

# Determination 2026/007

**The issue of a building consent, an alleged failure to issue a notice to fix, and compliance of proposed building work with Clause B1**

**1994 Arundel Rakaia Gorge Road, Mayfield, Ashburton**

## **Summary**

This determination relates to the construction of a new residential building. The determination considers three matters: the issue of a building consent, whether the authority failed to exercise a power of decision to issue a notice to fix, and compliance with Clause B1 *Structure* of proposed remedial building work.



**Figure 1: View of east corner of the building**

In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”) and references to “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

The Act and the Building Code are available at [www.legislation.govt.nz](http://www.legislation.govt.nz). Information about the legislation, as well as past determinations, compliance documents (eg, Acceptable Solutions) and guidance issued by the Ministry, is available at [www.building.govt.nz](http://www.building.govt.nz).

## 1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Peta Hird, for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment (“the Ministry”).<sup>1</sup>
- 1.2. The parties to the determination are:
  - 1.2.1. A and D Manhire, the owners of 1994 Arundel Rakaia Gorge Road (“the owners”) who applied for this determination.
  - 1.2.2. Ashburton District Council, carrying out its duties as a territorial authority or building consent authority (“the authority”).
  - 1.2.3. S Song (“the first engineer”), the Chartered Professional Engineer<sup>2</sup> that carried out structural design work for the building consent.
  - 1.2.4. J Rana (“the designer”), a licensed building practitioner<sup>3</sup> concerned with the relevant building work, being design work for the building consent.
  - 1.2.5. K How, a licensed building practitioner<sup>4</sup> concerned with the relevant building work, being construction of the building on behalf of the construction company (“the builder”)<sup>5</sup>.
  - 1.2.6. M Leaman (“the second engineer”), the Chartered Professional Engineer concerned with the relevant building work in relation to the remediation proposal.

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<sup>1</sup> The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

<sup>2</sup> Chartered Professional Engineers, under the Chartered Professional Engineers of New Zealand Act 2002, are treated as if they were licensed in the building work licensing class Design 3 and Site 3 under the Building (Designation of Building Work Licensing Classes) Order 2010.

<sup>3</sup> License class: Design.

<sup>4</sup> License class at the time the building work was carried out: Carpentry and Site.

<sup>5</sup> The construction company produced the building consent plans and specifications, fabricated the steelwork and anchor bolt assemblies, excavated for the foundations, constructed the foundations and floor slab on grade, erected the steelwork, and installed the roof and wall cladding systems and external door and window joinery. In addition to the building work undertaken by the builder, the owners engaged others to complete the internal framing and fitout work.

- 1.3. In accordance with section 170(a), I have consulted with Fire and Emergency New Zealand (“FENZ”) regarding matters involving fire safety and fire-engineering practice.
- 1.4. The matters to be determined, in terms of sections 177(1)(a), (1)(b), (2)(a) and (2)(f) are:

- 1.4.1. First matter: The building consent

The exercise of the authority’s power of decision to issue building consent BC0093/16 on 24 November 2016, in particular with regard to the approved plans and specifications relating to structural and fire rating design items identified in a report issued by the owners’ engineer on 20 September 2024 (“the 2024 report”).

- 1.4.2. Second matter: The notice to fix

Whether the authority failed to exercise a power of decision to issue a notice to fix for building work carried out under the building consent on or around 13 March 2017. In making this decision I consider the building work as it presented at that time, specifically the matters of non-compliance identified by the authority in its letter to the owners on 13 March 2017 and.

- 1.4.3. Third matter: The remediation proposal

Compliance with Clause B1 *Structure* of remediation work outlined in the second engineer’s proposal. In making this decision I consider the fill material and foundation as those relate to the proposed remediation of the building.

## 2. Building work and background

- 2.1. The owners’ property is a level section on a main road in a small rural settlement. The building work is the construction of a new two-storey residential building containing two attached dwellings with internal garages. The dwellings largely mirror one another.
- 2.2. The building is constructed using steel portal frames, plus other steel framing members and cross-bracing, supported on reinforced concrete foundations. The ground floor slab is reinforced concrete bearing on fill material. The floor slab is tied into a 400mm deep x 400mm wide reinforced concrete ‘perimeter footing’<sup>6</sup>, shown in the plans as being supported on a combination of ‘good ground’ and the ‘deep bored pier’ foundations. The wall and roof cladding is profiled metal, and the joinery is aluminium.

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<sup>6</sup> The perimeter footing was to extend a maximum 300mm above cleared ground level and a minimum 200mm below cleared ground level.

- 2.3. Timber framing with plasterboard and plywood linings have been used for the internal fitout and intertenancy fire wall<sup>7</sup>, and each dwelling has an internal timber staircase.
- 2.4. On 24 November 2016, the authority issued building consent BC0093/16 for “Two Units with Garages Underneath”. Construction commenced around November 2016 and was subject to several inspections by the authority as the work progressed into 2017.
- 2.5. The authority issued amendments to the building consent on 1 February 2017, 21 February 2017, and 20 June 2017. These involved: lower floor bathroom layouts and windows, and garage door flashing details; removing first-floor internal walls and change in wall linings; and a variation to the fire design to incorporate two units downstairs in the garage space.
- 2.6. In early 2017, the owners and the authority raised concerns about certain aspects of the building work. These included the following issues notified by the authority:
  - 2.6.1. The strandboard flooring, in inspections on 10 January 2017 and February 2017.<sup>8</sup>
  - 2.6.2. Concerns about the building being out of plumb, in a letter to the owners dated 21 February 2017.
  - 2.6.3. Issues with cut girts, fire-rating to steel columns and beams, and thermal break to the roof, recorded in an inspection on 28 February 2017.
- 2.7. On 13 March 2017 the authority wrote to the owners about aspects of the building work that the authority considered did not comply with the building consent (“the March 2017 letter” – see paragraph 3.17). In that letter the authority requested that the building work stop until a remediation plan was in place.
- 2.8. Various assessments were carried out and reports produced in the years following, including a building consultant’s report in early 2018, a structural assessment in June 2018, a visual survey report in August 2019, a building consultant’s inspection report in October 2023, and a ‘potential defects and remediation’ report by the second engineer in April 2024.
- 2.9. In mid-2025, the builder engaged the second engineer to prepare a remediation proposal intended to “outline remedial solutions for elements that do not meet the...Building Code due to alterations from consented drawings”. The proposal is

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<sup>7</sup> The construction of the intertenancy wall, where it is unlined, was incomplete when the application for determination was received by the Ministry.

<sup>8</sup> A subsequent inspection on 6 April 2017 provided further detail about the authority’s concerns, which related to fixings required at 150mm centres to the edges.

described in a report prepared by the second engineer (“the remediation proposal”<sup>9</sup> - see also paragraph 3.37).

- 2.10. Several issues remained unresolved between parties and the owners applied for a determination.

### 3. Discussion

- 3.1. In the following paragraphs consider the three matters to be determined separately. I have included a summary of parties’ submissions where relevant.<sup>10</sup>

#### First matter: The building consent

- 3.2. The first matter concerns the exercise of the authority’s power of decision to issue building consent BC0093/16 on 24 November 2016, specifically with regard to structural and fire rating design issues outlined in the 2024 report.
- 3.3. In considering whether the provision in section 49(1) was met, I have assessed a sample from the issues raised in the 2024 report.
- 3.4. As stated in paragraph 1.3, I consulted with FENZ on the fire safety design issues raised in the 2024 report. On 26 November 2025, FENZ responded:

In relation to the fire safety element, we have reviewed the files provided and consider that, the [2024] report provides a good summary of the issues. In this instance we have no technical comments to add to what has already been provided by others.

#### Legislation

- 3.5. Section 49(1) provides:

##### 49 Grant of building consent

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

- 3.6. Section 7 provides “plans and specifications – (a) means the drawings, specifications, and other documents according to which a building is proposed to be constructed, altered, demolished, or removed; ...”.
- 3.7. The plans and specifications accompanying the application for building consent incorporated a ‘Fire Report’ dated 26 September 2016, which included information about the required fire resistance rating and construction of the intertenancy wall.

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<sup>9</sup> ‘1994 Arundel-Rakaia Gorge Road, Mayfield ... Remediation Report ...’, revision 1, dated 10 June 2025.

<sup>10</sup> S Song and K How have not made any submissions to this determination.

- 3.8. The Ministry has previously issued guidance under section 175 regarding fire safety designs and the importance of communicating and coordinating such designs accurately to support an application for building consent.<sup>11</sup>

### Submissions

- 3.9. The owners consider the “the engineering design is flawed and should not have received a building consent” and the authority “did not have reasonable grounds to issue the building consent”. The owners consider this is also evident in the “extensive strengthening work proposed”.
- 3.10. The authority did not make a submission in relation to this matter.
- 3.11. The designer submits, with regard to the fire-rating of the steelwork:

“[T]he Fire Design was done by the Fire engineer<sup>[12]</sup> ... and most of the fire engineering notes were shown on the Plans to make the construction process easier. During construction all the relevant plans, reports and documents are required to be read in conjunction. The [first engineer’s] fire report Drawing F100 notes clearly mention the Fire rating required around walls, columns, beams, portal and floor system ... [and] the Plans have been approved by [the authority]...”.

### The 2024 report

- 3.12. The 2024 report raised a number of issues concerning the structural and fire rating design, though it does not refer to or identify the relevant performance criteria of the Building Code. I have summarised and assessed a sample of these below:

#### *Structural design*

- 3.12.1. **Baseplates** – “[T]he baseplates are designed assuming Grade 300 plate, but only Grade 250 plate was specified on the architectural/structural drawings and shop detail drawings”.

My assessment – The structural calculations are based on a higher minimum yield strength steel (ie 300 MPa), whereas the building consent plans specify a yield strength steel of Grade 250 (ie 250 MPa). The structural calculations do not include an equivalent assessment using Grade 250 steel. Further, I note the structural calculations are only for 260mm long base plate (ie the ‘Edge column base connection’); they do not include an equivalent assessment for the 300mm long x 120mm wide x 16mm ‘Central column base connection’.

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<sup>11</sup> Practice Note 22, ‘Guidelines for Documenting Fire Safety Design’, version 1, dated September 2011.

<sup>12</sup> The designer did not prepare the Fire Report that was included in the application for building consent.

Regarding the baseplates, I conclude the provision in section 49(1) was not met because there was a lack of information and contradictory information in the building consent plans and specifications.

- 3.12.2. **Windows W01 to W04** – “The detailing and original fabrication and erection did not allow for the installation of windows W01 to W04 along the ground floor of the northeast elevation ...”.

My assessment – The building consent plans include information showing windows W01, W02, W03 and W04 and four cross-bracing elements across the northeast elevation at ground floor level. However, the same plans did not include dimensions for the setting out of the windows, the cross-bracing, or the wall girts (across the elevation). I note also the plans did not align with the ‘shop drawings’ included in the building consent (for example, the location of the cleats intended to secure the wall girts and cross-bracing where these clashed with the windows).

I conclude the provision in section 49(1) was not met because the building consent plans and specifications provided contradictory and insufficient information about the setting out of windows W01, W02, W03 and W04 where these do not take into consideration the structural design of some columns, brace posts, cleats, wall girts and cross-bracing.

In a joint experts’ report dated 6 November 2024, the second engineer stated that “The shop detailing (and original fabrication and erection) did not allow for the installation of windows W01 to W04 along the ground floor of the northeast elevation and modifications were made onsite to accommodate these windows”. I have not received information that indicates whether these modifications were subject of an application to amend the building consent prior to the alterations being made on site. Regardless, this determination considers the plans approved by issue of the building consent on 24 November 2016, not subsequent amendments.

- 3.12.3. **Bracing** – “The upper floor framing plan on A201 includes the note ‘This joist row to be under brace wall upstairs’. But [there is] no reference elsewhere on the drawings to the timber wall above having a bracing function”.

My assessment – The annotation, which indicates the internal timber framed walls at first-floor level were designed or intended to form part of the bracing for the building, is not reflected in the rest of the information regarding the bracing for the building.

Based on the overall specific engineer design for the whole building (incorporating the steel portal frames, cross-bracing to the external walls and roof bracing etc) there is nothing else that indicates the bracing for the building was reliant at all on the two internal first-floor walls having any bracing capacity. I have received no information to indicate it affected the

bracing design for the building, and it appears the annotation on plan A201 was an error.

Considering all of the information from the plans and specifications, I am of the view that despite the annotation on A201 there was sufficient information for the authority to be satisfied as to compliance for the purpose of section 49(1).

#### *Fire design*

- 3.12.4. **Steel beam in intertenancy wall** – “Drawing A201 shows the joists of the upper floor being [high strength] 150/15 cold formed joists. A typical steel moment frame was intended to be between the two units, and one was installed on site. This includes a 200U[B]25 with [square hollow section] post under to support the upper floor. All steelwork on the line between the units has to be fire rated in accordance with the...fire report.<sup>[13]</sup> Yet detail ‘20 Mid Floor Detail’, which is between the two units at the upper floor level, shows no steel beam. Instead only timber wall framing is shown, along with cold formed joists from the floor.”

My assessment – Detail 20 on plan B005 does not include the 200UB25 structural beam specified elsewhere in the building consent plans (eg plan A302 and slop drawings A0(2) and W01) and structural calculations. Neither does it align with the fire rating design in the fire report which specified a particular proprietary fire rated plasterboard system to be installed to the structural steelwork in the intertenancy wall (ie to the floor beam, mid-span square hollow section post, and supporting columns at either end). Detail 20 also does not align with the plasterboard manufacturer’s specifications and installation instructions for its proprietary system.

I conclude the provision in section 49(1) was not met, in particular with regard to Clauses C3 and C6, because there was a lack of information and contradictory information in the building consent plans and specifications about the construction and fire rating of the mid-floor junction between the two household units at the location of the ‘200UB25’ floor beam, SHS post and supporting columns.<sup>14</sup>

- 3.12.5. **Steel floor joists adjoining intertenancy wall** – “No consideration has been given as to how the fire rating of the [intertenancy] wall is to be maintained where the [high strength] 150/15 C shaped steel joists penetrate the wall to fix onto the steel beam. The [wall lining] technical expert stated that the only way to achieve this is to fire rate the underside of the cold formed steel

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<sup>13</sup> The ‘Fire Protection Plan’ attached to the fire report specified a requirement for a “30 minute fire rated wall” for the intertenancy wall.

<sup>14</sup> An amendment to the building consent issued by the authority on 20 June 2017 included a revised specification for the construction of the intertenancy wall. However, the amended plan (A.01.1 revision A) did not include an updated Detail 20 to include the 200UB25 floor beam.

joist floor, but none is shown on the consented drawings and none has been installed on site”.

My assessment – It is not clear from the building consent plans and specifications how the fire rating of the intertenancy wall was to be maintained where the C-shaped floor joists penetrated the wall.<sup>15</sup> The fire report includes some generic information about ‘Fire stopping and service penetrations’ but did not provide any specific information about how to maintain the fire resistance rating of the intertenancy wall where multiple floor joists penetrate the wall from both sides, and for example, Detail 20 on plan B005 refers to an unspecified ‘fire sealant’ to be used around the floor joists. Further, it is not clear if the design considered the collapse of building elements that have a lesser fire resistance that must not cause the consequential collapse of elements that are required to have a higher fire resistance (ie the floor joists and the intertenancy wall respectively).

The provision in section 49(1) was not met, in particular with regard to Clauses C3 and C6, because the plans and specifications lacked information about the fire rating of the intertenancy wall at penetrations by floor joists.

**3.12.6. Fire rating of intertenancy wall** - “[T]he fire report...states...the intertenancy wall is required to be fire rated to 30 minutes ... [and the proprietary wall lining manual from the manufacturer] states that for a 30 minute fire stability rating, either one layer of 16mm [fire-rated wall lining] or two layers of 10mm [fire-rated wall lining] are required. The fire rating shown in Details 21 and 22 does not comply ... because ... there is only one layer of 10mm [fire-rated lining] and one layer of ... standard [wall lining]”.

My assessment – The combination of plasterboard linings (in conjunction with the timber wall construction) in the plans<sup>16</sup> did not align with those in the fire report<sup>17</sup> nor with the product manufacturer’s installation manual for its tested systems that was referenced in the building consent specifications (this despite the wall system reference number also being specified on the same plans).

The building consent plans do not align with the fire report and there is contradictory information in the building consent documents regarding the fire rating of the intertenancy fire-rated wall construction. There is insufficient information to establish how, or if, the alternate combination of linings proposed on plans B005 and B006 would achieve the 30-minute fire-

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<sup>15</sup> The second engineer subsequently put forward proposals for fire-rating around the floor joists in an email to the owners dated 6 April 2017. An amendment to the building consent was issued by the authority on 20 June 2017, and this included an intention to provide (‘...under a new building consent’) a 45-minute fire rated proprietary plasterboard ceiling lining to be fixed to the underside of the floor joists.

<sup>16</sup> Detail 20 on plan B005 and Details 21 and 22 on plan B006.

<sup>17</sup> Including the ‘Fire Protection Plan’, F100, issue 1, dated 5 October 2016, attached as Appendix A of the fire report.

rating specified in the fire report and the provision in section 49(1) was not met in relation to Clauses C3 and C6.

### **Conclusion on first matter**

- 3.13. The plans and specifications accompanying the application for building consent were inconsistent and lacked coordination with the fire report. The building consent also provided insufficient and contradictory information for several issues relating to the building's structural and fire safety performance (described above).
- 3.14. For those reasons and noting that I have assessed only a sample of the items raised in the 2024 report, I conclude the provision in section 49(1) was not met in relation to Clauses B1, C3 and C6 when the authority issued the building consent on 24 November 2016.
- 3.15. Under section 188, the Chief Executive must confirm, reverse or modify or determine the decision or exercise of a power to which it relates, or determine the matter. Before considering the appropriate remedy under section 188 in regard to the authority's decision to issue the building consent, I first consider whether the authority failed to exercise a power of decision to issue a notice to fix and the compliance of the remediation proposal.

### **Second matter: The notice to fix**

- 3.16. The second matter is whether, on or around 13 March 2017, the authority failed to exercise a power of decision to issue a notice to fix for building work carried out under the building consent.
- 3.17. In making this decision I have considered information about the building work as it was at that time and the items set out in the authority's letter dated 13 March 2017, being those aspects of the building work the authority identified as not compliant with the building consent. The letter, which included photographs of the building work<sup>18</sup> and references to plan details, states:

[The] following items do not comply with the building consent BC0093/16;

1. The building is out of plumb at worst corner of 40 mm over 6 m in height. This falls outside the scope of NZS 3404.1<sup>[19]</sup> ... [but] does not make the building structurally unsafe ... As this is ascetic [sic] we can get the original builder to rectify by request or issuing a notice to fix NTF...
2. Steel bracing has been installed incorrectly and must be rectified. Girts which have been cut must be replaced and bracing have solid spacer between welded bracket and cross bracing. This will require some of the cladding to be removed.

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<sup>18</sup> Photographs included with the letter appear to show several examples of connection bolts not tightened in addition to other issues described in the letter.

<sup>19</sup> I note the documentation provided in support of the building consent application referred to both New Zealand Standard NZS 3404.1:1997 *Steel Structures Standard* and the 2009 version.

3. Steel posts where bolt holes don't line up must have a full FWAR 6mm [fillet weld all round] and be fully primed.
4. L flashing over front of each ground unit to be released and corrugated [expanding foam tape] installed to stop water egress when cleaning walls. Do not use bituminous product just closed cell foam.
5. Foundations are out of line and vermin can enter building between back of cladding and foundation approximately 20 mm in places. This must be rectified.
6. [Proprietary wood panel] flooring has not been fixed as per manufacturer's instructions, rectify.
7. Fire wall roof junction has not been followed.
8. Likewise external wall and fire wall junction has not been followed.
9. [A proprietary] 10 mm [thick] thermal break has not been installed and 10 mm timber is there instead. This does not give the same thermal break. Rectify.
10. Plans clearly show firewall under stairs[,] not constructed at time of inspection.<sup>[20]</sup>

Going forward [the authority's] only regard is that the building being built, that all work complies with the consented plans and other documents [sic]. At this stage we request you to stop all work until such time that you have given us a remedy for how the incorrect items are to be rectified. Failing to stop work voluntary [sic] will result in a [notice to fix] to be issued to all parties carrying out work and this carries a cost to all parties affected.

## Legislation

3.18. The relevant parts of section 164 state:

### 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 ...
- (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;  
...

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<sup>20</sup> I understand this to be referring to the 'Proposed Upper Floor Framing Plan' on building consent plan A201 and 'Proposed Lower Floor Plan' on building consent plan A101.

## Submissions

- 3.19. The owners consider a notice to fix should have been issued, either in February or March 2017, and would have enabled the issues with the building work to be identified and resolved.
- 3.20. The authority has stated it “considers that its actions were consistent with the requirements of Section 164...[and] directed that construction work cease until the property owner and builder could agree a remediation plan for the identified non-compliant work. [The authority] made it clear to the property owner that failure to comply would result in the issuance of a Notice to Fix. As the builder involved adhered to this directive, the formal issuance of a Notice to Fix was not required”.
- 3.21. Included in the March 2017 letter, the authority stated “... we [the authority] have to give [the builder] the opportunity [to] rectify their work as set out in the New Zealand Building Act 2004 section 362 [i]mplied warranty”.
- 3.22. Subsequently, in correspondence to the Ministry the authority clarified:

References to Section 362 of the Building Act were included solely to provide guidance on available mechanisms for resolving non-compliance matters. These references did not influence, nor were they considered in, [the authority's] decision not to issue a Notice to Fix.

- 3.23. The second engineer commented on compliance of several of the items in the March 2017 letter in a ‘Potential defects and structural remediation report’ dated April 2024 prepared for the builder (in summary):

### Structural defects

- 3.23.1. Regarding item 1, “The building is leaning...to...around 40mm”. “The frame is outside the construction tolerances expected for a steel framed structure. We have checked for the additional loading this has caused using AS/NZS1170 the New Zealand Loading standards and NZS3404 the Steel Structures standard and it meets the requirements for drift and strength and could be considered an alternative solution to the New Zealand Building Code”.
- 3.23.2. Regarding item 3, “The fillet weld is much stronger than the loads it needs to carry. The length is acceptable...[and] no additional work is required”.
- 3.23.3. Regarding the photographs showing “[b]olts not tightened...[the builder] checked the structural bolts, and they were correctly tightened. The photograph of the loose bolts may have been taken before the bolts were fully tightened. No one has exposed the connection to check”.

3.24. The owners' engineer has commented on some of the same issues (in summary):

3.24.1. The main structural columns are not within code-compliant vertical limits, they tilt excessively (by differing magnitudes and in different directions) and adversely affect the installation of other steel members and the building as a whole.<sup>21</sup> There are amenity issues with the out of tolerance construction, including unacceptable appearance and problems relating to the fitout. The steel structure has not been erected in a manner that complies with the Building Code, and “[t]he use of Alternative Solutions does not provide a ‘back door’ to justify design or construction that is not code-compliant”.

3.24.2. Site modifications were done where the square hollow section columns and horizontal struts are visible and a number involved site welding because of the misfit of the consented bolted connections. There are issues with site welding of zinc layer of the steelwork, requiring it to be fully removed by grinding and corrosion protection reinstated with an application of a zinc rich paint and “[h]ow well the removal of the zinc coating was done is not known”.

3.25. In a joint report dated 6 November 2024, both the owners' engineer and second engineer agree “the girt itself likely has insufficient strength to resist code level bracing loads” where the upper and lower braces meet<sup>22</sup>, and “[f]urther to this, in order to fit the diagonal flat braces in, the outer flange of the girt has been cut away at two locations. Not only has the flange and a small part of the web [been] removed at each brace location, the corners of the cuts are not rounded, and the cuts extend past the corners, further reducing the girt strength under axial load”.

### **My assessment**

3.26. At the time of the March 2017 letter, the authority had identified (among other issues) that the building was out of plumb<sup>23</sup>, girts had been cut to accommodate cross-bracing, and plasterboard linings had not been installed as detailed to achieve the required fire rating at various junctions. In other words, several aspects of the building work had not been carried out in accordance with the building consent.

3.27. The authority was able to exercise its power to issue a notice to fix under section 164, because there was building work that did not comply with the building consent. However, in relation to the provision in s164(2) that an authority “must” issue a notice to fix, previous determinations<sup>24</sup> have taken the approach that there

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<sup>21</sup> With reference to allowable tolerance for column verticality in New Zealand Standard NZS 3404: Part 1:2009 and based on the results of as-built survey data provided by others.

<sup>22</sup> It appears the two engineers were referring to an area where two ground floor bracing panels are located to the northeast side of the building.

<sup>23</sup> With regard to verticality, subsequent measurements confirm this affects the whole building to varying degrees, and exceeds tolerances provided for in the building consent.

<sup>24</sup> See for example, Determination 2013/018, [9.5] and [9.6]. The determination considered the issue of a notice to fix at the same time as giving written notice of a refusal to issue a code compliance certificate under section 95A.

is discretion in the exercise of that power<sup>25</sup>, and broadly speaking I agree with that approach.

- 3.28. Determination 2013/015<sup>26</sup>, which concerned the issue of a notice to fix at the same time as a refusal to issue a code compliance certificate, also commented on the use of 'site notices' to notify an owner of non-compliant building work during construction:

[4.2.7] The common practice for authorities inspecting building work during the construction phase is to identify any work that does not comply with the consent and/or the Building Code and to issue a site notice requiring the work to be remediated. If the site notice is not complied with ... [and] ... an owner fails to carry out the work that will be the appropriate time for an authority to consider whether to issue a notice to fix.

- 3.29. When deciding the appropriate action to ensure compliance during construction and whether to issue a notice to fix, there are a range of factors that will be relevant for authorities to consider. These may include, but are not limited to:

- 3.29.1. whether the building work that is not in accordance with the building consent will still comply with the Building Code
- 3.29.2. whether issues of non-compliance have previously been communicated to the owner and/or builder
- 3.29.3. whether there is a pattern of ongoing or repeated non-compliance
- 3.29.4. whether non-compliances are numerous or, taken together or individually, are significant and have the potential to adversely affect the performance of the building.

- 3.30. Two items in the March 2017 letter are not well described, and so I have not considered these further. These are item 3 (welding), which did not identify which steel posts or their location, and item 4 (flashing) was unclear whether it was the apron flashing at the junction of the mono-pitch roof and first-floor wall or head flashings to joinery or some other flashing<sup>27</sup>. Similarly, item 10 (firewall under the stairs) was incomplete at the time of the inspection.<sup>28</sup>

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<sup>25</sup> The High Court in *Lee v Auckland Council* [2016] NZHC 2377, at [57] said "the mandatory nature of the obligation at s 43(6) [issuance of a notice to rectify under the Building Act 1991] is not obviously reducible to a mere discretion (unlike the 2004 Act notice to fix provisions)".

<sup>26</sup> Determination 2013/015: *The refusal to issue a code compliance certificate and simultaneous issue of a notice to fix for a 14-year old house*. Issued 8 April 2013.

<sup>27</sup> The building consent plans do not include a detail for the apron flashing at the change of direction across the northeast elevation of the building, and the 'corrugate window head' (Detail 09 on plan B003) and the 'corrugate door head' (Detail 37 on plan B013) do not include the use of a corrugated closed cell foam strip. Although building consent specifications (4241 'Profiled metal cladding', items 2.10 and 4.3) refer to proprietary 'closure strips', it is not clear from the description in the specifications where they were intended to be installed.

<sup>28</sup> The fire report in the original building consent does not include a requirement to protect either stair from fire, and the March 2017 letter preceded the approved amendment to the building consent on 20 June 2017 that detailed the firewall construction to the two internal stairs.

- 3.31. I note three of the items in the March 2017 letter are indicative of issues that can be addressed relatively easily, such as item 5 (potential vermin entry point), item 4 (flashing closers) and item 6 (flooring)<sup>29</sup>. In contrast, substantial work would have been required to rectify other issues such as the verticality, cut girts, and the required fire rating at various junctions. Remediation was likely to require some redesign, for example where cross-bracing and girts interfaced, and the removal of the building work that had already been completed (such as the cladding).
- 3.32. In regard to compliance with the Building Code, while I acknowledge the second engineer's views about the building's structural performance in relation to the verticality, I note that is disputed by the owners' engineer. Regardless, alongside the issues concerning structural elements, I consider the non-compliance of the fire rating at various junctions at that time was a significant issue in terms of the performance of the building in respect of code clauses that concern life safety.
- 3.33. Further, several issues had been identified in prior inspections. The authority had identified the building was out of plumb in a letter to the owners dated 21 February 2017. A week later, during an inspection on 28 February, the authority raised the issues concerning the cut girts, fire rating to the steel columns and beams, the strandboard flooring (which had already been identified in an earlier inspection on 10 January) and the thermal break to the roof.
- 3.34. Due to the nature, extent, and impact of the non-compliant building work on the performance of the building, I am of the opinion several aspects of the building work that were not in accordance with the building consent on or around 13 March 2017 met the threshold for the authority to exercise its discretion to issue a notice to fix. I therefore conclude there was a failure to exercise a power of decision to issue a notice to fix.
- 3.35. Regarding the authority's comments about section 362, I note this provision does not create a statutory obligation on the authority to give a builder an opportunity to rectify non-compliant building work. Part 4A of the Act, 'Consumer rights and remedies in relation to residential building work', includes implied warranties and remedies for breach of implied warranty under sections 362H to 362P. These concern contractual matters between the owners and builders and have no bearing on an authority's exercise of its powers under section 164 in respect of a contravention of the Act or the Regulations.

### **Conclusion**

- 3.36. Due to the nature, extent, and impact of the non-compliant building work on the performance of the building, I consider there was a failure to exercise a power of decision to issue a notice to fix on or about 13 March 2017.

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<sup>29</sup> Although initially unclear whether it was the type or location or spacing of the fixings and/or the supports under the floor sheets, or whether it related to all or part of the construction, a later inspection on 6 April 2017 provided more detail.

### Third matter: The remediation proposal

3.37. The third matter to be determined is compliance with Clause B1 *Structure* of remediation work outlined in the second engineer's proposal.<sup>30</sup> In making this decision I specifically consider the fill material and foundation as they relate to compliance of the proposed remediation work.<sup>31</sup>

#### Legislation

3.38. Section 17 provides:

**17 All building work must comply with the building code**

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.

#### Submissions

3.39. The owners "don't believe the remediation / repair will work due to the fill" material; they submit (in summary):

3.39.1. The fill material specifications are inconsistent in the building consent documentation. Building consent plan "B001 shows GAP20 as the fill in 150mm layers, whereas the cover sheet [says] AP40. [The authority's building consent] processing document [says] GAP20".<sup>32</sup> Regardless, it "appears we have some rocks 80-100mm big under the home".

3.39.2. "The structural fill under the floor slab is not compliant ... [and] the foundations do not reach the ground where the land is lower than other parts of the dwelling" ie "up to 750mm at the southeast of the site" and "the perimeter foundations [are] sitting on a pile of loose stone".

3.39.3. The crack in the floor slab is in the unit to the east side of the building and extends from approximately mid-way across the ground floor slab leading towards the south-east side "where the land dropped away".

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<sup>30</sup> The proposal is not in the form of a building consent application. I have assumed the following documents form the second engineer's remediation proposal: '1994 Arundel-Rakaia Gorge Road, Mayfield Remediation Report' dated 10 June 2025, 'Specification Remediation for Manhire at 1994 Arundel-Rakaia Gorge Rd Mayfield' (undated); Producer Statement – Design (PS1) dated 13 June 2025; Plans dated June 2025; Structural calculations titled 'Repairs and Strengthening' dated 17 June 2025; Certificate of design work from a Licenced Building Practitioner (a Chartered Professional Engineer), dated 13 May 2025. The 'Design work that is [Restricted Building Work]' refers to new wall bracing and new hold down bolts for the portal legs; it does not include 'Foundations ...'.

<sup>31</sup> The remediation proposal includes other work, for example, some new cross-bracing and steel columns, welded joints, fire rating to the intertenancy wall, and relocation of the internal stairs. I have not considered the Building Code compliance of this other work.

<sup>32</sup> GAP = General All Passing. "40" or "20" being material with a maximum particle size of 40mm or 20mm.

3.39.4. The crack in the floor slab first appeared in 2018/2019<sup>33</sup> and was approximately 700 – 800mm long. By July 2025 it “had grown to about 4 [metres] long” and had extended further up to October 2025. The crack is between 1 – 3mm wide, but the depth of the crack is not clear.<sup>34</sup>

3.39.5. Structural engineers engaged by the owners inspected the visible foundation components on 24 July 2025, “to identify any visible defects in the foundation system”, and observed the following issues:

The fill material “appeared to be granular fill with silt, which does not meet the engineering specification for structural fill”.<sup>35</sup>

“There is evidence that the fill underneath the foundation has shifted, creating voids beneath the perimeter foundation. This is a critical issue as it could undermine support for the foundation beams ...”.

“The [damp proof course] has become dislodged in some areas”.

“Minor cracking observed to the concrete slab...up to 3.5 to 4 metres in length”.

3.40. The authority considers the floor slab crack is non-structural and the concrete is spalling and is “minor in nature”.

### **My assessment**

#### *The fill material and the concrete floor slab*

3.41. References to “fill” herein is to the material supplied to site that was laid down before the reinforced concrete floor slab was poured above it. It appears the same fill material extends under an area of the ‘perimeter footing’ towards the southeast side of the building where the adjacent ground is at its lowest level<sup>36</sup>. The placement of the fill material is sitework, as that term is defined in section 7.

3.42. The authority conducted several inspections during construction. The following inspection records refer to, or include photographs of, the presence of the fill material:

3.42.1. *Foulwater/Stormwater Drainage inspection record 14 December 2016*. The inspection record includes several photographs where fill material was in place either side of the drainage pipework. The fill includes some large diameter stone (river run or similar), some of which is within the building’s internal footprint.

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<sup>33</sup> The concrete was first poured in December 2016.

<sup>34</sup> On 9 December 2025, the owners provided some photographs, a short video recording, and sketch (to confirm the location and extent) of the crack.

<sup>35</sup> The report does not clarify which “engineering specification” it was referring to.

<sup>36</sup> Detail 01 on building consent plan B001 shows the footing supported on ‘good ground’ (it does not specify fill material under the footing).

3.42.2. *Pre Pour Slab inspection record 15 December 2016, which states:*

'Fill/Depth, 400mm, Certified by engineer'.

'All Work is in accordance with the Building Consent ... Yes ... Copy of engineers PS4 is submitted to [the authority] covering the fill before the [code compliance certificate] will be issued as discussed with the builder on site. Advised Engineer has been to site'.

3.42.3. *Reinspection Foulwater/Stormwater Drainage inspection record 3 March 2017.* The inspection record did not refer to the fill material under the floor slab, but it did include photographs indicating the presence of some fill material adjacent to the building and extending under the perimeter footing.

- 3.43. The building consent provides contradictory information regarding the size of fill material to be used (ie both 20mm and 40mm) but not larger than 40mm. However, an invoice dated 18 January 2017 addressed to the owners (from an excavation company) states, 'Supply Pea shingle, river run, AP20, AP40 [and] AP65'. It is also evident in the photographs provided by the owners and the authority that the fill material that has been used includes 'river run' and 65mm size material. Therefore, the fill material used is not in accordance with the building consent.
- 3.44. I have seen no information or documentation to confirm the fill material was laid, compacted, and tested in accordance with NZS 4431<sup>37</sup>, or NZS 3604<sup>38</sup>. With regard to the authority's 15 December 2016 inspection notes, I have received no information that confirms an engineer inspected the fill material. I note the PS1 dated 4 November 2016 from the first engineer, and the on-sites tests for 'foundation excavations' and 'Ground conditions'<sup>39</sup>, and PS4 dated 12 June 2017 from the second engineer, do not refer to the fill being in place or certified.
- 3.45. It is apparent the fill material is not uniform in size or mixture. In my opinion this affects the material's ability to be compacted as required to support the floor slab.
- 3.46. The actual depth of the fill material appears to be greater than 400mm deep at the southeast side of the building where the natural ground level is lowest. This aligns with building consent plans A301 and A301A which indicate a height difference of 750mm from finished floor level down to finished ground level. Although building

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<sup>37</sup> New Zealand Standard NZS 4431: 1989 *Code of Practice for Earthfill for Residential Development*. This standard is referenced in the building consent plan 'cover' sheet under sub-heading 'Site [and] Foundation'. Section 11 'Test Methods' in NZS 4431 cross-references to New Zealand Standard NZS 4402 *Methods of testing soils for civil engineering purposes*, dated 1986 and 1988.

<sup>38</sup> New Zealand Standard NZS 3604:2011 *Timber-framed buildings*. This standard is referenced in the building consent specifications, section 2210 'Preparation and groundwork'. Item 7.5.3.2 of NZS 3604 provides 'Granular fill material shall be composed of rounded gravel, crushed rock, scoria or approved material' with limitations of material size (either 19mm, or 37.5mm for fill thickness exceeding 100mm).

<sup>39</sup> Conducted on 2 December 2016 by another person on behalf of the same engineering company that the first and second engineers worked for.

consent plan 'cover' sheet specifies 'All structural fill to be AP40 compacted every 150mm layer with one Nuclear Density Test (NDT) every 600mm fill', I have received no such test results where the fill is at its deepest to the southeast side of the building (ie where it exceeds 600mm in depth).

- 3.47. The owners first observed cracking in the floor slab on the southeast side of building in about 2018-19. The crack has progressively worsened and is now approximately four metres long and between 1-3mm wide. Although the depth of the cracking is not clear, photographs provided by owners indicate it is more than minor or superficial.
- 3.48. The exact cause of the floor slab cracking is unclear, but I consider a possible contributing factor is the poor-quality fill material. Evidence indicates there are voids in the fill material under parts of the 'perimeter footing', and while it is not clear whether they extend under the floor slab (for example in the vicinity of the cracking to the floor slab), the voids nevertheless indicate settlement of the fill has occurred.
- 3.49. The building consent plans do not suggest either the floor slab or the 'perimeter footing' was designed to be unsupported (ie suspended). Building consent plan B001 shows the 'perimeter footing' was to bear on 'good ground', not fill material, and the floor slab was to be supported on a combination of fill material, a sand blinding and damp-proof membrane. It is unclear whether the issues with the fill material mean the perimeter footing and slab are no longer adequately supported and any impact on the compliance of those building elements with clauses B1 and B2.
- 3.50. Regardless of the exact cause(s) of the cracking in the floor slab, the evidence provided by the parties demonstrates failure of the floor slab has occurred within the life of the building, meaning it has not met the requirements of Clause B2 *Durability* (B2.3.1(a)) as it relates to Clause B1 *Structure* (B1.3.1 and B1.3.2).
- 3.51. However, there are no details in the remediation proposal of any proposed action to investigate whether the voids extend under the slab, repair or replace part of or all of the concrete floor slab, or remediate the underlying fill material where voids have been observed. Without additional information from further investigation, that could be used to develop remediation proposals for the fill material and cracked floor slab, I cannot be satisfied that the remedial work currently proposed by the second engineer will result in a code-compliant building.

### The foundations

- 3.52. Although the floor slab is tied into the 'perimeter footing' and standard slab thickening, for the purpose of this determination references to "foundation" are to those building elements that are designed to support, and transfer loads to the ground, from the structure above – namely the 1.2m deep concrete filled reinforced

piles, the 1.5m deep concrete post footings, and 'perimeter footing' as shown on the proposed foundation plan<sup>40</sup>.

3.53. The relevant part of the remediation proposal includes:

3.53.1. new hold down bolts to be fixed into the existing foundations

3.53.2. several new 600mm square x 600mm deep 'foundation underpinning pad[s]' to the northwest and northeast corners of the building (to be positioned below the existing 500mm deep 'perimeter footing'), bearing on naturally occurring ground.

3.54. Based on the previous on-site test results, and associated PS4, the naturally occurring ground conditions are adequate to support the new 'foundation underpinning pad[s]'.

3.55. Regarding compliance of the second engineer's remediation proposal with Clause B1 *Structure* (specifically in relation to the proposed new 'foundation underpinning pad[s]') and new hold down bolts, I have in this case relied on the following:

3.55.1. the PS1 from a Chartered Professional Engineer, and confirmation of proposed construction monitoring.

3.55.2. the stated means of compliance of B1 in the remediation proposal and a 'design life of 50 years' (ie B2.3.1(a))

3.55.3. reliance on the structural design standards referred to in the second engineer's remediation proposal

3.55.4. the specific engineer design (eg plans and calculations<sup>41</sup>) provided by the second engineer

3.55.5. the previous assessment of existing ground bearing conducted on 2 December 2016

3.55.6. the 'Peer Review of [the second engineer's] Remediation Strategy' undertaken by a separate Chartered Professional Engineer, as recorded in Technical Memo dated 27 June 2025.

3.56. Taking this information into consideration, I am of the view the construction of the proposed new 'foundation underpinning pad[s]' and hold down bolts will comply with clause B1. However, as noted above, the proposed new work to the foundations does not address the issues regarding the floor slab cracking or the fill material.

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<sup>40</sup> Building consent plans A201, as well as 'section AA' on plan A302.

<sup>41</sup> Note, I have not attempted to reassess or analyse the form, content or outputs from the structural calculations; instead, I have elected to rely on the competence of the Chartered Professional Engineer to perform such tasks within their stated field of practice and code of conduct.

## Conclusion

- 3.57. The floor slab as constructed has not met the requirements of Clause B2 *Durability* as it relates to Clause B1 *Structure*.
- 3.58. The remediation work outlined in the second engineer's proposal does not include measures to repair or replace the cracked floor slab. It also does not include any proposals to investigate and remediate the issues with the underlying fill material.
- 3.59. The remediation work outlined in the engineer's proposal, considered in isolation, will comply with clause B1.<sup>42</sup> However, the remediation proposal does not address the existing issues with the fill material or the floor slab, and so I cannot be satisfied that the remedial work currently proposed by the second engineer will result in a code-compliant building.

## 4. Remedy

- 4.1. A determination under section 177(1)(b) is in respect of an authority's exercise of its powers of decision. Section 188(1) provides that a determination by the Chief Executive must confirm, reverse, or modify that decision, or determine the matter to which it relates.
- 4.2. I have determined the matter in relation to the failure to exercise a power of decision to issue a notice to fix and compliance of the remediation proposal. With regard to the authority's exercise of its power of decision to issue the building consent, I now consider whether that decision should be confirmed, reversed or modified.
- 4.3. The District Court, in *Estate Properties Ltd v Hastings District Council*, stated "The Chief Executive's choice of remedy under s 188(1) is an exercise of discretion"<sup>43</sup> and that it was open to the Chief Executive to not apply one of the positive steps required by section 188(1)(a)<sup>44</sup>. Further, the court took the view that declining to reverse a decision did not have the effect of confirming the decision<sup>45</sup>.
- 4.4. I note that where a building consent is later found to contain inadequate details or does not demonstrate compliance with the Building Code, it does not necessarily follow that the decision to issue the building consent should be reversed. In some circumstances an amendment to the building consent can be made to address deficiencies and bring the proposed building work into compliance with the Building Code.

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<sup>42</sup> My consideration is limited to the proposed remedial work and I have not assessed the compliance of existing foundations that would be retained.

<sup>43</sup> *Estate Properties Ltd v Hastings District Council* [2021] NZDC 17000, at [21].

<sup>44</sup> *Ibid.* at [30], [37] and [42].

<sup>45</sup> *Ibid.* at [29].

- 4.5. I agree with the approach taken in Determination 2011/119<sup>46</sup>, that where a building consent has been relied on there would need to be compelling reasons to reverse the decision to issue the building consent. Factors considered in that determination included whether the decision to issue the building consent was incorrectly made on the basis that the building consent authority did not have reasonable grounds to be satisfied that the provisions of the Building Code would be met, and whether the building work could be made compliant with the Building Code.
- 4.6. The District Court in *Cooper v Tasman District Council*<sup>47</sup> (“*Cooper*”) identified some factors as relevant to the question of whether a building consent should be reversed:
- 4.6.1. “[T]he deficiencies in the material accompanying the application for consent may not be relevant to the current issue of concern” and “unless the flaws are significantly connected with the current issues of concern, then ... the consent should not be reversed”<sup>48</sup>.
- 4.6.2. “[I]t might be a fair assumption that the process of inspections during construction and the process of considering the issue of a Code Compliance Certificate at the end would ensure that, no matter what shortcomings there might have been in the original consent, the building would in fact end up code-compliant. Again, in those circumstances, it is not easy to see why the consent should be reversed in respect of a code-compliant building”<sup>49</sup>.
- 4.6.3. “[I]f the shortcomings in a consent meant that a house built in accordance with it could never be code-compliant, then to reverse the consent would seem to be the appropriate, if not the only, remedy”<sup>50</sup>.
- 4.7. The court in *Cooper* also noted “...to reverse the consent entails the consequence that the house would have been built unlawfully, with further consequences which could ultimately include an order for its demolition”<sup>51</sup>. This highlights the consequences of reversing a building consent, particularly for the building owners who may be negatively impacted by such a decision, and supports the view that there must be compelling reasons to so.
- 4.8. In this case, I elected to consider only a representative sample of the items from the 2024 report and based on that sample I reached the conclusion the authority did not have reasonable grounds to be satisfied that the provisions of the Building Code would be met if the building was constructed in accordance with the submitted

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<sup>46</sup> Determination 2011/119 *The issue of building consents and code compliance certificates for three buildings on land that has subsided* (23 December 2011) at [6.3.8].

<sup>47</sup> CIV-2009-042-000116, NZDC Nelson, Broadmore J, 21 July 2010.

<sup>48</sup> *Ibid.* at [40] and [41].

<sup>49</sup> *Ibid.* at [42].

<sup>50</sup> *Ibid.* at [43].

<sup>51</sup> *Ibid.* at [37].

plans and specifications when it originally issued the building consent on 24 November 2016.

- 4.9. There were three subsequent amendments to the building consent, that I must also take into consideration. Those amendments altered the layout of the ground floor and shower drainage, the lining to the first-floor walls, and the lining of the intertenancy wall and underside of the of the first floor. However, they did not address the required fire-rating of the steel work, nor the arrangement of the steel work and the windows on the northeast elevation (which gave rise to modifications on site during construction).
- 4.10. In regard to the potential for the building to be made compliant with the Building Code, I have taken into account the remediation proposal. Although the proposal addresses shortcomings in the original building consent (for example the design of the baseplates, hold-downs and foundations), it does not address issues with the fill material or cracked floor slab. Whether the building will be able to comply with the Building Code will require further investigation of the fill, and remediation of the fill and concrete slab.
- 4.11. Further, some 10 years have passed since the original building consent was granted. There will have been changes to some of the compliance documents, such as Acceptable Solutions and various standards, that were relied on in the original building consent application to establish compliance with the Building Code.
- 4.12. In the circumstances, I consider there are compelling reasons in this case to reverse the authority's decision to issue building consent BC0093/016.

## 5. Decision

- 5.1. In accordance with section 188 of the Building Act 2004, I hereby determine:
- the provision in section 49(1) was not met when the authority issued building consent BC0093/016 on 24 November 2016
  - the authority failed to exercise a power of decision to issue a notice to fix on or around 13 March 2017
  - the remediation work described in the second engineer's proposal in respect of the new hold-down bolts and foundation underpinning pads will comply with clause B1 but does not result in a code compliant building in relation to the floor slab and underlying fill; and
  - I reverse the authority's decision to issue building consent BC0093/16.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 13 March 2026.

**Peta Hird**

**Lead Determinations Specialist**