



## Determination 2015/025

# Regarding conditions on a building consent for the recladding of a house at 5 Clutha Avenue, Khandallah, Wellington

### 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 and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to the determination are:

- the owners of the house, P Fox, D Hadfield, and E Osborne (together “the applicants”), acting through an agent who is a Licensed Building Practitioner
- Wellington City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

1.3 This determination arises from the decision of the authority to issue a building consent for the recladding of a house subject to certain requirements (refer paragraph 3.7). The applicants consider the authority has placed conditions on the consent that it is not legally entitled to do so; in particular the requirement for a quality assurance plan in respect of ‘timber remediation’ to form part of the consent application and what the applicants considered to be a ‘narrow band of selective experts’ that the authority would accept as being adequately experienced or qualified.

1.4 The matter to be determined<sup>2</sup> is therefore whether the authority was correct in the exercise of its powers of decisions to in respect of the conditions included in the issued building consent.

### 2. The building work

2.1 The building is a three-story house with timber frame construction. It is complex in plan and form, has a number of weathertightness risk features including a number of roof to wall junctions, minimal eaves, and an enclosed deck.

2.2 The existing wall cladding is a monolithic cladding system consisting of 7.5mm plywood substrate with closed cell polystyrene and a plaster system over.

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

<sup>2</sup> Under sections 177(1)(b) and 177(2)(a) of the Act

2.3 The approved alterations include:

- removal of the existing plaster cladding to all external walls, enclosed decks and chimneys; retaining the existing plywood substrate
- addition of a proprietary fibre-cement weatherboard cladding system over new cavity battens to all external walls, enclosed decks and chimneys, with a new building wrap applied to the retained plywood substrate
- removal of existing windows, replacing window reveals and widening to accommodate new cladding
- removal of existing polystyrene collar to chimneys, and replacement with a cap flashing
- removal of a timber facing board to an arched window, with new flashing installed.

### 3. Background

3.1 The applicants applied for the building consent on 12 November 2014. Supporting the application was a letter dated 12 November 2015 (sic) which set out the background to the building work and noted that the house was not leaking but the applicants had chosen to re-clad because of the stigma associated with monolithic cladding.

3.2 The letter went on to note that as an alteration the regulatory test was compliance with section 17 of the Act in respect of Clauses E2.2.3 and B2.3.1 of the Building Code<sup>3</sup>, and section 112 in respect of the following:

B1 Structure: The provision of the new cladding is adding to the general rigidity of the building an improvement on what was there before.

H1 Thermal efficiency: The existing insulation will remain untouched however there will be some improvement in the thermal efficiency of the structure by the virtue of adding the new cladding.

B2 Durability: Nothing we are doing by fitting this new cladding is reducing the durability of the building, it is enhancing it.

3.3 I note here that the specification supplied with the building consent application, other than standard references to moisture content, did not address what steps would be taken should the underlying substrate to the existing cladding show evidence of moisture ingress.

3.4 In an email to the authority, the agent put forward his view that the individuals named by the agent 'have enough experience to meet [the authority's] guidelines', and questioned the authority's approach in that it appeared the authority was applying a default risk position of dealing with the application as though it was for a 'full on leaky home'. The agent requested the authority specifically outline why the level of oversight was being sought and why the experts the agent had put forward were not acceptable to the authority.

3.5 On 22 January 2014 the authority wrote to the agent in regards to the 'assessment of timber remediation expert', noting that the decision the authority had made 'is in accordance with [its] Policies and Processes and remains unchanged.'

3.6 The agent responded to the authority, stating:

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<sup>3</sup> In this determination, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code (First Schedule, Building Regulations 1992).

In light of your response and to meet your requirements I will use a Registered Building Surveyor [name supplied] to get the project underway.

As I don't agree with the [authority's] interpretation or requirement but understand that is the [authority's] firm policy I will apply for a determination on this issue.

- 3.7 On 23 January 2015 the authority issued building consent no. 319649 for the alterations. The building consent stated that it was subject to a condition under section 90, and also referred to an "Addendum to the Consent" and "Guidance to the Consent". The building consent included a section titled "Quality assurance", noting:

Approval of this building consent is on the basis of the following quality assurance measures being undertaken during construction;

The listed measures included a named registered building surveyor as the chosen 'timber remediation expert' and outlined a process to be followed should timber remediation be required.

- 3.8 Much of the content set out in the "Quality Assurance" section of the building consent was repeated in the addendum Guidance to the Consent under the heading "Potential Timber remediation". The addendum also noted documentation that would have to be submitted before a code compliance certificate could be included, and that list of documentation included 'timber remediation specialist report'.
- 3.9 The application for determination was received on 3 March 2015.

## 4. The submissions

- 4.1 The applicants did not make submission supporting their application, but provided copies of the following documents:
- Some correspondence between the parties.
  - The approved building consent.
  - The quality assurance plan.
  - The covering letter to the building consent application.
  - The construction specification and plans, stamped as approved by the authority.
- 4.2 The authority acknowledged the determination application in a form response received on 18 March 2015. A submission on the matter was received by email on 19 March 2015, in summary:
- The authority recognises that it is not entitled to add conditions to a building consent – the notes added to the building consent addenda, referred to by the applicants as a condition, were added under similar circumstances as those considered in Determination 2012/036<sup>4</sup>.
  - Rather than conditions these were the documentation of an agreement made between the authority and the applicants; it was mutually agreed information that was issued as part of the approved drawings, specifications and supporting documentation.
  - The authority followed its current policy, as required by way of Regulation 6 of the Accreditation of Building Consent Authorities Regulations 2006, which

<sup>4</sup> Determination 2012/036 Regarding the granting of a building consent with a condition requiring a fire resistance rating to be applied to a new window (*Department of Building and Housing*) 11 May 2012.

requires the proposed person/s to be suitably qualified and experienced in the area under consideration.

- 4.3 A draft determination was issued to the parties for comment on 30 March 2015.
- 4.4 The authority responded in a submission dated 1 April 2015. The authority acknowledged that a procedural error had occurred and the section entitled 'quality assurance' was incorrectly included within the building consent. The authority also referred to a statement in the draft determination which had said 'Remediation, if required, could then be addressed by way of an amendment to the consent.' The authority noted that this is the process it previously used, however the authority had found that it caused delays in building work at a time when the building was vulnerable. The authority altered its processes to having an agreement to address remedial works in place prior to the commencement of recladding/overcladding work.
- 4.5 In a response received on 8 April 2015, the applicant accepted the draft in principle, subject to reconsideration of paragraph 5.4.2. The applicant considers that remedial work can be effectively dealt with by the LBP in the course of construction and that work inspected as part of the authority's 'preclad' inspection. The applicant also agreed with the authority's submission that an amendment to a consent to deal with remedial works would cause unnecessary delay during construction.

## 5. Discussion

### 5.1 General

- 5.1.1 The Act states that conditions can be placed on a building consent, but only in relation to those specifically required by the Act under sections 67, 73, 75, 90 and 113.
- 5.1.2 However, it is not uncommon for authorities to include conditions on a building consent as a means to make up for inadequate and deficient documentation provided in support of a building consent application.
- 5.1.3 The onus is on the applicant to provide the appropriate level of information when the consent is lodged to enable the authority to consider compliance with the Building Code and subsequently approve or refuse the consent.
- 5.1.4 In guidance to building consent authorities<sup>5</sup>, the Ministry has previously acknowledged that restricting the use of consent conditions to the ones provided for under the Act does not always work in the 'real world', and suggested that those requirements not provided for under the Act be communicated in a separate section clearly identified as advisory notes.
- 5.1.5 Previous determinations have also discussed the inclusion of conditions in building consents. In Determination 2012/079<sup>6</sup>, in regards to a consent condition requiring specific fire engineering design for roof venting requirements in a warehouse building, I stated:

- 5.4.1 I accept that it is common practice for building consents to be accompanied by notes and conditions. It is my view that this practice is acceptable, provided the conditions are used appropriately to highlight specific areas for

<sup>5</sup> Refer BCA Update April 2010 <http://www.dbh.govt.nz/bca-update-april-2010#aid17>

<sup>6</sup> Determination 2012/079 Regarding the refusal to issue a code compliance certificate in respect of the compliance of the fire safety design for a new retail warehouse building (*Ministry of Business, Innovation and Employment*) 19 December 2012 at paragraph 5.4.1

attention, and are used to clarify aspects of the building work and the processes that relate to it.

5.1.6 In Determination 2014/064<sup>7</sup> I further expanded on this, noting

5.10.10 In my view the wider context of this statement in Determination 2012/079 makes it clear the 'condition' relates to compliance with the Building Code or a Building Consent.

## 5.2 The consent

5.2.1 The authority holds the view that the requirements were not included as a condition on the consent but were documenting information that was mutually agreed between the parties.

5.2.2 In regards to the requirements being considered a condition on the consent; I note here that the requirements were not only included in the consent addenda but were in fact included in the consent itself. The introductory sentence on the Quality Assurance requirements set out in the consent stated

Approval of this building consent is on the basis of the following quality assurance measures being undertaken during construction.

5.2.3 In addition, it is clear from the correspondence between the parties that the applicants did not agree with the requirement but accepted the inclusion only in order that the authority would progress the consent. This is evident in the email from one of the applicants some time on or after 22 January 2015 (refer paragraph 3.6).

5.2.4 Given that the applicants maintained the view that the requirements were unnecessary in terms of establishing compliance of the building work for which the consent was being sought, and that the requirements were also included within the consent, I agree with the applicants in this case that the consent included the requirements set out under 'Quality Assurance' as conditions of the consent.

## 5.3 The consent conditions

5.3.1 In this case the consent condition relates to the possibility of the underlying substrate or timber framing requiring remediation. I note here that as the building work is an alteration, under section 112 remediation of the existing building elements cannot be required unless under particular circumstances. Those circumstances would be if the damage to the underlying structure is such that the new building work would not comply with the requirements of the Building Code or the damage is such that the building has become dangerous or insanitary as defined in the Act. However *if* there has been moisture ingress I suggest it would be prudent to address any effects of that moisture ingress on the existing building elements and that the recladding work presents an opportunity do so.

5.3.2 From the documents supplied to the determination by the applicants it appears there was no weathertightness assessment report to support the statement in the covering letter to the building consent application regarding performance of the existing cladding.

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<sup>7</sup> Determination 2014/064 Regarding the authority's exercise of its powers of decision in requiring a Record of Work for tanking as Restricted Building Work for a building consent at 7 Marsh Way, Kaiwharawhara, Wellington (*Ministry of Business, Innovation and Employment*) 19 December 2014.

- 5.3.3 I acknowledge that in considering the consent application the authority may have concerns regarding the performance of the existing cladding and any damage that may have occurred to the underlying substrate and timber framing as a result of moisture ingress. However, placing conditions on the building consent for recladding is not the appropriate regulatory mechanism to address those concerns.
- 5.3.4 In respect of the building work for which consent was sought and taking into account the application of section 112, any concerns regarding the underlying substrate and structure to which the new cladding was to be fixed should have been addressed by way of a request for further information. Relevant information would include the intended process for investigation of any damage that may have been caused should the removal of existing uncover any evidence of moisture ingress.
- 5.3.5 In submissions to the draft determination, the authority and applicant have requested I consider the appropriate steps to be taken should the underlying substrate or framing require remediation. The draft determination stated “remediation, if required, could then be addressed by way of an amendment to the consent.” However, I agree that whether an amendment to the consent is required will depend on the circumstances in each case. Where the consent application has addressed the possibility of remediation being required, such as in the Quality Assurance agreement in this case, the provision of as-built drawings along with the authority’s site inspection notes will be sufficient. However, in circumstances where remediation was not addressed in the building consent application an amendment to the consent may be required. Regardless, it is important that the extent of the remedial work undertaken that was outside the consent application is recorded on the property file.

#### **5.4 The authority’s requirements for an ‘timber remediation expert’**

- 5.4.1 Included in the consent conditions was the requirement for a ‘timber remediation expert’. I note here that until an assessment is made of the performance of the existing cladding, whether through a weathertightness assessment or when the existing cladding is removed, there is nothing to establish whether someone with appropriate experience in this field is required.
- 5.4.2 I also hold the view, if timber remediation is required, that it is for the applicants to put forward the details of those proposed to carry out or supervise such work and for the authority to then make an assessment. However, should the authority form the view that the proposed person/s are not suitably experienced or qualified, the authority should clearly communicate its reasons to the applicants.
- 5.4.3 The applicant has submitted that in the normal course of an alteration it is not uncommon to address some timber replacement and that it can be dealt with by an LBP as a simple replacement. I note that the competency level of the person undertaking that work will depend in part on the extent of remedial work required, and that the LBP should have the appropriate competency level for the relevant building category.

#### **5.5 Conclusion**

- 5.5.1 In conclusion, I consider that the authority incorrectly exercised its powers of decision in issuing the consent including the condition under the title “Quality Assurance”, and that this should be removed from the consent. The issue of timber remediation, should such remediation be required, is more appropriately addressed in advisory notes to the consent.

## **6. The decision**

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority was incorrect in the exercise of its powers of decisions to in respect of the conditions included in the issued building consent: accordingly the consent is hereby modified by removal of the section titled “Quality Assurance”

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 29 May 2015.

John Gardiner  
**Manager Determinations and Assurance**