

Determination 2015/061

Regarding the issue of dangerous building notices in respect of cantilevered timber-framed decks to three monolithic-clad apartment buildings at 346 Oceanbeach Road, Mount Maunganui



Summary

This determination considers the issue of a dangerous building notice in respect of timber-framed decks to three apartment buildings. Remedial work resulting from water ingress has been carried out to two decks, and a dangerous building notice has been issued in respect of the remaining decks.

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 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:
 - Tauranga City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority
 - the owners of the 21 Units issued with the dangerous building notices, (“the owners”). I have included a list of the units and owners in Appendix A.
- 1.3 I have included the building manager, the Body Corporate (no. 89906), and the owners of Units 8 and 9 as persons with an interest in this determination.
- 1.4 This determination arises from the decision of the authority to issue dangerous building notices in respect of decks to Units 1 to 7 and 10 to 23 at 346 Oceanbeach Road. The authority is of the view that the condition of the cantilevered timber

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.

decks and the associated wing walls mean the decks are likely to collapse and cause injury or death to persons. There is evidence of structural decay to the decks and wing walls of Units 8 and 9 caused by moisture ingress over the period of time since construction, and the authority is of the view that decks of the other units are in a similar condition.

1.5 The matter to be determined² therefore is the authority's exercise of its powers of decision in issuing the dangerous building notices under section 124.

1.6 In making my decision I have considered

- the submissions of the parties, including the following reports:
 - assessment of the building envelope, by a building surveyor engaged by the Body Corporate (the "2012 assessment report")
 - damage observed during repairs to Units 8 and 9, by a building consultant engaged by the authority subsequently ("the 2014 consultant's report")
 - a report on the structural issues identified in the 2012 assessment, by a structural engineer engaged by the authority
- the report of the expert commissioned by the Ministry to advise on this dispute ("the expert")
- the other evidence in this matter.

2. The building work

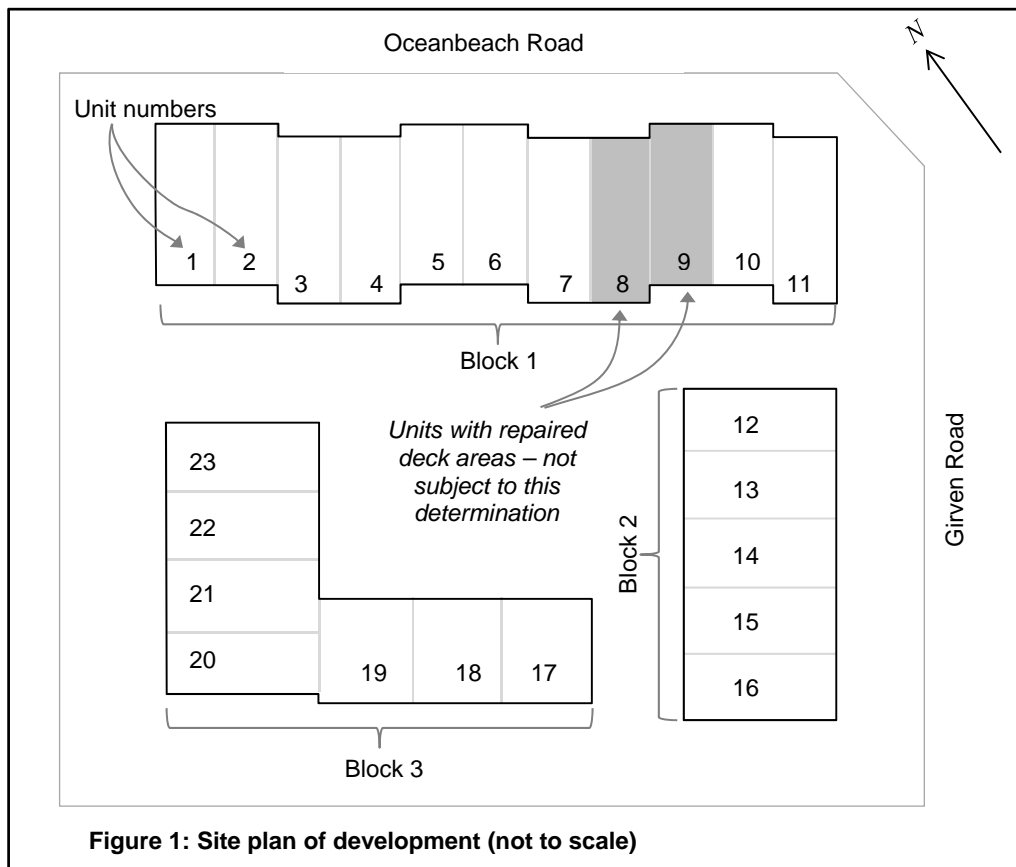
2.1 The development consists of three blocks of units: Block one Units 1 to 11, which fronts Oceanbeach Road; Block 2 Units 12 to 16, which fronts Girven Road; Block 3 Units 17 to 23, which is L-shaped and sited on the remaining western portion of the site.

2.2 The blocks are three-storey terraced multi-unit residential building known as "The Terraces". The development is situated within 150m of a breaking surf beach and is in a very high wind zone.

2.3 The foundations and ground floors of each unit are constructed of reinforced concrete. The walls are prefabricated using engineer designed laminated veneer lumber ("LVL") wood panels. The panels are approximately 40mm thick and incorporate sections of light-weight timber framing or strapping. The prefabricated units are effectively bolted together using a system of threaded steel rods. Level 1 and 2 floors are timber-framed spanning between the LVL panels, overlaid with particleboard.

2.4 The cladding is a 9mm fibre-cement sheet system, direct-fixed to the LVL substrate over building wrap, finished with a modified plaster jointing system and a spray-applied textured coating. The roof design incorporates large internal- gutters between the individual apartments constructed of low pitched sections with plywood substrate and sheet membrane coverings.

² Under sections 177(2)(d) and 177(2)(f) of the current Act



2.5 The decks

- 2.5.1 There are decks on the second and third storey of each unit. Approximately half of the decks are partly cantilevered decks supported jointly by the common wing walls and cantilevered floor beams, with 190x45 deck joists spanning between.
- 2.5.2 There is a double 190x45 perimeter deck joist, which powder coated aluminium handrail stanchion base plates are screw fixed to. The return hand rails are end fixed into the side of the common wing wall and to the wall face of the unit; the fixings are 2 stainless steel screws to each of the fixing plates.
- 2.5.3 The wing walls are double frames of 100mm x 50mm timber with a 10mm gap between. The walls are designed to provide fire separation between the units and extend beyond the roof.

3. Background

- 3.1 The buildings were constructed under building consent no. 3227, and a code compliance certificate was issued by Bay Building Certifiers³ on 13 December 2000.

3.2 The 2012 assessment report

- 3.2.1 It appears that weathertightness issues were evident some time after construction, and a building surveyor was engaged by the Body Corporate to undertake investigations to units in Block 1. The building surveyor undertook site visits in March 2012 and produced a report titled building envelope assessment report dated 20 April 2012 (“the 2012 assessment report”), which included photographs of the

³ Bay Building Certifiers was registered as a building certifier under the Building Act 1991: their approval as a certifier expired on 30 June 2005.

invasive investigation carried out. The report was provided to the authority in September 2014 by a real estate agent acting on behalf of some of the unit owners.

3.2.2 The 2012 assessment report concluded that there was systemic failure of the building envelope and the cladding had failed to protect the underlying structure. There was evidence of:

- decay in the LVL, and toxic mould present
- signs of pre-existing water ingress on the more exposed eastern elevation at the balcony thresholds
- significantly high moisture readings and decay in structural framing, most prevalent in the deck areas

3.2.3 In regards to the decks the 2012 assessment report noted:

Some sections of treated timber framework on balcony sections has demonstrated superior resistance to decay, but are still in the process of inevitable decay as hazard treatment leaches from the timbers due to excessive levels of moisture penetration.

Further commentary in the attached photographs noted (for example):

... extensive decay and composting of the wall and balcony support. The wall has become detached completely from the balcony and baluster rails.

... These sections and adjoining balconies were taped off, as structural failure is imminent.

Consistent weathering failures at the double-framed inter-tenancy wall were recorded, with greatest damage occurring on the wall sections that project further outside the roof line ... All these sections form integral connections with raised balconies on both east and west elevations.

... Panel test to further [inter-tenancy] wall balcony deck critical junction. Total saturation and decay.

... Typical detail and further evidence of total decay at balcony external corners. Fixings to safety balustrades at these corners have no suitable holding.

3.3 Remedial work to units 8 and 9 and resulting concerns

3.3.1 In February 2014 the owners of units 8 and 9 were granted building consent to carry out remedial work related to weathertightness issues and engaged a building surveyor. The building surveyor discovered structural decay in the decks and notified the authority.

3.3.2 On 7 April 2014 the authority inspected units 8 and 9, and observed considerable decaying of the timber around the deck areas as well as in the framing on the eastern side of the units. The authority also observed visible signs of cracking and bulging in the exterior cladding on a number of other units in the development.

3.3.3 On 8 April 2014 the authority wrote to the owners of all units within the development, noting the decay damage evident in the decks and adjacent walls which the authority considered dangerous in terms of section 121, and expressing concern that this would be common in other units. The authority requested invasive investigation be carried out and a remedial proposal prepared in order to bring the buildings into compliance with the Building Code.

3.3.4 On 2 May 2014 at the request of the Body Corporate, the authority met with representatives of the Body Corporate and its solicitor, some of the unit owners, and the designer and builder involved in the remedial work to units 8 and 9. The owners

expressed the view that invasive investigation was unnecessary as they were aware there were weathertightness issues with the buildings. The designer recommended access to all deck areas be closed off because he considered the damage observed on the wing walls was indicative of issues with the construction of all the decks and that they were dangerous due to the risk of failure.

- 3.3.5 Subsequently the Body Corporate wrote to the owners of all the units, advising that the decks on units 1 to 7, 10 to 11 and 12 to 16 were
- ... deemed unsafe and must not be used until repairs are effected. It is recommended that lockable bolts are fitted to the inside of the doors on these decks to prevent people from accessing them at all times.
- 3.3.6 The authority has stated it received confirmation from some owners, or their agents, indicating remedial work would be carried out.
- 3.3.7 On 31 July 2014 the authority received an application for a building consent for proposed remedial work to Unit 2. No further consent applications were received in respect of other units.
- 3.3.8 On 9 September 2014 the authority received an email from the designer involved in the remedial work to units 8 and 9. The designer advised that there was a concern regarding the fire rating of the wing walls and that these walls also support the balconies above. In a further email the designer confirmed that during remedial work to Units 8 and 9 the deterioration of framing in adjacent Units 7 and 10 was clearly visible.

3.4 The 2014 consultant's report

- 3.4.1 The authority subsequently engaged a building consultant to prepare a report on the damage that had been observed when the consultant was overseeing the repairs to Units 8 and 9. The consultant provided a report dated 23 September 2014 ("the 2014 consultant's report"), which included photographs taken while the framing was exposed.
- 3.4.2 The consultant described the damage observed to the northeast elevation as 'severe and widespread', commenting that
- ... the extent of decay damage evident to units 8 and 9 is typical enough to cause serious concern in respect to the fire separation and structural integrity of the complex.
- ... Until remediation works are carried out, and if water ingress is allowed to continue unhindered, further development of inadequate fire separation and increasing structural damage cannot be ruled out.

3.5 The authority's actions

- 3.5.1 On 25 September 2014, as a result of contact with a real estate agent representing some of the unit owners, the authority received a copy of the 2012 assessment report.
- 3.5.2 On 24 October 2014 the authority advised the Body Corporate and wrote to the owners, providing notification that it considered the buildings to be dangerous buildings as defined in section 121 of the Act and in regards to structural integrity and fire safety. The authority noted that it was seeking the advice of the New Zealand Fire Service ("the NZFS") and concluded the letter to the owners as follows:

In the meantime all owners must ensure:

- 5.1 their decks/balconies **are not used or accessed;**

5.2 that they, and occupiers, take particular care in relation to fire safety; and

5.3 that the contents of this letter are **brought to the attention of all occupiers/tenants.**

3.5.3 Subsequent to receiving the letter some owners contacted the building manager. The building manager responded by email to at least one owner on 29 October 2014 stating that in the building manager's opinion the authority could not restrict access to all of the units 'unless they have them tested'.

3.5.4 The authority requested the NZFS provide its view on whether the buildings were dangerous in terms of section 121(1)(b). (Refer paragraph 3.6.5.)

3.5.5 On 30 October 2014 the authority's environmental health officer inspected the building and found no visible mould inside the units. The authority's officer concluded there were no health hazards relating to toxic mould.

3.5.6 On 31 October 2014 the authority issued dangerous building notices under sections 124(2)(c) and 125(1) to the owners of units 1 to 7 and 10 to 23, and provided a copy to the Body Corporate and the building manager. The content of the notices was essentially identical, stating that the authority was satisfied that it is

...a dangerous building in that its deck/balcony is likely to collapse and cause injury or death to persons.

The notice required work be carried out to strengthen, remove or replace the affected parts of the buildings so as to reduce or remove the danger of the decks collapsing, and required the work be carried out within six months of the notice being issued.

3.5.7 Included in the notices was a section titled 'grounds for notice' in which the authority set out the issues identified in the 2012 assessment report, the consultant's report, and correspondence from the designer (refer paragraph 3.3.8). The authority also noted the observations made by its officer, and that although the authority had requested work be carried out to address structural issues to the decks it was not aware of any remedial work being carried out other than to Units 8 and 9.

3.5.8 On 31 October 2014 the authority erected a warning sign pursuant to section 124(2)(b) at the entrance point to the development on Oceanbeach Road, and attached a copy of the dangerous building notice and a laminated warning sign to the inside of the glass door leading to the decks to Units 1 - 7, 10 - 12 and 23. The authority observed that the majority of the units were occupied or 'in the process of being occupied for the upcoming long weekend'. The authority was later advised by one of the unit owners that despite a request from them that their unit be closed, the unit was continuing to be rented out.

3.5.9 On 3 November 2014 the authority again fixed copies of the dangerous building notices to the inside of the glass doors in units it could access, and to the front doors of those units it could not access. The authority observed that a number of the warning signs previously affixed had been removed from balcony doors, and the warning sign at the entrance of the development had been removed. The authority erected a further notice at the entrance that day.

3.5.10 On 13 November 2014 the authority also posted copies of the dangerous building notices to those financial institutions thought to have an interest in the units subject to the notice.

3.6 The NZFS and 2014 structural engineer's report

- 3.6.1 On 4 November 2014 the authority wrote to the NZFS requesting it provide its view on whether or not the buildings satisfied the criteria for fire separation and alarm systems. On the same day the authority also sought a report from a structural engineer of the structural issues identified in the 2012 assessment.
- 3.6.2 On 19 November 2014 the authority received a report from the structural engineer. The structural engineer noted:
- the vertical load support system for the building is primarily through the joists onto the inter-tenancy walls and the internal wall
 - the decks are supported on timber joists that are in-turn supported on either the inter-tenancy walls or on cantilevered timber beams
 - the lateral support for the building is provided by:
 - in the across direction, by the inter-tenancy and end walls
 - in the along direction, by the plywood lined panels at the front and rear of each unit and also by the steel portal frame over the garage doors at the rear.
- 3.6.3 After reviewing the previous reports, the structural engineer considered that:
- ... parts of the deck and deck support timbers have rotted, which makes the decks potentially unsafe for use.
- There is no indication that the internal floors have been compromised by rotting.
- The reports indicate that parts of the brace panels across the front of the units are likely to have been affected by the water, with the plywood and framing probably rotting. This will reduce the lateral bracing capacity of the structure. ... there will still be enough bracing capacity to resist the wind loading [Building Code performance requirement], even though the building will be unlikely to resist the design earthquake loads [not a requirement].
- 3.6.4 The structural engineer concluded that the buildings could be deemed dangerous in terms of the Building Act because of the weakened deck structures, but that the remainder of the building was not dangerous.
- 3.6.5 On 26 November 2014 the NZFS inspected Unit 9 and advised that there was not a significant fire risk at the building, but recommended new fire alarms be fitted. This was confirmed in an email from the NZFS to the authority on 5 February 2015.
- 3.7 On 30 December 2014 the authority observed the decks on the second and third floors of Units 1 to 6, 14, and 15 were in use. The photographs taken by the authority show some decks with outdoor furniture in place, clothing racks in use on the decks, and a number of decks where towels were hung on the deck railing, and people were present on two of the decks.
- 3.8 The Ministry received an application for a determination from the authority on 5 May 2015.
- 3.9 On 22 June 2015 I issued to the owners an interim direction under section 183 reversing the suspension of the section 124 notice. The effect of the interim direction being the section 124 notice remains in force and continues to have full effect.
- 3.10 Following receipt of the expert's report (refer paragraph 5) I issued to the owners a final direction under section 183(1) reversing the suspension of the section 124 notice.

4. The submissions

4.1 The authority

4.1.1 The authority provided a submission that set out the background to the issuing of the dangerous building notices. In regards to the current status of the units, the authority noted:

- (with the exception of units 8 and 9) no remedial work has been carried out on any of the units that are subject to dangerous building notices
- a building consent has been issued for remedial work on Unit 22, but work has not yet commenced
- the authority has received remedial works plans for Unit 13, but no consent has been issued
- the complex continues to be advertised for holiday accommodation on the internet
- as owners have not taken action subsequent to the dangerous building notices, the authority intends to prosecute the individual owners.

4.1.2 The authority also noted that the dangerous building notices were not issued in relation to fire safety issues or toxigenic mould issues. I have listed the documentation provided by the authority in Appendix B.

4.2 Unit owners

Units 5, 7, 10 and 11

4.2.1 The owner of unit 5, who also made comment on behalf of the owner of Units 7, 10 and 11, emailed the Ministry on 16 July 2015, noting that:

- Not all decks are being used.
- The owner of Units 5, 7, 10 and 11 wish to repair those units, but no action has been taken as the owners are waiting on an application under section 74 of the Unit Titles Act.
- Some owners are unable or unwilling to repair their units, and others that are willing to repair won't be able to get a code compliance certificate if the neighbouring unit hasn't been repaired.
- The Body Corporate has written to the onsite letting managers to get the warnings placed on the websites that the apartments are advertised on, but this has not happened.

4.2.2 In an email of 3 August 2015 in response to the draft determination, the owner of Unit 5 further submitted that Units 5, 7, 10, 11, 13 and 21 along with some other units are not in the letting pool as the owners are unwilling to rely on the letting managers to alert tenants or visitors to the risks. The owner expressed continuing concern that units were being advertised and let without any warning as to the risks.

Unit 12

4.2.3 The agent for Unit 12 advised by email on 6 July 2015 that 'permanent locks' had been installed to all doors leading to the decks.

Unit 15

- 4.2.4 The agent for Unit 15 advised in a letter dated 18 May 2015 that an application pursuant to section 74 of the *Unit Titles Act* was in the process of being filed in the High Court.
- 4.2.5 The agent provided a submission by letter dated 4 June 2015, providing further background to the situation. The owner accepted that there was significant decaying of timber in the deck areas to Units 8 and 9, but questioned whether the authority was entitled to issue dangerous building notices for units that are physically separated from the block comprising Units 8 and 9, and on what evidence does the authority have.
- 4.2.6 The agent also noted that there was reluctance from some owners to complete remedial works on the decks in isolation from the other weathertightness remedial work required. The owner was also concerned about how the durability of remedial works would be affected if adjacent unit owners did nothing, and preferred all of the remedial work be addressed in one go rather than a 'piece-meal' approach.

Units 17, 18 and 22

- 4.2.7 Acknowledgement forms were received from the owners of Unit 17, 22, and 18 on 21 and 22 May, and 12 June 2015 respectively. The owners made no submission in response to the determination application.

4.3 Other correspondence

- 4.3.1 The building manager wrote to me on 3 July 2015 to dispute an aspect of the expert's report (refer paragraph 5.3.4) regarding the deck barrier. The building manager considers declaring the units dangerous was 'over the top', and that

I am an ex builder and have inspected all the decks in our letting pool and 80% of the hand rails have no issues. Also 75% of decks are not cantilevered so have no possibility of collapsing.

4.4 The draft determination and submissions in response

- 4.4.1 A draft determination was issued to the parties for comment on 27 July 2015.
- 4.4.2 The following sets out the date of responses received from parties that accepted the draft with no further comment:
- Authority – 10 August 2015
 Unit 2 – 7 August 2015
 Unit 7, 10, 11 – 31 August 2015
 Unit 17 – 8 September 2015
 Unit 20 – 23 August 2015
 Unit 22 – 9 September 2015
- 4.4.3 In its response to the draft determination the authority noted that further dangerous building notices had been issued on 24 June 2015 for all units in the complex (with the exception of units 8 and 9), with the notices requiring access to the decks be closed off. The authority noted that with the exception of three units, the owners had complied with the notice or advised the units were not in use.

- 4.4.4 On 17 August 2015 the agent acting for the owner of Unit 12 requested additional time to respond to the draft determination. An extension was granted until 1 September 2015; however no further response or comment was received.
- 4.4.5 The owner of Unit 5 responded by email on 1 August 2015, accepting the draft and reiterating that the deck to unit 5 was not being used and Unit 5 is not part of the letting pool, and the owner wished to undertake repairs.
- 4.4.6 The owner of Unit 13 responded by email on 4 August 2015, noting that a building consent application had been lodged but, although keen to begin repairs, the owner was reluctant to do so until the section 74 notice had been processed. Unit 13 had been ‘secured with deadbolts’. The owner noted that the notices issued by the authority were not attached to front door of their unit when the owner returned to it. On 23 September 2015 the owner advised the consent for repair work had been granted.
- 4.4.7 The owner of Unit 15 responded in a letter dated 27 August 2015, reiterating his view that the issues present in some decks may not be present in all and submitted that ‘it is incumbent upon [the Ministry] to reassess the evidence as the basis that the dangerous building notice was issued on an erroneous assumption’ if when the cladding is removed it is evident that there is no moisture ingress affecting the structure to the deck(s). I have commented on this request at paragraph 6.12.4. The owner advised that he has complied with the requirements of the notice, and had instructed a designer to obtain building consent for work to be carried out in Unit 15.
- 4.4.8 The owner of Unit 3 did not accept the draft and made a submission by email on 28 August 2015 in response (in summary):
- The unit was occupied at the time the notice was issued (refer paragraph 3.5.8) and the owner requested the occupant close the unit; the owner could not legally evict the tenant.
 - In regards to the use of the decks in December (refer paragraph 3.7) the owner had not been instructed to lock off the decks by the authority; when the signs were erected the manager and tenants were advised by the authority that the decks could be used at their own risk.
 - Not all decks are being used. Those in the letting pool had locks fitted after the notice of 24 June 2015 was issued.
 - There were signs to units 16, 17, and 18 (in addition to those referred to in paragraph 5.3.3).
 - The expert’s comment regarding the handrail pulling out is disputed (refer paragraph 5.3.4).
 - The advice given to the owner was prior to the notice being issued that required the decks be locked off (refer paragraph 6.5).
 - All units in the letting pool have signs, and the doors to the deck are locked.
- 4.4.9 By email on 9 September 2015, the owner of Unit 18 advised that they supported the authority’s decision to issue the dangerous building notice, but that they do not believe the same extent of damage has occurred to their deck. The owner has sought building consent for repairs to Unit 18.
- 4.4.10 In a letter dated 10 September 2015, a legal advisor acting on behalf of the owner of Unit 6 advised that an architectural designer had been engaged ‘to supervise the

specifications and work to be undertaken' and a consent application had been made. By email on 10 September 2015 the architectural designer clarified that no building consent application had been lodged for Units 6 and 19 as the specifications and drawings were still in preparation.

- 4.4.11 By email on 11 September 2015, the owner of Unit 16 advised that a chain and padlock had been fitted to the door to restrict access, and noting that they were waiting on the section 74 application.
- 4.4.12 Despite reminders on 18 August and 8 September 2015, the owners of the following units did not respond to the draft determination: 1, 14, 19, 21

5. The expert's report

- 5.1 As mentioned in paragraph 1.6, I engaged an independent expert to provide an assessment of the condition of the decks. The expert is a Chartered Professional Engineer. The expert carried out a review of the documentation and undertook a site visit on 17 June 2015. The expert provided a report on 7 July 2015 which was forwarded to the parties on 10 July 2015.
- 5.2 The expert commented on the weathertightness of the building generally, as well as the decks, noting that all units were detailed and constructed similarly, and it was reasonable to assume that the exposed walls of all units (except 8 and 9) would be in varying states of deterioration depending on their relative exposure. Accordingly the expert held the view that units 12 to 23 should be treated in the same manner as units 1 to 11.

5.3 The decks

- 5.3.1 The expert marked up site plans to show the cantilevered deck beams and the deck joists. The expert also provided annotated elevations indicating areas of visible defects and referencing annotated photographs included in the report.
- 5.3.2 The annotated photographs showed:
- cracks in the cladding at the upper deck joint to wing wall (Units 2, 3, 4, 6, 11)
 - cracks in deck paving plaster work and at joint to the wing wall (lower decks of Units 1, 2, 5, 6, 10, 14, 15)
 - splitting/cracking and bulging of cladding joints to the wing wall (lower decks between Units 12 & 13, and Units 14 & 15)
 - handrail fixing pulled out from wing wall (Unit 6)
 - cracks in wing wall cladding (between Units 5 & 6, and Units 14 & 15).
- 5.3.3 Regarding the authority's warning signs to the glazed doors to the decks, the expert noted they were only sited at the following:
- Units 1 to 6 facing Oceanbeach Road only, first floor only
 - Units 12 to 15 facing Girven Road only, first floor only
 - Units 19 and 20 facing southwest only, first floor only
 - Units 21 and 22 facing northwest only, first floor only.

None of the authority's warning signs were evident on the glazed doors to any of the second floor balconies, or at the entrance to the complex.

5.3.4 The expert also noted that:

While inspecting the interior and decks of unit 6 the building manager leant on one of the deck handrails and the end plate then came away from the wall fixing point. Both screws pulled out with little effort and there was no evidence of any solid fixing timber remaining behind the cladding at this point of the handrail fixing when we replaced the screws back into their holes.

5.3.5 The expert considered that should deck failure occur, which in the expert's opinion was likely, the consequence of that failure could be very serious.

5.4 The external envelope generally

5.4.1 Commenting generally on the cladding, the expert noted that cladding failures/issues were clearly evident to all external building elevations throughout the entire development. The expert provided annotated elevations showing areas of visible defects and referencing annotated photographs included in the report.

5.4.2 The annotated photographs showed:

- bulging in cladding to Unit 1, and Unit 11
- open splitting of cladding to Unit 1 at the inter-storey level
- cracks in cladding joints sealant filled and painted over to Unit 4
- cracking in cladding to Unit 23
- bulging in plasterwork at joints (between Units 22 & 23, and Units 20 & 21)
- bulging in plasterwork at joints (between Units 22 & 23, and Units 20 & 21)
- bulging of cladding joints (Units 12, 13, 14, 15, 16).

5.4.3 The expert also noted that the direct fixing of the cladding system to the timber framing would fall outside the current Acceptable Solution, E2/AS1.

5.5 Conclusion

5.5.1 The expert concluded that in his opinion there was sufficient evidence to:

- deem the deck handrails to Units 1 to 11 as dangerous
- deem the deck support structure and therefore the decks themselves to Units 1 to 11 as dangerous
- indicate that the deck handrails and deck support structure to the remaining units are likely to be dangerous.

6. Discussion

6.1 Section 121 sets out the meaning of “dangerous building” as follows:

121(1) A building is dangerous for the purposes of this Act if,—

(a) in the ordinary course of events (excluding the occurrence of an earthquake), the building is likely to cause—

(i) injury or death (whether by collapse or otherwise) to any persons in it or to persons on other property; or

(ii) damage to other property; ...

6.2 Section 121(1)(a) establishes that a building is dangerous if, in the ordinary course of events, (excluding earthquakes) the building is “likely” to cause injury or death or

damage to other property. The term “likely” has been considered in a number of judicial decisions regarding section 121 and its predecessor in the Building Act 1991 and means something that could well happen.⁴

- 6.3 Observations made by the authority on 7 April 2014 in its inspection of remedial work to the decks and wing walls to Units 8 and 9 raised concerns with the authority regarding decaying timber framing. The authority also observed visible signs of cracking and bulging in the exterior cladding on a number of other units in the development, and the following day notified the owners of other units of its concerns regarding the condition of the decks.
- 6.4 The authority then sought and received further evidence and opinion regarding the condition of the decks, received in the form of:
- a recommendation from the designer involved in the remedial work to Units 8 and 9 that access to all deck areas be closed off because he considered the damage observed on the wing walls was indicative of issues with the construction of all the decks and that they were dangerous due to the risk of failure (refer paragraph 3.3.4)
 - confirmation from the designer that during remedial work to Units 8 and 9 the deterioration of framing in adjacent Units 7 and 10 was clearly visible (refer paragraph 3.3.8)
 - a report from a building consultant in which the consultant identified the extent of decay damage evident to Units 8 and 9 and expressed the view that it was ‘typical enough to cause serious concern in respect to the fire separation and structural integrity’ (refer paragraph 3.4)
 - an historical report (2012) from a building surveyor which concluded there was systemic failure of the cladding system, evidence of decay in structural framing in the deck areas, and concerns regarding fixings to deck barriers (refer paragraph 3.2).
- 6.5 I note here that subsequent to receiving notification from the authority that access to the decks must be restricted, the building manager provided advice to at least one owner that access could not be restricted without the authority testing each of the relevant units.
- 6.6 I am of the view that it is not necessary for the authority to undertake testing or investigation on each of each of the units’ deck areas in order for the units to be issued with dangerous building notices. The units were constructed using the same materials and design methodologies, and while the test under section 121 may be a high one, in addition to its own knowledge and experience regarding weathertightness issues, the authority had:
- clear evidence of the extent and level of decay damage to structural timber framing to the decks and wing walls of Units 8 and 9
 - evidence of decay damage to structural timber framing to the wing walls to the units adjacent
 - the 2012 report providing evidence of widespread failure of the cladding system and decay damage in framing

⁴ See *Rotorua District Council v Rua Developments Ltd* DC Rotorua NP1327/97, 17 December 1999, and discussed in Determination 2006/119.

- the opinion of both the designer involved in the remedial work to Units 8 and 9 and the building consultant that the issues evident during the remedial work would be typical throughout the development and to such an extent that the structural integrity of the decks was compromised.
- 6.7 Given the information before it at the time, I consider the authority correctly exercised its powers in respect of the issue of the dangerous building notices in regards to the structural stability of the deck areas and the deck barriers.
- 6.8 In making this determination I must confirm, reverse, or modify the issue of the dangerous building notices. Accordingly, I sought further evidence, in the form of advice from the expert, that would corroborate or contradict the evidence submitted to the determination by the authority.
- 6.9 I am of the view that the expert's findings corroborate the evidence available to the authority at the time it made the decision to issue the dangerous building notices. There is clear evidence that the weathertightness failures of the cladding system has allowed moisture ingress over an extended period into the structural framing timber that has caused significant levels of decay damage. I am of the view that the damage is such that in the ordinary course of events the decks are likely to cause injury or death by collapse.
- 6.10 In respect of the structural stability of the building, the dangerous building notice issued by the authority on 31 October 2014 required
- ... work to be carried out on [the individual Units] to strengthen, remove or replace the affected parts of the building so as to reduce or remove the danger of the deck/balcony collapsing.
- 6.11 In regard to the requirements set out in the notice, I am of the view that they accord with section 124(2)(c) of the Act which requires the authority to give written notice 'requiring work to be carried out on the building ... to reduce or remove the danger'. Given that the notice applied to the decks as a whole, and the authority also put up a notice at the doors accessing the decks warning people not to use the decks, I am of the view that the matter of the danger presented by the deck barrier did not need to be addressed in addition.
- 6.12 General comment**
- 6.12.1 It is of concern that the issues regarding the condition of the decks was first raised in 2012 and three years on steps have not been taken, other than to Units 8 and 9, to address either the cause of the weathertightness failure or the decay and damage to the underlying structure.
- 6.12.2 Of greater concern is the removal of the warning notices that were erected by the authority at the entrance to the development and on the doors accessing the decks, and that a number of the decks continue to be used.
- 6.12.3 The authority has indicated that it intends to take further action by way of prosecution. I note here that in order to address the ongoing access to the dangerous decks the authority has the option, under section 126(1), to carry out building work in order to reduce or remove the danger. I suggest the authority consider the option of undertaking building work under this section that would physically restrict access to the decks.
- 6.12.4 In regards to the submission of the owner of Unit 15 (refer paragraph 4.4.7) with respect to what should happen, if, when the cladding is removed, there is no evidence

of moisture ingress affecting the deck structure. I note that the authority has the ability to carry out any inspections it considers necessary, and it also has the power to withdraw the dangerous building notice should it consider the deck is not dangerous under section 121.

7. The decision

- 7.1 In accordance with section 188 of the Building Act 2004, I hereby determine that at the time of the authority's decision to issue the dangerous building notices in respect of decks to Units 1 to 7 and 10 to 23 at 346 Oceanbeach Road, there was sufficient evidence that the building was dangerous for the purposes of section 121(1)(a)(i) in terms of structural stability to the deck areas and deck barriers, and accordingly I confirm the authority's decision to issue dangerous building notices to the owners of Units 1 to 7, and Units 10 to 23.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 29 September 2015.

John Gardiner
Manager Determinations and Assurance

Appendix A

A.1 List of relevant units (1 – 7 and 10 – 23) and owners.

Unit no.	Owner	Acting through
1	Kiwijockey Investments Limited	
2	The Positive Portfolio Limited	
3	J & K Van Gog	
4	C Taylor	
5	ABCDE Investments Limited/	
6	Willow Bay Company Limited	Legal advisor
7	M & K Halenar	
10	M & D Halenar	
11	M Halenar	
12	Oceans 5 Limited	H. Lovett
13	E & J Campbell	
14	J & K Van Gog	
15	The Henderson Family Trust	One of the trustees
16	G & S Lewis	
17	D & J Morris	
18	CSL (No 100) Limited	The company director
19	Willow Bay Company Limited	
20	Big Sky Limited	
21	D & F Kent	
22	W & C McIntyre	
23	J & K Van Gog	

Appendix B

B.1 Copies of the following documentation was provided by the authority.

Date provided	Document	Description
30 April 2015 (Application)	Letter	Covering letter to application, including list of owners and legal description of Units
	Report	The 2012 assessment report
	Image/plan	Aerial view and site plan
	Letter	Dated 8/4/2014 "Site visit and Tauranga City requirements"
	Letter	Dated 14/5/2014 "Building Repairs! Terraces Body Corporate 89906"
	Emails	Dated 9/9/2014 "wing walls Unit 7 & 10"
	Report	The consultant's report
	Letter	Dated 24/10/2014 "URGENT: RISKS OF DECK FAILURE AND POTENTIAL FIRE SAFETY ISSUES"
	Email	Dated 29/10/2014 (Building Manager) "Unit 13"
	s124 notices	s124 notices to individual units 1 – 7 and 10 – 23 and covering letters dated 31/10/2014
	Warning notice	Example of warning notice placed inside units
	Letters	Dated 13/11/2014 "346 Oceanbeach Road, Mt Maunganui – Dangerous Building Notice"
	Letter	Dated 4/11/2014 (NZFS) "The Terraces situated at 346 Oceanbeach Road, Mount Maunganui"
	Report	Dated 19/11/2014 (CPEng) "The Terraces 383 Oceanbeach Road, Mount Maunganui"
	Photographs	Documenting some decks in use
	Emails	Dated 28/1 and 5/2/2015 (NZFS) "The Terraces 340 Oceanbeach Road"
	Screenshots	https://www.terraces-oceanbeach.co.nz/ accessed 15/4/2015
	High Court judgement	The Wanaka Gym Ltd v Queenstown Lakes District Council [2012] NZHC 284
	Determination	2010/133
22 May 2015	USB	Property file for the consented plans (3227) for the construction of units at 346 Oceanbeach Road.