BUILDING PERFORMANCE

# Determination 2022/007

## Regarding the proposed or purported refusal by an authority to issue two code compliance certificates and grant two certificates of acceptance for building work in respect of alterations to an existing building, timber deck, and several retaining walls

438 Portobello Road, Macandrew Bay, Dunedin


**Summary**

This determination considers an authority's exercise of decision to propose or purport to refuse to issue two code compliance certificates and grant two certificates of acceptance, related to the construction of several retaining walls and remedial work to the underside of a timber deck. The building work is the subject of various specialist reports from a number of different geotechnical and structural chartered professional engineers. The determination discusses the reasons given by the authority for the refusals.


The legislation discussed in this determination is contained in Appendix B. In this determination, unless otherwise stated, references to "sections" are to sections of the Building Act 2004 ("the Act") and references to "clauses" are to clauses in Schedule 1 ("the Building Code") of the Building Regulations 1992.

The Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (e.g., acceptable solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

# 1. The matter to be determined

1.1. This is a determination made under due authorisation by me, Katie Gordon, National Manager Building Resolution, Ministry of Business, Innovation and Employment ("the Ministry"), for and on behalf of the Chief Executive of the Ministry[1].

1.2. The parties to the determination are:

1.2.1. the owners of the dwelling, K. McKinlay and A. Reid ("the owners")[2] using the services of an agent ("the agent"), and a legal advisor. The owners applied for the determination.

A. Reid was also the licenced building practitioner who carried out or supervised the building work under the first building consent until May 2015.

1.2.2. Dunedin City Council ("the authority"), carrying out its duties as a territorial authority or building consent authority.

1.2.3. the purchasers of the property where the building work was carried out, R. and V. Whitburn ("the purchasers"), using the services of a legal advisor.

1.2.4. the licensed building practitioner, L. Mullen ("the builder"). The builder carried out or supervised the building work from May 2015 onwards, in relation to amendments A and B to the first building consent, the third building consent, and the first and second certificates of acceptance.

1.3. This determination arises from the authority's failure to decide whether to issue two code compliance certificates[3] and grant two certificates of acceptance[4] for building work at 438 Portobello Road, Macandrew Bay, Dunedin. The determination also considers subsequent decisions by the authority to propose or purport to

[1] The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

[2] A record of title search for identifier OT2C/1273, legal description Lot 1 DP 11138, on 15 December 2021, confirmed that K McKinlay and A Reid are the current registered owners of the property.

[3] Section 95A of the Act.

[4] Sections 98(1)(b) and 99A of the Act.

refuse to issue two code compliance certificates and grant two certificates of acceptance. These were:

1.3.1. The code compliance certificates for the first building consent ABA-2008-1319[5], and third building consent ABA-2017-338.[6]

1.3.2. The certificates of acceptance for the first application COA-2016-3, and second application COA-2019-58.

Details about all four certificates are described in paragraphs 2.3 and 2.4, and a summary of the items of dispute are in table 1.

The refusals arose because:

1.3.3. the authority is not satisfied that the building work complies with certain clauses of the Building Code; in particular, B1 *Structure*, B2 *Durability*, and E1 *Surface Water*

1.3.4. the authority has stated that it will only make a decision on the issue of the code compliance certificates and certificates of acceptance at the same time and in conjunction with each other

1.3.5. the authority considers that it has received conflicting information from several chartered professional engineers acting separately on behalf of both the owners and the purchasers

1.3.6. the authority stated it had considered whether the code compliance certificate could be issued for the third building consent (ABA-2017-338) based on the information held on file, but that without full access to the property, it was unable to establish if the building work complies. The issue of the code compliance certificate was therefore refused (refer to table 2 and the subsequent inspections by the authority in July 2021)

1.3.7. the authority stated that the owners were to seek an agreement as to the compliance of the building work with the Building Code from the purchasers' engineers before it would make a decision to issue the code compliance certificates and certificates of acceptance

1.3.8. in respect of the crib retaining wall, the authority considers:

(a) it is not able to determine the backfill used behind the wall, the drainage installed, or the stretchers behind the wall and the headers

[5] This includes a refusal to grant amendment B to the first building consent.

[6] The second building consent ABA-2016-94 is outside the matter to be determined. See paragraph 1.9.3.

(b) it has insufficient information to demonstrate compliance with Verification Method B1/VM1[7] or clause B2.2[8]

1.3.9. that screw fixings used to install the supporting frame and soffit battens to the timber deck located along the north elevation of the dwelling were the incorrect material (zinc coated) and should have been stainless steel. This is due to the location of the building being within 100m of a harbour and in a high exposure zone[9]. The authority considers it has insufficient information to demonstrate compliance with B1/VM1 and clause B2.2

1.3.10. in respect of the first building consent (ABA-2008-1319), the authority confirmed it had not made a decision to issue the code compliance certificate, but it had indicated verbally, on many occasions, that it is likely to refuse the issue of the certificate. The authority considers:

(a) amendment B to the consent, to change the specification of the granular fill material used behind the basement garage retaining wall, has not been granted

(b) the information received with the amendment B application is insufficient to demonstrate compliance with Acceptable Solution E1/AS1[10] and clause B2.2

(c) it had received some information from the owners in response to a request for further information dated 20 December 2017 regarding amendment B, but not enough information has been provided to grant the amendment

(d) it cannot issue the code compliance certificate until amendment B has been granted.

1.4. The matters to be determined, under sections 177(1)(b), (2)(d) and (3)(b), are:

1.4.1. the authority's failure to exercise its powers of decision in relation to the two code compliance certificates and two certificates of acceptance, and amendment B to the first building consent.

1.4.2. the authority's subsequent proposed or purported decision to refuse to issue two code compliance certificates and grant two certificates of acceptance, and amendment B to the first building consent.

[7] Verification Method for New Zealand Building Code Clause B1 *Structure*, "General".

[8] Functional requirement B2.2: Building materials, components and construction methods shall be sufficiently durable to ensure that the building, without reconstruction or major renovation, satisfies the other functional requirements of this Code throughout the life of the building.

[9] New Zealand Standard 3604:2011 *Timber-framed buildings*, Section 4 – Durability, sub-section 4.2 – Exposure Zones, item 4.2.3.3 – Zone D: High, and figure 4.2 (page 4-5).

[10] Acceptable Solution for New Zealand Building Code Clause E1 *Surface Water*.

1.5. In deciding these matters, I must consider:

1.5.1. whether the authority had sufficient information before it to make those decisions

1.5.2. the reasons it provided to the owners for not making a decision[11]

1.5.3. the reasons it subsequently provided in its proposed or purported refusal to issue each of the code compliance certificates and grant the certificates of acceptance, including its reasons for refusing to grant amendment B for the first building consent (ABA-2008-1319).

## Matters outside this determination

1.6. I have not considered the exercise of decisions by the authority when it granted and issued the first building consent ABA-2008-1319 (or amendment A to that consent), or the second building consent ABA-2016-94, or the third building consent ABA-2017-338. The application for determination did not include the exercise of decisions by the authority to grant and issue these building consents (other than that relating to amendment B to the first building consent), and they are therefore outside the scope of the determination.

1.7. I have not considered the compliance of the building work covered by the first building consent ABA-2008-1319, or amendment A to that consent.

1.8. Amendment A to the first building consent (ABA-2008-1319)[12] was for the installation of a steel channel at the base of concrete block garage wall to collect and dispose of any external moisture that may enter the building. The authority conducted a "building completion" inspection on 27 August 2015, for which it recorded the outcome as "pass". The authority stated:

> All work complete as per approved drawings and compliant with [the] New Zealand Building Code; All work has now been completed as per amendment 2008-1319 A.

The authority has made a clear statement as to the compliance of the building work with the building consent in respect of amendment A. The authority also did not refer to amendment A for its reasons to refuse to issue the code compliance certificate for building consent ABA-2008-1319. Therefore, amendment A has not been considered further in this determination.

1.9. The following items are referred to in the determination as they relate to some elements of the building work in dispute. However, they were not included in the

[11] The authority confirmed it had verbally indicated, on many occasions, that it is likely to refuse the applications given the many pieces of conflicting information it had received (refer to table 1).

[12] The owners applied for amendment A on 24 July 2015 and the authority issued it on 24 August 2015.

application for determination. As such, the exercise of decision by the authority in relation to these items is outside the scope of the determination.

1.9.1. The three notices to fix in respect of the building work that is the subject of this determination.

1.9.2. A dangerous building notice[13] in respect of "the formed soffit to the underside of the deck at the front of the property which was installed without [a] building consent and has failed therefore the structure is considered dangerous".

1.9.3. A code compliance certificate that was issued for the second building consent ABA-2016-94 for "Stormwater Drainage Upgrade" on 18 April 2018.

1.10. The parties have also included reference to matters that relate to the Resource Management Act 1991, and the authority's Code of Subdivision and Development policy (dated 2010). These are outside the scope of this determination. I have no jurisdiction under other enactments or an authority's subdivision and development policy. This determination only considers matters relating to the Building Act and its regulations.

### Notes on the formatting used in this determination

1.11. The background to this determination involves many statutory instruments and specialist structural and geotechnical reports by various chartered professional engineers and other experts. The names of these instruments and reports have been placed in bold at the point in the text where they are most fully explained (refer to Appendix A, table 2). This has been done for ease of reference and does not indicate any particular emphasis or importance attached to the text.

1.12. In addition, due to the number of reports commissioned by the parties in respect of the matters to be determined, these reports have been summarised together in Appendix A, table 2.

## 2. The building work

2.1. The owners' property is situated on a hillside close to and overlooking the sea at Macandrew Bay in Dunedin (Lot 1 DP 11138). See figure 1.

[13] Section 124 of the Act


**Figure 1: Property location**

(Note: The image pre-dates the remedial building work to the crib wall authorised by building consent ABA-2017-338. It has been reproduced from figure 4 of the owners' environmental engineers' report dated 15 July 2015).

2.2. Since taking ownership of the property in 2007, the owners have carried out building work to renovate and extend an existing detached residential dwelling on the property, as well as to extend an existing crib retaining wall, and create a new barbecue area with its own retaining walls.

2.3. Some of the building work has been carried out under three building consents issued by the authority.

2.3.1. **ABA-2008-1319** – issued on 23 July 2008 to "Demolish part of existing and erect dwelling, Install gas fire" ("**the first building consent**")[14]. This consent is still active and has been subsequently amended by:

(a) **ABA-2008-1319/A** – issued on 24 August 2015 to "Install Drain Channel in Basement Garage to Collect and Discharge Water from Leaking Internal Retaining Wall" ("**amendment A** to the first consent"), this amendment has been approved.

(b) **ABA-2008-1319/B** – requested by the owners on 28 November 2017 for "Amended the specifications – Section 1.8.3, Change Granular Fill Material to GAP40" ("**amendment B** to the first consent"). This

[14] The building consent certificate stated it was "issued subject to the conditions specified in the attached pages headed "Conditions of Building Consent". These pages were not attached to the copy of the certificate provided to the Ministry.

amendment has been applied for but has not yet been issued by the authority[15].

2.3.2. **ABA-2016-94** – issued on 26 February 2016 for "Stormwater Drainage Upgrade" ("**the second building consent**"). A code compliance certificate was issued for this consent on 18 April 2018 (see paragraph 1.9.3).

2.3.3. **ABA-2017-338** – issued on 15 March 2017 for "Remedial work to crib block retaining wall" ("**the third building consent**")[16]. This consent is still active.

2.4. In addition, there are two applications for certificates of acceptance ("**COA**"), which remain active. These applications relate to building work that was carried out without a building consent being first obtained. The owners have applied for COAs for the following:

2.4.1. **COA-2016-3** – applied for on 3 February 2016 for adding additional surcharge to the existing crib retaining wall and creating the new barbecue area ("**the first certificate of acceptance**").

2.4.2. **COA-2019-58** – applied for on 27 September 2019 after work to "Install support Framing and Soffit Battens to Deck" ("**the second certificate of acceptance**").

2.5. The majority of the building work covered by the first building consent is not in dispute and has been 'passed' by the authority during its inspection process.

2.6. However, there are still three broad areas of the building work where issues remain in dispute between the parties:

2.6.1. the construction of the crib retaining wall (the east and west wings)

2.6.2. the aggregate used to backfill behind the basement garage foundation wall and crib retaining wall

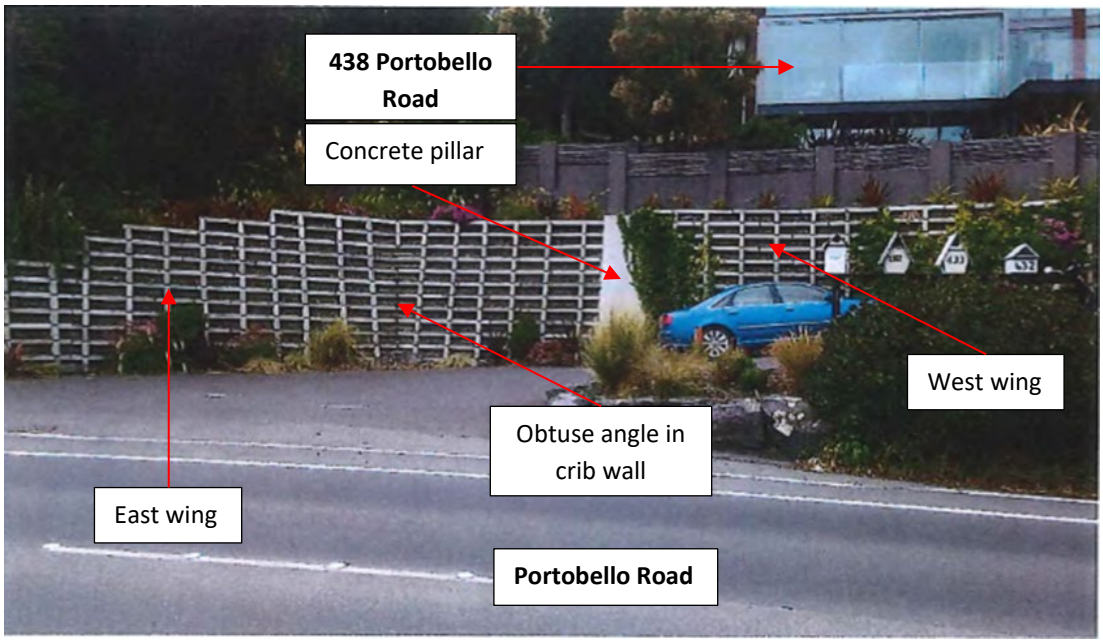
2.6.3. the fastening of the soffit for the first-floor deck at the front of the building.

## The crib retaining wall

2.7. The crib retaining wall is located towards the front (northern roadside) of the owners' property ("**the crib retaining wall**"). The wall has two wings, which meet at an obtuse angle approximately 8m from its eastern end. See figure 2.

[15] The authority has confirmed that because amendment B has not been granted, this prevents the issue of the code compliance certificate for ABA-2008-1319.

[16] The authority's "record of required inspections" indicated it needed to conduct a "completion" inspection only. In respect of any "producer statements" required by the authority, a "PS4 for all work associated with remedial works" was to be provided.




## Figure 2: Extent of crib retaining wall

(Note: The photograph pre-dates the remedial building work to the crib wall authorised by the third building consent. It has been reproduced from the owners' geotechnical engineer's first report dated 15 January 2016).

2.8. The central section of the wall, which is part of the west wing, was constructed first (sometime between the 1950s and 1960s). The owners then constructed the eastern and western sections of the wall between August and November 2011[17], using the same method of construction as the previous section. See figure 3. This work was carried out without a building consent, resulting in the application for the first certificate of acceptance.

[17] Conflicting information has been provided as to exactly when the building work was undertaken. Information provided on 11 January 2022 by the owners suggested the eastern and western sections were constructed in 2011 to 2012.

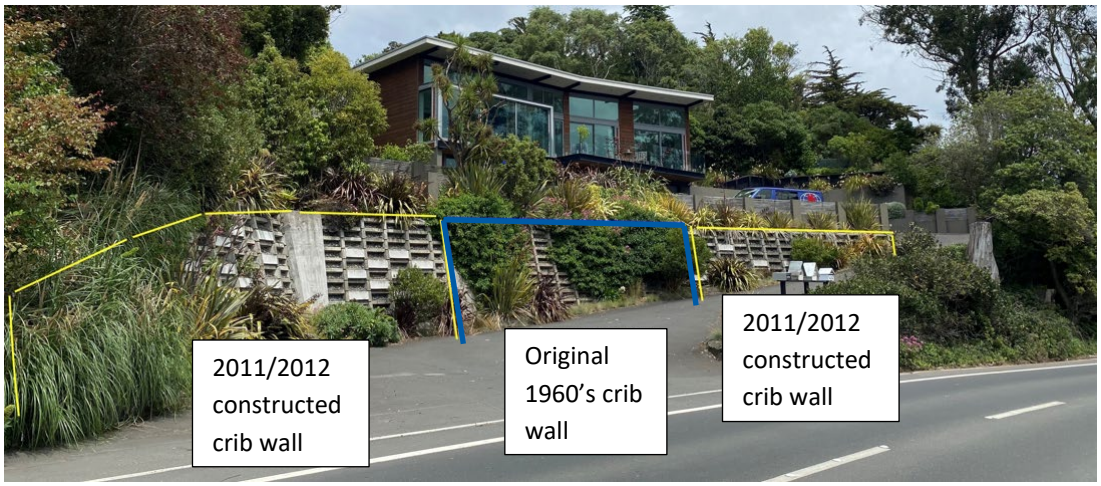



**Figure 3: Construction timeline for crib retaining wall**

(Note: Photograph was provided by the owners on 11 January 2022. The area marked with a blue line indicates the section of the wall that was first constructed sometime between the 1950s and 1960s. The areas marked with yellow lines indicate the sections of the wall constructed without a building consent in 2011 to 2012).

2.9. The method of construction relies on concrete stretchers placed parallel to the front face of the wall. The headers are concrete members which are perpendicular to the face of the wall, the ends of which are visible. The headers have recesses in them to seat the stretchers. The stretchers and headers form a series of interlinked 915mm-wide crib "boxes" which are filled with stone (angular basalt hardfill)[18]. See figure 4.

[18] The description of the construction has been reproduced from the owners' consulting engineer's third report dated 13 August 2015.

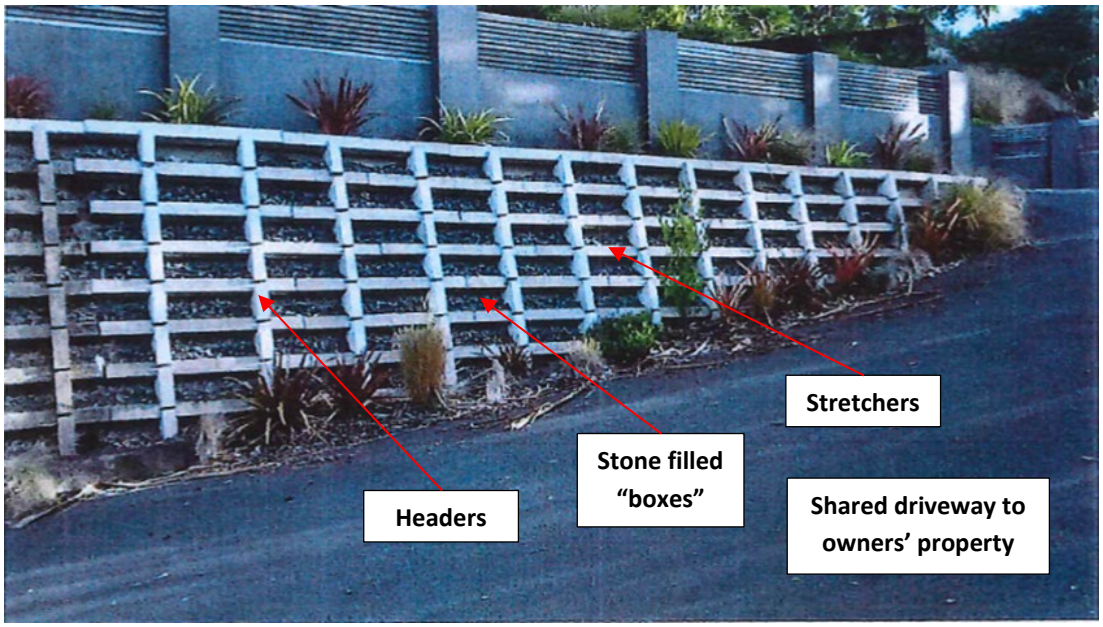



**Figure 4: West end (top section) of the crib retaining wall**

(Note: The photograph pre-dates the remedial building work to the crib wall authorised by building consent ABA-2017-338. It has been reproduced from the owners' consulting engineer's third report dated 13 August 2015).

2.10. The crib retaining wall flanks the shared driveway leading from Portobello Road to the owners' dwelling. The wall is approximately 30m long and varies in height from 0.8m at its lowest western end, to 3.5m in the middle, before reducing to 1.6m at its eastern end. Its average height is approximately 2.4m.

2.11. Approximately 20m from the west end of the crib wall is a 1m x 1m concrete pillar that is the full height of the wall. The owners' consulting engineer stated, "it appears that this pillar was constructed to allow…[a] storm drain to drop [down] to the level of the shared drive". See figure 2.

2.12. An as-built drawing for the crib retaining wall from when it was built in 2011 to 2012, shows that the wall has been constructed on top of a reinforced concrete foundation, which varied in depth from 150mm to 300mm, and varied in width from 1000mm to 1400mm[19].

2.13. The wall is constructed at a 1:4 lean. Along most of its length it is constructed firmly against a vertical bank of weathered rock, except in the area where the old driveway used to be, where there is a larger gap between the wall and bank.

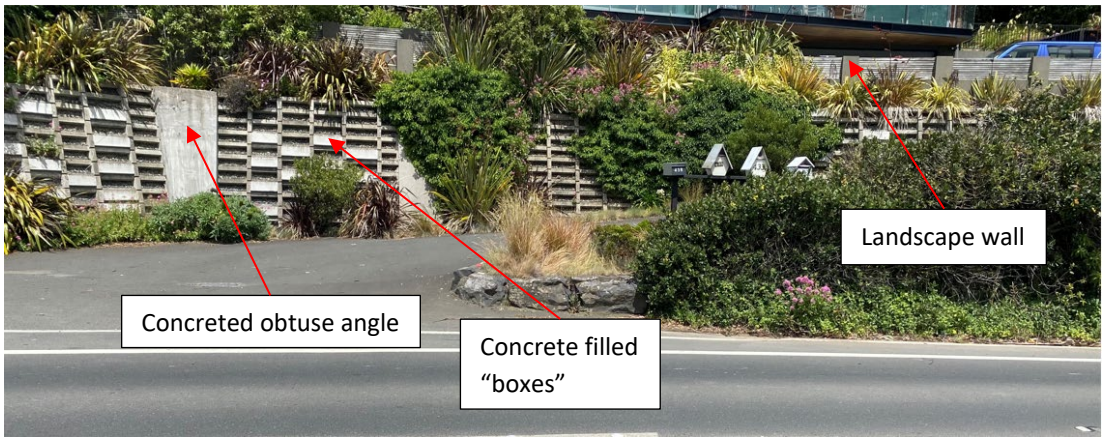
[19] The as-built cross-section of the crib retaining wall is included in the owners' geotechnical engineer's second report dated 4 September 2017.

2.14. The wall's depth at its base is not known but would typically (for this type of construction) be deeper than at its top[20].

2.15. An as-built drainage plan, supplied by the builder on 19 January 2018, indicates a 100mm drainage coil has been installed at the base of the wall, between the back of the concrete cribs and the cut face of the weathered rock. This area is backfilled with 20mm and 40mm clean compacted gravel.

2.16. At the point where the two wings of the wall meet and are joined, the stretcher at the top of this join had rotated, causing the stone fill in the crib boxes in this area to partly fall out. This was remediated as a result of building work authorised by the third building consent ABA-2017-338.

2.17. The third building consent included the placement of reinforced concrete in some of the boxes formed by the crib wall headers and stretchers, as well as replacing the crib construction at the obtuse angle in the wall with reinforced concrete. See figure 5.




## Figure 5: Remediated crib retaining wall

(Note: The photograph was provided by the owners on 11 January 2022).

2.18. The west wing of the crib retaining wall is surcharged by a 1.3m high landscape wall, offset approximately 1.8m in the garden above it[21]. It is also surcharged by a part of the driveway to the south of the wall (between the wall and the dwelling). The east wing is surcharged by a bank that is substantially covered in vegetation. See figure 5.

## The barbecue area retaining wall

[20] For the purposes of this determination, the "depth" of the crib wall describes the horizontal distance from the front face of the wall to the rear of the wall.

[21] The purchasers dispute the setting out of the landscape wall in relation to the crib retaining wall. The description used in this case has been reproduced from the owners' geotechnical engineer's first report dated 15 January 2016.

2.19. The concrete blockwork retaining wall around the barbecue area at the back of the dwelling ("the barbecue area retaining wall") was built by the owners without first obtaining a building consent. See figure 6.

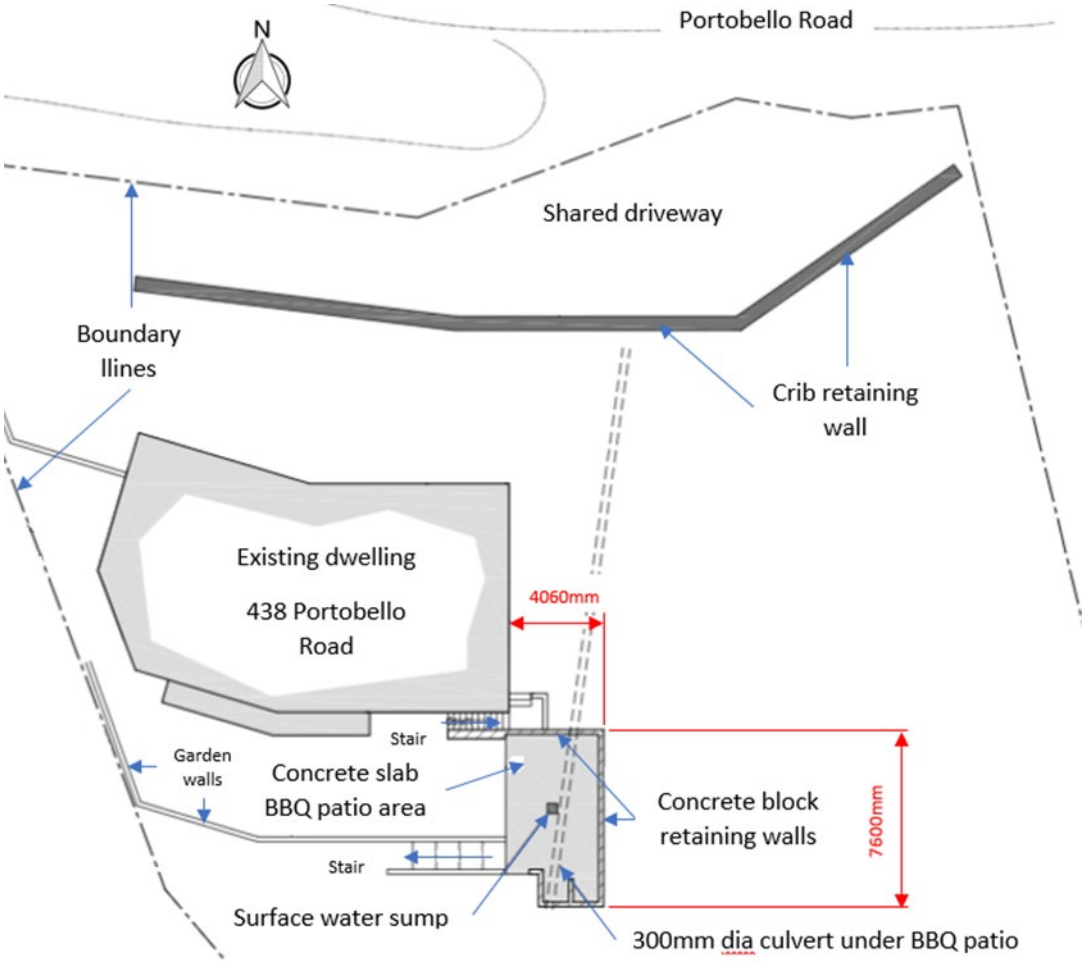



**Figure 6: Site plan indicating location of barbecue area retaining walls (not to scale)**

(Note: The plan has been reproduced from the owners' structural engineer's drawing S1, revision A, dated 29 January 2016, number 15126. The original plan is included in the authority's records for certificate of acceptance application COA-2016-3).

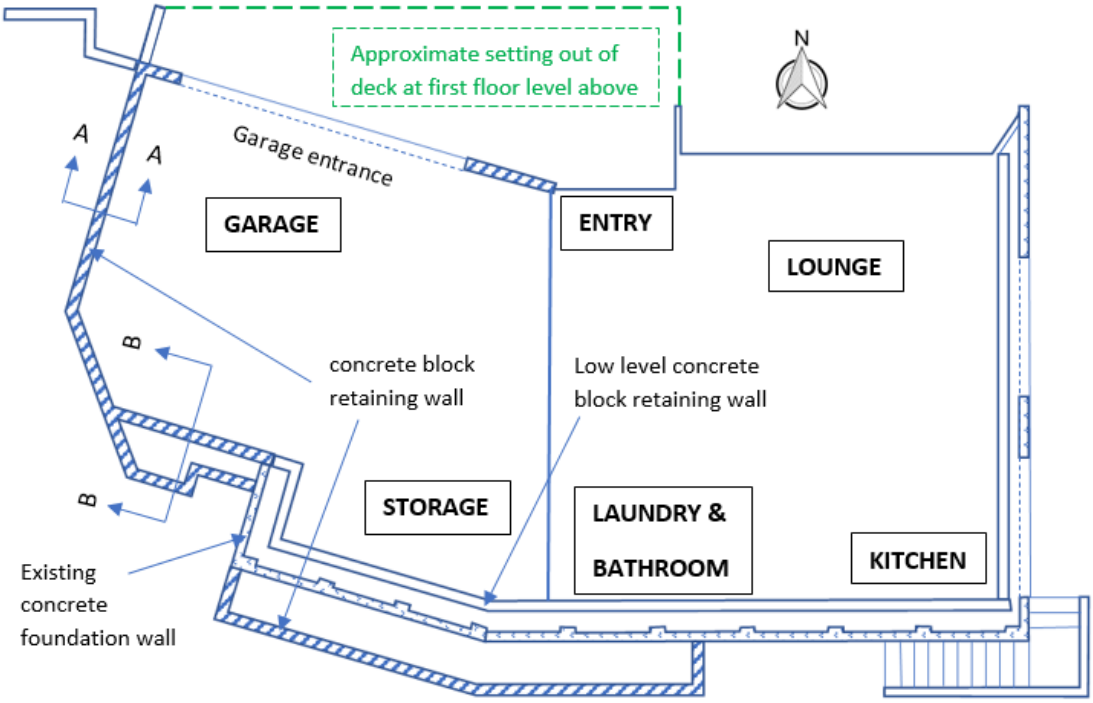
2.20. The wall is constructed from solid-filled concrete blocks, reinforced with vertical and horizontal steel bars. The wall encloses and retains the ground below a raised concrete slab barbecue patio. The wall extends both above and below the level of the patio and retains two sides of it.

2.21. On its northern side, the wall is constructed on a concrete strip foundation laid over an existing concrete retaining wall. The eastern side is constructed on a similar foundation laid over the ground.

2.22. The maximum retained height of the walls is 1.8m[22]. The walls extend 1m high above the level of the concrete patio they enclose, to create a safety barrier.

## The ground floor foundation walls and drainage backfill

2.23. The ground floor foundation walls to the dwelling and garage includes parts of the original concrete wall and some new reinforced concrete block walls. See figure 7.

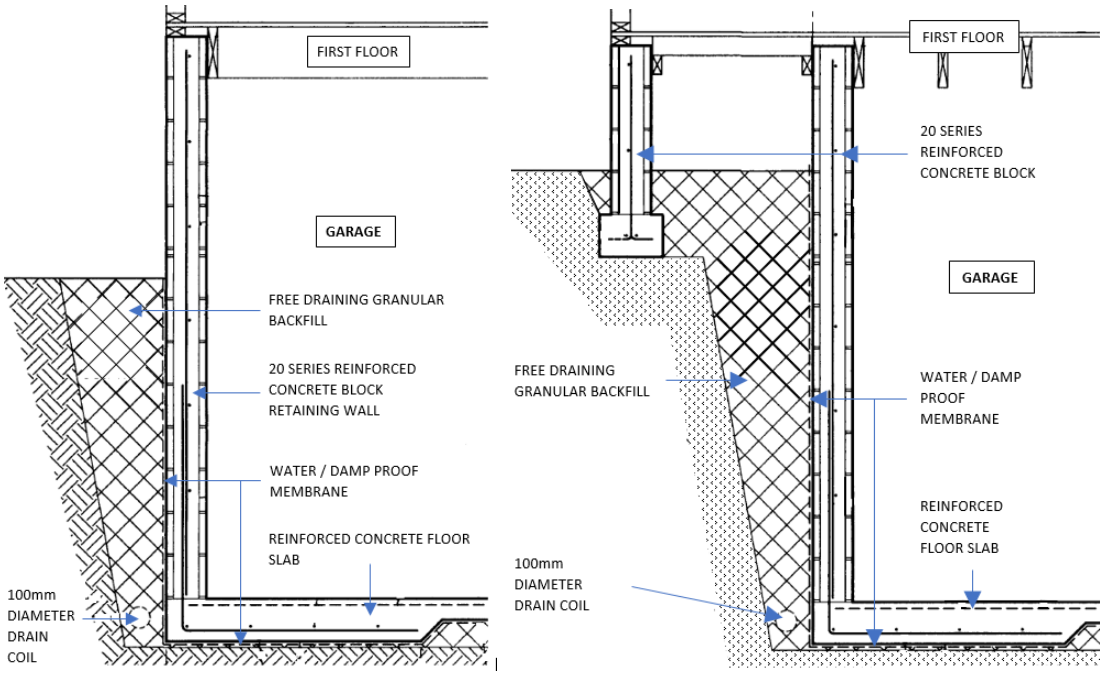



## Figure 7: Ground floor plan (not to scale)

(Note: this plan is replicated from owners' structural engineer's drawing 7170, Sheet S1, Revision 2, dated May 2008. Sections A-A and B-B are shown in figure 8).

2.24. In the area between the natural ground of the bank beyond the foundation wall and the outside of the wall, a 100mm diameter subsoil drainage coil (or slot drain) has been installed at the base of the wall. See figure 8. This drainage coil is also indicated on the as-built drainage plans provided by the builder on 9 January 2018.

[22] The purchasers dispute the height of the walls. The description used in this case has been reproduced from the owners' structural engineer's first report dated 29 January 2016.




**Section A – A** **Section B - B**

**Figure 8: Sections through ground floor garage walls (not to scale)**

(Note: Sections A-A and B-B are replicated from owners' structural engineer's drawing 7170, Sheet S1, Revision 2, dated May 2008. Refer to figure 7 for location of sections A-A and B-B).

2.25. The subsoil drainage coil is bedded in screened crushed recycled concrete; this was the fill originally specified in the consent. However, the remainder of the space between the wall and the natural ground has then been backfilled with GAP40 aggregate[23]. This is not the aggregate originally specified.

2.26. The owners applied for an amendment to the first building consent (amendment B) to change the specification to the GAP40 aggregate used. The "Structural Specification", revision 3, dated 27 November 2017, item 1.8.1 states:

> Backfill material shall consist of a granular material not containing excessive amounts of silt or clay and free of all organic material…GAP 40 is considered a satisfactory material.

However, the authority has not yet granted this amendment. The owners state this is because the purchasers have objected to the change in the aggregate.

## The fastening of the soffit to the deck at the front of the dwelling

[23] GAP40 – General All Passing (or Purpose), weathered metal aggregate up to 40mm in size.

2.27. The first-floor level timber deck is located along part of the north elevation of the dwelling. Figure 7 indicates the approximate setting out of the deck in relation to the rest of the dwelling. See also figure 9.

2.28. The deck was originally constructed under the first building consent ABA-2008-1319.

2.29. The deck is constructed using 190 x 45mm deck joists spaced at 450mm centres, with 100 x 25mm thick decking on top. The building consent plans for ABA-2008-1319 indicate that the underside of the deck was exposed (i.e. not covered or concealed by any additional timber battens or slats).

**(a) Top view of deck** **(b) Underside of deck**

## Figure 9: Deck

(Note: Photographs provided by the owners on 11 January 2022).

2.30. It is unclear when the soffit was formed to the underside of the deck (see figure 9(b))[24], but it was installed without first obtaining a building consent. The soffit was formed using 75 x 50mm timber battens that were glued and nailed along the underside of the joists. Hardwood timber slats were then screw fixed to the battens. Subsequently, the glue and nails that joined the deck joists and the battens together gave way.

[24] The purchasers believe the building work "was done prior to their initial inspection of the property in 2015".

2.31. On 5 September 2019 the authority issued a notice to fix and dangerous building notice in respect of the soffit to the deck that had "failed". The owners then applied for a certificate of acceptance (COA-2019-58) on 27 September 2019 for the remedial building work completed to re-fix the soffit.

2.32. The remedial building work was designed, and the construction monitored, by the owners' chartered professional structural engineer. The engineer provided a Producer Statement – Design (PS1) and a Producer Statement – Construction Review (PS4), which stated compliance with Building Code clause B1 *Structure*.

2.33. The remedial building work involved refixing the battens to the joists, and initially this was done using 120mm x 5mm zinc-coated screws at approximately 500mm centres. However, after concerns were raised by the authority about the durability of these screws (due to the location of the building being in a high exposure zone, close to Otago harbour), additional 150mm long stainless-steel straps were fixed using stainless steel nails into the sides of all of the deck joists and battens. In total, 92 straps were installed. The original screws are still in place but are now redundant, as the straps carry the full load of the soffit (refer to the owners' structural engineer's fourth report dated 7 September 2021 in Appendix A, table 2).

2.34. On 11 January 2022, in an email to the Ministry, the owners stated:

> [the] Agent for the owners confirms the hardwood timber slats[25] have been re-fixed with stainless steel screws.

2.35. The documents related to the certificate of acceptance application (COA-2019-58) were approved by the authority on 30 September 2019. At the same time, the authority confirmed:

> Before [the authority] can issue the certificate [it needs] to inspect the work to ensure it complies with the Building Code.

# 3. Background

3.1. The owners purchased the property in 2007, at which point there was an existing dwelling on the property believed to have been constructed in the 1960s. There was also an existing large crib block retaining wall at the front of the property.

3.2. From 2008 until 2012, the owners engaged in renovating and extending the dwelling, as well as carrying out other building work around the property.

3.3. This building work has involved multiple building consents, certificate of acceptance applications, and specialist reports from a number of different geotechnical and structural chartered professional engineers and other professionals. A summary of

[25] The hardwood timber slats refer to the external building element that can be observed on the underside of the deck. See figure 9(b).

the timeline of events and reports commissioned by the parties associated with this case is in **Appendix A, table 2**.

3.4. The majority of the building work was carried out pursuant to the first building consent (ABA-2008-1319). The building work was undertaken by the owners using the services of their own building company.

3.5. Between October 2008 to July 2015, the authority carried out numerous inspections of the building work, all of which are now noted on the authority records as "passed".

3.6. During this same period, the existing crib block retaining wall was also extended. This building work was undertaken without the owners first obtaining a building consent.

3.7. On 28 May 2015, the owners and purchasers entered into a sale and purchase agreement with respect to the property. The agreement was conditional on the owners obtaining a code compliance certificate in relation to the first building consent (among other things) by the settlement date.

3.8. In June or July 2015[26], Dunedin experienced exceptionally heavy rainfalls. The back of the owners' property flooded. See figure 10 (a) and (b). This caused a small leak through the concrete block foundation wall at the back of the garage. A small amount of gravel was also washed out of the crib retaining wall.


**(a) View facing south from BBQ patio** **(b) View facing north-west**

## Figure 10: Photographs from 2015 storm event

(Note: Photographs included in the owners' geotechnical engineer's second report dated 4 September 2017).

## Current status of items of dispute

3.9. The current status of the items of dispute between the owners and the authority, in respect of the various code compliance certificates and certificates of acceptance, is

[26] Conflicting information has been provided as to the exact date of the storm event, but it is likely to have been on 3 and 4 June 2015 based on New Zealand historic weather records available from National Institute of Water and Atmospheric Research at https://hwe.niwa.co.nz (accessed on 14 December 2021).

summarised in **table 1**. The reports provided by the purchasers' engineers are not referenced in table 1, however they are summarised in Appendix A, table 2.

## Table 1: Current status of items of dispute

| |
|---|
| **Code compliance certificate for the first building consent ABA-2008-1319 (incorporating amendments A and B)** for alterations to an existing dwelling. Amendment B seeks to change the specification of the backfill material used for the drainage. |
| Current status according to authority records: "CCC suspended"<br><br>**Authority** confirms it has not made a decision in respect of the issue of the code compliance certificate, but has "verbally indicated, on many occasions, that [it is] likely to refuse the application given the many pieces of conflicting information" it has received.<br><br>Authority confirms that if it was required to make a decision "it will be to refuse the application" for the code compliance certificate. |
| **Authority's** reasons for refusal:<br>• Amendment B (change backfill to GAP40), applied for on 28 November 2017 "has not been granted".<br>• Amendment B information is insufficient to demonstrate compliance with Acceptable Solution E1/AS1 and clause B2.2.<br>• It had received additional information regarding amendment B, in response to a request for further information dated 20 December 2017, "but at this time not enough information has been provided to grant the amendment".<br>• The building work associated with ABA-2008-1319 "is not complete in accordance with the building consent".<br>• It cannot issue the code compliance certificate until amendment B has been granted. |
| **The Owners** have provided the following to the authority.<br><br>24 October 2015 – letter from the agent. The retaining walls have been backfilled with free-draining gravels and all have 100mm diameter drain coils laid.<br><br>4 September 2017 – Owners' geotechnical engineer's second report. The GAP40 aggregate used is sufficiently permeable and compatible with the retained soils based on site specific tests, a camera survey, independent accredited laboratory test results and modelling analysis. It was noted that "the drainage system behind the wall is expected to perform as intended". The report was supplemented with drainage aggregate analysis.<br><br>28 November 2017 – Owners apply for amendment B to the first building consent ABA-2008-1319, for a change to the specification of drainage gravel used behind foundation wall (from 25mm gravel to GAP40). The owners advise that 150mm to 200mm layers of 25mm gravel have been used above the [drainage coils] at the base of the walls, with the balance of the backfill constituting GAP40 aggregate. |

21 February 2018 – Owner's geotechnical engineers confirm backfill for foundation wall complies with clauses E1 and B1[27].

22 February 2018 – Owners' structural engineer confirmed "that the structural capacity of the retaining walls has not been compromised by the amended [G]AP40 backfill (which has similar 'structural' properties to [the] clean material originally specified). However, this is based on the results of the permeability tests, carried out by [the owners' geotechnical engineer], which found that the backfill (as-built) is sufficiently free draining [and permeable] to avoid water pressure behind the wall".

27 August 2018 – Owners' geotechnical engineer confirmed that the change in the aggregate (GAP40) for the stormwater drainage as per building consent ABA-2008-1319/B "meets the requirements of the Building Code".

**Certificate of acceptance COA-2016-3**
(to extend the crib retaining wall, and construction of the retaining walls for the barbecue area)

Current status according to authority records: "Ref building"

**Authority** confirms it has not made a decision in respect of COA-2016-3 but has "verbally indicated, on many occasions, that [it is] likely to refuse the application given the many pieces of conflicting information" it has received.

Authority confirms that if it was required to make a decision "it will be to refuse the application" for COA-2016-3.

**Authority's** reasons for refusal:

- It has received insufficient information to demonstrate compliance with clauses B1, B2.2, and E1.
- It is not able to determine the crib wall backfill.
- It is not able to determine the drainage.
- It is not able to determine stretchers behind the crib wall and the headers.

**The Owners** have provided the following to the authority:

13 August 2015 – Owners' consulting engineer's third report assessed the stability and construction of the crib retaining wall. Based on a visual assessment of the wall, the report concludes that the crib retaining wall is well constructed.

24 October 2015 – Letter from the agent (acting on behalf of the owners) to the authority details construction of the new and old sections of the crib retaining wall, the concrete column, and remedial work required.

16 January 2016 – Owners' geotechnical engineer's first report on the crib retaining wall concludes that the wall complies with clauses B1 *Structure* and B2 *Durability*.

[27] The engineer did question the applicability of clause E1 for retaining structures, as they considered clause B1 was the most appropriate for retaining wall designs. See also previous Determination 2020/031 "Regarding the purported refusal to issue a building consent for the construction of retaining walls and associated drainage at 16 Newark Close, Tauranga" dated 3 December 2020.

3 February 2016 – Owners apply for certificate of acceptance.

4 September 2017 – Owners' geotechnical engineer's second report notes that the crib retaining wall is constructed against an existing cut of weathered volcanic rock. It is stable and complies with clause B1 *Structure*.

1 June 2018 – The reviewing engineer's report concurs that the crib retaining wall is stable for static loadings, and complies with clause B1 *Structure*.

27 August 2018 – Owners' geotechnical engineer confirms the repairs to the crib retaining wall "are appropriate" and comply with the stability requirements of the Building Code.

20 July 2021 – Authority receives an undated Producer Statement – Construction Review (PS4) from the owners' structural engineer in respect of "remedial work to existing crib" retaining wall. This states there is compliance with clause B1 *Structure*, for the third building consent (ABA-2017-338).

13 September 2021 – The owners' geotechnical engineer's third report. Refer to Appendix A, table 2.

**Code compliance certificate for the third building consent ABA-2017-338**
(for remedial building work to crib retaining wall)

Current status according to authority records: "CCC refused"

**Authority** issues letter on 21 January 2021. The authority stated it had considered whether the code compliance certificate could be issued based on the information held on file, but without full access to the property, it was unable to establish if the building work complies. The issue of the code compliance certificate was therefore refused.

26 July 2021: Authority conducts inspection of the foundations. It confirmed receipt of a Producer Statement – Construction Review (PS4) from the owners' structural engineer. However, the inspection outcome was "fail" because "due to structural engineers differing opinions the [authority] is not able to be satisfied [on] reasonable grounds that the work complies with the building consent".

27 July 2021: Authority conducts a "building completion" inspection. The inspection outcome was "fail". The inspection record itself does not give the reasons for the failed inspection, but a tabulated summary of the inspections provided by the authority on 13 January 2022 confirms the same reason as that stated on 26 July 2021.

**Authority's** reasons for refusal:

- It has received insufficient information to demonstrate compliance with Verification Method B1/VM1 and clause B2.2.
- It is not able to determine the crib wall backfill.
- It is not able to determine the drainage.
- It is not able to determine stretchers behind the crib wall and the headers.

**The Owners** have provided the following to the authority [refer to list above for COA-2016-3]:

3 March 2017 – Owners' structural engineer's second report. The report is accompanied by a PS1 from a chartered professional engineer certifying the compliance of the design of

the remedial works with clause B1 *Structure*, as well as design sketches showing proposed reinforced concrete detailing.

6 March 2017 – Owners apply for third building consent (ABA-2017-338) for "Remedial work to Crib Block Retaining Wall". Authority issues building consent on 15 March 2017.

12 May 2017 – Owners' structural engineer issues a Producer Statement – Construction Review (PS4) for "remedial work to existing crib wall", in compliance with clause B1 *Structure*, for building consent ABA-2017-338.

9 January 2018 – The builder provides additional information to the authority including as-built drain plans for the drainage behind the crib retaining wall.

**Certificate of acceptance COA-2019-58**
(for the fastenings, timber framing and soffit battens to a timber deck)

Current status according to authority records: "Ready to inspect"

**Authority** confirms it has not made a decision in respect of COA-2019-58 but has "verbally indicated, on many occasions, that [it is] likely to refuse the application given the many pieces of conflicting information" it has received.

Authority confirms that if it was required to make a decision "it will be to refuse the application" for COA-2019-58.

On 13 January 2022, the authority confirmed it attended site on 31 October 2019, but the inspection "was cancelled because of engineering [difference] of opinions".

**Authority's** reasons for refusal:

- It has insufficient information to demonstrate compliance with Verification Method B1/VM1 and clause B2.2.
- The screw fixings are the incorrect material and should be stainless steel (since the building is located within 100m of a harbour, and is therefore in a Zone D "high" exposure zone as referenced in NZS 3604:2011 *Timber-framed buildings*).

**The Owners** have provided the following to the authority.

26 September 2019 – Owners' structural engineer's third report detailing the remedial work carried out to the deck soffit fixings, its compliance with NTF-2019-278, and that a certificate of acceptance could be applied for. Report included Producer Statement – Design ("PS1") dated 26 September 2019, and Producer Statement – Construction Review ("PS4") dated 27 September 2019, for the new soffit stainless steel straps and nail fixings used, and included two photographs showing the as-installed straps.

27 September 2019 – Owners apply for second certificate of acceptance (COA-2019-58).

30 September 2019 – Authority approves documents relating to the second certificate of acceptance (COA-2019-58). Advised the owners the building work would need to be inspected.

7 September 2021 – The owners' structural engineer's fourth report. Additional stainless-steel straps have been installed, and these fixings now "take the full factored load" of the soffit, so the zinc coated fixings are now "redundant". Concluded that "given that the

> stainless-steel straps are providing all the structural support to the ceiling, [the owners' structural engineer] believe that the fixings comply with B1/VM1 and B2/AS1".

3.10. The Ministry received an application for a determination on 29 June 2021.

# 4. Submissions

## The owner

4.1. The owners made a submission with their application for a determination in which they set out the background to the matter and their assessment of the issues that had arisen and now needed to be resolved.

4.2. The owners summarised their understanding of the building work that still needed to be 'signed off'. For the following items, the authority requires "confirmation from a [chartered professional engineer] acting for the purchasers and a certificate would be issued":

4.2.1. The crib retaining wall needs a code compliance certificate and certificate of acceptance.

4.2.2. The barbecue area retaining wall needs a certificate of acceptance.

4.2.3. The deck soffit needs a certificate of acceptance.

4.2.4. The first building consent (ABA-2008-1319) needs a code compliance certificate subject to the amendment to the consent.

4.2.5. In respect of amendment B to the first building consent, the owners note that the gravel that has been used "is more suited [than] that originally specified" and has been fully addressed in the engineers' reports.

4.3. The other main points from the owners' initial submission can be summarised as follows.

4.3.1. All work on the retaining walls, extension to the dwelling, and stormwater has been "completed to code compliant standards".

4.3.2. All notices to fix have been responded to with haste, with all required work carried out.

4.3.3. The purchasers arranged alternative designs and pricing for this building work, without discussing this with the owner[28].

4.3.4. The purchasers have been in contact with the authority about the owners' property since 2015. The authority has copied correspondence about the property to the purchasers even though they do not own the property. The purchasers have also requested to be present at inspections and meetings with the authority.

4.3.5. The purchasers have commissioned various experts' reports and provided them to the authority. As a result, the authority will not issue any code compliance certificates or certificates of acceptance due to the conflicting experts' reports, when usually it would "rely on the confirmation of a single engineer".

4.4. The agent, acting for the owners, made a further submission dated 13 July 2021 which was received by the Ministry on 19 July 2021. The main points are summarised as follows.

4.4.1. All inspections relating to the first building consent have passed, and the owners have not received a letter refusing to issue the code compliance certificates. Nor have they been notified that the consent is suspended.

4.4.2. All building work has been carried out by licenced building practitioners.

4.4.3. The authority is requiring that the owners discuss the outstanding issues with the purchasers' engineer, but the engineer will not talk to the owners.

4.4.4. The authority is refusing to assess each issue individually, saying it will "only sign off everything at once".

4.4.5. Regarding amendment B to the first building consent ABA-2008-1319 and the change in specification for the GAP40 aggregate used by the foundation wall, the owner stated, "the originally specified 20mm granular fill was used to encase the 100mm drain coil, however the remaining void behind the wall was filled with GAP40". At a meeting hosted by the authority on 10 March 2020, the owners' geotechnical engineer advised that:

(a) in-situ permeability testing to assess drainage capacity was carried out, which confirmed it was free draining

(b) samples were taken and grading testing was undertaken…to assess its permeability

[28] The Ministry has not been presented with any alternate designs and pricing from the purchasers. Regardless, these are outside the matters for determination as they don't reflect, or have a bearing on, the decisions made by the authority or the building work undertaken by the owners.

(c) numerical modelling of the drainage metal using the results of [(a) and (b)] above which confirmed that the [G]AP40 had sufficient permeability to prevent any water build up (by a factor of 3 to 6)

(d) as the original design had no filter fabric included, the [G]AP40 actually reduces the risk of any clogging as it provides a natural filter between the in-situ soils and the clean metal [aggregate] around the pipe. This was confirmed by camera inspection i.e. no silt was present

(e) the above conclusion had been peer reviewed by a dam engineer with considerable experience in groundwater drainage issues

(f) the natural soils were of low permeability so [a person] would not expect significant groundwater seepage.

4.4.6. Both the geotechnical engineer's report and the amended specification for the aggregate have been peer reviewed by another engineer, and the authority has been provided with all this information.

4.4.7. With respect to the third building consent (ABA-2017-338), which relates to the remedial work on the crib retaining wall, the owners "do not believe there are any outstanding issues under this consent", and the authority was to conduct a final inspection on 20 July 2021. The owners have not received any letter refusing to issue a code compliance certificate for this consent.

4.4.8. With respect to the first certificate of acceptance (COA-2016-3), regarding remedial building work to the crib retaining wall and barbecue area retaining wall, the owners stated they have not received any refusal relating to the application. As requested by the authority, the engineers' reports relating to the crib and barbecue area retaining walls have been peer reviewed. The reviewing engineer was selected because "they are recognised leaders in both structural and hydraulic engineering and are specialist engineers in the area of land stabilisation". However, the authority has now suggested that the purchasers' engineers need to agree that the building works comply with the Building Code.

4.4.9. With respect to the second certificate of acceptance (COA-2019-58), regarding the fixings to the framing and soffit of the deck, the owners have not received any refusal notification from the authority. The authority has said the building work should be approved by the purchasers' engineer, but the owners cannot contact him. The purchasers' engineer has indicated verbally that this work should be signed off by the owners' structural engineer. The owners' structural engineer has issued a PS1 and PS4 for this building work.

4.5. On 11 January 2022, the owners responded to a request for further information from the Ministry.

4.5.1. Regarding whether the owners had formally applied for a code compliance certificate[29] for the first building consent ABA-2008-1319, the owners confirmed:

> [The] Agent for the owners cannot recall or find a record of having formally applied for this [code compliance certificate], save for email requests seeking final inspections and sign-off.

4.5.2. Regarding whether the owners had formally applied for a code compliance certificate for the third building consent ABA-2017-338, the owners confirmed:

> [The] Agent for the owners cannot recall or find a record of having formally applied for [code compliance certificate]. Agent for the owners recalls booking a final inspection about mid-2021, which was then postponed as [the authority] was wanting to sign-off all outstanding matters together.

## The authority

4.6. The authority acknowledged the application for determination on 8 July 2021 and indicated it did not wish to make a submission at that stage.

4.7. On 20 July 2021, in response to the Ministry's request for further information, the authority advised that it had not yet refused to issue any code compliance certificates or certificates of acceptance, but that it "is likely to do so". The reasons given were that the parties' engineers had been unable to agree on whether the building work met the requirements of the Building Code. The authority had also met with the parties on several occasions and "they cannot agree on a way forward or resolution".

4.8. On 21 July 2021, in response to a request for further information from the Ministry, the authority confirmed:

> The [code compliance certificate] for [building consent] ABA-2008-1319 at this stage has not been refused, the [code compliance certificate] is suspended.

4.9. On 30 August 2021 and 3 September 2021, the authority subsequently clarified the basis for its proposed decisions in respect of the matters in this case. In summary, the authority stated that it was likely to refuse:

4.9.1. to issue a code compliance certificate in respect of the first building consent **ABA-2008-1319**. The reasons given were that the work covered by the consent was not yet complete, as amendment B (amended specifications for granular fill) to the consent ABA-2008-1319/B had not yet been granted, and no code compliance certificate could therefore be granted.

[29] Section 92 of the Act.

The authority stated that insufficient information had been provided to establish that the building work complies with Acceptable Solution E1/AS1[30] and clause B2.2[31]. The authority requested further information on 20 December 2017. The authority acknowledges some additional information has been provided, "but at this time not enough information has been provided to grant the amendment"[32]

4.9.2. to grant the first certificate of acceptance **COA-2016-3** (crib and barbecue wall). The reasons given were that the information provided is insufficient to prove compliance with clauses B1, B2.2 and E1, and it was "not able to determine…[the] crib wall back fill, drainage, [and] stretchers behind the wall and the headers"

4.9.3. to issue a code compliance certificate for the third building consent **ABA-2017-338** (remedial work to crib retaining wall). The reasons given were that the information provided is insufficient to demonstrate compliance with Verification Method B1/VM1 and clause B2.2, and it was "not able to determine…[the] crib wall back fill, drainage, [and] stretchers behind the wall and the headers"

4.9.4. to grant the second certificate of acceptance **COA-2019-58** (framing and soffit battens for deck). The reasons given were that the information provided is insufficient to prove compliance with Verification Method B1/VM1 and clause B2.2, and it was not satisfied on reasonable grounds that aspects of the building work complied. The building is within 100 metres of the harbour, which is Zone D in terms of NZS 3604. Accordingly, the screw fixings are the incorrect material and should be stainless steel.

## The purchasers

4.10. The purchasers acknowledged the application for a determination on 29 July 2021. In line with the High Court minute of 24 June 2021[33], the purchasers declined to make a submission on the matter. However, the purchasers did express a view on the matters to be determined.[34]

4.11. On 9 September 2021, the purchasers queried the current status of amendment A for the first building consent ABA-2008-1319 (refer to paragraph 1.8). The

[30] Surface water.

[31] Functional requirement B2.2: Building materials, components and construction methods shall be sufficiently durable to ensure that the building, without reconstruction or major renovation, satisfies the other functional requirements of this Code throughout the life of the building.

[32] The authority did not confirm what information it had received, or what additional information it believed was still required.

[33] High Court of New Zealand, Dunedin Registry, minute CIV-2021-412-82 dated 24 June 2021, associated with a hearing held on 23 June 2021.

[34] However, in this case, the owners applied for the determination and confirmed the matters to be considered.

purchasers also raised concerns about the second building consent for an upgrade to the stormwater drainage (ABA-2016-94). This building consent has had a code compliance certificate issued for it on 18 April 2018, which the purchasers acknowledge, but note they have "ongoing concerns that a secondary flow path has not been provided in relation to the storm water drainage" (refer to paragraph 1.9.3).

### The builder

4.12. The builder acknowledged the application for a determination on 19 July 2021 but declined to make a submission at that stage.

# 5. Draft determination

5.1. On 3 March 2022, a draft determination was sent to the parties.

5.2. On 23 March 2022, the owners responded by stating they "did not have any comments on the draft determination".

5.3. On 25 March 2022, the authority responded by stating that it accepted the draft determination.

5.4. On 28 March 2022, the purchasers provided a letter dated 25 March 2022 which detailed their reasons for not accepting the draft determination. It included several reports not previously received by the Ministry (these have been summarised together in Appendix A, table 2). The letter also referred to matters outside the determination, including (but not limited to) the Resource Management Act 1991, the second building consent (ABA-2016-94, see paragraph 1.9.3), amendment A to the first building consent (ABA-2008-1319, see paragraph 1.8), and the sub-surface drain coils laid around and under the dwelling. The items raised by the purchasers that are relevant to the determination include, but are not limited to:

5.4.1. Confirmation of the status of the purchasers in terms of the property ownership.

5.4.2. Concerns with "quality issues that…remain", such as the remedial work to the soffit of the deck, specifically the screws that remain in place that are "no longer of any structural importance, [but] will rust and be unsightly".

5.4.3. Reference to correspondence from 1 June 2016 to 30 August 2017 between the purchasers and the manufacturers and suppliers of the materials for the crib retaining wall, including the stretchers that were, or were not, installed to the rear of the wall's construction, as well as the fill material used, and "drainage in the back of the wall".

5.4.4. In reference to the crib retaining wall, "that no drain coil ends or sump are visible" and the "purchasers have been advised that it is impossible to confirm what has been built without deconstructive testing".

5.4.5. Disagreement regarding the maximum height and average height of the crib retaining wall. However, the purchasers did not state what they believed those dimensions were.

5.4.6. Their view that the "authority has an independent statutory role and it is for the authority to come to its own view in light of all the information it has (both supplied to it and from its own inspections)".

5.4.7. Confirmation that the purchasers "have not authorised their experts to engage directly with the owners" and the "authority has not requested this, and the purchasers do not consider anything is likely to be achieved".

5.4.8. Confirmation that "the engineer has not issued a PS4" for the building work in relation to the first certificate of acceptance and that the purchasers' "experts have not seen confirmation that [the crib retaining wall] has been constructed as per the plan and drainage installed".

5.4.9. Confirmation that "there are ground cracks behind the retaining crib wall which suggest movement in the wall"[35].

5.4.10. Reference to "cracking on the face of the [barbecue] retaining walls and also on both sides of the non-retaining upper part of the walls" and provided comments on the amount of steel reinforcement used in the walls.

5.4.11. Reference to technology that is "available to establish the presence of reinforcement, but not the dimensions of the steel used".

5.4.12. Confirmation that "there is no difficulty with full access to the property" by the authority.

5.5. On 29 March 2022, the builder accepted the draft determination.

5.6. Any issues with a material impact on the matters to be determined have been taken into account and are reflected in the final decision.

# 6. Discussion

6.1. The dispute arose because the owners have raised concerns about the authority's proposed or purported exercise of its powers of decision to refuse to issue two code compliance certificates (including amendment B to the first building consent) and

[35] The purchasers did not provide any evidence to verify the extent of any ground cracks, or if the wall had in fact moved or by how much. These were not reasons given by the authority when it proposed or purported to refuse to issue the first COA (COA-2016-3).

grant two certificates of acceptance. The reasons given by the authority are summarised as follows. The authority:

6.1.1. is not satisfied that the building work complies with certain clauses of the Building Code, in particular, clauses B1 *Structure*, B2 *Durability*, and E1 *Surface Water*

6.1.2. will only make a decision for the issue of the code compliance certificates and certificates of acceptance at the same time and in conjunction with each other

6.1.3. considers it has received conflicting information from several chartered professional engineers

6.1.4. stated that without full access to the property, it has been unable to establish if the building work associated with the third building consent (ABA-2017-338) complies. The issue of the code compliance certificate was therefore refused (refer to table 2 and the subsequent inspections by the authority in July 2021)

6.1.5. stated that the owners were to seek an agreement as to the compliance of the building work with the Building Code from the purchasers' engineers before it would make a decision to issue the code compliance certificates and certificates of acceptance

6.1.6. stated that in respect of the crib retaining wall, it is not able to determine the backfill used behind the wall, the drainage installed, or the stretchers behind the wall and the headers, and it has insufficient information to demonstrate compliance with Verification Method B1/VM1 or clause B2.2

6.1.7. considers that the screw fixings used to install the supporting frame and soffit battens to the timber deck located along the north elevation of the dwelling were the incorrect material (zinc coated) and should have been stainless steel. This is due to the location of the building being within 100m of a harbour and in a high exposure zone. The authority considers it has insufficient information to demonstrate compliance with B1/VM1 and clause B2.2

6.1.8. confirmed it had not made a decision to issue the code compliance certificate in respect of the first building consent (ABA-2008-1319), but it had indicated verbally, on many occasions, that it is likely to refuse the issue of the certificate. The reason given was that it first needed to grant amendment B to the consent, for the change made in the specification for the granular fill material to be used. However, it has insufficient information to demonstrate compliance with Acceptable Solution E1/AS1 and clause B2.2.

6.2. The matter to be determined is firstly the authority's failure to exercise its powers of decision in relation to the two code compliance certificates (including amendment B to the first building consent) and two certificates of acceptance. Secondly, it is the authority's proposed or purported decisions to refuse to issue those certificates.

6.3. In determining whether the authority was correct to propose or purport to refuse to issue the code compliance certificates and grant the certificates of acceptance, I need to consider the reasons given for those decisions.

6.4. In considering the matters above, I will cover the following:

6.4.1. the relevant legislation ("Legislation")

6.4.2. the requirements of an authority when making decisions about whether to issue the certificates and grant the building consent amendment ("The authority's regulatory actions")

6.4.3. the specific matters relating to each of the decisions (referenced to each of the certificates concerned).

## Legislation

6.5. Section 3 "Purposes" of the Act states:

> This Act has the following purposes:
>
> …..
>
> (b) to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the Building Code.

6.6. Section 4 "Principles to be applied in performing functions or duties, or exercising powers, under this Act" states:

> …..
>
> (2) In achieving the purposes of the Act, a person to whom this section applies must take into account the following principles that are relevant to the performance of functions or duties imposed, or the exercise of powers conferred, on that person by this Act:
>
> …..
>
> (q) the need to ensure that owners, designers, builders and building consent authorities are each accountable for their role in ensuring that –
>
> (i) the necessary building consents and other approvals are obtained for proposed building work; and

(ii) plans and specifications are sufficient to result in building work that (if built to those plans and specifications) complies with the Building Code; and

(iii) building work for which a building consent is issued complies with that building consent

…..

6.7. Section 14F outlines the responsibilities of a building consent authority (see Appendix B).

6.8. Section 95A states that if a building consent authority refuses to issue a code compliance certificate, it must give the applicant written notice of the refusal, and the reasons for that refusal.

6.9. Similarly, under section 99A, if a territorial authority refuses to grant an application for a certificate of acceptance, it must give the applicant written notice of the refusal, and the reasons for the refusal.

6.10. Other relevant extracts of the legislation are included in Appendix B.

## The authority's regulatory actions

### The reasons for refusal

6.11. Reasons for refusing to issue a code compliance certificate have been discussed in previous determinations. I hold the same view as discussed in Determination 2020/005[36] regarding what is expected of an authority when giving reasons for a refusal. I consider that this applies regardless of whether it is in relation to a code compliance certificate or certificate of acceptance. In this respect, I reiterate the following key points.

6.11.1. The requirement that an authority provide reasons in writing for refusing to issue a code compliance certificate or certificate of acceptance gives the applicant notice of the work required to be done in order to obtain the relevant certificate. The reasons provided by the authority will concern the areas of the building work where the authority does not believe the building work complies with the building consent (i.e. in respect of an application for a code compliance certificate) or the Building Code or the Act.

[36]Determination 2020/005, "Regarding the refusal to issue a code compliance certificate for a 22-year-old house at 63b Thirteenth Avenue, Tauranga". Issued 7 May 2020. See section 5.2 of 2020/005 "The authority's regulatory actions".

6.11.2. It is important that an owner is given sufficiently explicit, specific, clear and valid reasons why compliance has not been achieved, so the owner can consider the work required to remedy the situation.

6.11.3. An inspection by the authority will provide it with sufficient information to make the written notice more meaningful and helpful to the owners in terms of specific reasons why it was unable to issue the code compliance certificate or a certificate of acceptance.

6.12. This also needs to be considered in respect of the authority's obligations under section 22(1) of the Local Government Official Information and Meetings Act 1987 ("LGOIMA")[37], and decisions previously reached in the High Court and Court of Appeal[38].

6.13. In the High Court case of *Hollander v Auckland Council*[39] the court stated:

> [53] Context is important in determining the extent to which it is necessary for reasons to be given. If the purpose for which reasons are required were to enable a party to determine whether to pursue a right of general appeal, the reasons must identify each material issue (legal and factual) relevant to that decision…
>
> [54] The extent of the obligation to give reasons will also be dependent on the functions cast on the particular tribunal responsible for making the relevant decision. In common with the approach taken to application of the principles of natural justice, where Parliament has established a special procedure, the extent of reasoning required to support a decision will be moulded to fit the purpose of the process

6.14. A generalised refusal which does not identify sufficiently explicit, specific, clear and valid reasons why building work may not comply with a building consent or the Building Code, is not sufficient for an authority to meet its obligations under sections 95A and 99A of the Act.

6.15. In this case, the Ministry is considering the reasons given by the authority in respect of two code compliance certificates (for the first building consent ABA-2008-1319, and the third building consent ABA-2017-338), as well as two certificates of acceptance (COA-2016-3 and COA 2019-58). In doing so, the Ministry is also considering the proposed or purported exercise of decision by the authority to refuse to issue amendment B to the first building consent (ABA-2008-1319) as this has a direct bearing on the issue of the associated code compliance certificate.

**Decisions related to multiple certificates**

[37] Determination 2020/005, paragraphs 5.2.10 and 5.2.11.
[38] Determination 2020/005, paragraph 5.2.13.
[39] *Hollander v Auckland Council* [2017] CIV 2016-404-2322 NZHC 2487.

6.16. The evidence in this case indicates that the authority has taken the view that it will only make a decision regarding the issue of the code compliance certificates and certificates of acceptance at the same time and in conjunction with each other.[40]

6.17. The Act does envisage a situation where a building may be subject to several different building consents, and these may run concurrently or separately. For example, under section 44(2) of the Act, an owner may make a series of applications for building consents for stages of the proposed building work.

6.18. The Act does not impose a statutory time frame for an owner to complete building work that is the subject of a building consent. Regardless, the time in which a building consent authority must decide whether to issue a code compliance certificate is stated in section 93 of the Act. However, this does not prevent the owner from continuing with the building work, for example, in any further period that may be agreed between the owner and the building consent authority concerned.[41]

6.19. Just because a building may be subject to several different building consents, or certificate of acceptance applications, there is no obligation under the Act for an owner to complete all the building work, at the same time, before an authority considers whether to issue or refuse to issue any code compliance certificates or certificates of acceptance. Indeed, if an authority has adopted such an approach, as it has in this case, then this is contrary to the intent of the Act.

6.20. A certificate of acceptance application, under section 96 of the Act, addresses that part of the building work that was completed without the owner first obtaining a building consent.

6.21. In this case, the crib retaining wall is the subject of both the third building consent (ABA-2017-338) for remedial building work, and a separate certificate of acceptance (COA-2016-3) for those parts of the wall that were constructed without a building consent in 2011 to 2012.

6.22. Although the two applications relate to the same building feature (i.e. the crib retaining wall), the building work as described in the plans and specifications is distinctly different. As such, an exercise of decision by the authority to either issue or refuse to issue a code compliance certificate in relation to the building consent, should not impact a separate exercise of decision the authority must make in respect of the certificate of acceptance. The decisions are mutually exclusive.

**Conflicting information received from chartered professional engineers**

[40] The authority did refuse to issue the code compliance certificate for the third building consent but only due to the fact that without full access to the property, it was unable to establish if the building work complies (see tables 1 and 2, and paragraph 6.1.4).

[41] Section 93(2)(b)(ii) of the Act.

6.23. The authority has stated that because it has received conflicting information related to the same subject matter, from several different chartered professional engineers, that is a reason to refuse to issue a code compliance certificate or grant a certificate of acceptance.

6.24. For example, the authority points to conflicting information it believes it has received from two chartered professional structural engineers in respect of the remedial work to the soffit of the deck.

6.25. However, just because two structural engineers may offer a different professional opinion on the same subject matter, it does not alter the authority's statutory duties when deciding whether the building work complies with a building consent or the Building Code, nor does it necessarily mean that the building work does not comply with either instrument.

6.26. If an authority places more weight on one professional opinion over another, it needs to give very clear reasons why it has come to that view. In this case, the authority has not reached a view that places more weight on one opinion over another; it has only stated it has received conflicting information. The authority has not qualified that statement by confirming what conflicting information it has received, or the weight it has given to those opinions or the reasons why.

6.27. The authority may choose, but it is not obligated, to take steps to try and negotiate a resolution to the different professional opinions offered by the structural engineers. Regardless, it is not an appropriate reason to refuse to issue a code compliance certificate or a certificate of acceptance. The authority must still give sufficiently explicit, specific, clear and valid reasons for a refusal and not just rely on a general statement to the effect that it has received conflicting information.

**Seeking agreement from other engineers**

6.28. The authority stated that the owners must seek an agreement as to the compliance of the building work with the Building Code from the purchasers' engineers before it would make a decision to issue the code compliance certificates and grant the certificates of acceptance.

6.29. The Act does not impose any such requirement on an owner to seek an agreement from another entity before an authority can make such a decision.

6.30. The exercise of powers of decision in respect of both instruments is solely the responsibility of the authority. In this regard, sections 3(b), 4(2)(q), and 14F of the Act clearly establish the purposes, principles, and duties that an authority must perform. This includes its role as a building consent authority when making a decision related to a code compliance certificate[42], and that of a territorial authority in respect of a certificate of acceptance[43].

[42] Sections 91, and 93 to 95A of the Act.
[43] Sections 96, and 98 to 99A of the Act.

6.31. In this case, the authority has indicated that another entity (i.e. the purchasers' engineer) must agree that something complies before it will exercise a power of decision in relation to the code compliance certificates and certificates of acceptance. This is contrary to the requirements of the Act.

**Means of compliance**

6.32. The authority has stated it is not satisfied on reasonable grounds that specific aspects of the building work comply with certain clauses of the Building Code, in particular, clauses B1 *Structure*, B2 *Durability*, and E1 *Surface Water*. The authority has made specific reference to non-compliance with Verification Method B1/VM1, the Building Code functional requirement clause B2.2, and Acceptable Solution E1/AS1.

6.33. If the authority believes that the building work does not comply with the Building Code, it needs to provide sufficiently explicit, clear, and detailed information that is actionable by the owners. This will depend on case-specific circumstances, but could include (but not be limited to) one or all of the following:

6.33.1. non-compliance of particular work with any specified performance clauses of the Building Code and the reasons why the authority holds this view

6.33.2. non-compliance with specified details of an Acceptable Solution, Verification Method, or product certificate, if these were stated as the means of compliance in the building consent

6.33.3. non-compliance with specified details in the plans and specifications included in the building consent

6.33.4. a physical feature in the construction that has been observed by the authority to be non-compliant with the building consent or Building Code.

6.34. Therefore, it is not appropriate for the authority to give reasons to refuse to issue a code compliance certificate or certificate of acceptance, based (in part) on broad statements about non-compliance with an Acceptable Solution or Verification Method, specifically when adherence to either instrument is not mandatory (section 23 of the Act).

6.35. In respect of the issue of a code compliance certificate, the authority must first consider "…if it is satisfied, on reasonable grounds…that the building work complies with the building consent"[44]. The test is not whether the building work complies with an Acceptable Solution or Verification Method.

6.36. Similarly, the authority "may issue a certificate of acceptance only if it is satisfied, to the best of its knowledge and belief and on reasonable grounds, that, insofar as it

[44] Section 94(1)(a) of the Act.

could ascertain, the building work complies with the Building Code".[45] Again, the test is not whether the building work complies with an Acceptable Solution or Verification Method.

## The first building consent ABA-2008-1319 (incorporating amendments A and B)

### The authority's position

6.37. The first building consent includes demolition of part of an existing dwelling and making significant alterations to extend what is left of the dwelling.

6.38. The remaining item of dispute between the owners and the authority regarding building consent ABA-2008-1319 relates to amendment B. The authority confirmed it cannot issue the code compliance certificate until amendment B has been granted.

6.39. The application for amendment B sought to "Change Granular Fill Material to GAP40". The owners applied for amendment B on 28 November 2017, but it has not yet been granted by the authority.

6.40. The authority confirmed it had received additional information in response to a request for further information dated 20 December 2017, "but at this time not enough information has been provided to grant the amendment". It also noted that it had received "many pieces of conflicting information" on this issue.

6.41. The authority believes it has insufficient information to demonstrate compliance with Acceptable Solution E1/AS1 and clause B2.2.

### Regulatory compliance

6.42. As already noted, it is not a mandatory requirement to comply with an Acceptable Solution. It would have been more appropriate for the authority to refer to the relevant performance criteria in conjunction with giving sufficiently explicit, specific, clear and valid reasons for refusing to grant the application for amendment B.

6.43. Section 45(4)(b) of the Act states "an application for an amendment to a building consent must…be made as if it were an application for a building consent, and this section, and sections 48 to 51 apply with any necessary modifications".

6.44. Section 50 of the Act states "if a building consent authority refuses to grant an application for a building consent, the building consent authority must give the applicant written notice of – (a) the refusal, and (b) the reasons for the refusal".

[45] Section 96(2) of the Act.

6.45. Based on the evidence provided in this case, the authority has not issued any such written notice that satisfies the requirements of section 50 of the Act in respect of the amendment B application.

**Information available to the authority**

6.46. The owners' structural engineer provided a revised structural specification, revision 3, dated 27 November 2017 in support of the amendment B application.

6.47. The specification for the backfill behind the foundation retaining walls was changed from 25mm aggregate to be GAP40 with a minimum amount of permeability, compacted in 150mm layers. The GAP40 has been used to backfill the balance of the area behind the retaining wall above the 100mm diameter sub-surface drainage coils[46] and smaller sized bedding material that surrounds it.

6.48. The owners' geotechnical engineer's second report dated 4 September 2017 states that the GAP40 aggregate used is sufficiently permeable and compatible with the retained soils based on site specific tests, a camera survey, independent accredited laboratory test results, and modelling analysis, and "the drainage system behind the wall is expected to perform as intended". The report was supplemented with a drainage aggregate analysis.

6.49. The owners' geotechnical engineer's third report dated 13 September 2021 included evidence that quantities (totalling approximately 149 tonnes) of "40mm clean metal" and "GAP40" aggregate for backfill material were delivered to site between September and November 2011. These dates coincide with the construction of the extensions to the crib retaining wall. However, although 40mm clean metal aggregate was delivered to site there is insufficient information to verify exactly where it was placed (noting that the purchasers' structural engineer in a report dated 5 August 2021 did not observe clean and free draining aggregate at one test hole location next to foundation wall to the rear of the dwelling).

6.50. On 21 February 2018, the owner's geotechnical engineers confirmed the backfill for foundation wall complies with clauses E1 and B1.[47] In my view, the presence of the backfill, in conjunction with the sub-surface drain coil, is intended to avoid the build-up of hydrostatic pressure and not the disposal of surface water. Therefore, the relevant clause is B1.

6.51. On 22 February 2018, the owners' structural engineer confirmed that:

> the structural capacity of the retaining walls has not been compromised by the amended [G]AP40 backfill (which has similar 'structural' properties to [the] clean material originally specified). However, this is based on the results of the permeability tests, carried out by [the owners' geotechnical engineer], which

[46] As noted on the as-built drainage plan provided by the Builder dated 9 January 2018.

[47] The statement from the geotechnical engineer did not clarify which performance clause(s) of the Building Code it believed had been complied with.

found that the backfill (as-built) is sufficiently free draining [and permeable] to avoid water pressure behind the wall.

6.52. The Building Code is performance based and does not state minimum requirements for backfill or trench fill to be used above sub-surface drainage coils behind a retaining wall.

6.53. The authority has not provided sufficiently explicit, specific, clear or valid reasons why it has refused to grant amendment B, or why it believes the backfill or trench fill material does not comply with the Building Code.

6.54. The evidence indicates that the owner has gone to some lengths to get the opinions of several chartered professional engineers, and has provided substantive information from tests conducted, modelling analysis, and a camera survey associated with this issue.

6.55. Conversely, the purchasers' engineers have not provided any test or modelling analysis data that either corroborates, or brings into doubt, the findings from the owners' structural engineer.

6.56. Under section 49 of the Act, the authority "must grant a building consent if it is satisfied on reasonable grounds that the provisions of the Building Code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application".

6.57. Bearing in mind the evidence already provided in this case, it is not clear what additional information the owner can provide to the authority to assist it to make a decision under section 49 of the Act.

6.58. Further, if the authority had considered there was some additional information that it required from the owners, it has not communicated this in a sufficiently explicit, specific, or clear manner that the owners could reasonably understand and respond to.

**The appropriate regulatory pathway**

6.59. It is not clear what circumstances lead the owners to apply for amendment B to the first building consent ABA-2008-1319 when they did in November 2017.

6.60. Section 40 specifies that all building work must be carried out in accordance with a building consent. Under section 45(4) a consent amendment is to be treated as if it were an application for a consent, while section 44 specifies that the building consent must be applied for before work begins. This means that a consent amendment cannot be granted for work that has already been completed (see also *Environment Waikato v Sutherland* District Court at Wellington CIV-2010-085-000629, 1 March 2011).

6.61. In this case, information received from the parties indicates that the building work to install the GAP40 backfill material was completed before the application for amendment B. The authority's drainage completion inspection on 25 May 2015 states "all work complete as per approved drawings[48] and compliant with the…Building Code", which was preceded by another inspection on 15 December 2009 which stated "drains OK to backfill", and an inspection of the drainage coil behind the existing foundation wall on 28 October 2008.

6.62. The sections of the Act that apply to changes to building consents are sections 45 and 45A.

- Section 45 allows for applications to amend a building consent. For minor amendments, the application must be in accordance with section 45A. In all other cases, the application for an amendment must be made as if it were an application for a building consent.

- Section 45A specifies that an application for a minor variation does not need to be on a prescribed form, and does not require the authority to issue an amended consent.

6.63. It is not clear what considerations, if any, the owners and the authority gave to an alternative approach such as a possible minor variation to the building consent (under sections 45(4)(a) and 45A. See Appendix B).

6.64. A minor variation is defined in the Building (Minor Variations) Regulations 2009 ("the Regulations").[49] Section 3(1) states:

> A minor variation is a minor modification, addition, or variation to a building consent that does not deviate significantly from the plans and specifications to which the building consent relates.

6.65. The purpose of the Regulations is to set out when changes to building work do not require an amendment to a building consent. A minor variation generally does not affect the level of Building Code compliance, it simply achieves a compliant outcome but in a different way.

6.66. The Ministry's guidance[50] on minor variations outlines factors to consider when deciding whether a change to work covered by a building consent falls within the definition of a minor variation. The guidance also outlines that decisions about whether a minor variation can be granted are the responsibility of the authority.

6.67. The guidance states that agreement to minor variations be sought before the building work is undertaken. This will give the building consent authority the

[48] I have seen no approved drawings that record the change to the backfill material, so note that the approved specification would have still referred to 25mm aggregate being used.

[49] Available at https://www.legislation.govt.nz/regulation/public/2009/0408/latest/DLM2615667.html

[50] https://www.building.govt.nz/projects-and-consents/build-to-the-consent/making-changes-to-your-plans/minor-variations-guidance/how-bcas-should-assess-and-process-minor-variations/

opportunity to make an assessment and advise the relevant party whether a formal amendment is required; and will assist in avoiding the completion of unapproved works that may need to be excluded from the consent and regularised through a certificate of acceptance. However, this does not prevent a minor variation being considered and approved by the authority in this case. Based on the information available, it appears that the owners could consider seeking to document and authorise the use of the larger GAP40 aggregate as backfill material by way of a minor variation.

6.68. I leave this matter to the parties to resolve. To assist the parties, I note that while 25mm aggregate may be a more common material to use, the evidence provided by the owners' geotechnical and structural engineers in this case suggests the GAP40 performs a similar function in the same way. Further, I note that the authority did have the opportunity to inspect the work to install the backfill material when it was done and prior to the reinstatement finished groundworks being completed.

6.69. For the reasons outlined above, I consider that the authority was incorrect to propose or purport to refuse to grant amendment B of the first building consent ABA-2008-1319 for the reasons given. The authority will need to make a new decision with respect to the application for amendment B of the first building consent, taking into account the matters discussed in this determination. Once the matter of the substituted drainage material has been resolved, the authority will then need to make a new decision in respect of the associated code compliance certificate.

## The first certificate of acceptance COA-2016-3

6.70. Certificate of acceptance application COA-2016-3 relates to the building work to extend the crib retaining wall (see figure 3), and the construction of the retaining walls for the barbecue area (see figure 6), without first obtaining a building consent.

6.71. The authority has stated it has not made a decision in respect of COA-2016-3 but has "verbally indicated, on many occasions, that [it is] likely to refuse the application given the many pieces of conflicting information" it has received. As discussed previously, just because an authority may receive "many pieces of conflicting information", it does not alter the authority's statutory duties when deciding whether the building work complies with the Building Code in respect of an application for a certificate of acceptance

6.72. If an authority refuses to grant an application for a certificate of acceptance, it must give the applicant written notice of the refusal and the reasons for the refusal. Based on the evidence provided in this case, the authority has not issued any written notice that satisfies the requirements of section 99A.

6.73. The authority's reasons for proposing or purporting to refuse to grant the application for certificate of acceptance amount to four issues:

6.73.1. It has received insufficient information to demonstrate compliance with clauses B1, B2.2, and E1[51].

6.73.2. It is "not able to determine" the crib wall backfill.

6.73.3. It is "not able to determine" the drainage.

6.73.4. It is "not able to determine" the stretchers behind the crib wall and the headers.

**Compliance with clauses B1, B2.2, and E1**

6.74. The authority stated it had received insufficient information to demonstrate compliance with clauses B1, B2.2[52] and E1.

6.75. However, the authority did not provide sufficiently explicit, specific, clear or valid reasons to refuse to grant the application for the certificate of acceptance based (in part) on any information related to the relevant performance criteria of the Building Code it believed was affected.

6.76. The purchasers' consulting engineers' report dated 20 July 2016, and the purchasers' structural engineer's first report dated 18 September 2017 (see Appendix A, table 2), did indicate some concerns with the construction of the as-built crib retaining wall and therefore compliance with the Building Code.

6.77. However, although both chartered professional engineers offered opinions on the as-built construction of the crib retaining wall, the reports did not include any detailed structural analysis or calculations to assess the stability of the wall.

6.78. Further, the purchasers' structural engineer's first report dated 18 September 2017 does state that the fact that the wall has survived heavy rainfall events in 2015 and 2017 with no signs of instability "suggests it will remain stable indefinitely".

6.79. The owners' geotechnical engineer provided four reports and correspondence regarding the crib retaining wall on 15 January 2016, 4 September 2017, 27 August 2018, and 13 September 2021. These are in conjunction with the owners' reviewing engineer's report dated 1 June 2018, and consulting engineer's third report dated 13 August 2015 (refer to Appendix A, table 2). The information in these reports includes, but is not limited to:

6.79.1. The wall complies with Clauses B1 *Structure* and B2 *Durability*.

6.79.2. The report from 13 August 2015 stated that based on a visual inspection "it appears the wall has been well constructed except at the acute angle" (this

[51] This reason given by the authority did not clarify whether it related to just the crib retaining wall, or the blockwork retaining walls that form the barbecue area, or both.

[52] Clause B2.2 is a functional requirement of the Building Code and not a performance criteria (See paragraph 6.33.1).

was remediated under the third building consent ABA-2017-338). The report also stated, "the very heavy rain that was experienced a couple of months ago was a good test that the wall is stable".

6.79.3. The report from 15 January 2016 was approved by the authority as part of building consent ABA-2017-338. It includes wall stability structural calculations for the crib wall dated 13 January 2015, and on-site ground test results.

6.79.4. The crib retaining wall is stable and shown to be constructed against an existing cut of weathered volcanic rock, and in part where the former driveway was, and "has been structurally modified to deal with [the] structural issues" raised in the purchasers consulting engineers' report dated 20 July 2016.

6.79.5. Reference to the wall's prior performance under extreme rainfall events.

6.79.6. The report from 4 September 2017 was supplemented with retaining wall structural calculations, crib wall plan, and drainage aggregate analysis.

6.79.7. The reviewing engineer's report dated 1 June 2016 concurs that the crib retaining wall is stable for static loadings and complies with Clause B1 *Structure*.

6.79.8. The report from 27 August 2018 confirmed the repairs to the crib retaining wall[53] "are appropriate" and comply with the stability requirements of the Building Code.

6.79.9. A full stability analysis of the crib retaining wall, with calculations, concludes the wall is stable.

6.79.10. The crib retaining wall has remained stable since it was constructed in late 2011.

6.80. I note that the owners' engineers have provided substantive evidence to the authority, which it can consider in making a decision about the code compliance certificate. In addition, I also note that the information provided by the purchasers' engineers does not include any detailed structural analysis, and their professional opinions pre-date key reports provided by the owners' engineers, that are (in part) in response to them.

**Barbecue patio area retaining wall**

[53] The third building consent ABA-2017-338. The owners' structural engineer issued a Producer Statement – Construction Review (PS4) for the remediated crib retaining wall dated 12 May 2017. A copy was provided to the authority on 20 July 2021.

6.81. In respect of the concrete blockwork retaining walls that form the barbecue patio area, the relevant reports and correspondence include, but are not limited to:

6.81.1. The owners' structural engineer's first report dated 29 January 2016, which concludes the wall appeared to be in "very good condition", with no evidence of "movement or cracking in the structure"[54], and that they were satisfied the walls complied with Clause B1 *Structure*. The report included structural calculations.

6.81.2. On 27 August 2018 the owners' geotechnical engineer stated they had reviewed the owners' structural engineer's first report and agreed with the loadings and design methodology used, and the conclusion reached that the wall complied with the Building Code.

6.81.3. The purchasers' structural engineer's report dated 5 August 2021 which included annotated plans attached to the report indicating varied amounts of steel in the barbecue area retaining walls.

**Crib wall backfill**

6.82. The issue in respect of the crib wall backfill relates to the GAP40 metal aggregate that has been placed above the sub-surface drainage coil, between the crib retaining wall and the natural ground of weathered volcanic rock behind it.[55]

6.83. The use of the GAP40 metal aggregate has already been discussed in respect of amendment B to the first building consent, and its use and application behind the crib retaining wall is similar. Consequently, this is not discussed further.

**Crib wall drainage**

6.84. The authority believes it was "not able to determine..[the] crib wall…drainage".

6.85. It is not clear what the authority means by that statement. However, the builder did provide an as-built drainage plan to the authority on 9 January 2018. This indicated that a sub-surface drainage coil has been laid at the base of the crib retaining wall.

6.86. The owners' geotechnical engineer's second report dated 4 September 2017 also included as-built cross-sections of the crib retaining wall, which showed a "100mm drain coil to stormwater".

6.87. The owners' geotechnical engineer's third report dated 13 September 2021 states that the drainage has been dye tested, and concluded that drains have been installed behind the wall, which lead to a sump at the bottom of driveway.[56]

[54] On 28 March 2022, in response to the draft determination, the purchasers referred to "cracking on the face of the [barbecue] retaining walls and also on both sides of the non-retaining upper part of the walls". The nature (superficial or otherwise), extent, and cause of the cracks is unknown.

[55] As detailed in the owners' geotechnical engineer's third report dated 13 September 2021.

[56] The report did not clarify who conducted the dye testing or when it was undertaken.

6.88. However, the purchasers' plumber's report dated 22 March 2022 was "not able to visually locate any drain coil or sump at the bottom end of the driveway crib [retaining] wall, near the northeast corner of the property". The purchasers' plumber therefore assumed "there is no drain coil laid behind the crib [retaining] wall at all". In response to the draft determination the purchasers noted they "have been advised that it is impossible to confirm what has been built without deconstructive testing". No evidence has been provided to confirm any "deconstructive testing" has been undertaken by any of the parties to establish the presence of the drainage coil or not. Taking into consideration all of the evidence available, I am of the view that it is more likely that not that there is a sub-surface drainage coil present.

6.89. Nothwithstanding that conclusion, a sub-surface drainage coil located at the base of a retaining wall is usually installed to relieve hydrostatic pressure that could otherwise build-up behind the wall. However, in this case, the wall is of a 'crib' construction which is filled with stone aggregate. As such, even if the drainage coil was not installed, a build-up of hydrostatic pressure is likely to be minimised by the method of construction used for the wall.

**Crib wall stretchers and headers**

6.90. The authority stated it was "not able to determine…[the] stretchers behind the wall and the headers".

6.91. It is not clear from that statement exactly what the authority's concerns are in relation to the crib wall stretchers and headers. The concerns may originate from the purchasers' consulting engineers' report dated 20 July 2016 (see Appendix A, table 2). This stated it was unable to confirm the length of the headers and whether stretchers were installed at the back of the wall.

6.92. The cribs are constructed of 900 series units, i.e. the headers are 915mm long. It is not clear whether stretchers have been installed to the rear of the wall, however, this is not required by the manufacturer's design. This is noted in the owners' geotechnical engineer's third report dated 13 September 2021, where a copy of the manufacturer's design has been attached.

6.93. Regardless, the purchasers and manufacturer did exchange several emails between June 2016 to August 2017 regarding the construction of the crib retaining wall which included comments about the stretchers (see Appendix A, table 2). However, there is no indication that the manufacturer attended site to observe the as-built construction, the ground conditions behind the wall, the backfill material used, or assessed any surcharge loadings. It is also unclear if the purchasers advised the manufacturer of the remedial building work undertaken in April to May 2017 in accordance with the third building consent ABA-2017-338, or that it had been designed and the building work monitored by the owners' structural engineer.

**Issue of the certificate of acceptance**

6.94. Taken together, including the evidence provided by the chartered professional engineers in this case (see paragraph 6.78), I am of the view that the authority has sufficient information to make a decision about compliance with the Building Code in respect of the as-built construction of the crib retaining wall from 2011 to 2012, and concrete blockwork retaining walls that form the barbecue patio area.

6.95. However, it is also clear that due to the nature of the construction of the crib retaining wall and concrete blockwork retaining walls that form the barbecue patio area, there are elements of both structures that are not able to be observed without additional invasive or destructive checks. For example, determining the size and type of reinforcement used in the concrete blockwork retaining walls, or the presence (or otherwise) of the stretchers to the rear of the crib retaining wall.

6.96. Regardless, section 99 of the Act does envisage such a situation when an authority issues a certificate of acceptance:

> (2) A certificate of acceptance may, if a territorial authority inspected the building work, be qualified to the effect that only parts of the building work were able to be inspected.
>
> (3) A territorial authority's liability for the issue of a certificate of acceptance is limited to the same extent that the territorial authority was able to inspect the building work in question.

6.97. The authority needs to make a new decision taking into account the information provided in this determination, whilst also considering the provisions within section 99 that may assist it.

## The third building consent ABA-2017-338

6.98. The third building consent ABA-2017-338 relates to the remedial building work to the crib retaining wall.

6.99. The authority issued a written notice on 21 January 2021 stating that without full access to the property, it was unable to establish if the building work complies, and for that reason the issue of the code compliance certificate was refused.

6.100. The authority subsequently undertook inspections on 26 July 2021 and 27 July 2021 and stated, "due to structural engineers differing opinions the [authority] is not able to be satisfied [on] reasonable grounds that the work complies with the building consent".

6.101. Although engineers may offer different professional opinions on a matter, it does not necessarily mean that the building work does not comply with the building consent, nor does it relieve the authority of its statutory obligations to make a decision to issue, or refuse to issue, a code compliance certificate.

6.102. On 30 August 2021 and 3 September 2021, the authority subsequently clarified the basis for its proposed decision to refuse to issue the code compliance certificate for the third building consent.

6.103. The reasons given by the authority were that the information it has received is insufficient to demonstrate compliance with Verification Method B1/VM1 and Clause B2.2, and it was "not able to determine..[the] crib wall back fill, drainage, [and] stretchers behind the wall and the headers".

6.104. The building work associated with the third building consent involves placing reinforced concrete in several of the boxes formed by the crib wall headers and stretchers, as well as forming a new reinforced concrete column at the obtuse angle in the existing crib wall (see figure 5). The design for this building work is supported by a Producer Statement – Design (PS1) issued by a chartered professional engineer.

6.105. It is evident that the scope of the building work detailed in the approved third building consent does **not** involve anything to do with the crib wall backfill, or laying any drainage, or installing stretchers behind the wall.

6.106. Therefore, the fact that the authority may believe it is "not able to determine" any of these items is irrelevant for the purposes of a decision to be made in accordance with section 94(1)(a) in respect of the third building consent.

6.107. A condition of the building consent when it was granted by the authority was that a "PS4 for all work associated with remedial works" was to be provided. The structural chartered professional engineer who issued the PS1 dated 6 March 2017 in respect of the third building consent, was the same engineer who issued the Producer Statement – Construction Review (PS4) dated 12 May 2017 which was received by the authority on 20 July 2021.

6.108. No evidence has been provided to suggest the building work does not comply with the building consent or the Building Code, and the authority should be able to place weight on the PS4 it has received from the structural chartered professional engineer acting on behalf of the owners.

6.109. The authority therefore needs to make a new decision taking into account the information provided in this determination.

## The second certificate of acceptance COA-2019-58

6.110. The second certificate of acceptance application COA-2019-58 relates to the framing and soffit battens fixed to the underside of the timber deck that the owner installed without first obtaining a building consent.

6.111. The authority confirmed that if it was required to make a decision "it will be to refuse the application" for the second certificate of acceptance. This is due to:

6.111.1. "the many pieces of conflicting information" it has received from the engineers

6.111.2. its view that it has insufficient information to demonstrate compliance with Verification Method B1/VM1 and clause B2

6.111.3. its view that the screw fixings are the incorrect material and should be stainless steel and not the zinc coated ones used (since the building is located within 100m of a harbour, and therefore in a Zone D "high" exposure zone as referenced in NZS 3604:2011 *Timber-framed buildings*).

6.112. The first two reasons to refuse to issue the second certificate of acceptance have already been addressed above in respect of information the authority has received from several engineers, and compliance with a Verification Method. In respect of both the reasons given, the authority has not given sufficiently explicit, specific, clear or valid reasons why it believes the building work does not comply with the Building Code.

6.113. Further, the authority confirmed it has not made a decision in respect of the second certificate of acceptance but has "verbally indicated, on many occasions, that [it is] likely to refuse the application". However, if an authority refuses to grant an application for a certificate of acceptance, it must give the applicant written notice of the refusal and the reasons for the refusal. Based on the evidence provided in this case, the authority has not issued any such written notice that satisfies the requirements of section 99A of the Act.

6.114. In respect of the screw fixings used to secure the framing and soffit battens to the underside of the deck, the parties do not dispute that the zinc coated type originally used was incorrect based on the location of the building in a high exposure zone. The respective engineers' reports received in this case support the view that the zinc coated fixings were not appropriate, so this has not been considered further.

6.115. On 27 September 2019, the owners applied for the second certificate of acceptance. The application included the owners' structural engineer's third report detailing remedial work carried out to the deck soffit fixings, and a Producer Statement – Design ("PS1") dated 26 September 2019, and Producer Statement – Construction Review ("PS4") dated 27 September 2019, for the new soffit stainless steel straps and nail fixings used. The authority accepted this documentation on 30 September 2019 and advised the owners the building work would need to be inspected.

6.116. The authority confirmed it attended the site on 31 October 2019, but the inspection "was cancelled because of engineering [difference] of opinions". However, this statement is at odds with the evidence provided to the Ministry. Indeed, neither of the reports provided by the owners' or purchasers' engineers dispute the fact that the incorrect zinc coated fixings were initially used, and the

purpose of the site visit was to inspect the new soffit stainless steel straps and nail fixings used.

6.117. In any case, no evidence has been provided to suggest the building work does not comply with the Building Code.

6.118. The authority needs to be satisfied, to the best of its knowledge and belief and on reasonable grounds, that, insofar as it could ascertain (e.g. by conducting a site inspection), that the building work complies with the building code. It needs to make a new decision taking into account all the information it has currently available.

# 7. Conclusion

7.1. The authority has refused to make a decision in relation to each of the four certificates. It has referred to conflicting information it has received from the parties' engineers, and has required the engineers to reach an agreement before it would consider granting and issuing the certificates. It has also stated that it will only exercise a power of decision for the issue of the code compliance certificates and certificates of acceptance at the same time and in conjunction with each other.

7.2. These are not valid considerations under sections 94(1)(a) and 96(2). In addition, the absence of written decisions as required under sections 95A and 99A makes it difficult for the owners to understand what is required to remedy the situation. I conclude therefore the authority was incorrect to refuse to exercise its powers of decision.

7.3. The authority subsequently proposed or purported to refuse to grant or issue the four certificates, and amendment B to the first building consent ABA-2008-1319. The authority did not give sufficiently explicit, specific, clear, or valid reasons for the refusals. I consider there is adequate information currently available to the authority for it to make decisions under sections 94(1)(a) & 96(2) of the Act.

7.4. The information presented to the Ministry does not suggest there is an impediment to reaching a conclusion regarding the compliance of the building work with the Building Code or the relevant building consents. Where the authority has provided reasons for refusal, I have concluded these reasons were not sufficiently explicit, specific, clear, or valid. Accordingly, I conclude the authority was incorrect in its proposed or purported refusal to grant amendment B to the first building consent, and grant or issue the four certificates, for the reasons it provided.

7.5. The authority is now required to make a new decision in respect of all four certificates (and amendment B to the first building consent), pending applications for the two code compliance certificates, that takes into account the findings of this determination.

# 8. Decision

8.1. In accordance with section 188 of the Building Act 2004, I determine that:

8.1.1. the authority was incorrect to fail to exercise its powers of decision in relation to the application for amendment B and associated code compliance certificate for the first building consent ABA-2008-1319, as well as the code compliance certificate for the third building consent ABA-2017-338, and the certificates of acceptance COA-2016-3 and COA-2019-58

8.1.2. the authority was incorrect to subsequently propose or purport to refuse to grant and issue the certificates listed above, and amendment B for the first building consent ABA-2008-1319, for the reasons given. Accordingly, I reverse the authority's decisions, requiring them to make new decisions.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 30 May 2022.

**Katie Gordon**

**National Manager, Building Resolution**

# APPENDIX A: TABLE 2 – TIMELINE OF EVENTS and SUMMARY OF REPORTS

| Date | Event |
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| 2007 | Owners purchase the property |
| June 2008 | Owners apply for the first building consent |
| 23 July 2008 | Authority issues first building consent **ABA-2008-1319**, for "Demolish part of existing and erect dwelling, Install Gas Fire". |
| 2008 to 2012 | Owners renovate and extend dwelling (under the first consent) and extend crib retaining wall (without obtaining a building consent). |
| 20 October 2008 to 27 August 2015 | Authority conducts site inspections associated with building consent ABA-2008-1319. |
| 28 May 2015 | Owners and purchasers enter into sale and purchase agreement for property. |
| Date unknown | Purchasers take possession of the property. |
| 3 June 2015 | Heavy rainfall causes leak through block wall at rear of garage, and washes away some gravel from behind crib retaining wall. |
| 8 July 2015 | Otago Regional Council report, number 2015/1008, document ID: A801392, titled "Coastal Otago Flood event 3 June 2015". |
| 15 July 2015[57] | **Owners' environmental engineers' first report** (Fluent Infrastructure Solutions Ltd) describes the existing 300mm diameter below ground surface water drainage across the owners' property (including under the barbecue area), and the storm event on 3 June 2015 which caused a surcharge and overflow which "very likely contributed to the leakage in the basement" of the new dwelling and caused some of the gravel to be washed out of the top of the crib retaining wall. |
| 15 July 2015 | **Owners' consulting engineer** (D Littleton) attends site, at the request of the builder, to inspect the garage basement wall and assess options for remediating reports of ingress of "dampness". |
| 16 July 2015 | **Owners' consulting engineer's first report** (D Littleton) on the garage concrete block foundation wall states that there is only a small amount of moisture ingress that will not affect occupants or damage building elements (reference clause E2.3.3) associated with a non-habitable space, and proposes installing a drainage channel (30 x 30 x 3mm aluminum angle) at the base of the wall, at the junction between the wall and the floor, to disperse any moisture through front wall of garage (engineer provides sketch design). |
| July 2015 | The builder installed the drainage channel (angle) at the base of concrete block garage wall, but with slight variations to consulting |

[57] The same engineer revised and issued an amended report dated 24 July 2015 and this recorded the same conclusions that were reached in the report dated 15 July 2015.

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| | engineer's consented design. Variations included the size of the angle to be installed (25 x 25 x 3mm), an offset of approximately 5mm away from the wall to accommodate variations in the wall's alignment, and the discharge point channel created by the angle at the garage door |
| 23 July 2015 | **Owners' consulting engineer's second report** (D Littleton) on the garage concrete block foundation wall concludes that the smaller sized drainage channel as installed has sufficient capacity and is "fine" provided the garage door when closed does not prevent water being discharged.<br><br>The report stated that the area was tested in conjunction with the builder and that "the rate of water flow used in the test was far greater than would ever be expected to leak through the wall". |
| 24 July 2015 | Owners apply for **Amendment A** to the first building consent (ABA-2008-1319) to install channel at base of concrete block garage wall to collect and dispose of any external moisture that may enter the building. |
| 13 August 2015 | **Owners' consulting engineer's third report**[58] (D Littleton) assessed the stability and construction of the crib retaining wall.<br><br>Based on a visual assessment of the wall, the report concludes that the crib retaining wall is well constructed, except at the acute join[59] where the top stretcher of the wall had rotated at this location causing some on the stone in the top crib boxes to fall out, and therefore suggests remedial work as a solution (this involves removing part of the rock fill and replacing it with concrete).<br><br>The very heavy rain that was experienced a couple of months prior was a good test that the wall is stable. |
| 24 August 2015 | Authority issues **Amendment A** to first consent[60] to install channel at the base of the concrete block garage wall to collect and dispose of any external moisture that may enter the building.<br><br>The approved documents included the owners' consulting engineers first report (dated 16 July 2015) and second report (dated 23 July 2015), along with a floor plan indicating the setting out of the proposed channel.<br><br>The authority noted that the reasons for accepting the amendment A application was the area concerned was "not a habitable space |

[58] The owners' consulting engineer's first and second reports relate to amendment A of the first building consent ABA-2008-1319, however, this is outside the matter for determination (see paragraph 1.8).

[59] The report refers to an "acute" angle in the wall when in reality (on plan) the angle is 'obtuse' (ie between 90 degrees and 180 degrees).

[60] The issue of amendment A to building consent ABA-2008-1319 is not a matter to be determined, but it is noted the owners applied for the amendment after the building work was undertaken.

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| | (vehicle garage)". The application form noted the relevant Building Code clause was E2 (*External Moisture*). |
| 27 August 2015 | Authority re-inspects 'Basement Tanking' and 'Building Completion' and passes both, noting that the work complies with the building consent and amendment A.<br><br>Inspection report states, in respect of amendment A: "change to 25 x 25 x 3mm aluminium angle noted by Engineer and is sealed to concrete floor to direct any water to rebate under Garage door which may seep through blockwall because of documented failure of Basement Tanking. Note the Builder…has installed the angle and has flood tested it with no sign of leaking".<br><br>"Building completion" inspection report confirms: "All work complete as per approved drawings and compliant with New Zealand Building Code; All work has now been completed as per amendment 2008-1319A".<br><br>Inspection report "outcome" states: "Suggest issue of CCC" |
| 24 October 2015 | Letter from the agent (acting on behalf of the owners) to the authority:<br><br>• Ref: 100mm drain coil and backfill gravels – retaining walls have been backfilled with free-draining gravels and all have 100mm diameter drain coils laid.<br>• Ref: crib retaining wall – detailed the construction of the foundation (between 150mm to 300mm deep, extending between 900mm to 1400mm to the solid clay bank at the rear, using reinforced concrete. The clay bank is approximately 1m from the front of the wall.<br>• Ref: Old crib block wall and new crib block wall – the new wall was constructed in early 2012 and is 3.5m high at the east end (not 4m). The old crib wall does not have a concrete foundation and was first built approximately 60 years ago.<br>• Ref: Reinforced concrete column – located at the junction between the new and old crib walls. Constructed of reinforced concrete and has the 300mm diameter stormwater drain behind it.<br>• Ref: the wall change of direction – remedial work is required, and notes a small quantity of gravel has been "washed out" as a result of the storm event in June 2015. |
| 17 November 2015 | Authority issues **first notice to fix** (NTF-2015-219) for contravention of section 40 of the Act, for carrying out building work without a building consent in relation to the crib retaining wall, the barbecue area |

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| | retaining wall, and piping of a water course that ran under the barbecue area without a resource consent.<br><br>The notice to fix required the owners to apply for a certificate of acceptance for the two retaining walls, and that any remedial work would require "an engineer's design and approval". |
| 15 January 2016[61] | In response to the first notice to fix, the owners' commission a company of geotechnical engineers to assess the stability of the existing crib retaining wall and its compliance with the Building Code.<br><br>**Owners' geotechnical engineer's first report** (Geosolve Ltd) on the crib retaining wall concludes that the wall complies with clauses B1 *Structure* and B2 *Durability*.<br><br>Report approved by the authority as part of building consent ABA-2017-338. Includes wall stability structural calculations for the crib wall dated 13 January 2015, and on-site ground test results. |
| 22 January 2016 | **Owners' environmental engineers' second report** (Fluent Infrastructure Solutions Ltd). The report describes a proposal for a "stormwater management upgrade" at the owners' property which includes the installation of new surface water drainage system around the east of the dwelling and barbecue patio area. The report also identifies the existing 300mm diameter stormwater pipe under the barbecue patio area which remains unaltered. |
| 29 January 2016 | **Owners' structural engineer's first report** (Stevenson Brown Ltd) on the **barbecue area retaining wall** concludes that wall appeared to be in "very good condition", with no evidence of "movement or cracking in the structure", and that they were satisfied the walls complied with clause B1 *Structure*.<br><br>The report included structural calculations, and a site plan reference 15126 S1 Rev. A (an extract of the plan is represented as figure 3). |
| 29 January 2016 | Owners apply for **second building consent** (**ABA-2016-94**) for "Stormwater Drainage Upgrade".<br><br>Authority issues building consent on 26 February 2016. This includes the **Owners' environmental engineers' second report** dated 22 January 2016.<br><br>Authority subsequently issues a Code Compliance Certificate in relation to this consent on 18 April 2018. |

[61] The first page of the report (reference number 150835) is dated 15 January 2015, but all subsequent pages are dated January 2016. A reasonable assumption is that the actual date of the report is January 2016 as the report references site inspections by the engineer on 17 December 2015 and 12 January 2016.

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| 3 February 2016 | Owners apply for the **first certificate of acceptance** (**COA-2016-3**)[62] for the building work to extend the crib retaining wall (maximum height 3m), and construction of the retaining walls for the BBQ area, that had been carried out without a building consent.<br><br>The application included:<br>• site plan 15126 S1 Rev. A from the owners' structural engineer<br>• owners' geotechnical engineer's first report dated 15 January 2016<br>• owners' structural engineer's first report dated 29 January 2016 |
| 6 June 2016 to 30 August 2017 | Purchasers exchange emails with the manufacturer of the crib wall system.<br><br>The purchasers describe the surcharge loading on the crib wall as including "a large lawn and the House in close proximity to the top of the 4 metre high wall" and "a large driveway"[63].<br><br>The purchasers confirmed that they had "discovered a pallet of concrete stretchers under some bushes".<br><br>The manufacturer stated, "a 900 series crib block wall in this type of situation would normally be built with a retained height of 1.2m to 1.5m max (5 courses)".<br><br>The manufacturer suggested that the purchasers "need to talk to an engineer about a design if the wall has to come down – a wall four metres high with surcharge in a slip zone would most likely to be a double series 1500 wall with reinforced footing". The manufacturer suggested that the owners could "obtain a retrospective sign off on the wall" from an engineer.<br><br>The manufacturer also suggested the use of larger size GAP65 "to fill the cells" and "place some no fines type of concrete in each cell full height both sides of the corner…so it keeps the infill in place but still allows some water to pass through if there is a water build up". |
| 20 July 2016 | **Purchasers' consulting engineers' report** (Calibre Consulting Ltd) reference number 709551 following site inspection on 11 July 2016.<br><br>The report includes:<br>• comments on the tanking and drainage to the basement walls[64] |

[62] Application form is dated 1 February 2016, but the authority's records confirm it was not lodged with it until 3 February 2016.

[63] There is no indication that the crib retaining wall is surcharged by the dwelling, and the driveway only extends part way along the west wing of the wall (behind a separate garden wall).

[64] The report does not provide a plan or clear description to confirm which walls were assessed.

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| | • comments on the "concrete crib retaining wall", noting the as-built construction compared against what it expected for a 4m high crib wall and therefore what the engineer considered were problems with the construction (eg spacings between headers, unsupported lengths of stretchers, incorrect setting out of the joins in the stretchers, the length of the headers are substantially less that what is required for a surcharged wall of this height)<br>• unable to confirm if drainage was installed by the wall<br>• unable to confirm what stretchers were installed at the back of the wall<br>• unable to confirm the length of the headers (but possibly 900mm)<br>• uncertainties regarding what drainage coil was installed, or not, around the garage basement wall and dwelling<br>• a sketch of a typical section through a 4m high crib wall. |
| 19 December 2016 | Parties attend mediation and enter into a settlement agreement with respect to the sale and purchase of the property, confirming that the owners would seek code compliance certificates and certificates of acceptance for various aspects of the building work. |
| 3 March 2017 | **Owners' structural engineer's second report** (Stevenson Brown Ltd) on the crib retaining wall, describes the issues with the existing wall, and the building work required to remediate these issues.<br><br>Report is accompanied by a PS1 from a chartered professional engineer certifying the compliance of the remedial works' design with clause B1 *Structure*, as well as design sketches showing proposed reinforced concrete detailing.<br><br>This report was approved by the authority as part of the third building consent (ABA-2017-338). |
| 6 March 2017 | Owners apply for **third building consent** (**ABA-2017-338**) for "Remedial work to Crib Block Retaining Wall".<br><br>The application included:<br>• marked up photographs indicating location of concrete infills to crib wall boxes<br>• a copy of the owners' geotechnical engineer's first report dated 15 January 2016, including wall stability calculations<br>• location plan for the crib retaining wall<br>• producer statement – design (PS1) from the owners' structural engineer for "crib wall remedial details" dated 6 March 2017, including design drawings (ref number 17006), in respect of clause B1 *Structure*, and compliance with Verification Method B1/VM1. |
| 9 March 2017 | Authority confirms to the builder (L Mullen) that a certificate of acceptance application is required for that part of the crib retaining wall that was constructed without first obtaining a building consent. |

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| 15 March 2017 | Authority issues **third building consent (ABA-2017-338)**. Owners' geotechnical engineer's first report and structural engineer's second report are approved as documents supporting the consent, including a Producer Statement – Design (PS1) undated from the owners' structural engineer along with design sketches and "consultant advice" dated 3 March 2017 (ref number 17006). |
| 12 April 2017 | Owners' structural engineer undertakes site "inspection of crib wall infills" in respect of the third building consent ABA-2017-338. |
| 12 May 2017 | Owners' structural engineer issues a Producer Statement – Construction Review (PS4) for "remedial work to existing crib wall", in compliance with clause B1 *Structure*, for building consent ABA-2017-338. |
| 2017 (specific date unclear) | Owners request site inspection to determine if the various code compliance certificates and certificates of acceptance can be issued.<br><br>Authority advised the owners to get all the completed construction checked and reviewed by registered chartered professional engineers, and this work should in turn be peer reviewed another chartered professional engineer. This was in respect of the crib retaining wall, the barbecue area retaining wall, the back fill material used behind the foundation walls, the drainage channel installed in the garage, and the stormwater flows. |
| 4 September 2017 | **Owners' geotechnical engineer's second report** (Geosolve Ltd) on the crib retaining wall and drainage fill behind the garage retaining / basement wall foundation wall concludes:<br><br>• that the crib retaining wall is stable, and shown to be constructed against an existing cut of weathered volcanic rock, and it complies with clause B1 *Structure*, and "has been structurally modified to deal with Calibre's structural issues" (see Calibre Consulting report dated 20 July 2016)<br>• The engineers also referred to the wall's prior performance under extreme rainfall events, and noted that this would no longer occur due to drainage improvement that have since been made<br>• the GAP40 aggregate used is sufficiently permeable and compatible with the retained soils based on site specific tests, a camera survey, independent accredited laboratory test results, and modelling analysis, and "the drainage system behind the wall is expected to perform as intended".<br><br>The report was supplemented with retaining wall structural calculations, crib wall plan, as-built cross-sections of the crib wall including a "100mm drain coil to stormwater", and drainage aggregate analysis. |

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| 18 September 2017 | The purchasers commissioned their own company of structural engineers (Hanlon & Partners Ltd).<br><br>The **purchasers' structural engineer's first report** on various aspects of building work (it considered the owners' geotechnical engineers' first report dated 15 January 2016, but <u>not</u> the second report dated 4 September 2017):<br><br>• Crib retaining wall – crib boxes are too small, so does not comply with Building Code, but the fact that the wall has survived heavy rainfall events in 2015 and 2017 with no signs of instability "suggests it will remain stable indefinitely".<br><br>• BBQ area wall – needs a Producer Statement – Design (PS1) and Producer Statement – Design Review (PS4).<br><br>• Waterproofing to basement foundation wall – permeability of fill will decrease over time, and channel is a "band aid". There is no mention of tanking in the building consent documents, and no as-built drawings for the field drains. Water has leaked into the basement in the past, there is a risk it will do so again. |
| 28 November 2017 | Owners apply for **Amendment B** to the first building consent **ABA-2008-1319**, for a change to the specification of drainage gravel used behind foundation wall (from 25mm aggregate to GAP40).<br><br>The owners advise that 150mm to 200mm layers of 25mm gravel has been used above the field drains at the base of the walls, with the balance of the backfill constituting GAP40 aggregate.<br><br>The amendment application included a copy of the owners' geotechnical engineer's second report dated 4 September 2017.<br><br>The owners' structural engineer provided revised structural specifications, revision 3, dated 27 November 2017 in support of the amendment application. The relevant clauses in the specification are:<br>• 1.8 Backfilling<br>• 18.1 – General – specified GAP40, placed in compacted 150mm layers<br>• 1.8.3 – Backfill behind retaining walls – specified GAP40 with a minimum amount of permeability, compacted in 150mm layers. |
| 20 December 2017 | Authority requests further information with respect to Amendment B to the first consent, specifically "provide a site plan showing location of retaining wall, including soil drainage plan". |
| 9 January 2018 | The builder (L Mullen) provides additional information to the authority in respect of amendment B to the first building consent (ABA-2008-1319), including: |

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| | • as-built drainage plans showing location of 100mm diameter coil drains, sumps, and inspection points, including around the garage foundation basement wall and behind the crib retaining wall<br>• site plan indicating the crib retaining wall<br>• an extract from Acceptable Solution E2/AS1 *External Moisture*, dated 1 February 2005, section 12 "Basements" and figure 133 titled "Basement waterproofing", complete with a hand-written noting referring to New Zealand Standard 4229 "*Concrete masonry buildings not requiring specific engineering design"*. |
| 1 February 2018 | Authority advises it requires confirmation from the owners' geotechnical engineers that "the backfill and drainage system for the retaining walls" complies with Acceptable Solution E1/AS1 (*Surface Water*) in order to issue amendment B to the first consent. |
| 21 February 2018 | Owner's geotechnical engineers confirm backfill for foundation wall complies with clauses E1 and B1 (but questions application of clause E1).<br><br>The engineer confirmed that the backfill and drainage system for the retaining walls comply with clause E1 *Surface water* on the basis of:<br>• the drainage system having sufficiently permeable backfill to avoid surcharging of groundwater from behind the wall<br>• the camera inspection identifying no fines being washed through from behind the wall<br>• the successful performance being demonstrated under normal and many extreme storm events.<br><br>Clause B1 was the most appropriate clause to use for retaining wall designs, with the typical design assumption being that groundwater is effectively controlled behind the wall, so water pressure does not build up. The engineers' investigations and assessment had proven this design assumption was correct and the drainage system was effective. |
| 22 February 2018 | Owners' structural engineer confirmed "that the structural capacity of the retaining walls has not been compromised by the amended [G]AP40 backfill (which has similar 'structural' properties to [the] clean material originally specified). However, this is based on the results of the permeability tests, carried out by [the owners' geotechnical engineer], which found that the backfill (as-built) is sufficiently free draining [and permeable] to avoid water pressure behind the wall."<br><br>The engineer advised that "the structural properties of the retaining walls and backfill have not really changed and still covered by the original PS1" (Producer Statement – Design). |

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| 5 March 2018 | Authority advises it had received "conflicting information", and requires of the owners a peer review by a chartered professional engineer of the foundation wall back fill before it could issue amendment B. |
| 1 June 2018 | The **owners' reviewing engineer** (R J Hall and Associates Ltd) peer reviews the owners' geotechnical engineer's second report (Geosolve Ltd) dated 4 September 2017.<br><br>The reviewing engineer's report concurs that the crib retaining wall is stable for static loadings and complies with clause B1 *Structure*. |
| 27 August 2018 | Owners' geotechnical engineer (Geosolve Ltd) writes to the authority about outstanding matters and COA-2016-3, stating all matters now comply:<br><br>• Confirmed the repairs to the crib retaining wall "are appropriate" and comply with the stability requirements of the Building Code<br>• With respect to the barbecue area retaining wall, the owners' geotechnical engineer noted that they had reviewed the owners' structural engineer's first report and agreed with the loadings and design methodology used, and the conclusion reached that the wall complied with the Building Code<br>• the change in the aggregate (GAP40) for the stormwater drainage as per building consent ABA-2008-1319/B "meets the requirements of the Building Code". |
| 29 August 2018 | A legal advisor for the owners sends a letter to the authority to request it review the owners' geotechnical engineer's report dated 27 August 2018 and confirm what further information it may require. |
| 30 November 2018 | Meeting held between the authority and the owners to discuss progressing the "issuance of the required certificates for 438 Portobello Road".<br><br>(Note: On 13 January 2022, in response to a request for further information from the Ministry to ascertain if any minutes or notes were taken at the 30 November 2018 meeting, the authority confirmed "no minutes were taken by the [authority]".) |
| 6 December 2018 | The owners emailed the authority stating that in their opinion there were no outstanding issues and asking that the authority issue the CCC for the first consent and the two COAs. The owners also referred to the "numerous specialist consultant's" reports they had obtained for the various elements of the building work. The owners stated, "all of these specialist reports with their supporting technical calculations have confirmed code compliance".<br><br>In response (also on 6 December 2018) the authority advised it "will carefully consider this information when making a decision". |

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| 14 January 2019 | **Purchasers' infrastructure engineer** (AR & Associates) issue "stormwater assessment" engineering memorandum, which includes a description of the historic watercourse and overland flow, and proposals for upgrading the stormwater drainage. |
| 29 January 2019 | **Purchasers' infrastructure engineer** (AR & Associates) letter to the legal advisor for the purchasers' which includes their assessment of the various building consents, certificates of acceptance, and their current status. |
| 31 January 2019 | **Purchasers' structural engineer's second report** (Hanlon & Partners Ltd) states:<br><br>• photos taken in the basement garage show the tanking in this area "was not effective"<br>• includes design details for remedial building works "to allow the installation of tanking membranes and associated field drains to ensure water does not enter the basement". |
| 5 September 2019 | Authority issues the **second notice to fix** (NTF-2019-278) and **dangerous building notice** (section 124 of the Act; NTF-2019-279) with respect to the soffit under the deck.<br><br>The **notice to fix** was for non-compliance with section 40 of the Act (work carried out without a building consent). The notice required of the owners to:<br>• engage a suitably qualified structural engineer to assess and provide a solution to this issue<br>• engage a carpenter to fix the issue as per the engineer's instructions<br>• apply for a certificate of acceptance.<br><br>The **dangerous building notice** stated that as the soffit had been installed without building consent and had failed, and was therefore considered dangerous. The notice required of the owners to:<br>• make the building work safe<br>• provide a written report from a suitably qualified structural engineer confirming that the area is now safe to occupy. |
| 13 September 2019 | **Purchasers' structural engineer's third report** (Hanlon & Partners Ltd) concludes that although the zinc-coated screws used to secure the soffit to the underside of the deck are the correct size and spacings, they need to be stainless steel to comply with NZS3604:2011 *Timber-framed Buildings*[65] as the deck is within 100m of the harbour.<br>Until the fixings are replaced with "type 304 stainless steel", the soffit remains dangerous. |

[65] Section 4 "Durability", 4.2 "Exposure zones", item 4.2.3.3 Zone D: High, and Figure 4.2.

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| 23 September 2019 | The builder completes remedial work to the soffit of the timber deck. |
| 26 September 2019 | **Owners' structural engineer's third report** (Stevenson Brown Ltd) detailing remedial work carried out to the deck soffit fixings, its compliance with the NTF-2019-278, and that a certificate of acceptance could be applied for.<br><br>Report included Producer Statement – Design ("PS1") dated 26 September 2019, and Producer Statement – Construction Review ("PS4") dated 27 September 2019, for the new soffit stainless steel straps and nail fixings used, and included two photographs showing the as-installed straps. |
| 27 September 2019 | Owners apply for **second certificate of acceptance** (**COA-2019-58**) for remedial work to deck framing and soffits.<br><br>Confirmed building work was carried out on 23 September 2019<br><br>The application included the owners' structural engineer's Producer Statement – Design ("PS1") dated 26 September 2019, and Producer Statement – Construction Review ("PS4") dated 27 September 2019. Both the PS1 and PS4 stated compliance with clause B1 *Structure* and Verification Method B1/VM1. |
| 30 September 2019 | Authority approves documents relating to the second certificate of acceptance (COA-2019-58).<br>Advised the owners the building work would need to be inspected. |
| 13 November 2019 | Letter to the authority from the legal advisor acting for the owners. Requested of the authority to confirm its position and what further was required to obtain the relevant code compliance certificates and certificates of acceptance. |
| 4 December 2019 | Further letter to the authority from the legal advisor acting for the owners, noting that the authority had not yet replied to the earlier letter dated 13 November 2019. |
| 10 March 2020 | Authority hosts meeting between the parties and their engineers.<br><br>The purpose of the meeting was to get agreement on the compliance of the outstanding elements of building work, to enable the various code compliance certificates and certificates of acceptance to be issued. The minutes of the meeting record (among other things) the various issues, and the parties' points of view with respect to these, and what actions that the parties were to take to resolve these. These included:<br>• basement foundation wall – the purchaser's structural engineer was to provide an alternative design option for remediating the tanking for the parties to review |

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| | • deck soffit – the purchasers' structural engineer was to inspect the building work to ensure that the works are satisfactory and meet Building Code conditions<br>• crib retaining wall – the purchasers' engineers were to provide comments on the wall's structural performance and what (if any) additional works would be required for them to be satisfied the wall is structurally sound and complies with the Building Code<br>• barbecue retaining wall – the authority could not issue a COA for this until the issues relating to the stormwater drainage / overland flow path are resolved.<br><br>It is unclear whether the information and actions requested of the purchasers' engineer at the meeting has been provided or carried out. |
| 30 April 2020 | Minutes drafted by the **Purchasers' infrastructure engineer** (AR & Associates) relate to the meeting held on 10 March 2020 (circulated on 11 March 2020), these included amendments drafted by the owners on 20 March 2020. The minutes are dated 30 April 2020, and were issued on or about 4 May 2020.Minutes including amendments related to the 10 March 2020 meeting. |
| 8 June 2020 | Owners write to authority setting out the matters it considers are still outstanding and requesting meeting to discuss these. |
| 21 January 2021 | Authority writes to owners refusing to issue code compliance certificate for **third building consent** (**ABA-2017-338**). The authority stated it had considered whether the code compliance certificate could be issued based on the information held on file, **but without full access to the property**, it was unable to establish if the building work complies. The issue of the code compliance certificate was therefore refused. |
| 3 May 2021 | Authority advises owners at meeting and in email that it cannot issue the code compliance certificates or certificates of acceptance when the parties' engineers can't agree.<br><br>Authority then sends an email to the owners providing the names of consultancies that could act as independent experts, but says it will only accept their findings if all parties agree to be bound by them and not take further action against the authority; and that it will not issue code compliance certificate or certificate of acceptance unless fully satisfied the work complies with the Building Code and building consent. |
| 29 June 2021 | Owners apply for determination. |
| 20 July 2021 | Authority receives an undated Producer Statement – Construction Review (PS4) from the owners' structural engineer in respect of "remedial work to existing crib" retaining wall, with stated compliance |

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| | with clause B1 *Structure*, for the third building consent (ABA-2017-338). |
| 5 August 2021 | **Purchasers' structural engineer** (Hanlon & Partners Ltd) undertook a site inspection on 27 July 2021, and confirms, following scanning of some walls, that "block walls detailed on [Owners' structural engineer's] drawings numbered 7170 showed reinforcing at the locations specified".<br><br>Marked up plans attached to the report indicating varied amounts of steel in the barbecue area retaining walls.<br><br>Drawings numbered 7170, sheets S1 to S8, were approved plans attached to the first building consent ABA-2008-1319.<br><br>Confirms that in one test hole location next to a rear foundation wall to the dwelling that "backfill behind [the] wall is all in crushed metal, not clean and free draining"[66]. |
| 27 August 2021 | Application for determination accepted by the Ministry following receipt of additional information. |
| 7 September 2021 | The **owners' structural engineer's fourth report**, responding to the authority's correspondence with the Ministry.<br><br>The report confirms:<br>• the owners' dwelling in located in corrosion zone D in terms of NZS 3604, and that stainless steel fixings are required.<br>• Zinc-coated fixings were initially used.<br>• Additional stainless-steel straps have been installed, and these fixings now "take the full factored load" of the soffit, so the zinc-coated fixings are now "redundant"<br>• Concluded that "given that the stainless-steel straps are providing all the structural support to the ceiling, [the owners' structural engineer] believe that the fixings comply with B1/VM1[67] and B2/AS1[68]". |
| 13 September 2021 | The **owners' geotechnical engineer's third report**, responding to the authority's correspondence with the Ministry.<br><br>The report states:<br>• the engineer was aware of the previous reports from a number of other engineers |

[66] The location of the test hole in the report (marked on plan S1) is behind a much larger "existing foundation", and to the rear of the newly formed low level reinforced concrete block wall (detail 14 on plan S2).

[67] Verification Method B1/VM1 "General".

[68] Acceptable Solution B2/AS1 "Durability".

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| | • the structural defects observed in the purchasers' consulting engineers' report from 20 July 2016 have been remediated<br>• a full stability analysis of the crib retaining wall, with calculations, concludes the wall is stable<br>• the purchasers' consulting engineer or structural engineers have provided no calculations to back up their assertions that the stability of the wall is deficient<br>• the peer review by the owners' reviewing engineer confirms the crib retaining wall is stable<br>• noted that the purchasers' structural engineer stated "the fact the [crib retaining] wall did survive these storms [in June 2015 and July 2017] suggests it will remain stable indefinitely"<br>• the crib retaining wall has remained stable since it was constructed in late 2011<br>• the majority of the crib retaining wall has been constructed (from late August through to November 2011) hard against a vertical bank of weathered rock (which is impermeable), and GAP40 aggregate was used as backfill<br>• included attachment 1 which confirms that quantities (totalling approximately 149 tonne) of "40mm clean metal", and "GAP40" aggregates for backfill material were delivered to site between September and November 2011<br>• the as-built drawings show drainage installed behind the crib retaining wall, and there is nothing to suggest it has not been installed<br>• the drainage has been dye tested[69] which concluded that drains had been installed behind the wall, which lead to a sump at the bottom of the driveway<br>• stretchers are not required at the rear of the crib retaining wall as detailed in the manufacturers' design[70]<br>• the cribs are 900 series ie the headers are 915mm long<br>• provided a copy of the manufacturer's design drawing for 900 series crib walls<br>• clause E1 [Surface water] does not apply to retaining wall drainage (refers to previous Determination 2020-031[71])<br>• it referred to earlier correspondences with the authority on 1 February 2018, 21 February 2018 and 5 March 2018 (summarised above)<br>• it referred to a meeting held with the authority on 10 March 2020, and included copies of the minutes to that meeting (summarised above) |

[69] The report does not state who conducted the dye test or when it was undertaken.
[70] A copy of the manufacturers' crib wall design details is appended to the report.
[71] Determination 2020/031 *"Regarding the purported refusal to issue a building consent for the construction of retaining walls and associated drainage at 16 Newark Close, Tauranga"* dated 3 December 2020.

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| | • Report concludes crib wall complies and there is essential agreement to this fact among the engineers, and that the drainage aggregate behind foundation wall complies, and the authority has sufficient information to pass it. |
| | **Reports received in response to the draft determination:** |
| 17 March 2022 | **Purchasers' infrastructure engineer** (AR & Associates) provides a memorandum which referred to matters outside the determination (see paragraphs 1.9.3 and 1.10). |
| 22 March 2022 | **Purchasers' plumber** (Barry Dell Plumbing) provides a report following a visual and CCTV inspection of the subsurface drainage coils.[72]<br><br>The report stated "The rear side of the block wall [to the south side of the dwelling], has been backfilled with compacted [G]AP40 gravel rather that clean, free draining material…as stated on the plans. It would therefore be fair to assume that all the drain coils are backfilled with [G]AP40".<br><br>The report went onto to state that the purchasers' plumber was "not able to visually locate any drain coil or sump at the bottom end of the driveway crib [retaining] wall, near the northeast corner of the property". It is therefore assumed "there is no drain coil laid behind the crib [retaining] wall at all". |
| 23 March 2022 | **Purchasers' structural engineer** (Hanlon & Partners Ltd) report, in response to the draft determination[73].<br><br><u>Deck soffit</u>: The notice to fix for the work to the deck soffit should be removed following the issue of the Producer Statement – Design ("PS1") and Producer Statement – Construction Review ("PS4") from the owners' structural engineer.<br><br><u>Crib retaining wall</u>: Acknowledges that the owners geotechnical engineer has provided many calculations and test reports but believes it should also provide a PS1 and PS4[74], and that the authority can only issue the code compliance certificate when the PS1 and PS4 are provided. |

[72] The report refers to matters outside the determination, namely the presence (or otherwise) and workmanship of the subsurface drain coils installed around and under the dwelling. These were not given as a reason for the proposed or purported refusal to issue the code compliance certificate for the first building consent ABA-2008-1319.

[73] The report also referred to a matter outside the determination, namely the "waterproofing of [the] basement" of the dwelling.

[74] The Ministry has received no evidence to indicate that the owners' geotechnical engineer either designed the crib retaining wall extensions before they were constructed in 2011 to 2012 or undertook any construction monitoring while they were being built.

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| | Barbecue area retaining wall: The purchasers structural engineer believes the engineer (albeit it is not clear which engineer is being referred to) should simply issue PS1 and PS4 certificates for the building work, and recommends that when these are provided, that the authority can issue the code compliance certificate[75]. |
| Undated | **Purchasers' consulting engineer** provides a hand-written memorandum that states:<br><br>"Wall construction[76]. The drawing of the walls construction has been provided to [the Ministry] by the LBP [builder]. Without destructing the wall no one can confirm what has actually been built as no inspections have been undertaken and no photos have been viewed. The purchasers have not been privy to this drawing[77].<br><br>[The Ministry] state that the west wall is surcharged by the landscaping wall. [The Ministry has] not been told it is also surcharged by the driveway. [The Ministry has] not been told the mid section is surcharge[d] by the landscaping wall. [The Ministry has] not been told the east wall is surcharged by the bank behind the wall.<br><br>The information provided to [the Ministry] states that the wall has been constructed against an existing cut of weathered rock this is correct for the east and west end. The section where the original driveway was which is also the highest portion of the wall has been backfilled". |

[75] The Ministry has received no evidence to indicate that an engineer either designed the barbecue area retaining wall or undertook any construction monitoring while it was being built.

[76] The memorandum does specify exactly which wall the engineer is referring to, but the text further down indicates the engineer is commenting on the crib retaining wall.

[77] Assuming the engineer is referring to the as-built drawing of the crib retaining wall, this was provided in the owners' geotechnical engineer's report dated 4 September 2017.

# APPENDIX B: THE LEGISLATION

A.1 The relevant sections of the Building Act 2004 include:

**14F Responsibilities of building consent authorities**

A building consent authority is responsible for –

(a) checking, in accordance with the requirements of this Act for each type of building consent, to ensure that –

(i) An application for a building consent complies with the Building Code:

(ii) Building work has been carried out in accordance with the building consent for that work:

(b) issuing building consents and certificates in accordance with the requirements of this Act.

**23 Effect of acceptable solution or verification method**

A person may comply with an acceptable solution or a verification method in order to comply with the provisions of the Building Code to which that acceptable solution or verification method relates, but doing so is not the only means of complying with those provisions

**44 When to apply for building consent**

…..

(2) An owner may make a series of applications for building consents for stages of the proposed building work.

**45 How to apply for building consent**

….

(4) An application for an amendment to a building consent must,—

(a) in the case of a minor variation, be made in accordance with section 45A; and

(b) in all other cases, be made as if it were an application for a building consent, and this section, and sections 48 to 51 apply with any necessary modifications.

….

**45A Minor variations to building consents**

(1) An application for a minor variation to a building consent-

(a) is not required to be made in the prescribed form; but

(b) must comply with all applicable requirements of section 45.

(2) Sections 48 to 50 apply, with all necessary modifications, to an application for a minor variation.

(3) A building consent authority that grants a minor variation-

(a) must record the minor variation in writing; but

(b) is not required to issue an amended building consent.

**49 Grant of building consent**

(1) A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the Building Code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application

**92 Application for code compliance certificate**

(1) An owner must apply to a building consent authority for a code compliance certificate after all building work to be carried out under a building consent granted to that owner is completed

**93 Time in which building consent authority must decide whether to issue code compliance certificate**

(1) A building consent authority must decide whether to issue a code compliance certificate for building work to which a building consent relates within—

(a) 20 working days after the date specified in subsection (2); or

(b) any further period after the date specified in subsection (2) that may be agreed between the owner and the building consent authority concerned.

(2) The date referred to in subsection (1)(a) and (b) is—

(a) the date on which an application for a code compliance certificate is made under section 92; or

(b) if no application is made, the expiry of—

(i) 2 years after the date on which the building consent for the building work was granted; or

(ii) any further period that may be agreed between the owner and the building consent authority concerned.

(3) Subsection (1) applies whether or not an application for a code compliance certificate is made under section 92.

(4) A building consent authority may, within the period specified in subsection (1), require further reasonable information in respect of the application for a code compliance certificate, and, if it does so, the period is suspended until it receives the information.

**96 Territorial authority may issue certificate of acceptance in certain circumstances**

(1) A territorial authority may, on application, issue a certificate of acceptance for building work already done—

(a) if—

(i) the work was done by the owner or any predecessor in title of the owner; and

(ii) a building consent was required for the work but not obtained; …..

(2) A territorial authority may issue a certificate of acceptance only if it is satisfied, to the best of its knowledge and belief and on reasonable grounds, that, insofar as it could ascertain, the building work complies with the Building Code

**98 Processing application for certificate of acceptance**

(1) A territorial authority must, within 20 working days after receiving an application for a certificate of acceptance,—

(a) grant the application; or

(b) refuse the application.