



## Determination 2009/72

# The refusal of a code compliance certificate for a house at 21 George Gee Drive, Lower Hutt (to be read in conjunction with determination 2007/40)

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### The parties

The applicants:	K Channtha and P Huy, owners of the house, acting through their legal adviser (“the applicants”)
The authority:	The Hutt City Council (“the authority”) carrying out its duties and functions as a territorial authority or building consent authority

### Persons with an interest

The previous owner:	Bun Hu Ea
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## 1 The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“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.
- 1.2 The matter for determination concerns the refusal of the authority to issue a code compliance certificate. Certain building matters were described in an earlier determination concerning the same house, Determination 2007/40 (“the first determination”). That determination decided that, while certain elements of the building did not comply with Clauses B2 and E2 of the Building Code, once certain identified faults were rectified the building would be code-compliant.
- 1.3 I take the view that the matters for determination in terms of sections 177(a), 177(b)(i) and 188<sup>2</sup> are:
- whether the house complies with the relevant clauses of the Building Code<sup>3</sup> (Schedule 1, Building Regulations 1992)

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<sup>1</sup> The Building Act 2004 is available from the Department’s website at [www.dbh.govt.nz](http://www.dbh.govt.nz).

<sup>2</sup> 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.

<sup>3</sup> The Building Code is available from the Department’s website at [www.dbh.govt.nz](http://www.dbh.govt.nz).

- whether the decision by the authority to refuse to issue a code compliance certificate for the house was correct.

1.4 In making my decision, I have considered the submissions of the parties, the report from an independent expert (“the expert”) commissioned by the Department to advise on this dispute, and the other evidence in this matter.

## 2 Sequence of events

2.1 On 13 April 2007, the Department issued the first determination, which confirmed the authority’s decision not to issue a code compliance certificate as the building did not comply with the Building Code.

2.2 In paragraph 5.3 of the first determination the expert commissioned by the Department listed a number of building element defects, and in paragraph 6.3.1 of the first determination I stated:

Generally the claddings appear to have been installed in accordance with good trade practice. However, taking account of the expert’s opinion, I accept that remedial work is necessary in respect of the following:

- The absence of overflows fitted to the decks.
- The defective head flashing above the laundry door which has allowed water to penetrate the wall.
- The leak from the damaged membrane to the rainwater discharge on the deck outside bedroom 4. The water is consequently pooling on the soffit lining below.
- The lack of seals or protection for exhaust vents above the laundry door.
- Any other building elements associated with the above that are consequently discovered to be in need of rectification.

2.3 Paragraph 7.3 of the first determination stated:

Because faults identified with the cladding system occur in discrete areas, I am able to conclude that satisfactory rectification of the items outlined in paragraph 6.3.1 will result in the building being becoming weathertight and in compliance with clauses B2 and E2.

2.4 I also point out that the covering letter attached to the expert’s report that was sent to the previous owner included the following statements:

**Please note:**

If the report identifies faults, we do not recommend you undertake any remedial work until you have been issued with the Department’s final decision. The expert’s report provides key information, but the Department is not bound by the expert’s recommendations, as information may be obtained from other sources.

As the report is specific to cladding issues, it may not identify all the faults in your house. It is not the purpose of the expert advisor’s report to identify all cladding faults, or to propose a comprehensive remedial plan. Please do not contact the expert about proposed remedial work.

- 2.5 Following the issue of a draft determination the authority issued a notice to fix that was dated 19 January 2007 listing items set out in the draft which remained in the final determination that was issued on 13 April 2007. The notice to fix also stated:
- a) Amend the building consent by providing drawings, specifications and other documents according to which the remedial work is proposed to be constructed, altered or removed.
  - b) The above shall include the proposed procedures for inspection during construction, alteration or demolition of the remedial work.
- 2.6 Based on the correspondence that has been provided, it appears that the authority was not consulted before the remedial work was carried out on the house on behalf of the previous owner. The required drawings and documents were also not forwarded to the authority. In addition, and despite the notifications accompanying the expert's report, the previous owner proceeded with the rectification work prior to the Department issuing the final determination.
- 2.7 It would appear that the previous owner sold the house to the applicants after the rectification work was carried out.
- 2.8 The application for this determination was received by the Department on 3 November 2008.

### **3 The submissions**

- 3.1 In a covering note to the application, the applicants' legal adviser set out the background to the dispute. The submission stated that the remedial work listed in the first determination had been rectified and that the applicants would accept a further investigation or inspection. The lack of a code compliance certificate would pose difficulties if the applicants wished to sell the house.
- 3.2 The applicants forwarded copies of:
- the notice to fix
  - the correspondence between the parties.
- 3.3 The authority acknowledged the application but noted that it did not wish to provide a submission.
- 3.4 In a letter dated 30 January 2009, in response to the expert's report (refer to paragraph 4), the applicants requested the determination be deferred while they obtained a full inspection and investigation of the dwellings weathertightness from a company who offer building inspection services. In a letter dated 2 July 2009, the applicants explained that there was nothing in this report which contradicts or disputes anything in the expert's report.
- 3.5 A draft determination was issued for comment to the parties on 4 August 2009. Both parties accepted the draft determination without comment.

## 4 The expert's report

- 4.1 As mentioned in paragraph 1.4, I engaged a second independent expert to provide an assessment of the condition of the rectified cladding on the house. The expert is a member of the New Zealand Institute of Building Surveyors. The expert inspected the house on 8 and 24 December 2008, and furnished a report that was completed on 9 January 2009.
- 4.2 The expert carried out a series of both invasive and non-invasive moisture readings on the interior and exterior of the house. The expert took invasive moisture readings through the cladding, and elevated readings were recorded at several locations, which leads me to believe that external moisture is entering the structure. The expert also noted areas where the MDF<sup>4</sup> skirting is swelling and at one location where there was evidence of decayed timber.
- 4.3 The expert also removed an area of cladding at one window jamb/sill junction and I am prepared to accept that the details exposed by this inspection are typical for other similar locations throughout the house.
- 4.4 Commenting specifically on the construction, the expert noted that:
- overflows had been fitted to all the decks, except to the one leading from the master bedroom
  - while the flashing over the laundry door head is effective, moisture is entering the cladding above this flashing
  - the leak outside bedroom four has been rectified
  - the laundry exhaust vents have been fitted with weather covers
  - the deck handrails do not meet the height requirement of 1000mm
  - the poorly fitted handrail to balustrade of the cantilevered deck over the garage is allowing moisture to enter the balustrade
  - there is cracking in the cladding to the driveway barrier and the cladding is also carried down onto the driveway surface
  - the junctions between the window jamb and sill flashings are not adequately sealed
  - the cladding to the external wall of the lounge is poorly detailed and is allowing the ingress of moisture.
- 4.5 A copy of the expert's report was provided to the parties on 15 January 2009.

## 5 Discussion

- 5.1 As described in paragraph 2.6, the previous owner had carried out repairs without consulting the authority, and also despite the Department's warning not to proceed with rectification until the final determination was issued.

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<sup>4</sup> Medium Density Fibreboard

- 5.2 I consider the expert's report establishes that the current performance of the cladding is still not adequate because it is allowing moisture penetration into the building. Consequently, I am satisfied that the house does not comply with Clause E2 "External moisture" of the Building Code.
- 5.3 In addition, the building is also required to comply with the durability requirements of Clause B2 "Durability". 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 building are likely to continue to allow the ingress of moisture in the future, the house does not comply with the durability requirements of Clause B2.
- 5.4 The present heights of the deck balustrades do not comply with Clause F4 "Safety from falling".
- 5.5 Because the faults identified with the building occur in discrete areas, I am able to conclude that satisfactory rectification and investigation of the following items will result in the house being brought into compliance with the Building Code:
- the lack of an overflow to the deck leading from the master bedroom
  - the deck handrails heights
  - the poorly fitted deck handrail to balustrade of the cantilevered deck over the garage
  - the cracking in the cladding to the driveway barrier and the cladding being carried down onto the driveway surface
  - the inadequately sealed junctions between the window jamb and sill flashings
  - the poorly detailed cladding to the external lounge wall.
- 5.6 However, given the high moisture readings and the timber decay noted in some cladding locations, the age of the construction, and the likelihood of the use of untreated framing timber, I recommend that further investigation be carried out to confirm that the timber framing has not decayed as a result of prolonged moisture ingress.
- 5.7 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).

## **6 What is to be done now?**

- 6.1 I suggest that the authority issues a new notice to fix that requires the owner to bring the building work into compliance with the Building Code. The notice should identify the defects listed in paragraph 5.5, referring to any further defect that might arise from further investigation (refer paragraph 5.6) and any other defects discovered in the course of the rectification work. The notice should not specify

how the defects are to be fixed. That is a matter for the current owner to propose and for the authority to accept or reject. It is important to note that the Building Code allows for more than one method of achieving compliance.

- 6.2 I suggest that the parties adopt the following process to meet the requirements of paragraph 6.1. Initially, the authority should issue the notice to fix. The owners 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. I stress the need for any proposed remedial work to be documented and agreed with the authority before any work commences on the building itself. Any outstanding items of disagreement can be referred to the Chief Executive for a further binding determination.

## **7 The decision**

- 7.1 In accordance with section 188 of the Act, I hereby determine that the house does not comply with Clauses B2, E2, and F4 of the Building Code and accordingly I confirm the decision of the authority to refuse to issue a code compliance certificate for the house.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing  
on 4 September 2009

John Gardiner  
**Manager Determinations**