

Determination 2006/121

Refusal of a code compliance certificate for ten year old building alterations with a “monolithic” cladding system at 55 Te Arawa Street, Orakei



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, Determinations Manager, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department. The applicant is the owner Mr Koppens (“the applicant”) and the other party is the Auckland City Council (“the territorial authority”).

1.2 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 (the First Schedule to the Building Regulations 1992)².

¹ The Building Act 2004 is available from the Department’s website at www.dbh.govt.nz.

² The Building Code is available from the Department’s website at www.dbh.govt.nz.

- 1.3 The matter for determination is the territorial authority's decision to refuse to issue a code compliance certificate and instead issue a notice to fix in respect of 9-year-old alterations to a house because it was not satisfied that:
- certain elements of the building complied with clauses F2 "Hazardous building materials", F4 "Safety from falling" and F7 "Warning systems",
 - the monolithic cladding to the walls of the house complied with clauses B2 "Durability" and E2 "External Moisture", and
 - other elements of the building complied with clause B2.

- 1.4 The matters to be determined are:

Matter 1: The notice to fix

Whether the items listed in the notice to fix relating to clauses F2, F4 and F7 are relevant to this house, and if so whether they are required to be fixed.

Matter 2: The cladding

Whether the monolithic cladding system as installed to the walls of the alterations ("the cladding"), complies with the Building Code. By "the cladding" I mean the components of the system (such as the backing materials, the flashings, the joints and the coatings) as well as the way the components have been installed and work together.

Matter 3: The additional durability considerations

Whether certain building elements that are not part of the cladding and are listed in paragraph 6 of the notice to fix dated 8 February 2006 ("the listed elements"), which have 5 or 15-year durability requirements, comply with clause B2 considering the time that has elapsed since the elements were constructed.

- 1.5 In making my decision, I have considered the submissions of the parties, the report of the independent expert commissioned by the Department to advise on this dispute ("the expert"), and the other evidence in this matter. With regard to the cladding, I have evaluated this information using a framework that I describe more fully in paragraph 8.1. I have not considered any other aspects of the Act or the Building Code.

2. The building

- 2.1 The building work consists of alterations to a detached house situated on a sloping site, which is in a high wind zone for the purposes of NZS 3604³. The house is two storeys high, with the original house constructed in the 1950's and extended (including recladding with monolithic cladding) within about 10 years of the most recent alterations. The building work considered in this determination consists of

³ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

extensions to the northern end of the house to the upper level bedroom and deck, with alterations to the ground floor dining area and entrance.

- 2.2 The resulting house is conventional light timber frame, with a concrete block perimeter foundation wall and timber-framed sub-floor, monolithic cladding and aluminium windows. At the northeast corner of the alteration work, both levels have windows with mitred corner joints. The house shape is reasonably complex in plan and form, with the clay tile hipped roof at two levels, with eaves and verge projections of 240mm (excluding gutters and fascias).
- 2.3 An existing tiled deck from the upper floor, located partly over living areas below, has been extended to link with the new extension. The cantilevered deck has a tiled floor and a monolithic-clad balustrade with a timber capping to which handrails are fixed.
- 2.4 The specification calls for the external wall framing to be treated to “NZTPA Commodity Specification H1”. The expert was unable to sight the wall framing, and I have received no other written evidence as to the treatment, if any, of the external wall framing timber. Accordingly, given the date of construction in 1996 and the timber specification, I consider that the external wall framing of the alteration work is unlikely to be treated.
- 2.5 The cladding system to the extension is what is described as monolithic cladding, and is a “Harditex” system (to match the earlier recladding) with 7.5 mm thick fibre-cement sheets fixed through the building wrap to the framing, and finished with an applied textured coating system.
- 2.6 I have received no copies of producer statements or warranties for the cladding.

3. Sequence of events

- 3.1 It appears that the territorial authority issued a building consent (HC 01125) early in 1996. The territorial authority has confirmed that a foundation inspection was carried out on 7 November 1996 and a pre-line inspection on 20 May 1997.
- 3.2 It appears that the applicant did not apply for a code compliance certificate until 2005, and the territorial authority carried out an inspection of the building work on 30 November 2005.
- 3.3 In a letter to the applicant dated 23 January 2006 the territorial authority explained the requirements of clauses B1 “Structure”, B2 “Durability” and E2 “External Moisture”, attached a notice to fix and concluded that it could not be satisfied that the building work complied with the building code.
- 3.4 In response to a letter from the applicant, the territorial authority acknowledged errors in the first notice to fix and issued a replacement notice to fix dated 8 February 2006, which included a lengthy list of items that were not in accordance with:
 - manufacturers' specifications

- relevant building code requirements at the time of construction
- accepted trade practice.

The notice to fix also outlined durability requirements for the building elements, noted concerns with regard to the lack of provision for drainage and ventilation and required the provision of:

- A method for ensuring that external water can drain away and the timber framing dry out, or
- Install an early warning device that will alert the building owner that external water has entered into the wall cavity and the timber framing is wet and that it may rot as a result if no maintenance is undertaken.

3.5 In a letter to the territorial authority dated 17 February 2006, the applicant questioned the fines applicable for not complying with the notice to fix, concluding:

When one considers that the building was completed under a building consent issued under a different Building Act and a different building code I find it hard to believe that the Council is issuing a notice to remedy these various matters so that they comply with the current code. If the Council say, and your notice is intended to say, that unless these matter are done no code of compliance will be issued that is another matter. If Auckland City Council issues this notice to me as a requirement under pain of substantial fines, that appears to me to be unfairly discriminatory as there must be thousands of other properties in Auckland City which do not comply with the current code, consents having been issued under the previous code.

3.6 The territorial authority responded in a letter to the applicant dated 21 February 2006, explaining that the items in the notice to fix were predominantly directed at compliance with the building code, and that if it believed that the building was “dangerous, unsafe or unsanitary” and no action was taken, then the fines would apply. However, the territorial authority noted the applicant’s intention to apply for a determination and therefore the fine was not applicable. With regard to the date of the consent, the territorial authority noted:

Every request for a final inspection is treated the same. If the building consent were issued prior to 2000 a durability assessment will be carried out because of the age of the building. If the building has been clad with a monolithic cladding an assessment will be carried out to satisfy Council that it complies with the Code. The building code has not changed and the objectives are the same. The difference is that Council are charged with obtaining knowledge and acting accordingly. The knowledge that we now have since your building consent was issued (1996) tells us that all houses will leak and Council would be irresponsible if it did not act on this information.

3.7 An application for a determination was received by the Department on 20 March 2006.

3.8 In a letter to the applicant dated 28 March 2006, the Department outlined how the determination would be processed and requested further information to support the application.

3.9 In a letter to the Department dated 24 May 2006, the applicant stated that he wished to advance the application and commented on the territorial authority’s requirements in the notice to fix. The applicant noted that he would comply with the requirements

in regard to the items described in section 3(a) and (b) of the notice to fix relating to clause F4 “Safety from Falling” of the Building Code (refer paragraph 5.6).

4. The submissions

4.1 Within the application, the applicant noted that the “Matter of doubt or dispute” was:

Building alterations generally in accordance with Building Consent in 1996, but on final inspection no CCC was issued. Requirements now by Auckland City Council are, in my contention, unreasonable.

4.2 In the letter to the Department dated 24 May 2006 (refer paragraph 3.9), the applicant noted that he was willing to meet reasonable requirements necessary to obtain a code compliance certificate and that the work had been done in accordance with the plans, the building consent and practice at the time. The applicant commented on and queried some of the items in the notice to fix, concluding:

The alterations were done in 1996 and have worked fine. There are no leaks. If the joints are repaired and if necessary repainted with an appropriate product there seems no reason in my submission why the durability periods should not be met.

4.3 The applicant forwarded copies of:

- the specification
- some of the consent documentation
- correspondence with the territorial authority.

4.4 The territorial authority made a submission in the form of a letter to the Department dated 3 May 2006, which noted that the areas of contravention in the notice to fix related to clauses B2, E2, F2, F4 and F7 of the building code.

4.5 The territorial authority forwarded copies of:

- the consent application
- the photographic record of the final inspection
- some of the correspondence with the applicant.

4.6 Copies of the submissions and other evidence were provided to each of the parties. Neither party made any further submission in response to the submission of the other party.

5. The expert's report

- 5.1 The expert inspected the claddings of the building on 21 June 2006, and furnished a report that was completed on 22 June 2006. The expert noted that “some aspects of the construction gave the appearance of inexperienced operatives and/or poor supervision”. The expert also noted that a lack of maintenance was apparent. However, the coating was “uniform, and in itself appeared to be sound, although there were cracks through it and it was peeling from the edges of some of the windows”. The expert noted that there were no issues associated with penetrations through the cladding, the junction of the bottom of the cladding with the concrete block perimeter wall was generally adequate, and the wall areas were of dimensions that do not require control joints to comply with the manufacturer's instructions.
- 5.2 The expert noted that the windows were face-fixed with head flashings, a fillet of sealant at the edge of the jamb flanges, no sill flashings and the coating applied after the window installation. The expert removed a small section of coating at the sill to jamb junction of the corner dining room window, noting that the tight junction of the flanges against the fibre cement backing sheet prevented verification of compressible foam seals under the flanges. However, the expert also noted that similarly installed joinery in the earlier extension work lacked seals under the jambs.
- 5.3 The expert took non-invasive moisture readings through linings of exterior walls throughout the house, and no elevated readings were noted. However, “borderline” readings were noted under the corner windows, and moisture damage was observed in swollen skirtings and rusting carpet fixings. Invasive moisture readings were taken through the wall cladding, at several risky areas, and an elevated reading of 20% was recorded in the top plate of the deck balustrade framing.

Moisture levels above 18% recorded after cladding is in place generally indicate that external moisture is entering the structure.

- 5.4 Commenting specifically on the cladding, the expert said:
- the clearance from the bottom of the cladding to the entry paving is inadequate, with the bottom of the fibre-cement below the tile surface
 - the clearance from the bottom of the cladding to the apron flashing of the lean-to roof is inadequate, with no clearance in some areas
 - the clearance from the bottom of the cladding to the deck paving is inadequate at some walls and at the balustrade, where the bottom of the fibre-cement is below the tile surface and water is able to pond against the junction
 - on the north wall adjacent to the new deck extension, the bottom of the cladding has been cut away to provide 30mm clearance (which is inadequate clearance), and the edge is unsealed and unfixed

- the sill of the door to the deck butts against the deck tiles and is poorly weatherproofed, with signs of moisture penetration shown by the swollen skirtings inside
- the timber capping to the deck balustrade is poorly weatherproofed at the junction with the cladding and the handrail is fixed through the flat top
- the deck balustrade appears to lack adequate flashings at the top and at the junction with the main wall, with swollen skirtings indicating possible moisture penetration into the wall
- the overflow outlets from the deck are plumbed to a single pipe
- the projections of the head flashings past the window jamb flanges are inadequate in a number of areas. A overlapping join in the head flashing to the upper doors was unsealed but was adequately sheltered under the eaves (which was directly above the head)
- the windows appear to lack adequate drainage gaps at the sills and adequate seals at the jambs, with small fillets of sealant applied at the edges of the jamb flanges. There are also cracks in the coating at the junction with the flanges
- although dry at the time of inspection, the corner windows lack sill flashings and have been leaking (probably from the corner mitres in the windows)
- there are a number of cracks at cladding joints, possibly due to movement resulting from the dark paint colour, moisture penetration, possibly defective joints and/or a lack of maintenance
- the subfloor ventilation beneath the dining room appears to be inadequate.

5.5 The expert also noted evidence of leaking under the upper floor study window in the original extension, and considered that this should be investigated as it was in a wall area adjacent to the cantilevered deck.

5.6 The expert considered that the notice to fix covered some items that showed cause for “reasonable concern about the likelihood of compliance” (in addition those in paragraph 5.4), and commented on the following items:

- item 3.0 a) – there are no window restrictors as required on the drawings
- item 3.0 b) – the heights of the balustrades are less than the 1m requirement

5.7 The expert commented that the notice to fix included a number of items that had been incorrectly carried forward from a standard list and were not relevant to the building consent issued for the building work on these alterations, as follows:

- Item 3.0 e) – there was no broken pane of glass (clause F2 “Hazardous building materials”).

- Item 3.0 f) – while there is no smoke detector in the bedroom, there was no requirement for one at the time of construction (clause F7 “Warning systems”).
- Item 4.0 c) – the apron flashings to the roof to wall junctions appear adequate.
- Item 4.0 e) – there are no issues with penetrations through the cladding, and there is no meter-box and no fan grilles in the building consent work.
- Item 4.0 f) – there is no timber slatted deck in the building consent work.
- Item 4.0 g) – there is no lack of drip edges to the cladding.
- Item 4.0 h) – there is no timber slatted deck in the building consent work.
- Item 4.0 i) – the cladding does not abut fascias or barges, so the item is irrelevant.
- Item 4.0 j) – there is no clothesline fixed to walls in the building consent work, so the item is irrelevant.

5.8 Copies of the expert’s report were provided to each of the parties on 26 June 2006. The applicant sought further advice to clarify the content of the report. The applicant requested that the determination should make clear which items in the notice to fix, when attended to, would enable a code compliance certificate to be issued. The applicant also requested a copy of the draft determination.

6 The hearing

6.1 The territorial authority requested a hearing, which was held before me on 2 November 2006. I was accompanied by a Referee engaged by the Chief Executive under section 187(2) of the Building Act 2004. At the hearing the applicant, Mr Koppens, appeared on his own behalf. The territorial authority was represented by three of its officers. Five other staff members of the Department attended. The applicant and the territorial authority spoke and called evidence at the hearing. The evidence from those present enabled me to amplify or clarify various matters of fact that were identified in the draft.

6.2 The territorial authority, which had provided a written submission dated 26 October 2006, made a verbal submission, which I summarise as follows:

- The real issue was that of a waiver and the territorial authority wished the Department to issue the necessary instructions in respect of this. This would remove the risk of a subsequent claim against the territorial authority.
- Based on current knowledge, as the territorial authority would not now issue a building consent for the building as it is today with face-fixed cladding, it could not issue a code compliance certificate.
- In reply to a question raised by the Department, the territorial authority accepted that when the building was completed, it probably would have satisfied the requirement of clauses B2 and E2. However, the territorial

authority requested an opportunity to check the inspection records to verify this. This was subsequently done and confirmed.

6.3 I summarise the applicant's presentation as follows:

- The territorial authority had asked the wrong question in obtaining a legal opinion regarding the question of a waiver. Negligence and obtaining of the code compliance certificate are the issues to be considered.
- The house has existed for 10 years in its current form and if rectified should last for a further 10 years.
- Testing had shown high moisture levels at only 2 locations and this could be attributed to internal condensation.
- Apart from rectifying the top of the balustrade, only the relevant windows need to be removed and replaced.
- Currently, the house does not leak.

6.4 In response to the submitted evidence, the Department:

- noted that it would re-format the determination in line with the latest durability revisions
- stated that it could not verify a decision by a territorial authority that was found to be negligent.

6.5 A discussion was held to establish a date at which the building was compliant with B2 (except for those items that require rectification). The owner suggested some time in 1997 and the territorial authority responded positively to this, subject to verifying the inspection records that could assist in this regard.

Matter 1: The notice to fix

7 Discussion

7.1 The owner has, as outlined in paragraph 3.9, agreed to comply with the sections 3(a) and 3(b) of the Notice to Fix relating to clause F4 "Safety from Falling". The expert agreed with the need for these to be included in the Notice to Fix. As outlined in paragraph 5.7, the expert noted items in the notice to fix that were irrelevant to this house and I accept the expert's finding. These items should be removed from the notice to fix.

7.2 The provision of domestic smoke detectors in Acceptable Solution F7/AS1 did not come into effect until April 2003. The building consent for the work was issued in 1996 and subsequent changes to the Building Code (and any associated changes to the relevant Acceptable Solutions) cannot be enforced retrospectively, however, the

applicant has agreed to install these. This item should also be removed from the notice to fix.

Matter 2: The cladding

8 Evaluation for code compliance

8.1 Evaluation framework

8.1.1 In evaluating the design of a building and its construction, it is useful to make some comparisons with the relevant Acceptable Solution⁴, in this case E2/AS1, which will assist in determining whether the features of this house are code compliant. However, in making this comparison, the following general observations are valid:

- Some Acceptable Solutions cover the worst case, so that they may be modified in less extreme cases and the resulting alternative solution will still comply with the Building Code.
- Usually, when there is non-compliance with one provision of an Acceptable Solution, it will be necessary to add some other provision to compensate for that in order to comply with the Building Code.

8.1.2 The approach in determining whether building work is weathertight and durable and is likely to remain so, is to apply the principles of weathertightness. This involves the examination of the design of the building, the surrounding environment, the design features that are intended to prevent the penetration of water, the cladding system, its installation, and the moisture tolerance of the external framing. The Department and its antecedent, the Building Industry Authority, have also described weathertightness risk factors in previous determinations⁵ (for example, refer to Determination 2004/1) relating to cladding and these factors are also used in the evaluation process.

8.1.3 The consequences of a building demonstrating a high weathertightness risk is that building solutions that comply with the Building Code will need to be more robust. Conversely, where there is a low weathertightness risk, the solutions may be less robust. In any event, there is a need for both the design of the cladding system and its installation to be carefully carried out.

8.2 Weathertightness risk

8.2.1 In relation to these characteristics I find that the alterations to this house:

- are built in a high wind zone
- are a maximum of two storeys high

⁴ An Acceptable Solution is a prescriptive design solution approved by the Department that provides one way, but not the only way, of complying with the Building Code. The Acceptable Solutions are available from the Department's website at www.dbh.govt.nz.

⁵ Copies of all determinations issued by the Department can be obtained from the Department's website.

- are reasonably complex in plan and form
- have eaves projections of about 400mm, including gutters, and verge projections of about 250mm above all walls
- have a cantilevered deck with a solid floor and monolithic clad balustrades
- have monolithic cladding which is fixed directly to the framing
- have external wall framing that is unlikely to be treated, so providing no resistance to the onset of decay if the framing absorbs and retains moisture.

8.2.2 When evaluated using the E2/AS1 risk matrix, one elevation of the alterations to this house demonstrates a moderate weathertightness risk, with the other elevations a high risk rating. The matrix is an assessment tool that is intended to be used at the time of application for consent, before the building work has begun and, consequently, before any assessment of the quality of the building work can be made. Poorly executed building work introduces a risk that cannot be taken into account in the consent stage but must be taken into account when the building as actually built is assessed for the purposes of issuing a code compliance certificate.

8.3 Weathertightness performance

8.3.1 Generally the cladding appears to have been installed in accordance with reasonable trade practice. However, some junctions, penetrations and edges are not well constructed, and these areas are described in paragraph 5.4 and in the expert's report. I accept the expert's opinion that remedial work is necessary in respect of:

- inadequate cladding clearance from the entrance paving
- inadequate cladding clearance from the roof apron flashing
- inadequate cladding clearance from the deck paving
- unsealed fibre-cement and lack of fixings at the bottom of the existing cladding adjacent to the new deck
- the poorly weatherproofed sill to the deck door, and signs of moisture penetration
- inadequate weatherproofing of the timber capping and the balustrade top, including at the junction with the main wall
- inadequate projections of the head flashings beyond the window jambs
- inadequate seals under the window jamb flanges, with cracks at the junctions, and lack of drainage gaps at the sill flanges
- inadequate weatherproofing, including the lack of sill flashings, to the corner windows to the upper and lower floors

- the cracks to the cladding at a number of joint locations
- any other building elements associated with the above that are consequently discovered to be in need of rectification.

8.3.2 I also note the expert's additional comments in paragraph 5.6 and note that the applicants do not dispute (refer paragraph 3.9) that the following items require attention:

- The lack of window restrictors
- The inadequate heights of the deck balustrades.

8.3.3 I note the expert's comment in paragraph 5.5 on the signs of moisture penetration under the upper floor study window adjacent to the cantilevered deck, and draw this to the attention of the applicant and the territorial authority for further investigation.

8.3.4 I also note the expert's comments in paragraph 5.7 on the items included within the notice to fix that appear to be irrelevant to these additions, and accept that these items are not relevant to the work undertaken within this building consent. However, with regard to item 3.0 f), although smoke alarms were not a requirement at the time of construction, I recommend that they be installed in accordance with the current requirements of the building code.

8.3.5 Notwithstanding the fact that the backing sheets are fixed directly to the timber framing, thus limiting drainage and ventilation behind the cladding, I have noted certain compensating factors that assist the performance of the cladding in this particular case:

- Apart from the defects identified in paragraph 8.3.1, the cladding appears to have been installed to reasonable trade practice.
- The house has roof projections that provide some protection to the wall cladding areas below them.

8.3.6 I consider that these factors help compensate for the lack of a ventilated cavity and can assist the building to comply with the weathertightness and durability provisions of the Building Code.

9 Conclusion

9.1 I am satisfied that the current performance of the cladding is not adequate because it is allowing water penetration into the building at present. Consequently, I am satisfied that the alterations to the building do not comply with clause E2 of the Building Code.

9.2 In addition, the alterations to the building are 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 on the alterations to the building are likely to allow the ingress of moisture in the future, the house does not comply with the durability requirements of clause B2.

- 9.3 Subject to further investigations that may identify other faults, I consider that, because the faults that have been identified with the cladding system occur in discrete areas, I am able to conclude that satisfactory rectification of the items outlined in paragraph 8.3.1 should be expected to result in the alterations to the building becoming and remaining weathertight and in compliance with clauses B2 and E2.
- 9.4 Effective maintenance of claddings (in particular of monolithic claddings) is important to ensure ongoing compliance with clauses B2 and E2 of the Building Code and is the responsibility of the building owner. Clause B2.3.1 of the Building Code requires that the cladding be subject to "normal maintenance", however that term is not defined in the Act.
- 9.5 I take the view that normal maintenance is that work generally recognised as necessary to achieve the expected durability for a given building element. With respect to the cladding, the extent and nature of the maintenance will depend on the material, or system, its geographical location and level of exposure. Following regular inspection, normal maintenance tasks should include but not be limited to:
- where applicable, following manufacturers' maintenance recommendations
 - washing down surfaces, particularly those subject to wind-driven salt spray
 - re-coating protective finishes
 - replacing sealant, seals and gaskets in joints.
- 9.6 As the external wall framing of the alterations to this building is likely to be untreated, periodic checking of its moisture content should also be carried out as part of normal maintenance.

Matter 3: The additional durability considerations

10 Discussion

- 10.1 As set out in paragraph 3.3, the territorial authority has concerns about the durability, and hence the compliance with the building code, of the listed elements, taking into consideration the completion date of the building in 1997.
- 10.2 I assume that the building was substantially completed in 1997 and was subject to a site inspection on 30 November 2005.

10.3 The relevant provision of clause B2 of the Building Code recognises that building elements must, with only normal maintenance, continue to satisfy the performance requirements of the Building Code for certain periods “from the time of issue of the applicable code compliance certificate” (clause B2.3.1 and ‘limits on application’ marginal note).

10.4 These durability periods are:

- 5 years if the building elements are easy to access and replace, and failure of those elements would be easily detected during the normal use of the building
- 15 years if building elements are moderately difficult to access or replace, or failure of those elements would go undetected during normal use of the building, but would be easily detected during normal maintenance
- the life of the building, being not less than 50 years, if the building elements provide structural stability to the building, or are difficult to access or replace, or failure of those elements would go undetected during both normal use and maintenance.

10.5 This 9-year delay between the completion of the house and the applicant’s request for a code compliance certificate raises the issue of when the listed elements complied with clause B2. I am therefore satisfied that as established at the hearing, all the building elements installed in the house, apart from items that have to be rectified as described in this determination, complied with clause B2 in 1997. The inspection records subsequently provided by the territorial authority did not provide any further clarification. Accordingly I have decided to establish a date of 1 September 1997 as when the listed elements complied with B2. I note that the pre-line inspection was undertaken on 20 May 1997.

10.6 In order to address these durability issues, I sought some clarification of general legal advice about waivers and modifications I have now received that clarification and the legal framework and procedures based on this clarification are described in previous determinations (refer to Determination 2006/85) and are used to evaluate the durability issues raised in this determination.

11 Conclusion

11.1 I continue to hold the views expressed in the previous related determinations, and therefore conclude that:

- (a) The territorial authority has the power to grant an appropriate modification of clause B2 in respect of all the listed elements, apart from items that have to be rectified as described in this determination, if the applicant applies for such a modification.

- (b) It is reasonable to grant such a modification, with appropriate notification, because in practical terms the building is no different from what it would have been if a code compliance certificate had been issued in September 1997.

11.2 I strongly recommend that the territorial authority record this determination and any modification resulting therefrom, on the property file and also on any LIM issued concerning this property.

12 The decision

12.1 In accordance with section 188 of the Act, I hereby determine that:

Issue 1: The notice to fix

1. the house does not comply with clause F4 of the Building Code, and rectification of the items outlined in paragraph 8.3.2 is required. (The other items included in the notice to fix are covered in Issue 2(2) below, or are not relevant to the building work that is the subject of this determination (refer paragraph 8.3.4).

Issue 2: The cladding

1. the cladding system as installed does not comply with clause E2 of the Building Code. There are a number of items to be remedied to ensure that the alterations to the house become and remain weathertight and thus meet the durability requirements of the code. Consequently, I find that the alterations to the house do not comply with clause B2. Accordingly, I confirm the territorial authority's decision to refuse to issue a code compliance certificate.
2. rectification of the items outlined in paragraph 8.3.1 will consequently result in the alterations to the house being weathertight and in compliance with clauses B2 and E2. Work to correct these items may expose additional associated defects that are not yet apparent. All rectification work is to be completed to the approval of the territorial authority.

Issue 3: The additional durability considerations

1. all the listed elements, apart from items that have to be rectified as described in this determination complied with clause B2 in 1 September 1997.
2. should the applicant so request, the territorial authority must modify its decision to issue the building consent to the effect that the building consent is amended as follows:

This consent is subject to an amendment to the Building Code to the effect that, clause B2.3.1 applies from 1 September 1997 instead of from the time of issue of the code compliance certificate in respect of all the listed elements, apart from those elements that have been rectified.

3. once the cladding and other matters set out in this determination have been rectified to its satisfaction, the territorial authority is to issue a code compliance certificate in respect of the building consent as amended.
- 12.2 The territorial authority should withdraw the notice to fix, and issue a new notice to fix (restricted to rectification of the items outlined in paragraph 8.3.1 and paragraph 8.3.2) requiring the owners to bring the alterations to the house into compliance with the Building Code. The notice to fix may list the items to be rectified but it should not specify how compliance is to be achieved as that is for the owner to propose and for the territorial authority to accept or reject. It is important to note that the Building Code allows for more than one method of achieving compliance.
- 12.3 I would suggest that the parties adopt the following process to meet the requirements of paragraph 12.2. Initially, the territorial authority should issue a notice to fix, listing all the items that the territorial authority considers to be non-compliant. The owner should then produce a response to this in the form of a detailed proposal, produced in conjunction with a competent and suitably qualified person, as to the rectification or otherwise of the specified issues. Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 12 December 2006.

John Gardiner
Determinations Manager