

# Determination 2024/019

**The refusal of a Schedule 1 discretionary exemption for partial reclad of a dwelling.**

**70 Tanekaha Road, Titirangi, Auckland**

## **Summary**

This determination considers an authority's decision to refuse to grant a discretionary exemption under clause 2 of Schedule 1 for building work to partially reclad a house without a building consent. It also considers the application of clause 1 of Schedule 1 which allows general repairs, maintenance and replacement to be carried out without building consent.



The legislation discussed in this determination is contained in Appendix A. In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”) and references to “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

## 1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Peta Hird, Principal Advisor Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.<sup>1</sup>
- 1.2. The parties to the determination are:
  - 1.2.1. A & S Longmire, the owners who applied for this determination (“the owners”)
  - 1.2.2. Auckland City Council, the territorial or building consent authority.
- 1.3. This determination arises from an authority’s decision to refuse to grant a discretionary exemption under clause 2 of Schedule 1 from the requirement to obtain a building consent for a partial reclad of the owner’s house. The authority refused the exemption because it considered the application to be lacking in quality assurance in regard to who would be undertaking the building work.
- 1.4. Therefore, the matter to be determined under section 177(1)(b) and (3)(c), is the authority’s decision to refuse to grant an exemption under clause 2 of Schedule 1 for work to partially reclad the owners’ house.
- 1.5. In deciding this matter, I will also consider the application of clause 1 of Schedule 1 for whether the proposed building work is a comparable building product or assembly and is replaced in the same location.

### Matters outside this determination

- 1.6. I have not considered any other aspects of the Act or of the Building Code, such as:
  - 1.6.1. the compliance of any cladding systems, existing or proposed, with the requirements of the Building Code
  - 1.6.2. the requirement in Schedule 1 clause 1(3)(c) with regard to the durability of the existing cladding

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<sup>1</sup> The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

1.6.3. the building consent or code compliance certificate relating to the installation of the existing cladding.

## 2. The building work

- 2.1. The building is a detached dwelling with three storeys, over a sloped site, with an attached garage at the front of the property at street level.
- 2.2. The building work described in the application for the discretionary exemption was to replace existing cladding with profiled metal cladding as a comparable cladding. The owners gave the reasons for replacement as being that the existing cladding has met its 15-year durability requirement and the existing cladding product is “no longer being approved in New Zealand”.
- 2.3. The plans provided in the application for the exemption showed the proposed work to replace the existing cladding on three elevations of the mid-floor, four elevations of the top floor and two elevations of the garage.

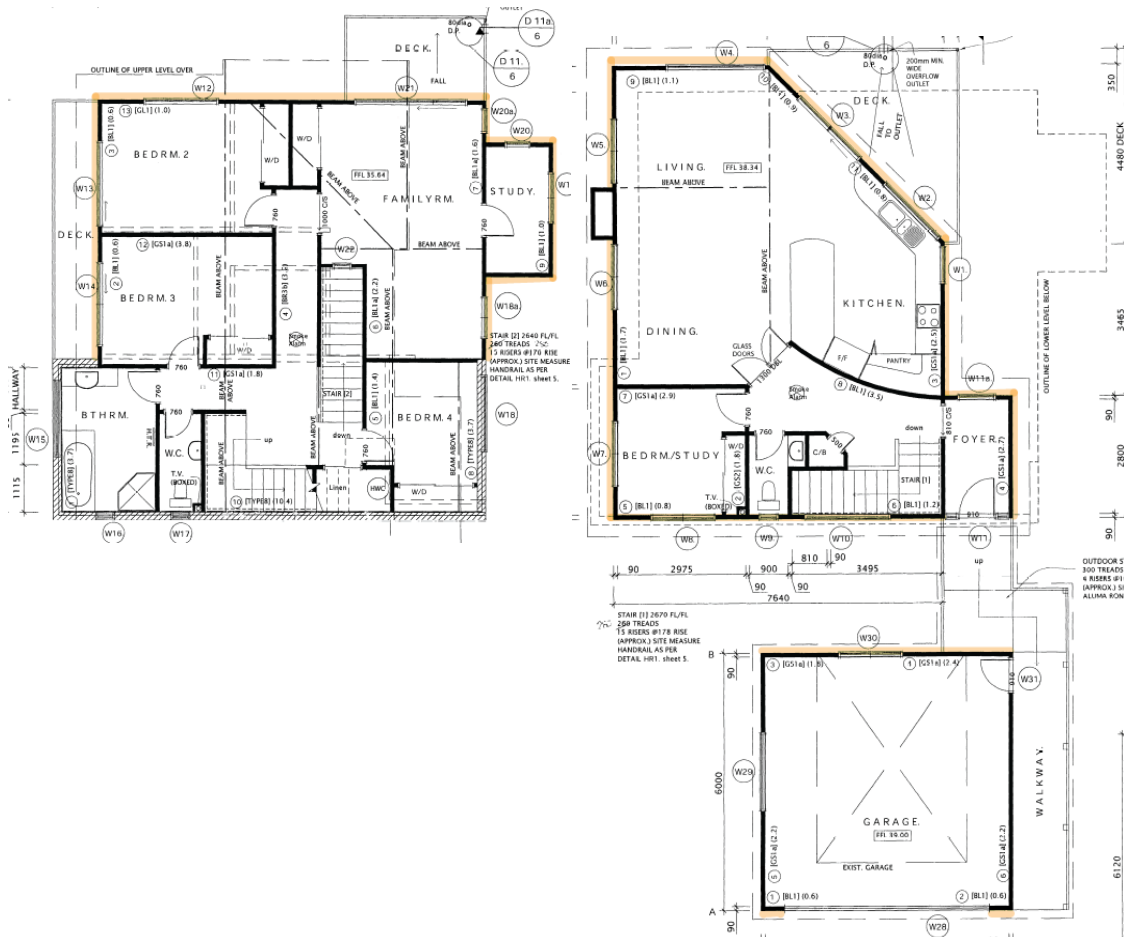


Figure 1: Mid and top floor plans, with elevations to be re-clad shown in orange highlight (not to scale).

- 2.4. The existing cladding is manufactured from organic fibres (wastepaper), saturated with bitumen under intense pressure and heat. It is:
- of a corrugate profile,
  - installed horizontally on a cavity system,
  - formerly BRANZ appraised.
- 2.5. The proposed metal cladding that would replace the current cladding is:
- trapezoidal (asymmetrical) profile,
  - to be installed horizontally and on the existing cavity system,
  - made of steel, with the specifications noting that this meets the requirement of E2.
- 2.6. The remaining elevations and the lower floor that are not shown to be replaced would retain the existing cladding type.

### 3. Background

- 3.1. The building work to construct the dwelling and garage, which included installing the existing cladding, was carried out under a building consent circa 2007-2008. A code compliance certificate was issued for this work in May 2009.
- 3.2. Sometime late 2022 or early 2023, the owners and authority had a pre-application meeting to discuss the proposed building work. The authority recommended that the owners obtain a Building Consent as it was “unable to provide confirmation that it [the building work] is within or outside the scope of Schedule 1”.
- 3.3. On 16 May 2023, a weathertight inspection of the dwelling was undertaken by a building surveyor on behalf of the owners and a report was issued on 20 June 2023. The inspection was focused on the existing cladding and included a desktop review of the authority’s property file.
- 3.4. The report concluded:
- 3.4.1. the property had “presented in generally good condition with no significant defects apparent to the [existing cladding] clad wall planes”. However, sun exposure had caused surface damage
  - 3.4.2. there were no elevated moisture readings in the timber framing, and the flashings appeared to be “well-detailed”

- 3.4.3. some flashing upgrades may be required, depending on the cladding being used in the replacement
- 3.4.4. there was no evidence to indicate that the cladding has not met the Building Code requirements.
- 3.4.5. based on the construction method, the risk of damage of small areas of moisture penetration is unlikely.
- 3.5. The owners applied to the authority for a discretionary exemption under clause 2 Schedule 1 to replace the cladding without a building consent. The information provided with the application included:
  - 3.5.1. Plans showing the location of the proposed replacement with the construction details including the flashing locations.
  - 3.5.2. The consultant's report, confirming the condition and performance of the existing cladding, including photos of the exterior.
  - 3.5.3. The manufacturer specifications and installation information for the proposed cladding.
- 3.6. The application was refused by the authority on 31 January 2024, for "lack of quality assurance provided as to who will be doing the work", and the owners subsequently applied for this determination.

## 4. Submissions

### The owners

- 4.1. The owners submit (in summary):
  - 4.1.1. No request for information was sent by the authority requesting a quality assurance program.
  - 4.1.2. The existing cladding was installed on a cavity system with the necessary flashings and is in accordance with E2/AS1<sup>2</sup>.
  - 4.1.3. The cladding replacement is a "like-for-like", ie comparable, and therefore, the proposed building work should fall under the Schedule 1 clause 1 exemption.
  - 4.1.4. The existing cladding has not failed but is showing signs of deterioration and is beyond its 15-year durability requirement.

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<sup>2</sup> Acceptable Solution E2/AS1 for New Zealand Building Code Clause E2 External Moisture

- 4.1.5. The consultant's report does not show any moisture ingress that would indicate failure of the existing cladding to meet durability requirements.
- 4.1.6. The authority should consider that the cladding is no longer "approved in New Zealand" and therefore, cannot be replaced with the same product.

### **The authority**

- 4.2. The authority submits (in summary):
  - 4.2.1. The owners provided no evidence of a quality assurance programme during the pre-application or application stage, and the details provided were insufficient to show that the building work would likely comply with the Building Code.
  - 4.2.2. The proposed work is high risk due to the dwelling being three-storeys and exposed to sea spray.
  - 4.2.3. It has concerns about the durability period for the flashings and cavity battens having passed.
  - 4.2.4. If the building work does not comply, there is a risk to other property and buildings that are within close proximity.
  - 4.2.5. The owners should apply for a building consent because of the complexity and high-risk nature of the building work however, this final decision is for the owners to make.
  - 4.2.6. Guidance has been provided to the owners about the authority's exemption process to assist them in making this decision.

## **5. Discussion**

### **Legislation**

- 5.1. The matter to be determined is the authority's decision to refuse to grant a discretionary exemption under clause 2 of Schedule 1 for a partial reclad of the owner's house.
- 5.2. Section 17 requires that all building work, whether it needs a building consent or not, must comply with the Building Code. Certain types of building work where consent is not required are set out as per sections 41 and 42A.
- 5.3. Section 41(1)(b) states that a building consent is not required in relation to any building described in Schedule 1. And section 42A(1)(a) provides that a building consent is not required for building work that is described in Part 1 of Schedule 1,

subject to certain conditions, including that the building work must comply with the Building Code to the extent required by the Act.

## **The refusal to grant the application for discretionary exemption**

- 5.4. The authority's decision was made in terms of clause 2 of Schedule 1 and it is that decision being considered in this determination. This clause provides:

### **2 Territorial and regional authority discretionary exemptions**

Any building work in respect of which the territorial authority or regional authority considers that a building consent is not necessary for the purposes of this Act because the authority considers that—

- (a) the completed building work is likely to comply with the building code; or
- (b) if the completed building work does not comply with the building code, it is unlikely to endanger people or any building, whether on the same land or on other property.

- 5.5. The building work described in the owners' application for discretionary exemption was "Replace existing... cladding with [the proposed cladding] as a like for like replacement of cladding material which has met its 15yr durability requirement. [The existing cladding is] no longer a NZ approved cladding product".
- 5.6. The Ministry's guide on exempt building work suggests authorities, when assessing a discretionary exemption application for the likelihood of compliance, take into account:
- 5.6.1. any substantial prior demonstration of competence in similar building work by the people undertaking the work
  - 5.6.2. the complexity of the building work relative to that competence
  - 5.6.3. any independent quality assurance systems that will be applied in the course of the building work.
- 5.7. In its refusal letter, the authority gave its reason for refusal as being because there was a "lack of quality assurance provided as to who will be doing the work". I have understood this to be in relation to the construction of the work and that there is no dispute in relation to the design of the partial reclad.
- 5.8. For building work completed under a discretionary exemption, the authority will usually not carry out any inspections of the work, as section 90 only requires inspections in relation to building work that has a building consent. It is then up to the building owner to provide the assurance that the work will likely be carried out and completed in a compliant manner.
- 5.9. I am of the view that an assessment for the purpose of deciding whether the building work is "likely to comply with the building code" should be proportional to the risk of the work not being compliant or endangering people or any building. In

making that assessment, factors such as the nature and scope of the work, the complexity, the use of common materials, products and construction methods, and similarities with existing materials and methods can be considered, alongside those factors discussed in paragraph 5.6 from the Ministry's guidance. No one factor is determinative, and they should be considered in combination.

- 5.10. In this case, the proposed work only involves replacement of the external cladding product; there are no proposed changes to elements of the cavity system, flashings, or joinery units. The building work would primarily require the installer to ensure the fixing requirements of the proposed cladding met the requirements of the specifications. The level of complexity of the work required is low.
- 5.11. In considering whether the building work is 'likely to comply' the person who would be completing the cladding replacement and their competency is a relevant factor. The owners did not identify the person who would be carrying out the building work or the competencies of the person who may be engaged in doing that work.
- 5.12. The owners may indeed wish to undertake the installation themselves and there is no indication they have the knowledge or experience to carry out that work in a way that will achieve compliance. In such circumstances, an independent quality assurance program may be sufficient to satisfy an authority that the building work would be likely to comply. In comparison, building work such as this carried out by a cladding installer or licensed building practitioner may not require further quality assurance to satisfy an authority that the work is likely to comply.
- 5.13. As explained in paragraph 5.8, the authority will not undertake inspections of building work approved under a discretionary exemption. Given the lack of information about who will be carrying out the building work, it is therefore reasonable to expect information of what oversight there will be of the work being done. Again, the nature and scale of that oversight should reflect the complexity of the building work, and due to the low level of complexity in this case that oversight may not be extensive. For example, confirming the condition of the cavity battens and building wrap once the existing cladding has been removed and a check of the fixing once the cladding is installed.
- 5.14. In response to the authority's submission, the owners have indicated that they can provide a schedule of inspections to be carried out by an independent person to give assurance that the work is likely to comply. However, no further detail has been provided to me. Due to the lack of knowledge of who will be carrying out the work and no quality assurance programme provided, I cannot be satisfied that the building work is likely to comply with the Building Code.
- 5.15. The authority has also submitted that if the work was carried out and does not comply with the Building Code, there is a risk to other buildings and properties in proximity, as well as a risk of external moisture penetrating the house. Schedule 1 clause 2(b) does allow for the authority to exempt work from the need for a building consent when, if it is unable to reach the view that the building work is



likely to comply with the Building Code, it is unlikely to endanger people or buildings on the same or other property.

- 5.16. In this case, should the cladding not comply with the Building Code external moisture entering the building introduces the likelihood of damage to the underlying structure of the building and undue dampness that has the potential to cause illness or injury to the occupants.
- 5.17. Therefore, I confirm the authority's decision to refuse the discretionary exemption on the basis that the lack of quality assurance information provided in this case does not give assurance that the work will be carried out in a compliant manner and if it does not comply, will be unlikely to endanger people or the building.

### **The application of clause 1 of Schedule 1**

- 5.18. While the matter to be determined concerns the authority's decision to refuse the discretionary exemption under clause 2 of Schedule 1, owners are able to carry out certain building work without a building consent under other exemptions in Schedule 1. Having confirmed the authority's decision to refuse the discretionary exemption, I have provided the following comments about whether the building work is a comparable building product or assembly and is replacement in the same location as required by clause 1 of Schedule 1.
- 5.19. The owners have submitted that they believe the partial cladding replacement is a replacement with a comparable cladding and can be carried out under clause 1 of Schedule 1 for *General repair, maintenance, and replacement*.
- 5.20. Clause 1 of Schedule 1 provides for the following building work to be carried out without obtaining a building consent:

#### **1 General repair, maintenance, and replacement**

...

- (2) Replacement of a building product or an assembly incorporated in or associated with a building, provided that—
- (a) a comparable building product or assembly is used; and
  - (b) the replacement is in the same position.

...

- 5.21. In this case, in considering if the replacement is comparable and in the same position for the purposes of Schedule 1 clause 1(2), aspects such as the profile, existing system, installation and material are relevant.
- 5.22. The profile of the existing cladding is corrugate, horizontally installed. The proposed cladding is a trapezoidal profile, also horizontally installed. Both of these profiles and installation orientations are within the scope of E2/AS1, up to a risk score of 20. I consider the difference in the profiles to be minor, with the trapezoidal profile crests and troughs being angled and flat rather than curved.

- 5.23. The function of the existing cladding is to prevent external moisture entering the building to safeguard the occupants from illness or injury. The weathertight report did not find evidence of external moisture entry into the building.
- 5.24. The house relies on the overall performance of the cladding system to prevent moisture ingress. The plans show this system as being made up of building paper beneath a cavity system to allow for drainage and air flow behind the cladding, and metal flashings at junctions between the claddings and joinery units.
- 5.25. The proposed work is only to the cladding product that is to be installed over the remaining system components. The fixing requirements are different: the existing fixings being at up to 600mm centres, whereas the specifications for the proposed cladding require 'hit-miss-hit' (in relation to the troughs of the profile) fixings which is approximately 250mm centres. However, the existing fixings are the maximum allowable spacings so the installed battens may be closer together than this. I do not consider it to be a complex installation to fix the proposed cladding to the existing system, including installing additional cavity battens should they be required.
- 5.26. The material of the cladding is being changed from natural fibres with bitumen to powder coated steel. The proposed cladding material is within the scope of E2/AS1 and is a common material used for profiled sheet claddings. While the existing cladding material is no longer available in New Zealand, the proposed material is a close accepted substitute that, as detailed above, provides a comparable level of performance.
- 5.27. As to the location of the replacement, the cladding is on the same elevations as the existing cladding and on the existing cavity system, so I consider the replacement is in the same position.
- 5.28. The authority has stated in its submission that the existing flashings and cavity battens will have exceeded their durability period of 15 years. I consider the durability requirements in B2 to be a minimum and does not necessitate a replacement of these elements at the 15-year mark if the condition is still acceptable. As the work is proposed, there is no evidence to show that replacements of these elements are required. If issues with the ongoing durability of the existing flashings and cavity battens are found during construction, it is expected that the situation and possible remedy would be appropriately reassessed, as with any other building alteration.

## 6. Conclusion

- 6.1. There is a lack of information to demonstrate that the proposed work would be likely to comply with the building code when constructed or if it does not comply, will be unlikely to endanger people or buildings for the purpose of a discretionary exemption under Schedule 1 clause 2.
- 6.2. Based on the information provided, the change to replace the existing cladding with proposed metal cladding is comparable and in the same position.

## 7. Decision

- 7.1. In accordance with section 188, I confirm the authority's decision to refuse the application for a discretionary exemption under clause 2 of Schedule 1.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 30 April 2024.

**Peta Hird**

**Principal Advisor Determinations**

## APPENDIX A Legislation

### 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.

### 41 Building consent not required in certain cases

- (1) Despite section 40, a building consent is not required in relation to— ...
  - (b) any building work described in Schedule 1 for which a building consent is not required (see section 42A); or...

### 42A Building work for which building consent is not required under Schedule 1

- (1) Despite section 40, subject to the conditions set out in subsection (2) and whether or not a building consent would otherwise have been required, a building consent is not required for building work in the following categories:
  - (a) building work described in Part 1 of Schedule 1; or...
- (2) Subsection (1) is subject to the following conditions:
  - (a) the building work complies with the building code to the extent required by this Act:
  - (b) after the building work is completed, the building,—
    - (i) if it complied with the building code immediately before the building work began, continues to comply with the building code; or
    - (ii) if it did not comply with the building code immediately before the building work began, continues to comply at least to the same extent as it did then comply:
  - (c) the building work does not breach any other enactment:
  - (d) the building to which the building work relates is not a hazardous substance location that is required to be authorised under the Health and Safety at Work Act 2015 or any regulations made under that Act. ...

### 90 Inspections by building consent authorities

- (1) Every building consent is subject to the condition that agents authorised by the building consent authority for the purposes of this section are entitled, at all

times during normal working hours or while building work is being done, to inspect—

- (a) land on which building work is being or is proposed to be carried out; and
  - (b) building work that has been or is being carried out on or off the building site; and
  - (c) any building.
- (2) The provisions (if any) that are endorsed on a building consent in relation to inspection during the carrying out of building work must be taken to include the provisions of this section.
- (3) In this section, inspection means the taking of all reasonable steps to ensure that building work is being carried out in accordance with a building consent.

## **Schedule 1 Building work for which building consent not required**

### **Part 1 - Exempted building work**

#### **1 General repair, maintenance, and replacement**

...

- (2) Replacement of a building product or an assembly incorporated in or associated with a building, provided that—
- (a) a comparable building product or assembly is used; and
  - (b) the replacement is in the same position.

...

#### **2 Territorial and regional authority discretionary exemptions**

Any building work in respect of which the territorial authority or regional authority considers that a building consent is not necessary for the purposes of this Act because the authority considers that—

- (a) the completed building work is likely to comply with the building code; or
- (b) if the completed building work does not comply with the building code, it is unlikely to endanger people or any building, whether on the same land or on other property.