



Determination 2010/060

Refusal to issue a code compliance certificate for a 12-year-old house completed under the supervision of a building certifier at 66 Thorn Road, Tauranga



1. The matters to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“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 applicants are the owners, M and M Troon (“the applicants”), and the other party is the Western Bay of Plenty District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.2 This determination arises from the decision of the authority to refuse to issue a code compliance certificate for a partly re-clad 12-year-old house because it was not satisfied that the building work complied with certain clauses² of the Building Code (First Schedule, Building Regulations 1992). The refusal arose because:
- the building work had been undertaken under the supervision of Bay Building Certifiers (“the building certifier”), which was duly registered as a building certifier under the former Building Act 1991, but which ceased operating as a certifier before it had issued a code compliance certificate for the work
 - there have been significant changes to the exterior from the original consent drawings of the house and the upper walls of the house have now been re-clad.

¹ The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Department are all available at www.dbh.govt.nz or by contacting the Department on 0800 242 243.

² 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.

1.3 The matter to be determined³ is therefore whether the authority was correct to refuse to issue a code compliance certificate. In deciding this, I must consider:

1.3.1 Matter 1: The remaining external envelope of the original house

Whether the remaining original external claddings to the house (“the claddings”) comply with Clause B2 Durability and Clause E2 External Moisture of the Building Code. The claddings include the components of the systems (such as the brick veneer, the windows, the roof claddings and the flashings), as well as the way the components have been installed and work together. (I consider this in paragraph 8.)

1.3.2 Matter 2: The remaining Building Code clauses

Whether the original building complies with the remaining clauses relevant to this house. (I consider this in paragraph 9.)

1.3.3 Matter 3: The durability considerations

Whether the elements that make up the original building work comply with Building Code Clause B2 Durability, taking into account the age of the house. (I consider this in paragraph 11.)

1.4 Matters outside this determination

1.4.1 A building consent was issued in 2007 for two conservatories to upper floor decks. A code compliance certificate was issued for this building work on 24 September 2007, and this determination does not consider this element further.

1.4.2 This house was the subject of an application for a determination in 2008 (“the 2008 application”) and an expert (“the expert”) was commissioned by the Department to advise on that dispute. Following the expert’s inspection of the original monolithic cladding to the upper walls of the house, the applicants withdrew their application.

1.4.3 The applicants subsequently elected to re-clad the upper walls and this was carried out under a building consent in 2009, with a code compliance certificate issued on 21 December 2009. This determination is therefore limited to the remaining elements of the construction and does not include the new cladding work.

1.5 The available evidence

1.5.1 Based on the information and records supplied, I consider there is sufficient evidence available to allow me to reach a conclusion on the code compliance of this building and this determination therefore considers whether it is reasonable to issue a code compliance certificate for the remaining original elements of the house. In order to determine that, I have addressed the following questions:

- (a) Is there sufficient evidence to establish that the remaining original building work complies with the Building Code? I address this in paragraph 5.
- (b) If not, are there sufficient grounds to conclude that, once any outstanding items are repaired and inspected, the building work will comply with the Building Code? I address this question in paragraph 10.

³ Under sections 177(b)(i) of the Act

1.5.2 Although the applicants withdrew their 2008 application, the expert completed a partial report and a copy was provided to the applicants for their information (“the expert’s 2008 report”). This determination uses some evidence gathered in 2008 in regard to the building work prior to the 2009 re-cladding.

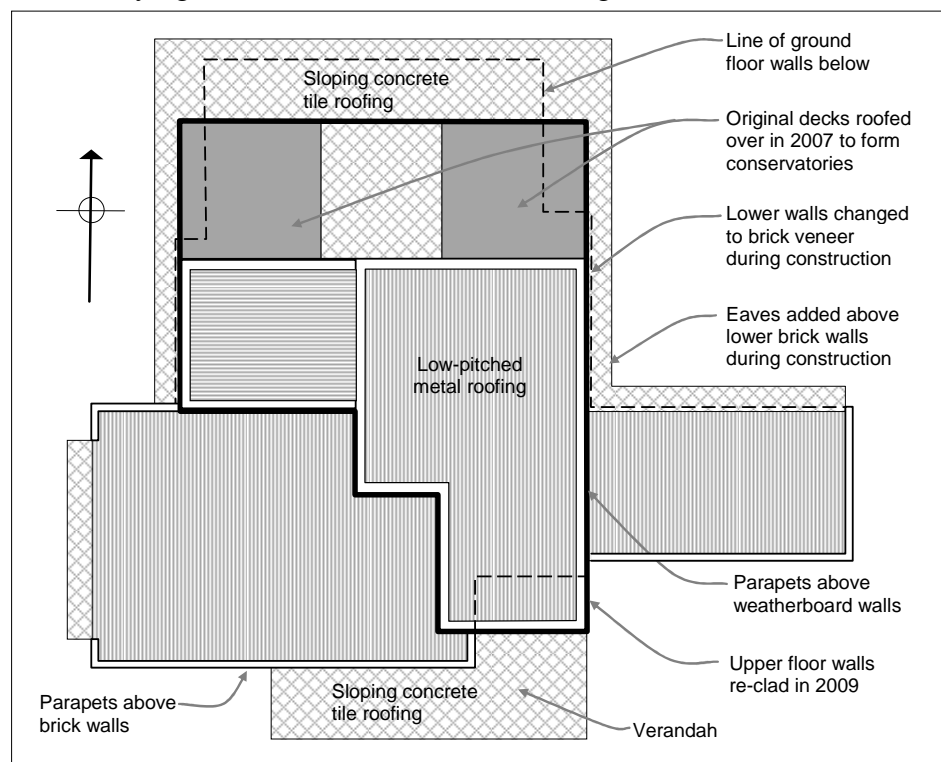
1.5.3 In making my decision, I have therefore considered:

- the submission and evidence supplied for the 2008 application
- the expert’s 2008 report
- the expert’s current report
- the applicants’ submission for this determination.

2. The building work

2.1 The completed detached house is two-storeys in part and is situated on a flat site in a high wind zone for the purposes of NZS 3604⁴. Construction is generally conventional light timber frame, with a concrete slab, fibre-cement weatherboards and brick veneer wall claddings, profiled metal and concrete tile roofing and aluminium windows. The house has a high weathertightness risk.

2.2 The house is complex in plan and form; with two different types of roof claddings and roofs at varying levels as shown in the following sketch:



2.3 Except for a small gable to the north, the upper level roof is low-pitched profiled metal, with the upper walls forming parapets. Lower level roofs are a mix of low-pitched profiled metal with some parapets and 25° pitched concrete tile lean-to roofs.

⁴ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

2.4 The remaining original elements

2.4.1 The original consent drawings called for EIFS⁵ walls extended to form parapets at upper and lower levels. Since then, various changes have been made, including:

- During construction in 2000:
 - ground floor walls were changed to brick veneer, with the walls forming parapets at parts of the ground floor projections
 - upper walls were changed to flush-finished fibre-cement cladding
 - concrete tile roofs were added to the lower level to form eaves.
- In 2007, the upper decks were fully enclosed to form conservatories. The work was carried out under building consent No 75988, and was issued with a code compliance certificate on 24 September 2007.
- In 2009, the fibre-cement cladding was removed, decayed framing was replaced and fibre-cement weatherboards were installed over a drained cavity. The work was carried out under building consent No 78737, and was issued with a code compliance certificate on 21 December 2009.

2.4.2 The elements of the house considered in this determination include:

- the remaining parts of the external envelope:
 - the brick veneer to the lower walls, including the windows
 - the profiled metal and concrete tile roof systems.
- the structure of the house
- the plumbing and drainage
- the interior of the house.

2.4.3 Given the date of construction of the house in 2000 and the decay found by the expert in 2008, I consider the original wall framing of this house to be untreated.

3. Background

3.1 The authority issued a building consent (No. 62600) on 24 November 1999 under the Building Act 1991, based on a building certificate issued by the building certifier on 5 November 1999.

3.2 The building certifier carried out the following inspections:

- Foundations on 25 November 1999 (which passed).
- Pre-pour slab inspections on 30 November and 7 December 1999 (which passed on the re-inspection).
- Pre-line building inspection on 10 March 2000 (which noted '2 sheet braces to check... ..Moisture content of timber OK. Part only').
- Pre-line plumbing inspection on 13 March 2000 (which passed).

⁵ Exterior Insulation and Finish System

- Drainage inspection on 31 March 2000 (which noted ‘No stormwater and no terminal vent for gully drain. As built plan to come.’).

3.3 No further inspections are recorded until a final inspection was requested in 2005. The building certifier carried out final plumbing and building inspections on 17 February 2005. In a letter to the applicants dated 24 February 2005, the building certifier listed seven items that required attention.

3.4 On 30 June 2005, without having issued a code compliance certificate, the building certifier ceased to operate as a building certifier and became ‘processing and inspections consultants’ operating on the authority’s behalf (“the contractor”).

3.5 In a letter to the applicants dated 29 August 2005, the contractor noted that the house had been re-inspected on 8 August 2005 and confirmed that the ‘required work identified in our earlier letter has been properly completed’. According to the applicants, as suggested by the contractor, the authority was provided with copies of this letter and the earlier letter dated 24 February 2005.

3.6 The authority’s pro-forma letter

3.6.1 In a pro-forma letter to the applicants dated 20 June 2006, the authority explained that when the building certifier ceased operating, an agreement had been made with a contractor to complete outstanding inspections on the building certifier’s projects and make recommendations regarding the issuing of code compliance certificates. The authority went on to explain that the liability for building work imposed by the Act meant that:

...before Council accepts such liability by issuing Code Compliance Certificates it must be satisfied inspections carried out by Bay Building Certifiers and Bay Inspections were satisfactory to confirm projects have been completed to the standards required by the Building Acts 1991 and 2004. Unfortunately our experience to date is that these inspections, supporting documentation and evidence are not satisfactory to support Council issuing Code Compliance Certificates. Regrettably, this lack of satisfactory inspection detail puts Council in the position where it is unable at this time to accept liability for these deficient projects or issue Code Compliance Certificates.

3.6.2 The authority explained that further inspections were therefore required in order to determine:

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

3.6.3 The authority also offered assistance with an application for determination, noting that it could make the application on the owner’s behalf, and attached a ‘Transfer Form’ to be filled in as required to initiate an assessment of the property. The authority concluded:

Please understand that this extra process is regrettable, but has been forced upon Council because it cannot accept any ongoing liability for private certifier projects (not Council projects) without being confident that the inspection documentation and inspections themselves were adequate in the first instance.

3.7 The authority's assessment

3.7.1 The applicants completed the transfer form, which requested the authority to 'undertake an assessment of the project' as explained in the above letter. The authority inspected the house on 5 September 2006.

3.7.2 Following the inspection, the authority wrote to the applicants on 28 September 2006, listing the 'non complying items' identified during its inspection, which included (in summary):

- changes to the wall claddings and addition of lower eaves
- paving laid up to the bottom of the brick veneer weepholes
- corrosion to the steel lintels to the brick veneer
- the unsealed joints between the steel lintels the window heads
- non-complying ventilation slots to the top of the brickwork
- the gap in the cladding at the top of the meterbox
- the junctions of the parapets with the adjacent roof cladding
- the lack of kickouts to roof flashings
- defects in the upper wall claddings (since replaced)
- defects in the upper decks (since enclosed).

3.7.3 The authority noted that the applicants 'may wish' to have the completed work inspected, but a code compliance certificate would not be issued, and:

That being the case, Section 91 of the Building Act 2004 requires that you apply for a Certificate of Acceptance...

If Council then decides it is able to issue a Certificate of Acceptance it will only cover those elements of the building that can be readily inspected and compliance with the Building Code determined.

3.8 The following year, the authority issued a building consent (No 75988) on 24 September 2007 for 'two conservatories', which covered roofing over the upper decks. That work was completed and the authority issued a code compliance certificate on 24 September 2007.

3.9 As-built drawings were completed in October 2007, showing the changes to the wall claddings and eaves, along with the conservatories. These drawings were submitted to the authority on 5 November 2007 with an application to amend the building consent.

3.10 Despite further attempts to resolve the outstanding matters, the situation remained unresolved and the Department received the first application for a determination on 7 May 2008. When the expert's inspection of the upper wall cladding revealed decay

in the framing, the applicants withdrew their application and elected to re-clad those walls.

3.11 The repair work

3.11.1 The applicants applied for a building consent (which I have not seen) to 'reclad the building, replace framing and insulation' in July 2008. A building consent was issued and the repair work commenced.

3.11.2 As the authority required specialist inspection of the framing, the builder engaged the expert to inspect the upper wall framing 'during the initial stages of the remedial works'. The expert informed the Department of his involvement with the project. Because the parties had agreed with his engagement, I did not consider this involved any conflict of interest.

3.11.3 In a letter to the authority date 14 January 2009, the expert confirmed that he had inspected the work:

...to ensure that the following requirements are being met.

- All decayed timber, and timber with potentially harmful mould is removed and replaced with appropriately treated framing as specified in NZS 3640:2003
- All remaining timber is in-situ preservative treated
- All damaged insulation is removed and replaced.

3.11.4 The expert confirmed that the work had been carried out in accordance with 'recognised remedial work practice', and concluded that the remedial work had resulted in his being satisfied that:

...the dwelling meets the relevant H1 Energy Efficiency requirements and the framing timbers, providing all causes of moisture elevation have been eliminated, will meet the requirements of B1 Structure and B2 Durability of the New Zealand Building Code.

3.11.5 The authority inspected the work and issued a code compliance certificate for 'reclad, replace framing, insulation, install linea board' on 24 December 2009.

3.12 The applicants subsequently applied for a certificate of acceptance for the remaining original building work and the authority responded in a letter dated 21 January 2010, setting out the background of the re-cladding work and stating:

Considering the above, I would advise you that as the building has been modified substantially from the originally approved scheme and that we have previously notified you of Council position regarding the issue of a Code Compliance Certificate, we would refuse your application for a Certificate of Acceptance...

3.13 The Department received the application for determination on 26 February 2010, and sought clarification from the authority for the reasons it did not believe the work was code compliant. No response was received.

4. The submissions

4.1 In their first application, the applicants made a submission dated 5 May 2008, which described the background and noted that the contractor had completed final

inspections and they had provided the letters confirming this to the authority in about September 2005, (assuming that this meant all matters were therefore resolved):

When we received the letter dated 20 June 2006 from [the authority] we were surprised to find that the house was still without compliance. We have tried to work with the Council to rectify this problem but they appear to not want to take any responsibility or liability and have referred us to your department to gain compliance.

- 4.2 In their letter dated 22 February 2010 supporting the application for this determination, the applicants explained how, following the expert's inspection in 2008 they had decided to 're-clad all the monolithic clad areas' of the house. The recladding had been carried out and a code compliance certificate had been issued for that work. The applicants had understood that 'once the weathertightness issues were taken care of', a code compliance certificate would be issued for the original consent but this has been refused due to 'discrepancies between the originally approved plans and what was actually built'. The applicants noted that as-built plans had been submitted on 25 October 2007.
- 4.3 Within the applications, the applicants forwarded copies of:
- some original drawings and the as-built drawings
 - the building certifier's inspection summary
 - some correspondence from the building certifier and the contractor
 - some correspondence from the authority.
- 4.4 The authority acknowledged the application but made no submission in response.
- 4.5 A draft determination was issued to the parties on 22 June 2010. The draft was issued for comment and for the parties to agree on a date when the house complied with Building Code Clause B2 Durability.
- 4.6 The applicants accepted the draft determination in a letter dated 28 June 2010. However, they advised of an error made in the draft with respect to the name of the owners. This has been corrected.
- 4.7 The authority responded to the draft determination in a letter to the Department dated 30 June 2010. The authority accepted the draft and, in response to statements made in the draft determination, submitted that it believed it had advised the applicants of its reasons for declining to granting either the code compliance certificate or the certificate of acceptance.
- 4.8 I acknowledge the authority's submission. However, I note that while the authority advised the applicants of the defects in the building, this advice pre-dated the successful completion of the remedial work. I remain of the view that the authority should have clarified why the remaining elements of the original house were not code compliant.
- 4.9 The parties agreed that compliance with Clause B2 Durability was achieved on 1 June 2000.

5. Grounds for the establishment of code compliance

- 5.1 In order for me to form a view as to the code compliance of the building work, I established what evidence was available and what could be obtained considering that the building work is completed and some of the elements were not able to be cost-effectively inspected.
- 5.2 The authority believes that any decision it makes with respect to compliance of the house is limited by what items it is able to inspect. I therefore needed to decide if I could rely on the inspections that were undertaken by the building certifier, particularly in regard to inaccessible building components.
- 5.3 In the absence of any evidence to the contrary, I take the view that I am entitled to rely on the inspection records, but I consider it important to look for evidence that corroborates these records and can be used to verify that the building certifier's inspections were properly conducted.
- 5.4 In summary, I find that the following evidence allows me to form a view as to the code compliance of the building work as a whole:
- The summary of inspections carried out by the building certifier, indicating satisfactory inspections of the inaccessible components (see paragraph 3.2).
 - The expert's 2008 report (see paragraph 6)
 - The code compliance certificate for the new cladding to the upper walls, which included exposing and replacing any damaged framing (see paragraph 3.11.3)
 - The expert's current report as outlined in paragraph 7.

6. The expert's 2008 report

- 6.1 As mentioned in paragraph 1.4.2, I engaged an independent expert to assist me with the 2008 application. The expert is a member of the New Zealand Institute of Building Surveyors. The expert inspected the house on 23 May 2008 and provided a partial report that was completed on 6 June 2008.
- 6.2 The expert carried out invasive moisture readings through the cladding into the framing at areas considered at risk and removed several small areas of cladding. Elevated moisture levels were found at all locations tested, with obvious decay identified in two areas.
- 6.3 Due to the results of the invasive testing, the expert considered that the upper floor needed to be considered for re-cladding and, with the agreement of the applicants, did not complete the investigation of remaining building elements.
- 6.4 Although the applicants withdrew their application, the expert's 2008 report was provided to them on 12 June 2008 for their information.

7. The expert's 2010 report

7.1 The expert re-visited the house on 19 May 2010 to assess the compliance of the remaining elements of the house with the relevant Building Code clauses, and provided a report dated 28 May.

7.2 The expert noted that the house appeared to be well maintained and in 'excellent condition'. The new weatherboards were 'well fixed and aligned', the original brick veneer was in 'excellent condition' and the general flashing work was 'tidy and effective'.

7.3 The brick veneer

7.3.1 The expert noted that the brick veneer was generally in good condition with no evidence of cracks or excessive stress. Vermin proof weep holes and vent slots were provided in accordance with NZS 3604 and sufficient ground or paving clearances are provided below the brickwork.

7.3.2 The expert also noted that the original mild steel lintel bars to window and door openings had been replaced with galvanised steel in accordance with NZS 3604. The joinery head to lintel junctions had been silicon-sealed and the joinery installation appeared satisfactory.

7.4 The roof claddings and parapets

7.4.1 The original tile roofs were in good condition, but the expert noted that the low-pitched profiled metal showed signs of damage from careless foot traffic. While he did not consider this likely to cause leakage in the short term, he warned of possible future problems should such foot traffic continue.

7.4.2 Metal cap flashings had been provided to all parapets, and the expert noted that these were 'well fixed' with sufficient slope and saddle flashings at wall junctions. Satisfactory apron flashings with end kick-outs were installed at junctions between the original sloping tile roofs and the new weatherboards. Roof penetrations were satisfactorily sealed and/or flashed.

7.5 Compliance with the relevant code clauses

7.5.1 The expert assessed the house for compliance with the relevant clauses of the Building Code and made the following comments.

7.5.2 B1 Structure

- The house is a fairly simple conventional structure and there is no evidence of structural stress or excessive movement.
- Inspection records note satisfactory inspections of foundations and floor slab.
- Structural elements are largely unchanged, so the design engineer's producer statement and calculations remain relevant to the completed house.

7.5.3 C1 Outbreak of fire

- A new wood pellet heater was installed in March 2009, with a code compliance certificate issued on 21 April 2009.
- The original chimney to the solid fuel water heater was rebuilt in 2009 and a code compliance certificate was issued for that work on 17 September 2009.
- Sufficient smoke alarms are installed.

7.5.4 E1 Surface water

- The house is sited on the spur of a hill, with ground sloping away from walls.
- Roof water is collected by gutters and directed to surface water drains.
- Inspection records indicate satisfactory inspections of drainage, with an as-built drainage plan dated 30 March 2000 submitted to the authority.

7.5.5 E2 External moisture

- There were no signs of moisture noted in the interior of the house, and no elevated non-invasive moisture readings recorded.
- 18 invasive moisture readings were taken in at-risk locations throughout the house, and readings were all between 9% and 13%.

7.5.6 E3 Internal moisture

- The tanking to the tiled showers could not be inspected, but there was no evidence of leaking detected from invasive moisture tests taken from adjacent rooms into bottom plates.
- A producer statement dated 21 June 2005 for the waterproofing was provided.
- The bathrooms and laundry are adequately ventilated. Floor surfaces and sanitary fixtures are impervious, well sealed and easily cleaned. Satisfactory splashbacks are provided where needed.

7.5.7 F2 Hazardous building materials

- Safety markings are visible on shower doors, the glass balustrade to the stairs and on other glazing where needed.

7.5.8 F4 Safety from falling

- The glazed balustrade to the internal stairs and landing is at an appropriate height and the wall-fixed handrail is satisfactory.

**7.5.9 G1 Personal hygiene, G2 Laundering, G3 Food preparation
G4 Ventilation, G7 Natural light and G8 Artificial light**

- The interior generally complies with the consent drawings, which show adequate provision to comply with the requirements.

7.5.10 G9 Electricity

- I note that an electrical certificate dated 23 June 2000 has been provided.

7.5.11 G12 Water Supplies

- Satisfactory potable water is supplied from spring water, which is gravity fed into a 5000 litre concrete holding tank, and then pumped to the house.

- Hot water is heated by a solid fuel water heater, which is boosted by solar panels installed on a lower roof.
- Water pressure seems satisfactory.
- The building certifier's inspection summary indicates satisfactory pre-line and final plumbing inspections.

7.5.12 G13 Foul Water, G14 Industrial Liquid waste (onsite effluent disposal)

- Fixtures appear to be in good operating condition with no apparent problems.
- The sewerage system is a 3300 litre septic tank and conventional trench construction for effective treatment of the effluent.
- The building certifier's inspection summary indicates satisfactory pre-line and final plumbing inspections.

7.5.13 H1 Energy Efficiency

- Fibreglass insulation was visible at two wall switches removed by the expert.
- All damaged insulation was replaced during the re-cladding work.
- Although the flat roof spaces could not be checked, the building certifier's inspection summary indicates satisfactory pre-line inspections.

7.6 A copy of the expert's report was provided to the parties on 9 June 2010.

Matter 1: The external envelope

8. Weathertightness

8.1 The evaluation of building work for compliance with the Building Code and the risk factors considered in regards to weathertightness have been described in numerous previous determinations (for example, Determination 2004/1).

8.2 Weathertightness risk

8.2.1 The remaining original external envelope of this house has the following environmental and design features which influence its weathertightness risk profile:

Increasing risk

- the partly two-storey house is in a high wind zone
- the house is complex in plan and form, incorporating roof parapets and complex junctions
- there are limited eaves and verges to shelter the cladding
- the original external wall framing is not treated to a level that provides resistance to decay if it absorbs and retains moisture

Decreasing risk

- the lower walls have are brick veneer over a cavity

- 8.2.2 When evaluated using the E2/AS1 risk matrix, these features show that all elevations of the house demonstrate a high weathertightness risk rating.

8.3 Weathertightness performance

- 8.3.1 Taking account of the expert's report, the original remaining claddings appear to have been installed in accordance with good trade practice and to the manufacturers' instructions at the time of construction.

8.4 Weathertightness conclusion

- 8.4.1 I consider the expert's report establishes that the current performance of the building envelope is adequate because it is preventing water penetration through the claddings at present, and that there are also no cladding faults on the house likely to allow the ingress of moisture in the future. Consequently, I am satisfied that the house complies with Clauses E2 and B2 of the Building Code.
- 8.4.2 Effective maintenance of claddings is important to ensure ongoing compliance with Clauses B2 and E2 of the Building Code and is the responsibility of the building owner. The Department has previously described these maintenance requirements (for example, Determination 2007/60).

Matter 2: Other clause requirements

9. Discussion

- 9.1 I consider that the expert's report, the building certifier's inspection records, and the other documentation, allow me to conclude that the building work is likely to comply with the remaining relevant clauses of the Building Code.

10. The appropriate certificate to be issued

- 10.1 Having found that the remaining elements of the building comply with the Building Code, I must now determine whether the authority can issue either a certificate of acceptance or a code compliance certificate.
- 10.2 Section 437 of the Act provides for the issue of a certificate of acceptance where a building certifier is unable or refuses to issue either a building certificate under section 56 of the former Act, or a code compliance certificate under section 95 of the current Act. In such a situation, a building consent authority may, **on application** [my emphasis] issue a certificate of acceptance. In the case of this house, the owner is seeking a code compliance certificate.
- 10.3 In this situation, where I have reasonable grounds to conclude that the remaining consented building work complies with the Building Code, I take the view that a code compliance certificate is the appropriate certificate to be issued.

Matter 3: The durability considerations

11. Discussion

- 11.1 The authority also has concerns regarding the durability, and hence the compliance with the building code, of certain elements of the house taking into consideration the age of the original building work completed in 2000.
- 11.2 The relevant provision of Clause B2 of the Building Code requires that building elements must, with only normal maintenance, continue to satisfy the performance requirements of the Building Code for certain periods (“durability periods”) “from the time of issue of the applicable code compliance certificate” (Clause B2.3.1).
- 11.3 These durability periods are:
- 5 years if the building elements are easy to access and replace, and failure of those elements would be easily detected during the normal use of the building
 - 15 years if building elements are moderately difficult to access or replace, or failure of those elements would go undetected during normal use of the building, but would be easily detected during normal maintenance
 - the life of the building, being not less than 50 years, if the building elements provide structural stability to the building, or are difficult to access or replace, or failure of those elements would go undetected during both normal use and maintenance.
- 11.4 In this case the delay between the completion of the building work in 2000 and the applicant’s request for a code compliance certificate has raised concerns that various elements of the building are now well through or beyond their required durability periods, and would consequently no longer comply with Clause B2 if a code compliance certificate were to be issued effective from today’s date.
- 11.5 It is not disputed, and I am therefore satisfied, that all the building elements complied with Clause B2 on 1 July 2000. This date has been agreed between the parties, refer paragraph 4.9.
- 11.6 In order to address these durability issues when they were raised in previous determinations, I sought and received clarification of general legal advice about waivers and modifications. That clarification, and the legal framework and procedures based on the clarification, is described in previous determinations (for example, Determination 2006/85). I have used that advice to evaluate the durability issues raised in this determination.
- 11.7 I continue to hold that view, and therefore conclude that:
- (a) the authority has the power to grant an appropriate modification of Clause B2 in respect of all the building elements.

- (b) it is reasonable to grant such a modification, with appropriate notification, as in practical terms the building is no different from what it would have been if a code compliance certificate for the building work had been issued in 2000.

11.8 I strongly recommend that the authority record this determination and any modifications resulting from it, on the property file and also on any LIM issued concerning this property.

12. The decision

12.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:

- the remaining elements of the original external envelope comply with Clauses E2 and B2 of the Building Code
- the house complies with the remaining relevant clauses of the Building Code

and accordingly, I reverse the authority's decision to refuse to issue a code compliance certificate for the original elements of the house.

12.2 I also determine that:

- (a) all the building elements installed in the house complied with Clause B2 on 1 July 2000.
- (b) the building consent is hereby modified as follows:

The building consent is subject to a modification to the Building Code to the effect that, Clause B2.3.1 applies from 1 July 2000 instead of from the time of issue of the code compliance certificate in respect of all the building elements.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 12 July 2010.

John Gardiner
Manager Determinations