

Determination 2008/86

The refusal to issue a code compliance certificate for a 7-year-old house at 104A Wexford Road, Miramar, Wellington



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, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department. The applicant is the owner P Stevenson (“the applicant”), and the other party is the Wellington City Council (“the authority”) carrying out its duties and functions as a territorial authority or building consent authority. I note that the applicant was also the builder of the house, but not the original owner.
- 1.2 The matter for determination is whether the authority’s decision to decline to issue a code compliance certificate for a 6-year-old house is correct. The refusal arose because the building work had been undertaken under the supervision of Nationwide

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

Building Certifiers (“the building certifier”) which was duly registered as a building certifier under the former Building Act 1991, but which lost its approval as a building certifier before it had issued a code compliance certificate for the building work.

1.3 I consider that the matters for determination are:

1.3.1 Matter 1: The cladding

There are no records of inspections of the exterior cladding. Consequently I must consider whether the cladding as installed complies with Clause B2 Durability and Clause E2 External Moisture of the Building Code² (First Schedule, Building Regulations 1992). By “the cladding as installed” I mean the components of the systems (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.

1.3.2 Matter 2: The remaining Building Code clauses

There are some records of inspections carried out as the house was constructed. I must consider to what extent these indicate that the house complied with the remaining clauses of the Building Code at the time of the final inspection.

1.4 I note that the builder originally sought a code compliance certificate for this house, which was refused by the authority as it considered that an application for a certificate of acceptance was the appropriate way to proceed (refer paragraph 3.10). In the case of this house, based on the records supplied, I consider that I have sufficient evidence available to allow me to reach a conclusion as to whether the building will comply with the Building Code once remedial work is completed. This determination therefore considers whether it is reasonable to issue a code compliance certificate.

1.5 In order to determine this matter, I must address the following questions:

- (a) Is there sufficient evidence to establish that the building work as a whole complies with the Building Code? If so, a code compliance certificate can be issued (refer paragraph 5).
- (b) If not, are there sufficient grounds to conclude that, once any outstanding items are repaired and inspected, the building work will comply with the Building Code? If so, a code compliance certificate can be issued in due course (refer paragraph 10).

1.6 In making my decision, I have considered the submissions of the parties, the report of the expert commissioned by the Department to advise on this dispute (“the expert”), and the other evidence in this matter. I have evaluated this information using a framework that I describe more fully in paragraph 7.1.

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

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.

2. The building

2.1 The original consent

The building work covered in the original consent consisted of a 2-storey detached house, with a single-storey garage extension, situated on an excavated sloping site that is in a very high wind zone in terms of NZS 3604³. Construction is conventional light timber frame, with concrete slabs and foundations, monolithic cladding and aluminium windows. The building was simple in plan and form, with 20° pitch profiled metal hipped roofs that have no eaves projections.

2.2 The current construction work

An extension to the house is currently being constructed, which adds a second storey above the single storey garage with a small 2-storey extension to the adjoining north wall. The work includes re-cladding of the original garage walls. I have received no information about the current building work, which has a separate building consent, and is not considered in this determination.

2.3 The building work considered

- 2.3.1 Because of the current construction work, the building work considered in this determination is limited to the west elevation and those parts of the north and south elevations that are not affected by the current construction work.
- 2.3.2 Two small cantilevered “Juliet” balconies project from the north and west elevations. The balconies have membrane covered floors and open metal balustrades. A large timber deck, with spaced timber decking and open timber balustrades, extends from the ground floor at the northwest corner.
- 2.4 The expert noted that he was unable to identify any treatment in the timber framing, which was supplied from Australia as part of the kitset house components. Given the date of construction and the lack of other evidence, I consider the external wall framing to be untreated. The applicant has stated that the deck framing was supplied as 150 x 50 H3 from local sources, as no timber was supplied with the kit-set.
- 2.5 The cladding system to the house is EIFS⁴ monolithic cladding. In this instance it is a “Kool-Wall” system that appears to be similar to most EIFS systems in use at the time of construction, with 40mm polystyrene backing sheets fixed directly to the framing over the building wrap. The sheets are finished with a mesh reinforced proprietary textured finish, followed by a final high-build membrane paint system. Planted polystyrene moulds are sealed and plastered to form decorative bands around windows and doors. The profile of the band provides a 15mm “leg” to cover the edge of the backing sheet, so forming the exterior reveal to the joinery.
- 2.6 The cladding is an Australian product that is provided as part of a proprietary kit-set building system supplied by Active Building Systems Pty Ltd. The applicant (as builder) and the plasterer have issued a jointly signed Producer Statement dated 26 November 2001 for the cladding application.

³ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

⁴ External Insulation and Finish System

3. Background

- 3.1 The original owner of the house purchased the kit-set building from the local supplier, and the applicant was employed to build the house on a labour only basis.
- 3.2 The authority issued an approval for a building consent (No. 79554) on 31 July 2001, based on a building certificate issued by Bay Building Certifiers Ltd on 31 July 2001. This approval included a note that “Nationwide Building Certifiers are undertaking all inspections and they will be issuing the Code Compliance Certificate”.
- 3.3 The building certifier carried out the following inspections during construction:
- slab and footings on 14 September 2001 (which passed)
 - drainage on 18 September 2001 (which passed)
 - exterior cladding on 18 October 2001 (which passed and noted “OK to clad”)
 - building and plumbing pre-lines on 1 November 2001 (which passed)
 - final inspection on 25 February 2003 (which noted some minor items).
- 3.4 On 1 January 2003 the scope of the building certifier was amended and, as the building work included cladding not covered by the Acceptable Solution E2/AS1, the building certifier could not issue a code compliance certificate for the house. The applicant has noted that he was not informed of this change, and therefore had no opportunity to have the work inspected by another organisation.
- 3.5 At some stage during construction, a small porch was added to the south of the house, with an undated set of drawings prepared for the addition.
- 3.6 A final re-check inspection was carried out on 12 November 2003 by an architect employed by the building certifier to undertake inspections. I have received a copy of the architect’s own records which confirms that the inspection was undertaken. The applicant has supplied the building certifier’s record of the inspection which indicates that outstanding items had been completed, no further inspection is required, and also notes “amended drawing of back porch required”.
- 3.7 The drawings of the back porch were forwarded to the building certifier on 20 November 2003. However, it appears that the drawings may not have been forwarded to the authority as there is no record that the porch was approved as an amendment to the building consent.
- 3.8 It appears that the building certifier’s Wellington office was closed in May 2004. The building certifier’s approval as a certifier expired on 30 December 2004.
- 3.9 As the applicant had completed all necessary work and had received no notification from the original owner, he assumed that the code compliance certificate had been issued. In October 2005, after renting the house since completion, the applicant purchased the property from the original owner, apparently still unaware that the certificate had not been issued.

- 3.10 When the applicant wanted to extend the house and contacted the authority on 10 July 2006, he became aware that a code compliance certificate had not been issued. The authority's internal record states that the applicant was informed that a certificate of acceptance could be applied for, and notes:

The external cladding system is "Koolwall" and the joinery penetrations may not have a mechanical flashing systems. These are matters Mr Stevenson would need to consider before applying for a C.O.A, as all documentation associated with inspections is public information.

- 3.11 I am not aware of any further correspondence between the parties, and the Department received an application for a determination on 6 June 2008.

4. The submissions

- 4.1 The applicant accompanied his application with a statement that outlined the background to the project, noting that the building certifier had failed to issue a code compliance certificate despite all inspections being satisfactorily carried out. The applicant stated that the authority refused to issue a code compliance certificate because the work was inspected by the building certifier and the window details might not comply, although installed according to the specifications, noting that:

All details were supplied on the building consent and stamped and ok by all three certifiers involved. All inspections were carried out and checked as asked by [the building certifier].

- 4.2 The applicant forwarded copies of:

- the drawings
- some of the building consent documentation
- the building certifier's inspection records
- the letter from the architect, who was employed as a building inspector by the building certifier, with advice of his inspection booking
- various calculations, producer statements and other statements.

- 4.3 The authority made a submission in the form of a letter dated 7 July 2008 to the Department. The authority outlined the background of the project and noted that the building certifier had ceased operations in 2004, without informing the authority that it was unable to inspect or certify the work under the building consent. The authority noted that it had suggested that the applicant should apply for a certificate of acceptance on 10 July 2006, but had received no application. The authority stated that it believed it was precluded from taking any action other than considering a certificate of acceptance, unless directed by the Department as it:

...considers that it has insufficient grounds on which to be satisfied that the completed work complies with the Building Code.

- 4.4 The authority forwarded copies of:

- some of the building consent documentation
- the internal memo dated 10 July 2006

- various calculations, producer statements and other statements.
- 4.5 Copies of the submissions and other evidence were provided to each of the parties. Neither party made any further submissions in response to the submission of the other party.
- 4.6 The draft determination was issued to the parties for comment on 29 July 2008.
- 4.7 The authority accepted the draft on 14 August 2008, subject to several minor comments, which I have incorporated as I consider appropriate. In regard to the comment on moisture in the western deck, I note that the expert's testing indicated that moisture had not penetrated past the backing sheets (refer paragraph 6.8.2). The windows' suitability for use in a very high wind zone is addressed in paragraph 7.4.4.
- 4.8 The applicant did not accept the draft determination. In a letter to the Department dated 15 August 2008, the applicant provided further background to the matter along with additional information and attached copies of:
- the cladding manufacturer's 2000 installation instructions used for the house
 - the gasfitting certificate dated 26 February 2002
 - the electrical certificates of compliance dated 28 August 2001 and 4 April 2002
 - the engineer's producer statement (PS4 - Construction review) dated 7 December 2001
 - the as-built drainage plan
 - information on the windows supplied for the house
 - various other records and information.

I have considered the applicant's comments together with the additional information supplied, and have amended the determination as I consider appropriate.

5. Grounds for the establishment of code compliance

- 5.1 In order for me to form a view as to code compliance, I need to establish what evidence is available and what can be obtained considering that the building work is completed and some of the elements are not able to be cost-effectively inspected.
- 5.2 In this case the evidence includes the building certifier's:
- inspection records for the construction (refer paragraph 3.3)
 - the final re-check inspection for the building (refer paragraph 3.6)
- 5.3 In the absence of any evidence to the contrary, I take the view that I am entitled to rely on the inspections undertaken by the building certifier.
- 5.4 With regard to the cladding, no specific inspections were recorded. In this particular case, corroboration of compliance comes from the cladding inspection by the expert.

5.5 In summary, I find that the following evidence allows me to form a view as to the code compliance of the building work as a whole:

- The records of inspections carried out by the building certifier, which indicate satisfactory inspections of both the accessible and inaccessible components.
- The expert's report as outlined below.

6. The expert's report

6.1 As mentioned in paragraph 1.6, I engaged an independent expert to provide an assessment of the condition of those building elements subject to the determination. The expert is a member of the New Zealand Institute of Building Surveyors. The expert inspected the house on 1 July 2008 and furnished a report that was completed on 8 July 2008.

6.2 The expert attached the manufacturer's installation instructions for the wall cladding dated January 2005. (I note that the applicant has since supplied the 2000 specifications, which applied at the time of the cladding installation.)

6.3 The expert noted that the building work appeared to be in accordance with the amended consent drawings, except for a small porch area added to the garage end of the south elevation (refer paragraph 3.7).

6.4 The expert noted that the overall standard of workmanship appeared acceptable, except for the items outlined in paragraph 6.9. However, the expert also noted that the cladding details generally depended on sealants for weathertightness, leading to a critical requirement to maintain the condition of the sealant.

6.5 The expert also noted that the construction work currently underway has caused temporary vulnerabilities at junctions between the new and older claddings.

6.6 The expert noted that there was no evidence of control joints installed in the cladding. I note that the manufacturer's 2005 instructions indicate that vertical control joints should be installed at not less than 6m centres, and some of the walls exceed this dimension. However, I also note that the 2000 instructions supplied by the applicant indicate that control joints should be installed at 10m to 13m, depending on the soil conditions. I consider this matter further in paragraph 7.4.3.

6.7 Windows

6.7.1 The expert noted that the windows are recessed, with the profiled bands forming reveals and no flashings visible. At the time of inspection, the window to bedroom 3 was still in place behind the partly constructed new wall and, being redundant, was able to be used for destructive investigation of the underlying flashing system. I accept that the exposed junctions are typical of similar locations elsewhere in the building.

6.7.2 The expert removed sections of cladding at the head and sill to jamb junctions of the redundant window, and noted that a metal alloy channel surrounded the entire window opening as a flashing system. However, the expert noted that, while the

channel appeared effective in capturing moisture there was no means of draining this back to the outside, which would potentially allow moisture to drain behind the backing sheets. Despite this shortcoming, the expert could see no sign of moisture penetration beyond the sealants applied at the profiled band.

- 6.7.3 The expert also noted that there are no markings or performance specifications available to show that the windows comply with the standards required for a very high wind zone. (I consider this matter in paragraph 7.4.4.) There are “flapped wind pressure/drain plugs inserted into all windows (except for the south bathroom window) in order to prevent wind-blown rain from entering the condensation channels.
- 6.7.4 The expert also noted satisfactory mesh within the coating, no evidence of past moisture and the foil-backed “vapour permeable sarking” building wrap. The expert noted that the foil backing interfered electronically with invasive moisture meters causing some inaccurate results.

6.8 Moisture

- 6.8.1 The expert inspected the interior of the house, taking non-invasive moisture readings internally, and no evidence of moisture was observed except under the tiles below the south bathroom window, where the reading was 35%. On investigation, the expert noted that the condensation channels appeared to be blocked, allowing condensation to pool at the inside sill and penetrate through the reveal junction into the framing below. However, the expert also noted that, unlike other windows, a wind pressure flap had not been inserted into this window and considered that wind blown rain from a recent southerly storm could be a contributing factor.
- 6.8.2 Due to the interference with invasive meter readings caused by the foil on the building wrap, the expert carried out non-invasive testing at the surface of the cladding and deck membranes, and noted several areas where moisture had penetrated into the outer plaster layer but not into the underlying framing. The expert also noted the following elevated readings:
- 25% through the membrane on the south side of the west deck
 - 25% in the soffit near the deck to wall junction on the south side of the deck.
- 6.8.3 The expert limited invasive testing to areas where the foil-backed wrap would not interfere with the readings, and recorded 21% below the lounge window where timber beyond the slab edge was exposed to wind-driven rain.
- 6.8.4 The expert noted that the first inspection of the house was carried out 2 days after a “severe gale-force southerly storm”, and wet weather also preceded the second inspection.
- 6.9 Commenting specifically on the wall claddings, the expert noted that:
- the cladding behind the fascia is unfinished, with no plaster and unsealed joints to the polystyrene backing sheets (relying only on sealant at the junction)
 - at the windows and doors, there is no provision for directing any water that penetrates past sealants at the profiled bands back to the outside

- the window sills formed from the profiled bands are flat, which allows water to pond against the junction, and there are cracks in some reveals
 - sealants critical for maintaining the weathertightness of various cladding and window junctions are in poor condition, with cracks apparent in many areas
 - the south bathroom window lacks a wind pressure flap, the condensation channel is not draining effectively and water has penetrated through the interior reveal
 - the bottom of the framing below the lounge window is exposed
 - there is damage to the cladding in some areas
 - the penetration for the southern light fitting is unsealed (I note that the applicant has stated that this fitting is sealed)
 - the metal balustrades are top-fixed through the membrane into the deck framing.
- 6.10 The expert also noted that, at the sides of the Juliet balconies, the junctions with the walls appear to lack adequate flashings, and are reliant on sealant for weathertightness, with water entering the polystyrene backing sheets at the west balcony via a break in the sealant. I consider this matter in paragraph 7.4.2.
- 6.11 The expert also noted that the house appeared to comply with the other relevant clauses of the Building Code, with the exception of the following:
- The metal balustrades to the upper decks are fixed through only half of the provided fixing holes, which is unlikely to comply with Clause F4 Safety from falling.
- 6.12 A copy of the expert's report was provided to the parties on 17 July 2008.

7. Evaluation for code compliance

7.1 Evaluation framework

- 7.1.1 In evaluating the design of a building and its construction, it is useful to make some comparisons with the relevant Acceptable Solutions⁵, 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.

⁵ 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.

7.2 Evaluation of external building envelope for E2 and B2 Compliance

7.2.1 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 determinations⁶ (for example, Determination 2004/1) relating to cladding and these factors are also used in the evaluation process.

7.2.2 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.

7.3 Weathertightness risk

7.3.1 In relation to these characteristics I find that this house:

- is a fairly simple, 2-storey building
- has no eaves or verge projections to protect the cladding
- has 2 cantilevered membrane clad decks, with top-fixed metal balustrades
- is built in a very high wind zone
- has monolithic cladding fixed directly to the framing
- will have two types of wall claddings when the current alterations are complete
- has external wall framing that is not treated to a level that provides resistance to the onset of decay if the framing absorbs and retains moisture.

7.3.2 The house has been evaluated using the E2/AS1 risk matrix. The risk matrix allows the summing of a range of design and location factors applying to a specific building design. The resulting level of risk can range from 'low' to 'very high'. The risk level is applied to determine what claddings can be used on a building in order to comply with E2/AS1. Higher levels of risk will require more rigorous weatherproof detailing; for example, a high risk level is likely to require a particular type of cladding to be installed over a drained cavity.

7.3.3 When evaluated using the E2/AS1 risk matrix, the weathertightness features outlined in paragraph 7.3.1 show that the 3 relevant elevations of the house demonstrate a high weathertightness risk rating. I note that, if the details shown in the current E2/AS1 were adopted to show code compliance, the monolithic cladding on this house would require a drained cavity. However, I also note that a drained cavity was not a requirement of E2/AS1 at the time of construction.

⁶ Copies of all determinations issued by the Department can be obtained from the Department's website.

7.4 Weathertightness performance: exterior cladding

7.4.1 Generally the cladding appears to have been installed in accordance with the manufacturer's instructions and to good trade practice. Taking account of the expert's report, I conclude that remedial work is necessary in respect of the items outlined in paragraph 6.9.

7.4.2 I also note the expert's comment in paragraph 6.10 regarding the reliance only on sealant for weathertightness at the junctions of the sides of the Juliet balconies with the walls, and I make the following observations:

- The applicant maintains that the deck membrane was extended behind the cladding by a minimum of 150mm, with the sealant forming just a first line of defence against moisture penetration.
- The building certifier inspected the underlying construction on 18 October 2001 and noted "OK to clad".
- Moisture penetration appears to be restricted to the backing sheets, without penetrating further into the wall framing underlying the junctions.

Based on the above, I am prepared to accept that, although the sealant is clearly in need of maintenance, the underlying junctions are adequately weatherproofed.

7.4.3 I note the expert's comment in paragraph 6.6 regarding the lack of vertical control joints, which is not in accordance with the manufacturer's 2005 instructions to install vertical control joints at a minimum of 6m centres. However, I also note that the 2000 instructions supplied by the applicant indicate that control joints should be installed at 10m to 13m, depending on the soil conditions. With regard to this house, I have considered the following factors:

- The house is 2-storeys high, with a concrete slab and foundations
- The cladding appears to have been installed according to good trade practice, and has been in place for 7 years with no signs of significant cracking or moisture entry associated with a lack of control joints.
- During the period since construction, all drying shrinkage in the concrete, plaster coating and supporting framing will have likely occurred, and the cladding's future performance will be governed solely by response to environmental factors such as imposed wind, earthquake forces, seasonal foundation movements, and moisture and temperature effects.
- As outlined in paragraph 2.5, this cladding has a very similar specification to that applying to other EIFS systems commonly in use at the time of construction in 2001. I note that the wall length limits for which vertical control joints were required for the latter systems were significantly beyond the wall lengths of 6.6m, 6.8m and 10.3m existing on this house. I also note that the cladding has a similar specification to that included within E2/AS1, which requires vertical control joints on walls over 20m long.
- The control joints have been installed in accordance with the manufacturer's 2000 instructions.

I therefore consider that, due to the particular characteristics of this building, the cladding system as installed is adequate, without the retrofitting of control joints.

7.4.4 I note the expert's comment in paragraph 6.7.3 regarding the lack of markings or performance specifications available to show that the windows comply with the standards required for a very high wind zone. However, the applicant has since supplied technical information and a letter from the Australian window manufacturer dated 24 July 2001, which indicate the following:

- The windows and doors for the house "were manufactured to conform to a 1000 PA (W41) and at 1500 PA (W50) rating, glazed and assembled in accordance with the requirements of NZS 4223.3 and AS/NZS 4667:2000."
- The table of window performance criteria shows that "W50" refers to the "Design Gust Wind Speed Ultimate State".

Given the successful performance of the windows over the 5-year period to date I accept that the windows meet the requirements to withstand a maximum ultimate limit state wind speed of 50 metres per second in a very high wind zone.

7.5 Evaluation of other Building Code requirements

7.5.1 Taking account of the expert's report, I conclude that remedial work is necessary in respect of the balustrade fixing as outlined in paragraph 6.10.

7.5.2 The expert's assessment of visible components of the building, together with the inspection records and other documentation, have satisfied me that the building is likely to comply with the provisions of the remaining relevant code clauses.

7.5.3 I also note that the current construction work underway on the building has exposed much of the underlying components of the house, which should have allowed the authority to observe any shortcoming in those sections of the original building work.

Matter 1: The cladding

8. Discussion

8.1 I consider the expert's report establishes that the current performance of the cladding is not adequate because it is currently allowing water penetration into the building. Consequently, I am satisfied that the cladding does not comply with Clause E2 of the Building Code.

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

8.3 Because the faults identified with the cladding systems occur in discrete areas, I am able to conclude that satisfactory rectification of the items outlined in paragraph 6.9 will result in the house being brought into compliance with Clauses B2 and E2.

- 8.4 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 Department 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).
- 8.5 In this instance I note that the weathertightness performance of the cladding is reliance to a large extent on sealant. The regular inspection and maintenance of the sealant joints therefore requires particular attention.

Matter 2: The remaining Building Code clauses

9. Discussion

- 9.1 Taking account of the expert's assessment of visible components of the building, together with the inspections recorded at the time of construction, the exposure of various parts of the construction during the current alterations, and the other documentation, I have come to the view that the building complies with the other relevant clauses of the building Code, with the exception of Clause F4.
- 9.2 However, I am able to conclude that satisfactory rectification of the item outlined in paragraph 6.10 will result in the house being brought into compliance with Clause F4.

10. The appropriate certificate to be issued

- 10.1 Having found that the building can be brought into compliance with the Building Code, I must now determine whether the authority should issue either a certificate of acceptance or a code compliance certificate.
- 10.2 Section 437 of the Act provides for the issue of a certificate of acceptance where a building certifier is unable or refuses to issue either a building certificate under section 56 of the former Act, or a code compliance certificate under section 95 of the current Act. In such a situation, an authority may, on application, issue a certificate of acceptance or a code compliance certificate. In the case of this building work, I note that the applicant has not sought a certificate of acceptance.
- 10.3 I am of the view that a code compliance certificate is the appropriate certificate to be issued in this situation, as I have reasonable grounds to conclude the building work can be brought into compliance with the Building Code.

11. What is to be done now?

- 11.1 I note that the authority has not issued a notice to fix. A notice to fix should be issued that requires the owners to bring the house into compliance with the Building Code, identifying the defects listed in paragraphs 6.9 and 6.10 and referring to any further defects that might be discovered in the course of investigation and rectification work, but not specifying how those defects are to be fixed. It is not for the notice to fix to specify how the defects are to be remedied and the house brought

to compliance with the Building Code. That is a matter for the owner to propose and for the authority to accept or reject. However, it is for the notice to fix to provide the owner with a definitive and, ideally, final list of items, the rectification of which can be followed by a final inspection and the issue of a code compliance certificate.

- 11.2 I suggest that the parties adopt the following process to meet the requirements of paragraph 11.1. Initially, the authority should issue the notice to fix. The owner should then produce a response to this in the form of a detailed proposal, together with suitable amendments to the plans and specifications, produced in conjunction with a competent and suitably qualified person, as to the rectification or otherwise of the specified matters. Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.

12. The decision

- 12.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the wall cladding does not comply with Clauses B2 and E2 of the Building Code, and the balustrade does not comply with Clause F4, and accordingly I confirm the authority's decision to refuse to issue a code compliance certificate.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 11 September 2008.

John Gardiner
Manager Determinations