



## Determination 2016/015

# Regarding the refusal to issue a certificate of acceptance for remedial work to the membrane roof and parapets of a house at 7 Paua Lane, Warkworth.

### Summary

This determination considers the authority's decision to refuse to issue a certificate of acceptance for remedial work to a membrane roof and parapets. The determination reviews the reasons given for the refusal and discusses the lack of inspections, the information that was before the authority at the time of its decision, and whether the building work was exempt from the requirement to obtain a building consent.

## 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 current 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 building owner, J Morrow (“the applicant”)
  - Auckland Council, including in its previous capacity as Rodney District Council, (“the authority”)<sup>2</sup>, carrying out its duties and functions as a territorial authority or a building consent authority
- 1.3 This determination arises from the decision of the authority to refuse to issue a certificate of acceptance for remedial building work that had been done without building consent first being obtained.
- 1.4 The matter to be determined<sup>3</sup> therefore is the authority's exercise of its powers of decision in refusing to issue a certificate of acceptance. In making this decision I must consider whether there was sufficient information for the authority to be satisfied, to the best of its knowledge and belief and on reasonable grounds, that, insofar as it could ascertain, the building work complied with the relevant clauses<sup>4</sup> of the Building Code (First Schedule, Building Regulations 1992).

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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> The building consent and code compliance certificate were issued by Rodney District Council, which was later transitioned into the Auckland Council. The term “the authority” is used for both

<sup>3</sup> Under sections 177(1)(b) and 177(2)(b) of the current Act

<sup>4</sup> In this determination, unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

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

1.6 The relevant sections of the Act are set out in Appendix A.

### 1.7 **Matters outside this determination**

1.7.1 This determination considers the application for a certificate of acceptance at the time the authority made its decision on 19 September 2013. After a draft of this determination was issued to the parties for comment, the applicant requested the determination application be suspended while further investigation was carried out, and a new application for a certificate of acceptance was made in November 2015. The authority has yet to exercise its powers of decision in respect of the new application and this determination does not consider that application further.

## 2. **The building work**

2.1 The site is located 110 meters from Omaha beach. The site is in a high wind zone and sea spray zone for the purposes of NZS 3604.<sup>5</sup>

2.2 The two-storey building has concrete foundations, a ground floor slab and tilt slab walls at ground level with single storey lightweight timber frame, intermediate floor and roof above. The cladding consists of vertical shiplap weatherboards and the joinery throughout is aluminium.

2.3 The original roof was constructed with a flat low pitch and a membrane roof covering. The perimeter of the roof ends at a low parapet that runs around the entire roof.

2.4 The subject of this determination is alterations that were carried out to the roof. The alterations involved applying a reinforced bituminous membrane over a new base fixed over the strengthening battens at the east end of the roof. A new zinc parapet cap flashing was fixed at the whole roof perimeter.

2.5 Given the date of construction, the use of untreated kiln dried framing was both widespread and permitted under NZS 3602, and the safest assumption in the absence of records is that the roof framing is unlikely to be treated with a preservative.

## 3. **Background**

3.1 The house was originally constructed in 2002-2003 under a building consent issued under the Building Act 1991 (“the former Act”) and a code compliance certificate was issued by the authority in 2003.

3.2 It appears there were issues with the weathertightness of the house from 2004 and the first repairs to the parapet cap flashing and the roof over one of the bedrooms were carried out. There is no information provided about whether this building work was completed with a building consent or not.

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<sup>5</sup> New Zealand Standard NZS 3604:1999 Timber Framed Buildings

- 3.3 A claim was then made to the Weathertight Homes Resolution Service (WHRS). A report was prepared 2005 and a further report in 2007 by a WHRS assessor, and the claim was settled by mediation in November 2008. From 2009-2012 further repair work was carried out by the applicant to the roof.
- 3.4 At some date in 2013 the applicant applied for a certificate of acceptance for the following building work, in summary:
- upstand height increased to +150mm
  - existing flashing systems replaced with pure zinc capping
  - stiffening of the substrate and fibreglass membrane laid
  - new membrane re-laid and repainted to stop bubbling
  - re-sealing of decks
  - all doors resealed and re-gasketed
  - weatherboards checked and watertight- painted for protection.
- 3.5 On 3 July 2013 the authority undertook an inspection of the building works to determine whether a certificate of acceptance could be issued. The file note from the authority notes the following observations:
- there is some cracking to the coating system applied over the membrane
  - the authority had **not** been able to sight the roof structure or plywood which is under the failed membrane.
- 3.6 On 19 September 2013 the authority wrote to the applicant formally advising under section 99A that they could not issue a certificate of acceptance for the roofing work:
- Following the site inspection and subsequent 'peer review' process, [the authority] could not be 'satisfied on reasonable grounds' that building works comply with the NZ Building Code, or that is its performing as intended.
- The areas for concern:
- The authority did not inspect the substrate or the framed parapets when the remedial work was being undertaken.
- As indicated on several occasions' a territorial authority may issue a certificate of acceptance only if it is satisfied, to the best of its knowledge and belief and on reasonable grounds, that, insofar as it could ascertain, the building work complies with the building code.
- 3.7 An application for determination was received by the Ministry on 9 January 2014.

## 4. The submissions

- 4.1 The applicant submitted that the work done on the premises was done without consent as there were no changes made to the original building, and that the work consisted of remediation to the existing structure.

4.2 The applicant states the reason the building work was required was because ...the leaking was causing internal damage to the rooms of the home due to flashings being nailed directly to the [bituminous membrane] roof hence repair of the flashings and replacement of the damage internal linings required immediately.

4.3 The applicant forwarded copies of:

- various quotations and warranties for products and guarantees
- various statements regarding maintaining products
- brief of evidence from the WHRS assessor
- mediation settlement agreement for the WHRS claim
- copies of some correspondence with the authority
- various photographs of the completed building work

4.4 The authority acknowledged the application for determination but made no submission in response.

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

5.1 As described in paragraph 1.5 I engaged the services of an expert, who is a member of the New Zealand Institute of Building Surveyors, to assist me. The expert examined the house on 20 January 2014 and produced a report completed on 20 February 2014; copies were forwarded to the parties on the same day.

5.2 With respect to the subject building work carried out to the roof, the expert observed that the new membrane and zinc capping appear to be constructed to a high standard, with no evidence of deterioration to the membrane and the zinc parapet flashing capping neatly constructed and installed.

5.3 However, the expert made the following observations:

- It is accepted that the parapet membrane was perforated and the roof leaked, therefore there is a risk of fungal infection or decay in the framing below, but there is no record of inspection by a timber decay specialist of laboratory analysis of framing samples during the repairs. Moisture from previous leaks may be trapped and have continued to cause decay or infection for some time after the repairs.
- There is insufficient information to show the adequacy of the framing where the upstand was raised.
- The zinc capping is fixed to unknown construction used to raise the parapet.
- There is insufficient detail to show whether the stiffeners were installed to the layout of the engineering plans as they are now overlaid with ply and roof membrane.
- There are no drawings, specifications or invoices covering the framing repairs and new ply substrate.

- The membrane was installed 75mm lap, being marginally less than the manufacturer's stated minimum of 80mm. The durability of the chimney detail may be reduced by the limited movement between the roof and chimney, and the membrane is fixed to an unknown substrate.
- The flue penetration detail lacked a top "bandage" and lacked a fillet at the base which is not in accordance with the manufacturer's specifications.

5.4 The expert noted it was his view that some of the building work that was carried out cannot be included in a certificate of acceptance because it is exempt from the requirement to obtain building consent under Schedule 1 of the current Act. The building work the expert considers exempt:

- all doors re-sealed and re-gasketed
- weatherboards painted for protection
- membrane re-painted.

5.5 The expert was of the view the condition of the substrate and framing could be assessed by destructive testing and laboratory analysis and, if they can be found, submission of invoices for materials used. The outcome of this may present sufficient information to enable the authority to conclude that the roof and parapet repairs comply with the requirements of the Building Code.

## 6. The draft determination and submissions

6.1 A draft determination was issued to the parties for comment on 27 February 2014. The draft concluded that the authority correctly exercised its powers of decision in refusing to issue the certificate of acceptance as it had insufficient information to be satisfied on reasonable grounds that the building work complied with the Building Code. The determination noted that establishing the condition of the framing and substrate may be sufficient for the authority to ascertain compliance with the Building Code.

6.2 In an email on 7 March 2014, the applicant noted that the intention in applying for the determination was 'only report should it be likely that a certificate would likely [be] issued and/or that there were no outstanding (*sic*) issues' and that he considered the outcome set out in the draft determination was effectively "rubber stamping" the prior decision made by the authority. The applicant requested that the determination not be progressed to a final decision, and noted he intended to re-assess his options. Given the applicant's request the determination was suspended.

6.3 On 19 May 2014 I sought confirmation from the applicant whether he wished the determination process to be completed. The applicant responded on 28 May 2014, noting that 'further evidence around completin (*sic*) of works' was being gathered.

6.4 On 7 July 2014 the applicant provided a report from a building surveyor on the condition of the substrate and framing ("the building surveyor's report"). As the report had not been provided to the authority, I forwarded a copy to it. No further correspondence was received from the parties.

- 6.5 On 18 November 2014 I wrote to the applicant to seek clarification on whether he wished the determination application to remain suspended pending confirmation from the authority that it was going to issue the certificate of acceptance, or whether the application was to continue being processed with the building surveyor's report taken into account as additional information. To assist the parties I suggested the authority advise the applicant of whether it would issue a certificate of acceptance, and that if the authority indicated it would refuse to issue the certificate the determination application could be continued.
- 6.6 On 27 November 2014 the authority confirmed that it would not be prepared to issue a certificate of acceptance based on the building surveyor's report; it considered the report was insufficient in that it did not comment on structural issues, refers to only four tested locations, and did not address the chimney penetration. The authority also noted that of the four locations tested three identified fungal growth and two did not identify any timber treatment.
- 6.7 On 9 March 2015 I again sought confirmation from the applicant whether the determination application was to be closed, remain suspended, or issued taking into account the information received to date. On 24 March 2015 the applicant requested the determination application remain suspended, noting that matters were 'being dealt with in accordance with the all instructions and advice' of the building surveyor.
- 6.8 On 12 October 2015 I wrote to the applicant with a proposal to close the determination application. In an email response on 14 October 2015 the applicant noted that in his view all of the authority's requests had been satisfied and it was the applicant's understanding that a certificate of acceptance was going to be issued. The applicant attached an addendum report dated August 2015 from the building surveyor on the flue penetration, confirmation of structural adequacy, and testing of the substrate roof.
- 6.9 On 23 October 2015 the applicant confirmed he wished to have the determination application remain suspended, and from attached correspondence it was evident that the parties were working to resolve the outstanding matters.
- 6.10 By email on 10 November 2015 the applicant requested the determination application proceed and submitted that all of the issues raised in the expert's report (refer paragraph 5.3) had been addressed. The applicant provided a copy of a new application for a certificate of acceptance dated 10 November 2015 and documentation in support of that application.
- 6.11 On 13 November 2015 I clarified with the authority that it was for the authority to make a new decision whether or not to issue the certificate of acceptance after taking into account the new information provided by the applicant.
- 6.12 The authority responded on 17 November 2015, referring back to the conclusion presented in the draft determination (see paragraph 6.1) and stating that the authority accepted the information provided by the applicant regarding the framing and substrate for the purpose of establishing code compliance 'provided reliance pursuant to section 19(1)(c) ... can be placed upon a finalised Determination which is

substantively reflective of the draft'. The authority had advised the applicant that the issue would be resolved after the determination being made and also advised the applicant to provide to the determination for review copies of the information supplied to the authority.

- 6.13 On 13 December 2015 the applicant advised that at a meeting on 5 November the authority had 'expressed confidence in all the works completed post the information that [the applicant] filed ... and thought that a [certificate of acceptance] could be achievable...'
- 6.14 On 2 February 2016 I wrote to the parties, noting that the parties appeared to have resolved the outstanding issues; the determination on the original matters could either be issued, or the applicant could request it be withdrawn.
- 6.15 In response, the applicant forwarded correspondence between the parties dated 6 January 2016, when the applicant sought confirmation of progress and to which the authority responded that it 'cannot make any progress until such time as the Determination is issued because of the reliance [the authority] intends to place on it.'
- 6.16 In an email on 17 February 2016 to the applicant, the authority confirmed that '[the authority] would only be able to issue a CCC in reliance on a Determination. It does not consider the statutory threshold for issue of a CCC can otherwise be satisfied.'
- 6.17 On 9 March 2016 I issued a final draft determination to the parties for comment, which included the discussion below regarding the status of this determination. Despite a reminder on 6 April 2016, no further comment was received from either party in response to the draft.

## 6.18 **The status of this determination**

- 6.18.1 I note here that the fact the determination was placed on hold for an extended period of time has meant that circumstances have moved on from when the application was made and the determination drafted. However, the matter for determination remains the authority's exercise of its powers of decision on 19 September 2013 in refusing to issue the certificate of acceptance.
- 6.18.2 In correspondence regarding making a new decision based on the new information put forward by the applicant, the authority has made reference to section 19(1)(c). Section 19 provides:
- (1) A building consent authority must accept any or all of the following as establishing compliance with the building code:
- ...
- (c) a determination to that effect made by the chief executive under subpart 1 of Part 3:
- 6.18.3 In this case the determination application was not made in respect of compliance (section 177(1)(a)), but rather in respect of the authority's exercise of its powers of decision. While some guidance was offered to the parties as a means to assist the applicant in resolving the issue, no determination was made on the compliance of the building work; that being the case the authority cannot "accept [the determination] as

establishing compliance with the building code” under section 19(1)(c). In order for the certificate of acceptance to be issued the authority must still exercise its powers of decision under section 96(2).

- 6.18.4 It is important to note that the exercise of an authority’s powers, in this case under section 96(2), should not be limited in terms of it considering only those issues highlighted in the summary of an expert’s report set out in a determination. Where a technical report is provided for a determination it is for a different purpose, being the provision of evidence or opinion to assist in my decision making. That evidence or opinion may corroborate or contradict an earlier decision made by the authority. A technical report by an expert engaged by the Ministry for a determination is not required to provide an exhaustive list of defects to be remedied or information to be provided in order for an owner to address non-compliance and the authority to exercise its powers, nor should it be relied on in this manner. It is important for authorities and owners to be aware of this distinction.
- 6.18.5 In addition the authority has stated that it does not consider the statutory threshold for issuing a “CCC” can be satisfied. I note that in this case it is not a code compliance certificate that is being applied for, but rather a certificate of acceptance. The statutory threshold for issuing a certificate of acceptance is set out in section 96(2) (refer also paragraphs 7.1.2 and 7.1.3 below). I note also that should the authority refuse to issue the certificate of acceptance, under section 99A it must give written notice of the refusal and provide reasons.

## 7. Discussion

### 7.1 The refusal to issue a certificate of acceptance

- 7.1.1 Section 40 of the current Act states that building work must not be carried out except in accordance with a building consent, and section 96(1)(a) provides for the issue of a certificate of acceptance where an owner has carried out building work without obtaining a building consent.
- 7.1.2 In this situation an authority may, on application, issue a certificate of acceptance ‘if it is satisfied, to the best of its knowledge and belief and on reasonable grounds, that, insofar as it could ascertain, the building work complies with the building code’.
- 7.1.3 This requires an authority to consider all the available evidence such as plans, and specifications, producer statements, the builder’s records, the owner’s records and any expert reports, and the authority’s own experience and knowledge of the builders and designers involved in the work in order to ascertain whether the building work complies with the Building Code. The authority must conduct a detailed assessment of the information submitted to support an application for a certificate of acceptance and if appropriate conduct a site inspection to determine “insofar as it could ascertain” compliance of the building work.<sup>6</sup>

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<sup>6</sup> See for example 2011/043 The refusal to issue a certificate of acceptance for a retaining wall to a driveway at 570 Wyuna Bay Road, Coromandel (*Department of Building and Housing*) 13 May 2011



7.1.4 Under section 97 of the Act with respect to an application for a certificate of acceptance, it is the applicant who must provide sufficient information to the authority to establish the level of compliance achieved.

## 7.2 **The compliance of the building work**

7.2.1 The authority's reason for declining to issue a certificate of acceptance was the lack of opportunity to inspect the membrane substrate, or raised parapet framing. I note here that an application for a certificate of acceptance is almost always in respect of building work that an authority has not had the opportunity to inspect.

7.2.2 The expert did not find out any new information, records, record drawings, photographs, invoices or other information as to what new ply and parapet framing materials were used or the condition of the existing framing.

7.2.3 The expert found that the membrane and capping were mostly installed well, with the exception of issues summarised in paragraph 5.3. The expert also considered that the condition of the substrate and framing could be assessed by cutting samples of the framing at agreed locations and sending them for laboratory analysis of bio-deterioration and preservatives treatment, and submission of invoices for the ply and framing timber used.

7.2.4 I conclude that, at the time the authority refused to issue the certificate of acceptance in 2013, there was insufficient information on the elements of the building work that could not be inspected and a lack of supporting information, and therefore no reasonable grounds to ascertain compliance with the Building Code.

7.2.5 In the draft determination I agreed with the expert that if the condition of the framing and substrate could be assessed it may be sufficient to ascertain compliance with the Building Code. I note that the applicant has taken further action in this regard and has provided the authority with more information. It is now for the authority to make a new decision under section 96(2).

## 7.3 **Exempt building work**

7.3.1 The applicant raised in his submission that a building consent was not required to be obtained as leaking was causing internal damage to the rooms within the home due to flashings being nailed directly into the membrane; hence repair of the flashings and replacement of the damage internal linings needed to be carried out immediately.

7.3.2 Section 41 (1)(c)(i) states that a building consent is not required in relation to any building work in respect of which a building consent cannot practicably be obtained in advance because the building work has to be carried out urgently for the purpose of saving or protecting life or health or preventing serious damage to property.

7.3.3 The repairs were not carried until over five years after the leaks were identified and cannot reasonably be considered to have been carried out urgently. I do not agree that this falls under the exception under section 41.

7.3.4 I agree with the expert's observations that some of the building work listed in the original application for a certificate of acceptance as described in paragraph 5.4, are maintenance work and therefore cannot be included in a certificate of acceptance under section 96(1)(a)(ii) as they are exempt under Schedule 1(a).

## **8. Decision**

8.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority correctly exercised its powers of decision on 19 September 2013 in refusing to issue the certificate of acceptance for the building work, as there was insufficient evidence to be satisfied to the best of its knowledge and belief and on reasonable grounds, that the building work complied with the Building Code.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 20 April 2016.

John Gardiner  
**Manager Determinations and Assurance**

## Appendix A

### A.1 The relevant sections of the Building Act 2004

#### **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.

#### **40 Buildings not to be constructed, altered, demolished, or removed without consent**

- (1) A person must not carry out any building work except in accordance with a building consent.

...

#### **41 Building consent not required in certain cases**

- (1) Despite section 40, a building consent is not required in relation to—

...

- (b) any building work described in Schedule 1; or
- (c) any building work in respect of which a building consent cannot practicably be obtained in advance because the building work has to be carried out urgently –
  - (i) for the purposes of saving or protecting life or health or preventing serious damage to property

#### **96 Territorial authority may issue certificate of acceptance in certain circumstances**

- (1) A territorial authority may, on application, issue a certificate of acceptance for building work already done—

- (a) if—

- (i) the work was done by the owner or any predecessor in title of the owner; and
- (ii) a building consent was required for the work but not obtained; or

...

#### **99 Issue of certificate of acceptance**

...

- (2) A certificate of acceptance may, if a territorial authority inspected the building work, be qualified to the effect that only parts of the building work were able to be inspected.
- (3) A territorial authority's liability for the issue of a certificate of acceptance is limited to the same extent that the territorial authority was able to inspect the building work in question.

#### **99A Refusal of application for certificate of acceptance**

If a territorial authority refuses to grant an application for a certificate of acceptance, the territorial authority must give the applicant written notice of—

- (a) the refusal; and
- (b) the reasons for the refusal