



Determination 2012/049

Regarding the refusal to issue a code compliance certificate for a 16-year-old house with monolithic cladding at 33 Bishopsworth Street, Hillsborough, Christchurch



1. The matter 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, Ministry of Business, Innovation and Employment (“the Ministry”)², for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to the determination are:

- S Barker, the owner of the house (“the applicant”) acting through a lawyer
- Christchurch City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

1.3 This determination arises from the authority’s refusal to issue a code compliance certificate because it is not satisfied that the building work complies with certain clauses³ of the Building Code (First Schedule, Building Regulations 1992). The authority’s concerns relate particularly to the ages of various elements in the house and to the weathertightness and durability of the exterior cladding.

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

² After the application was made, and before the determination was completed, the Department of Building and Housing was transitioned into the Ministry of Business, Innovation and Employment. The term “the Ministry” is used for both.

³ 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.

1.4 The matter to be determined⁴ is therefore whether the authority was correct to refuse to issue a code compliance certificate for the work. In deciding this, I must consider:

1.4.1 Matter 1: The external envelope

Whether the external claddings to the building (“the claddings”) comply with Clause B2 Durability and Clause E2 External Moisture of the Building Code. The claddings include the components of the system (such as the backing sheets, the plaster and coatings, the windows, the roof cladding and the flashings), as well as the way components have been installed and work together. I consider this in paragraph 6.

1.4.2 Matter 2: The remaining code clauses

Observations on the remaining code clauses are made in paragraph 7.

1.4.3 Matter 3: The durability considerations

Whether the building elements comply with Clause B2 Durability of the Building Code, taking into account the age of the house and its construction over a period of about 7 years. I consider this in paragraph 8.

1.5 As the building consent was issued under the Building Act 1991, the issuing of a code compliance certificate is subject to the requirements of section 436 of the current Act. Accordingly, the building work has to be assessed against and comply with the requirements of the Building Code that was in force at the time the building consent was granted in order for a code compliance certificate to be issued.

1.6 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.

2. The building work

2.1 The building work consists of a single-storey detached house with a basement garage, which is situated on a steep east-facing site⁵ in a very high wind zone for the purposes of NZS 3604⁶. The site was excavated to provide the building platform and basement garage, with a retaining wall to the rear west boundary. The simple L-shaped house is assessed as having a low weathertightness risk.

2.2 Apart from the specifically engineered concrete slab, foundations and retaining walls, construction is generally conventional light timber frame, with monolithic wall cladding, aluminium joinery and a profiled metal roof. The hipped and gabled roof has eaves and verges of about 600mm.

2.3 The ground floor concrete slab forms a deck on the east elevation. A timber pergola extends over the deck from the eaves fascia, with posts fixed to the concrete foundation wall at the deck perimeter. A second pergola extends from the wall above the east garage doors.

⁴ Under sections 177(1)(b) and 177(2)(d) of the Act.

⁵ Identified as located in the ‘green zone’.

⁶ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

2.4 The expert noted no evidence as to timber treatment. Given the erection of the framing in 1995, I consider that the framing will be boron-treated but I am unable to determine the level of that treatment. In the absence of supporting evidence, I therefore consider that the external wall framing may not be treated to a level that will provide resistance to fungal decay.

2.5 The cladding

2.5.1 The expert's investigations have established that the installed cladding was a proprietary solid plaster system⁷. The cladding system consists of fibre-cement sheets fixed through the building wrap directly to the framing timbers, and covered with three coats of fibreglass mesh-reinforced modified plaster finished with a 2-coat coating system. That system had a BRANZ appraisal at the time of installation⁸, which has since been withdrawn.

2.5.2 The plasterer provided a 15-year "Materials Guarantee" and a 5-year "Plaster Application Guarantee" (both dated 20 May 2003) for the cladding system. Both guarantees also carried an exclusion clause, whereby the applicator did not accept responsibility for consequential damage of any kind to any building component that has occurred as a result of the use of untreated timber.

3. Background

3.1 The authority issued a building consent (No. 94009039) for the house on 22 November 1994 under the Building Act 1991.

3.2 I note that in respect of the cladding the drawings are unclear and do not specify the exterior wall cladding, with only one section drawing noting the cladding as a form of flush-jointed fibre-cement sheet. I note that the plasterer's 'Application Statement' incorrectly identifies the cladding as EIFS⁹.

3.3 The first stage of construction

3.3.1 The house was completed over a period of about nine years, with the first stage of construction carried out during 1995. The authority carried out various inspections including:

- foundations and retaining walls in January and February 1995 (which passed, with records noting 'engineer inspected' and 'as per engineer's details')
- foul and surface water drains in April 1995 (which passed)
- floor slab reinforcing and DPM in April 1995 (which passed)
- a progress inspection on 24 October 1995 (which passed, noting 'work still in progress').

3.3.2 The framing appears to have been installed and the building closed in by the end of 1995, with a record of a pre-line inspection that appears to have passed on

⁷ Multiplast jointing and finishing system

⁸ BRANZ Appraisal Certificate No.477(2007)

⁹ External Insulation and Finish System

22 December 1995. Little further progress was made and on 5 February 1996 the authority granted 'an extension of time'.

3.3.3 I have seen no record of further progress made. Ownership of the property subsequently passed to the applicant in July 1997. A hand-written note of the authority's dated 14 October 1997 records the change in ownership and notes an 'amended layout'. The note also refers to future work, with a 'pre-lining inspection' intended to be at the end of November 1997 and 'outside coating' to be applied in January 1998.

3.3.4 No inspections are recorded and, in a letter to the applicant dated 7 April 1999, the authority noted that the 'project should be nearing completion' and stated that a final inspection should be arranged. A notation added to the letter was to the effect that finishing work was likely to be held up for approximately nine months.

3.4 The second stage of construction

3.4.1 In a letter to the applicant dated 13 February 2001, the authority granted another extension of time to recommence work on the house, noting that work should be started 'on or before 30/08/2001'. Some work recommenced.

3.4.2 In April 2001, a solid fuel heater was installed under a separate consent and was issued with a code compliance certificate on 3 May 2001.

3.4.3 The authority carried out what appears to be a progress inspection of construction on 31 May 2001, noting 'spouting and downpipes to be fitted'. A further progress inspection a year later on 31 May 2002 noted 'spouting and downpipes installed to s/w system. Completion could be 12 months'.

3.4.4 Although unfinished, it appears that the house was occupied by the end of 2002 as an 'electrical certificate of compliance' dated 28 December 2002 notes:

Connect up wiring and install extra lights and plugs in new home. Main switchboard and temporary wiring already in place.

3.4.5 There is no record of any cladding inspection, though it appears from dates given on guarantees that the exterior wall cladding was completed around mid-2003. The last recorded inspection on 23 September 2003 was described as a 'final' inspection; and the record notes 'internal finishing [required] as discussed with owner' along with another note 'check cladding?' The authority also noted 'some work is not satisfactory', although no specific defects are identified.

3.4.6 There are no further records of inspections and an authority's 'file note' dated 4 November 2005 stated:

Due to non-completion of the Building Consent the documentation has been placed on the property file. Because of the age of this building project a code compliance certificate may not be issued.

3.4.7 There is no evidence of further contact between the parties until the applicant wished to sell the property and contacted the authority in September 2011. The parties corresponded about obtaining a code compliance certificate for the house; with the authority describing its process for older building consents.

3.4.8 The Ministry received the application for a determination on 1 February 2012 and sought clarification from the parties regarding as to the matters in dispute. Following some correspondence, the authority agreed to carry out a final inspection of the house.

3.5 The final inspection

3.5.1 The authority re-inspected the house on 2 March 2012. The re-inspection 'failed' a number of items. In regard to the external envelope, items included (in summary):

- cladding cracks
- deteriorated paintwork
- inadequate window head flashings
- garage door reveals deteriorating
- pergolas erected without consent
- deck slope
- spouting clearance/spouting coming off brackets at rear of house
- rebate to garage door
- adequate weather seal to garage/cladding around door 7.5 ply treatment unknown
- garage surface water drainage

3.5.2 Other items identified included (in summary):

- ceiling insulation
- backflow prevention
- retaining wall membrane or tanking/drainage behind retaining wall unknown, no silt traps sited, exposed pipe not connected to any system
- coil drain to cesspit
- step down to end of front porch 350mm requires step to be installed
- retaining walls to rear of house over 1m with no barrier
- gaps over 100mm in balustrade to front steps
- handrails required to steps at side of house
- smoke alarms to be installed
- hot water cylinder restraints required
- 9kg gas bottle to be vented to the exterior
- splash back to gas hobs required
- ceiling insulation to be re-laid
- floor joists to above garage area joists – engineer to approve use of 10mm bolts
- insufficient headroom at stairs from hallway down to garage
- as built drainage plan required for surface and foul water drains

3.5.3 The authority also stated:

Due to the large number of cracks plus nail fixing movement to exterior cladding plus some corner damage that may have been done prior to earthquakes, [the authority] is unable to know if any water has been able to penetrate cladding and affect structural elements.

4. The submissions

4.1 In a letter to the Ministry dated 7 February 2012, the lawyer outlined the background to the situation, noting that the builder's producer statement required by the authority could not be provided as the builder was deceased. The applicant had also been informed that 'due to the age of the consent' a determination should be sought.

4.2 The lawyer forwarded copies of:

- the consent documentation
- the authority's inspection records
- correspondence with the authority
- various producer statements, warranties, certificates and other information.

4.3 The authority made no submission in response to the application or subsequent to the inspection of 2 March 2012.

4.4 In emails to the lawyer, the Ministry suggested the applicant proceed with the 'more obvious and easily achievable "fixes" in conjunction with [the authority]'. Confirmation was also sought on what items were disputed. The lawyer responded on 23 March 2012, stating that the 'main matter which is in dispute is the issue of cladding compliance (B2 and E2)', and that 'numerous items identified in section 14 of [the authority's] inspection do not have any bearing as to whether [a code compliance certificate can be issued]'

4.5 A draft determination was issued to the parties on 15 May 2012. The draft was issued for comment and for the parties to agree dates when the building elements complied with Building Code Clause B2 Durability.

4.6 The lawyer responded to the draft determination, and the expert's report, in a letter to the Ministry dated 30 May 2012. In respect of the external envelope the lawyer submitted that:

- cracking to the cladding is as a result of recent seismic activity and will be 'attended to by EQC' and as such should not be considered in the decision to issue a code compliance certificate
- the requirement for seals between jamb flanges and backing sheets (refer paragraph 5.3.2) is recent and was not required at the time of construction. When applying sealant the builder stated that the areas concerned were dry and the areas around flanges were still sealed and had no cracks
- the expert's observations supported the view that the windows are weathertight.

- 4.7 The lawyer provided photographs of windows and cracking to the cladding, and requested that the requirement for seals to be applied between jamb flanges and backing sheets be 'waived' or that the authority supply with the notice to fix a sketch confirming which areas require remedial work.
- 4.8 In regards to the front stairs, the lawyer submitted that the area of the stairs over 1m in height and with balustrades over 100mm apart was a small area, and that as it was not 'wildly out of compliance' that a waiver be granted.
- 4.9 In regards to the remaining matters the applicant's lawyer stated that work has been carried out as follows
- step down to the end of the front porch as been installed
 - edge protection has been installed for the retaining wall
 - handrail has been installed for the steps to the south side of the house
 - the hot water cylinder restraints have been installed
 - the headroom for steps to the garage has been padded
- 4.10 The lawyer agreeing with the dates proposed in the draft determination of 1 January 1996 and 1 October 2003 as the dates when compliance with Clause B2 was achieved (refer paragraph 8).
- 4.11 The authority responded to the draft by email on 29 June 2012. The authority accepted the draft but made no comment as to the durability dates.
- 4.12 On 7 July 2012 the Ministry requested the applicant provide further information to confirm the size of the gaps between the balustrades to the front steps. The lawyer responded in an email to the Ministry on 9 July 2012, advising that the applicant 'has hired someone to look at the balustrades and fix it to meet current safety standards'.
- 4.13 I have taken account of the submissions and amended the determination as I consider appropriate. I have responded to the lawyer's requests for waiver in respect of specific elements of the external envelope in paragraph 6.5.

5. The expert's report

- 5.1 As mentioned in paragraph 1.6, I engaged an independent expert assist me. The expert is a member of the New Zealand Institute of Building Surveyors. The expert inspected the house on 4 April and 17 April 2012 to assess the external envelope in respect of compliance with Clauses E2 and B2, and provided a report dated 26 April 2012.

5.2 General

- 5.2.1 The expert noted that the house construction generally appeared to be of a reasonable quality, with 'some areas of poor workmanship'. The expert observed that the cladding's surface finish is 'inconsistent' and the internal stairs to the basement are 'poorly constructed'; adding that although window flashings are 'poorly detailed' most windows are protected by a wide overhanging soffit.

5.2.2 The expert noted the following changes from the consent drawings:

- timber pergolas added above the garage door and the deck on the east elevation
- various interior alterations, including partitions around the kitchen and lounge
- additional windows and various changes to window sizes and positions.

(I also note that the fibre-cement sheet cladding shown in the consent drawings has been coated with a proprietary plaster system.)

5.2.3 The expert noted that the date of coating application suggested that fibre-cement backing sheets were exposed for some time prior to protection. According to the applicant, cracks developed in the cladding following recent seismic activity and the expert noted that the significant ground movement evident at the junction of the concrete steps with the basement retaining wall confirmed that likelihood.

5.2.4 The expert also noted that the pergola over the deck was attached to the eaves fascia, with little risk of moisture ingress to the wall framing. The expert observed that the pergola junction with the wall above the garage door appeared satisfactory, with a metal flashing under lapping the cladding and protecting the stringer junction.

5.3 Windows and doors

5.3.1 Windows are face-fixed against the fibre-cement backing sheets, with metal head flashings, no sill flashings and the coating applied after installation. The expert removed a small section of cladding from a typical jamb to sill junction; observing the plaster coating, the mesh reinforcing, the backing sheets and the building wrap.

5.3.2 The expert observed that backing sheets were installed with joints in line with the jambs and no seals under jamb flanges, which was contrary to the manufacturer's instructions. The expert also noted a 'copious amount of sealant' recently applied to the ends of head flashings, which lacked adhesion and was able to be peeled back.

5.4 Moisture levels

5.4.1 The expert inspected and took non-invasive moisture readings in the interior of the house, noting no evidence of moisture ingress.

5.4.2 The expert took invasive moisture readings through the cladding at all window jamb to sill junctions, with most readings ranging from 9% to 13%. The highest readings of 17% and 18% were recorded at the windows in the gable end wall exposed to the east, but the cut-out at the 18% reading showed no sign of moisture penetration.

5.5 Commenting specifically on the external envelope, the expert noted that:

- there are many backing sheet joint cracks as a result of recent earthquake movement; and these require attention to prevent moisture penetration

The windows and doors

- there are no seals between the jamb flanges and the backing sheets (I also note that no drainage gaps are provided under sill flanges, meaning that any moisture penetrating the jambs may be trapped at the sills)

- sealant applied to some upper jambs lacks adhesion and ends of head flashings are not weathertight, which can lead to moisture penetration at those windows not protected by the eaves
- the garage door reveals are lined with deteriorating plywood.

5.6 The expert also made the following comments:

- Although head flashings are not weathertight, window heads beneath 600mm eaves are sheltered by the overhang, with low moisture levels recorded.
- Although there are no vertical control joints installed, cladding cracks have resulted from significant earthquake movement rather than normal movement.

5.7 The expert also observed the lack of safety barriers to the exterior retaining wall, noting also that one partly blocked pipe appeared to provide the only drainage from behind the wall. The expert considered that this needed further investigation.

5.8 A copy of the expert's report was provided to the parties on 3 May 2012.

6. Matter 1: The external envelope

6.1 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).

6.2 Weathertightness risk

6.2.1 This house has the following environmental and design features which influence its weathertightness risk profile:

Increasing risk

- the house is sited in a very high wind zone
- the house is two-storeys-high on the east and south elevations
- pergolas are attached to the building
- the level of treatment to the external wall framing is unknown

Decreasing risk

- the house is simple in plan and form
- there are eaves and verges to shelter the claddings
- the basement garage has masonry walls.

6.2.2 When evaluated using the E2/AS1 risk matrix, these features show that the elevations of the house demonstrate a low weathertightness risk rating. I note that, if the details shown in the current E2/AS1 were adopted to show code compliance, flush-finished fibre-cement cladding would require a drained cavity at all risk levels. However, I also note that a drained cavity was not a requirement at the time of construction.

6.3 Weathertightness performance

- 6.3.1 Generally the claddings appear to have been installed in accordance with good trade practice and the manufacturer's instructions at the time. However, taking account of the expert's report, I conclude that remedial work is necessary in respect of the areas identified in paragraph 5.5.
- 6.3.2 In response to the lawyers submission of 30 May 2012 (refer paragraph 4.6) regarding the performance of the external envelope, I note that
- it is accepted that cracking has occurred as a direct result of seismic activity, however this does not alter the fact that the cladding can no longer be considered to comply with Clauses E2 and B2 and is required to comply before a code compliance certificate can be issued
 - in respect of the lack of seals between the jamb flanges and the backing sheets, lack of drainage gaps under sill flanges, and inadequate sealing of some windows not protected by eaves; though there is no evidence of undue moisture ingress at this time these details are likely to allow moisture ingress in the future and are therefore not in compliance with Clause B2 insofar as it relates to Clause E2 (refer paragraph 6.4).
- 6.3.3 I also note the expert's comments in paragraph 5.6, and accept that these areas are adequate in these particular circumstances. In particular and in response to the lawyer's submission (refer paragraph 4.6), I note that the expert has identified those windows that are sheltered under eaves as adequate in respect of the window head flashings.

6.4 Weathertightness conclusion

- 6.4.1 I consider the expert's report establishes that the current performance of the building envelope is adequate because there is no evidence of moisture penetration at present. I am therefore satisfied that the house complies with Clause E2 of the Building Code.
- 6.4.2 However, the building envelope is also required to comply with the durability requirements of Clause B2. Clause B2 requires that a building continues to satisfy all the objectives of the Building Code throughout its effective life, and that includes the requirement for the house to remain weathertight. Because the cladding faults will allow the ingress of moisture in the future, the building envelope does not comply with the durability requirements of Clause B2.
- 6.4.3 Because the faults identified in the external building envelope occur in discrete areas, I am able to conclude that satisfactory investigation and rectification of the items outlined in paragraph 5.5 will result in the house being brought into compliance with Clauses B2 and E2 of the Building Code.
- 6.4.4 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 Ministry has previously described these maintenance requirements (for example, Determination 2007/60).

6.5 Waiver of Clause E2

- 6.5.1 The lawyer has requested a waiver in respect of the weathertightness of the windows (refer paragraph 4.7): such a waiver would be of performance requirement Clause E2.3.2. When considering such a waiver, the purposes and principles of the Act in section 4¹⁰ must be taken into account: these place particular emphasis on the performance of household units.
- 6.5.2 No compelling reasons have been submitted to support the view that Clause E2 should be waived. I consider such a waiver would be appropriate in this instance.
- 6.5.3 In respect of the lawyer's submission that the need for seals to window jambs is a 'recent' requirement (refer paragraph 4.6); I note that the performance requirements of Clause E2 have not changed to any significant extent in the period since the consent was issued in 1994.

7. Matter 2: The remaining code clauses

7.1 General

- 7.1.1 Compliance with the remaining Building Code clauses is being pursued between the owner and the authority. The lawyer has submitted that work has been carried out in respect of non-compliant items previously identified as

- 350mm drop to end of front porch requires step to be installed (D1)
- handrail required to steps to south side of house (D1)
- hot water cylinder restraints required (G12)
- insufficient headroom at stairs from hallway down to garage (D1)
- edge protection to the retaining wall (F4)

The lawyer has also submitted that the applicant is arranging for the balustrades to the front steps to be brought into compliance. I therefore leave these matters to the authority to confirm by way of an inspection prior to the issue of a code compliance certificate.

- 7.1.2 The lawyer's submission in response the draft determination made no further comment as to the ceiling insulation (Clause H1). I consider this to be a matter that can be resolved by the parties prior to the issue of a code compliance certificate.
- 7.1.3 In respect of the requirement for the 9kg gas bottle to be vented to the exterior; the turn states in Appendix G that LPG cylinders may be located indoors if they have a requirements under Clause G10 cite NZS 526111 as an Acceptable Solution, which in capacity not exceeding 25 litres (9Kg) and are located in a situation where there is air movement across the cylinder. I have received no information as to the location and air movement at this time. I note NZS 5261 (Section 2.7) also provides information on the clearances required to gas hobs.
- 7.1.4 I leave it to the owner to verify the adequacy of the bolt fixings to the floor joists above the garage to the satisfaction of the authority.

¹⁰ Section 4(2)(a)(i) and (ii), and 4(2)(b)

¹¹ New Zealand Standard 5261:2003 Gas installation

- 7.1.5 I note that the installation of smoke alarms was not a requirement of the Building Code at the time the building consent was issued and cannot now be required; however I strongly suggest that detectors be installed in accordance with F7/AS1.
- 7.1.6 The inspection calls for an ‘as built’ drainage plan for surface and foul water drains. I do not consider it is now practical to provide this information; the current performance of the drains does rest on this information being provided.
- 7.1.7 It is unclear from the authority’s inspection of 2 March 2012 what items of non-compliance are referred to by:
- backflow prevention (identified as ‘failed’ in section 7 of the inspection)
 - coil drain to cesspit

As the authority has made no submission in respect of these items I consider that the authority no longer has any concern as to non-compliance.

8. Matter 3: The durability considerations

- 8.1 There are concerns about the durability, and hence the compliance with the Building Code, of certain elements of the building taking into consideration the completion of the house in stages from 1995 to 2003.
- 8.2 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).
- 8.3 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.
- 8.4 In this case the prolonged construction, and the delay since the completion of the house, raises concerns that many 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. However, I have not been provided with any evidence that the building elements did not comply with Clause B2 at the time of installation.
- 8.5 It is not disputed, and I am therefore satisfied, that all the building elements installed as part of stage 1 of the construction (refer paragraph 3.3.2), and the completion of the remaining building elements as part of stage 2 of the construction (refer

paragraph 3.4.5), complied with Clause B2 on 1 January 1996 and 1 October 2003 respectively.

8.6 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.

8.7 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, if requested by an owner
- (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 code compliance certificates for the two stages of the building work had been issued in 1996 and 2003.

8.8 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.

9. What is to be done now?

9.1 The authority should issue a notice to fix that requires the owner to bring the house into compliance with the Building Code, identifying the defects listed in paragraphs 5.5, and referring to any further defects that might be discovered in the course of investigation and rectification, but not specifying how those defects are to be fixed. It is not for the notice to fix to specify how the defects are to be remedied and the building brought to compliance with the Building Code. That is a matter for the owner to propose and for the authority to accept or reject. I note the lawyer has advised that some remedial work has already been undertaken.

9.2 I suggest that the parties adopt the following process to meet the requirements of paragraph 9.1. For any of the specified matters that remain outstanding, the applicant should respond to the notice to fix with a detailed proposal, produced in conjunction with a competent and suitably qualified person, as to the rectification or otherwise of those matters.

9.3 The lawyer has stated that the authority required the provision of a builder's producer statement, which the applicant is unable to provide. While producer statements may form part of evidence used to establish the compliance of various elements in a building, they are not the only evidence that can be considered. In the case of this house, I am satisfied that code compliance is able to be established without the provision of a builder's producer statement.

9.4 Once the items listed in paragraphs 5.5 have been rectified to its satisfaction and the authority is satisfied that the items listed in paragraphs 7.1.1 to 7.1.4 are compliant, and the appropriate amendment made, the authority may issue a code compliance

certificate in respect of building consent No. 94009039 modified as described in paragraph 8.

9.5 Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination

10. The decision

10.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the external building envelope does not comply with Clause B2 of Building Code, insofar as it relates to Clause E2, and accordingly I confirm the authority's decision to refuse to issue a code compliance certificate.

10.2 I also determine that:

(a) all the building elements installed in the house, apart from the items that are to be rectified as described in Determination 2012/049, complied with Clause B2 on 1 January 1996 for all building elements completed to that date, and 1 October 2003 for the remaining elements.

(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 January 1996 for stage 1 of the construction (all building elements completed to that date including the external envelope), and
- 1 October 2003 for all remaining building elements completed under stage 2 of the construction,

with the exception of those items that are to be rectified as set out in Determination 2012/049.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 12 July 2012

John Gardiner
Manager Determinations