



Determination 2013/011

Regarding the authority's exercise of its powers in respect of a refusal to grant building consent for an alteration to an existing apartment at Unit 8C the Dilworth Building, 22–32 Queen Street, Auckland

1. The matter to be determined

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

1.2 The parties to this determination are

- the owners of the apartment, J and A Clegg (“the applicants”) acting through a building consultant (“the agent”)
- Auckland Council, carrying out its duties and functions as a territorial authority or building consent authority (“the authority”).

1.3 The determination arises from a decision by the authority to refuse to grant building consent for proposed remedial work to the base and bottom plate of the external walls of an existing apartment.

1.4 The matter to be determined² is whether the authority correctly exercised its powers in refusing to grant building consent. In considering this matter, I must consider

1.4.1 **Matter 1: The grounds on which the refusal was made**

Whether the authority correctly exercised its powers in refusing to grant building consent for the proposed building work based on the grounds given by the authority in its refusal. I have considered this matter in paragraph 6.3.

¹ The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.dbh.govt.nz or by contacting the Ministry on 0800 242 243.

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

1.4.2 **Matter 2: The code compliance of the proposed building work**

Whether there was sufficient evidence provided in the building consent application for the authority to conclude on reasonable grounds that the building work and the existing building (as altered) would comply with the Building Code to the extent required by the Act. I have considered this matter in paragraph 6.4.

1.4.3 The agent has submitted that the matter to be determined is only whether the authority can require the applicants to undertake additional works to that which they propose, and that the code-compliance of the proposed building work and the existing building should not have been considered. I have discussed this further in paragraph 6.5.

1.5 In making my decision I have considered the submissions of the parties, the report of the independent expert commissioned by the Ministry (“the expert”) and the other evidence in this matter. I emphasise that each determination is considered on a case-by-case basis.

2. The building work

2.1 The existing building

2.1.1 The existing building is a roof-level apartment built on top of the Dilworth Building, which is a Historic Place Category 1 listed building. The apartment is one of four constructed in 1994. It has steel and timber wall framing, and timber roof joists. The agent states that the timber wall framing is non-loadbearing, as the roof is supported on steel posts and beams.

2.1.2 The apartment has a concrete foundation with a wooden floor laid on joists over this. It is surrounded by roof-top paving also laid on top of the concrete pad. The paving is laid over a Butynol membrane which runs up behind the external wall cladding and under the door and window sills. The external wall cladding is unpainted stucco plaster, applied over a fibre-board rigid backing. The apartment has composite aluminium and timber joinery, and a part-flat, part-sloping membrane roof.

2.2 The proposed building work

2.2.1 In 2011, due to a failure of the apartment’s roof drainage, the apartment was subject to a flood that caused damage to the internal wall linings. When the linings were removed they revealed damage to the bottom of the external cladding and wall framing as a result of water ingress through the external wall cladding. No drainage gap had been provided between the stucco and the paving, and wicking has occurred at the bottom of the cladding’s fibre-board backing sheet. There is also some damage to the timber wall framing where the stucco has penetrated the membrane and moisture has entered. The agent states that this damage is limited to the bottom 300mm of the fibre-board backing and ‘limited areas’ of the timber wall framing ‘that can be repaired in isolation and leaks addressed’.

- 2.2.2 The application for building consent was for remedial work to construct concrete nib walls at the base of the existing external walls of the apartment following removal of the existing bottom plates and base of the timber studs. The nib walls would be along 'the internal framing line'. In a report provided as supporting documentation to the consent application, the agent states that these nib walls were supposed to have been built when the apartment was first constructed, but were not. The nib walls would be 280mm high by 90mm wide.
- 2.2.3 A new 45mm thick wooden bottom plate would be installed over a damp-proof membrane on the top of these nib walls. Any decayed framing timber 'associated with the concrete nib work' would be removed. A treatment would be applied to the rest of the framing 'to mitigate risk of further decay'. Any holes in the Butynol membrane would be fixed as the framing was removed, but otherwise the membrane and existing plaster cladding would be left undisturbed.

3. The background

- 3.1 The applicants engaged a designer ("the designer") to prepare the plans and specifications for the proposed building work, and to apply for building consent on their behalf.
- 3.2 The designer applied for building consent on 14 August 2012. The application included copies of the plans and specifications and a supporting report by the agent dated 10 August 2012. This report set out the background to the application and stated it was for a 'limited work consent'.
- The owners wish to restore the interior lining to allow the apartment to be occupied. It is proposed to fit the concrete nib to the internal framing line during this work so that there can be confidence in the durability of the building work being considered. Providing a nib will protect the new plate to be provided.
- 3.3 The report acknowledged that 'future work will be required to address the cladding and framing issues that are discrete from the interior framing line'. This would include identifying and removing any other affected timber framing, extending the concrete nib under the window and door thresholds (these were excluded from the consent being applied for), rectifying the external cladding and potentially remodelling the exterior walls. However, because of the heritage nature of the Dilworth Building it was anticipated that work affecting the outside of the apartment could be a lengthy process and, as a result, it was 'not part of the consent application at this time'.
- 3.4 The report concluded that the applicants were relying on section 112 of the Building Act in applying for a building consent for limited work.

The provision of the concrete nib will ensure that the 'building work' (the replacement plate and lining attached to it) complies with the building code. The situation with the existing cladding will be unaffected by the works undertaken and therefore satisfy s112(1)(b) "*continue to comply with the other provisions of the building code to at least the same extent*" as before the alteration'...The building while non compliant in parts will, with the work being proposed, be not dangerous or insanitary and will be monitored to ensure this unacceptable threshold is not reached in the future.

- 3.5 On 20 September 2012, the authority wrote to the designer requesting further information about the building consent application. This included
- details of how the plaster cladding will be supported when the damaged substrate (backing board) is removed and how the plaster mesh will be fixed back onto the concrete nib
 - a method for repairing any plaster cladding that is damaged when the substrate and framing are removed
 - details of how moisture will be prevented from wicking up the cladding in areas where the cladding remains in contact with the deck
 - evidence of how moisture ingress in the walls under the windows and doors will be prevented from continuing to affect the wall framing
 - elevations of the walls to be shown on the plans
 - a revision of the specification for any treated timber that was replaced
 - the removal of the moisture probes from the plans as these were not part of the consent.
- 3.6 The authority also stated that:
- The [agent's] report refers to identifying damaged timber outside of the area of work where the nib is to be installed for removal in the future. This is unacceptable to [the authority] and all damaged timber is required to be removed to prevent any further spread of decay. The report goes on to state that those areas of damaged timber will be treated with a preservative to prevent the further spread of decay. This is not acceptable as the product is not designed for use on already decayed framing.
- The authority also requested information about some other matters that have subsequently been resolved and accordingly those have not been included here.
- 3.7 The agent responded to the authority's letter in an email dated 20 September 2012. The email addressed each of the authority's request items and asked that the building consent 'be issued for only the building work we have indicated to be done'.
- 3.8 The agent and authority held a site meeting at the applicant's apartment on 12 October 2012. Following this, the authority wrote to the agent on 17 October refusing to grant the building consent. The grounds given for the refusal were:
- [The authority] believes the introduction of the concrete nib walls to only part of the wall line and also by not altering the external cladding to form an acceptable clearance above the deck level will not alleviate the issues of stopping the moisture from entering the building and stopping it from causing damage to the adjoining wall and floor framing and also from becoming a serious health risk should it be left unchecked. Also not addressing the damaged framing under the door and window sills and leaving damaged timber within the wall frame is not accepted industry practise (sic).
- 3.9 The agent responded to the authority's refusal in a letter dated 24 October 2012. This letter stated that the authority's refusal was not based on the proposed building work's non-compliance with the Building Code under section 49 of the Act, but rather on the authority's requirement that additional work should be included within

the consent, and that the authority did not have the mandate to do this. The letter referred to the requirements for remedial work under section 112 of the Act and to previous determinations and concluded that, as the authority had agreed that the applicant's apartment was not dangerous, earthquake prone or insanitary under section 124 of the Act, it 'has no jurisdiction over this existing building and must consider only the *building work* described in the application.'

3.10 The authority wrote to the agent on 31 October 2012 repeating its refusal to grant the building consent on the grounds set out in its previous correspondence.

3.11 The Ministry received the application for determination on 5 November 2012.

4. The submissions

4.1 The agent made a submission in a letter and email accompanying the application for determination. The submission set out the background to the dispute and repeated the agent's arguments from the correspondence between the parties. It stated that the applicants were seeking a determination directing the authority 'to consider the consent application in respect to only the building work the owner wishes to have included at this time.'

4.2 The applicants provided copies of

- the building consent application and supporting documentation
- correspondence between the parties.

4.3 The authority did not acknowledge the application for determination or make a submission in response.

4.4 Submissions on the expert's report

4.4.1 In the paragraph 5.3.2 I have summarised the authority's requests for more information (as itemised in its letter of 20 September 2012), the expert's comments about these requests (from the expert's report) and the agent's submission in response. Note that some requests have subsequently been resolved between the parties and are not included in this determination.

The applicant

4.4.2 On 6 December 2012, the agent made a submission on the applicants' behalf in response to the expert's report. With the submission, the agent enclosed copies of a BRANZ Bulletin³ referred to by the expert and case law⁴.

4.4.3 In the submission, the agent restated his opinion that the matter for determination is whether the authority was correct 'to insist on more work being done than the owner wishes to include in the scope of work at this time', and suggested that the expert should have limited his considerations to this issue.

³ BRANZ Bulletin No. 365 (1998): Acceptable plans and specifications

⁴ Auckland City Council v New Zealand Fire Service, 19/10/95, Gallen J, HC Wellington AP 336/93, partially reported at [1996] 1 NZLR 330.

- 4.4.4 The agent then responded to each of the points in the expert's report, reiterating the arguments from his earlier submission and from the correspondence between the parties where relevant.

The authority

- 4.4.5 The authority provided a submission dated 11 December 2012 in response to the expert's report and commented briefly on the authority's view of the matter.
- 4.4.6 In regards to the information provided in the consent documentation and construction details referred to in the expert's report, the authority submitted that it accepts the nib detail in principal in some locations, however clarification is needed in others such as where there are two bottom plates and whether in those instances there would be one or two nibs installed.
- 4.4.7 The authority considers that even following additional provisions, noted in the expert's report as being required for the new building work to resist the ongoing moisture ingress, compliance with E2.2 will not be achieved as moisture will still be entering the building. The authority noted that it could be argued that under section 112 of the Act the building as a whole after the alteration only needs to comply as far as E2 is concerned to the same extent (ie leaking) as it did before the alteration work. This would have a detrimental effect on the new works, preventing the new works from complying with the Building Code, and accordingly the authority can not issue the consent.
- 4.4.8 The authority also noted

It is not normal practice to leave damaged timber in place that would under normal circumstances require removal. Leaving it (the damaged timber) in place is not only somewhat misguided, but would be negligent as clearly the timber does not meet B2 and any spoils within the rotten timber will only spread, creating further non-compliance.

4.5 Submissions on the draft determination

- 4.5.1 A draft determination was issued to the parties for comment on 4 January 2013. The draft did not consider the matter of the authority's exercise of its powers in respect of the grounds for refusing to issue the consent, but concluded that the authority was correct in its refusal as there was insufficient information to establish that the proposed building work would comply.

The authority

- 4.5.2 In a letter dated 24 January, the authority reiterated its view that it could not be satisfied the building work would comply in respect of Clause B2 and E2, and submitted (in summary):
- in regards to the interpretation of section 112, the authority 'accepts that the building cannot be made to meet current code requirements unless those items outlined in paragraph [6.2.5] come into play', and it is the new building work and its relationship to the existing building that the authority has concerns

- if the building continues to leak but that leak has no effect on the proposed work, then the proposed work complies with the requirements of section 112; however if leaks effect the proposed work 'it will then prevent [it] from remaining durable' and the new work would fail to meet the durability requirements of the Building Code
- 'the conditions within the wall cavity where the proposed work is to be undertaken will continue to be conducive to fungal growth as long as moisture ingress continues ... as long as moisture continues into (sic) enter the area of the new work and the fungi continues to grow, [the authority] can not be satisfied on reasonable grounds that compliance with E2 can be achieved for the new work'
- the building contains shops at ground level and offices at levels between the shops and apartments; 'therefore accessibility as well as means of escape from fire are applicable' in terms of the application of section 112.

4.5.3 The authority also stated its view that

...leaving rotten timber in contact or close proximity to new timber is negligent. The spread of rot moulds etc from contaminated timber to new timber will happen, even if the new timber for example is treated to H3.2.

The applying of on site treatment onto existing timber to be left in place which contains decay can limit the progression of decay in its early stages of development. Site applied treatments and new treated timber will not reliably prevent decay. If timber continues to be exposed to high levels of moisture, (in excess of 18% moisture content), decay will occur, hence the need to remove all timber one metre beyond the last decay.

The applicant

4.5.4 The applicant's agent forwarded a detailed and wide ranging submission by email on 24 January 2013, which included commentary on the determination process. Though I have read the submission in full, I have provided only a summary of the points raised (below).

4.5.5 The agent submitted that the matter for determination was the refusal of the consent on the grounds that the authority wanted 'more work included than the owner wishes to include at this time,' and that the authority was incorrect 'to require a greater scope than described in the application'. The agent also submitted that the information put forward by way of the expert's report was 'new evidence' and 'outside of the chief executive's power to introduce' (see paragraph 6.5 for further discussion on this) and that the assessment should have been made only on the plans and not a site inspection.

4.5.6 The agent also submitted that

- the report referred to in the authority's letter of 20 September 2012 (refer paragraph 3.6) did not say that the preservative would 'prevent' the further spread of decay, but that the preservative would be applied to all framing 'to mitigate risk' of further decay
- the main area of timber 'untouched and still damaged is where wall (sic) is double framed. The outer wall in this case will not be touched by the new

work (except [the application of the preservative] to mitigate decay) but will be done later'

- the concrete nib wall will not decay even if the present conditions are maintained
- the bottom plate will be raised 200mm higher than present; decay is in the lower 200mm of the wall and framing above this line is 'unaffected by conditions'
- the risk of decay is mitigated by using the preservative and H3.2 treated timber
- the contractor 'is confident that any tears and holes (from cladding fixing staples) can be properly rectified by an over lay of membrane from the inside face'
- where there are two bottom plates the 'outer plate is independent of the proposed building work'
- if the repairs to the membrane are undertaken and the concrete nib provided 'this alleviates the present situation' and there is then no requirement for the specifications to demonstrate the proposed work will be of a moisture resisting standard (refer paragraph 6.4.2)
- the plaster cladding is not now fixed to the bottom plate and the new building work will not alter that; as long as the cladding is not removed at the tile junction then the loads continue to be carried by the tiles, and only cutting the stucco would leave it unsupported

4.5.7 In the agent's opinion

It is not substantiated that the existing conditions would be detrimental as the new materials are durable concrete and H3 framing further from and now above current leak source.

The agent also stated

[The intention is] to provide a detail that could survive in a potentially adverse environment and this was [the] reason for [the] durable concrete solution to the nib.

The concrete nib and treated plaster would need to be at risk and this is not the case. I have amended the determination as I consider appropriate.

4.6 Submissions on the second draft determination

- 4.6.1 A second draft determination was issued to the parties for comment on 4 February 2013. The second draft concluded that the authority incorrectly exercised its powers in its refusal to grant building consent for the proposed building work on the grounds given in its refusal, but that there was insufficient information provided in the consent application to establish the work would comply with the Building Code to the extent required and accordingly the authority's decision to refuse consent was confirmed.

The authority

4.6.2 In a letter dated 21 February, the authority restated its views on the application of section 112 and referred to a previous determination (2011/117) which said

I note that the authority raised questions about its ability to consent and sign off building work where there are non complying features of the existing building. As described in paragraph 5.3.1 [of Determination 2011/117], it is my view that the owner is entitled to decide the scope of work to be undertaken. Furthermore, it is my view that the authority can only consider non complying features of the existing building if the features affect the compliance of the new building work.

4.6.3 The authority stated that it ‘does not want the entire building to comply’ but that it is the non-complying features of the existing building and how they will affect the new building work that are of concern.

4.6.4 The authority also stated that the ground floor retail spaces and office floors above contain spaces which require the provision of access and facilities for people with disabilities. The authority noted that to state that there is no requirement under section 112 for the building to have provisions for access and facilities for people with disabilities was incorrect, but the authority referenced section 112(2)(a) and stated it would be unreasonable to require the upgrade of these features considering the proposed amount of work.

The Agent

4.6.5 The agent made a submission on the second draft determination on 21 February 2013 and in response to the authority’s submission on 22 February 2013. The submissions reiterated the agent’s views stated in earlier submissions and noted the following (in summary):

- no building work would be carried out that would affect the external envelope and therefore Clause E2 of the Building Code is not applicable
- the proposed building work will not make the existing building less compliant
- the only building work, and therefore the only part that needs to be assessed for compliance, is the proposed remediation of the internal side of the wall. The compliance of the whole wall does not need to be assessed nor is there a requirement to predict its impact on the new building work but only to consider ‘known conditions of use’.

4.6.6 The agent noted that agreement for the work to be carried out under schedule 1 as exempt work was originally sought but refused by the authority, and further discussed the application of schedule 1 to repair work, and discrete repairs and the level of maintenance required in situations where deficiencies have been identified.

4.6.7 The agent requested that the determination decision reference ‘the specific information that was insufficient in the building consent application so that the owner is in no doubt as to the information that the [authority] is entitled to request and [the owner] is now required to provide’.

- 4.6.8 In response to this I refer the agent and owner to paragraph 6.4.2 which sets out those areas in which I consider the application for consent was deficient. I also note that under section 48(2) of the Act the authority is entitled to ‘require further reasonable information in respect of the application.

5. The expert’s report

- 5.1 As mentioned in paragraph 1.5, I engaged an independent expert to assist me. The expert is a member of the New Zealand Institute of Architects. The expert was engaged to review the building consent documentation and provide a report about the proposed building work and in relation to the existing building. The expert inspected the applicants’ apartment on 20 November 2012 and provided a report on 2 December 2012.

5.2 The existing building

- 5.2.1 The expert’s site inspection confirmed that there were obvious risks of leaks from where the external cladding finished at or below the paving, and from vertical junctions in certain of the apartment’s walls. Inspection inside the apartment where internal linings and floor boards had been removed found evidence of past leaks and water damage. The expert concluded that it was ‘clear, and not disputed by the applicant, that the external walls and timber floor zone at the perimeter zone are subject to ongoing leaks’. The expert also considered it likely ‘that bracing loads at least’ must be being transmitted through the fibre-board backing boards on the external cladding.

5.3 The building consent application

- 5.3.1 The expert reviewed the building consent application documentation with regard to
- the adequacy of the information provided in support of the consent application
 - compliance of the proposed building work with the Building Code
 - the effect of the proposed building work on the compliance of the existing building under section 112 of the Building Act
 - the authority’s requests for further information and grounds for refusing to grant building consent.
- 5.3.2 With respect to the authority’s requests for further information, the expert commented on whether the requests were justified, and if so, what additional information was required. I have summarised the expert’s comments, together with the agent’s submission on them, in the table below.

Item 4	‘Detail of how the area of plaster cladding where the work is to occur will be supported with the removal of the damaged substrate and how the plaster mesh will be fixed back into the concrete nib is required to be provided on the plans.’
Expert’	‘This is a reasonable request, because the fixing of the [fibre-board backing] and mesh will be cut during the removal of the existing framing in the nib zone, and no new fixing is indicated, leading to the risk of further deterioration, cracks etc at the base.’

Agent	<p>'This is a reasonable request but the fact is there is no integrity at present between the bottom plate fixings and the plaster.</p> <p>This is an issue that should be flagged to be included with the future work.</p> <p>The [fibre-board backing] is largely missing at the lower 200 of the wall and fixings ineffective. The cladding loads are supported by fixings above and the tiling hard to bottom termination that while compromising drainage and causing wicking provides structural support for the cladding to a greater degree than any fixing might be expected.</p> <p>The integrity of the plaster is good and cracking not evident.'</p>
Item 5	'...provide a methodology of how the plaster cladding is to be repaired where it is damaged by the removal of the framing and substrate.'
Expert	'This is a reasonable request given the risk of damage to the plaster during the works.'
Agent	<p>'The plaster will not be further damaged and will only be repaired when further work is undertaken but not now under this consent. It is not part of the "building work process" and not a likely risk.</p> <p>This is not reasonable as 'risk' is speculation and builders are experienced at removing framing under these circumstances. It is a performance based code.</p>
Items 6, 7 and 10	<p>'Detail of how the capillary action of moisture up the cladding is to be prevented while the cladding is left in contact with the decking is required to be provided on the plans.'</p> <p>'...provide evidence of how moisture ingress from the wall areas under the doors and windows that are to be left undisturbed is to be prevented from continuing to affect the adjoining wall frame.'</p> <p>'The [agent's] report refers to identifying damaged timber outside of the area of work where the nib is to be installed for removal in the future. This is unacceptable to [the authority] and all damaged timber is to be removed to prevent any further spread of decay. The report goes on to state that those areas of damaged timber will be treated with a preservative to prevent the further spread of decay. This is not acceptable as the product is not designed for use on already decayed framing.'</p>
Expert	'[These requests relate] to existing construction, not to the works for which consent has been applied for and is not an s112 issue'
Agent	Agreed
Item 8	'Elevations of the unit walls are required to be provided on the plans.'
Expert	'This is a reasonable request and necessary to bring the drawings up to the standard indicated [in] BRANZ Bulletin 365.'
Agent	<p>'There is no work to elevations and extra compliance costs not justified. The plans will be provided but the determination should clarify this requirement for internal alterations only.'</p> <p>'Bulletin 365 is not a compliance document.'</p>
Item 11	'The details show moisture probes in the timber frame with a note stating 'not part of the consent'. Please revise the detail with the probe and note removed.'
Expert	'It is common for drawings to include both work for which consent is required and not required...and this request is unreasonable.'
Agent	'Permanent probes have been well considered in such determinations as 2010-79 and others. They are efficacious to understanding performance and giving owner understanding of moisture level.'

5.4 The expert was of the view that sufficient specifications were required to demonstrate that the proposed building work will be of a moisture-resisting standard, given that it will occupy an area that is and will continue to be subject to moisture

ingress. The expert considered the additional provisions that would be needed to be added to achieve this included:

- stainless steel or other chemical and moisture resistant fixings, for use between the wall studs and new bottom plate
- a moisture resistant lining
- provision to ensure that the insulation, when reinstalled, cannot transfer moisture across the framing zone.

6. Discussion

6.1 The matter for determination is whether the authority correctly exercised its powers in refusing to grant building consent for the proposed building work. In considering this matter I must consider the reasons given for the refusal and whether there was sufficient evidence provided in the building consent application for the authority to conclude on reasonable grounds that the building work and the existing building (as altered) would comply with the Building Code to the extent required by the Act.

6.2 The extent of Building Code compliance required by the Act

6.2.1 I have not been provided with a copy of a code compliance certificate for the original construction of the apartment, and neither of the parties has commented on this. However, I assume that a code compliance certificate was issued after construction was completed; if that is correct the proposed building work constitutes an alteration to an existing building and the proposed building work must therefore be considered under section 112 of the Act. Under section 112, the building after the alteration must:

- comply as nearly as is reasonably practicable with respect to means of escape from fire, and
- comply as nearly as is reasonably practicable with respect to the provision of access and facilities for people with disabilities, and
- continue to comply to as at least the same extent as before the alteration for all other Building Code clauses.

6.2.2 Section 112 does not override the section 17 requirement that all building work must comply with the Building Code, to the extent required by the Act, unless the building work is subject to a waiver or modification of the Building Code.

6.2.3 I note that the authority has raised a number of issues that relate to the existing building. The application for a building consent is for the construction of a concrete nib wall and new bottom plate at the base of some of the apartment's existing external walls (refer to paragraph 2.2). I have therefore considered:

- whether the proposed building work (which is the new building work) will comply fully with the Building Code
- whether the building, after the building work is carried out, will comply as nearly as is reasonably practicable with respect to means of escape from fire

- whether the building, after the building work is carried out, will continue to comply to at least the same extent as before the alteration for all other Building Code clauses.

6.2.4 I accept that the authority has considered the requirement for provision of access and facilities for people with disabilities under section 112(2)(a) and I agree that it would be unreasonable to require the building as a whole be assessed in this regard where the alterations are to a single residence within a larger building with a mixed use and mixed ownership arrangement.

6.2.5 I note that it is my view that once a code compliance certificate has been issued for building work, an authority is unable to take any action in respect of that work unless

- the building is dangerous, is earthquake-prone, or is insanitary, or
- the owner decides to alter the building, change its use, or change its intended life.

6.2.6 While the condition of a building may mean that it is not currently code-compliant, this of itself does not oblige a building owner to bring the existing building into compliance with the Building Code. A building owner is only obliged to undertake building work in respect of an existing building for the reasons given in paragraph 6.2.4 above. I note here that many elements, including the cladding, may well be beyond the required 5 and 15 year durability periods.

6.3 **Matter 1: The grounds on which the refusal was made**

6.3.1 Section 49 of the Act requires '[An 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.'

6.3.2 The authority refused to grant the building consent and in its letter of 17 October 2012 (refer paragraph 3.8) gave as the basis for that refusal the following:

[The authority] believes the introduction of the concrete nib walls to only part of the wall line and also by not altering the external cladding to form an acceptable clearance above the deck level will not alleviate the issues of stopping the moisture from entering the building and stopping it from causing damage to the adjoining wall and floor framing and also from becoming a serious health risk should it be left unchecked. Also not addressing the damaged framing under the door and window sills and leaving damaged timber within the wall frame is not accepted industry practise (sic).

6.3.3 The reason given for refusing the building consent application did not relate to the compliance of the proposed building work with the Building Code or the ongoing compliance of the existing building under section 112. I consider the authority was incorrect in its decision to refuse to grant the building consent on the basis that the proposal was for discrete repairs and did not include a wider range of possible remediation work.

6.4 **The code compliance of the proposed building work**

- 6.4.1 Setting aside the reasons the authority gave for its refusal to grant consent, I must now consider whether the authority was correct in its decision in respect of the compliance of the proposed work before I can confirm, modify, or reverse that decision.
- 6.4.2 I have assessed the building consent application in terms of section 112 of the Act, in conjunction with the comments of the expert, and note that the building consent application does not include:
- sufficient specifications to demonstrate that the proposed building work will be sufficiently durable to withstand the effects of moisture, given that it will occupy an area that is, and will continue, to be subject to moisture ingress
 - details of how any damage to the deck membrane upstand and plaster cladding, as a result of the building work, will be made good
 - details of how the existing cladding will be fixed to the proposed work, once installed
 - elevations of the external walls.
- 6.4.3 I do not accept the authority's position that 'site applied treatments and new treated timber will not reliably prevent decay'. The bottom plate is treated to CCA H3.2 which is a treatment designed to provide this degree of protection without leaching. In respect of the existing framing, any site-applied treatment would not reduce the extent to which the existing building elements comply with the Building Code, as required by section 112(1)(b) of the Act.
- 6.4.4 While these are a relatively small number of issues it is my view that they would have provided the authority with good grounds for refusing to grant the building consent if the authority had turned its mind to these issues at the time.
- 6.4.5 However, the authority did not identify these issues at the time of making its decision and instead requested further information about a number of issues; not all of these were related to the proposed building work but were in respect of the compliance of the existing building. I acknowledge the authority's concerns in regards to the remedial work required to make the apartment weathertight and durable, however as noted in paragraph 6.2.6, while the condition of the building may mean that it is not currently code-compliant this of itself does not oblige a building owner to bring the existing building into compliance with the Building Code and the authority can only consider those matters in their relationship to the compliance of the proposed building work and under section 112.
- 6.4.6 While I have concluded the authority was incorrect to refuse to grant the building consent for the reasons it gave at the time (refer paragraph 6.3.3), I have decided not to reverse the decision of the authority because of the matters identified in paragraph 6.4.2. These matters would have provided the authority with good grounds for refusing to grant the building consent had the authority turned its mind to these matters at the time it refused to grant the building consent.

6.5 Other matters

- 6.5.1 The submissions by the agent raised a number of queries about the powers and procedures for making a determination and I have discussed these points below.
- 6.5.2 The agent submitted that the matter for determination should be whether the authority was correct to refuse to grant building consent because the proposal was for discrete repairs and did not include a wider range of possible remediation work; that the expert should not have considered the code-compliance of the existing building; and that the determination was wrong to consider whether there existed reasons for not granting the building consent other than those identified by the authority and raised in the application for determination by the agent.
- 6.5.3 The agent also submitted that based on these views of the scope of the matter for determination there was no power to engage an expert to assist with the determination and referred to *Beattie v Far North District Council*⁵ for the proposition that an expert engaged by the chief executive 'can only approach the matter within the statutory framework'.
- 6.5.4 I note that the matters that may be the subject of a determination must be one of the matters set out in section 177 in respect of which an application for determination may be made. The relevant power to make a determination here is the authority's exercise of its power of decision in respect of an application for a building consent under section 177(2)(a) of the Act.
- 6.5.5 In order to understand whether the authority was correct to refuse the application for building consent, I need to determine whether it had reasonable grounds for being satisfied 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'. This in turn requires me to decide whether or not the proposed building work achieves the degree of compliance required by sections 17 and 112 of the Act.
- 6.5.6 In regards to the assessment of elements of the existing building, I am of the view that establishing compliance of the proposed building work requires that the existing building and the interaction between those components be taken into account in respect of the current and ongoing moisture ingress, and the assessment was appropriate in that regard.
- 6.5.7 The decision in this determination is that the authority was incorrect to refuse to issue the building consent because the proposal did not contain a wider range of possible remediation work that could be undertaken. However, I have declined to reverse the decision of the authority given there are other reasons that would have been available to the authority for refusing to grant building consent if the authority had turned its mind to those issues.⁶
- 6.5.8 In respect of the chief executive's power to engage experts to assist with a determination I note section 187(1) provides 'the chief executive may engage a

⁵ *Beattie v Far North District Council* DC Whangarei CIV-2011-088-313, 14 November 2012

⁶ For an analysis of the important distinction between the power to make a determination and the exercise of discretion as to relief under section 188 see *Cooper v Tasman District Council* DC Nelson CIV-2009-042-000116, 21 July 2010.

suitable person to assist the chief executive in relation to any application for a determination' and subsection (3) provides 'the chief executive may, in making a determination, rely on a report from the person.' I consider these provisions provide ample basis for my decision to engage an expert to prepare a report on the code-compliance of the proposed building work.

7. What happens next?

7.1 Taking account of the findings of this determination, the authority should clarify the information it requires to be provided to enable it to be satisfied on reasonable grounds that the proposed work will comply with the Building Code to the extent required by the Act. The building consent application should be modified and resubmitted to the building consent authority, taking into account the findings of this determination. The authority should then consider the application in terms of section 112 of the Act as outlined in this determination.

7.2 The applicants are aware of the weathertightness failures of the external wall cladding and this is one of the primary concerns of the authority. The agent has noted that the consenting process for remedial work to the external cladding will be protracted due to the heritage status of the building. I note here the expert recommended the proposed remedial work may be better approached as stage one of a staged application for re-cladding, and I suggest the applicants and their agent give this due consideration.

8. Decision

8.1 In accordance with section 188 of the Act, I hereby determine that

- the authority incorrectly exercised its powers in its refusal to grant building consent for the proposed building work on the grounds given in its refusal.
- there was insufficient information provided in the consent application to establish on reasonable grounds that the building work will comply with the Building Code to the extent required by the Act, and accordingly I confirm the authority's decision to refuse to grant building consent.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 4 March 2013.

John Gardiner
Manager Determinations and Assurance