MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HIKINA WHAKATUTUKI

Determination 2017/032

Regarding the issue of insanitary building notices in respect of a dwelling at 598[1] Frasers Road, Ashburton

Summary

This determination concerns insanitary building notices issued for a dwelling without potable water supplies or sanitary facilities, and where the cladding was left incomplete for 10 years. The determination discusses who the notices should have been issued to, the remedies provided for in the notices; and whether the dwelling is insanitary, and if so, on what grounds.

1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004[2] ("the Act") made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment ("the Ministry"), for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to the determination are:

- the owners of the subject building, R & D Smith, who applied for this determination ("the applicants")
- the owners of the land on which the building is located, G & P Smith ("the landowners)
- Ashburton District Council ("the authority"), carrying out its duties as a territorial authority or building consent authority.

1.3 This determination arises from the decision of the authority to issue insanitary building notices under section[3] 124(2)(c) in respect of a dwelling at 598 Frasers Road. The authority is of the view that the lack of running potable water and

[1] The insanitary building notice refers to 596 Frasers Road. It is my understanding that is the address of the landowner's property and not the address of the subject building, which is 598 Frasers Road.

[2] 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.

[3] In this determination, unless otherwise stated, references to sections are to sections of the current Act and references to clauses are to clauses of the Building Code.

personal hygiene facilities, and the incomplete cladding and deteriorating building wrap mean the building is an insanitary building under section 123 of the Act.

1.4 The applicants are of the view that the notices should have been issued to the applicants rather than to the landowner and are disputing the requirement in the notice for the services to the building be disconnected. They are also seeking a decision in relation to the authority not issuing a notice to fix but rather issuing the insanitary building notices.

1.5 The authority chose to issue insanitary building notices rather than a notice to fix in this case. Therefore, the matter to be determined[4] is the authority's exercise of its powers of decision in issuing the notices under section 124(2)(c) in respect of the person to whom the notices were issued, the remedies provided for in the notices, and whether the building is insanitary under section 123 of the Act.

1.6 In making my decision, I have considered the submissions of the parties, the report of the expert commissioned by the Ministry to advise on this dispute ("the expert"), and the other evidence in this matter.

2. The building and background

2.1 The building site is one of two on a flat site in a rural area. The applicants purchased the land circa 1987 and sold it to the landowner sometime in 2006; there is a right to occupy in place that allows the applicants to continue to reside on the land.

2.2 The building was relocated to the site in either 2006 or 2007 under building consent BC 1181/06 issued by the authority.

2.3 The building is a detached, single-storey dwelling, with an approximately 30^{o} pitched roof with Dutch gables and eaves of approximately 600mm. Construction consists of conventional light timber framing with external wall claddings over a cavity, timber pile foundations with timber floor joists and particle board flooring, and a combination of anodized aluminium and timber exterior joinery. The building was formerly clad with brick veneer and timber weatherboard; the bricks were removed for the relocation, but the remaining weatherboard cladding remained in place. The roof cladding is long-run corrugated galvanized iron.

2.4 The applicants have advised that the authority carried out an inspection of the foundations sometime in March 2007 – I have not seen a copy of any inspection records relating to the relocation of the subject building or for the consented building works.

2.5 The authority has advised that neither the water supplies nor drainage works approved in the building consent have been carried out because no resource consent, if required, has been granted by Environment Canterbury.

The notice to fix

2.6 On 25 January 2011 the authority wrote to the landowners, noting that the subject building was occupied and that it did not comply with the building consent. The authority's letter referred to the requirement for the building to be made weathertight and noted that as the building wrap had been left exposed for over three months it would need to be replaced before the cladding was installed.

[4] Under sections 177(1)(b) and 177(3)(f) of the Act

2.7 The letter also stated that the building was 'unfit for human habitation' (i.e. that it was insanitary as defined in section 123); however the authority did not issue a notice under section 124 but issued a notice to fix under section 164. The particulars of contravention or non-compliance were described as follows:

> New Zealand Building Act 2004 Section 123 (b) (c) (d) Insanitary Building
>
> Weather tightness,
>
> Potable supply,
>
> Adequate sanitary facilities.

The notice set out the remedy as being to complete the building work that was approved under building consent BC1181/06, with 22 February 2011 as the date for completion.

2.8 On 20 April 2011 the authority wrote to the applicants, referring to a meeting held on 2 February 2011. The letter confirmed the applicants were residing in a self-contained motor home on the site and not in the subject building, and that the parties had agreed to the following actions to be undertaken by 31 October 2011:

- Cladding to be installed pending inspection of building wrap, insulation and flashings.
- Drainage and septic tank to be installed pending resource consent being obtained (if required).
- Final inspection of all works carried out under building consent BC1181/06.

2.9 It is my understanding that Environment Canterbury required additional information in relation to the drainage and septic tank, and that situation has remained unresolved.

2.10 The applicants have advised that the authority carried out an inspection of the cladding in June 2011, which the applicants state was "passed" – I have not seen a copy of an inspection record relating to this.

The insanitary building notices

2.11 The authority carried out a site visit on 5 September 2016, at which time the building was occupied by members of the applicants' family as emergency accommodation. The authority wrote to the applicants the same day, advising that a notice had been attached to the building under section 124(2)(b), and that the building must be vacated within ten days.

2.12 The authority stated that the building was considered insanitary[5] on the following grounds:

> This dwelling does not have a source of running potable water for drinking or bathing.
>
> There is a port-a-potty in [the] bath room but it is not an acceptable solution.
>
> There are no smoke alarms.
>
> Solid fuel heater flue is to *(sic)* short. …
>
> Gas oven has gas 9 kg bottle sitting against the side of it. …There is [also] a requirement for fumes from [the] gas cooker to be extracted to the exterior of the building. This is to prevent carbon dioxide poisoning. …

[5] Under section 123(a)(i) and (ii), and 123(b), (c) and (d)

> Exterior cladding of dwelling has not been completed. Building wrap is beyond its warranty and has deteriorated. Likewise in some places building wrap is missing and insulation has disappeared. The dwelling is not weather tight …

2.13 On 19 September 2016, the authority issued an insanitary building notice under section 124(2)(b) and 124(2)(c) to the landowners ("the first s124 notice"). The notice stated that the landowners must:

> i) not use the solid fuel heater, and
>
> ii) .. may use the building as a workshop to perform your watch making repairs, and
>
> iii) the building cannot be lived in until BC951016[6] and BC1181/06 have been issued Code Compliance Certificates

The notice did not include a timeframe in which the building work under the consents was to be carried out.

2.14 The applicants advised that in late 2016 the horizontal corrugated steel cladding was fitted over new building wrap to the unclad areas of the north and west elevations, but that the cladding to the remaining areas did not proceed as the authority had directed the applicants stop work. (I note here that during the site visit the expert observed the installed cladding as well as the remainder of the new pre-cut steel cladding stored ready for installation).

2.15 On 10 January 2017, the authority issued another insanitary building notice to the landowners ("the second s124 notice"). Though much of the content was the same, the remedies in this notice were set out as being that the landowner must:

> i) Disconnect any remaining services to the building
>
> ii) Remove the building from the property
>
> iii) Complete requirements i) and ii) by the 31st January 2017.

2.16 The applicants have advised that they met with the authority on 11 January 2017, and that it was their understanding that they should not do anything until the authority made contact again and at that time a proposal could be put to the authority for the completion of the building work.

2.17 It appears that a family member acting on behalf of the applicants contacted the authority on 3 February 2017. I have not seen a copy of that correspondence, however I have seen the authority's response of the same date, in which the authority set out the reasons for the insanitary notices being issued and stated:

> The reason for not allowing remedial work to happen, is mainly based on the historical nature of the file. There are numerous occasions in the past where meetings have been held and promises have been made to finish the building work on the building along with conditions about occupying the building. None of these were met. [The authority] had previously issued an Insanitary Notice and Notice to Fix, but [the authority] failed to act or follow through on those previous notices.

2.18 I am not aware of any further correspondence on the matter, though I understand that the landowner arranged for disconnection of power to the subject building.

[6] It is my understanding that building consent BC951016 is unrelated to the subject building

3. The submissions

3.1 The initial submissions

3.1.1 The application for determination was received on 14 February 2017. The applicants provided:

- a copy of the second s124 notice
- the email from the authority on 3 February 2017
- photographs of the building, showing some areas where cladding is complete and some areas where building wrap appears to have been replaced but the cladding is not yet installed, and some areas where weatherboard cladding has been installed

3.1.2 In a submission dated 10 February 2017 accompanying the application, the applicants set out their views on the matter (in summary):

- It was the applicants understanding in 2011 that if they did not occupy the building, and instead used it only as a shed, that the authority would allow them more time to carry out the necessary building work.
- The applicants had met with the authority in 2016 and had an agreed way forward to resolve the matter, however, they have been unable to continue with the building work due to a medical condition.
- The authority had been 'unreasonable' in its actions and is 'in part responsible for some of the delays and miscommunications'.
- The materials to complete the cladding are onsite, and the work to address sanitation issues is on hold pending the outcome of the resource consent process with Environment Canterbury.

3.1.3 The landowners provided a submission on 23 February 2017 in response to the application, confirming that the applicants had a right to occupy at the property. The landowners submitted that:

- They were unaware of the notice to fix in 2011 and only became aware of the matter in 2016.
- The applicants' lack of action has had an adverse effect on the landowners as the insanitary notice has been 'recorded against our mortgage and is included in our LIM report'.
- The process has been managed between the authority and the applicants; the landowners are only involved in the dispute as they legally own the land on which the subject building is located.

3.1.4 On 1 March 2017, in response to the determination application, the authority provided copies of:

- the first and second s124 notices
- relevant correspondence
- the notice to fix
- photographs of the subject building from 2010, showing the building wrap as it appeared at that time

- a series of photographs taken on 20 December 2016, showing the general condition of the building wrap (which appears to be the wrap as originally installed) in areas that remained without cladding.

3.2 The first draft determination and submissions in response

3.2.1 A first draft of this determination was issued to the parties for comment on 8 March 2017. The first draft discussed the remedies provided for in the insanitary building notices and who the notice should or should not have been issued to. The parties were advised that after the expert's report was received a further draft would be issued that addressed whether or not the building was insanitary under section 123.

3.2.2 The first draft concluded:

- the requirements to disconnect the services and remove the building were not lawful requirements of a section 124 notice, and the authority incorrectly exercised its powers in respect of the remedies stated in the notices
- as owners and occupiers of the building, the applicants should have been issued with the insanitary building notices, and it was incorrect to issue the notices to the landowners.

3.2.3 A submission was received from the applicants on 16 March 2017, advising that the landowners had refused to allow the power to be reconnected and had also turned off the water supplies. The applicants noted that the cladding materials to complete the works were on site and the unclad walls were prepared and waiting for inspection by the authority which had been requested on 30 January 2017. The applicants made no submission on the matters regarding the remedies in the notices or who the notices should have been issued to, but provided further detail regarding the background events, including that:

- the water supplies were first disconnected by the landowner in February 2014
- the building was occupied as emergency accommodation in August 2016, but this was only temporary
- the power was cut off to the building by the landowner on 31 January 2017 (as a consequence of it being a requirement of the second s124 notice)
- notices and correspondence to the applicants have been incorrectly addressed to the landowners' postal address, and vice versa.

3.2.4 A submission was received from the authority on 20 March 2017. The authority confirmed that the second insanitary building notice had been affixed to the building, and provided copies of the certificate of title (search date 2 September 2016) and correspondence from Environment Canterbury regarding foul water treatment/disposal at the property. The authority submitted (in summary):

- At the time the authority issued the notices there was no reference to a lease agreement or licence to occupy; the lease agreement or licence to occupy agreement was registered after the notices were issued.
- The authority also considers the notices were correctly issued to the landowner under section 126(3) as the amount recoverable becomes a charge on the land on which the work was carried out – there is no reference in that subsection to a building owner.

- The toilet on the house bus cannot be considered a suitable means for sanitary disposal because it is not always on site. The applicants had others living in the building and it was reported to the authority that the house bus left for a period of time, leaving the people occupying the building without toilet facilities.
- The approved building consent included a bore and septic tank and effluent field. It is beyond the power of the authority to state that a potable water supply and on-site waste water system is to be installed without matters relating to the disputed issues over the lease agreement and outstanding issues concerning Environment Canterbury being resolved. (I note here that the requirement to carry out building work to prevent the building remaining insanitary would not relieve the applicants of their obligations under any other Act.)

3.2.5 No response was received from the landowners to the first draft determination.

3.2.6 The authority, the landowners, and the applicants made submissions subsequent to receiving copies of the expert's report. I have summarised those submissions in paragraph 4.7 below.

3.3 The second draft determination and submissions in response

3.3.1 A second draft of this determination was issued to the parties for comment on 7 April 2017 that took into account the findings of the expert in relation to the status of the building. The second draft found that the building did not meet the test of an insanitary building under sections 123(a) or 123(b), but that it was insanitary under the definition in sections 123(c) and 123(d) because it does not have a potable water supply or sanitary facilities.

3.3.2 The second draft modified the second insanitary building notice to: remove references to sections 123(a) and (b); state that the notice was issued under section 124(2)(c) requiring building work to be carried out on the building to prevent it from remaining insanitary and under section 124(2)(d) restricting entry to the building for particular purposes as follows:

- use of the living spaces, on the condition that the sanitary facilities in the adjacent house bus remain available to the occupants at all times
- uses relating to watch repairs
- carrying out of building work.

The authority

3.3.3 In a response provided on 21 April 2017, the authority did not accept the second draft determination and submitted (in summary)

- When the authority inspected the building and issued the notices, the building was in a state of disrepair and met the definition in sections 123(a) and (b). The insulation, which has now been covered up, was wet; the building wrap had been exposed for 10 years and was torn; and there was missing insulation.
- While the authority agrees that 'it is normally up to the building owner' to decide how to meet the requirements to prevent a building remaining insanitary, in this case after 10 years of non-compliance it was the authority's

view that it was prudent to put a remedy in writing. Removal of a building is a valid option under section 127 of the Act.

- In regards to who the authority issued the notices to: at the time the notices were issued the authority did not have any written proof from the applicants that they owned the building. The lease agreement or license to occupy was provided subsequently and was registered as a caveat on the certificate of title after the issue of the notices.
- The landowner does qualify under section 125(c): 'under the lease agreement [the landowner] had borrowed money against the applicants as part of the agreement for the right to occupy the land'.
- It should be noted in the determination that the notices are not invalid as per section 125(3).

3.3.4 The authority also questioned who the mortgagee was in this situation and how the authority would monitor the requirement of the modified notice that the house bus remains on site at all times.

The landowners

3.3.5 The landowners did not accept the draft and in a response provided on 21 April 2017 advised that they 'own the land and have a mortgage over all of the land' and in their view therefore meet section 125(2) in respect of being issued a copy of the notices. The landowners confirmed that the caveat was registered after the first s124 notice was issued and set out their view that the caveat has no relevance and references to it should be removed from the determination.

3.3.6 The landowners stated their concerns regarding the extent of the expert's inspection and provided three undated photographs showing areas of incomplete cladding, missing insulation and building wrap.

3.3.7 The landowners also queried the approach taken in the second draft determination in regards to the use of the house bus for the provision of sanitary facilities for a dwelling, and how this would be monitored.

The applicants

3.3.8 The applicants responded on 21 April 2017, noting they accepted the expert's findings and the conclusions of the second draft determination.

4. The expert's report

4.1 As mentioned in paragraph 1.6, I engaged an independent expert to provide an assessment of the building in regards to the question of whether it is an insanitary building. The expert is a registered building surveyor. The expert carried out a review of the documentation that had been submitted and undertook a site visit on 10 March 2017. The expert provided a report on 17 March 2017 which was forwarded to the parties on 20 March.

4.2 The expert noted that corrugated steel cladding had been fitted to the unclad areas of the north and west elevation at some time in late 2016, and that the applicant had advised the expert that the building wrap and insulation had been replaced immediately prior to the new cladding being installed and that this had been inspected by the authority. (The authority has disputed that any inspection was carried out).

4.3 The expert made observations of the internal and external building features, moving stored items to enable visual inspections of floor coverings and skirting below windows, and carried out non-invasive measurement of moisture content in skirting and plasterboard linings, recording the following general observations:

Cladding (E2)

- Large areas of the south and east elevations remain without cladding. Where the cladding is missing there are no obvious signs of decay or fungal growth in the exposed timber framing and no visible mould.
- Window flashings and flashing junctions between dissimilar claddings are inadequate and wall underlay was not continuous behind cladding junctions.
- Apart from some poorly executed apron stop-ends between the roof and gables on the north side, the roof flashings were generally tidily fitted.
- Wooden joinery is overdue for sanding and painting.
- There were no visual indications of mould or water stains on carpets, wall linings, or skirting.
- While skirting was slightly swollen in one area, moisture readings indicated that any moisture which had been present had dried out and there was no visible damage when viewed from under the floor. The swelling is likely to be historic.
- Moisture readings were taken into the plasterboard below one window in each elevation - none of the readings were elevated.

Water supply (G12)

- The water supply is provided by the neighbouring section belonging to the landowner, but at the time of the expert's visit had been turned off.

Foul water (G13)

- There was no sanitary system onsite at the time of the expert's visit.

4.4 The expert also commented on the current use of the building, noting the following:

- The house bus is self-contained, with toilet and sanitary facilities.
- The dwelling did not appear to be being lived in at the time of the site visit.
- A small area was set up as a watch repair workshop, but due to lack of power was not being used at the time.

4.5 The expert concluded that, based on how it is situated and constructed and the current state of the building, the building was not likely to be injurious to health (refer section 123(a)), and that despite the lack of cladding, moisture has not penetrated or at least not to the extent that it has caused damage/decay (refer section 123(b)) but that it is likely to become insanitary in the future if the cladding was left incomplete.

4.6 The expert noted that the building is currently without potable water supply (refer section 123(c)) and has no sanitary facilities (refer section 123(d)), but that the current use is not for habitation.

4.7 The submissions in response to the expert's report

4.7.1 The authority made a submission on 20 March 2017 (in summary):

- The authority is concerned the expert's report was not independent because information was provided by the applicant during the site visit and wasn't verified by the expert.
- The authority had not inspected any of the cladding in late 2016, nor any of the underlying insulation or building wrap. The last inspection was 3 November 2011.
- It is unclear how the expert can comment on whether or not the building is in a state of disrepair; the building 'looks in a better state now that it did when the notices were issued'. The authority had previously observed missing flashings, missing insulation, and defective building wrap and exposed building wrap.
- The authority would be unable to 'sign off' work that has been covered up without having been inspected.
- The current intended use of the building, as consented, is a dwelling. In addition, the applicants are 'constantly inside the building during the day' and present there rather than in the house bus when the authority visits the site.

4.7.2 The landowners provided a submission on 20 March 2017 (in summary):

- The building has been used as a dwelling for most of the last ten years and was occupied by family members even after the first s124 notice was put on the door in 2016.
- The landowners also have concerns regarding the independence of the expert's report, given that information from the applicants was not verified.
- The building was consented as a dwelling and must meet the legislative requirements.
- While there had been an agreement in place regarding supply of water, this agreement was discontinued and the water supply to the building was disconnected by the landowners approximately three years ago.
- The landowners disconnected the power as per the requirements in the insanitary building notice.
- The landowners expect that building work should have been carried out promptly after the first s124 notice was issued, and the works completed recently 'to improve looks' are 'too little too late'.

4.7.3 The applicants' submission was received on 28 March 2017, largely responding to issues raised in the authority's and landowner's submissions (in summary):

- The applicants dispute the authority's view that the expert wasn't independent. The expert inspected inside and underneath the building, and the expert's assessment did not require him to contact the authority.
- The applicants use the building for things such as storage, phone calls, and the like, so it is reasonable that the applicants are in the building at various times during the day.
- The applicants do not dispute that family members had occupied the building during August 2016.

4.8 In regards to the issues raised by the authority and landowner concerning the independence of the expert, I note here that building occupiers are generally on site for access and security purposes when an expert engaged by the Ministry undertakes an assessment of a building. I do not consider comments from the applicants recorded in the expert's report records in any way affects the expert's observations regarding the current status of the building.

5. Discussion

5.1 Is the building insanitary?

5.1.1 Section 123 of the Act sets out the meaning of "insanitary building" as follows:

> A building is insanitary for the purposes of this Act if the building—
>
> (a) is offensive or likely to be injurious to health because—
>
> (i) of how it is situated or constructed; or
>
> (ii) it is in a state of disrepair; or
>
> (b) has insufficient or defective provisions against moisture penetration so as to cause dampness in the building or in any adjoining building; or
>
> (c) does not have a supply of potable water that is adequate for its intended use; or
>
> (d) does not have sanitary facilities that are adequate for its intended use.

I have considered each of these in turn:

Section 123(a)(i)

5.1.2 I concur with the expert's opinion that the building is not offensive or likely to be injurious to health because of how it is situated or constructed. Although the cladding has been left incomplete, I do not consider that in itself renders the building 'offensive or likely to be injurious to health' because of how it is constructed.

Section 123(a)(ii)

5.1.3 I acknowledge the authority's concerns regarding the missing flashings/insulation and state of the building wrap, and building work that has been carried out without the benefit of inspection by the authority. I note however that the matter of whether the building work complies with the Building Code and whether a code compliance certificate can be issued is a different test to whether or not the building is insanitary.

5.1.4 At the time the authority issued the first s124 notice on 19 September 2016, the cladding had been incomplete for a significant period of time and the authority observed damaged and missing building wrap and wet/damp insulation. I agree with the authority that these building elements were in a "state of disrepair". The question then becomes whether, because the external building envelope or parts of it were in a state of disrepair, was the building insanitary under section 123(a)(ii)?

5.1.5 I am of the opinion there is a distinction between the state of building elements and the state of the building itself. It does not automatically follow that because parts of a building envelope are in a state of disrepair that the building is insanitary under section 123(a)(ii). Over a building's lifetime individual building elements will deteriorate or be damaged and the Act provides for building elements to be repaired or replaced to address this. The assessment of the condition of the building for the purpose of establishing whether it is insanitary must therefore also take into account

the consequences of the extent and effect of those building elements being in a state of disrepair (in this case including the absence of cladding).

5.1.6 The cladding was incomplete for a significant period of time and exposed building elements would have gone through a number of cycles of wetting and drying. Based on the observations of the expert, the consequences of the external building envelope lacking cladding and with damaged and missing building wrap, does not appear to have had a significant impact on the internal aspects of the building or the building's structure. The expert found no evidence of deteriorated linings, swollen skirting, mould growth, decayed framing, or the like.

5.1.7 I am of the view that the lack of cladding, the damaged and missing building wrap, and the moisture in the insulation has not caused the building to fall into a "state of disrepair" such that the building would be considered 'offensive or likely to be injurious to health'. I conclude therefore that the building does not meet the test of section 123(a)(ii).

Section 123(b)

5.1.8 For a building to be insanitary under section 123(b) there must be 'insufficient or defective provisions against moisture penetration' and those insufficient or defective provisions must cause 'dampness in the building'.

5.1.9 At the time the authority issued the insanitary building notice, the lack of cladding and the missing and damaged building wrap meant that the building was not protected against moisture penetration; the provisions against moisture penetration were 'insufficient and defective' and clearly satisfied the criteria in section 123(b).

5.1.10 However, there is no evidence that moisture that may have penetrated over the time the cladding was incomplete had caused 'dampness in the building'. The building wrap had deteriorated and exposed building elements had gone through a number of cycles of wetting and drying, but the expert found no evidence of moisture ingress into the timber framing or undue dampness or damage to the internal linings.

5.1.11 Given the observations of the expert and the lack of evidence of 'dampness in the building', I conclude that the building is not insanitary under section 123(b).

5.1.12 The installation of the cladding has not been completed at this time, though the areas where cladding has not been installed are not as extensive as they were at the time the notice was issued and the applicants have the materials on hand to complete the work. I am of the view that any moisture that may have been present in the building envelope that remained after the cladding was installed, or that may be present when the remaining cladding is installed, is unlikely to be beyond the drying and dispersion capacity of the external envelope.

Sections 123(c) and (d)

5.1.13 The building is currently without potable water supply and has no sanitary facilities, which are relevant to the test in sections 123(c) and (d). I have considered the lack of potable water and sanitary facilities in terms of the "intended use" of the building.

5.1.14 The building was relocated onto the land as a detached dwelling. While there may have been some agreement between the applicants and the authority in 2011 that the applicants would not occupy the dwelling and would use it only as a workshop for a period of time, it appears that this was a temporary measure and the authority did not consider this to constitute a change of use under the Regulations[7].

5.1.15 Section 7 of the Act defines the intended use of the building as including 'any reasonably foreseeable occasional use that is not incompatible with the intended use'. In the circumstances, I am of the opinion the building remains *SH – Sleeping single home* and under Clause A1 of the Building Code is a "detached dwelling". As such, the building is required to have a potable water supply and sanitary facilities.

5.1.16 I conclude therefore that the building is insanitary under the definition set out in sections 123(c) and 123(d) of the Act due to the fact that it does not have a potable water supply or sanitary facilities that are adequate for its intended use.

5.1.17 A notice issued under section 124(2)(c)(ii) provides for an owner to carry out building work to prevent the building remaining insanitary. Based on the submissions of the parties it is my understanding there are issues between the landowner and the applicants regarding the supply of water that may impact on the options available to the applicants to satisfy the insanitary notice – those issues fall outside the ambit of this determination.

5.2 The wording and content of the notices

5.2.1 Following the authority's assessment of the building, section 124 provides for a number of actions that the authority may carry out, and the authority has discretion as to which action or combination of actions is appropriate in the circumstances. Those actions include:

> Section 124(2)
>
> (a) put up a hoarding or fence to prevent people from approaching the building nearer than is safe:
>
> (b) attach in a prominent place on, or adjacent to, the building a notice that warns people not to approach the building:
>
> (c) except in the case of an affected building, issue a notice that complies with section 125(1) requiring work to be carried out on the building to—
>
> (i) reduce or remove the danger; or
>
> (ii) prevent the building from remaining insanitary:
>
> (d) issue a notice that complies with section 125(1A) restricting entry to the building for particular purposes or restricting entry to particular persons or groups of persons.

5.2.2 In this instance the authority has issued the notices identifying the building as insanitary. The heading in both notices refer to section 124(2)(d), which provides for entry to the building to be restricted for particular purposes or to particular persons or groups, however, the content of the notice does not identify the particulars of such a

[7] Refer clauses 5 and 6 and Schedule 2of the *Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005*.

restriction and it is therefore unclear whether the reference to section 124(2)(d) was an error. I am of the view that the particulars of a restriction should be expressed clearly in the notices, and that it would be reasonable to allow entry to the building for the purpose of carrying out building work to prevent the building from remaining insanitary. I discuss section 124(2)(d) further in paragraph 5.3.

5.2.3 The content of the notices confirm they were issued in respect of the insanitary status of the building and issued under 124(2)(b) and (c); though they do not describe the reasons the authority considers the building insanitary. The authority had previously set out its reasons in its letter of 5 September 2016, and these reasons accord with the particulars of contravention in the notice to fix issued earlier in 2011, however, I am of the view that when a notice is issued under section 124, either the notice or accompanying correspondence must clearly identify the reasons for the notice being issued. A notice issued under section 124(c) requires work to be carried out, and it should be clear to the person receiving the notice what aspects of the building that are considered to have met the test of being insanitary in order that the person is able to adequately respond.

5.2.4 In regards to the remedies set out in the second notice, the requirement to 'disconnect any remaining services to the building' is not a lawful requirement of a section 124 notice. Section 124(2)(c)(ii) provides for building work to be carried out on the building to 'prevent the building from remaining insanitary'; it can only require work to be carried out to remedy the insanitary aspects of the building. How the building owner elects to meet that requirement is for the owner to propose and for the authority to consider.

5.2.5 A building owner may choose to remove or demolish a building as a means to satisfy an insanitary building notice, or they may elect to carry out the necessary building work to prevent the building from remaining insanitary. I do not consider that requiring the building to be demolished or removed is reasonable when there are other means by which an insanitary building notice may be satisfied.

5.2.6 The authority has submitted that it considered it was prudent to exercise its powers under section 127 of the Act requiring the removal of the building after 10 years of non-compliance.

5.2.7 I acknowledge that the circumstances involved in this case are complex, and also involve a number of issues that fall outside of the Building Act. However, the exercise of an authority's discretionary powers under section 127 of the Act, requiring a building be demolished or removed, is a severe measure for an authority to take and one which has significant impact on the building owner.

5.2.8 In this case, I have found the building remains insanitary under sections 123(c) and (d). I am of the opinion it was reasonable for the applicants to choose to carry out the necessary building work to satisfy the requirement to prevent the building from remaining insanitary. Pending resolution of issues relating to potable water and power supply, the applicants may be limited in the options available to them to satisfy the notice.

5.2.9 Whether or not resolution of those issues is achieved, or impediments to carrying out the necessary building work to address subsections (c) and (d) are overcome, does not alter my view on the use of section 127 in this case, unless or until such a time that the building becomes 'offensive or likely to be injurious to health' (s123(a)), or dangerous (s121).

5.3 Who the notice is issued to

5.3.1 Section 125(1) sets out requirements for notices issued under section 124(2)(c); including that the notice be in writing and fixed to the building. It is my understanding that both the first and second notices were fixed to the building.

5.3.2 Section 125(2) lists the persons to whom 'a copy of the notice must be given to':

> (a) the owner of the building; and
>
> (b) an occupier of the building; and
>
> (c) every person who has an interest in the land on which the building is situated under a mortgage or other encumbrance registered under the Land Transfer Act 1952; and
>
> (d) every person claiming an interest in the land that is protected by a caveat lodged and in force under section 137 of the Land Transfer Act 1952; …

5.3.3 The circumstances in this case are unusual in that the landowners are not the owners of the building and the applicants have no legal rights in respect of the land on which the building is situated, such as through a lease registered against the title[8], although a caveat has recently been lodged by one of the applicants against the title.

5.3.4 Normally the landowner would also be the owner of the building and in accordance with section 125(2)(a) would receive the section 124(2)(c) notice. However, in this case, the owner of the building under section 125(2)(a) is the applicants; they are also the occupiers of the building under section 125(2)(b) and one of the applicants (D Smith) has registered a caveat against the title (s125(2)(d)). Accordingly the applicants should have been issued with a copy of the first s124 notice as the owner and occupiers, and also a copy of the second notice under section 125(2)(d).

5.3.5 The authority was incorrect to issue the insanitary building notices to the landowners. The landowners are not the owners of the building and a copy of the section 124(2)(c) notice is not required to be given to an "owner of the land" under section 125(2). The categories of person to whom a copy of a section 124(2)(c) notice must be given are the owner of the building, the occupants, a person claiming an interest in the land under a mortgage or other encumbrance, and a person claiming an interest protected by a caveat.

5.3.6 The landowners submitted that they satisfy section 125(2)(c) as they are the owners of the land and have granted a mortgage over the land. However, section 125(2)(c) is not intended to cover a mortgagor (the person who grants a mortgage over their land in favour of the person who has loaned them money) but is intended to cover the mortgagee (the person who acquires an interest in the land in return for advancing money to the owner of the land). Section 125(2)(c) refers to a "person who has an interest in the land … under a mortgage". It is only the mortgagee in a mortgage who acquires an interest in the land under the mortgage. The mortgagor, the landowner, is already the owner of the land, and does not acquire any further interest in the land under the mortgage. The landowners in this case, not falling within any of these categories of person in section 125(2), are not required to be given a copy of the section 124(2)(c) notices.

[8] The authority's submission of 20 March 2017 noted that the lease or license to occupy agreement between the applicants and the landowner may be in dispute, and that the agreement had never been registered on the certificate of title as was required by a clause in the agreement. I have not seen a copy of the agreement and a dispute regarding the agreement is not a matter that can be addressed through a determination under section 177 the Act; however, the caveat was registered on 21 September 2016 – which was after the issue of the first s124 notice but before the issue of the second s124 notice.

5.3.7 The authority submitted that the landowner should be given a copy of the notices under section 125(2) because the authority's costs of carrying out work under section 126(3)(c) to ensure the building is no longer insanitary could become a charge on the land if the authority fails to recover those costs from the owner of the building.

5.3.8 The authority is correct that when a landowner does not own the building on their land the landowner will not be given a copy of a section 124(2)(c) notice unless the landowner qualifies under one of the other categories of person in section 125(2) to whom a copy of the notice should be given. As landowners usually own the buildings on their land this situation is likely to arise only infrequently, however, the authority is right that it is in the landowner's interests to be given a copy of any section 124(2)(c) notice relating to a building on their land.

5.3.9 In the particular circumstances in this case, I see no reason why the authority cannot provide a copy of a section 124(2)(c) notice to the landowner for their information as I would expect that any section 124(2)(c) notice would be included in the property file for the land and in any LIM report prepared for the land. Such a notice would not be provided pursuant to section 125(2) and would place no obligations on the owner of the land.

5.3.10 As noted in the authority's submission in response to the second draft, section 125(3) provides that the insanitary building notices are not invalid simply because a copy of it has not been given to any or all of the persons referred to in section 125(2).

5.4 What happens next?

5.4.1 The authority has concerns regarding the compliance of the building work given that inspections were not undertaken when building wrap and cladding were installed in 2016, and the authority has advised that it may not have reasonable grounds on which to be satisfied that the building work complies with the building consent.

5.4.2 The authority may address these issues through a notice to fix for building work that is not compliant with the Building Code and/or notice under section 95A of a refusal to issue a code compliance certificate. It will then be for the applicants to address the notice by submitting to the authority a proposal of work to remediate areas of non-compliance with the Building Code or providing additional information to satisfy the authority as to compliance with the building consent.

5.4.3 In this case, I have concluded the building is insanitary only in respect of supply of potable water and sanitary facilities. The applicants have indicated a desire to complete the remaining cladding, and are currently using the adjacent house bus for the provision of potable water and sanitary facilities, and continue to use the building for other daily activities.

5.4.4 A new insanitary notice is to be reissued to the applicants and the mortgagor as follows:

- The building meets the definition of an insanitary building under section 123 (c) and (d) as it does not have a potable water supply and lacks sanitary facilities.
- The insanitary building notice is issued under 124(2)(c) requiring building work be carried out on the building to prevent the building from remaining insanitary.
- The insanitary building notice is issued under 124(2)(d) restricting the entry to the building for the following purposes:

- use of the living spaces, on the condition that potable water and sanitary facilities remain available to the occupants in a convenient location
- uses relating to watch repairs
- carrying out of building work.

5.4.5 The authority has raised concerns regarding this approach and in respect of the need to monitor whether the house bus remains on site 'at all times'. The landowners also queried the approach in regards to the use of the house bus for the provision of sanitary facilities for a dwelling and how this would be monitored, and noted that the house bus was not on site at all times.

5.4.6 In coming to my conclusion relating to the restriction of entry described in paragraph 5.4.4, I have considered the period of time in which a notice on restriction on entry is valid (30+30 days under section 125(1A)), and the objective and functional clauses of the Building Code that relate to the need for potable water and sanitary facilities in light of this 30+30 day timeframe.

5.4.7 I am of the view that the use of the house bus for the purpose of satisfying the objective and functional requirements of the Building Code would be adequate for the period of 30+30 days. I am also of the view that a requirement in the notice for the house bus to be 'on site at all times' would be impractical, because within the 30+30 day timeframe the applicants would have to regularly replenish fresh water supplies and dispose of waste and sewerage at a waste dump station; accordingly I have amended the wording of the restriction.

5.4.8 It is noted that the options available to the applicants to satisfy the notice in terms of the provision of potable water supply and sanitary facilities may be limited by circumstances that are outside the ambit of this determination.

5.4.9 In the event that the section 124(2)(d) notice expires before the applicants are able to organise a potable water supply and sanitary facilities, it will be incumbent on the authority to use the section 125(1)(d) deadline within which the work under a section 124(2)(c) notice must be completed to ensure the building ceases to be insanitary within a reasonable timeframe. The failure of a person to comply with a section 125(1)(d) deadline is an offence under section 128A of the Act.

5.4.10 The section 124(2)(c) notice will have to take into account the fact that some steps towards obtaining a potable water supply and sanitary facilities may be beyond the control of the applicants, but there will be a range of activities and steps that will be within the control of the applicants and able to be undertaken by the applicants.

6. The decision

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

- the authority incorrectly exercised its powers of decision in respect of the remedies provided for in the second insanitary building notice relating to disconnection of services and the removal of the building
- the authority incorrectly exercised its powers of decision in respect of the person to whom both insanitary building notices were issued, and
- the authority correctly exercised its powers of decision in respect of the building being insanitary as defined in sections 123(c) and (d) of the Act;

6.2 I hereby modify the authority's decision, requiring a new insanitary building notice to be issued under sections 124(2)(c) and 124(2)(d) as described in paragraph 5.4.4 of this determination.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 22 May 2017.

John Gardiner
Manager Determinations and Assurance

Appendix A

A.1 Relevant sections of the Act discussed in this determination

Subpart 6—Special provisions for certain categories of buildings

Definitions of dangerous, affected, earthquake-prone, and insanitary buildings

123 Meaning of insanitary building

A building is insanitary for the purposes of this Act if the building—

(a) is offensive or likely to be injurious to health because—

(i) of how it is situated or constructed; or

(ii) it is in a state of disrepair; or

(b) has insufficient or defective provisions against moisture penetration so as to cause dampness in the building or in any adjoining building; or

(c) does not have a supply of potable water that is adequate for its intended use; or

(d) does not have sanitary facilities that are adequate for its intended use.

124 Dangerous, affected, earthquake-prone, or insanitary buildings: powers of territorial authority

(1) This section applies if a territorial authority is satisfied that a building in its district is a dangerous, affected, earthquake-prone, or insanitary building.

(2) In a case to which this section applies, the territorial authority may do any or all of the following:

(a) put up a hoarding or fence to prevent people from approaching the building nearer than is safe:

(b) attach in a prominent place on, or adjacent to, the building a notice that warns people not to approach the building:

(c) except in the case of an affected building, issue a notice that complies with section 125(1) requiring work to be carried out on the building to—

(i) reduce or remove the danger; or

(ii) prevent the building from remaining insanitary:

(d) issue a notice that complies with section 125(1A) restricting entry to the building for particular purposes or restricting entry to particular persons or groups of persons.

(3) This section does not limit the powers of a territorial authority.

125 Requirements for notice requiring building work or restricting entry

(1) A notice issued under section 124(2)(c) must—

(a) be in writing; and

(b) be fixed to the building in question; and

(c) be given in the form of a copy to the persons listed in subsection (2); and

(d) state the time within which the building work must be carried out, which must not be less than a period of 10 days after the notice is given or a period reasonably sufficient to obtain a building consent if one is required, whichever period is longer; and

(e) state whether the owner of the building must obtain a building consent in order to carry out the work required by the notice.

…

(1A) A notice issued under section 124(2)(d)—

(a) must be in writing; and

(b) must be fixed to the building in question; and

(c) must be given in the form of a copy to the persons listed in subsection (2); and

(d) may be issued for a maximum period of 30 days; and

(e) may be reissued once only for a further maximum period of 30 days.

(2) A copy of the notice must be given to—

(a) the owner of the building; and

(b) an occupier of the building; and

(c) every person who has an interest in the land on which the building is situated under a mortgage or other encumbrance registered under the Land Transfer Act 1952; and

(d) every person claiming an interest in the land that is protected by a caveat lodged and in force under section 137 of the Land Transfer Act 1952; and

(e) any statutory authority, if the land or building has been classified; and

(f) Heritage New Zealand Pouhere Taonga, if the building is a heritage building.

(3) However, the notice, if fixed on the building, is not invalid because a copy of it has not been given to any or all of the persons referred to in subsection (2).

126 Territorial authority may carry out work

(1) A territorial authority may apply to the District Court for an order authorising the territorial authority to carry out building work if any work required under a notice issued by the territorial authority under section 124(2)(c) is not completed, or not proceeding with reasonable speed, within—

(a) the time stated in the notice; or

(b) any further time that the territorial authority may allow.

(2) Before the territorial authority applies to the District Court under subsection (1), the territorial authority must give the owner of the building not less than 10 days' written notice of its intention to do so.

(3) If a territorial authority carries out building work under the authority of an order made under subsection (1),—

(a) the owner of the building is liable for the costs of the work; and

(b) the territorial authority may recover those costs from the owner; and

(c) the amount recoverable by the territorial authority becomes a charge on the land on which the work was carried out.

127 Building work includes demolition of building

Any work required or authorised to be done under section 124(2)(c) or section 126 may include the demolition of all or part of a building.