Department of Building and Housing
Te Tari Kaupapa Whare

Determination 2009/56

Determination regarding the refusal to amend a consent and issue a code compliance certificate for a 5-year-old block of 5 semi-detached townhouses at 131 to 139 Metcalfe Road, Waitakere City

1. The matters to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004[1] ("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 five semi-detached townhouses within Block A ("the applicants"):

- 139 Metcalfe Rd (Lot 27): Carseldine Investments Ltd ("Unit 27")
- 137 Metcalfe Rd (Lot 28): Roxburgh Porter Investments Ltd ("Unit 28")
- 135 Metcalfe Rd (Lot 29): M and M Brown Investments Ltd ("Unit 29")
- 133 Metcalfe Rd (Lot 30): P Cain ("Unit 30")
- 131 Metcalfe Rd (Lot 31): P Cain ("Unit 31")

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

1.2.2 The original applicant was the owner of Unit 28 ("the original applicant"), with the owners of the other units in the building subsequently joining the application. The owners are acting via an agent ("the lawyer").

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

1.2.4 I consider the other owners of the remaining 62 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-unit development and it is not satisfied that the building work complies with certain clauses of the Building Code[2] (First Schedule, Building Regulations 1992).

1.3.2 The refusal arose because:

- the building ("Block A") is one out of 20 blocks in the development ("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 determination are:

1.4.1 Matter 1: Code compliance of the claddings

Whether the claddings as installed comply 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: The building's compliance with the remaining Building Code clauses

Whether certain building elements in Block A, 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 the applicants request, could amend the single building consent for the development, which includes Block A, so that Block A has its own separate building consent. That would make it possible for the authority to issue a code compliance certificate in respect of the applicants' units. (I consider this in paragraph 11.)

[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.

1.5 The limited inspection records

1.5.1 I note that there are limited inspection records available for some of the blocks within the development. Although the building certifiers maintain (and the authority does not dispute) that inspections of the building work were carried out during construction, only some records of specific inspections for Block A can now be located.

1.5.2 In order to determine the code compliance of Block A, I must therefore address the following questions:

(a) Is there sufficient evidence to establish that Block A 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 A will comply with the Building Code? If so, a code compliance certificate can be issued in due course. (I consider this question in paragraph 10).

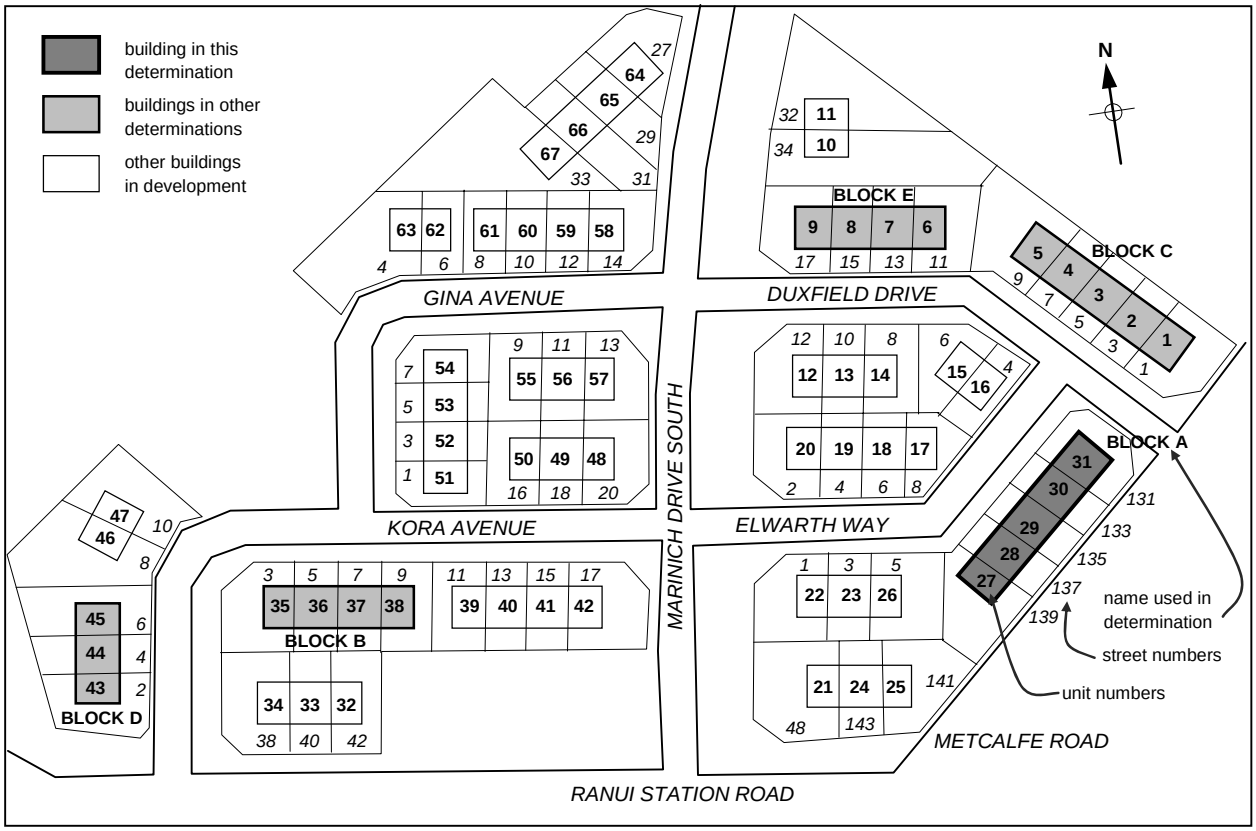
1.6 In making my decisions, I have considered the submissions of the parties, the available building certifier records for the building, the report of the expert commissioned by the Department to advise on this dispute ("the expert"), and the other evidence in this matter. I have evaluated this information using a framework that I describe more fully in paragraph 8.1.

1.7 Four other blocks in the development have been the subjects of recent determinations. As Block A 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

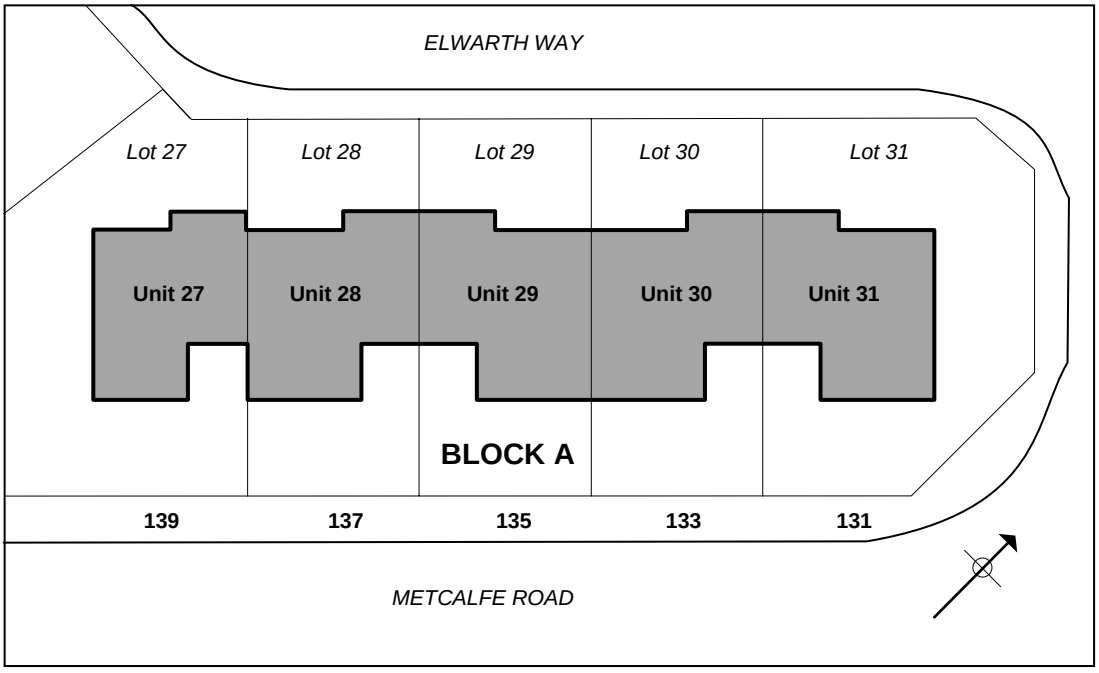
2.1 Block A is part of a complex of 67 residential units comprising 20 free-standing blocks that range in size from two semi-detached townhouses to five semi-detached townhouses. One building consent was issued to cover all 20 blocks, as shown in the site plan (see page 4).

2.2 Each individual townhouse has its own separate land and building title, which defines the legal boundary to each property. Property titles for the subdivision were finalised progressively, with the plan that included Block A deposited in May 2003. The units are generally of similar size, construction and materials, with blocks progressively constructed, sold and occupied, from March 2003 to 2004.



3. The building work

3.1 The following site plan shows Block A:



3.2 Block A is a two-storey building, which is situated on a flat site in a low wind zone in terms of NZS 3604[3]. The block sits parallel to Metcalfe Road, with the main

[3] New Zealand Standard NZS 3604:1999 Timber Framed Buildings

entries and garage doors facing the road. The building is fairly simple in plan and form, with garages set back from the front southeast wall. The ground floor of each unit 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, cladding, 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. The main gable roof has eaves projections about 500mm deep and verges 200mm deep. Part of the northwest roof continues up as a monopitch, with no eaves or verge projections, to finish in line with the recessed southeast walls.

3.4 Upper decks to the northwest elevation are recessed to sit above the garage areas, with the roof providing a canopy of about 950mm above. Below the decks, the projecting northwest garage walls are monolithic-clad, and continue up to form the deck balustrades.

3.5 The party walls between adjacent units are timber-framed, with fire-rated interior linings. The walls extend out to the northwest to form monolithic-clad barriers between adjacent decks, and these project beyond the eaves by about 600mm.

3.6 The expert noted that timber exposed in the ceiling space was marked as kiln-dried, but the specification is silent on timber treatment. Given the date of construction in 2002 and the lack of other evidence, I consider that the wall framing is untreated.

3.7 The monolithic wall cladding is an EIFS[4] system, with purpose-made flashings to windows, edges and other junctions. The cladding appears typical of most EIFS systems 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 some areas, two layers of the backing sheets are used to provide an increased cladding thickness of about 90mm overall.

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.

4.2 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 Building certifier A carried out initial inspections during the construction of Block A, including the floor slab plumbing on 20 February 2003. The project was then passed to building certifier B for completion of the inspections, although I have not seen an inspection summary for these inspections.

[4] External Insulation and Finish System

4.4 The units in Block A were completed by June 2003, and building certifier C issued an interim code compliance certificate dated 17 June 2003 for the building, which covered "Units 27, 28, 29, 30, 31 only" and noted that it was:

> An interim Code Compliance Certificate in respect of only part of the building work under the above Building Consent.

4.5 In common with other buyers, the original applicant purchased Unit 28 in June 2003 on the basis that the interim code compliance certificate was "acceptable certification" of code compliance. The understanding was that the developer would apply for a final certificate when all the building work under the building consent had been completed and inspected.

4.6 In March 2007, intending to sell his unit, the original applicant contacted the authority about his code compliance certificate and was advised that no certificate had ever been issued. On enquiry, the developer claimed that a code compliance certificate had been issued, although no copy had been retained.

4.7 The original applicant engaged a building consultant ("the consultant"), who inspected the building and advised that some minor remedial work was required. This was subsequently carried out and the consultant asked the authority to carry out a final inspection and to issue a code compliance certificate.

4.8 In a letter to the consultant dated 11 September 2007, the authority noted that the building consent covered all 67 units in the development, all of which had been inspected by certifiers, and any code compliance certificate would have to include all units. The authority was not prepared to consider any inspections unless evidence was provided that the building certifiers had issued interim code compliance certificates for all 67 units in the development. The authority also noted that, if units had any monolithic wall cladding, a report from an 'appropriately qualified accredited weathertightness assessor' would be required.

4.9 Continuing correspondence between the original applicant's lawyer and the authority over the next nine months failed to resolve the situation, and the Department received an application for a determination from the original applicant on 7 July 2008.

4.10 The Department contacted the owners of the other units in Block A to explain the situation and to outline options available to them. All of the owners elected to join with the original applicant in seeking a determination, with the last response received by the Department on 1 September 2008.

5. The submissions

5.1 In a statement accompanying the application, the original applicant outlined the background of the development and the subsequent attempts to resolve the situation, noting that the authority was unwilling to consider splitting the building consent without a determination being made.

5.2 The original applicant forwarded copies of:

- the specification and some of the consent drawings

- the building consent for the development
- the interim code compliance certificate issued by building certifier B, dated 17 June 2003 for Unit 28
- the correspondence with the consultant
- some of the correspondence with the authority
- certificate of title documentation for Unit 28.

5.3 In a letter to the Department dated 8 July 2008 the authority requested time to make a submission as it considered that:

> ....depending upon outcome, the decision made by the Department could have complex ramifications in respect of ancillary issues, which themselves could then be the subject of further sequential dispute.

5.4 At the request of the Department the authority forwarded a copy of the interim code compliance certificate issued by building certifier C, dated 17 June 2003 and other documentation that was able to be located for the five units in Block A.

5.5 The draft determination was issued to the parties for comment on 29 January 2009.

5.6 The authority responded to the draft determination in a submission to the Department dated 11 March 2009. The authority did not accept the draft saying that it disagreed that the consent could be split in to the various blocks even if an application was made. The authority said:

> A perusal of the Act at the time the application for consent was processed shows that there is no authority for a consent to be split into parts. The precedent effect of such an approach is unimaginable.
>
> … the developer at the time of the application, it did not exercise its right to progress this development in stages and sought one consent and therefore only one code compliance certificate can be issued …
>
> … splitting the consent essentially creates new consents which the Council is required to take responsibility for and to carry out inspections for.
>
> To divide the consent up into individual blocks will mean treating them as new consents subject to the new Act and any new requirements set by the Building Code as well the need to undertake inspections under the new Act.

The authority concluded the submission by saying

> [the consent] cannot be split into the various blocks and the entire development must be the subject of … one notice to fix and one code compliance certificate were one to be issued.

5.7 The applicants accepted the draft without comment on 13 March 2009.

5.8 The applicants made an application to the authority to the split the consent in a letter dated 23 June 2009.

5.9 In a letter to the Department dated 17 July 2009, the authority confirmed it would 'not split a consent that had already been issued unless required to do so under a determination, or in respect of an amendment to an consent …'. The authority also

confirmed its position with respect its refusal to split the consent in an email to the Department of the same date.

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 A, I need to establish what evidence is available and what can be obtained considering that the building work is completed and it is not cost-effective to inspect some of the elements.

6.2 In this case the evidence is the interim code compliance certificates for Block A and a summary of the initial inspections during construction (refer paragraph 4.3). Despite being unable to locate complete records of the specific inspections for Block A, I have no reason to doubt that these were carried out. I consider it likely that the inspections for Block A would have been similar to those carried out on other units in the development, the records of which I have been able to review.

6.3 I also note that a "Producer Statement – Construction Review" dated 8 May 2003 for Block A was supplied by a registered engineer and an as-built plumbing and drainage plan was supplied.

6.4 I note that in this instance the interim code compliance certificate for Block A has been issued as originally intended by the previous Act in that the certificate was issued in respect of completed work, albeit part of the consented work.

6.5 Before deciding whether or not to rely on the building certifiers having carried out satisfactory inspections during construction and on the interim code compliance certificate issued for Block A, 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.

6.6 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 interim code compliance certificate for Block A, which indicates satisfactory inspections of both the accessible and inaccessible components.
- The inspection record indicating satisfactory construction of the plumbing work within the floor slab.
- 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 units 27 to 31 on dates from 15 September through to 15 November, and provided a report that was completed on 4 December 2008.

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 and appeared to be installed to 'normal trade practice'. Some repairs and maintenance to the sloping balustrade tops were noted, and the paint coating was described as 'flat 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 uPVC 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. However, an invasive moisture reading indicated no penetration into the framing, so interior condensation is considered to be the likely cause. The expert took 6 invasive moisture readings through the cladding at areas considered at risk, and recorded moisture readings from 9% to 11%.

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 window heads adjacent to brick veneer with a gap at the end of the head flashing, and investigation is needed to ensure that an appropriate back flashing is installed
- there are some minor cracks and damage to the cladding and coating that require maintenance, and the paintwork requires recoating
- the metal fascias above the southwest entries penetrate the upper cladding above the garage
- the metal fascia to the northwest 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.

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 Block A:

- **B1 Structure**

The external visual inspection showed no signs of significant 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 the driveways sloped away from the building.

- **E3 Internal moisture**

The kitchen, laundry and bathroom areas appeared satisfactory, with no internal moisture problems noted. The upper bathrooms have extract fans and any clothes dryers installed have ducted ventilation to the outside.

- **F2 Hazardous building materials**

The deck ranchslider have markings for safety glass in the top panels. However, glass in other doors and in the bath enclosure panels, where safety glass is required, is not marked.

- **F4 Safety from falling**

No problems were noted, with opening windows and deck balustrades at satisfactory heights and the staircases fitted with a continuous handrail.

- **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 house was well ventilated, from sufficient opening windows and fans vented to the outside from the upper bathrooms.

- **G5 Interior environment**

The interior of the units appear to be in accordance with current domestic standards.

- **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 with no evidence of leaks or other problems.

- **H1 Energy Efficiency**

Ceiling insulation has been installed, and wall insulation is provided by the EIFS cladding. However, wall insulation could not be confirmed in ground floor walls behind the brick veneer.

7.9 A copy of the expert's report was provided to the parties on 5 December 2008.

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 in so far as it relates to Clause E2).
- The remaining relevant code requirements.

In the case of Block A, 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 Solutions[5], which will assist in determining whether the features of this building 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 one or more other provisions to compensate for that in order to comply with the Building Code.

Matter 1: The code compliance of 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 determinations[6] (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.

[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.

8.3 Weathertightness risk

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

Increasing risk

- the building is two-storey 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

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 A 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 two elevations of Block A demonstrate a moderate weathertightness risk rating and the remaining two 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

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 7.6.1, 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
- investigation of the ends of window heads adjacent to brick veneer, to ensure adequate weatherproofing at the junction with the brick
- the minor cracks and damage to the cladding and the deteriorating paintwork
- the junctions of the verge fascias with the upper cladding above the garage
- the junctions of the eaves fascia with the top of the monolithic-clad party walls

- the deteriorating uncapped deck balustrades and the junctions with the walls
- deteriorating sealants at penetrations through the cladding.

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 more than 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 A complies with Clause E2 of the Building Code.

8.5.2 However, 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 A 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 A being brought into compliance with Clause B2 as well as E2.

8.5.4 It is emphasised 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 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: The building's compliance with the remaining Building 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 A complies with the other relevant clauses of the building Code, with the exception of Clause F2.

9.2 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.

9.2.1 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 the building 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. As outlined in paragraph 4.6 the applicant has requested a code compliance certificate for Block A.

10.3 In this situation, where I consider I have reasonable grounds to conclude that Block A 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 A is part of a larger complex of 67 residential units comprising 20 free-standing blocks that range in size from two semi-detached townhouses to five semi-detached townhouses. One building consent was issued to cover all 20 blocks which means only a single code compliance certificate can be issued for all 67 townhouses, unless the building consent is amended.

11.2 The owners of the 5 townhouses in Block A have sought this determination so that a code compliance certificate can be issued for Block A. In order for that to happen,

the existing building consent would need to be split, so that the code compliance of Block A can be dealt with separately from the code compliance of the remaining 62 units.

11.3 The authority refused to amend the building consent on 17 July 2009 to enable a code compliance certificate to be issued for Block A separately from the remaining 62 units. In its refusal the authority stated it would not split the building consent unless required to do so by a determination. The authority had earlier submitted:

- it had no statutory authority to seek additional information as to plans and other specifications for that part of the work split-off from the existing consent;
- the former Act did not authorise a consent to be split into parts;
- retrospective building consents are not permitted under the former Act or the current Act;
- if the authority were to issue a new consent it would be required to undertake inspections under the new consent, but could not now do so given the completed state of the buildings.

11.4 In my view, the authority has the power under the Act to deal with an administrative issue such as splitting a consent where a consent deals with two or more buildings and the owner requests the consent be split to deal with one or more buildings separately. Territorial authorities that are building consent authorities have broad and wide-ranging responsibilities in respect of the building consent process under the Act. The nature and extent of the building work described in a building consent and the management of the building consent process clearly fall within the discretionary powers of building consent authorities under the Act.

11.5 During the building process there will often be changes in circumstance produced by design changes, changes to the scope of work proposed, the number of buildings proposed or the timing of completion that may require changes to the scope of a building consent and the number of buildings covered by a consent. A building consent authority has the power under the Act to deal with these changes in circumstance affecting the number of buildings covered by a consent by way of amendment to a consent to split-off particular buildings.

11.6 In response to the particular points raised by the authority I comment as follows. The power of the authority to seek additional information in respect of plans and specifications for the building work to be separated from the existing consent is contained in section 48(2) of the Act relating to the application process for a building consent.

11.7 It is not the former Act that is generally relevant to the existing consent but the current Act, which provides that a consent issued under the former Act must be "treated as if it were a building consent granted under section 49" (see section 433 of the Act).

11.8 An amendment to a consent would not be a substantive amendment and so doesn't raise the concerns traditionally associated with the issuing of retrospective consents after building work has been undertaken. The building work that has been undertaken was undertaken lawfully pursuant to a building consent.

11.9 While the issuing of a new consent would normally require inspections by the authority of the building work, no building work will specifically be proposed in the amendment, which will be of an administrative nature only. Further, the authority can have no concerns about the need for inspections arising solely from the amendment because the compliance of Block A will be the subject of this determination.

11.10 I take the view that, as Block A is a block of separately owned semi-detached buildings, the free-standing building should be able to be assessed separately for compliance with the building code and the authority should amend the original 2002 building consent to create a separate building consent for Block A. That will enable the owners to apply for a code compliance certificate for Block A without requiring the cooperation of the owners of the remaining 62 units within the development.

12. What is to be done now?

12.1 Once a consent has been issued for Block A as discussed above in paragraph 11, a notice to fix should be issued that requires the owners to bring Block A into compliance with the Building Code, identifying the defects listed in paragraphs 8.4.1 and 9.2.1 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 unit 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 in paragraphs 8.4.1 and 9.2.1 have 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;

- Block A does not comply with Clause B2 of the Building Code insofar as it relates to Clause E2, and accordingly I confirm the authority's decision to refuse to issue a code compliance certificate;

- The other elements in the building comply with the relevant clauses of the building code with the exception of Clause F2 on which I have received insufficient information to able to determine that matter;
- The authority is to amend the consent to create a separate consent for Block A as detailed in paragraph 11 above.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 30 July 2009.

John Gardiner
Manager Determinations