



Determination 2015/078

Regarding the refusal to issue a code compliance certificate for a 9-year-old house with mixed claddings at 38 Tanners Point Road, Katikati



Summary

This determination considers the authority's decision to refuse to issue a code compliance certificate; the grounds for the refusal were the authority's concerns regarding the performance of the exterior cladding in terms of weathertightness and durability. The determination reviewed the reasons given for the refusal and considered whether the items identified in the refusal comply with the Building Code.

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ ("the current 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 builder and current joint owner of the house, G Denton ("the applicant") acting via an agent ("the agent")
 - Western Bay of Plenty District Council ("the authority"), carrying out its duties as a territorial authority or building consent authority.
- 1.3 This determination arises from the decision of the authority to refuse to issue a code compliance certificate for the 9-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).

¹ The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.building.govt.nz or by contacting the Ministry 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.

- 1.4 The matter to be determined³ is therefore whether the authority was correct to refuse to issue a code compliance certificate for the reasons given in its letter dated 3 June 2015. In deciding this matter, I must consider:
- (a) Whether the external building envelope of the house complies with Clause B2 Durability and Clause E2 External moisture of the Building Code that was in force at the time the consent was issued. The building envelope includes the components of the systems (such as the wall claddings, the cantilevered deck, the windows and the roof cladding) as well as the way the components have been installed and work together. I consider this in paragraph 6.3.
 - (b) Whether other items identified by the authority comply with the relevant parts of the Building Code: namely Clauses E3 Internal Moisture, D1 Access Routes, F4 Safety from falling, G9 Electricity, G11 Gas as an energy source and G12 Water Supplies. This includes any other items noted by the expert during his inspection. I consider this in paragraph 6.4.

1.5 Matters outside this determination

- 1.5.1 In its letter dated 3 June 2015 refusing to issue the code compliance certificate, the authority limited its concerns to items associated with the clauses outlined above. Except for other items observed by the expert during his inspection, this determination does not address other clauses of the Building Code.
- 1.5.2 I note that the applicant indicated he would apply to the authority for a modification of durability provisions to allow the durability periods specified in Clause B2.3.1 to commence from the date of substantial completion in 2006. Although I leave this matter to the parties to resolve in due course, I have taken the anticipated modification into account when considering the claddings.
- 1.5.3 I also note that the parties have agreed to exclude the ground level south deck from the building consent. Except for junctions with the subject building work, this determination does not consider other aspects of the south deck.
- 1.6 In making my decisions, 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 two-storey detached house situated on a sloping site in a high wind zone for the purposes of NZS 3604⁴. The house is fairly simple in plan and form but includes some complex junctions and is assessed as having a moderate to high weathertightness risk (see paragraph 6.3.3).
- 2.2 The expert takes the garage/workshop doors and main entry as north-facing and this determination follows that convention. The rectangular floor plan includes a basement set partly into the site slope; resulting in the house being two-storeys high on the front/north elevation and single-storey on the rear/south elevation.
- 2.3 The basement level provides the main entry and an internal study and storeroom in the central area. A double garage occupies the east end and a large workshop the west end; with garage doors into both areas. A mechanical hoist (“the dumbwaiter”) allows a trolley of firewood to be lifted from the garage to the woodburner above.

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

⁴ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

- 2.4 The upper floor includes two bedrooms at the west end, a master bedroom and ensuite in the east end, and living areas in the central area, with bi-fold doors opening onto a north cantilevered timber deck. Bi-fold doors along the south wall open from the lounge and bedrooms onto ground-level timber-framed decking.
- 2.5 Construction is generally conventional light timber frame with some specifically engineered elements. The basement has reinforced concrete floor slabs and foundations, concrete masonry walls and timber-framed interior partitions. The south wall and parts of the east and west walls are retaining walls.
- 2.6 The upper floor is timber-framed, with brick veneer panels to north walls above the garage and workshop, fibre-cement weatherboards elsewhere, aluminium joinery and profiled metal roofing. The expert observed no evidence of timber treatment but, given the date of framing installation in 2005, I consider that the external wall framing is likely to be treated.
- 2.7 The roof is divided into three monopitched sections, with a raised central section above the living area. The low-pitched roofs have eaves and verges that vary from about 450mm to more than 600mm overall, except for the clerestorey walls to the raised central section, where there is no roof overhang. The roof slopes up to form oblique eaves overhangs above the south walls.
- 2.8 A timber-framed cantilevered deck, with tiled floor and open metal balustrades, extends to the north above the main entry. Ground level decking attached to the concrete block basement walls extends along the south elevation (“the south deck”). As outlined in paragraph 1.5.3, the south deck structure will be excluded from the building consent and is not considered further in this determination.
- 2.9 The primary wall cladding is a proprietary fibre-cement weatherboard system (“the weatherboards”) which are fixed directly through the building wrap to the framing and finished with an applied paint coating.
- 2.10 The front elevation includes brick veneer panels above the north walls of the concrete block garage and workshop. The specified bricks are 230 long x 70mm thick x 152mm high, with the bottom course laid on the side to provide a projecting band above the lower concrete block walls. The veneer is tied to upper wall framing and the cavity is ventilated via a gap under the soffit and weep holes at about 400mm centres in the bottom brick course. Concrete block basement walls and the brick panels are plastered and painted to provide a monolithic finish.

3. Background

- 3.1 The authority issued building consent No. 71398 to the former owner on 10 August 2004 under the Building Act 1991 (“the former Act”). A letter dated 12 July 2004 attached to the consent application explained that the south deck was shown outside of the building work as its height exempted it from the requirement for a building consent. (It appears that the deck was constructed after the dwelling.)
- 3.2 Work commenced in September 2004 with the authority’s inspections including:
- basement construction from September 2004 to January 2005
 - brick veneer in August 2005
 - pre-line inspections during September 2005.

- 3.3 I note that the authority's recently completed 'Old building consent checklist – CCC review' included a summary of inspections undertaken on the building work, which noted the inspection of brick veneer on 1 August 2005, with a note added 'assume for block work'. The checklist did not identify the plastered brick veneer and it appears there may have been a misunderstanding about the cladding.
- 3.4 The authority carried out a final inspection on 4 December 2006 and the inspection record listed seven items requiring attention, none of which related to external claddings. Item 2 in the list noted 'rear balcony – balustrade to areas over 1 metre above ground.' According to the applicant, he informed the authority of completion of the relevant items⁵, provided information about waterproofing under the shower tiles and subsequently assumed that a code compliance certificate had been issued as no further correspondence was received.
- 3.5 In 2010 the applicant discovered that no code compliance certificate had been issued for the house and contacted the authority. The authority inspected the house on 18 February 2010 and issued a site notice to the original landowner, which 'failed' with respect to the following items:
- waterproof membrane under tiles (including north upper level cantilevered deck), with a request for 'a written undertaking explaining system used' (undated statement about materials and methods subsequently provided)
 - engineering confirmation of south deck construction
 - solid fuel heater required one additional rivet (subsequently added).
- 3.6 It appears that the site notice was not mailed correctly to the applicant who was unaware of the final statement in the notice which stated 'due to delay in progressing works the [authority] may not issue a Code Compliance Certificate'. The applicant did not resolve matters with the authority at that time.

3.7 The 2015 refusal to issue a code compliance certificate

- 3.7.1 The applicant formally applied for a code compliance certificate for the house, with the application noted as received by the authority on 18 March 2015. The authority carried out a further final inspection on 13 May 2015 and the inspection record identified documentation required and listed the following as 'failed elements' (in summary, with relevant clauses shown in brackets):
- rear south deck (B1)
 - waterproofing behind bathroom wet area tiling (E3)
 - temperature of delivered hot water (G12)
 - steps to the south deck (D1)
 - waterproofing of the garage retaining wall (E2)
 - dumbwaiter chute (F4).
- 3.7.2 In a letter to the authority dated 16 May 2015, the agent set out the background to the dispute, describing the various final inspections, the lack of 'proper communication' due to incorrect addressing of correspondence and the changes in the authority's inspectors since 2006. The agent noted that the situation had become untenable for the applicant as the latest inspector had stated:

⁵ Which excluded the south deck as this was not part of the building consent.

... that as he did not inspect the house as it was being built he would not give approval for a Code of Compliance to be issued and that he would continue to raise new matters on any further inspections.

- 3.7.3 In a letter to the agent dated 3 June 2015, the authority confirmed the items that needed to be resolved before a code compliance certificate could be issued. Those items are summarised, together with the applicant's responses, in Table 1 (see paragraph 3.9).
- 3.7.4 In regard to weathertightness (item 8), the authority added a requirement for:
- ...a report from a member of the NZ Institute of Registered Building Surveyors (specialised in weathertightness).
- The report will need to confirm the weathertightness performance of the building envelope with respect to requirements of the building code Clauses B2 and E2; including the external membrane [to the retaining wall].
 - The [authority] requires that adequate testing (including invasive and destructive testing where necessary) is carried out by the Building Surveyor to support the conclusion in their report.
 - A repair schedule for any proposed remedial works is also required to be submitted for approval prior to commencing of any remedial work. Where required, amendment application or separate building consent is also required for the remedial works.
 - If is recommended that you reach an agreement with the [authority] in term[s] of who will be the Building Surveyor prior to engagement.
- 3.8 The agent applied to the Ministry for a determination on 18 June 2015. The Ministry sought further information from the parties, which was received on 23 July 2015.
- 3.9 In a letter to the Ministry dated 6 July 2015, accompanying additional information, the agent addressed the concerns raised by the authority as shown in the following table.

Table 1: The authority's letter dated 3 June 2015

No.	Authority's concern/requirement	Applicant's response	Code Clause
1	The rear south deck – engineering certification or exclusion from consent	Offer to exclude deck from CCC accepted	B1
2	Waterproofing behind wet area tiling	Detailed information already provided No photographs taken or required by authority when waterproofing installed. Membrane was inspected and approved. No sign of water leakage in nine years of use	E3
3	Temperature of delivered hot water [to sanitary fixtures and appliances]	Delivered hot water measured at 55.1°. Thermostat has been adjusted.	G12
4	Handrails to south deck steps	Handrail now installed	D1
5	Waterproofing of garage retaining wall	Retaining wall membrane inspected and approved during construction. Water entry into garage from stormwater during 'exceptional downpour'. Problem addressed several years ago and garage has since remained dry.	E2
6	List of contractors	All information on subcontractors supplied during construction. Unreasonable to require again 9 years later.	-
7	Safety of firewood dumbwaiter	Firewood dumbwaiter chute is sealed at the top to prevent access.	F4
8	Weathertightness report	Not required if durability commencement date modified to 2006.	B2,E2

No.	Authority's concern/requirement	Applicant's response	Code Clause
9a	Modify durability provisions	Agreed to modify durability provisions to commence from the proposed date of substantial completion of 30 July 2006.	B2
9b	Electrical certification	Already provided	G9
9c	Gas certification	Already provided	G11

4. The submissions

4.1 In a statement on behalf of the applicant, the agent outlined the background to the situation, describing the current situation as a 'stalemate position' and stating:

The last [authority] inspection on 13 May 2015 was carried out by a fourth inspector who informed [the applicant] and myself that he would not issue a [code compliance certificate] for the building as he had not been present or carried out a site inspection during the construction period.

4.2 The applicant provided copies of:

- a site inspection form, with ticks showing required inspections
- a hand-completed inspection record dated 4 December 2006
- the site notice of the re-inspection dated 18 February 2010
- an undated producer statement for tiling
- structural calculations, drawings and producer statement for design.

4.3 The authority made no submission but provided a copy of its letter to the agent dated 3 June 2015 which set out the reasons for its refusal to issue a code compliance certificate for the house.

4.4 The authority forwarded a CD-Rom, entitled 'Property File', which contained documents pertinent to this determination including:

- the original consent documentation
- the inspection records
- correspondence with the applicant, the original landowner and the agent
- various other information.

4.5 A draft determination was issued to the parties for comment on 2 October 2015.

4.6 The applicant responded to the draft on 5 October 2015, advising an intention to address weathertightness issues but noting that in his view the requirement for a handrail on the steps of the garden path leading from the courtyard to the garden was excessive. The applicant noted the authority 'did not require this'.

4.7 Despite reminders to respond to the draft determination on 16 and 28 October 2015, the authority did not provide a response until 30 November 2015: in an email received on this date the authority advised it has no comment to make.

5. The expert's report

5.1 General

5.2 As mentioned in paragraph 1.5.3, I engaged an independent expert to assist me. The expert is a member of the New Zealand Institute of Building Surveyors and inspected the house on 3 and 28 August 2015, providing a report completed on 11 September 2015. The parties were provided with a copy of the report on 11 September 2015.

5.2.1 The expert noted that the scope of his inspection was to provide an assessment of the issues raised by the authority in its letter dated 3 June 2015, with comment on any other significant compliance matters.

5.2.2 The expert noted that the consent drawings are 'well detailed', with the house generally in accordance except for the following minor differences:

- Single pane windows on upper west and east elevations not installed.
- Glass block partitions changed in plan.
- Study/storeroom door not installed.
- Storeroom/garage door omitted (left as opening in wall).

5.2.3 The expert assessed construction quality as 'good', with the house 'generally finished to an acceptable trade standard' and noted it was well maintained apart from lichen growth and gutters needing cleaning. The expert observed that 'cladding penetrations and aluminium joinery to cladding junctions are generally well sealed.'

5.3 Item 1: the rear deck

- The south deck does not impact on the consented work; with deck slats sufficiently clear of the wall cladding and adequate clearances between the deck stringer and the weatherboard cladding, and there is no evidence of associated moisture penetration at the junctions.

5.4 Item 2: Wet area waterproofing

- Inspection records indicate that a tiling producer statement was requested following the first final inspection on 4 December 2006 and again on 18 February 2010. An undated detailed statement was provided by the applicant, but it is not clear when this was received by the authority.
- There is no evidence of leaking into basement ceilings below showers, which indicates satisfactory performance of the wet area waterproofing over 9 years.

5.5 Item 3: Hot water temperature

- Hot water cylinders and associated tempering valves were installed by a local registered plumber. The delivered temperature is now 49° on the wetback cylinder and 47° from the second cylinder.
- Significantly higher temperature in pipes on the cylinder-side of tempering valves indicates that the cylinder temperatures are set to minimum of 60°.

5.6 Item 4: Handrails

- Graspable handrails have been installed to the steps at both ends of the south deck and to the internal stairs. However, no handrail is fitted to the paved steps at the northeast corner of the house, where the overall rise is about 1150mm.
- The handrail height of the balustrades to the north balcony is about 960mm above the deck floor level, slightly below the 1 metre height for compliance with F4.

5.7 Item 5: Retaining wall membrane to garage

- There is no evidence of moisture entry through any concrete block retaining walls, with the only sign of past moisture at a non-retained northwest corner.
- Flaking paint beside garage door indicates that plaster had been wet at some stage, which supports the applicant's description of a one-off flooding event that would not have affected the underlying masonry.

5.8 Item 7: The dumbwaiter

- The firewood dumbwaiter uses a garage door opener mechanism; with switches at both ends and the upstairs hatch unable to be opened until the trolley arrives.
- Although the interlock mechanism satisfactorily prevents falls into the chute, unrestricted access at the garage level could allow a child to crawl into the dumbwaiter trolley and be trapped if the trolley is raised to the upper level.

5.9 Item 8: Weathertightness of the building envelope

- 5.9.1 The expert took non-invasive readings internally and inspected the interior linings, noting no evidence of current moisture penetration. The expert noted no signs of water entry to tiles adjacent to deck doors but observed water stains to carpets beside bedroom doors to south deck. Further investigation revealed:
- flexible flashing tape installed over door thresholds
 - no deterioration to underlying materials in master bedroom, indicating that the minor carpet marking was likely to have resulted from condensation
 - rusted fixings and stained flooring under a large water mark at the east jamb of bedroom 2.
- 5.9.2 In order to investigate the above, the expert removed a small section of lining from the east jamb, noting low 8% moisture levels with the bottom plate appearing in good condition. Hose-testing for 15 minutes resulted in no detectable water entry and the owner advised that the stain was about 8 years old, with no recurrence of dampness since then. The expert considered that the water staining was likely to be a 'one-off historic event' as a result of doors inadvertently being left open during rain.
- 5.9.3 The expert also took invasive moisture readings at sample areas considered at risk of moisture penetration, with most readings from about 7% to 8%. However, the expert noted the following:
- 34% in fibre-cement trim to the west weatherboard/deck junction, but only 7% in the framing below the junction, with apparently sound drill shavings
 - 30% in fibre-cement trim to the west weatherboard/deck junction, but only 8% in the framing below the junction, with apparently sound drill shavings

- 35% in cantilevered joists at the northwest corner of the deck.

(I note that moisture levels over 18% generally indicate that external moisture is entering the structure and further investigation is required. In this case moisture readings were taken during the wet winter period and are therefore likely to represent higher levels of expected seasonal variation.)

5.9.4 Commenting specifically on the external envelope, the expert noted:

- lower ends of the apron flashings to raised central section lack kick outs to divert water into gutters, with lichen growth and the ends of weatherboards deteriorating (although no signs of water entry into adjacent rooms)
- the lack of weatherboard clearance above the plastered blockwork is likely to result in premature deterioration of the bottom edge of the boards
- the lack of drainage gaps above south window head flashings are likely to result in premature deterioration and eventual moisture penetration because little shelter from rain is provided by the upward sloping eaves
- unflushed junctions with wall cladding at ends of the cantilevered north deck have resulted high moisture levels in fibre-cement trim, which is likely to eventually lead to water penetration into timber wall and deck framing
- the membrane beneath the deck tiles requires further investigation as high moisture levels in the north deck framing indicate that moisture is likely to be penetrating through the tiles and membrane into the underlying structure.
- at the brick veneer/weatherboard east junction to the north elevation, the plastered brick veneer lacks a drainage hole at the internal corner.

5.9.5 The expert made the following additional comments:

- Although trim to the south wall/roof junctions at corners of raised central section butts against roof flashing and minor deterioration needs maintenance, this is not considered significant as vertical junctions are reasonably well sealed, with no evidence of moisture penetration into framing as a result.
- Although plaster butts against the ends of weatherboards and may cause some premature deterioration of board edges, the vertical junctions appear reasonably well sealed and there is no evidence of associated moisture entry.
- The lack of drainage above the north window head flashings is unlikely to lead to moisture penetration, due to the shelter provided by the north eaves.
- Although floor clearances to north deck tiles are below 100mm, the deck is well drained and door sills are 'well clear' of deck, with no evidence of associated moisture penetration into adjacent interior spaces.
- Although joinery openings in plastered blockwork walls lack drip edges above window heads, windows appear well sealed and there is no evidence of associated moisture entry after more than nine years.

5.10 Summary

5.10.1 The expert concluded that the following areas required further investigation and/or remedial work to comply with associated clauses of the Building Code:

- In regard to Clauses E2 and B2:
 - lack of kickouts to bottom ends of apron flashings
 - lack of clearance from weatherboards to top of plastered blockwork
 - lack of drainage gaps above exposed south window head flashings
 - unflushed junctions with cladding at ends of the north deck floor
 - investigation of the deck membrane to establish cause(s) of moisture penetration into the cantilevered deck joists
 - lack of drainage from brick veneer at the northeast internal corner adjacent to the ensuite bathroom
- Lack of a handrail to paved steps at north east corner of the house (D1)

5.10.2 The expert considered that the other items identified by the authority were satisfactory given the age of the house, the particular circumstances, and the lack of evidence of moisture penetration or damage to date.

6. Discussion

6.1 This building consent was issued under the former Act, and accordingly the transitional provisions of the current Act apply when considering the issue of a code compliance certificate for work completed under this 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 In order to determine whether the authority correctly exercised its powers of decision in refusing to issue a code compliance certificate, I must consider whether the building work complies with the Building Code that was in force at the time the consent was issued. This assessment relies on expert's report, the current condition of the building and its performance in the period since its completion. The assessment considers the reasons given by the authority in refusing to issue a code compliance certificate for the house.

6.3 The compliance of the external envelope

Weathertightness risk

6.3.1 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).

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

Increasing risk

- the house is two-storeys-high and is in a high wind zone
- the house has three types of wall cladding with some complex junctions
- upper walls have fibre-cement weatherboards fixed directly to the framing
- the oblique eaves to the south provide little shelter from rain

- a cantilevered tiled deck projects from the upper level

Decreasing risk

- external wall framing is likely to be treated to a level that provides sufficient resistance to decay if it absorbs and retains moisture.
- there are generous eaves to shelter the upper north claddings
- basement walls are plastered blockwork
- the monolithic north panels are plastered brick veneer.

6.3.3 Using the E2/AS1 risk matrix to evaluate these features, elevations are assessed as having a moderate to high weathertightness risk rating. If current E2/AS1 details were adopted to show code compliance, drained cavities would be required for the fibre-cement weatherboards to all elevations. However, this was not a requirement when the building consent was issued in 2004.

Weathertightness performance

6.3.4 Generally the claddings appear to have been installed in accordance with good trade practice and the manufacturer's instructions at the time. However the expert has identified that the areas outlined in paragraph 5.10.1 require attention, including one area where there is evidence of moisture penetration.

6.3.5 I also note the expert's opinions as outlined in paragraph 5.9.5 and accept that those areas are adequate in the particular circumstances described.

Weathertightness conclusion

6.3.6 I consider the expert's report establishes that the current performance of the building envelope is not adequate because there is evidence of moisture penetration. Consequently, I am satisfied that the claddings currently do not comply with Clause E2 of the Building Code.

6.3.7 The durability requirements of Clause B2 include a requirement for wall claddings to remain weathertight for a minimum of 15 years and for timber framing to remain structurally adequate for a minimum of 50 years. Although a modification of the durability provisions to allow provisions to commence from the date of substantial completion in 2006 would mean that most cladding areas have already performed satisfactorily for more than 9 years, I am satisfied that the cladding did not comply with Clause E2 for that period and that some areas risk moisture penetration in the coming six years. I am therefore satisfied that the building envelope does not comply with the durability requirements of Clause B2 insofar as it relates to Clause E2.

6.3.8 Because the identified moisture penetration and cladding faults occur in discrete areas, I am able to conclude that satisfactory investigation and rectification of areas outlined in paragraph 5.10.1 will result in the building envelope being brought into compliance with Clauses E2 and B2 of the Building Code.

6.3.9 It is emphasised that each determination is conducted on a case-by-case basis. Accordingly, the fact that a particular cladding system has been established as being code compliant in relation to a particular building does not necessarily mean that the same cladding system will be code compliant in another situation.

6.3.10 The expert has commented on several areas that require maintenance. 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, including examples where the external wall framing of the building may not be treated to a level that will resist the onset of decay if it gets wet (for example, Determination 2007/60).

6.4 The remaining matters of compliance

- 6.4.1 Taking account of the expert's report and the other evidence, I am satisfied that in relation to the items identified by the authority, the house complies with the remaining clauses of the Building Code with the exception of the lack of a handrail to paved steps at northeast corner of the house (Clause D1).
- 6.4.2 In regards to the compliance of the dumbwaiter, I note that the opening at level 1 requires compliance with Clause F4 and I conclude that the safety interlock of the cover to that opening satisfies that performance requirement. There are no obligations under the Building Code in relation to the dumbwaiter as a mechanical system. However, given the risk of entrapment raised by the expert I suggest that it would be prudent for the dumbwaiter to be operated from the lower level or some other mechanism installed to mitigate that risk.

6.5 Documentation

- 6.5.1 The authority has required a number of producer statements to be provided as evidence of compliance. The authority can receive these if they are offered but it cannot require these. An authority accepts producer statements at its discretion and if it is reasonable to do.
- 6.5.2 The authority has also sought the names of the contractors who undertook the work. This is not a requirement for the establishment of compliance under section 436(3)(b)(i).
- 6.5.3 I also note the authority's requirement for energy works certificates for the electrical and gas work to the house. While section 94(3) of the Act says that failure to provide an energy works certificate is 'sufficient reason' to refuse to issue a code compliance certificate, the absence of a certificate does not prevent a code compliance certificate from being issued. I have addressed this issue in past determinations⁶, and I remain of the view this provision allows the authority to apply this requirement as it considers appropriate.
- 6.5.4 The applicant maintains that certificates have already been provided and provided further copies. Notwithstanding this, building work is more than nine years old, and the provision of energy works certificates at this time would appear to be of limited value.

6.6 The durability considerations

- 6.6.1 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).

⁶ For example Determination 2013/035 Regarding the refusal to issue a code compliance certificate for a 14-year-old house and a 15-year-old quarantine building, *Ministry of Business Innovation and Employment*, 27 June 2013

- 6.6.2 In this case the nine year delay since the completion of the house in 2006 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.
- 6.6.3 I have considered this issue in many previous determinations and I maintain the view 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 a code compliance certificate for the building work had been issued at the time of substantial completion in 2006.

I therefore leave the matter of amending the building consent to modify Clause B2.3.1 to the parties once any other outstanding matters are resolved.

7. What happens next?

- 7.1 I note that the building consent was issued to the applicant's father as the former owner. As noted in Determination 2014/035⁷, no notice to fix is able to be issued to the current owner in respect of breaches of the Act or Regulations in respect of work carried out by a previous owner.
- 7.2 If the applicant wishes to pursue a code compliance certificate, a detailed proposal should be developed to address the investigations and defects identified in paragraph 5.10.1 of this determination to be submitted to the authority for its consideration and approval. Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.

8. The decision

- 8.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:
- external wall claddings do not comply with Building Code Clauses E2 and B2
 - the exterior paved steps do not comply with Building Code Clause D1
- and accordingly I confirm the authority's decision to refuse to issue a code compliance certificate.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 2 December 2015.



John Gardiner
Manager Determinations and Assurance

⁷ Determination 2014/035: The issue of a notice to fix for weathertightness remedial work carried out by a previous owner, *Ministry of Business Innovation and Employment*, 15 August 2014