence of moisture ingress.

⁶ Determination 2012/079 Regarding the refusal to issue a code compliance certificate in respect of the compliance of the fire safety design for a new retail warehouse building (*Ministry of Business, Innovation and Employment*) 19 December 2012 at paragraph 5.4.1

⁷ Determination 2014/064 Regarding the authority's exercise of its powers of decision in requiring a Record of Work for tanking as Restricted Building Work for a building consent at 7 Marsh Way, Kaiwharawhara, Wellington (*Ministry of Business, Innovation and Employment*) 19 December 2014.

- 4.10 I consider it is reasonable for the authority to have drawn to the applicants' attention the possibility of damage to the underlying structure being uncovered that may need to be addressed in order that the proposed building work will achieve compliance, and I consider the "strip off" inspection is a suitable means of identifying whether additional work to the building's structure may be required.
- 4.11 However, I am of the view that the authority incorrectly exercised its powers in respect of the inclusion in the first addenda regarding the Quality Assurance Plan and identification of a timber remediation expert. I acknowledge that the authority has subsequently amended the wording and I consider the amendments to generally be appropriate, with the exception of the requirement for a named 'timber remediation expert'.
- 4.12 As noted in Determination 2015/025, until an assessment is made of the performance of the existing cladding, whether through a weathertightness assessment or when the existing cladding is removed, there is nothing to establish whether someone with appropriate experience in this field is required. While it may be advantageous to the applicants to have already considered this, I am of the view that it is not a condition that can be placed on the consent.
- 4.13 In conclusion, I consider:
- the authority incorrectly exercised its powers of decision in issuing the building consent including the requirements relating to timber remediation as worded in the addenda to the consent
 - although it is strongly suggested that remediation is undertaken to any existing timber framing that has been damaged through moisture ingress, I note it is only a requirement under the Act to do so where the framing relates to the compliance of the consented work (i.e. the replacement cladding), or if the building is considered dangerous or insanitary
 - I note the authority modified the addenda to remove the requirement for a named timber remediation expert subsequent to the issue of the draft determination.

5. The decision

- 5.1 In accordance with section 188 of the Act, I hereby determine the authority incorrectly exercised its powers of decision in respect of the requirements relating to timber remediation when it issued building consent No. 345440.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 19 July 2016.

John Gardiner
Manager Determinations and Assurance