



Determination 2017/016

Regarding the decision to issue a building consent for repairs to a multi-storey building at 9 Hopetoun Street, Freemans Bay, Auckland



Summary

This determination is concerned with the compliance of discrete repairs proposed to the top levels of a multi-storey building. The determination considers whether the authority was correct to issue a building consent for that work, and whether the replacement of a related deck membrane was exempt from requiring a building consent.

1. The matter to be determined

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

1.2 The parties to the determination are:

- the GK Hannam Family Trust, which is the owner of Unit 900 on levels 9 and 10 of the property that the proposed building work relates to, and the applicant in the current determination (“the applicant”). The applicant is represented by its solicitor

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

- Body Corporate 126001, which is the body corporate of the property that the proposed building work relates to (“the body corporate”)². The body corporate is acting through its manager as agent and is represented by its solicitor
- Auckland Council carrying out its duties and functions as a territorial authority or a building consent authority (“the authority”).

1.3 This determination arises from the authority’s decision to issue a building consent for proposed building work on the decks, balustrades and external wall framing of units 801 and 900 on levels 8, 9 and 10 of the property. The applicant opposes the issue of the building consent on the grounds that the proposed building work will not comply with the Building Code. The applicant also disagrees with the authority’s decision that the replacement of the waterproof membrane on the level 9 deck was repair and maintenance and therefore exempt from requiring a building consent.

1.4 Accordingly, the matter to be determined³ is whether the authority correctly exercised its power of decision in issuing a building consent for the proposed building work. In making this decision, I must also consider whether the authority was correct to treat the proposed building work to replace the deck membrane as exempt building work under subpart 1 of part 1 of Schedule 1 of the Act⁴.

1.5 In making my decision, I have considered the application, the submissions of the parties, the report of the independent expert commissioned by the Ministry to advise on the dispute (“the expert”), and the other evidence in this matter. I have not considered any other aspects of the Act or Building Code, beyond those required to decide on the matter to be determined.

2. The proposed building work

2.1 The property is a 13-level multi-use building in a central suburb of Auckland. The building was constructed in 1988. Its lower levels are used for commercial purposes, while the upper levels are apartments. The apartments that the building work relates to are on levels 8, 9 and 10. The building as a whole has a concrete pile foundation, concrete-framed structure and concrete walls. The exterior walls have lightweight steel stud framing. They are clad with an exterior insulation and finish system (EIFS) and spandrel cladding. The joinery is aluminium.

2.2 All of the apartments have decks. The level 9 apartment has a large deck (approximately 375 sqm), which in places forms the roof of the apartments below. This deck is finished with a ‘peel-and-stick’ membrane, which is attached directly to the concrete floor slab below. Unglazed terracotta tiles on a grout bedding have been installed on top of the membrane. The concrete floor slab and membrane have no falls; minimal falls had been incorporated into the overlaying grout bed and tiles.

2.3 At some point there have been leaks from the level 9 deck, predominantly around the edge of the deck where it abuts the balustrade. These have caused corrosion to the steel framing of the level 9 balustrade wall, and the external wall framing and cladding of the level 8 apartment below.

2.4 The body corporate propose to repair the damage by replacing the deck membrane, fixing new steel framing members to the damaged framing, and recladding the affected areas on levels 8 and 9. A new plaster façade system will be used on the

² The body corporate was acting as agent for its members when it applied for the building consent and exemption, and as such is included as a party to the determination.

³ Under sections 177(1)(b) and 177(2)(a) of the Act.

⁴ In this determination, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

inside face of the level 9 balustrade walls. The body corporate applied for a building consent for this building work.

3. The background

- 3.1 The applicant is the owner of the unit title (stratum in freehold) for the level 9 apartment (referred to as Unit 900, or Unit Q on the plans).
- 3.2 In 2014, it became apparent that water seepage from the deck on level 9 of the building had caused extensive corrosion of the steel external wall framing on the level 9 parapet, as well as below the deck and within the external walls of the unit on level 8 below. When the damage was detected in 2014, various temporary repairs were carried out at the east and west ends of the level 9 deck, including overlaying the tiles with a PVC sheet membrane at the eastern end, and removing the tiles and screed at the western end. However, these repairs were only temporary and leaks are beginning to reoccur.
- 3.3 In 2015, the body corporate commissioned a company of consulting engineers (“the body corporate’s engineer”) to determine the extent of the damage and develop a programme of works to repair it. In December 2015, the body corporate applied for an exemption under sub-part 2 of part 1 of Schedule 1 of the Act for the building work relating to repairs to the deck balustrade and wall, and replacement of the deck membrane.
- 3.4 On 23 December 2015, the authority wrote to the body corporate advising that its application for an exemption under sub-part 2 of Schedule 1 had been declined. The grounds given were that replacing the framing within its specified life and potentially with a different type of framing (timber) did not constitute normal repairs and maintenance; and that the installation of a new cavity-based cladding system also was not repairs or maintenance. In the authority’s opinion, both types of work required a building consent. With respect to the deck membrane, the authority concluded that as the existing sheet membrane was to be replaced with another sheet membrane, although of a different type, this would fall within the general exemption for repairs, maintenance and replacement in Clause 1(1) of Schedule 1.
- 3.5 In December 2015, the applicant commissioned a company of property and building consultants (“the applicant’s consultants”) to review and report on the external envelope of the entire building. The consultants concluded that the remedial works should include full replacement of the balcony membrane, and recladding of the adjacent balustrade and walls; and that the latter work needed to occur in the context of recladding for the entire building. The consultants were of the view that the failures in the balcony membrane and cladding were likely to be present throughout the building, and that carrying out isolated repairs was unlikely to be effective.
- 3.6 In January 2016, the body corporate applied for a building consent to carry out repairs to the deck, balustrade walls and external wall cladding. In applying for the building consent, the body corporate was acting in its capacity as agents for all of the owners of units within the building. With its application, the body corporate submitted plans prepared by its engineer. The authority requested further information, and the body corporate supplied this in March 2016.
- 3.7 The authority issued a building consent, based on the submitted plans and specifications, on 15 April 2016 (B/2016/1009). The building work authorised by the consent was ‘RECLAD – Levels 8 and 9 – repair water damaged steel wall framing’.

The consent was stated to be subject to a condition under section 113 of the Act, as follows:

Under s.113 of the Act, this building must be altered, removed or demolished on or before the end of 15 years from the date of issue of this consent (being the specified intended life of the building).

Note: This condition is only imposed on a building consent for a building intended to have a life of less than 50 years. In order to extend the specified life of the building, the owner must give written notice to [the authority] under section 114 of the Building Act and obtain approval from [the authority] under section 116.

3.8 In April 2016, the applicant commissioned its consultants to review the authority's decision in issuing the building consent, in particular 'the suitability of the information submitted in support of the application'. The main conclusions in the consultants' report can be summarised as follows.

- The authority had 'failed to identify the consequential works necessary' to install a new deck membrane, and that as a result it was 'not possible to carry out a like for like repair solution in accordance with Schedule 1'.
- The building exceeds the height limits in the Acceptable Solution for Clause E2, and as a result the authority 'ought to have requested building specific façade design wind pressure calculations to determine if the proposed cladding system was suitable for use, as per the cladding manufacturer's advice'.
- The authority relied on assertions from the body corporate's engineer that the joinery in the building was performing, when in fact several previous reports had identified that it wasn't. 'Before relying on the statements provided by the [body corporate's engineer] [the authority] ought to have requested evidence that demonstrated that the joinery was in fact performing'.
- The authority has not considered 'the degradation of the existing cladding system' or how this is to be fixed to the replacement framing.
- The building consent will create handrail heights that do not comply with the Building Code and will create a risk of falls. As part of the wider repairs, 'a full width balustrade cap flashing ought to be constructed with suitable falls for moisture. The top fixed handrail should also be replaced with a side fixed handrail and be increased in height to comply with [Building Code] clause F4'.
- The building consent contains a condition limiting the life of the building works to 15 years. The building has a future lifespan of 22 years. 'In limiting the life expectancy of the new structural elements to the balustrade wall ... [the authority] has reduced the lifespan of the building by 7 years'.
- Due to the above matters, the authority could not have been reasonably satisfied that the building works would satisfy the durability requirements in the Building Code, and should not have issued the consent. The authority also should not have relied on the evidence of the applicant's engineer who is not a weathertightness expert.
- Previous reports have identified that a number of factors are causing the building to leak, not just the deck membrane, and even after the completion of the work in the building consent the building will 'remain at risk of failure'.

3.9 The applicant applied for a determination about the authority's decisions to issue building consent B/2016/1009 and in respect of the exemption, and this was received by the Ministry on 5 May 2016.

4. The submissions

4.1 The applicant made a submission with its application for a determination. In the submission, the applicant asserted that the authority should not have issued the building consent or granted the exemption for the reasons set out in its consultants' report of April 2016 (see paragraph 3.8). The applicant stated that it was seeking a reversal of these decisions.

4.2 With its submission, the applicant included:

- a copy of its April 2016 consultants' report and attachments, including a certificate of title in relation to the applicant's apartment and various other reports relating to the building
- documents from the authority's property file for the property, including some of the building consent documentation.

4.3 The body corporate made a submission dated 6 July 2016. The submission clarified that in relation to the determination, the body corporate was acting on behalf of the owners of the three units on level 8 of the building. The main points of the submission can be summarised as follows.

- The authority declined to grant an exemption under subpart 2 of part 1 of Schedule 1. Accordingly the only matter for determination relates to the building consent.
- The proposed works if completed in accordance with the consented plans will comply with the Building Code and will not make the building less compliant, as required by section 112.
- Although the current condition of the building may not be code compliant there is no obligation on the body corporate to make it so.
- The authority was only obliged to consider the building works that formed part of the application for building consent, and does not have a mandate to require the body corporate to undertake additional works. Reversing the building consent would have this effect.
- It was never the body corporate's intention to bring the entire property up to a code compliant standard, and it is not obliged to do so. The building work will 'reinststate the integrity' of the cladding on the level 8 apartment and level 9 balustrade.
- The report relied on by the applicant is based on visual inspections and has been prepared without access to all the information. It is largely concerned with parts of the building that are not the subject of the determination.
- The replacement of the membrane is repairs and maintenance and covered by the exemption in Schedule 1 of the Act. 'Consequently, [the body corporate] is not required to consider the consequential works proposed in the report when replacing the membrane (and nor is [the Ministry])'.

- Alteration to the handrail was never part of the building consent application, and accordingly the authority could not require it to be bought up to new standards.
- The authority had good grounds to grant the building consent and this decision should be confirmed.

4.4 The authority acknowledged the application for a determination, but has not made a submission in response.

5. The expert's report

- 5.1 As stated in paragraph 1.5, I engaged an expert, who is a registered architect and building consultant, to assist me in this determination. The expert reviewed the building consent documents provided and conducted a site visit on 21 July 2016 to clarify certain issues in the documentation.
- 5.2 The expert provided a report dated 8 August 2016. In response to feedback from the parties, this was updated and a new report issued on 1 September 2016. The parties were provided with a copy of the revised report on that day.
- 5.3 With respect to the consent documentation, the expert found that there were omissions and lack of clarity with respect to the proposed new cladding, framing and joinery in the consented plans. There were also inaccuracies and omissions in the cladding specifications that formed part of the consent.
- 5.4 The expert's findings are summarised in the table below. From these findings, the expert concluded that 'the building consent documents are not sufficient to support an opinion that if complied with, the building work would necessarily comply with the requirements of [the Building Code]'

Document reference	Comment	Doubt as to compliance with Building Code clause
	Consented drawings	
S1	No comment	
S2	The approved plans do not show smoke detectors in the apartment. It is assumed that the existing fire detection system referred to in the fire report dated 22/09/2015 is in service and compliant.	Subject to confirmation
S3	<ul style="list-style-type: none"> • The text on Section AA is not legible • The nogs necessary to support the top and bottom edge of the cladding system indicated on S6 are not shown on this drawing. 	Unknown B1 & E2
S4	<ul style="list-style-type: none"> • No scale is indicated, it appears to be 1:25 • The nogs necessary to support the top and bottom edge of the cladding system indicated on S6 are not shown as continuous on this drawing. 	B1 & E2
S5	The text on the Zone A Demolition and Zone A Repair sections is not legible	Unknown
S6	<ul style="list-style-type: none"> • All typed text is too small and not clearly legible. • No building wrap is shown and it appears the plaster board is intended as a rigid air barrier. Was unable to find manufacturer's or other information that indicates that it is suitable or has been assessed for this purpose. • There is no support to the bottom edge of the new plaster board between studs, whereas the manufacturer's details show support at four edges. This leads to reasonable doubt that it will be sufficiently rigid to prevent movement and possible premature failure of the membrane that is to be fixed to it. • The studs indicated on S4 & S5 are at approximately 	B1 & E2

	<p>500-600mm centres, so there is no support for 50% of these battens.</p> <ul style="list-style-type: none"> It is proposed to retain a narrow strip of the existing cladding. This creates risks that it will fail because: <ul style="list-style-type: none"> it is a narrow strip of eps with cement topping and susceptible to breaking during the work and in service it is not a suitable material to provide the fixings indicated for the new over flashing it will not be possible to fix it to the new nogs because there is insufficient lap between the remaining panel and the gms framing member. Presumably the nogs are intended to be continuous, but only two are shown on drawings S4 & S5. 	
S7	<ul style="list-style-type: none"> The 'GI' – flashings are not dimensioned. The text generally is not legible 	E2
S8	<ul style="list-style-type: none"> The entirety of the 'As constructed details of existing windows' is not legible. Detail A – Section AA: the only connection shown for the new cladding studs to the primary structure is to a 90x45mm plate, which is fixed by nail-on connectors to a 140x65mm plate bolted to the underside of the concrete edge beam. No connection is shown to the top of the beam and there appears to be nothing new to resist horizontal wind and balustrade impact loads. 	Not clear B1 & E2
	Consented plans	
Item 6	The reference to new cladding system appears to be incorrect. Other drawings and specifications refer to a different system.	B1 & E2
Omission	The fibre cement backer for the plaster board cladding and its fixings is not specified.	B1 & E2
Omission	There are no notes or specification for the fixing of the cavity battens. E2/AS1 details are not referred to and could not be relied upon because the building is outside the scope of E2/AS1 and in this case the 12mm thickness of the cladding results in the need for longer fixings requiring SED or other justification.	B1 & E2

5.5 The expert also agreed with the applicant's consultant's report of 29 April 2016, with respect to the omissions of detail in the consent documentation regarding the new cavity cladding system to be used on the internal face of the balustrade walls. The expert's findings in this regard are summarised in the following table.

Document reference	Applicant's consultant's remarks	Expert's comment
p. 4, para. 7	The new cavity cladding system is covered by a BRANZ appraisal for use on buildings within the scope of E2/AS1, but this building is taller. Therefore, peer review by a façade engineer is required.	Agreed the building is more than three storeys high and therefore the building is outside the scope of E2/AS1 and the appraisal.
p. 4, paras 8 and 9	The wind zone is indicated as being Medium on application, but BRANZ maps indicate it is a High Wind Zone. The building exceeds the height limits in the BRANZ appraisal for this system, and for E2/AS1 and NZS 3604. Therefore, the authority should have requested a building specific façade design wind speed calculation to determine if the proposed cladding system was suitable.	Agreed.

5.6 The expert also considered and discussed the issues of whether the building work relating to the membrane qualified as exempt building work under Schedule 1; and the degree of compliance required from the building work and the building as a whole, under section 112 of the Act.

5.7 The expert further noted that the amended drawings, submitted by the body corporate in response to the first version of the expert's report remained insufficient to enable the authority to be reasonably satisfied that the building work would comply with the Building Code if completed in accordance with the plans and specifications.

5.8 The parties' submissions on the expert's report

5.8.1 The body corporate made submissions dated 12 August 2016 and 26 August 2016 on the first version of the expert's report. The applicant made a submission dated 22 August 2016 on the first version of the expert's report. As noted in paragraph 5.2, the expert's report was amended as appropriate, and a final version issued on 1 September 2016.

5.8.2 The body corporate subsequently requested two extensions of time to make submissions on the second expert's report, which were granted by the Ministry.

5.8.3 The applicant made a submission on the final version of the expert's report dated 7 November 2016. This submission focused on:

- the timeframes and process for the determination, including the admissibility of additional materials submitted by the body corporate during the determinations process
- the Chief Executive's powers with respect to the determination under section 188 of the Act
- points raised in earlier submissions on the matters that an authority must assess when considering the code compliance of proposed building work for the purposes of issuing a building consent.

5.8.4 On 10 November 2016, the body corporate provided a submission on the final version of the expert's report. Attached to the submission were a written submission from the body corporate's engineer dated 8 November 2016, further specifications and plans relating to the proposed new cavity cladding system, and updated CAD versions of the consented plans. The latter plans were produced to address the readability and inconsistency issues raised in the expert's report. The body corporate's submission focussed on:

- the admissibility of the documentation that it had subsequently supplied
- the building work that should form the basis of the determination
- matters raised in the applicant's submission on the expert's first report.

6. The draft determination

6.1 I issued a draft determination dated 15 December 2016, and the parties were provided with a copy of this on 16 December 2016.

6.2 The parties' submissions on the draft determination

6.2.1 The applicant accepted the draft determination, subject to a submission dated 26 January 2017. The submission sets out some points in the draft that, in the applicant's view, required correction.

6.2.2 In particular, the applicant clarified that it was not submitting that the scope of the building work should be extended to include other areas of non-compliant work. Instead, it was submitting that the membrane should have been included within the

consent as ‘interdependent building works’. The applicant attached a letter from its consultants dated 26 January 2017, in relation to this submission.

- 6.2.3 The applicant also made a submission about the extent to which I should take the additional evidence provided by the body corporate into account in assessing the authority’s decision to grant the building consent.
- 6.2.4 The applicant subsequently submitted a report from its consultants dated 17 February, which it stated was in response to the body corporate’s submission of 26 January 2017 (see paragraph 6.2.5). The report deals at length with the adequacy of the repair works that the body corporate has carried out on the rest of the building. It also discussed the possibility of the membrane manufacturer providing a warranty for the membrane, and of the authority issuing a building consent for the building work that was subject to a waiver.
- 6.2.5 The body corporate did not accept the draft determination, and made a submission on it dated 26 January 2017. The submission stated that, since March 2016, ‘significant and detailed inspection, repair and weather protection work’ had been carried out on the exterior of the building, with the exception of Unit 900.
- 6.2.6 In addition, the body corporate made substantial additional submissions as to why the membrane replacement should be considered as an alternative solution. Also that the proposed building work has the potential for a waiver under section 67 to be applied for and granted.
- 6.2.7 The authority accepted the draft determination, and made further comments on it in a submission dated 26 January 2017. The submission stated that, in the authority’s opinion, the ‘best way forward’ was for the body corporate to apply for a ‘fresh’ building consent. The submission also pointed out that responsibility for assessing whether exempt building work can be carried out in a code compliant manner, and, if not, applying for ‘the requisite building consent/waiver’ for the associated ancillary works, rests with the owner.
- 6.2.8 I have taken the parties’ submissions into account and altered the final determination as I consider appropriate.

7. Discussion

7.1 The decision to issue the building consent

- 7.1.1 The applicant has asked for a determination about whether the authority was correct to issue building consent B/2016/1009/C. The applicant is of the opinion that the building work, if carried out in accordance with the consent, would not comply with the Building Code. The applicant also considers that the authority should have required the body corporate to bring more remedial work within the consent in order to satisfy the durability requirements of the Building Code.
- 7.1.2 The relevant legislation is sections 17, 49 and 112 of the Act. Section 49 relates to granting a building consent and specifies that:
- (1) A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.
- 7.1.3 Section 17 states that:
- All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.

The section makes it clear that even building work for which a consent is not required, such as exempt work under Schedule 1, must comply with the Building Code.

7.1.4 Section 112 sets out the degree of compliance required when the building work relates to alterations to existing buildings, which includes alterations made for the purpose of maintenance, replacement or repair. The section specifies that:

(1) A building consent authority must not grant a building consent for the alteration of an existing building, or part of an existing building, unless the building consent authority is satisfied that, after the alteration,—

(a) the building will comply, as nearly as is reasonably practicable, with the provisions of the building code that relate to—

(i) means of escape from fire; and

(ii) access and facilities for persons with disabilities (if this is a requirement in terms of section 118); and

(b) the building will,—

(i) if it complied with the other provisions of the building code immediately before the building work began, continue to comply with those provisions; or

(ii) if it did not comply with the other provisions of the building code immediately before the building work began, continue to comply at least to the same extent as it did then comply.

7.1.5 Applying this legislation in the current case, the first question I must consider is whether the authority could be satisfied on reasonable grounds that the building work, if completed in accordance with the plans and specifications provided as part of the consent documentation, would comply with the Building Code.

7.1.6 In my opinion, the authority could not be so satisfied. Section 17 makes it clear that the building work, as new work, must comply fully with the code, and I consider that the plans and specifications available to the authority, at the time it made its decision to issue the building consent, contained too many errors, omissions and uncertainties for the authority to be reasonably satisfied that compliance would be achieved. I concur with the expert in this regard, in particular with respect to the areas of inadequacy in the plans and specifications, as identified in his report of 1 September 2016 and set out in paragraphs 5.4 and 5.5 of this determination.

7.2 The scope of the building consent

7.2.1 The applicant has also submitted that the authority should have extended the scope of the building consent to include the deck membrane on the grounds that this was ‘interdependent building works’. The applicant submits that the compliance of the repairs to the balustrade wall ‘are reliant, and fully inter-dependent, on the upstand of the replacement membrane to provide a weathertight junction between the balustrade and the balcony deck’, and that the authority should have taken this into account in granting the consent.

7.2.2 I note that I have considered a similar issue, relating to discrete repairs, in Determination 2013/011⁵. In that determination, an authority had withheld a building consent on the grounds that the proposed repairs would not address other issues that were causing the building to be non-compliant with the Building Code. In that determination, I noted that there was no obligation on a building owner to bring an

⁵ 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* (Ministry of Business, Innovation and Employment) 4 March 2013

existing building into compliance with the Building Code; and that once a code compliance certificate had been issued an authority was powerless to require a building owner to undertake particular building work unless the building had become dangerous, earthquake prone or insanitary, or the owner decided to alter the use of the building. As a result, I concluded that the authority had been incorrect 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”.

- 7.2.3 In my opinion, similar reasoning applies in the current case. The body corporate applied for a building consent for discrete repairs to some of the external wall cladding and framing of the level 8 and 9 apartments. Section 112 establishes that after the alterations, if it did not comply before, the existing building need only continue to comply to the same extent that it did before. The applicant is correct that the repairs cannot reduce the level of compliance by undermining or removing the weathertight junction between the building’s external wall cladding and deck membrane. In granting the consent, the authority must be satisfied that Clause E2 will continue to be complied with, in this respect, to the same extent that it did before the repairs. However, it is not open to the authority to prescribe how this is to be achieved, by requiring the deck membrane to form part of the consent. It is the responsibility of the applicant for a building consent to work out how compliance in this situation will be maintained.

7.3 The exemption

- 7.3.1 The applicant has also asked for a decision about the authority’s decision to exempt the replacement of the waterproof membrane for the level 9 deck from the need for a building consent.
- 7.3.2 In its submissions, the body corporate has correctly identified that the authority did not grant an exemption in respect of this building work under subpart 2 of part 1 of Schedule 1 of the Act. Instead, in its letter of 23 December 2015, it indicated that the membrane would be exempt under subpart 1 of Schedule 1, as it was a replacement with a comparable material (another sheet membrane).
- 7.3.3 While I consider that the authority was correct in identifying that the replacement of the membrane itself was exempt, it is important to note that even exempt building work must comply with the Building Code to the extent required by the Act. This means that the installation of the new sheet membrane must comply fully with the requirements of the code, including Clause E2. Responsibility for determining whether exempt building work can be carried out in a code compliant manner rests with the owner; in this case the body corporate. In making this assessment, the owner may consult with their technical advisers and the authority, as required.
- 7.3.4 The manufacturer’s technical information for the new membrane makes it clear that the membrane is suitable for installations to decks within the scope of the Acceptable Solution E2/AS1. However, the deck area proposed to be covered by the membrane exceeds the maximum deck area identified in the Acceptable Solution. In addition, the concrete floor slab that the membrane is to be installed on top of has zero falls, whereas the Acceptable Solution provides for a minimum slope of 1 in 40 when the membrane is to be installed on a deck or balcony.
- 7.3.5 This means that if the membrane was to be installed as a straight replacement for the existing membrane, it is unclear that compliance with Clause E2 would be achieved. To provide a clearer basis on which to establish compliance, it would appear necessary to modify the substrate to create steeper slopes than exist at present, or use

a membrane suitable for use at the lesser pitch. There are also likely to be consequent modifications needed to the deck drainage, and to create the required overlap between the membrane and the cladding on the walls of the level 9 apartment.

- 7.3.6 Accordingly, I conclude that a building consent is required for the consequential works required to ensure that the installation of the proposed replacement deck membrane achieves compliance with the Building Code.
- 7.3.7 I note here that in its submission on the draft determination, the body corporate has suggested that the membrane was to be installed as an alternative solution. The fact that it is an alternative solution has no impact on the need to achieve code compliance. The membrane as installed must still achieve full compliance with the Building Code. The 15 year manufacturing warranty that the body corporate says would be available for the membrane would not address the issues I have outlined in paragraph 7.3.5. If it is not possible to achieve compliance through a straight replacement, either as an Acceptable or an alternative solution, then responsibility for applying for ancillary works to make the membrane compliant or for applying for exemption from the need for compliance in relation to a particular clause of the code, rests with the applicant for the building consent; in this case the body corporate.

8. Other matters

8.1 Section 113

- 8.1.1 The applicant has questioned the authority's inclusion of a section 113 condition in the building consent, on the grounds that it will reduce the remaining life of the building. Section 113 relates to buildings with specified intended lives. The section states that:

- (1) This section applies if a proposed building, or an existing building proposed to be altered, is intended to have a life of less than 50 years.
- (2) A territorial authority may grant a building consent only if the consent is subject to—
 - (a) the condition that the building must be altered, removed, or demolished on or before the end of the specified intended life; and
 - (b) any other conditions that the territorial authority considers necessary.
- (3) In subsection (2), **specified intended life**, in relation to a building, means the period of time, as stated in an application for a building consent or in the consent itself, for which the building is proposed to be used for its intended use.

- 8.1.2 As I understand it from the parties' submissions, the authority's intention in including this clause in the building consent was to limit the intended life of the cladding, as the body corporate's engineer had advised that the entire building was to be re-clad in 10 years. However, this is not the purpose or impact of a section 113 condition, which relates to the life of the building as a whole, where the specified intended life of the building (as defined by subsection 3) is less than 50 years. As far as I am aware, this is not the case here, and section 113 does not apply.

8.2 Section 67

- 8.2.1 In its submission on the draft determination, the body corporate made submissions relating to the possibility of a section 67 waiver or modification. In the body corporate's opinion, such a waiver or modification will be necessary, as due to the nature of the building, it will not be possible for the parties to devise a repair solution

that achieves complete compliance with the Building Code; in its opinion, this could only be achieved through a complete re-clad of the building.

- 8.2.2 Section 67 of the Act allows building consent authorities to grant an application for a building consent subject to a waiver or modification of the Building Code, and to impose conditions on that waiver or modification as they consider appropriate. In the current case, if such a waiver or modification is necessary, it is up to the body corporate to apply for one, in the context of applying for a building consent. Discretion then rests with the authority whether or not to grant it.

8.3 The updated plans and specifications

- 8.3.1 The body corporate has produced updated plans and specifications in respect of the proposed building work. I have not assessed these plans and specifications, in terms of their likelihood of achieving code compliance, as it was not necessary for me to do so in making my decision on the matter to be determined. However, I note that neither the expert nor the body corporate itself are of the opinion that they are sufficient to produce a code compliant solution. As stated in paragraph 8.2.2, if the body corporate's intention is that an exemption be granted for this work under Section 67, then it must apply for one in the context of applying for a building consent.

8.4 The building work on the rest of the building

- 8.4.1 I note that both the applicant and the body corporate have made significant submissions in the response to the draft determination on the adequacy of the building work that has been carried out to the balance of the building. This work is outside the scope of this determination and I make no decision on its code compliance here.
- 8.4.2 However, I note that in the absence of evidence from a qualified weathertightness specialist and the absence of invasive testing there can be no confidence that a competent diagnosis has taken place (by either party) or that the repairs and maintenance that have been carried out are adequate.

9. What should now be done

- 9.1 It is now up to the body corporate to apply for a new building consent, based on revised plans and specifications. It is then for the authority to decide whether it can be reasonably satisfied that the provisions of the Building Code would be met if the building work were properly completed in accordance with the new plans and specifications.
- 9.2 In making this assessment, the authority can take in account the findings in this determination, in particular those relating to the shortfalls in the original plans and specifications; the need for a building consent for the waterproof membrane for the deck; and the degree of compliance required by section 112.
- 9.3 The parties should discuss whether or not a waiver or modification of the Building Code is likely to be required, or whether compliance to the extent required by section 112 of the Act can be achieved, based on the plans and specifications alone. I note that I have issued past determinations on section 67 modifications, including

Determination 2015/010⁶ referred to in the body corporate's submission of 26 January 2017, and that these may be of assistance to the parties in considering this issue. If the parties decide that a waiver or modification will be needed, it is up to the body corporate to apply for this.

10. The decision

- 10.1 In accordance with section 188 of the Building Act 2004, I determine that the authority incorrectly exercised its powers of decision-making in issuing a building consent for the building work, and accordingly I reverse that decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 14 March 2017.

John Gardiner
Manager Determinations and Assurance

⁶ Determination 2015/010 *Regarding the authority's refusal to grant a modification of Clause C3.4(a) of the Building Code in respect of materials used for internal surface linings at a new school hall at 90-98 Blake Street, Greymouth* (Ministry of Business, Innovation and Employment) 31 March 2015