

## **Determination 2008/94**

### **Refusal of a code compliance certificate for a house at 8A Cullen Place, Tawa (to be read in conjunction with determination 2007/35)**

#### **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, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department. The parties are the owners, Mr and Mrs Turner (“the applicants”) and the Wellington City Council, carrying out its duties and functions as a territorial authority or a building consent authority (“the authority”).
- 1.2 Certain building matters were described in an earlier determination concerning the same house, Determination 2007/35 (“the first determination”). The first determination decided that, while certain elements of the building did not comply with Clauses B1 and B2 of the Building Code, once certain identified faults were rectified, the building would be code-compliant. In this instance, the matter for determination concerns the refusal of the authority to issue a code compliance certificate.
- 1.3 In making my decision, I have considered the submissions of the parties, the report of a second independent expert commissioned by the Department to advise on this dispute (“the expert”), and the other evidence in this matter.

#### **2. Sequence of events**

- 2.1 On 29 March 2007, the Department issued the first determination, which confirmed the authority’s decision not to issue a code compliance certificate.
- 2.2 Paragraph 7.3.2 of the first determination stated

It is possible that, in the course of rectifying the defects observed by the expert, other associated defects will be discovered. These too will need to be fixed.

2.3 Paragraph 8.4 of the first determination stated:

As I state in paragraph 7.3.2, other faults may become evident during the course of rectifying the faults outlined in paragraph 7.3.1, and therefore I cannot provide the confirmation sought by the territorial authority in its letter dated 15 March 2007. If the process described in paragraph 9.3 is followed the territorial authority will be able to satisfy itself, by appropriate inspection, that faults identified in the course of rectification are themselves rectified. The territorial authority may of course decline to issue a code compliance certificate if any of the faults described in paragraph 7.3.1, or associated faults that are discovered in the course of rectification, are not rectified to its satisfaction.

2.4 The authority issued a notice to fix dated 5 April 2007. Under the required remedial action set out in the notice were the items that the first determination listed as requiring rectification, together with the following additional items:

1. Provide a warrantee required from the fibre cement manufacturer that the fibre claddings will meet their specifications for durability of both parapet sheets and soffit linings.
7. Confirm the cause of the high moisture reading. Refer to item: 6.3 of the determination.
8. Confirm the timber frame affected by the moisture ingress will meet the requirements of Clause B2, Durability, of the NBC.
9. Lodge a proposal with Council by 5 June 2007 to advise how the remedial work, listed above will be carried out.

2.5 The applicants forwarded a “Specification of Remedial Works” that was received by the authority on 21 August 2007, and which described how the items listed in the first determination were to be rectified.

2.6 The authority issued a building consent (No 167885), which I have not seen, in regard to the remedial work to be carried out on the house.

2.7 The authority carried out a site visit on 7 February 2008 to inspect the remedial work carried out under the consent and identified certain non-compliant items. A further external inspection was then carried out by the authority.

2.8 Following the second inspection, the authority wrote to the applicants on 21 February 2008 describing the process up to the second inspection. The authority set out a list of “non-compliant items and outstanding matters” that were required to be addressed to the authority’s satisfaction. This list included the items identified in the first determination, together with 20 other matters of concern. The authority also noted that it would charge fees for all the time spent by its officers on the matter.

2.9 The applicants responded in a letter to the authority dated 18 March 2008. The applicants queried why the authority had listed the additional items in its letter of 21 February 2008. Also, as these were not “faults identified in the course of the rectification works are themselves rectified” why were they listed? In the applicants’ opinion, these items were outside the jurisdiction the authority may have in the matter, and were accordingly “ultra vires”.

2.10 The authority replied to the applicants in a letter dated 14 April 2008. The authority stated that it could issue a code compliance certificate if it considers, on reasonable grounds, that the work shown on the approved building consent complies with the Building Code. The authority was of the opinion that the wording set out in

paragraphs 7.3.2 and 8.4 of the first determination indicated that matters other than those dealt with in the determination could be raised by the authority.

2.11 The application for this determination was received on 2 July 2008.

### **3. The submissions**

3.1 In a covering note to the application, the applicants considered that the extra demands made by the authority were unreasonable. The applicants also took issue with the authority requirement that additional fees would be charged by the authority.

3.2 The applicant forwarded copies of:

- the notice to fix
- the “Specification of Remedial Work”
- the previous determination
- the correspondence with the authority.

3.3 The authority wrote to the Department on 24 July 2008 noting that it had received a request to carry out an inspection of the remedial work. During this inspection, additional matters of non-compliance relating to the original building consent were observed. Further inspections were then carried out on the property.

3.4 The authority forwarded copies of:

- some inspection reports
- the letter to the applicants dated 21 February 2008.

### **4. The expert’s report**

4.1 As discussed in paragraph 1.3, I engaged an independent expert to provide an assessment of the condition of those building elements subject to the determination. The expert is a member of the New Zealand Institute of Building Surveyors and is not the same expert who prepared the report for the first determination.

4.2 The expert inspected the building on 29 July 2008, and furnished a report that was completed on 30 July 2008. The expert commented on the items listed in the previous determination, together with those set out in the authority’s letter to the applicants dated 21 February 2008. The expert’s findings are summarised below.

### **5. The draft determination**

5.1 Copies of a draft determination were forwarded to the parties on 14 August 2008.

5.2 The authority in a letter to the Department dated 27 August 2008, accepted the draft subject to the following concerns:

- The delaminated plywood above the garage doors.

- The substrate to the internal gutter membranes.
- The gaps in the safety barriers.
- The weatherproofing of the meter box.
- The cable penetrations through the cladding.

5.3 The applicants responded to the draft determination in a letter to the Department dated 18 September 2008. The applicants stated that they were prepared to undertake the remedial work listed in the draft. However, they were of the opinion that:

- the plywood was not delaminating and would satisfactorily survive for 15 years
- the meter box, which is in a sheltered position, was installed in line with standard practice at the time the work was carried out.

5.4 I have carefully considered the parties comments regarding the draft determination and have amended the draft as I consider appropriate.

## **6. Discussion**

6.1 The expert's report leads me to believe that currently the building does not comply with various clauses of the Building Code.

6.2 However, because the faults identified with the building occur in discrete areas, I am able to conclude that satisfactory rectification of the items outlined in paragraph 6.3 will result in the building becoming code-compliant.

6.3 Table 1 below summaries the matters raised by the authority, the experts findings, and my conclusion as to the rectification work required.

**Table 1:**

<b>The remedial work listed in the first determination (corresponds to first item in authority letter dated 21 February 2008)</b>	<b>Expert's findings</b>	<b>My conclusion as to what rectification work is required</b>
<i>1.1 Replace Hardiflex cladding to inside of level 2 top roof parapet</i>	The expert noted that the cladding, which had recently been replaced, is not painted and is poorly nailed, with nails protruding from the cladding. This indicated that there may be decaying timber behind the lining. In addition, the parapet cap flashing is not properly secured.	Replacement of the Hardiflex cladding to the inside of the level 2 top roof parapet and the securing of the parapet capping
<i>1.2 Replace Harditex soffits</i>	The replacement of the soffits was due to their being unpainted and exposed to the weather. The expert noted that the soffits are painted and had been for an extended period, possibly since new.	Nil
<i>1.3 Seal head flashings</i>	The expert agreed that the head flashings in question should be sealed.	Sealing of head flashings
<i>1.4 Fit Scriber</i>	The expert agreed that scribes should be fitted, including those at the entrance elevation against the side entry door.	Fitting of additional scribes
<i>1.5 Fit Pipe Flashing</i>	While the expert agreed that the detail should be protected, it was suggested that a simple cone that fitted over the pipe would be the best method of achieving this.	Installation of an additional pipe flashing

Defect listed in the authority letter dated 21 February 2008	Expert's findings	My conclusion as to what rectification work is required
2 <i>A current manufacturer's product warranty and approved applicators certificate to be provided for the membrane applied to the exterior roof and deck surfaces.</i>	The expert was of the opinion that as it was 8 years since the membrane was installed, the homeowner would not be able to obtain the information/guarantee requested by the authority. There were no indications to suggest any failures had occurred, the membrane was operating as required, and it would have failed before now if it was substandard. However, the 8-year time span meant that maintenance involving cleaning and repainting should now be carried out	nil
3 <i>The Traffiguard (LAM) membrane upstands for internal gutters need to be applied to the substrate that meets the requirements of the product manufacturer and clause E2/ASI</i>	The expert found that the substrate, specified as being 17.5mm H3 treated plywood, was "solid and intact" and there was no evidence to show it was inadequate. The authority had identified the substrate as being plywood in request No 9, and as there were no indications of decay in the exposed end, the expert assumed it was durable and likely to be H3 treated. However, as the area in the southern corner below the upper roof overhang was exposed, a protective corner flashing should be installed.	Installation of a protective cover flashing to the south corner
4 <i>Overflows with a minimum diameter of 75mm are required.</i>	The expert agreed that the enclosed membrane-covered areas should be fitted with overflows.	Installation of overflows with a minimum diameter of 75mm
5 <i>Complete the fixings for the horizontal colour steel fascia cladding</i>	The expert did not consider that these fixings are inadequate or that any were missing.	nil

6	<i>Verification of water proofing of wall cladding / parapet junctions</i>	A close inspection after the destructive testing implied that the membrane was well laid behind the joint. While the steel parapet cap flashing did not go up and under the cladding, the joint at this area was protected by the membrane upstand wrap and water was free to drain away. However, the sealed joint required regular maintenance.	nil
7	<i>Complete the external cladding where some fibre glass insulation is visible.</i>	The expert did not observe this fault and assumed that it was missed or already repaired.	nil
8	<i>Turn down the trim deck roof trays</i>	The expert noted that, as the roof is such a low pitch, the roof edge should be modified so as to control water running off the roof. It was observed that the building paper extending beyond the last nail fixings is water damaged and mildew covered, and that the lower roof lacks any compressed foam infilling.	Turn down the trim deck roof trays
9	<i>Additional flashings are needed where some of the coloursteel fascias abut the traffiguard gutters</i>	The expert observed that the only junction that requiring a flashing was that on the south corner.	Additional flashing to the south corner abutting the Traffiguard gutters
10	<i>Some of the upper roof apron flashings have been fixed with galvanised clouts through the up-stands.</i>	The expert observed that the upper roof apron flashing was repeatedly penetrated by clouts on each elevation and several clouts were missing, leaving holes that could allow water-entry.	Fixing of some of the upper roof apron flashings through the upstands

<b>Defect listed in the authority letter dated 21 February 2008</b>	<b>Expert's findings</b>	<b>My conclusion as to what rectification work is required</b>
11 <i>Seal the gaps between the external aluminium joinery and plywood cladding</i>	The expert noted that the gaps between the windows and the cladding are serious weathertight issues and required rectification as water could penetrate the joint and enter the cladding and the framing. Additional fixing of the sheets below some windows indicated that draining water had previously warped the cladding.	Sealing of the gaps between the external aluminium joinery and plywood cladding
12 <i>Seal the pipe penetrations in the wall cladding</i>	Several pipes penetrating the cladding required sealing.	Sealing of the pipe penetrations in the wall cladding
13 <i>Some of the ply cladding requires additional fixings</i>	No areas of cladding requiring additional fixing were identified. However, a sheet of cladding overhanging the concrete foundation beside the garage door is twisting away from the wall and requires securing.	Replacement of a sheet of cladding overhanging the concrete foundation beside the garage door
14 <i>Some of the plywood cladding appears to be delaminating above the garage doors</i>	One plywood sheet above the garage doors is cut 18mm up through the sheet end, weakening the sheet, which is distorted and requires securing.	Securing of the distorted plywood sheet above the garage doors
15 <i>The sides and top of the meter box requires additional weatherproofing</i>	A sealed edge should be provided to the external meter box.	Provision of a sealed edge to the external meter box

<b>Defect listed in the authority letter dated 21 February 2008</b>	<b>Expert's findings</b>	<b>My conclusion as to what rectification work is required</b>
16 <i>Additional weatherproofing is required where the Traffiguard deck membranes terminate on the deck safety barrier posts</i>	This common detail, where the membrane is secured to the wooden posts, is not a good system as moisture is generally carried within the timber post and transferred below the membrane surface. However, the junctions have recently been repainted with top-coat paint and the paint to the posts overlaps the membrane surface and it is as reasonably protected.	nil
17 <i>The plywood manufacturer's specifications require 6mm wide anti capillary grooves in the boxed corner boards</i>	Whilst the corners are capped with 65mm boxed corner boards, which are not grooved, they are well ventilated and have good drainage at the sheet junctions. It was considered that the provision of capillary grooves would achieve very little additional protection.	nil
18 <i>A current approved applicators certificate will need to be provided for the waterproofing applied to the monolithic wall cladding system.</i>	Based on a visual examination, the expert was satisfied that the waterproofing was satisfactory. However, the corner boards fitted on to the unprotected Harditex sheets lack capillary grooves and there are indications that water has penetrated the gap between the texture and cover board. The same detail applies to the soffit junction but, as this is protected, it is not so critical.	Capillary grooves to the corner boards fitted on to the unprotected Harditex sheets

Defect listed in the authority letter dated 21 February 2008	Experts findings	My conclusion as to what rectification work is required
19 <i>Some of the gaps in the safety barriers exceed the 100mm maximum allowed by the building code</i>	<p>The expert noted the following non-compliant barrier items:</p> <ul style="list-style-type: none"> <li>• The lower rail of the top level stainless barrier is 175mm above the deck floor rather than the 100mm space required.</li> <li>• The large gaps in the stair rail barrier could allow a child to fall through them.</li> <li>• The opposite side of the steps, where there is a drop of approximately 2 metres in total, has no hand rail or barrier.</li> <li>• The safety fence to the lower concrete steps, where the protected drop is 2.5metres, has a 135mm gap between the concrete and the bottom rail, which exceeds the 100mm required dimension.</li> </ul>	<p>Gap between top level barrier and door floor to be closed to a maximum clearance is 100 mm.</p> <p>Stairs between lower and upper levels to have a barrier added to open side and the other side have barrier modified to prevent child from falling through.</p>
20 <i>Some open riser gaps in the timber flight of stairs where falls of greater than 1m exceed 100mm.</i>	The only open step that is above the 1m requirement is the top step which has been filled in.	Nil
21 <i>Some fixings securing some of the safety barriers beside the external stairs will not meet the requirements of clause B2</i>	The galvanised bolts securing the safety barrier on the lower concrete wall are now rusting and are not going to satisfy the 50 year minimum requirement of the Building Code.	Replacement of the fixings securing some of the safety barriers beside the external stairs

- 6.4 I accept the expert's opinion that the following items do not require rectification but which do require maintenance: (The bracketed references relate to the items in Table 1.)
- The membrane applied to the roof and deck surface (item 2).
  - The wall cladding / parapet junctions (item 6).
  - The termination of the deck membranes at the deck safety barrier posts (item 16).
- 6.5 I also accept the expert's opinion, that the following matters require attention: (The bracketed references relate to the items in Table 1.)
- The replacing of the Harditex soffits (Item 1.2).
  - The substrate to the internal gutter membrane upstands (item 3).
  - The fixings for the horizontal colour steel fascia cladding (item 5).
  - The completion of the external cladding (item 7).
  - The anti capillary grooves to the boxed corner boards (item 17).
  - The open riser gaps in the timber flight of stairs (item20).
- 6.6 In its letter of 14 April 2008 to the applicants, the authority has stated that it cannot issue a code compliance certificate unless the completed work complies with the Building Code. It also was of the opinion that matters other than those raised in the original determination could be investigated. While I do not necessarily agree that the wording of the original determination leads to this second conclusion, I accept that a building consent authority must be certain, on reasonable grounds, that all completed building work is code-compliant.
- 6.7 Following the issuing of the first determination, the authority issued a notice to fix that listed four items of rectification additional to those listed in the original determination. It then issued a building consent regarding the remedial work to be carried out on the house. Following a further two inspections by the authority, it wrote to the applicants on 21 February 2008 listing the additional 20 items that are subject to this determination.
- 6.8 I am concerned that these additional items were in the main of a nature that was observable when the authority issued the building consent and the notice to fix. I agree with the applicant's concerns as to the extra costs ensuing from the repeated inspections and draw these to the attention of the authority. However, I find that the performance of the territorial authority in this regard is not a matter for my decision. The technical aspects as reported must stand or fall on their own merits, and I have determined these accordingly.

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

- 7.1 I note that the authority has not issued a further notice to fix, but has set out in concerns in its letter to the application dated 21 February 2008. The authority should now issue a new notice to fix that requires the owners to bring the building into compliance with the Building Code. The notice to fix should not specify how those defects are to be fixed. That is a matter for the owners to propose and for the territorial authority to accept or reject.
- 7.2 I would suggest that the parties adopt the following process to meet the requirements of paragraph 7.1. Initially, the territorial authority should issue the notice to fix, which should list the items set out in paragraph 6.5. The owners should then produce a response to this in the form of a detailed proposal, produced in conjunction with a competent and suitably qualified person, as to the rectification or otherwise of the specified defects. Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.

## **8. The decision**

- 6.1 In accordance with section 188 of the Act, I hereby confirm the authority's decision not to issue a code compliance certificate.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 06 October 2008.

John Gardiner  
**Manager Determinations**