



Determination 2011/049

Regarding the refusal to issue code compliance certificates for alterations to a house at 20 Lambley Road, Titahi Bay, Porirua



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. The applicant is the owner of the house, J Morgan (“the applicant”) and the other party is the Porirua City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

1.2 This determination arises from the decision of the authority to refuse to issue code compliance certificates for alterations and additions to a house undertaken under two building consents. The refusal arose because:

- the authority is not satisfied that the building work:
 - complies with the durability provisions of the Building Code, considering the age of the building work completed from 1993 to 1998

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.

- complies with other relevant clauses² of the Building Code (First Schedule, Building Regulations 1992)
- the authority has no records of inspections during construction of the alterations.

1.3 The matter to be determined³ is therefore whether the authority was correct to refuse to issue code compliance certificates for the alterations. In deciding this, I must consider:

1.3.1 Matter 1: Relevant clause requirements

Whether the alterations to this house comply with the relevant clauses of the Building Code. (I consider this in paragraph 7.)

1.3.2 Matter 2: The durability considerations

Whether the building elements comply with Clause B2 Durability of the Building Code, taking into account the ages of the alterations. (I consider this in paragraph 8.)

1.4 The building consents

1.4.1 The building work considered in this determination includes the following two building consents:

- Consent No. ABA 2330 (“the 1993 consent”) issued on 19 May 1993 for alterations and a small addition to the house (“the 1993 alterations”)
- Consent No. ABA 980773 (“the 1998 consent”) issued on 30 March 1998 for a new roof and framing to create a mezzanine level (“the 1998 alterations”).

1.4.2 I note that a third building consent (No. ABA 5040) was issued on 1 April 1996 for a detached double garage building. That garage was subsequently demolished and re-built using the same concrete slab (“the re-built garage”) under a new building consent (No. BCA0222/08); and a code compliance certificate was issued for that work on 19 November 2010.

1.4.3 Although this determination does not consider the re-built garage, some building work associated with the subject alterations was carried out under BCA0222/08 and included in the code compliance certificate for that consent (see paragraph 3.6).

1.5 The available evidence

1.5.1 There are no inspection records available for the alterations to this house. Therefore, in order to determine the compliance of the alterations to this house, I have addressed the following questions:

- (a) Is there sufficient evidence to establish on reasonable grounds that the building work as a whole complies with the Building Code? (I consider this question in paragraph 5). If so, a code compliance certificate can be issued.

² 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.

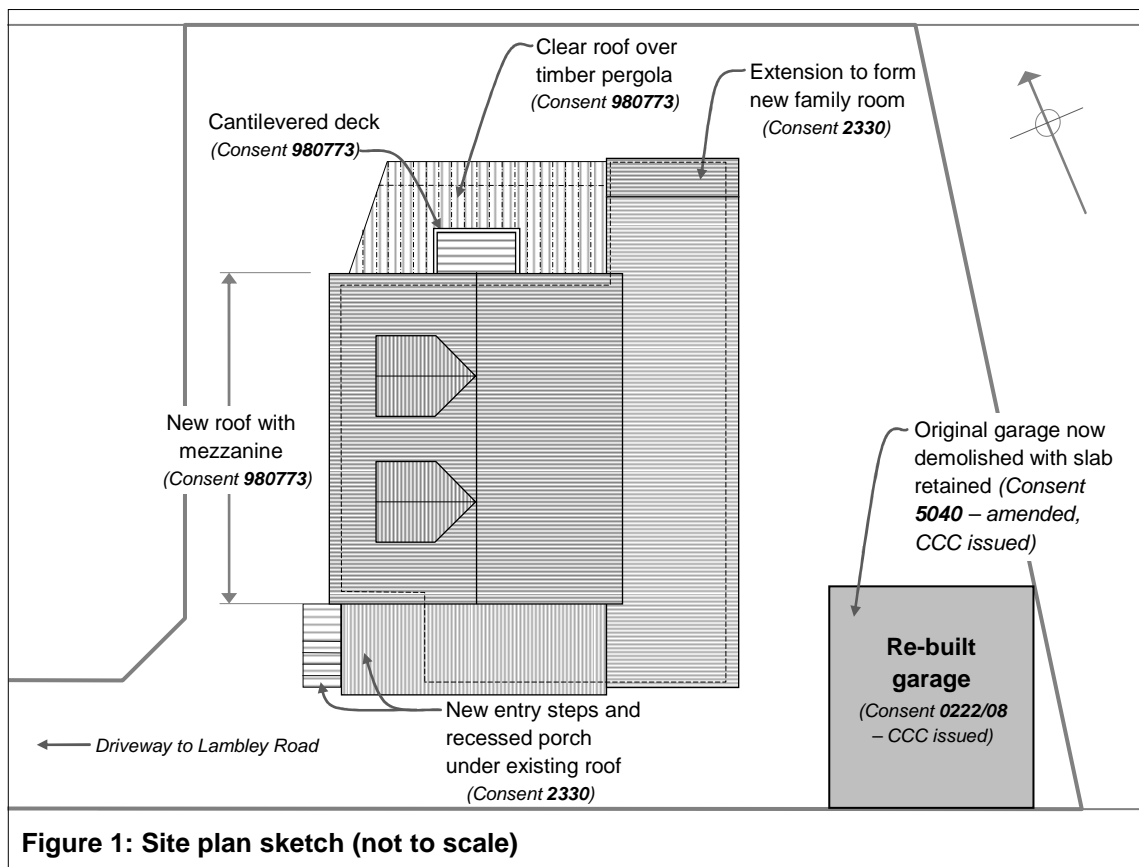
³ Under section 177(2)(d) of the Act.

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

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

2. The building work

2.1 The building work consists of alterations to a detached house situated on the rear section of a gently sloping sub-divided site. The coastal site is exposed to the south in a very high wind zone for the purposes of NZS 3604⁴. The alterations to the house are indicated in the following sketch:



2.2 The altered house is simple in plan and form and is assessed as having a moderate weathertightness risk. Construction is generally conventional light timber frame, with pile foundations, rusticated weatherboards, profiled metal roofing and aluminium windows.

⁴ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

2.3 The original cottage

2.3.1 The original house appears to have been built in the 1930's⁵ as a simple two-bedroom holiday cottage with a 25° pitch gable roof, a west front entry and a rear low-pitched lean-to to the east. The cottage had a timber-framed floor, rusticated weatherboard cladding, timber windows and doors, and profiled metal roofing.

2.3.2 Various alterations were made prior to the subject building work, with the east lean-to extended and another lean-to added to the south gable end wall. Prior to the 1993 alterations, the cottage had four small bedrooms opening off a living room; and a separate kitchen, laundry, bathroom and toilet in the north east corner of the lean-to.

2.4 The 1993 consent

2.4.1 The 1993 alterations included:

- demolition of the front west entry porch
- new entry steps and a recessed entry porch at the southwest corner under the existing lean-to roof
- extension of the north end of the east lean-to and interior changes to form:
 - a new kitchen/family room in the north east corner
 - a new bathroom.

2.4.2 Changes made during construction included the:

- omission of a bay window to the west
- reduction of the entry porch verandah and changed entry steps.

2.5 The 1998 consent

2.5.1 The 1998 consent drawings showed the 1998 alterations including:

- the replacement of the original gable roof with a 37° pitch gable roof
- two west-facing dormer windows and windows in gable ends
- a 3.6m deep mezzanine above the north bedrooms, with access via a ladder.

2.5.2 Changes were made during and/or following construction, which included:

- glazed doors in lieu of north upper gable end window and a small deck added
- a staircase to the mezzanine in lieu of a ladder
- a door removed and opening widened between dining and living rooms
- windows replaced with glazed doors to dining room and north bedroom
- addition of a clear-roofed timber pergola to northwest corner
- addition of a window to east wall of entry porch
- replacement of original timber window sashes with aluminium sashes.

⁵ Source: Quotable Value Ltd.

- 2.6 The expert noted that the exposed roof framing timbers to the 1998 roof alterations were Douglas fir and macrocarpa, with a tongue-in-groove macrocarpa ceiling above exposed rafters. Given the age of the cottage, the majority of the original wall framing is likely to be rimu, while the 1993 alterations are likely to use boracic-treated framing. Taking account of the age of the exterior wall alterations, I consider that most of the wall framing in this house is likely to be treated to a level that will provide some resistance to fungal decay.

3. Background

3.1 The 1993 consent

- 3.1.1 The authority issued a building consent to the then owner for the 1993 alterations (No. ABA 2330) on 19 May 1993 under the Building Act 1991. I have not seen a copy of the consent.
- 3.1.2 The authority's consent 'work sheet' indicates that three building and plumbing inspections were required, but there are no records that any were carried out. Given the minor extent of alterations it is likely that these were completed during 1993.
- 3.2 In 1996 a detached garage building was constructed on the southeast corner (see paragraph 1.4.2). During the following year the property was sub-divided into two sections, with a driveway providing access to the cottage at the rear.

3.3 The 1998 consent

- 3.3.1 The authority issued a building consent to a former owner for the 1998 alterations (No. ABA 980773) on 30 March 1998 under the Building Act 1991. I have not seen a copy of the consent and there are no records of any inspections of the work.
- 3.3.2 Given the date of the building consent, it is likely that the alterations were completed during 1998. However, no code compliance certificate was sought until the former owner prepared to sell the property in 2002 and requested inspections of the outstanding building consents.

3.4 The authority's refusal to issue code compliance certificates

- 3.4.1 In a letter dated 20 November 2002, the authority noted that it had inspected the building work under the three consents on 18 November 2002. The authority stated that it could not issue code compliance certificates for any of the consents.
- 3.4.2 In regard to the 1993 alterations, the authority noted that its refusal was due to:
- changes to the entry porch (see paragraph 2.4.2)
 - the inadequate height of the balustrade to the porch steps
 - the 'length of time from consent to final inspection'.
- 3.4.3 In regard to the 1998 alterations, the authority noted that its refusal was due to the following unauthorised changes from the consent drawings:
- changes to the mezzanine floor

- the steepness of the mezzanine stairs
- the dining room door opening
- the mezzanine deck and doors.

3.4.4 The authority also noted that the verandah to the north elevation was not shown on any consent drawings and a code compliance certificate might be issued if amended plans were submitted that showed:

- the work as constructed
- evidence that the dining room doorway lintel is adequate
- evidence that the mezzanine staircase complies with the code.

3.4.5 A property inspection company subsequently inspected the house and reported on some of the items identified by the authority, and a set of amended drawings was prepared and submitted as requested by the authority.

3.5 The authority's second refusal

3.5.1 In a letter to the former owner dated 17 January 2003, the authority acknowledged the report and drawings, but again refused to issue code compliance certificates. In regard to the 1993 consent, the authority stated that as the porch balustrade now complied with the code there were 'no other outstanding issues with this consent'.

3.5.2 In regard to the 1998 alterations, the authority noted that, although the dining room doorway lintel information was accepted, there were still outstanding issues regarding:

- the compliance of the mezzanine stairs
- the lack of information about the cantilevered deck and the deck door lintel.

3.5.3 The authority stated that it:

...may be able to issue a Code of Compliance Certificate if the required information is received and acceptable and the stairs are altered to comply with the Building Code. Prior to the work of the stairs commencing an amended plan showing the new design must be submitted and approved by Council.

3.5.4 A drawing of the mezzanine deck was prepared and, according to a 'file note', the authority visited the property on 28 January 2003 'as part of a building consent inspection'. There is no detailed inspection record but the deck drawing was apparently handed to the authority during that inspection as it is initialled as received on 28 January 2003.

3.5.5 The applicant purchased the property in February 2003.

3.6 The code compliance certificate for the re-built garage

3.6.1 During 2008, a new building consent (No. BCA 0222/08) was issued on 2 May 2008 for the demolition of the garage building and the erection of a new garage on the original floor slab. (I note that the original garage consent (No. ABA 5040) has now been amended to reflect the retention of the floor slab and a code compliance certificate for the 'garage foundation and slab' was issued on 1 April 2011).

3.6.2 I have not seen a copy of the consent documents, but it also appears that changes to the mezzanine staircase along with a new door and windows were included as part of BCA 0222/08. The authority issued a code compliance certificate on 19 November 2010 for that building consent, which describes the building work as:

Existing dwelling – Garage re-built on existing slab, stair replacement to upper loft area and new door and windows.

3.7 The authority's third refusal

3.7.1 In response to a request for a review of the status of the outstanding building consents, the authority visited the site on 9 December 2010 and wrote to the applicant on 5 January 2011, noting that the original garage consent would need to be amended to reflect that only the concrete slab remains under that consent.

3.7.2 In regard to the 1993 and the 1998 building consents, the authority noted that 'a code compliance certificate check list inspection was failed on 18 November 2002' and also stated that it could find no evidence of other inspections carried out under these consents. (I note that a lack of inspections was not raised in any earlier correspondence – see paragraphs 3.4 and 3.5).

3.7.3 For both the 1993 consent and the 1998 consent, the authority stated:

Given the durability requirements of Clause B2.3.1 of the New Zealand Building Code 1992 and the liability provisions of Section 393 of the Building Act 2004 we are unable to issue a code compliance certificate at this time. Due to the lack of inspections completed and passed by [the authority] we cannot be satisfied on reasonable grounds that the completed building work complies with the New Zealand Building Code 1992, therefore we are unable to grant a code compliance certificate at this time.

3.8 The Department received an application for a determination on 3 March 2011 and sought the record of the authority's visit on 28 January 2003 referred to as 'part of a building consent inspection' in the file note (see paragraph 3.5.4).

3.9 The authority responded in an email dated 16 March 2011, stating that its inspector 'did not think it necessary to complete an inspection sheet as it appears he was only visiting the site to assess the as-built drawing of the unconsented and already constructed balcony'. The authority repeated that it had not been 'given an opportunity to carry out inspections during construction'.

4. The submissions

4.1 The applicant provided copies of:

- drawings and specifications for the consents
- the as-built drawings of the altered house
- the correspondence from the authority
- various other statements and information.

4.2 The authority made a submission in a letter to the Department dated 16 March 2011, which summarised the recorded history of the two subject building consents. The authority noted that it 'was not given an opportunity to carry out inspections during

construction' and referred to observations of photos taken during its site visit on 9 December 2010. The authority concluded that:

...we do not have reasonable grounds to conclude that the building complied with Clause B2 at the time of substantial completion. As [the authority] is not satisfied on reasonable grounds that the building complies with the Building Code, we will not issue a code compliance certificate or grant a modification of Clause B2.3.1 unless we are specifically directed to by the Department of Building and Housing in the final Determination.

4.3 A draft determination was issued to the parties on 5 May 2011. The draft was issued for comment and for the parties to agree dates when the house complied with Building Code Clause B2 Durability.

4.4 The authority's response to the draft

4.4.1 The authority responded in an email to the Department dated 16 May 2011. The authority did not accept the draft determination and noted that its position remained as stated in its submission dated 16 March 2011 (see paragraph 4.2).

4.4.2 I have discussed in detail similar concerns raised by the authority in previous determinations (for example, Determinations 2011/32 and 2011/39). In response to the authority's submissions for this determination, I note the following:

- The authority has stated that it will 'not issue a code compliance certificate or grant a modification of Clause B2.3.1 unless [it is] specifically directed to do so by the Department ...'.
- If the applicant undertakes the necessary remedial work in accordance with a proposal accepted by the authority (refer paragraph 9.2) then on receipt of an application for a code compliance certificate the authority has a statutory obligation to consider that application and decide whether to issue a code compliance certificate. I expect the authority to comply with its statutory obligations.
- Because no records can be located, the authority has concluded that no inspections were carried out. I do not accept this position.
- Even if no inspections were completed, the Building Code is performance-based, and account must be taken of the performance of the alterations over 12 and 17 years since completion, and the performance of the visible building elements. Evidence of code compliance should not be limited to the inspection records held by the authority.

4.5 The applicant's response to the draft

4.5.1 The applicant accepted the draft determination on 17 May 2011, subject to several non-contentious amendments. I have considered these comments and have amended the determination as I consider appropriate.

4.5.2 Following receipt of the draft determination, the applicant engaged a structural engineer to investigate the rafter to ridge beam connections. I have included the engineer's recommendations within my conclusions in paragraph 7.3.1.

- 4.5.3 The applicant confirmed that the glass to the window adjacent to the mid-landing to the mezzanine stairs is marked as ‘Tempafloat AS/NZS 2208⁶’, and also noted that this window was included in the code compliance certificate of 19 November 2010.

4.6 Compliance with Clause B2 Durability

- 4.6.1 The authority did not comment on suggested completion dates for the building work, maintaining that:

...if the Department believes that the building work complies with the Building Code, then it is only fair and reasonable that the Department should ultimately instruct [the authority] ... to grant the code compliance certificates and grant modifications to a date which the Department considers is relevant.

- 4.6.2 I have commented on the authority’s position in previous determinations, for example 2011/039.
- 4.6.3 The applicant accepted the likely completion dates suggested in the draft determination and agreed that the durability periods for the building work should commence from 1 January 1994 for the 1993 building consent, and 1 January 1999 for the 1998 building consent.

5. Grounds for the establishment of code compliance

- 5.1 I note that the letters from the authority following its final inspection in 2002 outlined problems that had been identified but made no mention of a lack of inspections. Because no records can be located, the authority has concluded that no inspections were carried out. However, given the ages of construction, I do not consider that a lack of documented inspections automatically leads to the conclusion that the authority did not undertake inspections or ‘had no opportunity’ to do so.
- 5.2 In order for me to form a view as to the code compliance of the building work, I have established what evidence was available and what could be obtained considering that the building work is completed and some of the elements are not able to be cost-effectively inspected. A visual inspection of accessible components can provide reasonable grounds to form a view on whether the alterations to this house comply with the Building Code.
- 5.3 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 consent drawings and the as-built drawings.
 - Statements about the two building consents included within the authority’s correspondence with the former owner and the applicant (refer paragraphs 3.4 and 3.5).
 - The code compliance certificate dated 19 November 2010, which included some elements of the alterations.
 - The expert’s report as outlined below.

⁶ Australian/New Zealand Standard AS/NZS 2208:1996 Safety glazing materials in buildings

6. The expert's report

6.1 As mentioned in paragraph 1.5.2, 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 house on 28 March 2011, providing a report dated 1 April 2011.

6.2 General

6.2.1 The expert noted the new weatherboards matching the original traditional cladding. The expert also noted that visible parts of flashings appeared 'excellent and well proven'. However, he observed that the rusticated weatherboards were now in need of painting.

6.2.2 Aluminium window and door sashes are fitted within timber joinery frames, which match the original, with traditional timber sills and facings. The expert noted that windows and doors were 'well integrated with joinery junctions', with 'long and generous head flashings' that overlap the head facings.

6.2.3 The expert inspected the interior of the house, taking non-invasive moisture readings, and observed no evidence of current moisture or indications of past leaks. Given the lack of evidence and the traditional weatherboard claddings, the expert did not consider it necessary to carry out invasive moisture testing.

6.3 The deck and doors

6.3.1 The expert noted that the lintel to the deck doors is only about 950mm and spans between the gable end rafters. I note that this is no wider than the windows shown in the approved consent drawings. The expert also noted that the doors opened easily and were square within the door frame, with no sign of movement.

6.3.2 The expert noted that the small deck cantilevers out from the floor joists, with no signs of deflection or 'concerning issues with this structure'. The deck has treated free-draining timber slats and joists, with metal flashings protecting joist penetrations and sealed fibre-cement panels between the joists.

6.4 The roof structure

6.4.1 The expert noted that the junctions of the macrocarpa rafters to the ridge beam were simple butt joints, with the rafters skew-nailed into the beam. At the southern end of the beam, gaps of several millimetres had opened at the joints. He considered this was likely to be the result of earthquake movement or 'very high wind pressure applied during gale force southerly winds which may have racked the structure'.

6.4.2 Although he saw no evidence that the roof was unsafe, the expert considered that additional fixing or bracing may be necessary and further investigation is needed.

6.5 Based on his observations of the cottage, the expert made the following comments (relevant code clauses are provided in brackets):

- roof rafters to ridge beam junctions require additional fixings and/or bracing fitted as required (Clause B1)

- insufficient under-floor ventilation is provided, which will raise moisture levels in sub-floor framing and floor materials (Clause E2)
 - the paintwork to the cladding is deteriorating (Clause B2)
- 6.6 The expert noted that glass in the window at the mezzanine stair landing needed investigation to ensure that appropriate safety glass was used (refer paragraph 7.3.5).
- 6.7 The expert concluded that, with the exception of areas noted in paragraph 6.5, he considered that:
- ...all other applicable clause requirements are met and the house has shown to be durable and compliant.
- 6.8 A copy of the expert's report was provided to the parties on 11 April 2011.
- 6.9 The authority responded to the report in an email on 27 April 2011 with a number of comments on the report and aspects of the determination. I have taken the authority's comments into consideration and addressed them as I consider appropriate.

Matter 1: Relevant clause requirements

7. Discussion

- 7.1 I note that alterations need to comply with the Building Code to the extent required by Section 112(b) of the Act. Those parts of the 1993 alterations within the existing building must therefore continue to comply with the code to 'at least the same extent as before the alteration.' That level of compliance is generally lower than would apply to the construction of a new building.
- 7.2 In assessing the compliance of the alterations to this house with the Building Code clauses relevant to the alterations, I have taken into account:
- the consent drawings and the as-built drawings
 - the expert's report, and the traditional nature of the construction
 - the required level of compliance for some of the alteration work
 - the authority's correspondence about the building consents
 - the authority's code compliance certificate which included the stairs
 - the age of the alterations constructed some 12 and 17 years ago
 - the likelihood that, despite the lack of records now available, some satisfactory inspections were carried out during construction
 - the engineer's report dated 25 April 2011.
- 7.3 Taking account of the above, I make the following comments on the remaining clause requirements relevant to these alterations.

7.3.1 B1 Structure

- The 1993 alterations included only a small addition to the foundations, while the 1998 alterations involved checking of piles under exterior walls with additional piles added only if necessary.
- The alterations are fairly simple and conventional and there is no evidence of structural stress or excessive movement of connections in the foundations after 12 to 17 years.
- In regard to the cantilevered deck, the expert noted no signs of deflection or other structural concerns after about 12 years.
- Apart from the rafter to beam connections identified by the expert in paragraph 6.5 and confirmed in the engineer's report dated 25 April 2011, the remaining elements of the alterations appear to comply with Clause B1.

7.3.2 E1 Surface water

- Roof water is collected by gutters and directed into council drains.
- The house site is gently sloping and the alterations do not materially alter the site drainage, with no indication of surface water problems after many years.
- Gutter and downpipe provision appears adequate, and the gully trap is protected from surface water entry.

7.3.3 E2 External moisture

- Claddings are simple and traditional, with the limited external wall alterations matching the original details and the exterior claddings remaining weathertight for some 12 to 17 years.
- Apart from inadequate sub-floor ventilation and the deteriorating paintwork identified by the expert in paragraph 6.5, remaining elements of the alterations appear to comply with Clause E2 and Clause B2 (insofar as it applies to E2).

7.3.4 E3 Internal moisture

- The facilities are simple and appear to be code-compliant.
- The facilities appear to perform at least as well as before the alterations.
- Adequate ventilation is provided from opening windows and there is no evidence of internal moisture.

7.3.5 F2 Hazardous building materials

- The expert identified the need to investigate the type of glass used in the window adjacent to the mid-landing to the mezzanine stairs.

7.3.6 F4 Safety from falling

- The entry stair handrail was accepted by the authority as compliant.
- The mezzanine stairs are covered by the code compliance certificate dated 19 November 2010 (see paragraph 3.6.2).

7.3.7 G1 Personal hygiene, G2 Laundering, G3 Food preparation G4 Ventilation, G7 Natural light and G8 Artificial light

- The as-built drawings show adequate provision to comply with requirements.
- All facilities are operating satisfactorily and appear code-compliant.
- The facilities appear to perform at least as well as before the alterations.

7.3.8 G12 Water Supplies and G13 Foul Water

- The house is connected to council mains water supply and sewerage systems.
- The alterations affecting plumbing and drainage were minor and carried out 17 years ago, with fixtures operating satisfactorily and appearing code-compliant.
- The gully trap and vent shown in the 1993 consent drawing appear satisfactory, with the gully rim above ground and the terminal vent raised above the roof level away from opening windows.

7.3.9 H1 Energy Efficiency

- The 1993 consent drawing noted 'insulation to NZS 4218P'.
- The 1998 specification called for fibreglass insulation to walls and ceilings.
- The house will comply at least to the same extent as before the alterations.

7.4 Conclusion

7.4.1 Taking account of the expert's report, I conclude that the areas identified in paragraph 6.5 require rectification.

7.4.2 The expert's report also commented on the open treads of the mezzanine stairs. However, I note that the 'stair replacement to upper loft area' is covered in the code compliance certificate dated 19 November 2010 (see paragraph 3.6.2) and these stairs are therefore not considered in this determination.

7.4.3 Based on the observations in paragraph 7.3, I consider that the expert's report, the lack of apparent problems after 12 to 17 years and the other evidence, provide me with reasonable grounds to conclude that, with the exception of the items identified in paragraph 6.5, the building work is likely to comply with the remaining relevant clauses of the Building Code.

7.4.4 I accept the applicant's submission as evidence that the glass to the window adjacent to the mid-landing to the mezzanine stairs meets the requirements of Clause F2 (refer paragraph 4.5.3).

Matter 3: The durability considerations

8. Discussion

8.1 The authority also has concerns regarding the durability, and hence the compliance with the building code, of certain elements of the house taking into consideration the age of the alterations completed in 1993 and 1998.

- 8.2 The relevant provision of Clause B2 of the Building Code requires that building elements must, with only normal maintenance, continue to satisfy the performance requirements of the Building Code for certain periods (“durability periods”) “from the time of issue of the applicable code compliance certificate” (Clause B2.3.1).
- 8.3 These durability periods are:
- 5 years if the building elements are easy to access and replace, and failure of those elements would be easily detected during the normal use of the building
 - 15 years if building elements are moderately difficult to access or replace, or failure of those elements would go undetected during normal use of the building, but would be easily detected during normal maintenance
 - the life of the building, being not less than 50 years, if the building elements provide structural stability to the building, or are difficult to access or replace, or failure of those elements would go undetected during both normal use and maintenance.
- 8.4 In this case the delay since the completion of the alterations has raised concerns that various elements of the building are now well through or beyond their required durability periods, and would consequently no longer comply with Clause B2 if code compliance certificates were to be issued effective from today’s date. However, I have not been provided with any evidence that elements included in the two building consents did not comply with Clause B2 at the end of 1993 and 1998.
- 8.5 The applicant has agreed that the durability periods for the building work should commence from 1 January 1994 for the 1993 building consent and 1 January 1999 for the 1998 building consent. The authority has declined to accept that the durability periods can be modified and consequently has not provided a completion date for the consented work. Despite the lack of any agreement by the authority, I conclude that the dates proposed by the applicant are reasonable.
- 8.6 In order to address these durability issues when they were raised in previous determinations, I sought and received clarification of general legal advice about waivers and modifications. That clarification, and the legal framework and procedures based on the clarification, is described in previous determinations (for example, Determination 2006/85). I have used that advice to evaluate the durability issues raised in this determination.
- 8.7 I continue to hold that view, and therefore conclude that:
- (a) the authority has the power to grant an appropriate modification of Clause B2 in respect of all the building elements, if requested by an owner
 - (b) it is reasonable to grant such a modification, with appropriate notification, as in practical terms the building is no different from what it would have been if code compliance certificates had been issued in 1993 and 1998.
- 8.8 I strongly suggest that the authority record this determination and any modifications resulting from it, on the property file and also on any LIM issued concerning this property.

9. What is to be done now?

- 9.1 A single notice to fix should be issued that requires the applicant to bring the alterations into compliance with the Building Code, identifying the investigations and defects identified in paragraph 6.5, 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 owner to propose and for the authority to accept or reject.
- 9.2 I suggest that the parties adopt the following process to meet the requirements of paragraph 9.1. The applicant should produce a response to the notice to fix in the form of a detailed proposal, produced in conjunction with a competent and suitably qualified person, as to the rectification or otherwise of the specified matters. (I note that this should include the engineer's proposal for additional fixings to the rafter to ridge beam connections.) Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.
- 9.3 Once the matters set out in paragraph 6.5 and any other defects have been rectified to its satisfaction, the authority shall issue code compliance certificates in respect of the building consents amended as outlined in paragraph 8.

10. The decision

- 10.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:
- the rafter to ridge beam junctions do not comply with Building Code Clause B1
 - paintwork to the cladding does not comply with Building Code Clause B2
 - sub-floor ventilation does not comply with Building Code Clause E2
- and accordingly, I confirm the authority's decision to refuse to issue code compliance certificates for the alterations.
- 10.2 I also determine that:
- (a) all the building elements installed in the alterations under building consents ABA2330 and ABA980773, apart from the items that are to be rectified as described in Determination 2011/049, complied with Clause B2 on 1 January 1994 and 1 January 1999 respectively.
- (b) the building consents are hereby modified as follows:
- The 1993 consent**
Building consent No. ABA2330
- The building consent is subject to a modification to the Building Code to the effect that, Clause B2.3.1 applies from 1 January 1994 instead of from the time of issue of the code compliance certificate for all the building elements, except the items to be rectified as set out in paragraph 6.5 of Determination 2011/049.

The 1998 consent

Building consent No. ABA980773

The building consent is subject to a modification to the Building Code to the effect that, Clause B2.3.1 applies from 1 January 1999 instead of from the time of issue of the code compliance certificate for all the building elements, except the items to be rectified as set out in paragraph 6.5 of Determination 2011/049.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 23 May 2011.

John Gardiner

Manager Determinations