



## Determination 2010/020

### The refusal to issue a code compliance certificate for a 7-year-old block of four semi-detached townhouses at 2, 4, 6 and 8 Elwarth Way, Waitakere City



#### 1. The matters 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 parties

1.2.1 The applicants are the owners of the four semi-detached townhouses within a free-standing building (“the applicants”), acting via the owner of Unit 18:

- 2 Elwarth Way (Lot 20): G and B Church Investments Ltd (“Unit 20”)
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- 4 Elwarth Way (Lot 19): G and B Church Investments Ltd (“Unit 19”)

<sup>1</sup> The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Department are all available at [www.dbh.govt.nz](http://www.dbh.govt.nz) or by contacting the Department on 0800 242 243.

- 6 Elwarth Way (Lot 18): Gregan Investments Ltd (“Unit 18”)
- 8 Elwarth Way (Lot 17): NZ Chums Ltd (“Unit 17”)

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 persons 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 6-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<sup>2</sup> of the Building Code (First Schedule, Building Regulations 1992).

1.3.2 The refusal arose because:

- the building (“Block I”) 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

In order to determine, in terms of section 177(b)(i) of the Act, whether the authority was correct to decline to issue the code compliance certificate, I must consider the following matters:

#### 1.4.1 Matter 1: 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 9.)

#### 1.4.2 Matter 2: The remaining Building Code clauses

Whether certain building elements in Block I, other than the claddings, comply with the other relevant clauses of the Building Code. (I consider this in paragraph 10.)

#### 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 I, so that Block I has its own separate building consent. That would make it possible for the authority to issue a code compliance certificate in respect of Block I. (I consider this in paragraph 12.)

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<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.

## **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, no records of specific inspections for Block I can now be located.
- 1.5.2 In order to determine the code compliance of Block I, I must address the following questions:
- (a) Is there sufficient evidence to establish that Block I 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 I will comply with the Building Code? If so, a code compliance certificate can be issued in due course. (I consider this question in paragraph 11).

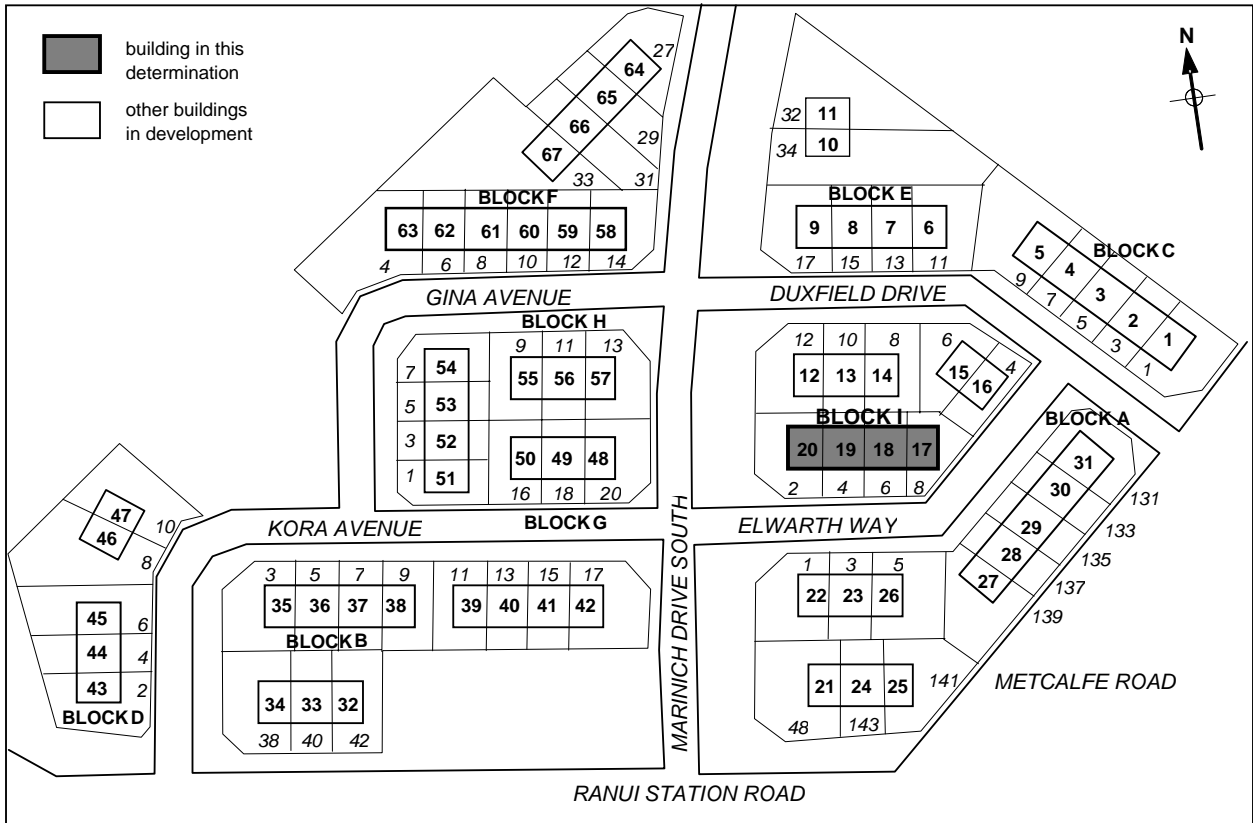
## **1.6 The evidence**

- 1.6.1 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”)
  - the expert’s findings for the other blocks in the development, which have the same layout and detailing and have been the subject of recent determinations
  - the other evidence in this matter.
- 1.6.2 I have evaluated this information using a framework that I describe more fully in paragraph 8.1.

## **2. The development**

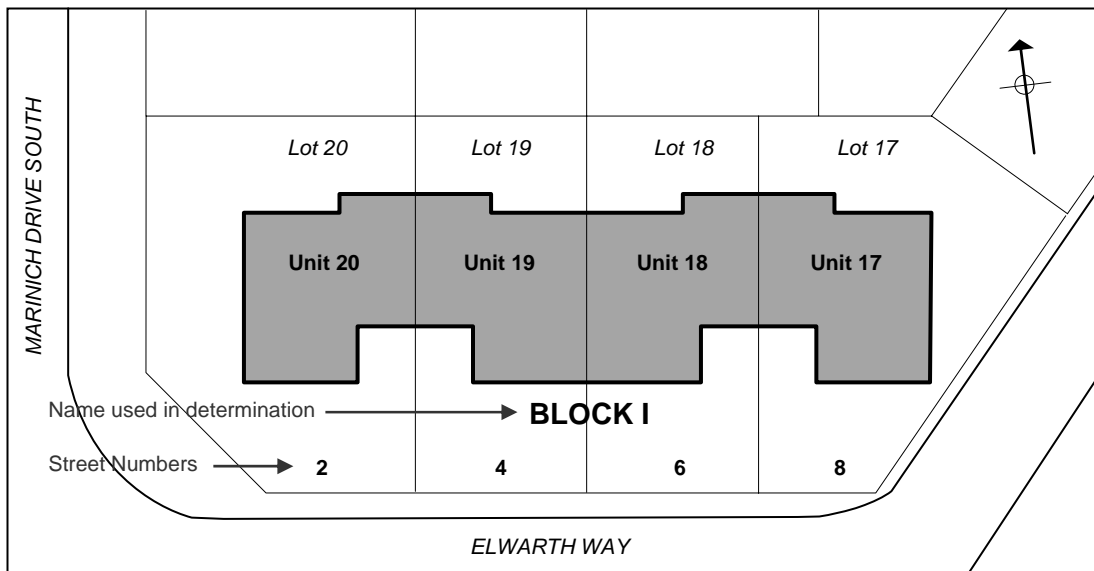
- 2.1 Block I is part of a larger complex of 67 residential units comprising 19 free-standing blocks that range in size from two semi-detached townhouses to six unit blocks of townhouses. Each townhouse has its own separate land and building title, which clearly defines legal boundaries to each property.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

2.3 The overall development is shown in the following site plan:



### 3. The building work

3.1 The following site plan shows Block I:



3.2 Block I is a two-storey building situated on a flat site in a low wind zone in terms of NZS 3604<sup>3</sup>. The block sits on the corner of Elwarth Way, with the main entries and

<sup>3</sup> New Zealand Standard NZS 3604:1999 Timber Framed Buildings

garage doors facing south towards the road. The building is fairly simple in plan and form, with garages set back from the front wall. The ground floors of each unit accommodate living, dining and kitchen areas, with three bedrooms and a bathroom in the upper levels.

- 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. 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.

### **3.4 The decks**

- 3.4.1 Upper decks to the rear elevation are recessed to sit above the garage areas, with the roof providing a canopy of about 950mm above. Below the decks, the rear garage walls are monolithic-clad, and continue up to form the deck balustrades.
- 3.4.2 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.
- 3.5 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 2002 and the lack of other evidence, I consider that the wall framing is not treated.
- 3.6 The monolithic wall cladding is an EIFS<sup>4</sup> 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 polystyrene 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 various inspections of Block I, although I have not seen an inspection summary for these inspections; and issued an interim code compliance certificate dated 14 May 2003 which included units 17, 18, 19 and 20. The certificate noted that it was:

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<sup>4</sup> External Insulation and Finish System

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

- 4.4 The structural engineer issued a Producer Statement – Construction Review dated 8 May 2003 for ‘Lots 17 - 20, which covered the ‘super pile foundation design and construction system’.
- 4.5 The units in Block I were subsequently sold and occupied in July and August 2003. 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.
- 4.6 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.
- 4.7 The Department received an application for a determination on 5 October 2009.

## **5. The submissions**

- 5.1 As construction information about the development had been previously supplied for recent determinations in regard to other blocks in the development, no further information about Block I needed to be supplied by the applicant or the authority.
- 5.2 The authority acknowledged the application but made no submission.
- 5.3 At the request of the Department, building certifier A forwarded copies of the interim code compliance certificate and other documentation that was able to be located for the four units in Block I.
- 5.4 The draft determination was issued to the parties for comment on 14 December 2009. The applicants accepted the draft without comment.
- 5.5 The authority did not accept the draft determination and a submission to the Department dated 2 February 2010. 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 submission questioned the Department’s position with respect to the legislative ability of an authority to modify either the Building Code with respect to Clause B2 Durability, and to amend a building consent to provide a separate for individual blocks. The authority concluded 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.
- 5.6 In response to the authority’s submission, with respect to the Department’s interpretation of the legislation, I note the following:
  - The legal arguments associated with the modification of the Building Code in respect of an existing consent are detailed in Determination 2006/85.

- Determination 2009/89 also considered a 2008 District Court decision<sup>5</sup>, which considered whether a waiver to the Building Code can be granted after the issue of the original building consent.
- The reasons why I am of the opinion that an authority is able to modify a building consent, in the manner described herein, are set out in detail in Determination 2009/56.

The authority has made no substantive submission that leads me to change my view of either matter.

## **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 I, 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 I note that in this instance the interim code compliance certificate has been issued as originally intended by the previous Act in that the certificate is issued in respect of completed work, albeit only part of the consented work for the total development.

### **6.3 The evidence**

6.3.1 In this case the available evidence consists of the engineer's producer statement and the interim code compliance certificate for Block I (refer paragraphs 4.3 and 4.4). Despite being unable to locate records of specific inspections for Block I, I have no reason to doubt that these were carried out. I consider it likely that the inspections for Block I would have been similar to those carried out on the other units in the development, the records of which I have been able to review.

6.3.2 Before deciding whether or not to rely on building certifier A having carried out satisfactory inspections during construction and on the interim code compliance certificate issued for Block I, I consider it important to look for evidence that corroborates or contradicts those inspections. In this particular case, corroboration comes from the expert's inspection, which can be used to verify whether the certifier's inspections were properly conducted.

6.3.3 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 I, which indicates compliance of all building elements, including the inaccessible components.
- The engineer's producer statement, which indicates satisfactory construction review of the floor slab and foundations.
- The expert's report as outlined below.

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<sup>5</sup> (Palmerston North CC v Morresey, Judge Callaghan, DC Palmerston North CIV-2007-454-000463 [11 August 2008])

## **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 9, 19 and 30 November 2009 and provided a report that was completed on 30 November 2009.

7.2 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 60mm.
- The deck balustrades have been changed to a continuation of the lower walls.

### **7.3 The cladding (general)**

7.3.1 The expert noted that the overall standard of workmanship appeared to be generally good, except for the items outlined in paragraph 7.10. The expert also noted that the cladding was straight with a consistent even finish, although the paint coating is generally 'flat, discoloured and chalky and is considered overdue for redecoration'.

7.3.2 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.

### **7.4 Investigations in previous inspections**

7.4.1 During inspections of blocks in the development, the expert removed small sections of cladding to investigate the underlying construction at:

- a window of Block A
- an inter-storey junction of Block B
- a deck to wall junction of Block E
- the bottom of a wall adjacent to a garage in Block F.

7.4.2 As the construction details are very similar for all of the buildings in the development, I consider that the junctions exposed are likely to be typical for all of the blocks and units.

### **7.5 The windows**

7.5.1 The windows are recessed, with metal head flashings and decorative elements 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.

7.5.2 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'.



## **7.6 The inter-storey junctions**

- 7.6.1 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.
- 7.6.2 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.

## **7.7 The deck to wall junctions**

- 7.7.1 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.
- 7.7.2 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.

## **7.8 The bottom plate**

- 7.8.1 During his inspection of Block F, the expert removed a section of cladding at a side wall to the garage recess where a previous cut-out had been made that had not been sealed. The expert observed that the interior slab level was about 50mm above the concrete to the driveway, with the 90mm thick EIFS capped with an uneven uPVC channel set against the paving.
- 7.8.2 The expert observed some timber staining indicating past moisture penetration, but no signs of decay were noted and invasive moisture readings were recorded at 9%.
- 7.8.3 As the construction details are very similar, I accept that the bottom plate junction exposed in Block F is typical of similar locations in all of the blocks inspected to date (Block A to Block I).

## **7.9 Moisture levels**

- 7.9.1 The expert inspected the interiors of the units, taking non-invasive moisture readings internally, and noted elevated readings:
- adjacent to showers, likely to be due to inadequate sealing of shower screens (with an invasive reading of 22% recorded in adjacent skirting of Unit 17)
  - adjacent to the ranchslider sills, likely to be due to interior condensation and blocked condensation channels (in common with other blocks).
- 7.9.2 During his inspections of Blocks A to G, the expert had taken extensive invasive moisture readings, and had recorded no elevated moisture readings. The expert therefore restricted invasive moisture readings to three areas at the front entry and

garage doors, four at the bottom and beneath a window of the wall below the deck. The readings ranged from 8% to 12%.

7.10 Commenting specifically on the claddings, the expert noted that:

**General**

- 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 impact damage to the cladding
- the metal fascias above the front entries penetrate the upper garage cladding

**The rear decks**

- the metal fascia to the rear eaves is cut into the top of the monolithic-clad party walls between the rear decks
- 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 deck outlets are poorly weatherproofed at the membrane junction
- the membrane to Unit 17 was damaged by a past spillage and is lifting

**The lack of maintenance**

- the condensation channels to some windows are blocked
- the paintwork is in poor condition and the coating to the cladding is damaged in some areas
- the gutters require cleaning
- some sealants at penetrations through the cladding are deteriorating.

**7.11 Other relevant code clauses**

7.11.1 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.

(However I note the signs of internal moisture outlined in paragraph 7.9.1 indicate that maintenance is required to some of the bath to wall sealants, the shower screens and the condensation channels to the windows.)

- **F2 Hazardous building materials**

Some of 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 and 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.

- **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 brick veneer walls when a power socket was removed.

7.12 A copy of the expert's report was provided to the parties on 4 December 2009.

## 8. Evaluation framework for code compliance

8.1 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 I, weathertightness considerations are addressed first.

## Matter 1: the cladding

### 9. Weathertightness

9.1 The approach in determining whether building work is weathertight and durable and is likely to remain so, is to examine 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.

#### 9.2 Weathertightness risk

9.2.1 Block I 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.

9.2.2 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. 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.

9.2.3 Block I has the following environmental and design features which influence its weathertightness risk profile:

##### **Increasing risk**

- the building is two storeys high
- there are 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 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.

9.2.4 When evaluated using the E2/AS1 risk matrix, the weathertightness features outlined in paragraph 9.2.1 show that the front and rear elevations of the block 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.

### 9.3 Weathertightness performance

9.3.1 Generally the cladding appears to have been installed in accordance with good trade practice. However, taking account of the expert's comments in paragraph 7.10, I conclude that remedial work is necessary in respect of the following:

#### General

- the lack of clearance from the bottom of the claddings to some areas of paving
- the cracks and damage to the cladding
- the junctions of the verge fascias with the upper cladding above the garages

#### The rear decks

- 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
- the inadequate weatherproofing of deck outlets
- the damaged deck membrane to Unit 17

#### The lack of maintenance

- the blocked condensation channels to some windows
- the poorly sealed shower screens and bath to wall junctions
- the deteriorating paintwork and damaged coating to the cladding
- the soil and debris build up in gutters
- the deteriorating sealants at penetrations through the cladding.

9.3.2 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 7.7). 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.

9.3.3 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 six years.

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

## **9.4 Weathertightness conclusion**

- 9.4.1 I consider the expert's report establishes that the current performance of the cladding is adequate because it is preventing water penetration through the cladding at present. Consequently, I am satisfied that Block I complies with Clause E2 of the Building Code.
- 9.4.2 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 I are likely to allow the ingress of moisture in the future, the building work does not comply with the durability requirements of Clause B2.
- 9.4.3 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 9.3.1 will result in Block I being brought into compliance with Clauses B2 and E2.
- 9.4.4 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.
- 9.4.5 I note the expert's comments on the need for maintenance of Block I. 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 remaining code clauses**

### **10. Evaluation for code compliance**

#### **10.1 Discussion**

- 10.1.1 Taking account of the expert's comments as outlined in paragraph 7.11.1, I consider that further investigation and/or remedial work is necessary in respect of the following (the applicable clauses are shown in brackets):
- bath sealants, shower screens and window condensation channels (Clause E3)
  - verification of the use of safety glass where required to doors (Clause F2).
- 10.1.2 I have come to the view that Block I complies with the other relevant clauses of the building Code, with the exception of the clauses noted above.

## **11. The appropriate certificate to be issued**

- 11.1 Having found that Block I 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.
- 11.2 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 applicant is seeking a code compliance certificate for Block I.
- 11.3 In this situation, where I have reasonable grounds to conclude that Block I 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**

### **12. Discussion**

- 12.1 Block I 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 unit blocks of 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.
- 12.2 The amendment of the consent, in respect of 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.
- 12.3 The owners of the 3 units in Block I have sought this determination so that a code compliance certificate can be issued for this building. In order for that to happen, the existing building consent would need to be further amended, so that the code compliance of Block I can be dealt with separately from the code compliance of the remaining 63 units.
- 12.4 I consider the basis for the decision reached in Determination 2009/56 also applies in this instance, and that the authority can amend the building consent to create a separate building consent for Block I in response to a request to do so by the owners. The amendment of the original consent will enable the owners to apply for a code compliance certificate for Block I without requiring the cooperation of the owners of the remaining 63 units within the development.

### **13. What is to be done now?**

- 13.1 A notice to fix should be issued that requires the owners to bring Block I into compliance with the Building Code, identifying the defects listed in paragraphs 9.3.1 and 10.1.1 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 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.

- 13.2 I suggest that the owners and the authority adopt the following process to meet the requirements of paragraph 13.1. 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.
- 13.3 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.
- 13.4 Once the matters set out in paragraphs 9.3.1 and 10.1.1 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 12.

## **14. The decision**

14.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:

- The cladding as installed to Block I does not comply with Clause B2 of the Building Code
- Block I does not comply with Clause E3 and Clause F2 of the Building Code

and accordingly, I confirm the authority's decision to refuse to issue a code compliance certificate.

14.2 I also determine that, if so requested by the owners of Block I (at 2, 4, 6 and 8 Elwarth Way), the authority is to amend the original consent to create a separate building consent as required and as detailed in paragraph 12 above.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 8 March 2010.

John Gardiner  
**Manager Determinations**