



Determination 2009/85

Determination regarding the refusal to issue a code compliance certificate for a 5-year-old block of four semi-detached townhouses at 11, 13, 15, & 17 Duxfield Drive, Waitakere City



1. The matters 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.

1.2 The parties

1.2.1 The applicants are the owners of the four semi-detached townhouses within a free-standing building (“the applicants”):

- 11 Duxfield Drive (Lot 6): Tonka Investments Ltd (“Unit 6”)
- 13 Duxfield Drive (Lot 7): C and B Kumar (“Unit 7”)
- 15 Duxfield Drive (Lot 8): L and A Rowley Holdings Ltd (“Unit 8”)
- 17 Duxfield Drive (Lot 9): Waiora Property Ltd (“Unit 9”)

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

1.2.2 The other party is the Waitakere City Council (“the authority”) carrying out its duties and functions as a territorial authority or building consent authority.

1.2.3 I consider the owners of the other 63 units in the development are parties with an interest in this determination.

1.3 The reason for the application for determination

1.3.1 This determination arises from the decision of the authority to refuse to issue a code compliance certificate for a 5-year-old building, because the building is part of a multi building development and it is not satisfied that the building work complies with certain clauses of the Building Code (First Schedule, Building Regulations 1992).

1.3.2 The refusal arose because:

- the building (“Block E”) is one out of 19 blocks (“the development”) constructed under a single building consent, and
- the building work had been undertaken under the supervision of building certifiers under the former Building Act 1991 which ceased operating as certifiers before issuing a code compliance certificate.

1.4 The matters to be determined

Based on the evidence available to me, I consider the matters for determination² are:

1.4.1 Matter 1: The claddings

Whether the claddings as installed complies with Clauses B2 Durability and E2 External Moisture. By “the claddings as installed” 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. (I consider this matter in paragraph 8.2.)

1.4.2 Matter 2: Compliance with the remaining Building Code clauses

Whether certain building elements in Block E, other than the claddings, comply with the other relevant clauses of the Building Code. (I consider this in paragraph 9.)

1.4.3 Matter 3: Amending the building consent

Whether the authority, in response to an application from the owners, is required to amend the building consent for the development, which includes Block E, so that Block E has its own building consent. That would make it possible for the authority to issue a code compliance certificate in respect of Block E. (I consider this in paragraph 11.)

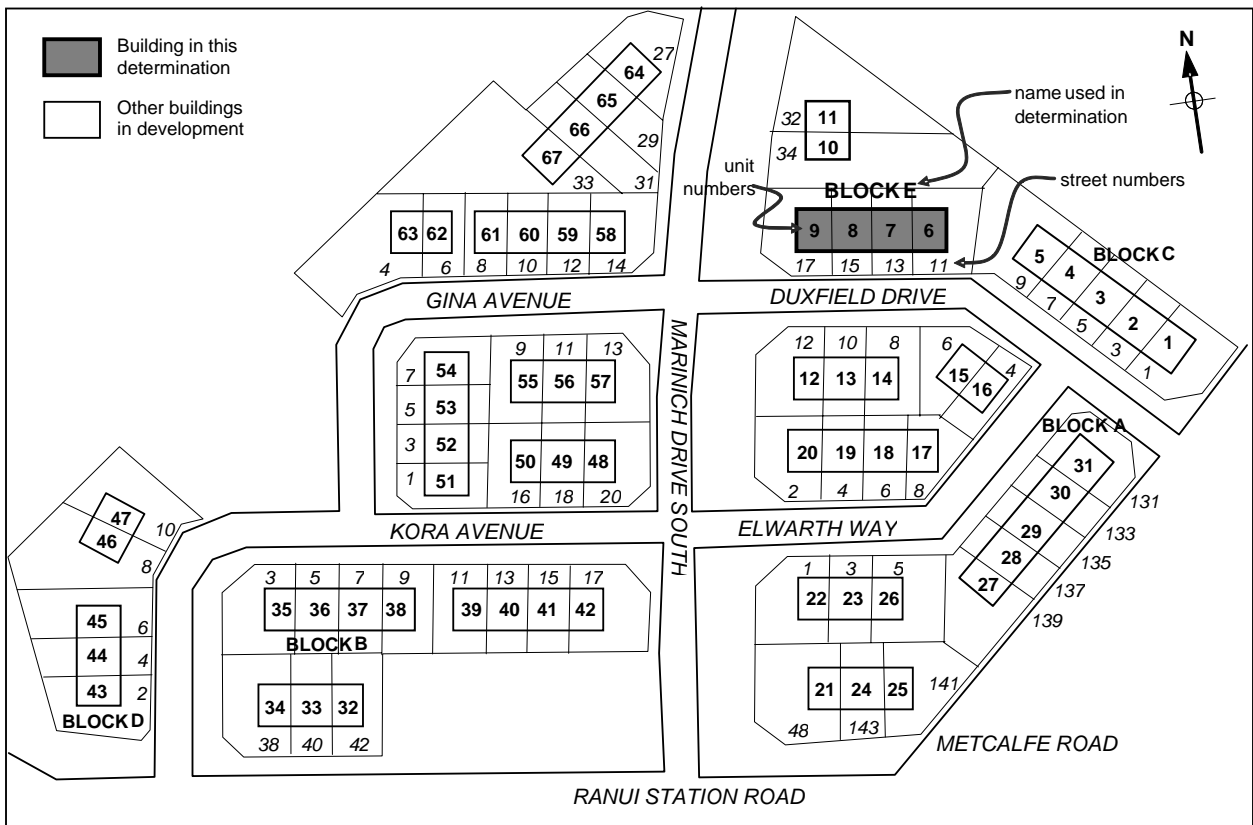
² Under section 177(a), 177(b)(v). In this determination, unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

1.5 The limited inspection records

- 1.5.1 The building certifiers maintain (and the authority does not dispute) that inspections of the building work were carried out during construction and I have located some of those records.
- 1.5.2 In order to determine the code compliance of Block E, I must address the following questions:
- (a) Is there sufficient evidence to establish that Block E complies with the Building Code? If so, a code compliance certificate can be issued. (I consider this question in paragraph 6).
 - (b) If the building work does not comply with the Building Code, are there sufficient grounds to conclude that, once any outstanding items are satisfactorily repaired and inspected, Block E will comply with the Building Code? If so, a code compliance certificate can be issued in due course. (I consider this question in paragraph 9.1.1).
- 1.6 In making my decisions, I have considered the submissions of the parties, the available building certifier records for the building, 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 8.1.
- 1.7 Other blocks in the development have been the subjects of recent determinations. As Block E is constructed with the same layout and detailing, I have also taken into account the expert’s findings for those other blocks.

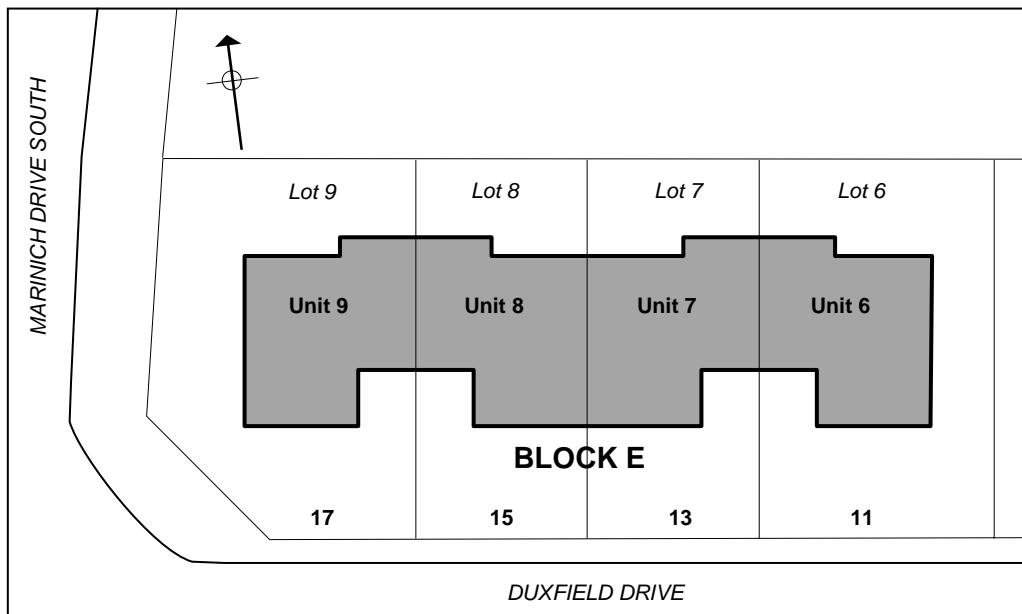
2. The development

- 2.1 Block E is part of a larger complex of 67 residential units comprising 19 free-standing blocks that range in size from two semi-detached townhouses to six semi-detached townhouses. One building consent was issued to cover all 19 blocks, as shown in the site plan on the following page.
- 2.2 Each townhouse has its own separate land and building title, which clearly defines legal boundaries to each property. Property titles for the subdivision were finalised progressively, with the certificates of title for Block E registered in June 2003. Blocks were progressively constructed, sold and occupied, from March 2003 to 2004. The units are generally of very similar size, construction and materials.



3. The building work

3.1 The following site plan shows Block E:



3.2 Block E is a two-storey building, which is situated on a flat site in a low wind zone in terms of NZS 3604³. The block sits at the corner of Duxfield Drive, with the main entries and garage doors facing south towards the road. The building is fairly simple

³ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

in plan and form, with garages set back from the front wall. The ground floor accommodates living, dining and kitchen areas, with three bedrooms and a bathroom in the upper level.

- 3.3 Construction is conventional light timber frame, with concrete slabs and foundations, pressed metal tile roof cladding and aluminium windows. The walls are clad in monolithic cladding, with panels of brick veneer to about half of the ground floor walls.
- 3.4 The main gable roof has eaves projections of about 500mm and verges of 200mm. Part of the rear roof slope continues up as a monopitch, with no eaves or verge projections, to finish in line with the recessed front walls.
- 3.5 Upper decks to the rear elevation are recessed to sit above the garage areas below, with the roof providing a canopy of about 970mm above. Below the decks, the projecting rear garage walls are monolithic-clad, and continue up to form the deck balustrades.
- 3.6 The party walls between adjacent units are timber-framed, with fire-rated interior linings. The walls extend out to form monolithic-clad barriers between adjacent decks, and these project beyond the eaves by about 600mm.
- 3.7 The expert noted that timber exposed in the ceiling space was marked as kiln-dried, and the specification is silent on timber treatment. Given the date of construction in 2003 and the lack of other evidence, I consider that the wall framing is not treated.
- 3.8 The wall cladding system is an EIFS⁴ monolithic cladding, with purpose-made flashings to windows, edges and other junctions. The EIFS cladding is a proprietary system that appears typical of most in use at the time of construction, with 40mm polystyrene backing sheets fixed directly to the framing, and finished with a mesh-reinforced plaster system and an acrylic paint coating system. In the upper walls, 2 layers of polystyrene are used to provide an increased cladding thickness of about 90mm overall.
- 3.9 The EIFS cladding supplier has provided a producer statement dated 18 June 2003, which states that the work “has been completed within the terms of best plastering practice” and which guarantees the materials and workmanship for 15 years. Exclusions from the guarantee include damage caused
- ...by water penetration through windows or other fixings by other contractors, and does not cover consequential damage.

4. Background

- 4.1 The authority issued a building consent (No. 20021596) on 24 July 2002, under the Building Act 1991. The single building consent was for the development of 67 residential units at “36-44 Ranui Station Rd”, which at that date was an undivided site at Lot 1 DP 204621.

⁴ External Insulation and Finish System

- 4.2 Supervision of the building work in the development was carried out by three registered building certifiers; “building certifier A”, “building certifier B” and “building certifier C”.
- 4.3 During the construction of Block E, building certifier A carried out inspections of the under-slab plumbing and drainage, and received a producer statement for review of the slab and foundations from the engineer. Building certifier A’s inspection summary noted “Balance of inspections by [building certifier B]”.
- 4.4 The building certifiers carried out the following inspections:
- under-slab plumbing inspections by building certifier A on 18 March 2003 (which passed)
 - building, plumbing, firewall and wall insulation pre-line inspections by building certifier B on 7 May 2003 (which passed)
 - gibnail inspections by building certifier B on 13 May 2003 (which passed)
 - drainage inspections by building certifier B on 10 June 2003 (which passed)
 - final inspections by building certifier B on 26 August 2003 (which passed).
- 4.5 Building certifier B issued separate interim code compliance certificates dated 24 September 2003 for each of the four units. Each certificate noted that it was:
- An interim Code Compliance Certificate in respect of only part of the building work under the above Building Consent.
- 4.6 The units in Block E were subsequently sold in February and March 2004. In common with other buyers, the original owners purchased these units with the understanding that the developer would apply for a final certificate when all the building work under the building consent had been completed and inspected.
- 4.7 On 15 September 2008, the authority wrote to all owners in the development to explain the situation and to invite owners of units within individual blocks to make joint applications for determinations.
- 4.8 The Department received an application for a determination from the applicants on 15 December 2008.

5. The submissions

- 5.1 As construction information about the development had been previously supplied for a recent determination in regard to another block in the development, no further information about Block E needed to be supplied by the applicants or the authority.
- 5.2 The authority acknowledged the application but made no submission.
- 5.3 At the request of the Department, the building certifiers forwarded copies of the inspection summaries, the interim code compliance certificates and other documentation that was able to be located for the three units in Block E.

- 5.4 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.
- 5.5 The draft determination was issued to the parties for comment on 5 May 2009. The applicants accepted the draft without comment.
- 5.6 The Department did not receive a response from the authority until 15 June 2009. In an accompanying letter dated 10 June 2009, the authority declined the draft saying that ‘the [authority] does not agree that the consent can be split into the various blocks even if an application was made’.
- 5.7 Determination 2009/56, which was in respect of another block (Block A) in the same development, was issued on 30 July 2009 (refer paragraph 11.2). The decision in Determination 2009/56 said that ‘the authority is to amend the consent to create a separate consent for Block A...’
- 5.8 On 5 August 2009 the Department issued a second draft determination in respect of another block (Block C) in the same development. The second draft determination was intended to establish whether the authority would make use of the precedent set by Determination 2009/56 and amend the consent without being directed to by the Department.
- 5.9 In response to this, and clarification about other blocks in the development, the authority confirmed its position in an email to the Department, dated 17 September 2009, which said:

...the [authority] will only split a consent for a block if a determination specifically directs the [authority] to do so and the council receives an application for the consent to be split.

I have taken the authority’s position as a refusal to amend the original consent.

6. Grounds for the establishment of code compliance

- 6.1 In order for me to form a view as to the code compliance of Block E, 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.
- 6.2 In this case the available evidence consists of
- the summary of inspections carried out by building certifier A and building certifier B (refer paragraph 4.4)
 - the “Producer Statement – Construction Review” dated 8 May 2003 supplied by a registered engineer
 - the as-built plumbing and drainage plan
 - the producer statement for the EIFS cladding.
 - the interim code compliance certificates for Block E (refer paragraph 4.5)

- 6.3 I note that in this instance the interim code compliance certificates have been issued as originally intended by the previous Act in that the certificates are issued in respect of completed work, albeit only part of the consented work for the total development.
- 6.4 Before deciding whether or not to rely on the building certifiers having carried out satisfactory inspections during construction and on the interim code compliance certificates issued for Block E, I consider it important to look for evidence that corroborates those inspections. In this particular case, corroboration comes from the expert's inspection, which can be used to verify whether the certifiers' inspections were properly conducted.
- 6.5 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 summary of inspections carried out by the building certifiers, which indicates satisfactory inspections of the inaccessible components.
 - The interim code compliance certificates for Block E, which indicate compliance of all building elements.
 - The engineer's producer statement, which indicates satisfactory construction review of the floor slab and foundations.
 - The expert's report as outlined below.

7. The expert's report

7.1 As mentioned in paragraph 1.6, I engaged an independent expert to assist me. The expert is a member of the New Zealand Institute of Building Surveyors. The expert inspected the units on 2 and 16 February 2009 and provided a report that was completed on 25 March 2009.

7.2 The cladding (general)

7.2.1 The expert noted the following variations from the consent drawings:

- The wall cladding is EIFS in lieu of painted fibre-cement sheet.
- The step down to the decks is reduced from 175mm to about 75mm.
- The deck balustrades have been changed to a continuation of the lower walls.

7.2.2 The expert noted that the overall standard of workmanship appeared to be generally good, except for the items outlined in paragraph 7.7. The expert also noted that the cladding was straight with a consistent even finish, although some repairs to the deck balustrades were noted and the paint coating was described as generally "flat, discoloured and chalky".

7.2.3 The expert noted he could not identify the particular type of EIFS system used, but the installation and detailing appeared to be of an acceptable standard. There was no evidence of control joints, but these are not generally required for the dimensions of EIFS used on this building.

7.3 The windows

7.3.1 The windows are recessed, with metal head flashings and decorative “sills” planted at the sills. During his inspection of Block A, the expert removed a small section of cladding at the sill to jamb junction of a typical ground floor window.

7.3.2 The expert noted the installation of metal and PVC flashings that appeared satisfactory and typical of those in EIFS cladding systems. The expert saw no sign of moisture penetration, with the timber “clean and dry”.

7.3.3 As the construction details are very similar, I accept that the window junction exposed in Block A is typical of similar locations in all of the blocks inspected (Block A to Block E).

7.4 The inter-storey junctions

7.4.1 During his inspection of Block B, the expert removed a small section of cladding at the inter-storey junction, above a vertical junction between the brick veneer and the EIFS panel over the lower window. The expert noted that the framing appeared to be “clean and firm”, with no evidence of moisture penetration.

7.4.2 The upper level EIFS cladding is generally located above the brick veneer and I note that any moisture penetrating the upper cladding would drain into the brick veneer cavity below. The expert also noted that the lower EIFS panel above the windows appeared to lack a back flashing at the vertical junction with the brick veneer.

7.4.3 As the construction details are very similar, I accept that the inter-storey junction exposed in Block B is typical of similar locations in all of the blocks inspected (Block A to Block E).

7.5 The deck to wall junctions

7.5.1 During his inspection of Block E, the expert removed a section of cladding at a typical junction of the balustrade with the wall to investigate the underlying construction. The expert noted that the EIFS was 50mm thick, with a single layer of mesh reinforcing to all faces and two layers of building wrap over the junction.

7.5.2 The expert noted that the framing was “normally firm when penetrated with a knife blade”, with moisture readings at 12% and no signs of moisture, water stains or corrosion of fixings.

7.5.3 As the construction details are very similar, I accept that the balustrade to wall junction exposed in Block E is typical of similar locations in all of the blocks inspected (Block A to Block E).

7.6 Moisture

7.6.1 The expert inspected the interiors of the units, taking non-invasive moisture readings internally, and noted slightly elevated readings adjacent to the ranchslider sills. Similar results had been noted during inspections of Blocks A to D, and invasive moisture readings had indicated no penetration into the framing, so interior condensation was considered to be the likely cause.

7.6.2 During his inspections of Blocks A to D, the expert had taken extensive invasive moisture readings through the cladding at areas considered at risk, and had recorded no elevated moisture readings.

7.6.3 The expert therefore restricted invasive moisture testing in Block E to the rear deck balustrades and associated junctions. The expert took nine invasive moisture readings at areas considered at risk (including at the cut-out), and recorded moisture levels from 9% to 12%.

7.7 Commenting specifically on the wall cladding, the expert noted that:

- the clearances from the bottom of the EIFS and brick veneer to the paving are insufficient in some areas, with the EIFS touching the paving in some areas.
- there are some cracks and damage to the cladding and coating that require maintenance, and the paintwork is in very poor condition
- some of the metal front doors are corroding
- there are movement cracks at the junctions of the soffits with the walls
- there are cracks showing at some upper window reveals, between the two layers of EIFS
- the metal fascias above the front entries penetrate the upper garage cladding
- the metal fascia to the rear eaves is cut into the top of the monolithic-clad party walls
- the uncapped deck balustrades form parapet walls above the ground floor walls and show signs of deterioration, with coating cracks apparent in some areas including fine cracks at the junctions of some of the balustrades with the walls
- some sealants at penetrations through the cladding are deteriorating, including shrinkage cracks in the sealant at the meter box.

7.8 Other relevant code clauses

7.8.1 The expert also assessed compliance with other relevant building code clauses, and made the following comments on those clauses relevant to this house:

- **B1 Structure**

The visual inspection showed no signs of structural problems. The hot water cylinders are fitted with earthquake restraints. The engineer's producer statement indicates satisfactory construction review of the floor slab and foundations.

- **E1 Surface water**

No signs of problems related to surface water drainage were noted, with overflows provided from decks and falls away from the building.

- **E3 Internal moisture**

The kitchen, laundry and bathroom areas generally appeared satisfactory. The upper bathrooms have extract fans and any clothes dryers installed have ducted ventilation to the outside.

- **F2 Hazardous building materials**

The glazed doors have markings for safety glass in the top panels. The shower door and the bathroom windows are also marked as safety glass. However, glass in other doors, where safety glass is required, is not marked.

- **F4 Safety from falling**

No problems were noted, with sills to opening windows, deck balustrades at satisfactory heights and the staircases fitted with a continuous handrail. The bathroom windows are fitted with restrictor stays.

- **G1 Personal hygiene, G2 Laundering, and G3 Food preparation**

All surfaces, finishes and facilities appear to be satisfactory, with no apparent problems.

- **G4 Ventilation**

The units are well ventilated, with sufficient opening windows and fans vented to the outside from the upper bathrooms.

- **G5 Interior environment**

The interiors of the units appear to be in accordance with current domestic standards. The expert also noted that there was no apparent noise transfer between adjacent units.

- **G7 Natural light and G8 Artificial light**

Adequate natural light is provided where necessary and artificial light is in accordance with current domestic standards.

- **G12 Water Supplies and G13 Foul Water**

The expert noted that all fixtures appear to be in good operating condition. An as-built drainage plan has been provided.

- **H1 Energy Efficiency**

The expert observed loose insulation installed above the upper ceilings. The expert also noted that fibreglass insulation was visible within the walls when a power socket was removed.

7.9 A copy of the expert's report was provided to the parties on 27 March 2009.

8. Evaluation for code compliance

8.1 Evaluation framework

8.1.1 I have evaluated the code compliance of this building by considering the following two broad categories of the building work:

- The weathertightness of the external building envelope (Clause E2) and durability (Clause B2 insofar as it relates to Clause E2).
- The remaining relevant code requirements.
- In the case of Block E, weathertightness considerations are addressed first.

- 8.1.2 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.

Matter 1: the cladding

8.2 Evaluation of the cladding

- 8.2.1 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.
- 8.2.2 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.

8.3 Weathertightness risk

- 8.3.1 Block E has the following environmental and design features which influence its weathertightness risk profile:

Increasing risk

- the building is two storeys high
- there are upper decks, with monolithic-clad balustrades, situated above garage areas
- the walls have monolithic cladding fixed directly to the framing
- the external wall framing is not treated to a level effective in resisting decay if it absorbs and retains moisture.

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.

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

Decreasing risk

- the building is built in a low wind zone
- the building is fairly simple in shape, with limited complex junctions
- eaves and verge projections are more than 500mm above most walls
- eaves above the upper decks are about 1m deep.

8.3.2 Block E 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.

8.3.3 When evaluated using the E2/AS1 risk matrix, the weathertightness features outlined in paragraph 8.3.1 show that the front and rear elevations of Block E demonstrate a moderate weathertightness risk rating and the end elevations a low rating. I note that, if the details shown in the current E2/AS1 were adopted to show code compliance, the monolithic cladding on the front and rear elevations of this building 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.

8.4 Weathertightness performance: exterior cladding

8.4.1 Generally the cladding appears to have been installed in accordance with good trade practice. However, taking account of the expert's comments in paragraph 7.7, I conclude that remedial work is necessary in respect of the following:

- the lack of clearance from the bottom of the claddings to some areas of paving
- the cracks and damage to the cladding and the deteriorating coatings and paintwork
- the corrosion to some of the metal entry doors
- the cracks at the junctions of the soffits with the walls
- the cracks in the reveals of the upper windows
- the junctions of the verge fascias with the upper cladding above the garages
- the junctions of the eaves fascia with the top of the monolithic-clad party walls
- the cracks in the uncapped deck balustrades and at the junctions with the walls
- the deteriorating sealants at penetrations through the cladding, including around the meter box.

8.4.2 I note the expert's investigation of the underlying construction to the deck balustrade to wall junction and the lack of moisture penetration into the junction (as outlined in paragraph 7.5). I consider that, providing these junctions are well-maintained and regularly monitored for evidence of cracking and deterioration, the construction is

likely to remain weathertight. I therefore consider that the balustrade to wall junctions are adequate in these circumstances.

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

- The cladding generally appears to be installed according to good trade practice.
- There is no evidence of moisture penetration after five years.

These factors can assist the building to comply with the weathertightness and durability provisions of the Building Code.

8.5 Conclusion

8.5.1 I consider the expert's report establishes that the current performance of the cladding is adequate because it is currently preventing water penetration through the cladding. Consequently, I am satisfied that Block E complies with Clause E2 of the Building Code.

8.5.2 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 Block E are likely to allow the ingress of moisture in the future, the building work does not comply with the durability requirements of Clause B2.

8.5.3 Because the faults identified with the cladding system occur in discrete areas, I am able to conclude that satisfactory rectification of the items outlined in paragraph 8.4.1 will result in Block E being brought into compliance with Clauses B2 and E2.

8.5.4 It is emphasized that each determination is conducted on a case-by-case basis. Accordingly, the fact that a particular cladding system has been established as being code compliant in relation to a particular building does not necessarily mean that the same cladding system will be code compliant in another situation.

8.5.5 I note the expert's comments on the urgent need for maintenance of the block. 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).

Matter 2: Compliance with the remaining code clauses

9. Evaluation for code compliance

9.1 Discussion

- 9.1.1 Taking account of the expert's comments as outlined in paragraph 7.8, I have come to the view that Block E complies with the other relevant clauses of the building Code, with the exception of Clause F2.
- 9.1.2 I have received insufficient information or verification regarding the glazing to the doors and bath enclosure panels, and I therefore cannot form a view as to compliance with F2.
- 9.1.3 Providing the use of safety glass where required is verified, the building will also comply with Clause F2.

10. The appropriate certificate to be issued

- 10.1 Having found that Block E can be brought into compliance with the Building Code, I must now determine whether the authority can 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, a building consent authority may, on application, issue a certificate of acceptance. However, I note that the applicants are seeking a code compliance certificate for Block E.
- 10.3 In this situation, where I have reasonable grounds to conclude that Block E can be brought into compliance with the Building Code, I am of the view that a code compliance certificate is the appropriate certificate to be issued in due course.

Matter 3: Amending the building consent

11. Discussion

- 11.1 Block E is part of a larger complex of 67 residential units comprising 19 free-standing blocks that range in size from two semi-detached townhouses to six semi-detached townhouses. One building consent was issued to cover all 19 blocks which means only a single code compliance certificate can be issued for all 67 residential units, unless the building consent is amended.
- 11.2 The amending of the consent in respect of a different block (Block A) in the development was one of the matters considered in Determination 2009/56 issued on 30 July 2009. Determination 2009/56 decided, amongst other matters, that the authority was to amend the consent to create a separate consent for Block A.

- 11.3 The owners of the four units in Block E have sought this determination so that a code compliance certificate can be issued for Block E. In order for that to happen, the existing building consent would need to be further amended, so that the code compliance of Block E can be dealt with separately from the code compliance of the remaining 63 units.
- 11.4 For reasons set out in Determination 2009/56, I take the view that, as Block E is a free-standing building of separately owned semi-detached townhouses, the authority can amend the original 2002 building consent to create a separate building consent for Block E. The amendment of the original consent will enable the owners to apply for a code compliance certificate for Block E without requiring the cooperation of the owners of the remaining 63 units within the development.

12. What is to be done now?

- 12.1 A notice to fix should be issued that requires the owners to bring Block E into compliance with the Building Code, identifying the defects listed in paragraphs 8.4.1 and 9.1.3 and referring to any further defects that might be discovered in the course of investigation and rectification, 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 building brought to compliance with the Building Code. That is a matter for the owners to propose and for the authority to accept or reject.
- 12.2 I suggest that the owners and the authority adopt the following process to meet the requirements of paragraph 12.1. 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, 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.
- 12.3 I also note that changes from the consent drawings have been identified and I leave the matter of appropriate documentation of these changes for the authority to resolve with the owners.
- 12.4 Once the matters set out in paragraphs 8.4.1 and 9.1.3 been rectified to its satisfaction, the authority is to issue a code compliance certificate in respect of the building consent amended as outlined in paragraph 11.

13. The decision

- 13.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:
- the claddings as installed to Block E do not comply with Clauses B2 of the Building Code insofar as it relates to Clause E2, and
 - Block E does not comply with Clause F2 of the Building Code,
 - accordingly I confirm the authority's decision to refuse to issue a code compliance certificate.

13.2 I also determine that, if so requested by the owners of Block E (Units 6 to 9 at 11, 13, 15, and 17 Duxfield Drive), the authority is to amend the original consent to create a separate building consent as required and as detailed in paragraph 11 above.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 8 October 2009.

John Gardiner
Manager Determinations