



Determination 2011/110

The exercise of an authority's powers in respect of a notice to fix for remedial building work at 40 Joseph Banks Drive, Whitby



1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department.

The parties to the determination are:

- the owners, Pynynton Family Trust (“the applicant”)
- the Porirua City Council (“the authority”), carrying out its duties and functions as a territorial authority and building consent authority.

¹ The Building Act 2004, the Building Code the Compliance Documents, past determinations, and guidance documents issued by the Department are available from the Department’s website at www.dbh.govt.nz or by contacting the Department on 0888 242 243.

- 1.2 This determination arises from a dispute between the parties relating to the issuing of a notice to fix for building work that was done to an existing house, and the regulatory matters concerning this notice. The applicant has sought to have the notice to fix withdrawn as they consider that:
- that authority has not established reasonable grounds on which to issue the notice
 - the building consent, upon which the notice was based, was cancelled
 - there was no requirement to obtain a building consent for the work that was carried out
 - no work has been carried out in contravention with the Act
- 1.3 I have taken the view that it is the authority's exercise of its powers in respect of issuing the notice to fix that is the matter central to this dispute. The notice to fix states that the building work had not been carried out in accordance with the building consent and that because the authority had not been provided the opportunity to inspect the building work, it was not able to establish whether or not the building work complied with the Building Code.
- 1.4 The matter to be determined² is therefore whether the authority correctly exercised its powers in issuing the notice to fix. In deciding this, I must consider:
- whether the building consent remained in force at the time the work was done
 - the authority's decision to issue notice to fix, including the contraventions and remedies that were set out in the notice to fix.
- 1.5 In making my decision, I have considered the submissions of the parties, the reports of the experts commissioned by the Department to advise on this dispute ((“the building surveyor”) and (“the regulatory expert”)), and other evidence in this matter.

2. The building

- 2.1 The original three storey dwelling was built during 1993 and 1994. It is situated on a south-facing, sloping residential section, exposed to southerly winds but is slightly sheltered from northerly winds. The construction is a mix of reinforced concrete basement foundation, concrete ring foundations, suspended wooden floors with piles and jack studs. The timber framing is H1 treated and the cladding is a fibre cement board with a textured plaster coating.
- 2.2 There are two decks, one on the southeast elevation which is a timber deck and free draining. The second deck is on the south elevation and comprises a butyl membrane clad deck that sits above the garage. The roof is a mixture of pressed metal tile and butynol membrane. There are also two large sloping and pitched atrium roof structures over the entry and upper level areas.
- 2.3 The lower level comprises a garage. The second level, which has flat access from the upper part of the section contains the main living area, laundry and master bedroom with ensuite. The upper level comprises of bedrooms and a bathroom.

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

3. Background

3.1 The building consent for the original dwelling was issued in 17 February 1993 under the Building Act 1991 and the code compliance certificate was issued on 30 August 1994.

3.2 On 13 May 2009, a building surveyor engaged by the applicant (“the applicant’s building surveyor”) inspected and reported on the condition of the house, with respect to its weathertightness. The applicant’s first building surveyor observed:

There is clear evidence of cracking of cladding sheet joints on trimmer studs below and above the windows on all elevations of the home and cracked horizontal sheet joints on the [western] and eastern elevations.

Moisture testing on the exterior determined dampness was entering the cracked joints of the cladding with results in the 18%-20% range.

... there is evidence of water damage at the skirting trim below windows, below the glazing system over the entrance foyer and where the intrusive investigation has been made above the window there is decay damage to timber framing below a structural beam. There was no evidence of excessive moisture evident on the day of inspection.

The sealing programme to provide temporary protection carried out by [the applicant] appears to have been effective.

During the investigation I was able to confirm damage to the structure and fabric of the home has been sustained as a consequence of the penetration of moisture.

3.3 On 5 November 2009 the authority issued a building consent for remedial work to repair the dwelling. The building work described by this consent includes:

- a full re-clad of the dwelling (incorporating a cavity system) and replacement of damaged timber
- modifications to the parapets
- minor internal changes.

3.4 In a letter dated 5 June 2010 to the authority, the applicant states:

... we have reduced the scale of the project to repair the existing house, re seal the existing cladding and replace any cladding that has been damaged. Our builder has removed all [wall linings] on the inside and replaced all water damaged studs. We will then use [a specialist] to seal the outside including adding any flashings and capping where required. We are also repairing any damaged butynol on the roof and removing parts of the glass atrium at the front door.

Accordingly we wish to adjust our consent to reflect repair work only to the house.

3.5 The authority has submitted that it does not have a record of this correspondence.

3.6 A site meeting was held, on 1 July 2010 with the applicant’s builder and the authority’s representative in attendance. At the conclusion of this meeting, the following was recorded and signed by the builder and the authority’s representative:

Ensure that Quality Assurance program is followed, [the authority] to inspect framing prior to any defective timbers being removed, after timbers have been replaced, prior to cladding. Quality Assurance document to identify who is responsible for identifying defective timbers and who is managing the project.

3.7 The building work (as described in paragraph 3.4) subsequently commenced. The authority was not asked to inspect any of the building work during construction.

- 3.8 On 13 January 2011, the authority wrote to the applicant to establish whether or not work had commenced. Shortly thereafter the authority undertook a site inspection and verified that building work had commenced and had in fact been completed.
- 3.9 During February 2011 there was correspondence between the authority and the applicant as to the status of the building consent. The applicant contends that the building consent was cancelled. The applicant had decided to undertake building work that was less extensive than that described in the building consent and was of the view that this work did not require a building consent. In an email to the authority dated 3 February 2011, the applicant stated:
- I wish to confirm that we wish to cancel our building consent as previously discussed with [the authority]. This is due to the fact that we made no alterations of improvements to the dwelling (due to advice that [any water damage to the property] was not significant) apart from normal repairs and maintenance including any water damage.
- All the internal wood has been exposed and any wood even slightly touched by water had been replaced. Any [external cladding material] that was damaged has been replaced and the house resealed ... All wood replacements are as per today's standard although tests showed that the previous wood used was also of today's standard.
- ... we have also replaced the butynol as part of maintenance and fibre glassed the cappings on the parapets so they are completely sealed.
- 3.10 In response, the authority did not accept that the building consent had been cancelled since in their view the Act does not make provision for such an action to occur.
- 3.11 On 11 and 17 February 2011, the applicant's builder provided photographs of the building work to the authority. The purpose of these photos was to provide the authority evidence of the building work that had been carried out and that the dwelling now complied with the Building Code.
- 3.12 The authority did not accept that the photographs provided the reasonable grounds necessary to establish that the building work complied with the Building Code.
- 3.13 On 21 February 2011, a notice to fix was issued. The notice identified the following as the particulars of contravention or non-compliance:
- Building work has been carried out otherwise than in accordance with the requirements of [the building consent] and the [Act].
 - [The authority] was not given an opportunity to carry out [the inspections] that were detailed as required in [the building consent]. [The authority] therefore cannot be satisfied on reasonable grounds that the completed building work complies with the consented drawings and the [Building Code].
- 3.14 The notice to fix also identified the remedies to the contraventions as:
- Engage a suitably qualified independent person to assess and report on the entire building in order to demonstrate that the completed building work that [the authority] was not given an opportunity to inspect complies with [the Building Code] and the consented drawings. This report must include comprehensive and detailed photographic evidence and must be presented to [the authority] for consideration.
 - Alternatively you may wish to remove the exterior cladding system and expose all necessary building elements so that [the authority] may complete the inspections identified as required in [the consent].

- 3.15 The applicant's builder provided a report to record the building work and repairs that were done. The work that had been done included drainage work, retaining wall construction, replacement of flashings and door framing at front door, external timber replaced and reconfigured at family room window, installation of insulation, remedial work to beam supporting the glass conservatory, remedial work to the gutters, remedial work to the parapets, and flashings installed to the conservatory.
- 3.16 An application for a determination was received by the Department on 2 May 2011.

4. The submissions

- 4.1 In the application for determination, the applicant considered that the building consent was cancelled, and any condition relating to the consent can no longer have effect, the remedial works do not require approval from the authority, and consequently, the authority should revoke the notice to fix. The application included:
- a letter supporting the application
 - correspondence between the parties
 - a report prepared by the builder (refer to paragraph 3.15).
- 4.2 The authority made a submission dated 11 May 2011, and provided the building consent documents and copies of correspondence with the applicant. The authority submitted that:
- it did not receive a request to cancel the building consent, however, if such a request was made it would have been declined as there are no provisions in the Act to cancel a consent
 - it did not receive an application to amend the consent prior to the completion of the work, however, if such a request was made it would have been declined as the scope of the work was deemed necessary in order to bring the building into compliance with the Building Code
 - the scope of the work done is not repairs and maintenance.
- 4.3 The applicant made a further submission in response to the authority's submission, noting:
- [The applicant's building surveyor] did not conduct invasive tests and noted low moisture levels on the day and an effective sealing plan in place.
- The points raised in [the applicant's building surveyor's] report were all able to be remedied through repairs undertaken.
- The primary purpose of the consent, as outlined in the application, was for extension to bedrooms and to change the layout of the roof which we needed consent for. This work was not pursued.
- The work undertaken was remedial only and not significant in terms of the total proportion of affected areas of the house.
- 4.4 I issued a draft determination to the parties for comment on 25 November 2011.

4.5 The authority did not accept the draft determination, and in a response dated 9 December 2011, the authority noted:

- the existing building has failed to comply with ‘the Building Code requirements of 1993’, and the building should now be brought into compliance with the Building Code as required by the building consent
- the basis for granting building consents for alterations and additions ‘is on the premise that existing buildings continue to comply with the provisions of the Building Code to at least the same extent as when the original building work was completed’
- the work related to the building consent should still be carried out given the scope of non compliance and the failures of the Building Code the Department’s expert identified
- there is no value in the applicant applying to amend the consent, given the work was not inspected and factual evidence clearly shows the completed building work is non compliant
- given the extent of non compliance it is unlikely that any meaningful certificate of acceptance could be issued, should one be applied for.

4.6 The applicant accepted the draft determination, and in a response dated 15 December (also in response to the submission of the authority), the applicant:

- disagreed with the authority’s requirement that building work be carried out, as per the building consent, and to bring the building into compliance with the Building Code
- accepted that errors were made in the attempt to make the house weathertight
- was comfortable with a plan involving targeted repairs in the interim, and in the future would look at a remediation plan to fully repair the house.

5. The experts’ reports

5.1 As mentioned in paragraph 1.5, I contracted two independent experts. The regulatory expert was commissioned to review and consider the regulatory aspects of the dispute. The building surveyor was commissioned to assess the Building Code compliance of the house with respect to the Building Code.

5.2 The regulatory expert’s report

5.3 The regulatory expert is a specialist in the field of building controls and the local government regulatory environment. The expert provided a report dated 20 August 2011, and the report was provided to the parties on 29 September 2011.

5.4 The purpose of the building regulatory expert’s report was to:

- establish the status of the building consent, and
- evaluate the veracity of the notice to fix.

The building consent

5.4.1 The regulatory expert noted that even though the applicant considered that they had cancelled the building consent the building work was of a nature that required a building consent.

5.4.2 The regulatory expert compared the work that had been undertaken with the work detailed in this building consent and found that some of the work had been undertaken, some hadn't been done and some additional work had been carried out and recorded this as follows:

| Description of work | Work done | Work not done | Additional work |
|---|-----------|---------------|-----------------|
| Changes to roof structure over entry to install new roofing and windows | | X | |
| New pole retaining wall in garage | | | X |
| Changes to bedroom 2 wardrobe | X | | |
| Remove wall in ensuite by vanity | X | | |
| New sump outside garage | | X | |
| Pump chamber behind | | | X |
| Alteration to nook between kitchen and dining | X | | |

5.4.3 Beyond this the regulatory expert was unable to establish exactly what work had been carried out. However, it was acknowledged that the photographs provided by the applicant showed a range of work that had been completed, some of which did not comply with the Building Code.

5.4.4 The regulatory expert noted that:

- under the Act an owner is able to decide on the scope of work that can be covered by a building consent
- section 40 requires that building work not be carried out except in accordance with an approved building consent (unless exempt from the requirements to obtain a building consent under Schedule 1)
- the owner was not able to rely on Schedule 1 of the Act to undertake repairs to the timber framing without building consent approval
- building work that fell within the scope of the building consent was undertaken, and the consent therefore did not lapse.

5.4.5 The expert considered that applicant should apply for an amendment to the building consent to redefine the scope of the work by removing the work that was not carried out.

The notice to fix

5.4.6 In respect of the notice to fix, the expert noted:

- a better description of the work carried out other than in accordance with the building consent is required
- the authority needs to clearly describe what work has been carried out that it considers does not comply with the Building Code.

5.4.7 In respect of the remedies listed on the notice to fix, the expert noted:

- the required report should be limited to the scope of the consent and include any work carried out without a consent, rather than require the entire building to be made Building Code compliant
- the relevant Building Code clauses are most probably B1 Structure, B2 Durability, E2 External Moisture, F4 Safety from Falling, E1 Surface Water and H1 Energy Efficiency
- the requirement to remove all the cladding, and the unclear breach does not appear reasonable and may in fact disadvantage the applicant.

5.4.8 In summary the expert considered that the authority needed reissue the notice to fix with the following:

- a clear description of the breaches in relation to non-compliance with the consent and additional work not covered by the consent
- remedies more specific to the breaches, including applying for a certificate of acceptance in relation to the additional work not covered by the consent.

5.4.9 The expert noted that the authority may need to undertake an inspection of the building work before issuing a notice to fix.

5.5 The building surveyor's report

5.5.1 The building surveyor is a member of the New Zealand Institute of Building Surveyors. He visited the house on 9 August 2011 and furnished a report dated 23 August 2011. A copy of the report was provided to the parties on 26 August 2011.

5.5.2 The purpose of the building surveyor's report was to assess the compliance of the building work. I note the building surveyor's report covers building work that relates to:

- the scope of the consented building work compared to the work that was carried out
- the compliance of the building work that was carried out
- the condition of existing building elements.

5.5.3 The Building Code compliance of existing building elements are outside the scope of this determination and are not described in this section. I have commented further on the scope of the building work in paragraph 5.5.12.

The scope of the consented building work compared to the work that was carried out

5.5.4 The building surveyor noted the building consent detailed a full re-clad on a cavity system with parapet modifications and internal changes.

5.5.5 The building work that was carried out included:

- replacing some of the damaged timber framing
- using and repairing existing cladding
- modifying the existing window/cladding junctions
- modifying the parapets and repairing the leaking roof drain
- modifying decks
- building a basement retaining wall
- installation of a drain and submersible pump, and
- completing landscaping.

The compliance of the building work that was carried out

5.5.6 The building surveyor undertook an external and internal inspection as well as carrying out internal invasive and non-invasive moisture readings and external non-invasive moisture readings.

5.5.7 Non-invasive moisture readings ranged from 21% to 56%. The building surveyor noted that moisture was entering the cladding around the windows below the decks and around the garage.

5.5.8 The building surveyor took invasive moisture readings behind internal linings that relate to building work that was done as follows:

- 27% at the skirting board below the left hand side of the northern window of the family room
- 22% at the lower left corner of the lounge curved window
- 100% at the right lower corner of the upper eastern bedroom window.

5.5.9 The building surveyor took invasive moisture readings to the laundry deck that relate to building work that was done were as follows:

- 32% at the boundary joist
- 28% at the jack stud
- 22% at the base plate.

5.5.10 I note that moisture readings above 18%, or which vary significantly, generally indicate that moisture is entering the structure and further investigation is needed. Readings over 30% indicate that the timber is saturated and decay will be inevitable over time.

5.5.11 The building surveyor made the following observations about the compliance of the building work that was carried out:

Patch repairs and jointing of the cladding

- The cladding had been patch repaired on the northern elevation. The work had not been done well.
- The new sheets were not flush with the old sheets which created a sealant filled ridge.
- Silicon has been installed at junctions and cut into horizontal joints, which is not an appropriate way to construct either a horizontal or vertical joint.
- One of these joints on the northern elevation had already failed and had separated from the fibre cement sheet joint which was allowing water to enter the joint and drain into the lower (newer) cladding.

Cladding to joinery detail

- The remedial work entailed repairing the framing, injecting expanding foam behind the joinery and applying a sealant against the exterior window jambs and completely sealing the ends of the head flashings.
- This approach is contrary to the manufacturer's specifications and the expert did not consider it a durable repair. No allowance was made for a 5mm gap between the cladding and the head flashing and the plaster had been taken hard to the flashing.
- It is likely that on the northern elevation water was entering through the window frame mitres and trapped by the plaster detail surround, preventing drainage and drying.

Decks and sub-floor

- The expert noted that an attempt had been made to repair the decking but he did not consider that the repairs would be successful.
- The expert noted that the deck was still leaking and that the framing would continue to decay.

Roof

- The low pitched butynol sections have had leaking internal drains. These had been repaired by inserting new long length strips of butynol. In two areas the butynol had started to peel and the expert concluded that it could not be considered durable.
- The roof to wall and roof to parapets had been sealed by applying painted fibreglass wrap that extended over the original steel cap flashings. This repair method is unreliable and therefore unlikely to be considered durable.
- On the parapet adjoining the entry foyer atrium the expert noted indications of repairs but that in this area the fibreglass wrap was 'drummy' to the touch indicating that at this point the fibreglass was no longer attached to the original parapet.
- The glazed roof over the entry has also been repaired although a glass panel had slid down and away from the upper frame allowing water to blow over the top edge of the glass. The flashing at this point was slightly raised.

- The glass panels had blocks of wood lodged in place between the gutter and glass lower edge. Also the expert noted that the right hand pane was approximately 50mm longer than the other panes suggesting that it had also dropped.

Replacement of framing

- An attempt had been made to replace some decayed timber. Studs had been spliced and bottom plate joints had been replaced. Whilst the repair work had not entailed replacement with full lengths, he did note that the replacement timber appeared to have bracing installed.

The condition of existing building elements

- 5.5.12 The building surveyor made some observations about existing building elements. The building surveyor did not undertake a full investigation of the existing building, as this determination is about the building work that was carried out, therefore the following comments should not be taken as a conclusive record of the condition of the existing building. I have included the following information to indicate to the owner the building elements that appear to have significantly damage.

Decayed framing and damaged building wrap

- Photographic evidence and subfloor examination indicated that framing timber had decayed and building wrap damaged, however, it was not possible to establish whether or not all the necessary replacement had occurred and without the cladding being removed, it would be almost impossible to remove and replace decayed timber and damaged wrap.
- A photo of a timber beam (thought to be near the front entry) showed considerable damage.

Decks and sub-floor

- The expert observed that decayed framing had been left in situ and that no evidence of applied timber treatment could be seen.

6. The building consent

6.1 The provision for the lapsing of building consents

- 6.1.1 The applicant contends that the building consent was cancelled. I have considered the provisions of the Act that relate to building consents. There are no provisions that relate to the cancellation of consents, however, I note that section 52 of the Act provides for the lapse of a building consent when building work to which it relates does not commence within 12 months after the date of issue of the building consent (or any further period that the authority may allow).
- 6.1.2 From the description of the background to the events provided by the applicant, and the information presented in the experts' reports, I am of the view that work was undertaken within this period that was within the scope of what was approved in the building consent, and as such the building consent could not lapse, and therefore section 52 does not apply.

6.2 The requirement for a building consent

6.2.1 I also note that part of the contention of the applicant appears to be that a building consent was not required, because the work was minor repairs and maintenance only, and that this work is therefore part of the original consent, and no alterations or improvements to the dwelling were made (refer to paragraph 3.9).

6.2.2 It is my view that the work described by the applicant and by the experts is building work, as defined in the Act. As to whether a building consent was required for this work, I note that the circumstances in which a building consent is not required are set out in section 41 of the Act, including work that is exempt from the requirement to obtain a building consent under Schedule 1 of the Act.

6.2.3 The applicant has stated that the repair work was carried out in June 2010. I have taken account of the Act (as at 1 April 2010). Paragraph a of Schedule 1 (that was in force at the time) states a building consent is not required for:

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—

...

(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

...

6.2.4 Taking regard of paragraph a of Schedule 1, I am of the view that:

- the work is not maintenance
 - although not defined in the Act, I consider maintenance to be work that is needed to restore/maintain the durability of a building element, where such durability has been reduced through normal circumstances (i.e. normal use, normal degradation)
 - the remedial work and replacement of timber is not maintenance, as its purpose is to repair the timber framing that has been degraded by other than normal circumstances (by in fact failure of another element – the E2 failure of the external envelope system)
- the work is the repair of building assemblies (the framing and building envelope) that have failed to meet the requirements of Clauses E2 and B2 (the latter as a consequence of the former).

6.2.5 Therefore, I consider the work did not come under the ambit of section 41, that it was not work described by Schedule 1 of the Act, and therefore was building work that required a building consent.

6.3 Conclusion

6.3.1 I am satisfied that the building consent did not lapse and that the building work carried out was work that required a building consent.

7. The notice to fix

7.1 The breaches

7.1.1 The notice to fix stated the breaches were:

- Building work has been carried out otherwise than in accordance with the requirements of [the building consent] and the [Act].
- [The authority] was not given an opportunity to carry out [the inspections] that were detailed as required in [the building consent]. [The authority] therefore cannot be satisfied on reasonable grounds that the completed building work complies with the consented drawing and the [Building Code].

7.1.2 I consider the experts' reports show that the breaches were:

- (i) building work was carried out that was not in accordance with the approved building consent and differs in scope to the work that was approved in the building consent, and an amendment to the consent was required, but not obtained
- (ii) building work was carried out for which a building consent was required, but not obtained
- (iii) building work was carried out that does not comply with the Building Code (refer to paragraph 5.5.11).

7.2 The remedies

7.2.1 The notice to fix stated the remedies were:

- Engage a suitably qualified independent person to assess and report on the entire building in order to demonstrate that the completed building work that [the authority] was not given an opportunity to inspect complies with [the Building Code] and the consented drawings. This report must include comprehensive and detailed photographic evidence and must be presented to [the authority] for consideration.
- Alternatively you may wish to remove the exterior cladding system and expose all necessary building elements so that [the authority] may complete the inspections identified as required in [the consent].

7.2.2 I have considered the appropriateness of the remedies sought and I am of the view that these are not appropriate for the following reasons:

- there is no requirement in the Act for the existing building to be brought into compliance with the Building Code. It is my view that an owner is entitled to decide the scope of work to be undertaken and therefore included in a building consent
- the building work constitutes an alteration to an existing building and therefore comes under the ambit of section 112 of the Act. Section 112 contains specific requirements for alterations that relates to the compliance of the altered building (which is the whole building as altered, not merely the alteration)
- under section 112(1) any new building work must comply fully with the Building Code (subject to any waiver or modification granted by the authority) and after the alteration, the altered building, as a whole must:
 - comply as nearly as reasonably practicable with the provisions of the Building Code that relate to means of escape from fire and access and facilities for people with disabilities.

- o continue to comply with the other provisions of the Building Code to at least the same extent as before the alteration.

7.3 The modification of that notice to fix

7.3.1 I am of the view that the notice to fix should be modified to provide remedies for the breaches I have listed in paragraph 7.1.2.

7.3.2 It is my view that any notice to fix should have particularised the building work that:

- did not comply with the consent
- the building work for which a consent was required but no consent was obtained
- the extent of this work that did not comply with the Building Code.

7.3.3 This would have clearly informed the applicant of the matters to be attended to in terms of bringing the building work into compliance with the Building Code.

7.3.4 The notice to fix should provide for actions to be taken with respect to:

Building work that was done without first obtaining a building consent but for which a building consent was required

(I) Building work that does not comply with the Building Code

- there is a significant amount of work in this category (refer to paragraph 5.5.11) where the weathertightness remedial work that was done was discrete repairs and much of it is temporary in nature
- this work is required to be brought into compliance with the Building Code
- this remedial work is likely to involve removal of the non-compliant aspects of the work and a proposal, most likely contained in an application to amend the building consent (given the scope of the building consent), to bring the work into compliance with the Building Code

(II) Building work that does comply with the Building Code

- there is likely to be work that was carried out without a building consent that does comply with the Building Code, for example the retaining wall, which the building surveyor noted appeared to be well designed and built
- the applicant should be required to apply for a certificate of acceptance to regularise this building work, however, given the extent of non compliance with the Building Code, it is likely that the work in this category will be limited in its scope
- appropriate documentation and evidence needs to be provided to support the application for a certificate of acceptance to demonstrate the work complies with the Building Code. Information, specifications, and drawings will need to accurately reflect what was built

- (III) Building work for which it cannot be ascertained whether it complies with the Building Code
- It is likely that there will be building work for which there is no evidence available to show that it complies with the Building Code. I have described my view of the basis for issuing a certificate of acceptance in previous determinations³. Any certificate of acceptance should clearly set out the nature and extent of the work that is not covered by the certificate of acceptance
 - it is likely that some of this work may be able to be inspected when further building work is undertaken to comply with the notice to fix

Building work that was done within the scope of the building consent

- (IV) Building work that does not comply with the Building Code
- there is building work to the external envelope that does not comply with the building consent, such as the repairs to the deck, but there is evidence that the work does not comply with the building consent or the Building Code
 - the application to amend the building consent will need to include a proposal to bring such building work into compliance (most likely by a combination of removal of the non-compliant work and further work to make the work compliant)
- (V) Building work that complies with the Building Code
- there is work that complies with the building consent (for example, internal alterations)
 - given the extent of building work undertaken that does not comply with the Building Code, it is likely that the work in this category will be limited in its scope
 - appropriate documentation and evidence will be required to be provided to demonstrate the work complies with the building consent (given the items in this category (for example, internal changes), it is my view that this should be relatively straightforward).

7.3.5 I also note that due to the extent of damage to the decks, the owners should attend to fixing the decks in the short term.

7.3.6 It is important that the parties recognise that the notice to fix serves as a disclosure document.

7.3.7 As I have noted in paragraph 5.5.3 and 5.5.12, the building surveyor did not undertake a full investigation of the existing building, as this determination is about the building work in dispute. The determination therefore does not include a conclusive record of the condition of the existing building. I have included information in paragraph 5.5.12 to indicate to the owner the building elements that appear to have significantly damage.

³ For example, Determination 2009/113

7.4 Conclusion

- 7.4.1 The authority was correct to issue a notice to fix as there are breaches of the Act and its Regulations. However I am also of the view that the notice to fix is too wide in its scope. It should be limited to the breaches of the Building Act and Building Code and not the entire building.

8. What is to be done now?

- 8.1 The authority should modify and reissue the notice to fix, taking into account the comments in paragraphs 7.1.2 and 7.3 about the contraventions and the corresponding remedies. The notice to fix should also refer to any further defects associated with the building work that might be discovered in the course of investigation and rectification. I note that the notice to fix should not refer to the entire building, but to the building work in dispute.
- 8.2 I also note that it is not for the notice to fix to stipulate how the defects are to be remedied and the building work brought into compliance with the Building Code. That is a matter for the owner to propose and for the authority to accept or reject. It is important to note that the Building Code allows for more than one means of achieving code compliance.
- 8.3 The applicant should engage a competent and suitably qualified expert to further inspect the building work and prepare the application to amend the building consent, and a proposal for the further building work that is required to bring the building work into compliance with the Building Code.
- 8.4 With respect to the proposal for further building work, the authority will be required to satisfy itself on reasonable grounds that the provisions of the Building Code are met.
- 8.4.1 Due to the extent of damage to the decks, the owners should attend to fixing the decks in the short term.

9. The decision

- 9.1 In accordance with section 188 of the Act, I hereby determine that the authority was correct to issue a notice to fix, because there were breaches of the Act and its regulations and accordingly, I confirm the authority's decision to issue the notice.
- 9.2 I also determine that the authority incorrectly exercised its powers in issuing the notice to fix because the required remedies were not appropriate, and accordingly the authority should modify the notice to fix to take account of the findings of this determination.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 23 December 2011.

John Gardiner
Manager Determinations