Ministry of Business, Innovation & Employment | Building & Housing

Determination 2012/050

The issue of a limited certificate of acceptance for a 9-year-old house completed under supervision of a building certifier at 52 Bell Road, Te Puke

1. The matters to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004[1] ("the Act") made under due authorisation by me, John Gardiner, Manager Determinations, Ministry of Business, Innovation and Employment ("the Ministry")[2], for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to the determination are:

- the owner, R Norton ("the applicant"), acting through an agent[3];
- Western Bay of Plenty District Council ("the authority"), carrying out its duties as a territorial authority or building consent authority.

1.3 This determination arises from the decisions of the authority to refuse to issue a code compliance certificate and to issue a limited certificate of acceptance for a 9-year-old house because it was not satisfied that the house complies with the Building Code (First Schedule, Building Regulations 1992). The refusal arose because the building work had been undertaken under the supervision of Bay Building Certifiers ("the

[1] The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.dbh.govt.nz or by contacting the Ministry on 0800 242 243.
[2] After the application was made, and before the determination was completed, the Department of Building and Housing was transitioned into the Ministry of Business, Innovation and Employment. The term "the Ministry" is used for both.
[3] The court-appointed manager of the applicant's property

building certifier"), which was duly registered as a building certifier under the former Building Act 1991, but which ceased operating as a certifier before it had issued a code compliance certificate for the building work.

1.4 The matter to be determined[4] is therefore whether the authority was correct to refuse to issue a code compliance certificate and to issue a limited certificate of acceptance. In making this decision, I must consider:

1.4.1 Matter 1: The code compliance of the house

Whether the building as a whole complies with the remaining clauses[5] of the Building Code other than those contained in the certificate of acceptance issued by the authority. (I consider this matter in paragraph 7.)

1.4.2 Matter 2: The durability considerations

Whether the building elements comply with Building Code Clause B2 Durability, taking into account the age of the house. (I consider this matter in paragraph 9)

1.5 In order to determine Matter 1, I must address the following questions:

(a) Is there sufficient evidence to establish that the building work as a whole complies with the Building Code?

(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?

I address these questions in paragraphs 5 and 8.

1.6 In making my decision, I have considered the submission of the applicant, the report of the expert commissioned by the Ministry to advise on this dispute ("the expert"), and the other evidence in this matter.

1.7 Matters outside this determination

1.7.1 The land information memorandum ("LIM") records three building consents issued for this property as follows:

- Consent No. BC 68206 issued on 19 November 2002 ("the house consent"); issued with a limited certificate of acceptance on 26 September 2011
- Consent No. BC 69539 issued on 15 August 2003 for installation of two solid fuel heaters; issued with a code compliance certificate on 3 October 2003
- Consent No. BC 75771 issued on 25 January 2007 for construction of a pool; issued with a code compliance certificate on 4 December 2007.

1.7.2 This determination is limited to the house consent and does not consider the other two building consents. I note that the authority issued a notice to fix on 26 September 2011 regarding the non-compliance of the swimming pool fencing, and I understand that this matter has been resolved between the parties (see paragraph 3.8).

[4] Under sections 177(1)(b), 177(2)(d) and 177(3)(b) of the Act
[5] 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.

1.7.3 I also note that there are no records for a farm shed to the south of the house and this determination does not consider that building.

2. The building work

2.1 The building work consists of a detached house situated on a large level rural site in a high wind zone for the purposes of NZS 3604[6]. The expert observed that the 'surrounding land is flat and low lying with a relatively high water table'. I also note that the building site lies within the area of land bordered by Bell Road and the railway line, which is identified by the authority[7] as a 'floodable hazard'.

2.2 The single-storey house is fairly simple in plan and form and is assessed as having a low weathertightness risk. The conventional light timber framed house was constructed by a group housing company; with concrete slab and foundations for the garage wing, timber-framed sub-floor elsewhere, stone veneer and plywood wall claddings, profiled metal roofing and aluminium windows.

2.3 The 25^{o} pitch hipped and gabled roofs have eaves of 500mm to 750mm, except for projecting bathroom walls on the south elevation where eaves are reduced to approximately 200mm. A large free-draining timber deck extends across the north living areas between the entry and the family room.

2.4 The drawings call for exterior wall framing to be 'KD H1' treated, but the expert could see no identification markings on sub-floor or roof framing. Given the date of construction in early 2003, I am unable to determine the particular level and type of treatment, if any, that is described as 'H1'. I therefore consider that the wall framing of this house may not be treated to a level providing resistance to fungal decay.

2.5 Most external walls are clad in 12mm thick plywood sheets fixed through the building wrap directly to the framing. 50mm x 25mm timber battens are fixed at 600mm centres through the plywood and over the joints. The battens incorporate weathergrooves on the rear face.

2.6 The sub-floor space is framed and enclosed with 6mm thick fibre-cement sheet. For walls to the north living/dining area, the fibre-cement extends over the lower half of the plywood and forms the substrate for decorative stone veneer.

3. Background

3.1 The authority issued a building consent (No. 68206) to the original owners on 19 November 2002 under the Building Act 1991, based on a building certificate issued by the building certifier.

[6] New Zealand Standard NZS 3604:1999 Timber Framed Buildings
[7] Land Information Memorandum – District Plan map 'G10 Rural Series' dated 16 January 2010

3.2 The building certifier carried out the following inspections:

- Pre-pour garage slab inspections on 3 February 2003 (which passed).
- Pre-line building and plumbing inspection on 28 February 2003 (which passed, noting 'Okay when straps are fixed on BR 6. Insulation OK...').
- Drainage inspection on 25 March 2003 (which passed, noting 'received drainage as built plan').
- Final building and plumbing inspections on 9 May 2003 (which passed, noting 'engineer to confirm pile sets for driven piles for dwelling').

(Although not recorded at the time, I note the required engineer's statement was signed and dated on 20 February 2003).

3.3 The building certifier ceased to operate as a building certifier on 30 June 2005 without issuing a code compliance certificate or a building certificate on completion.

3.4 In June 2006, the authority sent out pro-forma letters to all owners of buildings constructed under the supervision of the certifier with uncompleted building consents, which would have included the original owners of this house. The authority said that further inspections were required in order to determine:

> If a Code Compliance Certificate could be issued or whether more building work and inspections are necessary, or
>
> If a Certificate of Acceptance could be issued or whether more building work and inspections are required, or
>
> If a Certificate of Acceptance is not appropriate or a Code Compliance Certificate cannot be issued to advise owners of their right to seek a Determination from [the Ministry].

3.5 The building certifier's inspection summary was amended the following month to include a notation against the final inspection stating '24/07/06 Received supervision of works certificate from [the engineer] for short driven timber pile foundations.' The former building certifier also issued the original owners with a 'Statement of Compliance with the NZ Building Code' dated 24 July 2006. Based on that, the original owners may have assumed that all compliance issues had been resolved.

3.6 There is no record of further correspondence, and the property was sold in July 2010. The applicant's agent received the land information memorandum ("LIM") from the authority on 30 March 2011, which revealed that no code compliance certificate had been issued for construction of the house. The agent then engaged a firm of solicitors ("the lawyer") to pursue the code compliance certificate from the authority.

3.7 A property inspection company inspected the house, and in a letter to the lawyer dated 10 May 2011, recommended a certificate of acceptance be sought 'to cover the non issue of the Code of Compliance Certificate'. The authority inspected the house and issued a limited certificate of acceptance, dated 26 September 2011, that stated:

> The territorial authority was only able to inspect the following parts of the building work and this Certificate is qualified as follows:
>
> Safety Glazing – F2 Hazardous Building Materials
>
> Smoke Alarms – F7 Warning Systems

> Ventilation – G4
>
> Natural Light – G7

(I note that smoke alarms were not a requirement of the Building Code at the time the consent was issued on November 2002.)

3.8 The authority also issued a notice to fix dated 26 September 2011 which noted that the 'pool fencing does not comply with the Fencing of Swimming Pools Act 1987'. Following correspondence with the authority, the lawyer advised the authority on 31 October 2011 that the pool fencing would be amended as required.

3.9 In the same letter, the lawyer noted that the house construction had been issued with a statement of compliance (see paragraph 3.5) and that the code compliance certificate was not issued 'due to timeframe', stating that the agent:

> ...would like to have the dwelling signed off and ask the [authority] to provide its advice as to what will be required to enable this to happen. That if it is necessary for walls to be removed so that the [authority] can inspect then they are prepared as agents for [the applicant] to arrange for this.

3.10 Despite the applicant's agent requesting a written response from the authority in letters dated 24 November and 1 December 2011, no response was received and the Ministry received an application for a determination from the applicant's agent on 5 April 2012.

4. The submissions

4.1 The applicant's agent made no submission but forwarded copies of:

- the building consent and consent drawings
- the building certifier's inspection summary dated 24 July 2006
- the engineer's statement dated 20 February 2003
- the 'Statement of Compliance with the NZ Building Code' dated 24 July 2006
- the certificate of acceptance dated 26 September 2011
- the lawyer's records of telephone discussions with the authority
- other correspondence with the authority
- various other statements and information.

4.2 The authority made no submission in response to application, or the expert's report, to clarify why it did not consider the house was code-compliant. The determination process is dependent, in large part, on the input of the parties and it would have been beneficial had the authority had engaged more fully in the process.

4.3 A draft determination was issued to the parties on 8 June 2012. The draft was issued for comment and for the parties to agree a date when the house complied with Building Code Clause B2 Durability.

4.4 On 20 June 2012 the Ministry received a response from the applicant's agent, accepting the draft and agreeing with the date proposed in the draft determination of 9 May 2003 as the date when compliance with Clause B2 was achieved.

4.5 The authority responded to the draft determination in a letter received by the Ministry on 11 July 2012. The authority not accept the findings of the determination submitting that:

> [The authority] was unable to be satisfied that the building work complied with the building code that applied at the time the building consent was granted and, therefore, issue a code compliance certificate because the building had been completed under the control of a private building certifier.
>
> The [Act] sets out the process to be followed in that situation and, accordingly, a certificate of acceptance was applied for, an inspection carried out, and a certificate issued. The certificate was qualified in accordance with Section 99(2) … to reflect the elements that were able to be inspected.

The authority proposed 31 May 2003 as the date when compliance with Clause B2 was achieved. The authority noted an error in the draft which has been corrected.

4.6 In response to the authority's submission I note that the authority has been party to a number of determinations where the authority has refused a code compliance certificate on the basis of building work having been completed under the supervision of a building certifier. In particular I refer the authority to paragraph 7.4.12 of Determination 2011/116[8] which stated:

> The test whether compliance has been achieved for consents issued under the Building Act 1991 ("the former Act") applies irrespective of the involvement of a building certifier or not. Section 436 requires the assessment or code compliance to be made against the requirements of the Building Code that were in force at the time the consent was issued. The involvement of a building certifier does not effect the application of the transitional provisions.
>
> While section 437 specifically provides for the issue of a certificate of acceptance in circumstances where a building certifier has not issued either a code compliance certificate or a building certificate (the latter under the former Act); it does not prevent an authority from issuing a code compliance certificate if it believes the work is fully compliant.

4.7 In response to the authority's position that it was unable to be satisfied that the building work was compliant, I consider that the inspection it undertook prior to issuing certificate of acceptance was very limited in scope. Any assessment to determine compliance requires an authority take into account all the available evidence as outlined paragraphs 5.1 to 5.4. I note that where the authority did not carry out particular inspections itself it is entitled to rely on inspections by others. It may also seek evidence to corroborate such inspections, or verification by other means, such as requesting certain elements to be exposed for inspection.

[8] Determination 2011/116: Refusal to issue a code compliance certificate for a 7-year-old house completed under the supervision of a building certifier

5. Grounds for the establishment of code compliance

5.1 In order for me to form a view on the code compliance of this house, I 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.

5.2 In this case the evidence provided by the applicants consists of the summary of inspections carried out by the building certifier, and the limited certificate of acceptance issued by the authority. In the absence of any evidence to the contrary, I take the view that I am entitled to rely on the building certifier's inspection records, but I consider it important to look for evidence that corroborates or contradicts these records to establish whether the building certifier's inspections were properly carried out.

5.3 I also consider that it is reasonable to take account of the nature of the house with respect to its straightforward construction, low risk profile, and the ease with which the building elements can be inspected.

5.4 In summary, I find that the following evidence will allow me to form a view as to the code compliance of the building work as a whole:

- The record of inspections carried out by the building certifier, which indicates satisfactory inspections of the building work (refer paragraph 3.2).
- The engineer's statement regarding the pile foundations.
- The former certifier's statement regarding code compliance of the house.
- The certificate of acceptance limited to three relevant code clauses.
- The expert's report on the house (as outlined below).

6. The expert's report

6.1 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 and inspected the house on 15 and 18 May 2012, providing a report completed on 18 May 2012.

6.2 General

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

- The stone veneer extends up to half-height of the wall, in lieu of full-height.
- The gas bottles behind the garage have recently been relocated.
- Metal garage doors replace the timber door shown in the drawings.

6.2.2 The expert described the overall construction quality as 'reasonable' apart from the identified defects, noting that the house was generally well presented and maintained although exterior plywood finishes were 'overdue for renewal'. He also noted that roof flashings appeared satisfactory, with well sealed apron flashings.

6.3 The plywood cladding

6.3.1 The expert inspected the fixing of the 12mm plywood cladding; comparing it to recommended good trade practice at the time of installation[9] and noted the following:

	Recommendations	As constructed
Sheet edges	150mm maximum spacing	600mm (at batten positions, including some bottom edges and at some windows)
Other fixings	300mm maximum spacing	
Bottom fixings	75mm maximum above bottom edges of sheet	250mm above bottom edges
Horizontal flashings	Provide 10mm clearance below upper sheets to flashing slope	Upper sheets hard against flashing
Edge sealing	All cut edges, bottom edges Back sealing to lower 150mm	Some areas unsealed

6.3.2 At an east window, the plywood had bowed, forcing the window frame outwards and revealing the lack of sill flashing or wrap over the sill plate. The gap also revealed the lack of seals behind jamb flanges and fixings through plywood edges. I accept that this window is likely to be indicative of other windows and doors in the house.

6.4 The stone veneer

6.4.1 The stone veneer is adhered to the fibre-cement backing, with a horizontal batten planted at the top but no vertical battens over the plywood joint to the northeast external corner of the living room where internal signs of moisture had been observed (see paragraph 6.5.1). A bead of sealant had been applied to that joint.

6.4.2 The expert removed a small section of stone from the above corner and noted that unsealed plywood cladding extends behind the backing sheets, allowing moisture to run from the upper plywood behind the backing sheets.

6.5 Moisture levels

6.5.1 The expert inspected the interior, taking non-invasive moisture readings that were all 'within acceptable levels'. Signs of moisture damage to carpet fixings and skirting at the northeast corner of the living room were observed, although invasive moisture readings were not elevated at the time of inspection (see paragraph 6.4.1).

6.5.2 The expert took seven sample invasive moisture readings at locations considered to be at risk of moisture penetration, recording readings from 8% to 15% which were 'within acceptable levels'.

[9] 1997 BRANZ Good Timber Cladding Practice manual

6.6 Clause E2: Weathertightness

6.6.1 Commenting specifically on the external envelope, the expert noted that:

- there is insufficient clearance to the underside of the plywood beside the garage doors

Windows and doors

- plywood edges to windows are not properly fixed, resulting in bowing in some areas of plywood, and the forcing of one window away from the wall line
- the building wrap is not extended over sill plates and there are no seals behind jamb flanges, with a surface fillet of sealant applied to the junction
- some junctions between the head flashing and adjacent Z flashing are unsealed

Plywood cladding

- the bottom of some sheets lack back sealing and some edges are unsealed
- there are insufficient fixings of the plywood sheets, which has resulted in the sheets bowing at the bottom and under some windows
- at the horizontal flashing to gable end walls, the upper plywood butts against the Z flashing and can trap moisture at the bottom of the sheets
- the external corner of the plywood above the stone veneer lacks cover battens, with a sealant bead relied on for weatherproofing
- there is an open horizontal joint beside the west garage window jamb
- the lack of maintenance has resulted in minor surface cracking
- there are no flashings or flanges to pipe penetrations and the meter box

Stone veneer

- the top of the stone veneer relies on a planted horizontal batten to weatherproof the junction with the upper plywood
- the stone veneer and backing sheets overlay the plywood and allow moisture to drain between the fibre-cement and unsealed plywood, with signs of past moisture penetration through the wall.

6.7 Clause E1: Surface water

6.7.1 Despite sufficient sub-floor ventilation, the expert observed water ponding under the house, resulting in mould on many floor joists and two corroding pile connections.

6.7.2 The expert considered that the sub-floor ponding is likely to result from:

- some sub-floor ground levels at a lower level than the exterior ground
- the high water table of the site
- loose downpipe connections allowing water to spill onto the ground.

6.8 Other relevant code clauses

6.8.1 The expert also assessed the house for compliance with the other relevant clauses of the Building Code. I have included his comments in paragraph 7.

6.9 A copy of the expert's report was provided to the parties on 28 May 2012.

7. Matter 2: The code compliance of the house

7.1 Taking account of the expert's report and the other available evidence, the following addresses the compliance of this house with relevant clauses of the Building Code.

7.2 Clauses B1 and B2: Structure

7.2.1 The house is a fairly simple conventional structure and the inspection summary records satisfactory inspections of garage foundations and floor slab and notes that bracing was passed during pre-line inspections. The timber piles were overseen by an engineer, who provided a statement dated 20 February 2003.

7.2.2 The expert noted no visible signs of structural settlement, movement or other problems apart from two corroding pile connectors identified in paragraph 6.7.1.

7.3 Clause E1: Surface water

7.3.1 The inspection summary indicates satisfactory inspections of drainage, with an as-built drainage plan provided and surface water drainage appeared to be operating in a satisfactory manner.

7.3.2 However, the expert observed ponding within the sub-floor area which will affect the durability of structural connections and some sub-floor timbers. The moisture in the sub-floor space also means that the building does not comply with Clause E2.

7.4 Clauses E2 and B2: Weathertightness of the cladding

7.4.1 Taking into account the defects identified in the expert's report, I am satisfied that the stone cladding installed on this house is not adequate because the construction details used are likely to lead to moisture ingress.

7.4.2 With respect to the remaining plywood cladding, I also consider that areas identified by the expert (refer paragraph 6.6.1) require attention. Because these faults are discrete, I am able to conclude that satisfactory rectification of items outlined in paragraph 6.6.1 will result in the plywood cladding being brought into compliance with Clauses E2 and B2 of the Building Code.

7.4.3 With respect to the stone veneer I consider further detailed investigation is necessary, including an assessment of the associated timber framing, to determine the level of compliance achieved, and the extent of any required remedial work. Such an investigation will require a careful analysis by an appropriately qualified person with the chosen remedial option submitted to the authority for its consideration.

7.4.4 Because the identified faults will allow the ingress of moisture in the future, the building work does not comply with the durability requirements of Clause B2.

7.5 Clause E3 Internal moisture

7.5.1 The expert observed no areas of non-compliance or evidence of interior moisture, noting that showers were fitted with impervious linings and trays and sanitary fittings were sealed to walls. Non-invasive moisture readings in walls adjacent to showers indicated no elevated moisture levels.

7.6 Clause F2 Hazardous building materials

7.6.1 The authority included Clause F2 in its certificate of acceptance (see paragraph 3.7).

7.7 Clause G1 to G8 (Personal hygiene, Laundering, Food preparation, Ventilation, Interior environment, Natural light, Electricity and Artificial light)

7.7.1 The house generally complies with the consent drawings, the interiors were inspected by the building certifier and the drawings show adequate provision to comply with the requirements.

7.7.2 The authority included Clauses G4 and G7 in its certificate of acceptance (see paragraph 3.7) and the expert observed no evidence of non-compliance with the remaining clauses.

7.8 Clause G12 Water Supplies, G13 Foul Water

7.8.1 The inspection summary records satisfactory inspections of pre-pour drainage and pre-line plumbing, together with a final plumbing inspection which passed, with an as-built drainage plan provided.

7.8.2 The expert noted that water pressure and delivery of town supply water appeared normal and sanitary fittings appeared to be functioning properly. He also noted that gulley trap heights and positions were satisfactory, and appeared to be draining freely with no sign of overflow or other problems.

7.9 Clause H1 Energy Efficiency

7.9.1 The building certifier's inspection summary indicates that satisfactory pre-line inspections were undertaken. The expert observed fibreglass insulation in the roof space and perforated foil draped over the subfloor joists. The expert also removed an aerial faceplate and observed wall insulation.

7.10 Conclusion

7.10.1 Taking account of the above observations and the expert's report, I conclude that remedial work, investigation and/or maintenance is necessary in respect of the following areas:

- the corroding pile connections to the sub-floor framing (Clauses B1 and B2)
- in regard to Clause E1:
  - the sub-floor ground levels, with ponding apparent
  - the loose downpipe connections

- in regard to Clause E2:
  - inadequate fixings to plywood, with some bowing and gaps apparent
  - lack of sealing to some areas and edges to plywood sheets
  - inadequate clearances from plywood to paving beside garage doors
  - inadequate clearances from upper plywood to the horizontal flashing
  - inadequate weatherproofing of some plywood joints
  - inadequate weatherproofing of plywood penetrations and meterbox
  - inadequate weatherproofing of windows and doors, including unfixed plywood, unsealed jambs, unprotected sill plates, unsealed ends to some head flashings and the movement of one window
  - inadequate weatherproofing of the limited wall areas clad in stone veneer
  - the excessive moisture to the sub-floor area.

7.10.2 I consider that the expert's report, the building certifier's inspection records, the certificate of acceptance and the other documentation, allow me to conclude that the remaining building work complies with the Building Code.

7.10.3 I also note the expert's comments in regard to the lack of maintenance and minor deterioration of the plywood cladding. Effective maintenance is important to ensure ongoing compliance with the Building Code and is the responsibility of the building owner. The Ministry 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).

8. The appropriate certificate to be issued

8.1 Having found that the building work 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.

8.2 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.

8.3 In the case of this house, I note that the applicant's agent applied to the authority for a certificate of acceptance based on the advice of a property inspection company. However, the subsequent letter to the authority (see paragraph 3.9) confirmed that the applicant was prepared to arrange the exposure of hidden elements in order to have 'the dwelling signed off'. I therefore consider that the possibility of applying for a code compliance certificate for the building was not adequately considered at that time.

8.4 In this situation, where there are reasonable grounds to conclude that the building work 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.

8.5 I have seen no inspection records for the authority's assessment of the house, nor the justification for the certificate of acceptance to be limited to only three clauses of the Building Code. I consider the establishment of compliance is able to be determined from the building certifier's inspection records, the performance of the exterior envelope over the past 9 years, and the like, as discussed in paragraph 5. The authority had the same evidence in front of it and I consider it was also capable of carrying out a similar assessment as described herein.

9. Matter 2: The durability considerations

9.1 There are concerns regarding the durability, and hence the compliance with the building code, of certain elements of the building taking into consideration the age of the building work completed in 2003.

9.2 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).

9.3 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.

9.4 In this case the delay since the completion of the building work in 2003 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 a code compliance certificate were to be issued effective from today's date. I have not been provided with any evidence that the building certifier did not accept that those elements complied with Clause B2 at a date in 2003.

9.5 It is not disputed, and I am therefore satisfied, that all the building elements in respect of building consent no. 68206, excluding those items that are to be rectified as described in paragraph 7.10.1 of this determination, complied with Clause B2 in May 2003 (refer paragraphs 4.4 and 4.5). The differences in the dates proposed are not significant and I have therefore chosen the more conservative of the two dates (9 May 2003) for inclusion in this determination.

9.6 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.

9.7 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 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 a code compliance certificate for the building work had been issued in 2003.

9.8 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.

10. What is to be done now?

10.1 The authority should issue a notice to fix that requires the applicant to bring the house into compliance with the Building Code, including the investigations and defects identified in paragraph 7.10.1, 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 owner to propose and for the authority to accept or reject.

10.2 I suggest that the parties adopt the following process to meet the requirements of paragraph 10.1. The applicant should respond to the notice to fix with a detailed proposal, 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.

10.3 Once the matters set out in paragraph 7.10.1 have been investigated and rectified to its satisfaction, the authority can issue a code compliance certificate in respect of the amended building consent as outlined in paragraph 9.

11. The decision

11.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the house does not comply with Building Code Clauses B1, B1, E1, and E2, and accordingly I confirm the authority's decision to refuse to issue the code compliance certificate.

11.2 I also determine that:

(a) all the building elements installed in the house, apart from the items that are to be rectified, as described in paragraph 7.10.1, complied with Clause B2 on 9 May 2003.

(b) the building consent 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 9 May 2003 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 7.10.1 of Determination 2012/050.

11.3 Following the modification to the consent, the authority shall, on issue of the code compliance certificate, withdraw the certificate of acceptance issued on 26 September 2011.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 23 July 2012.

John Gardiner
Manager Determinations