Department of Building and Housing
Te Tari Kaupapa Whare

Determination 2009/45

Determination regarding the issuing of a notice to fix for a shed at 103B Burke Street, Thames

1. The matters to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004[1] ("the Act") made under due authorisation by me, John Gardiner, Manager Determinations, Department of Building and Housing ("the Department"), for and on behalf of the Chief Executive of the Department. The applicant is the owner of the building, the Housing New Zealand Corporation ("the applicant") acting through a firm of lawyers ("the applicant's lawyers"). The other party is the Thames Coromandel District Council ("the authority") carrying out its duties and functions as a territorial authority or a building consent authority and acting through a firm of lawyers ("the authority's lawyers").

1.2 The owner of the adjoining building and one of two cross leases held on the land on which the building work in question is built ("the adjoining owner") has been included as a person with an interest in the determination.

1.3 This determination arises from the decision of the authority to issue a notice to fix for a shed and adjoining concrete paving.

1.4 I take the view that the matters for determination in terms of sections 177(a), 177(b)(iv) and 188[2] of the Act are:

- whether the shed and canopy comply with the Clause C3 'Spread of fire' and Clause E1 'Surface water' of the Building Code (Schedule 1 of the Building Regulations 1992)
- whether the paving complies with Clause E1 'Surface water'
- whether the shed required a building consent

[1] The Building Act 2004 and the Building Code are available from the Department's website at www.dbh.govt.nz.

[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.

- whether the authority was correct in issuing a notice to fix that required the removal of the shed within the specified timeframe.

1.5 The applicant's lawyers have advised costs will be south under section 190 of the Act. This will be the subject of a separate direction.

1.6 In making my decision, I have considered the submissions of the parties, the report provided by a consultant employed by the applicant, together with the other evidence in this matter, including that presented at the hearing. I have not considered any other aspects of the Act or the Building Code.

2. The building work

2.1 The building work consists of a canopy, shed and adjoining concrete paving. The shed is a single-storey structure located in the yard adjacent to one unit of a two-unit property (refer figure 1). The overall dimensions of the shed are 1850mm x 1200mm (giving an overall area of 2.2m^2) and it has a maximum height of 1980mm. The shed is situated 1150mm away from the unit, approximately 100mm from the inter-unit boundary fence, and 180mm from the site boundary fence.

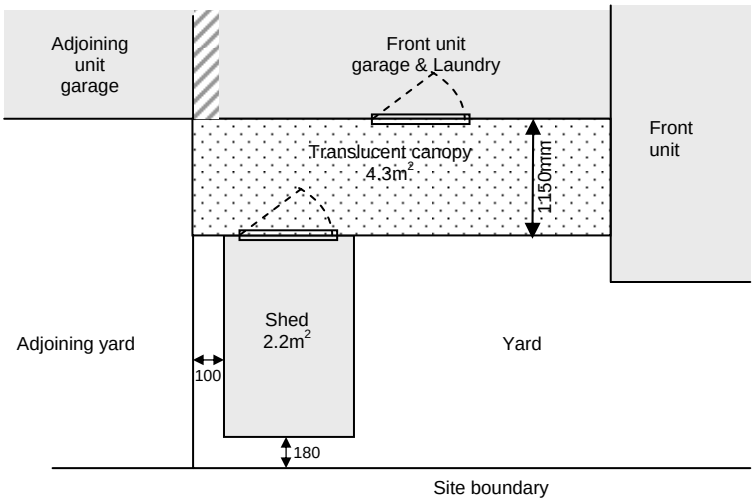

Figure 1 – plan

2.2 The shed is of light timber-framed construction with ply sheet external cladding and a metal-clad roof, but it is not lined internally. The shed has a concrete floor slab set 55mm above the adjoining paving. The surface water from the roof is collected in a spouting and discharges through a downpipe onto the paving and then into the stormwater system. A translucent canopy with a surface area of 4.3m^2 has been constructed between the shed and the unit.

2.3 The concrete paving in question covers the yard area and slopes away from the house to discharge surface water away from the unit. I have been informed by the applicant that an existing path was widened and re-contoured prior to the shed slab being laid.

3. Background

3.1 The applicant has informed me that the shed was constructed in November 2007 to replace an existing shed. The applicant's lawyers said:

> The existing shed was [located] in the western corner [of the property], though not in precisely the same location [as the new shed]. The [owner] did not obtain a building consent prior to construction [of the new shed].

3.2 Based on the evidence provided to me at the hearing, I am prepared to accept that the canopy constructed between the shed and the house was erected some time after the shed was completed.

3.3 The authority issued a notice to fix dated 13 November 2008 regarding the shed and paving. The "Particulars of contravention or non-compliance" on the notice stated:

> The construction of a storage shed closer than its own height to a legal boundary and to a residential accommodation without first obtaining a Building Consent contrary to Section 40 of the Building Act 2004. In addition the storage shed does not comply with clause C3 of the Building Code because the structure is not fire rated in accordance with C/AS1 7.10.5 and 7.8.5. The construction of the concrete path adjacent to the storage shed does not comply with E1.2 of the Building Code because the concrete paving is less than 150 mm below the floor level of the dwelling as required by E1/AS1 2.0.1. Furthermore stormwater from the roof of the shed is being discharged to the ground in contravention of E1.2 of the Building Code.

To remedy the contravention or non-compliance, the applicant was to:

> Remove the Storage Shed and to remove the Concrete Path.

3.4 A firm of consulting engineers ("the consultants") was engaged by the applicant to investigate the construction and location of the shed. The consultants carried out an inspection and reported to the applicant in a letter dated 6 November 2008. The report described the units and the construction of the shed and the paving and noted that the yard area drains surface water away from the unit. The consultants were of the opinion that in accordance with paragraphs (i), (j) and (k) of Schedule 1 of the Act, the shed would be exempt from the requirement to obtain a building consent for its construction. The report also included a sketch plan of the external yard layout and a set of photographs showing aspects of the shed and paving.

3.5 The application for a determination was received by the Department on 15 December 2008.

4. The submissions

4.1 In a submission to the Department on behalf of the applicant, dated 11 December 2008, the applicant's lawyers described the background to the dispute. In summary, the submission raised the following matters:

- The timeframe given for complying with the notice to fix was unreasonable.
- The requirement to remove the shed was unnecessary and the authority should consider the alternative of rectifying the shed to meet Building Code requirements.

- It was possible for the paving to be considered in the light of an alternative solution rather than mandatory compliance with the Approved Document E1/AS1.
- The surface water from the shed roof discharged into the stormwater drainage system through spouting and a downpipe.

4.2 The submission also requested that the notice to fix be amended to allow for the rectification of the shed and paving as alternatives to their removal, delete the reference to the lack of surface water discharge from the shed roof and extend the notice timeframe.

4.3 The applicant forwarded copies of the:

- consultants' report dated 6 November 2008
- notice to fix.

5. The legislation and the Compliance Documents

5.1 The definition of "owner" is contained in section 7 of the Act:

7 Interpretation

In this Act, unless the context otherwise requires,—

owner, in relation to land and any buildings on the land,—

(a) means the person who—

(i) is entitled to the rack rent from the land; or

(ii) would be so entitled if the land were let to a tenant at a rack rent; and

(b) includes-

(i) the owner of the fee simple of the land; and

(ii) for the purposes of sections 32, 44, 92, 96, and 97, any person who has agreed in writing, whether conditionally or unconditionally, to purchase the land or any leasehold estate or interest in the land, or to take a lease of the land, and who is bound by the agreement because the agreement is still in force.

5.2 The relevant provisions of Schedule 1 of the Act are:

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

(i) building work in connection with any detached building (except a building that is required to be licensed in terms of the Hazardous Substances and New Organisms Act 1996 or a building closer than its own height to any residential accommodation or to any legal boundary) that—

(iv) does not exceed 1 storey, does not exceed 10 square metres in floor area, and does not contain sanitary facilities or facilities for the storage of potable water, but may contain sleeping accommodation (without cooking facilities) if the detached building is used in connection with a dwelling:

(j) building work in connection with the closing in of an existing veranda, patio, or the like so as to provide an enclosed porch, conservatory, or the like with a floor area not exceeding 5 square metres:

(k) any other building work in respect of which the territorial authority (or, as the case requires, the regional authority) considers that a building consent is not necessary for the purposes of this Act because that building work—

(i) is unlikely to be carried out otherwise than in accordance with the building code; or

(ii) if carried out otherwise than in accordance with the building code, is unlikely to endanger people or any building, whether on the same land or on other property.

5.3 The relevant provisions from the Building Code Clause C3 Spread of fire are:

OBJECTIVE

C3.1 The objective of this provision is to:

(c) Protect adjacent household units, other residential units, and other property from the effects of fire.

PERFORMANCE

C3.3.5 External walls and roofs shall have resistance to the spread of fire, appropriate to the fire load within the building and to the proximity of other household units, other residential units, and other property.

5.4 The relevant provisions from C/AS1 are

Small buildings

7.10.5 An S rating need not be applied to single floor small buildings where:

(a) The FHC is no greater than 1, and

(b) The floor area is no greater than 40m2, and

(c) It does not contain a sleeping purpose group.

However, a FRR of no less than 30/30/30 shall apply to any external wall less than 1.0 m from the relevant boundary.

COMMENT:

This paragraph is intended to apply to garages, sheds, and similar buildings, not to sleeping accommodation such as granny flats.

It is considered that other property is adequately protected for such buildings by providing a simple FRR to the wall.

5.5 The relevant provisions from Acceptable Solution E1/AS1 are:

2.0.1: Suspended floors and slabs on ground shall be at least 150 mm above the finished level of the surrounding ground immediately adjacent to the building…

6. The draft determinations

The first determination

6.1 The first draft determination was forwarded to the parties for comment on 26 January 2009.

6.2 The applicant through its lawyers accepted the draft subject to a minor spelling error, which I corrected.

6.3 The authority did not accept the draft and its lawyers provided a submission dated 13 February 2009. I summarise the matters raised as follows:

- As the shed was connected to the house by a translucent canopy, the shed is effectively an addition to a residential unit. As such, it is not exempt from the requirement to obtain a building consent, paragraphs (i) of the First Schedule is not applicable because it is not a "detached" building and it is closer than its own height to residential accommodation and to a legal boundary. Paragraph (j) of the First Schedule is not applicable to the shed. The wall of the shed adjacent to the house should also be fire-rated because it is connected to the canopy, which in turn is connected to a residential unit.
- The downpipe serving the roof discharges directly onto the concrete paving, therefore the shed does not comply with clause E1.
- The concrete paving is not 150 mm below the floor level of a residential unit, has no discernable fall, and does not discharge into an open-ended channel. Accordingly, it is not code-compliant.
- As the work is not code-compliant, it would in the event of a fire be likely to endanger people, and as the work has already been carried out, the authority is not permitted to consider an exemption under paragraph (k) of the First Schedule. Also the specific provisions in paragraph (i)(iv) override the general provision of paragraph (k).
- As the fee simple land is owned by a company and a private individual, as well as being leased to the applicant, the authority cannot grant a certificate of acceptance, unless both the owners of the fee simple and the leasehold estate apply for one. In this case, the private individual has advised the authority that she does not want it to issue a certificate of acceptance.
- The determination cannot direct the authority to withdraw the notice to fix as section 188 requires the Chief Executive to either, confirm, reverse or modify the authority's decision. The notice to fix should be confirmed without modification, so that the applicant is required to remove the shed and apply for a building consent for its re-construction.

6.4 The authority also forwarded copies of documents verifying the ownership and leasing arrangements of the property and some photographs showing features of the shed.

6.5 The applicant through its legal advisors provided a submission dated 6 March 2009 in response to the authority's submission on the draft determination. In summary, the submission said:

- The applicant accepted that a building consent was required for the shed. However, consents were not required for the paving and the linking canopy.
- Compliance documents were not the only means by which code-compliance may be addressed. It was accepted that C/AS1 should apply to the shed, but only in respect of the wall adjoining the neighbouring property. While the concrete pavement was not built in accordance with E1/AS1, because it drains into the approved stormwater drainage system, it is code-compliant.

- It was not accepted by the applicant that *all* the owners of a building are required under the Act to formally consent to, or to sign, an application for a building consent or a certificate of acceptance. There is no ability for the authority or the Department to take into account any dispute between 'owners' as to whether or not a building consent should be granted.
- The house and the shed are two separate buildings and the installation of the canopy did not have the effect of making the two buildings as "one building with a common use" in terms of section 8(1)(c). There was a clear distinction between the uses of the two buildings in question.
- The shed construction was unlawful because no building consent was issued but it was not unlawful on the grounds that it did not comply with Clause C. The construction of the paving and the patio was lawful as neither required a building consent. If the authority were to issue a notice to fix, the applicant has the options of either demolishing the shed or making it code-compliant. The authority did not have the statutory ability to prescribe the owner take one course over the other.
- Certificates of acceptance do not remove the inherent unlawfulness of the building work, but provided owners with assurances that to an authority's best knowledge and belief, and on reasonable grounds, that certain building work is code-compliant.
- Allowing the applicant to make the shed code-compliant was consistent with the policy and principles of the Act.
- The one-month timeframe in which the applicant had to comply with the notice to fix was not reasonable and a three-month alternative period should be applied.
- The draft determination effectively reversed the authority's decision to issue a notice to fix and also determined the matters at issue between the parties. In this instance, it might be more appropriate for the Department to modify the wording on the notice to fix.
- The issues involving the cross-lease of the property were not relevant to the determination process under the Act.
- The private individual objecting to the issuing of the certificate of acceptance was not entitled to be notified under the Act of any application for a building consent or a certificate of acceptance and was not entitled to be notified of the authority's decision to issue a notice to fix. Accordingly, it followed that she was not entitled to be a party to the hearing of an application for the determination in respect of those matters.

6.6 The applicant's submission also requested the Chief Executive to make an order for costs against the authority under section 190(2). This will be the subject of a separate direction.

6.7 The applicant requested that the Department confirm the draft determination as modified by the applicant's submissions. It also submitted that a hearing was not required.

The second determination

6.8 The second draft determination was forwarded to the parties for comment on 28 April 2009.

6.9 The applicant through its lawyers accepted the draft subject to minor amendment, which I have considered. The applicant also stated that it sought leave to file an application for a contribution towards its costs from the authority once the determination had been finalised.

6.10 The authority did not accept the draft and its lawyers provided a submission dated 15 May 2009. The authority suggested some minor and non-contentious amendments to the draft, which I have considered. I summarise the major matters raised on behalf of the authority as follows:

- As the shed was positioned 'approximately five inches' over the inter-unit boundary, the authority could not issue a certificate of acceptance, the shed should be removed and any remedial work to the shed should be subject to a building consent applied for by the applicant.
- The paving covers the bottom of the exterior cladding of the laundry, which can result in wicking that could in turn affect the structural integrity of the wall bottom plate.

I respond to these points in paragraph 9.

7. The hearing and site visit

7.1 The authority requested a hearing, which was held at Thames on 2 April 2009 before me. I was accompanied by a Referee engaged by the Chief Executive under section 187(2) of the Act. The hearing included a visit to the house.

7.2 The hearing was attended by:

- the applicant, who was represented by its lawyers, two of its officers and its consultant
- the authority, represented by its lawyer and two of its officers
- the adjoining owner accompanied by two support persons
- three other officers of the Department.

7.3 All the parties and the applicant's consultant spoke at the hearing and at the site visit. The evidence presented by those present enabled me to amplify or clarify various matters of fact and was of assistance to me in preparing this determination.

7.4 The hearing was adjourned part way through the process so that a site visit could take place to clarify some of the technical matters arising from this determination.

7.5 The applicant accepted that the shed did require a building consent, was prepared to make it code-compliant, but did not wish to apply for a certificate of acceptance, given the difficulties it was currently having with the authority.

7.6 I summarise the technical matters discussed at the hearing as follows:

- Was the shed a separate structure or an extension to the existing house?
- Was the paving adjacent to the shed code-compliant?
- Was the discharge of external moisture from the shed roof code-compliant?

7.7 The non-technical questions can be summarised as follows:

- Was the time frame for the applicant to comply with the notice to fix reasonable?
- Was the requirement of the notice to fix to remove the shed the only option open to the applicant?
- Was the approval of both the tenants in common required for an application for building consent or a certificate of acceptance?
- Should costs be awarded against the authority in respect of the determination?

7.8 All the parties provided submissions or comment on the various matters that were raised. I have carefully considered and taken account this evidence, together with the submissions made on behalf of the parties.

8. Who can apply for a certificate of acceptance?

8.1 The applicant's lawyers submitted the Act does not require all the owners to apply for a certificate of acceptance but that an application by "an owner" would be sufficient. The authority's lawyers submitted that "the owner" means the owners of the fee simple of the land as they are the only people who can let the land at a rack rent.

8.2 Section 96(1)(a) concerns building work without a building consent and makes no reference to who may apply for a certificate of acceptance. I note that sections 96(1)(b) and (c) refer respectively to sections 42(1) (urgent building work) and section 91(4) (private building consent authority that refuses to issue a code compliance certificate for building work for which it issued the building consent) and both sections 42(1) and 91(4) provide for "the owner" to apply for a certificate of acceptance.

8.3 Forms 8 and 9 in the Schedule to the Building (Forms) Regulations 2004 concern an application for a certificate of acceptance and the certificate of acceptance itself. Both contemplate "the owner" applying for a certificate of acceptance. It is unclear to me on what basis Forms 8 and 9 purport to require an application for a certificate of acceptance to be made by "the owner" when the relevant provision in the Act, section 96(1)(a), is silent as to who makes such an application. A form in a regulation cannot limit the scope of a provision in an Act. Therefore, at least in respect of an application for a certificate of acceptance under section 96(1)(a) regarding building work without a building consent, it would appear that any person may make an application.

If I am wrong in this conclusion I have proceeded to consider who would be "the owner" in this case.

8.4 Section 7 defines an owner as the person who 'in relation to land and any buildings on the land … is entitled to the rack rent from the land or would be so entitled if the land were let to a tenant at a rack rent'. The rack rent represents the full rent of a property. The applicant and the private individual are the holders of an undivided half share of the fee simple estate but have entered cross leases with each other for a term of 999 years. The cross leases do not represent the rack rent of the land as they have been executed for a peppercorn rental of 10 cents per annum. The applicant and the private individual will not be entitled to the rack rent from the land until the expiry of the current leases – in 996 years.

8.5 It is the leasehold estates held by each of the owners that confer the fullest rights to ownership as they confer the right to exclusive possession of the buildings. In my view, the owner under section 7 of the Act is the holder of the leasehold estate who is entitled by virtue of their estate to let the buildings to a tenant at the rack rent. I also note that Form 8 contemplates a lessee being an owner as it provides for ownership to be established by a lease and focuses on the legal owner of the building, not the land. Form 8 includes the following:

> The following evidence of ownership is attached to this application: [*copy of certificate of title, lease, agreement for sale and purchase, or other document showing full name of legal owner(s) of the building*]

In this case, the owner for the purposes of applying for a certificate of acceptance would be the applicant.

8.6 If I am wrong in this conclusion, and both owners of the fee simple estate are the owners for the purposes of applying for a certificate acceptance, then I am of the view that the proviso to section 7 comes into play and the definition of "owner" does not apply because the context of section 96 requires otherwise (the definitions in section 7 only apply "unless the context otherwise requires").

8.7 The relevant context is that the other similar provisions in the Act relating to applications in respect of building work refer to "an owner" and this allows one owner to apply rather than all possible owners if there are more than one (see sections 44 (application for a building consent), 92 (application for a code compliance certificate), 101 (application for a compliance schedule) and 114 (notice of change of use)). It would be inconsistent with these provisions (especially in the absence of any requirement in section 96(1)(a) for an application to be made by even "an owner") to require an application by all owners. The better view is that, at best, Forms 8 and 9 can only require one of the owners to apply, and this would be the owner with the greatest rights of ownership over the relevant land and buildings at issue under the Act – in this case the applicant.

8.8 Further, the purpose of the Act is to ensure that buildings are safe and healthy for the people who use them. For the purposes of achieving compliance with the requirements of the Act the focus of the Act is predominantly on the person who has the legal ownership or control of the building. It would be inconsistent with these purposes to reach a conclusion that an owner of an undivided share of the fee simple estate who has no rights in respect of a building on that land is nonetheless required

to apply for a building consent for building work on such a building, for a code compliance certificate when the work is completed, for a certificate of acceptance if the building consent is not obtained, and is also one of the persons to whom a notice to fix is to be addressed if the building work undertaken does not comply with the building consent.

9. Discussion

9.1 Was a building consent required?

9.1.1 As the applicant now accepts that a building consent was required for the shed, this matter does not require to be determined.

9.1.2 In response to the second draft determination, the authority has stated that, as the shed is "approximately 5 inches" over the neighbour's boundary, the authority could not issue a building consent or a certificate of acceptance in respect of the shed.

9.1.3 I do not believe that the position of the shed in relation to the neighbour's boundary has been clearly established. In any case, I do not consider that the overlapping of a building onto a neighbouring property is itself a matter that I can determine under section 177 of the Act. Rather, it is a matter of private law between the two lessees. However the location of the shed is relevant to compliance with Clause C3 (refer paragraph 9.2).

9.2 The code-compliance of the shed

9.2.1 The shed must be built in accordance with the Building Code. The authority has concerns regarding the shed's compliance with Clauses C3 and E1.

9.2.2 The authority is of the opinion that the shed is not a separate structure but rather it is an extension to the adjoining house. Based on the evidence produced at the hearing, I accept that the canopy was erected some time after the shed was constructed and therefore, the shed can be considered as an isolated structure.

9.2.3 The shed is a maximum of 200mm away from two adjoining boundaries. Therefore, I am of the opinion that the requirements of Clause C3.3.5 apply to the shed and in terms of paragraph 7.10.5 of C/AS1 a fire resistance rating of 30/30/30 should be applied to those walls adjacent to the two boundaries.

9.2.4 As the wall of the shed adjoining the house is more than one metre away from it, I do not consider that this particular wall requires fire-rating. While I accept that C/AS1 is only one way of achieving code-compliance, I consider that its application is relevant to the shed.

9.2.5 Based on my comments in Paragraph 9.2.3, I accept that, due to the lack of appropriate fire rating, the shed does not comply with Clause C3.

9.2.6 As the canopy is in effect an alteration to the house, section 112 will apply. In this respect, while the alteration does not fall within the requirements of escape from fire or disability facilities, the canopy does need to comply with the Building Code to at least the same extent as before the alteration. In this respect, the end of the canopy

extends to the boundary with the adjoining property. Accordingly, it does not comply with the requirements for an open sided building as set out in Figure 7.10 of C/AS1, which would require a minimum 300mm separation from the boundary or the fire-proofing of the canopy. Accepting that C/AS1 is only one method of compliance I consider that its application is relevant in this instance. A relatively simple exercise would be to cut off at least 300mm from the end of the canopy at the boundary and this would enable the canopy to comply with Figure 7.10 requirements.

9.2.7 The consultants have noted that the surface water from the shed roof is conducted directly into the stormwater drainage system through a downpipe. However, from observations made during the site visit, the shoe at the base of the downpipe does not completely drain surface water into the adjoining sump. Some water was observed to flow onto the adjoining property when the consultant poured a limited amount of water onto the shed roof. As this flow would be greatly increased during an event having a 10% possibility of occurring annually, I am of the opinion that the shed does not comply with Clause E1.

9.3 The code-compliance of the paving

9.3.1 The authority has stated that, as the paving is less than 150mm below the floor level of the unit, it does not comply with E1/AS1 2.0.1. The authority was also of the opinion that surface water could enter the car port/laundry areas of the property during heavy downpours. In its submission to the second draft determination, the authority notes that the concrete paving has covered the bottom of the existing laundry cladding and this is in breach of Clause E2. As also noted by the authority, this matter was not covered in the notice to fix.

9.3.2 The applicant's lawyers have pointed out that compliance with an Approved Document such as E1/AS1 is only one means of complying with the Building Code. Accordingly, compliance can be met outside the requirements of E1/AS1. The applicants were also of the opinion that the paving was not "building work" as defined in the Act.

9.3.3 Based on information provided at the site visit, the bottom plate upstands for the shed were constructed at the same time as the paving was laid. In my opinion that would lead me to believe that the paving is building work as defined in the Act. The demonstration conducted by the consultants lead me to accept that the paving effectively drains away from the house towards the surface water sumps. The area is further protected by the canopy between the shed and the unit.

9.3.4 While there is a possibility that water could enter the carport area during heavy rain showers, I note that Clause E1.3.2 only applies to 'Housing, Communal Residential and Communal Non-residential buildings'. In Determination 1999/005, the Building Industry Authority (the precursor to the Department) held that a domestic garage did not come within the definition of the limits set out in Clause E1.3.2 but rather within the definition of "outbuildings". I am in agreement with the decision in Determination 1999/005, and find that the carport is not subject to the requirements of Clause E1.3.2, nor are the laundry facility areas contained therein intended for human habitation.

9.3.5 Accordingly, I accept that the paving meets the requirements of Clause E1 in its existing configuration.

9.3.6 In response to the second draft determination the authority has raised the issue of the laundry cladding not meeting the requirements of Clause E2 as the paving buries the base of the cladding. I note that this matter did not feature on the notice to fix nor was it raised at the hearing or the site visit. I observe also that it was noted at the site visit that the new paving was constructed to the same level as the paving that it replaced.

9.3.7 From the photographic evidence that was taken at the site visit, at least some of the base of the cladding in question is situated above the new paving. In addition, there is no evidence of water ingress into the laundry in the 18 months since the paving was laid. The consultants have noted in their 6 November 2008 report that the shed and the canopy have created 'a comfortable dry area' and the porch effect 'keeps the entry to the shed and the back laundry area dry' as opposed to the previous paving layout.

9.3.8 Taking the factors above into account, I am prepared to accept that the paving does not affect compliance with Clause E2 in regard to the laundry wall cladding.

9.4 The notice to fix

The time frame

9.4.1 The authority imposed a time limit of up to 13 December 2008, by which time the applicant has to comply with the requirements of the notice to fix. This has been queried by the applicant, who considers the time to be unreasonable.

9.4.2 Section 183(1) states:

> Until the chief executive makes a determination on a matter, and decision or exercise by any person in section 177 that relates to that matter is suspended unless and to the extent that the chief executive directs otherwise.

I note that the authority is a 'person in section 177' as regards this determination.

9.4.3 In view of this section of the Act, I consider that the time limit imposed by the authority in its notice to fix will be suspended until a final determination is made on the matters arising from the notice.

9.4.4 Once the determination is complete and the revised notice to fix can be issued, I suggest two months is a reasonable time frame in which to complete the work required.

The particulars of contravention

9.4.5 In accordance with the decisions that I have made in paragraphs 9.2 and 9.3, I consider that only the matters pertaining to the building consent, the fire-rating of the shed, and proximity of the canopy to the boundary, and the discharge of surface water should have been included on the notice to fix.

9.4.6 The notice requires the shed and paving to be removed and the applicant has queried the necessity for these actions. As I have found the paving to be code-compliant, there is no need for any action to be taken in this regard. I do not consider that removal or demolition of the shed is the only option, providing that the two walls adjoining the boundaries are fire-proofed to meet the requirements of Clause C3.3.5, the separation of the canopy from the boundary, and the drainage of the water from the shed roof are made compliant. Accordingly, any notice to fix should allow for this alternative.

9.5 Conclusion

9.5.1 I conclude that:

- the shed does not comply with Clause E1 and is also required to be fire-rated as discussed in paragraph 9.2.3 in order to comply with Clause C3
- the canopy does not comply with Clause C3
- the paving complies with Clause E1
- the notice to fix should be modified to allow the owner to remedy the contravention by making the shed and canopy code-compliant.

10. What is to be done now?

10.1 The authority should withdraw its notice to fix and issue a new one that requires the owners to bring the shed and canopy into compliance with the Building Code. The notice to fix should not specify how the defects are to be fixed. That is a matter for the owners to propose and for the authority to accept or reject.

10.2 I would suggest that the parties adopt the following process to meet the requirements of paragraph 10.1. Initially, the authority should issue the notice to fix. The owners should then produce a response to this in the form of a detailed proposal, produced in conjunction with a competent and suitably qualified person, as to the rectification or otherwise of the specified defects. If there are any outstanding items of disagreement, these can then be referred to the Chief Executive for a further binding determination.

10.3 Once the shed and canopy are made code-compliant to the authority's satisfaction, the applicant can apply to the authority for a certificate of acceptance.

11. The decision

11.1 In accordance with section 188 I hereby determine that:

- the shed and canopy do not comply with the Building Code with respect to Clauses E1 and C3
- the paving complies with the Building Code with respect to Clauses E1
- the shed was building work that required a building consent
- the authority should modify the notice to fix to reflect the findings of this determination, namely that the notice to fix should be modified to allow the

owner to remedy the contravention by making the shed and canopy code compliant.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 25 June 2009.

John Gardiner
Manager Determinations