



Determination 2013/040

Regarding the refusal to issue a code compliance certificate for a 13-year-old house with unauthorised recladding to some of the walls at 168 Centreway Road, Orewa



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 and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to the determination are:

- the owner of the building, A Taylor (“the applicant”)
- the Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

1.3 The reasons for this determination

1.3.1 The application for this determination arises from the following:

- The original house was built in 1998 and 1999 with monolithic cladding fixed directly to the timber framing in some areas. In 2012 the applicant decided to sell the property and removed some areas of monolithic 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.

- The applicant removed the areas of monolithic cladding and replaced them with timber weatherboards installed over a drained cavity (“the recladding work”) without obtaining building consent or an amendment to the existing building consent.
- The authority carried out a final inspection in early 2013 and refused to issue a code compliance certificate for the house due to the unauthorised work; the authority then issued a notice to fix which identified the change in cladding.
- The authority is also not satisfied that the recladding work complies with certain clauses² of the Building Code (First Schedule, Building Regulations 1992), in particular its weathertightness and durability.

1.4 The matter to be determined³ is therefore whether the authority was correct to refuse to issue a code compliance certificate and to issue the notice to fix for the house, and whether the recladding work complies with the Building Code. In deciding this matter, I must consider:

1.4.1 Matter 1: The status of the recladding work

Whether the recladding work required building consent, taking into account the existing building consent for the house. I consider this in paragraph 5.

1.4.2 Matter 2: Compliance of the recladding work

Whether the recladding work complies with Clause E2 External Moisture and Clause B2 Durability of the Building Code. The recladding work includes the new timber weatherboards, the new drained cavity, original timber framing, associated windows, the flashings, and the adjacent original wall and roof claddings, as well as the way components have been installed and work together. I consider this in paragraph 6.

1.5 Matters outside this determination

1.5.1 Defects in the upper deck were also identified in the notice to fix and remedial work to the deck is underway with the authority’s agreement. The deck is therefore not considered in this determination.

1.5.2 This determination is limited to the recladding work, including the durability of the original timber framing underlying the reclad walls. Except at intersections with the recladding work, this determination does not include the original wall and roof claddings not altered during the recladding work.

1.6 In making my decision, I have considered the applicant’s submission, the report of the expert commissioned by the Ministry to advise on this dispute (“the expert”), and the other evidence in this matter.

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.

³ Under sections 177(1)(b), 177(2)(d) and 177(2)(f) of the Act

2. The building work and background

2.1 The building work consists of the replacement of some wall cladding to a detached house that is two-storey in part and is situated to the rear of a level site in a high wind zone for the purposes of NZS 3604⁴. The expert has taken the garage doors as facing east and this determination follows that convention.

2.2 The existing house

2.2.1 Construction of the L-shaped house is conventional light timber frame, with concrete foundations and floor slab, monolithic and brick veneer wall claddings, aluminium windows and pressed metal tile roofing. The master bedroom and ensuite bathroom in the partial upper level includes an enclosed deck to the northwest corner.

2.2.2 The house was constructed under building consent No. ABA 982182 issued to the applicant on 9 October 1998 under the Building Act 1991 (“the former Act”). The authority carried out various inspections, including a pre-line inspection on 23 April 1999. The next and last inspection was a drainage test in September 1999, and the house was completed by the end of 1999 without a final inspection.

2.2.3 The applicant has submitted copies of timber invoices, which noted ‘boric’ framing, with no treatment level shown. A sample extracted from the framing during installation of moisture probes in February 2013 described the sample as boric ‘maybe a little weaker than H1.2’. The expert forwarded a timber sample from original wall framing for testing, which concluded that the sample was boric-treated, most likely to a level equivalent to H1.2. Based on this evidence, I consider the original framing was boric-treated to a level that provides some resistance to decay.

2.2.4 The wall claddings to the house were originally

- conventional brick veneer to more than half of lower walls, with strips of direct-fixed textured fibre-cement above and between joinery units
- EIFS⁵ cladding to the remaining walls, consisting of 40mm polystyrene backing sheets fixed directly to the framing over the building wrap and finished with a mesh-reinforced plaster system.

2.3 The 2012 recladding

2.3.1 In 2012 the applicant decided to remove the EIFS cladding ‘as a preventative maintenance measure due to the stigma and issues of’ direct fixed monolithic cladding. He elected to replace the EIFS with timber weatherboards. Neither a building consent nor amendment to the existing consent was sought.

2.3.2 The new cladding is horizontal timber weatherboards fixed through 20mm H3 treated timber battens and new building wrap into the original framing. Timber facings and scribes are installed at joinery jambs and corner junctions.

2.3.3 An extensive set of photographs recorded the re-cladding work and show

⁴ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

⁵ Exterior Insulation and Finish System

- the original building wrap removed and the original framing exposed, with no visible sign of water stains or decay
- installation of fibreglass wall insulation and new building wrap
- existing joinery openings with wrap taken around trim framing and flexible flashing tape installed at corners of the openings
- vertical cavity battens installed, with spaced sloped battens between
- back flashings installed at junctions with brick veneer and at other junctions
- pipe penetrations flashed with flexible flashing tape
- internal joinery trim removed and foam air seals installed
- facings installed, with scribes set into sealant.

2.4 The new cladding was completed by late 2012 and the applicant requested a final inspection, which the authority carried out on 22 January 2013. The inspection record noted some minor items and maintenance to be completed and photographs were apparently taken during the inspection.

2.5 The refusal to issue a code compliance certificate

2.5.1 The property file, including photographs taken during the inspection, was reviewed by the authority. The authority then emailed the applicant on 23 January 2013, noting that water staining shown in photographs taken beneath the upper deck needed investigation by a 'building expert' to determine the cause and a scope of works for remedial work was to be submitted. The authority also queried the timber weatherboard cladding, noting:

This is not mentioned on any previous inspections ... hence you will need to explain to [the authority] when the change of cladding occurred please as there is no other building consent approved for any changes to the external cladding.

2.5.2 The applicant responded on 1 February 2013, explaining that some changes in lower claddings were during construction of the house and attaching a report on the upper deck. The applicant also explained that he had removed the lower EIFS as it had been direct-fixed and he wanted 'to be sure that everything was fine and there would be no come backs in the future'. The applicant had discovered that reinstating the EIFS would need to be over a cavity, so decided to use Pine weatherboards; the work was done over a four-month period with photographs taken throughout.

2.5.3 The authority replied the same day, acknowledging the deck report and stating:

...based on what you have now told us with regards to the cladding (i.e. – you have removed existing cladding and reclad without a building consent), at this stage it would be hard for [the authority] to accept that the building works are compliant with the NZ Building Code.

2.6 The notice to fix

2.6.1 In an email to the applicant dated 8 February 2013, the authority confirmed that it could not issue a code compliance certificate for the house and stated that a notice to fix would be issued because:

Under Section 40 of the Building Act 2004, buildings cannot be “constructed, altered, demolished or removed without consent” and if there is a failure of the building code then [the authority] must issue a “Notice to fix”.

- 2.6.2 The authority issued a notice to fix dated 8 February 2013, which identified apparent moisture problems in the upper deck and required a ‘scope of works’ for repairs to be submitted for approval.
- 2.6.3 The ‘Particulars of contravention or non-compliance also stated in item 4.0:
- Areas of the external cladding differ from the approved building consent. Where the approved documents show ‘brick veneer’ or ‘Harditex’ cladding in some areas, [the authority] confirm the ‘timber weatherboards constructed over a drained cavity’ have been installed.
- There has been no approval or building consent issued for the above changes to the external cladding and therefore is in breach of Section 40 of the Building Act.
- 2.7 The applicant engaged a building surveyor to assist in carrying out remedial work to the upper level deck, which is now underway and is not considered further in this determination.
- 2.8 The applicant also engaged a building consultant (“the consultant”) to investigate moisture and timber treatment levels in the original framing. The consultant installed 10 moisture detection units (“MDUs”) into the bottom plate of the south and west garage walls and testing of drillings indicated the presence of boric treatment. Moisture levels varied from 13% to 18%, compared to a control level of 16%.
- 2.9 The Ministry received an application for a determination on 12 March 2013.

3. The submissions

- 3.1 The applicant provided a submission, noting that items 2.0 and 3.0 of the notice to fix were not in dispute as work to the upper deck was underway with the agreement of the authority. In regard to the recladding referred to in item 4.0 of the notice, the applicant set out the background to the situation, explaining why new weatherboards had been installed and that he did not think that the recladding required consent.
- 3.2 The applicant forwarded copies of
- the original building consent documentation
 - the inspection records
 - the notice to fix dated 8 February 2013
 - email correspondence with the authority
 - photographic records of the 2013 recladding work
 - various certificates, reports and other information.
- 3.3 The authority forwarded a CD-Rom, which contained the same documents as provided by the applicant.
- 3.4 A draft determination was issued to the parties for comment on 5 June 2013.

- 3.5 The applicant accepted the draft without further comment in a response received on 12 June 2013. The authority accepted the draft in a response received on 21 June 2013 but requested that the wording be altered to clarify that a certificate of acceptance may be applied for, so that the determination could not be interpreted to infer that the certificate would be automatically issued.

4. The expert's report

- 4.1 As mentioned in paragraph 1.6, I engaged an independent expert to assist me. The expert is a member of the New Zealand Institute of Building Surveyors. The expert inspected the house on 25 April 2013, providing a report dated 1 May 2013; a copy of that report was provided to the parties on 6 May 2013.

4.2 General

- 4.2.1 The expert noted that his assessment was limited to whether the lower walls that had been recently clad in weatherboards met the durability and weathertightness provisions of the Building Code.
- 4.2.2 The expert described the overall standard of workmanship as good, with the weatherboards giving 'the impression of having been carefully installed', with cavity closures in place and the cut ends of boards properly painted.
- 4.2.3 The expert removed a sample of exterior wall framing and forwarded it for analysis of treatment. The laboratory report dated 1 May 2013 noted that treatment testing:
- ...gave a strong positive colour reaction for boron throughout the cross-section, e.g., wood was most likely treated according to Hazard Class 1 of NZS3640:1992 (replaced by H1.2 of NZS3640:2003).

4.3 The 2012 weatherboards

- 4.3.1 The expert studied the construction photographs provided by the applicant, noting there were no photos of the stairwell walls. However, he considered that the photos covered sufficient representative wall areas to provide reasonable assurance that all reclad walls had been similarly installed. The expert was also able to access the wall framing under the stairs and could see no signs of moisture.
- 4.3.2 At the expert's request, the applicant removed the facing at the brick to weatherboard junction. The expert was able to see the end of the backflashing and measured it at 130mm wide, which spanned the junction at the brick face and was wide enough to extend across the roof to wall junction above.
- 4.3.3 The expert inspected the weatherboard cladding from the outside and studied the construction photographs, noting that
- although not to current recommendations, ground clearances are acceptable providing gardens are maintained to prevent moisture reaching bottom plates
 - windows and doors appeared to be installed in a satisfactory manner, with jambs protected by fitted sealed scribes and stop ends to head flashings
 - roof to wall junctions appear to have been carefully executed
 - all inter-cladding junctions appear to have been reasonably well formed

- penetrations were sealed satisfactorily
- the paintwork appeared in good order.

4.4 Moisture levels

- 4.4.1 The expert took eight invasive moisture readings into bottom plates of weatherboard-clad wall at locations considered to be at risk, and readings ranged from 15% to 18%. The expert considered these to be within the expected range, given heavy rain for several weeks preceding his inspection. The expert also observed that drillings ‘appeared clean and the timber was hard’.

4.5 Other matters

- 4.5.1 While inspecting the weatherboard walls, the expert also observed the remaining claddings and the upper deck; making some comments. As outlined in paragraph 1.4, this determination is limited to the weatherboard claddings and I leave the expert’s comments on other matters for the parties to consider.

4.6 The expert’s conclusion

- 4.6.1 The expert noted there was no evidence that the original EIFS cladding ‘had failed E2 or B2 (or any other code clause)’. He also concluded that the new cladding complied with the relevant performance requirements of the Building Code.

Matter 1: The status of the recladding work

5. Discussion

- 5.1 At the time the recladding work was undertaken, the applicant had found no moisture penetration through the original cladding and therefore did not consider a change to weatherboards in lieu of EIFS would require approval. The authority observed that unauthorised change in cladding during its final inspection of the house and included it as item 4.0 in the notice to fix.

5.2 The relevant legislation

- 5.2.1 Section 40 of the Act states that building work must not be carried out except in accordance with a building consent. However, Section 41(1)(b) of the Act exempts some types of work by stating that a building consent is not required for building work described in Schedule 1.

- 5.2.2 Paragraph (a) of Schedule 1 states that consent is not required in respect of:

- (a) any lawful repair and maintenance using comparable materials, or replacement with a comparable component or assembly in the same position, of any component or assembly incorporated or associated with a building, including all lawful repair and maintenance of that nature that is carried out in accordance with the Plumbers, Gasfitters, and Drainlayers Act 2006, except—
 - (i) complete or substantial replacement of a specified system; or

- (ii) complete or substantial replacement of any component or assembly contributing to the building's structural behaviour or fire-safety properties; or
- (iii) repair or replacement (other than maintenance) of any component or assembly that has failed to satisfy the provisions of the building code for durability, for example, through a failure to comply with the external moisture requirements of the building code; or
- (iv) ...

Comparable material, component, or assembly

- 5.2.3 This recladding work included removing the original EIFS and replacing that with weatherboard cladding installed over a cavity. In order to assess whether a building consent was required for that work, I need to consider how Schedule 1(a) applies.
- 5.2.4 I am of the view that the exclusions to paragraph 1(a) do not apply in this case. The original EIFS cladding did not provide bracing to the building, therefore the re-cladding does not fall within the exclusion in Schedule 1(a)(ii) in that the cladding is not a structural component or assembly. The photographs and the expert's report also satisfy me that the original cladding had remained weathertight and had therefore met the required 15-year durability period described in Clause B2.3.1, and so the exclusion in Schedule 1(a)(iii) for components that have failed the durability requirements does not apply.
- 5.2.5 In regard to the installation of the replacement cladding, I must consider whether this amounts to the use of 'comparable materials, or replacement with a comparable component or assembly in the same position...'. In considering the comparability of a component or assembly I have considered a number of aspects of the building work including the similarity in function, the compatibility between the materials, the complexity of the finished assembly (typically a comparison of the construction details), and whether the new work employs commonly-available products or systems.
- 5.2.6 In this case the original EIFS cladding fixed directly to the framing was replaced with a weatherboard cladding formed from lapped boards over a cavity. Although I consider the new cladding to be at least as good as the original, I do not consider it can be described as 'comparable' to monolithic cladding. The weatherboard cladding differs in configuration and assembly with different fixing and detailing to that of the EIFS, for example at junctions with joinery and other cladding types, and the addition of the drained cavity.
- 5.2.7 I therefore take the view that the re-cladding work is not exempt building work under Schedule 1. I note here that in accordance with section 17 of the Act the building work must comply with the Building Code regardless of whether building consent was required.
- 5.2.8 Section 164(1)(a) of the Act states that an authority may issue a notice to fix if it considers on reasonable grounds that building work has been carried out that required consent and for which consent was not obtained. Having come to the view that consent was required, I consider the authority was correct to include that item within the notice to fix. I also note that the notice to fix included building work that did not comply with the Building Code and that those items are not in dispute; accordingly I consider the authority was correct to issue a notice to fix and to refuse

to issue the code compliance certificate in respect of the non-compliant building work.

Matter 2: Compliance of the recladding work

6. Weathertightness of the recladding work

6.1 In regards to the recladding, the expert's inspection of the accessible components, the construction photographs and the other evidence have provided grounds for me to form a view that the 2012 recladding work complies with Clause E2 and Clause B2 of the Building Code.

6.2 The appropriate certificate(s) to be issued

6.2.1 Having found that the recladding complies with the Building Code, I must now determine whether the authority can issue either a code compliance certificate for the house as a whole including the recladding, or a certificate of acceptance for the recladding work separately from the building work completed under the original consent.

6.2.2 I note that the original building consent was issued under the former Act, and accordingly the transitional provisions of the Act apply when considering the issue of a code compliance certificate for work completed under that consent. Section 436(3)(b)(i) of the transitional provisions of the current Act requires the authority to issue a code compliance certificate if it 'is satisfied that the building work concerned complies with the building code that applied at the time the building consent was granted'.

6.2.3 Section 96 of the Act makes provision for the issue of a certificate of acceptance in certain circumstances. One of these is where 'a building consent was required but not obtained'. In these circumstances an authority may, on application, issue a certificate of acceptance if it is satisfied 'to the best of its knowledge and belief' that the work complies with the Building Code.

6.2.4 In this situation the original building work, completed in 1999, is now over 13 years old. I note also that at the time of completion there were variations in the as-built work from the approved plans (refer paragraph 2.5.2). I take the view, therefore, that the existing building consent requires amendment to reflect the as-built work to exclude the cladding that have been removed and replaced, and to modify Clause B2.3.1 in respect of the durability provisions.

6.2.5 I consider that a certificate of acceptance is the appropriate certificate to regularise the recladding work that was carried out without consent.

7. The decision

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

- the recladding carried out in 2012 without consent having been obtained was building work that required consent, and accordingly I confirm the authority's decision to issue the notice to fix including this item
- the building work carried out under consent No ABA 982182 did not comply with the Building Code, and accordingly I confirm the authority's decision to refuse to issue a code compliance certificate
- the recladding carried out in 2012 complies with Building Code Clause E2 and Clause B2 and a certificate of acceptance may be applied for in due course.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 15 July 2013.

John Gardiner
Manager Determinations and Assurance

Appendix A: The relevant legislation

A.1 Building consent

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

- (1) A person must not carry out any building work except in accordance with a building consent.
- (2) A person commits an offence if the person fails to comply with this section.

41 Building consent not required in certain cases

- (3) (1) Despite section 40, a building consent is not required in relation to—
 - (a) a Crown building or Crown building work to which, under section 6, this Act does not apply; or
 - (b) any building work described in Schedule 1; or

Schedule 1: Exempt building work

A building consent is not required for the following building work:

- (a) any lawful repair and maintenance using comparable materials, or replacement with a comparable component or assembly in the same position, of any component or assembly incorporated or associated with a building, including all lawful repair and maintenance of that nature that is carried out in accordance with the Plumbers, Gasfitters, and Drainlayers Act 1996, except—
 - (iii) repair or replacement (other than maintenance) of any component or assembly that has failed to satisfy the provisions of the building code for durability, for example, through a failure to comply with the external moisture requirements of the building code

A.2 Compliance

17 All building work must comply with building code

All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.

A.3 Code compliance certificate and Certificate of acceptance

96 Territorial authority may issue certificate of acceptance in certain circumstances

- (1) A territorial authority may, on application, issue a certificate of acceptance for building work already done—
 - (b) if—
 - (ii) a building consent was required for the work but not obtained...

436 Transitional provision for code compliance certificates in respect of building work carried out under building consent granted under former Act

- (1) This section applies to building work carried out under a building consent granted under section 34 of the former Act.

- (2) An application for a code compliance certificate in respect of building work to which this section applies must be considered and determined as if this Act had not been passed.
- (3) For the purposes of subsection (2), section 43 of the former Act—
 - (a) remains in force as if this Act had not been passed; but
 - (b) must be read as if—
 - (i) a code compliance certificate may be issued only if the territorial authority is satisfied that the building work concerned complies with the building code that applied at the time the building consent was granted; and
 - (ii) section 43(4) were omitted.