



## Determination 2011/054

# The issuing of various notices to fix in respect of building work at 72 Webb Street, Wellington

### 1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department.

1.2 The parties to the determination are:

- Vey Group Ltd, the building owner (“the applicant”)
- the Wellington City Council carrying out its duties and functions as a territorial authority and a building consent authority (“the authority”).

1.3 I take the view that the matter to be determined<sup>2</sup> is whether the decision of the authority to issue various notices to fix was in accordance with sections 164 and 165<sup>3</sup>. The determination does not specifically consider the content of the notices, other than to decide whether the matters described in the notices, as contraventions, meet the requirements of sections 164 and 165.

1.4 The applicant has also set out the following matters<sup>4</sup> that the applicant submitted were relevant to the application and that I should consider:

- (i) the time taken by the authority to respond to building consent amendment No 1 (AA 1). Requests for information by the authority on AA 1 were outside the 20-day period described in section 48
- (ii) the time taken by the authority to respond to amendment No 2 (AA 2)
- (iii) the authority’s position with respect to the separation of the steel cladding from the treated timber battens

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<sup>1</sup> The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Department are all available at [www.dbh.govt.nz](http://www.dbh.govt.nz) or by contacting the Department on 0800 242 243

<sup>2</sup> In terms of sections 177(1)(b) and 177(2)(f) of the Act

<sup>3</sup> In this determination, unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

<sup>4</sup> Applicant’s letter to the Department dated 8 February 2011 (refer paragraph 5.5)

- (iv) the authority's response to the applicant's letter of 22 May 2009
- (v) acknowledgement that the applicant had lodged and paid for amendments AA 1 to AA 4, and that AA 1 and AA 2 cannot be combined
- (vi) the authority's refusal to conduct inspections and whether the list of 'required inspections' was appropriate
- (vii) the 'legal standing' of the breaches described in notices to fix No 1 and 2 (NTF 1 and NTF 2)
- (viii) the existence of a backing rod behind the expanded foam installed around some of the window and door joinery units.

I consider that the majority of these issues are outside the matters I am able to determine under section 177. Therefore consideration of these additional matters is limited to the discussion in paragraph 7.7.

- 1.5 In making my decision, I have considered the submissions of the parties, the report of an independent expert commissioned by the Department ("the expert") to advise on this dispute, and the other evidence in this matter. The relevant provisions of the Act and the Building (Forms) Regulations 2004 are set out in Appendix A.

## **2. The building work**

- 2.1 The building work in question relates to a multi-storey building consisting of three levels plus a basement. The original uses for the building were for residential apartments on the top two levels and a day care centre on the ground floor. The fit out of the ground floor was not included as part of the consent and the consented plans showed the ground floor as an open space.
- 2.2 Some internal timber-framed walls were subsequently built on the ground floor but no building consent or amendment to the Stage 2 building consent was obtained for this work. Some of these walls were originally constructed in relation to the day care facility and additional walls were later built to adapt the ground floor area for two apartments. The plan relating to a new building consent application shows the new toilet facilities and associated plumbing required for the apartments.

## **3. Background**

- 3.1 The authority issued a building consent (No 173252) in early 2008 for Stage 1 of a new building that was to contain both commercial and residential premises. The consent was for excavation, demolition, re-piling, retaining walls and slab only.
- 3.2 The authority states that it received a building consent application for Stage 2 on 5 May 2008. The building work was described as:

4 storey building-basement with stairs, parking area; ground floor -2 commercial areas, residence lockup apartment entry. 1<sup>st</sup> floor- 6 apartments, bedrooms, bathrooms and ensuites. 2<sup>nd</sup> floor- kitchen, living/study areas and stairs to 1<sup>st</sup> floor unit 6 only bedroom on level 2.

The authority issued a building consent (No 178711) in respect of this work on 8 September 2008.

- 3.3 Following site inspections of the construction, the authority corresponded with the applicant requesting further information. The authority wrote to the applicant on 3 April 2009, listing items that the authority required to be addressed as follows:
- Amended detail drawings were required for:
    - 1A Deck edge flashing
    - 1B Deck and cladding junctions flashing
    - 1C Deck supports flashing
    - 1D Window flashing details
    - 1E Deck safety barriers
    - 1F Cantilevered deck joist flashing.
  - The applicant was to apply for an amendment for the changes to cladding materials, deck membranes, and the rigid air barrier (“RAB”) wrap.
  - The cladding manufacturer’s fire-rated systems had to be referenced in the specifications.
  - Details of how the fire apron is attached to the building.
  - There was no sign that a backing rod had been installed behind the expanding foam around some of the window and door joinery units.
- 3.4 The authority issued a notice to fix (“NTF 1”) on 6 April 2009 in regard to work that had been undertaken that was not in compliance with the Building Code or the building consent. NTF 1 required the applicant to:
- Stop work until all items as outlined in the letter of 03 April 2009 have been addressed to [the authority’s] satisfaction.
- The following inspections are required with respect to the remedial work; Prewrap and preclad inspections are required to sight the RAB instillation, the Cavity system instillation (*sic*) and an inspection of the cladding systems prior to removing the scaffolding.
- 3.5 In a letter dated 18 April 2009, the applicant made an application for an amendment to the original building consent (“AA 1”). The application listed the following amendments:
- Substitution of an RAB in lieu of building wrap to most locations.
  - The deck waterproofing substitution.
  - Change to the profile of the corrugated steel.
  - Revised balustrade details.
- 3.6 The authority carried out a pre-lining inspection on 22 April 2009, following which it corresponded with the applicant regarding the cladding.
- 3.7 The authority issued a notice to fix (“NTF 2”) dated 28 April 2009 in respect of building consent 178711, which required the building work to be stopped until the authority’s concerns had been addressed. In addition, it was noted that parts of the external cladding might have to be removed. NTF 2 required the applicant to:

Stop work until all items as outlined in the letter of 03 April 2009 have been addressed to [the authority's] satisfaction.

Parts of the newly installed cladding system to the eastern elevation may need to be removed for Council to view aspects of the cladding system installation (*sic*) and flashing details.

The following inspections are required with respect to the remedial work; Prewrap and preclad inspections are required to sight the RAB installation, the Cavity system installation (*sic*) and an inspection of the cladding systems prior to removing the scaffolding.

- 3.8 The authority issued a notice to fix (“NTF 3”) dated 5 May 2009 that required the supply of amended plans detailing soil stack layouts and the decks. NTF 3 required the applicant to:
- Submit amended plans to soil stack layout
  - Submit plans relating to all decks
- 3.9 The authority carried out a further inspection on 11 May 2009, after which the authority requested further information (“RFI 1”) concerning AA 1 issued on 13 May 2009.
- 3.10 The authority undertook a site visit and issued a notice to fix (“NTF 4”) on 18 May 2009 in regard to work (namely exterior cladding) had been undertaken that was not in accordance with the Building Code and the building consent. The notice also required all building work to immediately cease until the authority was satisfied that the applicant was able and willing to resume operations in compliance with the Act and the Building regulations 1992. NTF 4 required the applicant to:
- Demonstrate compliance with the Building Consent, in particular all exterior cladding and flashing detail to conform to the manufacturers' specification installation requirements.
  - Provide a separation between all colour steel cladding and the treated cavity battens.
  - Provide that information requested for the processing of the amended plan application, dated 13 May 09.
- The following inspections are required with respect to the remedial work;  
Pre-wrap inspection for the Rab-Board installation.  
Pre-clad inspection to sight flashings, taped joints and cavity battens.  
Weather-tight inspection prior to coatings of the cladding and the removal of any scaffold.
- 3.11 The applicant responded to the authority in a letter dated 22 May 2009. The applicant discussed details relating to the specified cladding and proposed the use of rusticated weatherboards instead. The applicant stated that separation of the profiled steel cladding and the cavity battens could be achieved by priming the battens, or installing a paper-based building paper behind the steel cladding.
- 3.12 The authority made a further information request (“RFI 2”) on 9 June 2009.
- 3.13 On 17 June 2009 the applicant submitted an application for amendment No 2 to the Stage 2 building consent (“AA 2”). In a letter to the applicant dated 18 June 2009, the authority stated that it had received AA 2 and that it would be included as part of AA 1. The authority also requested further information from the applicant.

- 3.14 An agent, acting on behalf of the applicant, applied for a third amendment to the building consent on 13 July 2009 (“AA 3”). The amendment was described as a ‘change of weathertightness details from existing plan’. In submitting AA3, the agent also requested that the authority ‘disregard the previous submission to change the cladding (amendment No. 2)’.
- 3.15 Further correspondence passed between the parties during July and August 2009. The authority made a further information request (“RFI 3”) for AA 3 on 3 August 2009.
- 3.16 On 18 August 2009 the applicant applied for a fourth amendment to the building consent (“AA 4”) regarding a sewer main. On 4 September 2009, the applicant wrote to the authority concerning a site visit carried out by the authority on 31 August 2009.
- 3.17 The authority issued a notice to fix (“NTF 5”) dated 4 September 2009 that required a response to the authority’s previous request for information. NTF 5 required the applicant to:
- Respond to the letters dated 9 June 09, 18 June 09 and 3 August 09, request for further information to enable the [authority] to complete the assessment of the amendments, one & two.
- The following inspections are required with respect to the remedial work;  
As required by the Building Consent Authority once the amended plans have been assessed and approved.
- 3.18 The application for a determination was received by the Department on 21 September 2010.

## 4. The submissions

- 4.1 The applicant provided a letter with the application setting out the disputed matters with the various notices to fix and associated correspondence issued by the authority.
- 4.2 In an additional submission the applicant noted that, with respect to NTF 1:
- The Building Code (*sic*) does not allow ...for additional information to a Building Consent application outside the 20 Working day period s48 Building Act 2004.
- There is also no law within the Building Act 2004 allowing [an authority] to ask for further information to an approved Building Consent.
- 4.3 The applicant also commented on the content of the authority’s letter of 3 April 2009 as follows:
- Items 1A-1D: Requests set out in NTF 1 should have been asked for during the application process and not during construction.
- Item 1E: The balustrade had been removed from the building consent application.
- Item 1F: The deck flashing request was outside the 20 working day limit.
- Item 2: There was a minor error in the specification regarding the profiled roofing material and this did not require a stop work notice.

- Item 3: Work had been carried out as per the manufacturer's instructions.
- Item 4: This matter was outside the 20 working days limit set out in section 48.
- Item 5: 'E2/AS1 doe (sic) not apply to this project as the Building is over 10 metres in height'. There was no need for the authority to look at the backing rod.

4.4 Referring to the stop work requirement set out on NTF 2 the applicant noted:

- NTF 2 was different from NTF 1 and asks for information relating to cladding elements including the flashings.
- Various inspections had been carried out by officers from the authority regarding the flashing elements and remedial or cosmetic work does not constitute matters covered by a notice to fix or a stop work notice.

4.5 The applicant was of the opinion that NTF 3 was an invalid notice not covered by the Act.

4.6 In summary, the applicant required the notices to fix to be 'made illegal and removed from Building Consent No 178711' and the stop work notices to be lifted from the building consent. It was submitted that the authority had also failed to provide inspection reports 'that truly reflects the inspection undertaken' relating to two inspections carried out by the authority. The applicant sought copies of these inspection reports.

4.7 In an letter to the Department dated 16 September 2010, the applicant made a further submission and in the context of the notices to fix stated that:

- The applicant was not disputing the letters mentioned in the various notices to fix but was arguing that a notice to fix can only be issued for specific reasons and in a prescribed format.
- There was no requirement in the Act for the applicant to respond to a letter or a phone call.
- 'A notice to fix can only be issued if s164 of the Building Act 2004 occurs, responding to letters is not mentioned in s164 and applies only to building work s166'.
- 'A notice to fix cannot be issued forcing [the applicant] to respond to a letter, it can be issued to comply with building related works within the letter only not respond to a letter'.

4.8 The applicant supplied copies of:

- the notices to fix and related material
- correspondence with the authority
- some manufacturers' information.

4.9 The authority emailed the Department on 26 August 2010, and attached copies of the following:

- The original building consent application.
- A plan showing the ground floor area relating to building consent No 178711.
- A timetable of events.

4.10 In a submission to the Department dated 29 November 2010, the authority's legal advisors set out the background to the dispute and summarised the authority's position regarding the determination application. The submission set out the authority's opinion regarding the notices to fix, which I summarise as:

- The authority can issue a notice to fix if it considers that the owner of a building, or a person carrying out or supervising building work, is contravening or failing to comply with the Act or its applicable regulations.
- The authority had issued numerous notices to fix requiring the applicant to remedy constructed building work that was not code-compliant and also required responses to the letters referred to on the notices.
- The applicant has decided only to challenge NTF 5 on the grounds that the applicant could not be forced to respond to a letter from the authority.
- The applicant has ignored the authority's requests for further information and has undertaken work that is not in accordance with the building consent or the Building Code.
- The authority has received the relevant information from the applicant so that it can grant the requested amendments AA 1 and AA 2, once the appropriate fees have been paid.
- The authority considered that its decisions to issue the notices to fix and the stop work notices were justified.

4.11 The submission included a timeline of events and also commented on the question of acceptance of building consent applications. I note that the matter of authority's refusal to accept a building consent application is considered in Determination 2011/053.

4.12 The applicant wrote to the Department on 24 November 2010 commenting on the authority's submission regarding the notices to fix and I have noted the content of this correspondence.

## **5. The draft determination**

5.1 The draft determination was forwarded to the parties for comment on 29 January 2011. The authority accepted the draft determination without comment.

5.2 The applicant did not accept the draft determination for the reasons set out in a letter to the Department dated 8 February 2011. The applicant noted what he considered were anomalies in the draft determination and provided further background information.

- 5.3 The applicant also discussed the implications of the notices to fix and commented on aspects of the cladding, fire-rated linings and related inspections he contended the authority had completed.
- 5.4 I have carefully considered the applicant's comments and have amended the draft determination as I consider appropriate.
- 5.5 The applicant also requested that the determination consider the specific issues as described in paragraph 1.4. I subsequently engaged an expert as described in paragraph 6.1.1.

## **6. The expert's report**

### **6.1 General**

- 6.1.1 As set out in paragraph 1.5, I engaged an independent expert, who is a Registered Architect<sup>5</sup>, to provide me with a report on the additional matters raised by the applicant as described in paragraph 1.4.
- 6.1.2 The expert noted the lack of information that had been supplied to the Department to date and sought additional information from the parties. The information obtained enabled the expert to determine the timetable of the interactions between the applicant and the authority.

### **6.2 The expert's findings**

The expert responded to items (i) to (vii) as set out in paragraph 1.4. Item (viii) was not considered by the expert as this was a new matter, i.e. additional to those matters covered in the draft determination. I address item (viii) in paragraph 7.7.1.

The expert's response is summarised as follows:

#### **(i) The time taken by the authority to respond to amendment AA 1**

The authority was not satisfied with the information received from the applicant in respect of AA 1 and issued RFI 1 within 20 working days of AA 1 being received. Accordingly, the 20-day processing time was stopped and the statutory period was properly suspended. AA 1 is ready to be issued but as, to date, there are outstanding fees to be paid the consent does not have to be granted as allowed for under section 49.

#### **(ii) The time taken by the authority to respond to amendment AA 2**

While the authority treated AA 2 in the nature of a request for further information on AA 1, on 13 July 2009 the applicant's agent submitted AA 3 to the authority and requested the authority to disregard AA 2. With the withdrawal of AA 2, there was consequently no need for the authority to either grant or refuse AA 2 within 20 working days.

#### **(iii) The authority's position with respect to the separation of the steel cladding from the treated timber battens**

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<sup>5</sup> Registered Architects are under the Registered Architects Act 2005 are treated as if they were licensed in the building work licensing class Design 3 under the Building (Designation of Building Work Licensing Classes) Order 2010.

The expert considered that the Compliance Document E2/AS1 could be used as a guide to how code compliance could be achieved. The expert also considered elements of NZS 3640<sup>6</sup> and the BRANZ publication “Guideline” dated April 2010, together with discussions with BRANZ and the cladding manufacturers. The expert concluded that if the battens were not treated with copper naphthenate then no separation was required. However, if the battens were so treated, then ‘further questions need to be asked of corrosion experts as to the risks arising from the 5% copper concentrate in [copper naphthenate] treatment’.

**(iv) The authority’s response to the applicant’s letter of 22 May 2009**

The authority’s RFI 2 dated 9 June 2009 responds in part to the applicant’s letter of 22 May 2009 as well as to an earlier letter of 16 May 2009. The expert noted that there may be further correspondence from the authority that has not been presented.

**(v) Acknowledgement that the applicant had lodged and paid for amendments AA 1 to AA 4 and that AA 1 and AA 2 cannot be combined**

Four amendments were lodged; AA 1 and AA 2 are considered above. The authority had informed the applicant in separate letters for each amendment (AA 1 and AA 3) that they had been granted. However, the amendments have not been issued as the relevant fees have not been paid.

**(vi) The authority’s refusal to conduct inspections and whether the list of ‘required inspections’ was appropriate**

The expert did not discover any evidence that the authority’s inspectors refused to carry out inspections. The applicant submitted that the inspection schedule is a generic list and most of the inspections are ‘not required by the authority’. The expert considered the inspections listed in the building consent were a ‘reasonable and indeed a minimum list if the [authority] is to carry out its duty under the Act’. The building file recorded that building work was being carried out without the required inspections.

**(vii) The ‘legal standing’ of the breaches described in NTF 1 and NTF 2**

The authority’s letters of 3 and 28 April 2009 identified specific non-compliances of the on-site work. The expert considered that this information should provide the clarity the applicant is seeking with regard to the breaches described in the NTFs. The expert did not comment on the ‘legal standing’ of the breaches that these notices identify. I consider this matter in paragraph 7.3 and it is reflected in the decision (refer to paragraph 8.1).

- 6.2.1 In his final comments, the expert was of the opinion that the standard of documentation provided for the consent was poor and that that the documents submitted for the amendments were ‘also minimal and unclear as to the extent or effect of the amendment and the achieving of code compliance’.
- 6.2.2 The expert’s report was forwarded to the parties for comment on 11 April 2011. The authority made no response.

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<sup>6</sup> New Zealand Standard NZS 3540: 2003 Chemical preservation of round and sawn timber

### 6.3 The applicant's response to the expert's report

6.3.1 In an email to the Department of 11 April 2011, the applicant responded to the expert's report, describing his interaction with the expert. The applicant did not accept the expert's comments regarding the standard of documentation. It was noted that the contract was a "design and build" concept constructed by an experienced contractor and as such, the complexity of the drawings would be reduced.

6.3.2 In a letter received by the Department on 3 May 2011, the applicant responded in detail to the expert's report. The applicant also attached a copy of a District Court decision, *Turvey v Wellington City Council*<sup>7</sup>, concerning the consent fees that the authority had charged the applicant. I have carefully read and analysed the applicant's submission and the Court decision, and set out a summary of the main issues as follows:

- The applicant was of the opinion that the authority had not correctly dealt with the correspondence between the parties nor with some of the issues that had arisen between them.
- Applying a ruling from the court decision, the applicant considered that the authority was out of time when it processed the applications for amendment.
- The applicant's agent was not given the authority to cancel amendments or building consents, nor to perform any duty other than that specified by the applicant. The expert had not received all the relevant information available as he had not fully communicated with the applicant.
- The limitations set out in E2/AS1 are not binding, as the solution indicates only one way to meet code-compliance. There are other 'acceptable solutions' such as manufacturer's specifications and those issued by independent building research institutions. The steel cladding was installed in accordance with the manufacturer's installation guides, which did not require separation between the battens and the cladding.
- The applicant did not accept that the authority had not combined the various applications for amendment.
- The authority's inspectors had declined to inspect the building work on some occasions and had also required more inspections than were necessary.
- The authority had mentioned breaches of the Act, but had failed to prove any wrongdoing and the applicant had challenged the items that the authority has claimed to be non-compliant.
- The expert's opinion that the consent documentation was deficient was disputed. The applicant noted that the proposed building work was to be constructed under a "design and build" contract, and therefore, a lesser standard of documentation was acceptable. The applicant said that 'the drawings are for the purpose of consents only and s45 of [the Act]' and that 'a competent person should be able to build a building with just floor plans and elevation[s]'.

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<sup>7</sup> *Turvey v Wellington City Council* (District Court, Wellington, Tuohy J, 17 May 2011, CIV-2010-085-000061)

- 6.3.3 The Court decision referred to in paragraph 6.3.2 chiefly considered the consent fees charged by the authority. However, the decision also considered the provisions of section 48. The Court found that where further information was requested after the 20-day period had expired there could be no suspension of that 20-day period as it had already expired. The Court upheld the authority's charges under section 219 in respect of work the authority had carried out checking the plans notwithstanding the work had been undertaken after the expiry of the 20-day period.
- 6.3.4 The expert responded to the applicant's submission in an email to the Department dated 4 May 2011. The expert stated that, following consideration of the applicant's response and the expert's own report, he stood by the advice that he had previously provided to the Department.
- 6.3.5 In considering the District Court judgement, the expert accepted that the request for information relating to the Stage 2 application was out of time. However, the expert noted that the determination dealt with the processing of amendments to the original consent and, for the reasons given by the expert, the suspension of amendments under RFI 1 was legitimate.
- 6.3.6 I have carefully considered the applicant's submission and the expert's response and amended the determination accordingly.

## **7. Discussion**

### **7.1 General**

- 7.1.1 The applicant has raised several issues concerning the various notices to fix that have been issued by the authority. I understand that the applicant's concerns are as follows:
- The authority could not request additional information concerning a building consent outside the 20 working day period set out in section 48. (This matter has now been decided by the District Court.)
  - There was no provision in the Act for an authority to ask for further information regarding a building consent that had been issued. Asking for additional information was not a valid reason to issue a notice to fix.
  - As the notices to fix were not in the prescribed format they were invalid.
  - There was no requirement in the Act for the applicant to respond to a letter or a phone call. As the letter was referred to in the notice to fix, the notice itself was invalid.
  - The reference in NTF 2 to stop work was not a valid stop work notice because the concerns raised in the authority's letter to the applicant of 3 April 2009 had not been addressed.
  - A stop work notice could only be issued in 'terms of section 165(c)' if the specified person shows an unwillingness to comply. In this instance, the specified person was willing to comply with the notice to fix and the steps that had been taken verified this.

7.1.2 I note that the authority in its submission, dated 29 November 2010, considers that applicant has concerns only in respect of NTF 5. However, from the information received from the applicant, I consider that the applicant's concerns are greater than this narrow interpretation.

## **7.2 The form in which the notices to fix have been issued**

7.2.1 The applicant is of the opinion that, as the notices to fix were not in the prescribed format, they were invalid. The validity of a form is not a matter that I can determine, however, under section 177(2) a determination can decide whether an authority was correct to issue a notice to fix. I have considered the issuing of the notices to fix in this context.

7.2.2 I note that, as set out in the Building (Forms) Regulations 2004, apart from Form 1, the use of other alternative forms to that set out for Forms 2 to 16 are not invalid if they contain minor differences from that prescribed, providing the alternative forms:

- (a) have the same effect as the prescribed form and are not misleading; and
- (b) contain all the information required by the prescribed form and the information is in the same order as appears on the prescribed form.

This is consistent with section 26 of the Interpretation Act 1999, which states:

### **26 Use of prescriptive forms**

A form is not invalid just because it contains minor differences from a prescribed form as long as the form has the same effect and is not misleading.

7.2.3 The relevant form regarding a notice to fix is Form 13. In comparing this form with the notices to fix issued by the authority, I find that the latter are very similar to the prescribed form and are not misleading.

## **7.3 The remedies sought in the notices to fix**

7.3.1 The remedies sought in the notices to fix appear to reflect two processes that are taking place in parallel but that should be treated as distinct; namely the assessment by the authority of two amendments to the consent, and work taking place onsite being done other than in accordance with the approved building consent. The latter process is an appropriate matter for a notice to fix but the former is not.

7.3.2 Notices to fix are to be issued in respect of breaches of the Act or Regulations, or in relation to building warrant of fitness and compliance schedules. This is consistent with the central role of a notice to fix in ensuring compliance and providing effective penalties for those that do not comply.

7.3.3 In my view notices to fix are not an appropriate means of requiring a specified person to provide information in respect of an amendment to a consent, submit amended consent documentation, or to advise of required inspections as is the case here. However, I note that the authority has also issued specific requests for information, which form the basis for the contents of the various notices to fix.

7.3.4 In my view the notices to fix should have been confined to describing the work that did not comply with the Act or Regulations and such matters as appropriate, if any, under section 165(1)(c)-(f) of the Act.

#### **7.4 The requests for further information (NTFs 1, 2, 3, 4, 5)**

7.4.1 As noted above I do not accept that a notice to fix is intended as a mechanism to seek specific information, particularly in respect of an amendment to a consent. Any application for an amendment is to be considered and, if acceptable, approved by the authority. Any supplementary information required to be provided by the applicant should be in accordance with the relevant provisions of sections 40-52.

7.4.2 If an application for an amendment is lacking information it can be suspended by the authority pending the information's receipt. If the requested information is not provided, the application can be declined as the authority will not have reasonable grounds for being satisfied the proposed building work will comply with the building code. By necessity the process requires that any amendment of a consent is approved by the authority before any amended work commences on site.

7.4.3 It is apparent from what is sought in the notices to fix that the authority has not received sufficient information in order to approve both amendments to the consent. Neither amendment has been approved, however, it appears that work in respect of the amended work has commenced on-site. The authority is fully justified in issuing a notice to fix in respect of unconsented work that is proceeding and/or considering whether to undertake a prosecution under section 40, but the notices to fix should be worded in terms of a breach of the Act and Regulations.

7.4.4 I also note that information sought on some notices to fix is detail that would normally form part of approved amended consent documentation, for example, the separation of the cladding and the cavity battens requested in NTF 4.

#### **7.5 The stop work notices (NTFs 1 & 2)**

7.5.1 Form 13 allows an authority to order work to cease immediately 'until the authority that issued the notice is satisfied that [the specified person] are able and willing to resume operations in compliance with the [Act] and regulations under that Act'. A notice to fix therefore provides a valid means of issuing a stop work notice.

7.5.2 In this situation the notices to fix describe the work in question but do not specifically refer to work being undertaken other than in accordance with the approved consent as should have been the case. NTF 1 and NTF 2 refer instead to the stop work notice being applied because the specified person had not addressed the items described in an earlier letter from the authority.

7.5.3 The applicant has referred to section 165(c) stating that a stop work notice can only be issued if the specified person shows that they are not willing to comply with the notice. I note that section 165(f) is the relevant provision. The applicant has stated that 'the intent and willingness was there for the specified person to comply with the notice to fix'. However, as stated by the applicant, it was at some time after the relevant notices to fix were issued before steps were taken to allay the authority's concerns.

7.5.4 I am therefore of the opinion that the authority was justified in issuing the requirement to stop work on the notices to fix; however notices NTF 1 and NTF 2 should have been worded to reflect the on-site breaches of the Act and the Regulations, and not in respect of information sought from the applicant.

## **7.6 Notices to fix: Conclusion**

7.6.1 In my view NTF 3 was incorrectly issued and should therefore be withdrawn.

7.6.2 I am of the view that the authority was justified in issuing NTFs 1, 2, 4, and 5, but these notices should be amended to:

- remove matters not considered appropriate (refer paragraph 7.3.3)
- include specific reference to work in breach of the Act or Regulations (refer paragraph 7.3.4).

7.6.3 While I consider NTFs 1, 2, 4, and 5 require modification, it may be more practical for the authority to remove the notices and issue a single notice in their place.

## **7.7 The additional matters raised by the applicant**

7.7.1 The applicant has raised additional matters (refer to paragraph 1.4, items (i) to (viii)) which he has asked me to decide. However, I consider that the majority of these issues are outside the matters I am able to determine under section 177. Therefore consideration of these additional matters is limited to the discussion below. The matters have been considered in the expert's report (refer paragraph 6.2) and I accept the expert's findings as follows:

- Items (i) & (ii): I consider that both AA1 and AA2 were processed within the 20-day statutory working day requirement in terms of section 48. The District Court decision (refer paragraph 6.3.2) does not affect this view.
- Item (iii): The authority has requested separation between the steel cladding and the timber cladding battens. I note that there is uncertainty as to the treatment applied to the battens and the expert has provided alternative scenarios in respect of this. Accordingly, I suggest that the authority and the applicant together ascertain what treatment, if any, was applied to the battens and, based on this investigation and the expert's recommendations, the authority is to decide whether any separation from the cladding is required.
- Item (iv): I do not accept the applicant's arguments that documentation such as manufacturer's recommendations ensure that building elements are code-compliant. Nor do I consider that such recommendations and the like are "approved documents". I therefore consider that the expert's approach regarding the cladding separation is a reasonable one.
- Item (v): I consider that the authority did not ignore the applicant's letter of 22 May 2009.
- Item (vi): I consider that the applicant lodged four consent amendments (AA 1 to AA 4). However, according to the expert's assessment of the matter, the fees relating to these have not been paid by the applicant. As the applicant's

agent in his letter of 13 July 2009 requested the authority to disregard AA 2, I find that AA 2 was not combined with AA 1.

- Item (vii): I do not accept that the authority refused to carry out inspections and I consider that the inspection schedule included legitimate matters that need to be addressed by the applicant. I also note that section 90 confers on an authority broad powers to carry out a range of inspections.

7.7.2 With regard to item (viii), as there is conflicting evidence as to whether a backing rod was installed behind the expanded foam, I suggest that invasive testing be carried out to establish the as-built situation.

7.7.3 I note that the applicant has stated that his agent was not given the authority to cancel amendments or building consents, nor to perform any duty other than that specified by the applicant. While this may well be the case, I accept that the authority would not be aware of these limitations and acted correctly in accepting the agent's request to disregard AA 2.

## **7.8 Request for information outside the 20 day period described in Section 48**

7.8.1 Section 48 provides for a building consent to be granted or refused within 20 working days, and for the time period to be suspended where an authority requests further information to enable it to process the application. An authority that fails to grant or refuse an application within the 20 day time period will be in breach of section 48. The consequences of such a breach were considered in *Williams and Co Trustees Ltd v Selwyn District Council*<sup>8</sup> where the applicant was unsuccessful in seeking a Court order compelling the authority to grant the building consent after the 20 day time period had expired. Chisholm J declined to grant the order on the basis that the Council was doing all it could to process the applications in a timely way but had insufficient resources to do so, and the effect of such an order would simply put the applicant ahead of other applicants waiting for building consents.

7.8.2 I accept that section 48 requires any requests for further information to be made within the 20 day time period, and for an authority to grant or refuse an application for a building consent within that time period. However, I do not think that it necessarily follows that an authority has no power to request further information after the expiry of the 20 day time period. As the Judge in *Turvey* (refer paragraph 6.3.2) concluded, the authority was entitled to charge for work it undertook checking plans after the expiry of the 20 day time period. The clear implication of this conclusion is that the authority was entitled to continue with the processing of the building consent application, to charge for that work, and to grant or refuse the application after the 20 day time period had expired.

7.8.3 In my view, irrespective of when additional information is sought by an authority, if the authority is of the view that the proposed work will not satisfy the requirements of section 49, then it is justified in refusing the application.

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<sup>8</sup> *Williams and Co Trustees Ltd v Selwyn District Council* (High Court, Christchurch, Chisholm J, 22 March 2006, CIV2006-409-409)

## **7.9 The consent documentation**

- 7.9.1 The expert has noted that the standard of the documentation provided in support of the consent was deficient. I accept this opinion.
- 7.9.2 The applicant has noted that the proposed building work was to be constructed under a “design and build” contract, and therefore, a lesser standard of documentation was acceptable. While I accept the concept of the “design and build” contracts differs from other forms of building contract, any documentation submitted in support of a consent, or an amendment to a consent, must provide sufficient detail to demonstrate to an authority how compliance is to be achieved in accordance with section 45.

## **8. The decision**

- 8.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:
- the decision to issue the notice to fix dated 5 May 2009 (NTF 3), is reversed
  - the issue of the notices to fix dated 6 April 2009, 28 April 2009, 18 May 2009, and 4 September 2009 (NTFs 1, 2, 4, 5 respectively) is confirmed but the notices to fix should be modified (or withdrawn and replaced) to take account of the findings of this determination.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 3 June 2011.

John Gardiner  
**Manager Determinations**

## Appendix A: The relevant legislation

A.1 The relevant sections of the Building Act are:

### **48 Processing application for building consent**

- (1) After receiving an application for a building consent that complies with section 45, a building consent authority must, within the time limit specified in subsection (1A),—
  - (a) grant the application; or
  - (b) refuse the application.
- (1A) The time limit is—
  - (a) if the application includes plans and specifications in relation to which a national multiple-use approval has been issued, within 10 working days after receipt by the building consent authority of the application; and
  - (b) in all other cases, within 20 working days after receipt by the building consent authority of the application.
- (2) A building consent authority may, within the period specified in subsection (1A), require further reasonable information in respect of the application, and, if it does so, the period is suspended until it receives that information.
- (3) In deciding whether to grant or refuse an application for a building consent, the building consent authority must have regard to—
  - (a) a memorandum provided by the New Zealand Fire Service Commission under section 47 (if any); and
  - (b) whether a building method or product to which a current warning or ban under section 26(2) relates will, or may, be used or applied in the building work to which the building consent relates.
- (4) Subsection (3) does not limit section 49(1).

### **164 Issue of notice to fix**

- (1) This section applies if a responsible authority considers on reasonable grounds that—
  - (a) a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent); or
  - (b) a building warrant of fitness or dam warrant of fitness is not correct; or
  - (c) the inspection, maintenance, or reporting procedures stated in a compliance schedule are not being, or have not been, properly complied with.
- (2) A responsible authority must issue to the specified person concerned a notice (a notice to fix) requiring the person—
  - (a) to remedy the contravention of, or to comply with, this Act or the regulations; or
  - (b) to correct the warrant of fitness; or
  - (c) to properly comply with the inspection, maintenance, or reporting procedures stated in the compliance schedule.

- (3) However, if a responsible authority considers that it is more appropriate for another responsible authority to issue the notice to fix, it must—
- (a) notify the other authority that it holds that view; and
  - (b) give the other authority the reasons for that view.
- (4) The other responsible authority referred to in subsection (3) must issue the notice to fix if it considers that this section applies.

**165 Form and content of notice to fix**

- (1) The following provisions apply to a notice to fix:
- (a) it must be in the prescribed form:
  - (b) it must state a reasonable timeframe within which it must be complied with:
  - (c) if it relates to building work that is being or has been carried out without a building consent, it may require the making of an application for a certificate of acceptance for the work:
  - (d) if it requires building work to be carried out, it may require the making of an application for a building consent, or for an amendment to an existing building consent, for the work:
  - (e) if it requires building work to be carried out, it must require the territorial authority, the regional authority, or both to be contacted when the work is completed:
  - (f) if it relates to building work, it may direct that the site be made safe immediately and that all or any building work cease immediately (except any building work necessary to make the site safe) until the responsible authority is satisfied that the person carrying out the work is able and willing to resume operations in compliance with this Act and the regulations.
- (2) Nothing in subsection (1) limits or affects the generality of section 164.

A2 The relevant paragraphs of the Building (Forms) Regulations 2004 are:

**6 Use of forms**

- (1) Form 1 may not contain any differences from the form that is prescribed.
- (2) Use of any other form is not invalid only because it contains minor differences from a form prescribed by these regulations as long as the form that is used—
- (a) has the same effect as the prescribed form and is not misleading; and
  - (b) contains all the information required by the prescribed form and the information is in the same order as appears on the prescribed form.

**Form 13—Notice to fix***Sections 164 and 165, Building Act 2004***To:** *[name and address of owner]***\*And to:** *[name and address of person carrying out or supervising the building work]***The building**

Street address of building:

Legal description of land where building is located: Building name:

Location of building within site/block number: Level/unit number:

**Particulars of contravention or non-compliance***[Insert details of failure or error with reference to any relevant building consent]*To remedy the contravention or non-compliance you must: *[state any building work that must be carried out and whether a certificate of acceptance must be applied for]*This notice must be complied with by: *[date or time frame]***Further particulars***\*You must contact [State whether the persons to whom the notice is given must contact the territorial authority for the district within which the building is situated, the regional authority for the region within which the building is situated, or both] on completion of the required building work.**\*All building work must cease immediately until the authority that issued this notice is satisfied that you are able and willing to resume operations in compliance with the Building Act 2004 and regulations under that Act.**\*The following building work must cease immediately until the authority that issued this notice is satisfied that you are able and willing to resume operations in compliance with the Building Act 2004 and regulations under that Act: [insert details of building work] If you do not comply with this notice you commit an offence under section 168 of the Building Act 2004 and may be liable to a fine of up to \$200,000 and a further fine of up to \$20,000 for each day or part of a day that you fail to comply with this notice.*

Signature:

Position:

On behalf of: *[name of territorial authority]*

Date:

*\*Delete if inapplicable.*