



## Determination 2012/040

### **The exercise of an authority's powers in respect of a refusal to issue a code compliance certificate for a ten-year old house completed under the supervision of a building certifier at 96 Vicenza Drive, Kaiapoi**



#### **1. The matter to be determined**

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department.

1.2 The parties to the determination are:

- the owners, D and K Harris (“the applicants”)
- Waimakariri District Council (“the authority”), carrying out its duties and functions as a territorial authority and building consent authority.

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<sup>1</sup> The Building Act 2004, the Building Code the Compliance Documents, past determinations, and guidance documents issued by the Department are available from the Department’s website at [www.dbh.govt.nz](http://www.dbh.govt.nz) or by contacting the Department on 0800 242 243.

- 1.3 This determination arises from the authority's refusal to issue a code compliance certificate because it was not satisfied that the building work complied with certain clauses<sup>2</sup> of the Building Code (First Schedule, Building Regulations 1992). The authority's concerns about the compliance of the house primarily relate to the weathertightness of the external envelope (refer paragraph 3.10).
- 1.4 The matter to be determined<sup>3</sup> is whether the authority correctly exercised its powers in respect of its refusal to issue a code compliance certificate. Subsequent to the completion of the building work remedial work was undertaken for which no consent was sought. Therefore in making my decision I must consider:
- whether a building consent was required for the unconsented remedial work
  - whether the consented building work complies with the relevant clauses of the Building Code
  - whether the remedial building work complies with the relevant clauses of the Building Code
  - whether a code compliance certificate, or some other certificate, is the most appropriate certificate to be issued in due course. In order to determine that, I have addressed the following questions:
    - (a) Is there sufficient evidence to establish that the building work as a whole complies with the Building Code? I address this question in paragraph 5.
    - (b) If not, are there sufficient grounds to conclude that, once outstanding items are repaired and inspected, the building work will comply with the Building Code? I address this question in paragraph 7.

## 1.5 Matters outside this determination

- 1.5.1 A swimming pool has been constructed under a separate building consent (No. 041435) and it appears that a code compliance certificate has been issued for this work.
- 1.5.2 I note this work has been identified during two assessments of the house as not meeting the requirements of the Fencing of Swimming Pools Act 1987 and Clause F4 of the Building Code. While the compliance of the pool is not considered in this determination, I have advised the parties that any action required to remedy this should not be delayed pending the outcome of this determination.
- 1.6 In making my decision, I have considered the submissions of the parties, the report of the expert commissioned by the Department to advise on the matter ("the expert"), the report of an assessor engaged by the Department's Weathertight Services Group ("the WSG assessor"), and the other evidence in this matter.

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<sup>2</sup> Unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

<sup>3</sup> In terms of sections 177(1)(b) and 177(2)(d) of the Act.

## **2. The building work**

### **2.1 The consented building work**

- 2.1.1 The two-storey timber framed house and semi-detached garage is situated on an exposed flat rural site in a high wind zone for the purposes of NZS 3604<sup>4</sup>. The building is founded on a concrete slab and foundation, and has recessed aluminium joinery with double glazing throughout.
- 2.1.2 The cladding is a proprietary EIFS<sup>5</sup> system consisting of 40mm polystyrene sheets fixed through building wrap to the framing, finished with a modified acrylic plaster reinforced with fibreglass mesh. The main roof of the house is hipped with 750mm soffit overhangs on all elevations and clad with concrete tiles. An externally fitted fascia/gutter system has been fitted throughout.
- 2.1.3 Two small sections of the lower level that project out beyond the upper level to the east and west, have flat roofs without soffit overhangs and have been clad with a butyl rubber membrane. The semi-detached garage has a concrete tiled roof with perimeter parapet walls and wide internal gutters lined with butyl rubber.
- 2.1.4 A partially-enclosed deck with glazed balustrades has been constructed at first-floor level on the north elevation of the building; the floor of the deck is clad with a butyl rubber membrane. The deck is situated partly over a living room, and has a roof overhang which extends beyond the footprint of the deck itself.
- 2.1.5 A flat entry canopy roof has been constructed on the south elevation of the building, and is clad with a butyl rubber membrane. A chimney has been constructed on the west elevation of the building.
- 2.1.6 The expert, the WSG assessor, and the assessor's biodeterioration expert have each noted that the timber framing in the ground and first floor walls of the building is untreated.

### **2.2 The remedial work**

- 2.2.1 There is limited information of the remedial building work carried in response to the WSG report. The following description is based on the observations included in the expert's report and photographs supplied by the applicant:
- installation of metal caps to garage parapets
  - repairs to membrane to entry canopy
  - excavation of unpaved ground adjacent base of cladding
  - remedial work including flashings to flat roof areas
  - sealing of a pipe penetration to a tiled roof
  - drip edge fitted to edge of tiled balcony floor
  - other remedial work as listed in the table at paragraph 6.3.2

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<sup>4</sup> New Zealand Standard NZS 3604:1999 Timber Framed Buildings.

<sup>5</sup> Exterior insulation and finish system.

### 3. Background

3.1 On 21 June 2001 the authority issued building consent No. 011511 for the building work under the Building Act 1991; based on a building certificate issued by a building certifier (“the first building certifier”) on 29 May 2001.

3.2 It appears a second building certifier was (“the second building certifier”) was engaged on 30 May 2001 to inspect the building work; however I have not seen evidence of any inspections carried out by the second building certifier. The following inspections were carried out by a third building certifier (“the third building certifier”) during construction:

- A foundation inspection on 13 September 2001 (which passed)
- A pre-line inspection on 26 November 2001 (which passed)
- A drainage inspection on 29 January 2002 (which passed)

3.3 The first, second and third building certifiers were each duly registered as building certifiers under the former Building Act 1991, but ceased operating as certifiers before a code compliance certificate was issued for the building work.

3.4 In a letter to the applicants dated 23 January 2007, the authority noted that a code compliance certificate had not been issued and:

[a]ccordingly, [the authority] must assess the documentation provided by [the second building certifier] and inspect the building works for compliance to the Building Code before a Code Compliance Certificate can be issued.

I have seen no record of the outcome of any assessment by the authority and it appears the matter remained unresolved until the applicants later sought a code compliance certificate.

3.5 The authority carried out a final inspection on 22 March 2010, which failed.

3.6 In a letter to the applicants dated 29 April 2010, the authority noted its decision to refuse to issue a code compliance certificate for the building work, stating that ‘the biggest impediment to gaining a [code compliance certificate] is the obvious signs of degradation of the exterior cladding’. The letter provided a list of 27 items the authority considered needed to be addressed before a code compliance certificate could be issued for the building work. (I have listed those items in the table at paragraph 6.3.2.)

3.7 In a letter to the applicants dated 17 September 2010, and in respect of some items listed in the authority’s letter of 29 April 2010, a structural engineer engaged by the applicants said that:

Interior (with regard to the double girder trusses) the trusses are ‘more than  
Item 1<sup>6</sup>: adequately tied together’ and there is ‘no basis for the implied  
requirement’

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<sup>6</sup> Refer Table at paragraph 6.3.2.

- Interior Item 2: (with regard to the truss fixings to girder truss) ‘the builder has exceeded some of the specified construction requirements’
- Interior Item 7: (with regard to the bracing fixings) The structural engineer noted his inspection had been completed following September 2010 earthquake and aftershocks which showed ‘no sign of damage’ and that there was ‘reasonable grounds for demonstrating the structural integrity, and bracing capacity of this (house) should not be in question’.

### 3.8 The WSG Report

- 3.8.1 In 2010 the applicant applied to the Department under section 14 of the Weathertight Homes Resolutions Services Act 2006, and the WSG assessor was engaged to carry out inspections at the property. The WSG assessor provided a report (“the WSG Report”) dated 14 January 2011.

#### General

- 3.8.2 The WSG assessor observed that the external wall construction of the lower floor was timber frame and not the reinforced concrete block shown on the approved plans. The WSG assessor noted that ‘the external cladding built date is considered to be 15 February 2002’.

#### Moisture

- 3.8.3 The WSG assessor took 27 invasive moisture readings in the exterior walls at areas considered at risk, and removed ten sections of cladding from the building in order to observe the underlying framing. The WSG assessor noted that the invasive moisture readings at each of these locations were less than 18%, with the exception of an elevated moisture reading of 18% in the top plate of the entry porch roof and decayed timber at this location.
- 3.8.4 Observing evidence of decay in the timber framing beneath the entry porch roof, the WSG assessor forwarded a timber sample to a biodeterioration laboratory for analysis of treatment and decay. The laboratory results confirmed that the sample:
- was ‘almost certainly’ untreated
  - contained evidence of the toxigenic mould *stachybotrys*
  - has ‘been exposed to moisture conditions that are inconsistent with sound building practice and/or weather-tight design, and ... appropriate remediation is needed to correct this’
  - contained ‘advanced decay of a type that often occurs well beyond the sample (risk of failure nearby). Replacement is typically recommended for framing in this condition’.

### **External envelope**

- 3.8.5 Commenting specifically on the external envelope, the WSG assessor noted:
- inadequate clearance between the bottom of the cladding and the finished ground level
  - the sealing between the cladding and the garage door frame has degraded
  - evidence of ‘moderate to severe’ cracking of the cladding’s plaster coating system
  - the external paint system shows signs of degradation, particularly on the sunnier sides of the building
  - evidence of cracking in the plaster coating at window sill junctions
  - evidence of poor workmanship with regard to the butyl rubber membrane material on the flat roof sections of the building, and there is evidence of a leak in the entrance canopy
  - the tiled floor-edge junction detail on the deck provides significant risks for moisture ingress now and in the future
  - the butyl rubber membrane internal gutters on the garage hold water, and moisture is entering at the leading edge of the parapets where cracks have developed in the plaster coating system
  - cracks visible at sheet joins in the plaster board ceiling lining of the garage
  - evidence of cracking and displacement of mortar around the concrete roof tiles on the main section of the building – presumed to be earthquake damage
  - the pipe penetrations on the roof have not been fitted with sealed collars.

### **3.9 Remedial work**

- 3.9.1 The WSG assessor’s report provided an overview of the remedial work required, noting that additional damage may be found during the remedial work and that detailed plans and specifications would require approval from the authority before work commenced.
- 3.9.2 It appears that the applicants arranged for remedial work to be carried out at some time in 2011 to address the items listed in the authority’s letter of 29 April 2010 (refer paragraph 3.6) and to repair the defects identified in the WHRS assessment and to make good the cut outs to the cladding.
- 3.9.3 The building work was carried out without building consent and the authority did not undertake inspections of the building work. Limited evidence of the remedial work has been provided by way of photographs from the applicants and by way of the expert’s comments in paragraph 6.

3.10 In a letter to the applicants dated 14 December 2011, the authority reiterated its earlier views as to its refusal of a code compliance certificate, noted the comments in the WSG assessors report (refer paragraph 3.9.1) and stated that:

As you are aware remedial work has been undertaken without authorisation of a building consent which would have been our preferred option.

At this point in time [the authority] is not prepared to issue the Code Compliance Certificate (CCC) for your dwelling because we are not satisfied on reasonable grounds that the exterior cladding will continue to meet the performance requirements of the NZ Building Code.

3.11 The Department received an application for a determination on 17 January 2012.

#### **4. The submissions**

4.1 The applicants provided a letter outlining the background of events, in which the applicants noted that the builder engaged to undertake the remedial work had advised that no consent was required.

4.2 The applicants submitted the following documentation:

- photographs and producer statements relevant to the remedial work
- a letter from a structural engineer
- copies of the building consent, PIM, list of the inspections, and some relevant documents from the authority's files
- correspondence from the authority, including an attached photo file
- a producer statement dated 15 February 2007 for the EIFS cladding.

4.3 The applicants subsequently provided

- A producer statement – construction PS3 dated '9/11' for the waterproof membrane to internal gutter (I take the date of this document to be September 2011)
- A producer statement issued by a licensed installer for the EIFS cladding, dated 12 February 2012, for the 'plaster remedial work around new diverters (by others), inspection cut outs and front R.N. entry column' carried out on 16 December 2011.

4.4 A draft determination was issued to the parties on 17 April 2012. The draft was issued for comment, and for the parties to agree a date when the building complied with Clause B2 Durability.

4.5 Both parties agreed the date of March 2002, being the date of substantial completion, as the date when compliance with Clause B2 was achieved, and the applicants accepted the draft without further comment.

- 4.6 The authority accepted the draft determination, but noted that it did not agree with the opinion given by the structural engineer as to interior items 1, 2, and 7 (refer paragraph 3.7) and did not agree with the Department's acceptance of those views. The authority submitted that:
- the double girder truss fixings were requested as they are typical fixings commonly specified by truss manufacturers in the district (Item 1)
  - a 'truss engineer' should be engaged to confirm if additional fixings are required because the design information was not on file, and the authority did not see connections where expected on-site (Item 2)
  - the perimeter nailing to the bracing panels should be confirmed because the inspection on 26 November 2001 which indicated 'bracing elements fitted as per plan' was the "pre-line" inspection' (Item 7).
- 4.7 Following the authority's submission on the draft I have taken advice from a structural engineering officer within the Department who is a chartered professional engineer. The engineering officer considered, in respect of Items 1 and 2, that the likely loads on the members concerned were low and/or that there were other elements contributing to the stability of the trusses. The engineering officer agreed with the structural engineer that there were reasonable grounds to establish that compliance has been achieved.
- 4.8 With respect to Item 7, the engineering officer was of the view that the bracing may not been tested by the ground shaking experienced in Kaiapoi for a number of reasons; including the directional nature of the earthquake shaking, and because the ground shaking experienced in Kaiapoi was less than the level the house would have been designed to withstand in that locality. The officer recommended that the fixings to the bracing walls be checked.
- 4.9 I have considered the submissions received and the opinion of the engineering officer and have amended the determination as appropriate.

## **5. Grounds for the establishment of code compliance**

- 5.1 I note that previous determinations provided a framework for establishing reasonable grounds to consider the code compliance of building work where building work is completed and some of the elements are not now able to be cost-effectively inspected.
- 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 elements were not able to be cost-effectively inspected.
- 5.3 In my view, it is reasonable to rely on the inspections that were undertaken particularly in regard to inaccessible building components, but it is also important to look for evidence that can be used to verify that the inspections that were undertaken were properly conducted.



5.4 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 WSG assessor's report (refer paragraph 3.8)
- the record of inspections carried out by the third building certifier (refer paragraph 3.2)
- the expert's report (refer paragraph 6).

## **6. The expert's report**

6.1 As mentioned in paragraph 1.6, I contracted an independent expert to assist me. The expert is a member of the New Zealand Institute of Building Surveyors. The expert inspected the building on 14 February 2012 and furnished a report dated 22 February 2012. A copy of the expert's report was provided to the parties on 23 February 2012.

### **6.2 General**

6.2.1 The expert noted that the overall construction quality '[a]ppears to be carried out in a tradesman-like manner'. The expert further noted that the cladding has been 'installed to good standard, lines true and straight, and surfaces uniform and consistent in texture'.

6.2.2 In respect of the remedial repairs the expert noted that generally 'observations indicate remedial repairs have not been carried out with good trade practice' and that details rely on sealant for weatherproofing.

6.2.3 The expert referred to the WHRS assessment and noted that

[g]iven the short period of time passed since both the invasive and destructive investigations were carried out as part of a weathertight investigation and the extent of remedial work having since been completed to address a leak and future likely issues no invasive moisture testing was carried out for this report.

6.2.4 The expert confirmed that amended plans showing an external timber framed wall construction to the ground floor in-lieu of reinforced masonry can be found on the property file.

### **6.3 Observations**

6.3.1 The expert observed cracks of less than 0.5mm to the interior, notably around window and door openings, which the expert considered were likely to be the result of seismic activity.

6.3.2 In regards to the items listed in the authority's letter of 29 April 2010, the expert made the following comments (items numbered as per authority's letter):

Authority items listed	Remedial work undertaken	Expert comment
<b>Exterior items 1 - 15</b>		
1. Cracking of the exterior cladding at various locations (WSG report refers to moderate to severe cracking of plaster system; cracking (isolated) of the plaster coating evident at window sill junctions, and cracking to garage parapet wall)	Repairs to garage parapet wall including metal parapet caps fitted	Fixings penetrate the parapet cap's top surface at the parapet wall junction. Roof underlay has not been taken over the gutter's membrane ensuring moisture drains into the gutter.
2. Inadequate sealing of pipe penetrations	Sealed	Roof penetration poorly over-flashed with EPDM boot. Boot split and over-use of sealant. Other penetrations sealed adequately.
3. Penetration of the plaster surface by a timber beam	Sealed	Beam has been sealed. Protection also provided by roof directly over beam's top edge.
4. Inadequate ground clearance below the base of the cladding, lower garden levels		No evidence of moisture ingress. Paved areas (north, east and west) with clearance of 50mm slope away from exterior walls allowing water to drain away. Garden levels immediately adjacent cladding lowered (south elevation); but lowered areas may easily be filled in again. Ground features abut cladding with no clearance (west elevation/garage). At risk of future moisture ingress.
5. Inadequate clearance between the base of cladding and the butyl rubber membrane to roof above the entry door		Remedial work questionable. Repair has not included extending the membrane up and under the cladding. Detail relies on sealant, risk of future moisture ingress
6. Proprietary kick-out flashings required to butyl rubber roofing	Flashings installed	A small section of plywood substrate remains exposed.
7. Lack of a drip edge along the front of the north-facing deck	Drip edge fitted	Drip edge fitted, but need to confirm that deck membrane extends down face of the balcony.
8. Window head flashings required to windows adjacent northwest flat roof.		No mechanical flashing fitted to window head, or flat top column (north elevation). No evidence of moisture ingress currently, however, detail may lead to risk of moisture ingress in future.
9. Concrete surrounds need to be installed around the gully dishes to prevent ingress of surface water into foul water system.	Installed	Gully surrounds fitted

10. Butyl rubber membrane repairs to garage roof are required where laps have opened up	Membrane replaced	Membrane extends under roof tiles and over wall cladding
11. Flashings to be installed to East and west flat roof areas where the butyl rubber membrane enters the spouting	Repaired	Remedial work undertaken. Appropriate flashings installed, edge flashings fitted allowing water to be channelled into the spouting. However, edge flashings do not fully cover plywood substrate.
12. Surface water outlet to the entry roof area has been inadequately installed  (WSG report notes in respect of the entry canopy roof: Defects in the installation of the rubber membrane contributing to the leak, however the most contributing factor is likely to be cuts surrounding the outlet and a failure to adequately dress the membrane down inside the rainwater outlet.)	Remedial work carried out	Remedial work has not been carried out in accordance with good trade practice. Detail relies on sealant.  (See previous comment Item 5)
13. No provision of overflow outlets to the rainwater heads to garage	Overflow installed	Overflow installed to metal rainwater head
14. The balcony barrier fixings through the top surface require suitable rubber grommets to prevent moisture ingress	Grommets fitted	Rubber grommets fitted
15. Repairs are required to the mortar on the concrete tile roof to the house	Repaired	Repairs have been made to mortar joints along hips and ridges

<b>Interior Items 1 - 12</b>		
1. The double girder trusses need to be adequately fastened		Refer engineer's letter (refer paragraph 3.7)
2. Confirmation is needed as to whether additional truss fixings are required		Refer engineer's letter (refer paragraph 3.7)
3. Sealing required between the bath and the adjacent tiles	Sealed	Junction sealed
4. Insulation required to the pipework at the top of the hot water cylinder to the tempering valve	Installed	Pipe insulation installed
5. Handrail required to the top flight of stairs	Installed	Rail installed
6. Seal between wall lining and window inside the shower area	Sealed	Though this junction has been sealed the location remains a risk and regular inspection and diligent maintenance is required

7. Bracing fixings to be correctly installed (no post-lining inspection undertaken)		No investigation undertaken
8. Provide adequate ventilation to the laundry/toilet area	Installed	Mechanical ventilation installed
9. Seal between laundry bench and wall	Sealed	Junction sealed
10. Complete skirting installation	Completed	Skirting completed
11. Impervious floor coverings to the wet areas in the garage	Installed	Impervious floor coverings installed
12. Details need to be provided for the shower tanking membrane installed behind the tiles.		Applicants advised area to be opened up to allow wider inspection. The expert noted 'no visual evidence of moisture damage to ceiling below first floor bathroom areas'.

## 7. The code compliance of the building work

7.1 I accept that the consented building work complies with Clause B1 in respect of “interior items” 1, 2 of the authority’s list of 29 April 2010. I have insufficient evidence to determine whether Item 7 (the nailing of the bracing elements) is code compliant, and I consider it prudent and not difficult or unreasonable to have the nailing checked.

7.2 Taking into account the expert’s report, I conclude that remedial work is necessary in respect of the following building work carried out under building consent No. 011511 (item numbers in brackets refer to the authority’s list of 29 April 2010):

- clearance to ground levels to the west elevation/garage (Exterior item 4)
- detail to the flat top column and adjoining window north elevation (Exterior item 8)

7.3 Taking into account the expert’s report, I conclude that the following elements comply with the relevant clauses of the Building Code (item numbers in brackets refer to the authority’s list of 29 April 2010):

- Ground clearance to paved areas (Exterior item 4)
- Sealing to bath and adjacent tiles (Interior item 3)
- Insulation to hot water pipework (Interior item 4)
- Handrail to stairs (Interior item 5)
- Seal to window inside the shower area (Interior item 6)

(I note here the expert’s comment that this will require regular inspection as part of normal maintenance and draw this to the attention of the applicants)

- Ventilation to the laundry/toilet area (Interior item 8)
- Seal to the laundry bench/wall (Interior item 9)

- Skirting (Interior item 10)
  - Impervious floor coverings to garage wet areas (Interior item 11)
- 7.4 In respect of the shower tanking membrane (interior item 12), I note that the applicant has advised that this area is to be opened up to allow further inspection, and I therefore leave this matter to be resolved between the parties in due course.
- 7.5 Taking into account the expert's report, I conclude that further remedial work is necessary in respect of:
- the garage roof underlay, to allow moisture to drain to the gutter
  - sealing of the roof penetration
  - ground levels adjacent gardens and where features abut cladding(south elevation)
  - membrane to cladding detail at the entry canopy roof, in particular the parapet to wall junction
  - the small exposed areas of plywood substrate to the east and west flat roofs
  - confirmation or remediation in respect of the balcony membrane extending down the face of the balcony
- 7.6 I consider the remedial work to the following areas to be adequate:
- Sealing of the timber beam penetrating the plaster.
  - Installation of the gully surrounds.
  - Installation to the east and west flat roofs of the water diverters.
  - Overflow installed to garage rainwater heads.
  - Rubber grommets provided to barrier fixings to balcony.
  - Repaired mortar joins to hips and ridges.
- 7.7 I consider the expert's report establishes that the current performance of the building envelope is adequate because it is preventing moisture penetration at present. I am therefore satisfied that the building complies with clause E2 of the Building Code.
- 7.8 However, the building 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 to remain weathertight. The expert has identified faults that are likely to allow future ingress of moisture. I take the view that the building work does not comply with the durability requirements of Clause B2 insofar as it relates to Clause E2, and I therefore consider the authority was correct to refuse to issue a code compliance certificate.
- 7.9 Because the faults identified with the claddings occur in discrete areas, I am able to conclude that satisfactory rectification of the items outlined in paragraphs 7.1 and 7.5 will result in the external envelope being brought into compliance with the Building Code.

- 7.10 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 (for example, Determination 2007/60).

## **8. Remedial work undertaken without consent**

- 8.1 Section 41(1)(b) of the Act states that a building consent is not required for any building work described in Schedule 1 (refer Appendix), which includes repairs and maintenance where components are replaced with comparable components that are at least as good as the originals (for example, the replacement of a hot water cylinder in the same position). However, Schedule 1 also specifically excludes the repair or replacement of components that have failed to satisfy the durability provisions (for example, through failing to remain weathertight).
- 8.2 It is clear that the more significant remedial work, to the entry canopy and the garage parapet, was carried out in response to a failure of those building elements in respect of Clauses E2 and B2 of the Building Code. I therefore take the view that the remedial work does not fall within the exempt building work under Schedule 1 and that a building consent was required for this work.
- 8.3 Section 17 of the Act also requires that '[a]ll building work must comply with the building code to the extent required by [the] Act, whether or not a building consent is required in respect of that building work.
- 8.4 A certificate of acceptance is usually the appropriate mechanism to regularise building work undertaken without consent<sup>7</sup>; however, as I have concluded that the building work does not comply with the Building Code (refer paragraph 7.5) a certificate of acceptance therefore would not be able to be issued.
- 8.5 The remedial work needed to bring the building work undertaken without consent into compliance with the Building Code will require the applicants to apply for a building consent for that work (refer paragraph 11.3). Once the matters have been rectified to its satisfaction, the authority may issue a code compliance certificate in respect of the remedial work.

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

- 9.1 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. In the case of this building, the applicant is seeking a code compliance certificate for the consented building work.

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<sup>7</sup> Under section 96(1)(a)

9.2 In this situation, where there are reasonable grounds to conclude that the building work completed under building consent No. 011511 can be brought into compliance with the Building Code, I take the view that a code compliance certificate is the appropriate certificate to be issued in due course. However, with respect to the remedial work undertaken to the garage parapet wall and the entry canopy undertaken without consent, the building consent should be amended to exclude those building elements.

## 10. The durability considerations

10.1 The issue of the code compliance certificate then raises the matter of the durability of the building work taking into account the building work carried out under the building consent was substantially completed in 2002.

10.2 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).

10.3 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.

10.4 In this case the delay between the completion of the consented building work and the applicant’s request for a code compliance certificate raises 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 a code compliance certificate were to be issued effective from today or a future date. I have not been provided with any evidence that the authority did not accept that those elements complied with Clause B2 at the time of substantial completion.

10.5 It is not disputed, and I am therefore satisfied, that all the building elements in the house complied with Clause B2 in March 2002 (refer paragraph 4.5.) I have taken the date as being 1 March 2002.

10.6 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.

- 10.7 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 the 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 a code compliance certificate for the building work had been issued in 2004.
- 10.8 I strongly recommend 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.

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

- 11.1 With regard to the consented building work, the authority should issue a notice to fix that requires the owner to bring the building work into compliance with the Building Code, identifying the items listed in paragraphs 7.1, 7.2, and 7.5 and referring to any further defects that might be discovered in the course of investigation and rectification.
- 11.2 I note here that it is not for the notice to fix to stipulate how the defects are to be remedied and the building work brought into compliance with the Building Code. That is a matter for the owner to propose and for the authority to accept or reject. It is important to note that the Building Code allows for more than one means of achieving code compliance.
- 11.3 In response to the notice to fix, the applicants should engage a competent and suitably qualified expert prepare the application for building consent and a proposal for the further building work that is required to bring the building work into compliance with the Building Code. With respect to the proposal for further building work; the authority will be required to satisfy itself on reasonable grounds that the provisions of the Building Code are met. The applicants should take the necessary steps to seek amendments to building consent No. 011511 to exclude those elements covered by the new building consent.
- 11.4 Once the matters have been rectified to its satisfaction and the appropriate amendment made, the authority may issue a code compliance certificate for the house and garage in respect of building consent No. 011511 modified as described in paragraph 10.
- 11.5 Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.



## 12. The decision

- 12.1 In accordance with section 188 of the Act, I hereby determine that the building work carried out under building consent No. 011511 does not comply with the Building Code that was in force at the time the consent was issued, and accordingly I confirm the authority correctly exercised its powers in refusing to issue the code compliance certificate.
- 12.2 I also determine that the building work undertaken without consent was building work that required consent and does not comply with Clause B2 Durability of the Building Code insofar as it relates to Clause E2 External Moisture.
- 12.3 I have insufficient grounds to be satisfied that the consented building work complies with Clause B1 Structure.
- 12.4 I also determine that:
- (a) all the building elements installed under building consent No. 011511, amended as per paragraph 9.2 and apart from the items that are to be rectified as described in Determination 2012/040, complied with Clause B2 on 1 March 2002.
  - (b) building consent No. 011511 is hereby modified as follows:

The building consent is subject to a modification to the Building Code to the effect that, Clause B2.3.1 applies from 1 March 2002 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 Determination 2012/040.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 25 May 2012.

John Gardiner  
**Manager Determinations**

## Appendix: The legislation

A.1 Section 41 (1) (b) of the Act states that a building consent is not required for any building work described in Schedule 1, which includes:

### **Schedule 1 Exempt building work**

1. A building consent is not required for the following building work:

(a) any lawful repair and maintenance using comparable materials, or replacement with a comparable component or assembly in the same position, of any component or assembly incorporated or associated with a building, including all lawful repair and maintenance of that nature that is carried out in accordance with the Plumbers, Gasfitters, and Drainlayers Act 1996, except—

(iii) repair or replacement (other than maintenance) of any component or assembly that has failed to satisfy the provisions of the building code for durability, for example, through a failure to comply with the external moisture requirements of the building code

A.3 Section 17 of the Act also states:

### **17 All building work must comply with building code**

All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.