

Determination 2007/128

Dispute about a notice to fix and a certificate of acceptance in respect of a house at 133 Victory Road, Laingholm, Auckland (to be read in conjunction with determination 2006/116)

Applicant:	Ms J Cowan (“the applicant”)
Territorial authority:	Waitakere City Council (“the territorial authority”)
Site Address:	133 Victory Road, Laingholm, Auckland

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004 (“the Act”) made under due authorisation by me, John Gardiner, Determinations Manager, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department. The application for determination arises because:
- the territorial authority has issued a notice to fix to which the applicant objects on the grounds of its content
 - the territorial authority has issued a certificate of acceptance to which the applicant objects on the grounds of its scope.
- 1.2 Certain building matters were described in Determination 2006/116 (“the first determination”) issued on 30 November 2006, concerning the same house. In making the first determination I considered whether the cladding complied with the Building Code and whether a building consent was required for work to re-clad the house. The first determination is discussed in paragraphs 2.1 to 2.4.
- 1.3 As phrased by the applicant, the matters to be determined in this second determination are whether:

- the new cladding that has been completed to date, and the building work carried out to swap the bedroom and bathroom from their previous locations, complies with the Building Code
- the territorial authority should have issued a certificate of acceptance for the building work described above (ie the cladding and the bedroom/bathroom swap), which was carried out without a building consent
- the notice to fix dated 8 February 2007, issued by the territorial authority, is incorrect because it covers items that have had no work done on them and items that have nothing to do with the building work for which the applicant sought a certificate of acceptance.

1.4 In terms of section 177 of the Act I conclude, after taking account of paragraph 1.3 above that the matters to be determined are whether I am satisfied that:

- 1) the new cladding complies with the Building Code. I note that the first determination found that cladding did not comply with the Building Code but only in respect of Clause B2.
- 2) the building work associated with the swapping of the bedroom and bathroom complies with the Building Code
- 3) the territorial authority was correct in refusing to issue a certificate of acceptance for the cladding and the building work associated with the bedroom/bathroom swap to date, all being work carried out without a building consent
- 4) the territorial authority has included in the notice to fix only those items appropriate for such a notice.

2. Background

2.1 The Department issued the first determination on 30 November 2006. Section 11 of that determination contained my decision.

2.2 In paragraph 11.1, I said:

The cladding does not comply with clause B2 of the Building Code, and accordingly confirm the territorial authority's concerns regarding its compliance

The question of whether a building consent is required for the re-cladding of the building is not a matter that can be the subject of a determination by the Department.

2.3 In paragraph 11.3, I said:

A new notice to fix should be issued that requires the owners to bring the building into compliance with the building code, identifying the defects listed in paragraph 6.4 above and referring to any further defects that might be discovered in the course of rectification, but not specifying how those defects are to be rectified. That is a matter for the applicant

to propose and for the territorial authority to accept or reject, with any disputes being submitted to the Chief Executive for a further determination.

2.4 In paragraph 11.6, I said:

As the original building was subject to a permit prior to the introduction of the Building Act 1991, a code compliance certificate should not be issued for this building work. However, I am of the opinion that, once the territorial authority accepts on reasonable grounds that the recladding and associated rectification work that is completed to date, complies with the Building Code, the applicant should then apply for a certificate of acceptance in accordance with section 96 of the Act. This is an option open to an owner when a building consent has not been obtained for building work for which a building consent was required. If the territorial authority is satisfied, after carrying out such inspections or other enquiries as it considers appropriate, that all the remedial work is code compliant, then it should issue such a certificate.

2.5 On or about 22 November 2006 the applicant requested a certificate of acceptance from the territorial authority. I note that this request was made 8 days prior to the issue of the first determination.

2.6 On 11 December 2006 the territorial authority inspected the house. According to the territorial authority's submission, dated 16 May 2007, the inspection was carried out for the purposes of determining what items of the building work would be included in the scope of the certificate of acceptance and for the purposes of issuing a new notice to fix.

2.7 On 8 February 2007 the territorial authority issued a notice to fix. The notice to fix listed 22 items as particulars of contravention.

2.8 On 8 February 2007 the territorial authority also issued a certificate of acceptance in response to a request from the applicant. Attached to the certificate was a "certificate of acceptance report" which indicated that the house had been inspected by the territorial authority's Team Manager-Building Consents and Team Leader Construction Review on 11 December 2006. The certificate of acceptance recorded that only four items were covered by the certificate, these were:

Lounge/Family

- New piles and posts supporting new laminated beam.

Bathroom

- Framing to new wall between bathroom and bedroom 2 and new framing adjacent to bathroom door.
- Piping out to shower/bath/vanity/WC.

Bedroom 2

- New piles and posts supporting new laminated beams.

I note that the certificate of acceptance issued by the territorial authority included in its scope all the structural work carried out during the repair of the above four items. From that I deduce that the territorial authority 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 requirements of clause B1 (structure) of the Building Code.

2.9 The Department received an application for a determination on 7 March 2007.

3. The submissions

3.1 The applicant provided a submission in the form of a letter received on 7 March 2007. Enclosed with the letter were copies of:

- the applicant's letter to the territorial authority, dated 5 March 2007, advising it of the application for a determination
- the notice to fix, dated 8 February 2007, annotated by the applicant
- the Certificate of Acceptance Report, dated 8 February 2007, annotated by the applicant
- the certificate of acceptance, dated 8 February 2007, annotated by the applicant
- the letter from the territorial authority to the applicant, dated 8 February 2007, that accompanied those documents.

3.2 In a letter to the applicant, dated 8 February 2007, the territorial authority included a "*list of building work that was not visible and could not be assessed, therefore . . . will not be covered by the [certificate of acceptance].*"

3.3 The applicant challenged the list of items and annotated a copy of the letter and the accompanying documents, as described in paragraph 3.1 above. The annotations noted:

- the deck framing adjacent to the Lounge/Family room was not exposed by the building work, plywood was fixed over the existing deck and fibreglass applied
- the kitchen windows were removed, flashed and refitted from the exterior so the wall framing never had to be exposed
- the dining-room walls were not touched and still have their original plasterboard internal lining in place
- there is no deck framing related to the dining-room because there is no deck off the dining-room
- the framing of two walls and the ceiling is visible in the bathroom
- in bedroom 2 all the wall and ceiling framing is visible
- in the bedroom/study no framing is exposed. A small strip of plaster ceiling, close to the window, was replaced

- the window to the internal stairway was removed, flashed and refitted without removing the internal plasterboard lining or altering the wall or ceiling framing
- in the upstairs lounge the repaired wall framing is still exposed to view
- in the main bedroom the ceiling was not subject to repair and only the external walls were repaired and reclad
- in the ensuite only the external wall was repaired and reclad
- the deck framing including balustrades is “as-built” – ply has been placed over the existing and fibreglass applied
- the stormwater drainage installed adjacent to the garage was existing.

3.4 In a letter to the Department, dated 16 May 2007, the territorial authority advised that the applicant did not send it copies of the annotated letter and documents, referred to in the above paragraph.

3.5 The applicant also made annotations (which the territorial authority had not seen) on the territorial authority’s Certificate of Acceptance Report (“the report”). Contrary to the report’s findings, the annotations noted:

Of the items that could be seen and assessed

- in the lounge/family room the plans show that the laminated beam is not new

Of the items that could not be seen and assessed

- the kitchen wall framing is not exposed – it is as built
- there is no deck framing off the kitchen
- no plasterboard was removed in the dining room – no repair required
- there is no deck associated with the dining room which is an interior room
- the external wall framing is exposed in the bathroom, as is almost all the ceiling framing
- in the bedroom/study the only repair has been to a small strip of ceiling
- in the internal stairway the window was removed and replaced - the remainder is existing and was not repaired
- in the upstairs lounge the ceiling and internal walls are existing - all repaired wall framing is visible
- in the main bedroom the framing of ceiling and internal walls is all existing
- in the ensuite all walls and ceiling are existing

- at the deck, all framing is as built and existing, and the balustrades have been reclad with 12mm treated ply over existing
 - the stormwater drainage close to the garage is existing, as the plans show.
- 3.6 The first draft determination was issued to the parties for comment on 24 April 2007.
- 3.7 The applicant accepted the first draft on 9 May 2007 subject only to some non-contentious comments.
- 3.8 The territorial authority responded to the first draft on 16 May 2007. The territorial authority did not accept the first draft and submitted that the applicant's request for a certificate of acceptance on 22 November 2006 was made before the first determination had been issued on 30 November 2006. Consequently the territorial authority received the application for a certificate of acceptance before it had had the opportunity to issue a new notice to fix in accordance with the findings of the first determination. The territorial authority's submission also sought amendment to some wording in the first draft determination.
- 3.9 I considered the parties submissions and amended the first draft determination as appropriate. The second draft determination was issued to the parties for comment on 21 May 2007.
- 3.10 The territorial authority responded to the second draft determination in an email to the Department dated 8 August 2007. In its submission the territorial authority clarified its responses to the previous draft determinations and raised concerns about the existing and proposed notices to fix. The territorial authority wished to record that it still has concerns regarding:
- the future performance of the cladding
 - the sheet bracing
 - the shower cubicle.
- 3.11 The applicant responded to the second draft determination, and to the territorial authority's submission described in paragraph 3.10, in a letter to the Department dated 23 July 2007. The applicant submitted that the second draft was accurate and concern was expressed at the lack of progress in finalising the matter. The applicant also submitted that:
- the vertical joints in the plywood linings as constructed did allow for cladding movement and that the placing of battens over the joints would "detract from the aesthetics of the ply sheeting"
 - the deck membrane is dressed into the new flanged outlets
 - fillets were fitted to the intersections of the floor/balustrade and deck/wall junctions prior to the application of the membrane.

- 3.12 The applicant wrote to the Department on 23 August 2007, disputing the territorial authority's assertion that the building was "*never given a final sign off*". The applicant noted, that prior to purchasing the house, she had received a letter from the territorial authority that stated that all works were finalised by 17 January 1997. Following receipt of this letter, the applicant continued with the house purchase relying on the fact that the house had been "*finalled*".
- 3.13 I considered the parties submissions and amended the second draft determination as appropriate. The third draft determination was issued to the parties for comment on 18 September 2007.
- 3.14 The applicant requested a hearing which was held on 18 October 2007. With the agreement of the parties, the hearing was convened at the applicant's house. In attendance were the applicant and her adviser, two representatives of the territorial authority, two officials from the Department, and a referee appointed by the Chief Executive under section 187 of the Act. The determination takes account of the submissions made by the parties at that hearing.

4. Discussion

- 4.1 The original house was constructed under a building permit issued prior to the enactment of the Building Act 1991 (the former Act) and the building work must be deemed to have been completed to the satisfaction of the territorial authority at the time. Section 8 of the former Act deals with building work completed or commenced prior to July 1992. Section 8 gave the territorial authority only limited powers (for example, if the building was dangerous or insanitary) to inspect work carried out prior to the former Act coming into force. In the following discussion all references to a certificate of acceptance, a code compliance certificate, or a building consent, all refer to building work carried out, or intended to be carried out under the Act and the former Act. No reference is made to building work completed prior to those enactments.
- 4.2 The alterations carried out on this house would have been subject to the relevant sections of either the Act or the former Act that prescribe requirements for alterations to existing buildings, as below.
- 4.3 Section 38 of former Act says:
- No building consent shall be granted for the alteration of an existing building unless the territorial authority is satisfied that after the alteration the building will
- (a) Comply with the provisions of the building code for means of escape from fire, and for access and facilities for use by people with disabilities (where this is a requirement in terms of section 47A of this Act), as nearly as is reasonably practicable, to the same extent as if it were a new building; and
 - (b) Continue to comply with the other provisions of the building code to at least the same extent as before the alteration.

4.4 Section 112(1) of the Act says:

A building consent authority must not grant a building consent for the alteration of an existing building, or part of an existing building, unless the building consent authority is satisfied that, after the alteration, the building will

- (a) comply, nearly as is reasonably practicable with the provisions of the building code that relate to
 - (i) means of escape from fire; and
 - (ii) access and facilities for persons with disabilities (if this is a requirement in terms of section 118); and
- (b) continue to comply with the other provisions of the building code to at least the same extent as before the alteration.

4.5 With respect to Section 112(1)(a)(ii), I note that the building is a private house, so no provision is required to be made for access and facilities for use by people with disabilities.

4.6 In paragraph 11.6 of the first determination I said that:

“once the territorial authority accepts on reasonable grounds that the recladding and associated rectification work that is completed to date, complies with the Building Code, the applicant should then apply for a certificate of acceptance in accordance with section 96 of the Act.”

4.7 The purpose of a certificate of acceptance, if requested, is to provide a regulatory sign-off for building work that is considered by the territorial authority to comply with the Building Code, but, for whatever reason, was carried out without a building consent.

4.8 On 11 December 2006 an inspection was carried out by the territorial authority but the scope of that inspection appears to have been far wider than “the recladding and associated rectification work completed to date” referred to in paragraph 4.6, and appears to have included aspects of the building that have not been altered or repaired as part of the building work carried out since January 2005. The territorial authority also stated that its inspectors chose to issue one notice to fix that covered both the items covered by the certificate of acceptance, and the items that were considered to be additional to the four items in the certificate of acceptance.

4.9 I observe that a determination made under section 188 of the Act is binding on the parties.

4.10 The notice to fix, dated 8 February 2007, listed the particulars of contravention under individual room headings and under a general heading. Some of the items under individual room headings, such as a requirement for air seals and drainage, were common to most rooms. The territorial authority has advised that the format of the notice to fix follows that of the certificate of acceptance application.

4.11 The table below compares the items listed in paragraph 6.4 of the first determination, which I said needed to be fixed (refer paragraph 2.3), with what I judge to be the corresponding items listed in the notice to fix of 8 February 2007.

Item	Item from Paragraph 6.4 of the first determination	Corresponding item in the notice to fix
a)	There are no vertical control joints and vertical sheet joints are glue sealed with no provision for movement. (I note that the non-mandatory compliance document E2/AS1 shows some ways of constructing joints that do provide for movement).	Provide cavity behind wall cladding or provide expert report demonstrating weathertightness compliance with NZBC E2.
b)	The junction between the horizontal joint flashing and the top cladding sheet is sealed (I note that Fig 121 in the non-mandatory compliance document E2/AS1 shows one acceptable way of constructing this detail). It is in my view important to consider the risk of the plywood becoming wet if there is a failure of the cladding system.	Provide cavity behind wall cladding or provide expert report demonstrating weathertightness compliance with NZBC E2
c)	The exterior joinery unit perimeters are face fixed with aluminium head flashings. There is sealant with a cross-section of 7mm wide by 2mm thick behind the jamb and sill sections. There is no provision for drainage or drying out above the head flashing	Air seals and drainage required to windows
d)	The proposed balcony balustrade details are likely to prove ineffective in preventing moisture penetration	Not mentioned in notice to fix
e)	The height of the balcony balustrade at 700mm is non-compliant. (I note that the applicant has stated that the balcony height has been "signed-off" by the territorial authority. However, it is essential, as a matter of safety, that the balustrade height should be checked for compliance.	Deck barrier (800mm) to be raised to comply.
f)	The 40mm high clearance at the balcony/building floor junction is insufficient	Insufficient clearance between deck and floor level
g)	There is insufficient clearance between the base of the cladding and the sill of the Ranchslider doors	Not mentioned in notice to fix
h)	There is a risk of cracking where the main roof membrane is applied over the edge of the cladding.	Not mentioned in notice to fix
i)	The balcony deck membrane is dressed directly into the downpipes and no flanged outlets are provided. (I note the applicant has asserted that in fact flanged outlets are provided.	Not mentioned in notice to fix

4.12 Following the hearing, and taking account of the evidence presented there, I conclude that the new notice to fix (see paragraph 6.1) should require a response to each of the items listed above (a to i) as follows:

- a & b) The owner should provide details in the form of drawings, specifications and other documentation to show clearly how the vertical joints, including those joints intended to work as control joints, are constructed, and how they will comply with clauses E2 and B2 of the Building Code. The details should include a statement as to the proposed maintenance regime necessary to maintain that compliance.
- c) The owner should provide details in the form of drawings, specifications and other documentation to show how the window installation, as existing, complies with clauses B2 and E2 of the Building Code, notwithstanding that it does not comply with Fig115 in Acceptable Solution E2/AS1.
- d) The owner to install a suitably-designed water proof capping to the balcony balustrade to protect the timber balustrade and provide a sloped top surface to shed water. The installation must include all necessary apron or other flashings.
- e) Under section 112(1) (b) of the Act the height of the existing balustrade is acceptable from a building regulatory viewpoint and no action to increase the height is required.
- f) As this feature is no less compliant than it was before the alteration, section 112(1) (b) applies and no action is required beyond normal maintenance.
- g) After taking account of the description of the installation of the membrane upstand at the base of the walls and the prepainting of the backs and edges of the cladding sheets I conclude that this item now complies and that no further work is required apart from normal maintenance.
- h) I accept that the roof now complies and no further work is required apart from normal maintenance.
- i) Satisfactory flanged outlets were observed on site. No Action is required beyond normal maintenance.

4.13 In addition, the notice to fix dated 8 February 2007 lists the following items which were not included in paragraph 6.4 of the first determination:

Area	Item No.	Matter of non-compliance
Dining Room	4.	Provide complying light and ventilation (internal room).
Bathroom	5.	Replace brackline behind shower (or demonstrate required bracing can be achieved in remainder of wall.)
	6.	Floor under shower to be made impervious to water.
Deck	15.	Insufficient deck membrane upstand. (150mm required).
	17.	Insufficient deck membrane upstand. (150mm required).

	18.	Fillets required under deck membrane at intersection of the floor and balustrade and the floor and wall
Area	Item No.	Matter of non-compliance
General	20.	Priming required to bottom of Ply Cladding sheets
	21.	Priming required to cut ends of cover boards and unprimed sheet edges.
	22.	Provide complying insulation to all walls & roof cavities.

4.14 At the hearing on 18 October 2007 the territorial authority agreed that items numbered 4, 5, 6, 15, 17, 18, 20, and 22 on the list above should be removed from the notice to fix dated 8 February 2007. The territorial authority said that item 21 should remain and be included in any certificate of acceptance that the owner might request once the work is complete.

5 Conclusion

5.1 Matter 1: Code compliance of the new cladding

5.1.1 The first determination considered, amongst other matters, whether the new cladding, as installed, complied with Building Code Clause E2 “External Moisture”. The first determination found that the cladding did comply with Clause E2, but there were specific matters that needed to be rectified in order to achieve ongoing compliance with Clause B2 “Durability”.

5.1.2 In the course of considering the first determination I commissioned an expert to inspect the house and to report to me on the performance of the cladding. The expert’s inspection took place on 25 August 2006. The expert found no sign of water ingress and I note that the cladding has continued to perform in this respect.

5.1.3 In paragraph 6.4 of the first determination I noted that provision will need to be made for movement control joints in some walls. Control joints will be required in the long balustrade and in the south and west lower walls. One example of such a joint is illustrated in Fig 119 in E2/AS1. The horizontal joints will require some modification to permit movement (see Fig 121 in E2/AS1 for one example of such a joint).

5.1.4 The notice to fix dated 8 February 2007 generally requires “air seals and drainage” to all the windows in the house. The first determination noted that there was “no provision for drainage or drying out above the head flashing”. It did not require air seals to be fitted, but confined the requirement for drainage to “above the head flashing”. (That is, the incorporation of a detail such as that illustrated in Fig.115 in E2/AS1). When the head flashing matter has been fixed at all windows, the cladding will comply with clause B2 of the Building Code.

5.1.5 I therefore conclude that when these items are fixed, the cladding will comply with Building Code Clauses B2.

5.2 Matter 2: Code compliance of the building work associated with the bedroom/bathroom swap

5.2.1 The notice to fix raised items relating to the bathroom (bracing of the wall behind the shower and an impervious floor to the shower) that were not raised in earlier submissions made by the territorial authority. I understand sheet bracing has been fixed to the external and internal wall of the new bathroom. The applicant has advised that a fibreglass waterproof membrane is yet to be installed on the bathroom floor. The shower cubicle already has its own impervious floor.

5.2.2 I therefore conclude that when the required work in the bathroom has been completed the bathroom will comply with clauses B1 and E3 of the Building Code. At the hearing held on 18 October 2007, the territorial authority agreed with that view and accepted that the rooms would be eligible to receive a certificate of acceptance once the work is completed and if the owner requests such a certificate.

5.3 Matter 3: Certificate of acceptance

5.3.1 As explained above, the new cladding and the bedroom and bathroom will comply with the specified clauses of the Building Code when the required remedial work has been carried out.

5.3.2 I therefore conclude that the territorial authority was correct in not issuing, for the moment, a certificate of acceptance for these items.

5.4 Matter 4: Notice to fix

5.4.1 In paragraph 6.4 of the first determination I listed the items in the house that needed to be fixed. As I noted at paragraph 4.8 of this determination, I anticipated that the territorial authority would carry out an inspection of “*the cladding and associated rectification work that is completed to date*” as my decision at paragraph 11.6 of the first determination directed. I also anticipated that if that inspection found the work to be compliant, a certificate of acceptance for it would be issued if requested by the owner.

5.4.2 Once the certificate of acceptance was issued I envisaged that a notice to fix would be issued by the territorial authority listing the remaining work to be done to bring the complete house to a code compliant standard. That notice could form the basis of an application for a building consent to carry out the necessary work, if any, that is not yet started and could be subject to a code compliance certificate if completed satisfactorily in accordance with a consent.

5.4.3 As it turned out, the inspection carried out by the territorial authority appears to have been for the purpose of preparing a “certificate of acceptance report” as well as a notice to fix. The “certificate of acceptance report” appears to comment on building work that was completed when the house was originally constructed, has not been

altered (such as the dining room), and should not be the subject of a certificate of acceptance. The notice to fix, on the other hand, correctly appears to be mainly confined to matters that are still to be fixed and therefore cannot be covered by a certificate of acceptance. However, the notice to fix also incorrectly includes at least one item (refer first item of the table in paragraph 4.13) that is not part of the building work carried out since 2005. In that regard I draw the territorial authority's attention to paragraphs 4.1, 4.3 and 4.4. The territorial authority has now informed me, and confirmed at the hearing on 18 October 2007, that this particular item will be removed from the notice to fix.

5.5 Summary

- 5.5.1 I note that for much of the time that has elapsed since a mediation settlement regarding this house, the interior wall linings have been removed. While that has facilitated inspections of the house, it has made the house uncomfortable and non-compliant with Building Code Clause H1 "Energy Efficiency".
- 5.5.2 Following my finding in the first determination that the house complied with clause E2 of the Building Code, the thermal insulation and wall linings could have been reinstated in the upstairs living and main bedroom. The internal wall linings above the reinstalled windows could also be reinstated now.
- 5.5.3 The bedroom and bathroom alteration, for which a building consent application was apparently not formally submitted, has now been largely completed. While the work will not be eligible for a code compliance certificate, it will be eligible for a certificate of acceptance, once the territorial authority has approved the work.
- 5.5.4 The laying of tiles over the selected impervious membrane in the bathroom is not recommended by the membrane supplier. Therefore the applicant proposes the floor will be fibreglassed to create an impervious membrane that joins the shower base to comply with clause E3. I note that the shower cubicle, in which the walls and floor are seamlessly joined, does not require a waterproof membrane underneath it.

6. The decision

- 6.1 In accordance with section 188 of the Act, I determine that the territorial authority must:
- withdraw the certificate of acceptance issued on 8 February 2007
 - issue a new certificate of acceptance in respect only of the recladding and associated rectification work, carried out without a building consent, that was complete and compliant on 11 December 2006 when the inspection was carried out by the territorial authority, but not including any building work that was completed prior to 1 July 1992
 - withdraw the notice to fix issued on 8 February 2007
 - issue a new notice to fix that:

- a) directly refers to the items listed in paragraph 6.4 of the first determination, as modified by paragraph 4.12 above
- b) is consistent with the direction in paragraph 11.3 of the first determination (which allows for the inclusion of any further defects found in the course of rectification)
- c) is concerned only with building work carried out since January 2005 that has not already been included in a certificate of acceptance.

6.2 I also determine that the owner must apply for a new building consent, or an amendment to the existing building consent as appropriate, to cover any building work required to comply with the new notice to fix.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 14 November 2007.

John Gardiner
Manager Determinations