Department of Building and Housing
Te Tari Kaupapa Whare

Determination 2011/080

The exercise of powers in respect of a notice to fix issued for a house at 859 Whangaparaoa Road, Whangaparaoa, Auckland

1. The matters to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004[1] ("the Act") made under due authorisation by me, John Gardiner, Manager Determinations, Department of Building and Housing ("the Department"), for and on behalf of the Chief Executive of that Department. The applicant is the owner and builder of the house, K Warner ("the applicant") and the other party is the Auckland Council[2] ("the authority"), carrying out its duties as a territorial authority or building consent authority.

1.2 This determination arises from a dispute between the parties relating to a lack of inspections and building regulatory matters. The result of this dispute is that the authority issued a notice to fix, the building consents for the building work that was being undertaken were then withdrawn, and the applicant applied for a certificate of acceptance, which was subsequently issued by the authority.

1.3 The applicant has sought to have the certificate of acceptance 'changed to a code compliance certificate'. However, as I consider that the notice to fix was the regulatory action that lead to the application for a certificate of acceptance, I have

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

[2] Before the application was made Rodney District Council was transitioned into the Auckland Council. The term authority is used for both.

taken the view that it is the authority's exercise of its powers in respect to the notice to fix that is the matter central to this dispute.

1.4 The notice to fix also stated that the authority would not be able to establish whether the building work that hadn't been inspected complies with the Building Code (First Schedule, Building Regulations 1992). From this statement, I have inferred that the authority was of the view that it would not be able to issue a code compliance certificate.

1.5 I therefore consider the matter to be determined[3] is whether the authority correctly exercised its powers in issuing the notice to fix with respect to the contraventions and remedies that were set out in the notice to fix, and as a result whether the authority was correct to issue the certificate of acceptance

1.6 In making my decision, I have considered the submissions of the parties, the report of the expert commissioned by the Department to advise on this dispute ("the expert") and the other evidence in this matter.

2. The building work

2.1 The building work consists of a detached house and garage building in a very high wind zone for the purposes of NZS 3604[4]. The site is about 20m from a coastal cliff to the east[5], with a timber retaining wall near the boundary providing a gently sloping building platform.

2.2 The building is two-storeys high in part and is made up of two main sections that were constructed in stages; a concrete garage structure ("the garage") and the remaining house structure ("the house"). The first floor level of the house extends partly over the garage roof and a small 'service room' is situated at second floor level. The construction is primarily comprised of specifically engineered elements, with some conventional light timber and steel frame as indicated in Figure 1.

2.3 The expert noted no evidence of treatment to the timber-framed walls. However, given the date of construction in 2005, I accept that the wall framing of the service room and other infill timber framing is likely to be treated to a level that will provide resistance to fungal decay.

2.4 The ground floors are a combination of:

- reinforced concrete slabs and foundations to the garage and water tanks, the sub-floor storage space adjacent to the garage and the eastern end of the house
- proprietary composite steel/concrete floors to the northwest corner of the garage, above the water tanks and the mid-section of the house, above the sub-floor storage space
- timber-framed floor on concrete block piers and concrete foundations to the mid-section of the house.

2.5 The walls are a combination of:

- plastered reinforced concrete block to the garage

[3] Under sections 177(1)(a), 177(1)(b), 177(2)(f) and 177(3)(e) of the Act. In this determination, unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.
[4] New Zealand Standard NZS 3604:1999 Timber Framed Buildings
[5] The expert's report refers to the front elevation as north, and this determination maintains that convention.

- bevel back weatherboards fixed over timber cavity battens to light steel framing on the ground and first floor walls to the house and timber framing to the second floor walls to the service room
- fibre-cement sheets over timber-framed wing walls to the entrance
- fibre-cement sheet with expressed joints to the eaves fascia bands, which extends as soffit linings.

2.6 The roofs are a combination of:

- 'torch-on' modified bituminous membrane on flat roofs to the proprietary composite steel/concrete roof to the garage, plywood on steel and timber framing to the house ground and first floor, and plywood on timber framing to the second floor service room
- 30^{o} pitched asphalt shingles over timber framing to small lean-to roofs to the western end of the house and the entry canopy.

2.7 The flat roofs to the ground floor generally have eaves of about 900mm overall, except above projecting bay windows to the east elevation. The upper roofs have eaves of about 700mm. Purpose-made 290mm wide metal gutters are concealed behind a fibre-cement clad fascia band, with a metal capping over the junction.

2.8 A paved deck on the lower house roof extends along the east and most of the north wall of the first floor. A stainless steel tube and wire balustrade is side-mounted to a membrane-covered upstand, with an internal gutter adjacent to the upstand.

2.9 A small free-draining timber deck is fixed to the foundations of the east wall of the living room. Above the deck, steel beams form a cantilevered canopy, with the fascia band extended around the outside and louvres installed within the frame.

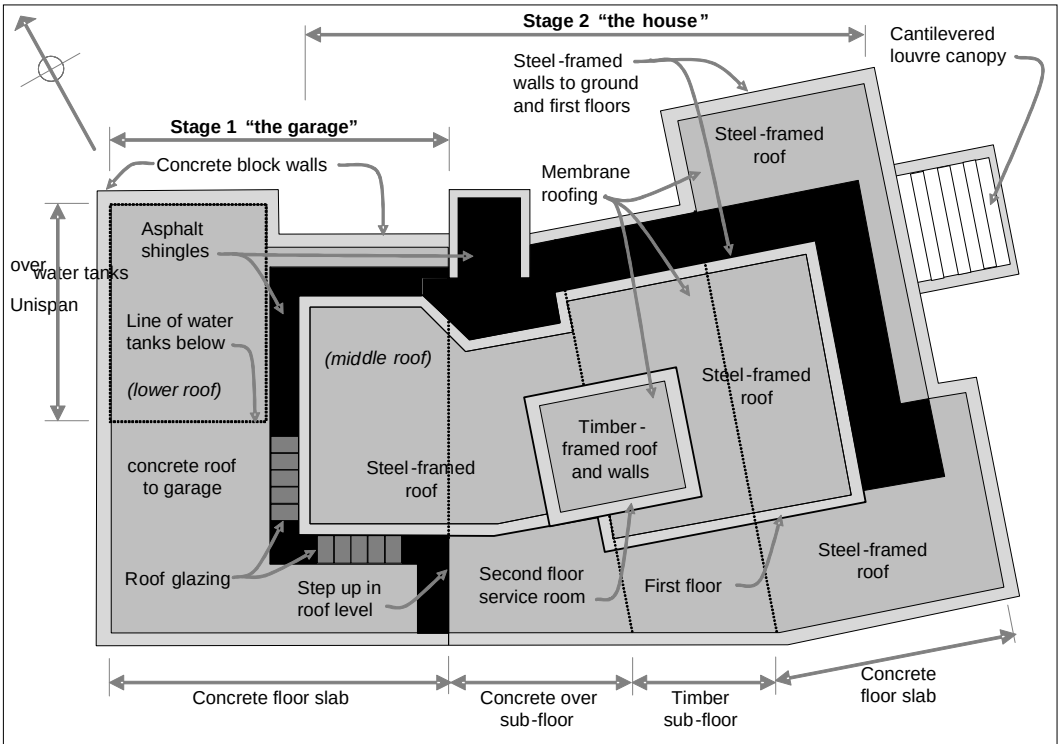

Figure 1: Construction elements (not to scale)

3. Background

3.1 The building work was carried out under two building consents which were issued in 2004 under the Building Act 1991 ("the former Act ") for the following stages:

- Stage 1: ABA 41654 ("the first consent") for the garage/workshop/watertank structure, including a site retaining wall and some excavation for the house ("the first consent"). The consent was issued on 24 August 2004 based on a building certificate issued by a building certifier.
- Stage 2: ABA 43201 for the house ("the second consent"). The authority issued the second consent (which I have not seen but I note that the PIM is dated 25 November 2004).

3.2 Construction onsite commenced around the same time the building certifier's approval as a building certifier ceased on 6 September 2004 and the certifier was therefore unable to inspect any completed work. The applicant advises that he spoke to an authority officer and proceeded with construction on the applicant's understanding that he could employ an engineer to oversee the work as it would be some time before the authority could check the plans and the foundations were ready to pour.

3.3 The engineer inspected the garage construction and issued producer statements ('PS4 – Construction Review') on the following dates:

- 16 November 2004 for excavations, foundation reinforcing, floor slab reinforcing, pile reinforcing
- 11 February 2005 for inspections of work on:
  - 15 December 2004 of part-height blockwork
  - 20 December 2004 of full-height blockwork
  - 11 February 2005 of concrete reinforcing.

3.4 The bored pile excavations for the timber retaining wall were inspected and passed by a geotechnical engineer, with a producer statement provided on 9 November 2006.

3.5 Construction continued on the garage and commenced on the house. As most of the house was also specifically engineered, the applicant assumed that the applicant's engineer could continue to oversee the work without involving the authority until pre-line stage.

3.6 The engineer inspected the house construction and issued producer statements on:

- 24 March 2005 to cover excavations, foundation reinforcing, pile reinforcing, blockwork foundation wall reinforcing
- 12 June 2005 for concrete slab reinforcing, unispan reinforcing, structural steel
- 14 November 2005 for all structural steel and revised structural components
- 12 September 2006 for the lintels to the second floor service room and the change from timber to steel framing for lower floors.

3.7 The sewer connection to the house, including 'bedding, backfill and pressure test' was inspected and passed by a qualified engineer, with a producer statement provided on 13 October 2006.

3.8 The applicant requested the authority carry out pre-line building and plumbing inspections. The authority was of the view that as it had not carried out foundation inspections, it could not form a view as to the Building Code compliance of the building work. It appears the authority was of the view that the necessary action for the applicant to take was to withdraw the building consents and apply for a certificate of acceptance.

3.9 In a letter dated 2 October 2006, the applicant followed the process advised by the authority to withdraw the two building consents and informed the authority a determination would be sought on the matter. The authority also issued a notice to fix dated 3 October 2006, which stated:

> 1. Particulars of contraventions
>
> You have commenced and carried out work not included in a current approved Building Consent and you have failed to request Council to inspect the building work.
>
> …
>
> Aspect of the building work that may have been completed should have been inspected by Council.
>
> Council is not satisfied that the work currently underway will meet the requirements of the Building Code.
>
> 2. Building work requirements
>
> 1. You are required, except for work necessary to properly secure and protect the site and keep the site safe, to cease the building work on this site forthwith.
>
> 2. To resolve the current impasse you are required to either withdraw the two Building Consents pertaining to this site and make an application for a Certificate of Acceptance for the same building work, or
>
> 3. Seek a Determination from the Department of Building and Housing as to how this Council is able to retrospectively approve building work completed prior to the amendment application; and how this Council is able to reasonably determine that building work, not inspected, complies with the New Zealand Building Code in order to issue a Code Compliance Certificate.

3.10 On 17 October 2006, the applicant formally lodged the application for a certificate of acceptance. I have seen no records of any correspondence between the issue of the notice to fix and the issue of the certificate of acceptance (refer to paragraph 3.11).

3.11 The authority issued a certificate of acceptance (No. UNB-244) on 29 September 2010 for 'new dwelling, garage and inground palisade retaining wall'. The certificate states:

> The [authority] was only able to inspect the following parts of the building work and this certificate is qualified as follows:
>
> - Framing, bracing, floor joists, roof framing and associated fixings
> - Insulation to walls and ceilings
> - Postline nailing of internal linings

- Waterproofing to bathroom floors and walls
- Deck and stair barriers and handrails
- Visible components at Final inspection

The work not able to be inspected and therefore not covered by this certificate are the following areas:

1. Ground conditions
2. Foundation and reinforcement
3. Blockwork and reinforcement and its waterproofing
4. Floor slab and reinforcement and associated vapour barrier
5. Reinforcing in foundations, blockwork and floor slabs
6. Stormwater and foul water drainage
7. Building wrap, flashings, taping and seals
8. The deck substrate and waterproofing
9. Electrical and gas installation work.

3.12 The applicant wished to have the certificate of acceptance reversed and a code compliance certificate issued, and on 21 February 2011 the Department received an application for a determination.

4. The submissions

4.1 The applicant outlined the background leading to the application for a certificate of acceptance for the building, noting that his decision to proceed with construction on the basis of engineer's inspections was based on his experience with other local authorities. He was of the view that this was 'obviously in hindsight a wrong decision'. The applicant described the construction of the building, and provided copies of:

- the PIM's for the garage and the house
- a series of construction photographs
- the letter to the authority dated 2 October 2006
- documentation for the certificate of acceptance application, including:
  - drawings and specifications
  - the structural engineer's producer statements and reports
  - producer statements for the timber retaining wall and sewer connection
  - various other statements, certificates and information
- the certificate of acceptance dated 29 September 2010.

4.2 The authority did not acknowledge the application.

4.3 Following the process of providing the expert's report to the parties (refer paragraph 6.3.1), on 9 May 2011 I requested further information be provided by the authority.

4.4 I did not receive a response from the authority until 5 July 2011. In its response the authority provided information to explain the background to the situation and stated:

> The status of all the building consents is "withdrawn" at the request of the owner to facilitate the [certificate of acceptance] process.

> After the [certificate of acceptance] application and the withdrawal of the building consent applications it was not possible to issue a [code compliance certificate].
>
> [The authority] … always accepted the PS4 producer statements from the engineer in relation to structural elements.
>
> The [certificate of acceptance] process included several requests for information and work. The [certificate of acceptance] was finally issued on 29 September 2010.

4.5 In response to the expert's report (refer to paragraph 6.3), in a letter dated 15 April 2011 the applicant provided some additional information and commented on some items in the report. Additional information included advice that:

- the entrance and wall and framing is all H5 with H 3.2 nogs
- the bituminous roof is now painted
- water from the storage tank is used only for landscaping and house cleaning
- the chimney flue is double sealed
- the balustrade wiring was from a faulty roll of 316 wire and is to be replaced.

These and other matters raised in the owner's submission have been taken into account in the determination.

4.6 The draft determination was issued to the parties for comment on 8 August 2011. The authority accepted the draft without comment.

4.7 The applicant accepted the draft, noting that at the time the notice to fix was issued only as-built plans were required and there was 'nothing to be fixed'; the spouting is regularly cleaned and there are two hose fittings at roof level for this purpose. The withdrawal of the building consents (refer paragraph 4.4) was accepted by the applicant 'because of the terms the [authority's] officers put to me'; the withdrawal of the consents was 'certainly not 'requested'' by the applicant.

5. Discussion: The notice to fix

5.1 The notice to fix and the remedies sought

5.1.1 As described in paragraph 3.9, a notice to fix was issued that required the applicant to stop work and gave the applicant two options to resolve the matter:

- withdraw the two building consents and make an application for a certificate of acceptance for the building work
- seek a determination as to how the authority can 'retrospectively approve building work completed prior to the amendment application', and how the authority can reasonably establish that the building work complies with the Building Code.

5.1.2 Under sections 163 to 168 of the Act, a notice to fix can be issued by an authority where a person is contravening or failing to comply with the Act or its regulations and a notice to fix must require the person to remedy the contravention or to comply with the Act or its regulations.

5.1.3 I consider it was inappropriate for the authority to have taken the view that compliance could only be established through the decision of a determination or that the building consents must be withdrawn.

5.1.4 I am also of the view that the remedies sought in the notices to fix are not appropriate and outside the scope of a notice to fix.

5.1.5 Furthermore, I note the granting of building consents are statutory decisions authorising particular building work to be undertaken. In this case, I consider those decisions were relied and acted upon by the applicant, who acted in good faith to ensure that completed work was adequately inspected. I do not consider it appropriate for the consents to be withdrawn after the completion of the work in question. I note that the grounds on which a building consent lapses (section 52) are quite narrow and there are no other powers in the Act that enable an authority to 'withdraw' a building consent. In this case the maintenance of the consents as issued under the former Act is also specifically provided for in the provisions of the Act.

5.1.6 Inspections are required to verify that completed building work complies with the plans and specifications, and the conditions of the building consent and the Building Code. If the authority did not carry out particular inspections itself, it is entitled to rely on inspections by others, or verification by another means. I note building consent conditions frequently require engineering inspections that are verified by way of a 'PS4 – Construction Review'. I have no reason to doubt the sequence of events as described by the applicant in his submission as outlined in paragraph 3. I accept the position he was placed in by the certifier ceasing its operations, and his engagement of an engineer to supervise the work as advised by the authority. I do not accept the authority needed to recheck the plans prior to inspecting any work onsite, as this work had already been certified as complying with the Building Code by the building certifier.

5.1.7 I consider the applicant did advise the authority of the work that required inspection but that the authority declined to do so. In terms of the evidence of compliance, I note that in this case, a Chartered Professional Engineer inspected building work for the first and second building consents, and issued Producer Statements for the construction of the foundations and structural components of the building.

5.1.8 It is my view that the options given in the notice to fix particularly in requiring the applicant to withdraw the building consents were not appropriate, and therefore I consider the authority incorrectly exercised its powers in respect to the issue of the notice to fix.

5.2 The withdrawal of the building consents

5.2.1 In it's submission to the Department, dated 5 July 2011, the authority stated that the 'status of the building consents is "withdrawn" at the request of the owner to facilitate the [certificate of acceptance] process.' However, that submission doesn't sit well with the contents of the notice to fix issued by the authority that required the applicant to "withdraw" the building consents.

5.2.2 It is my view that an authority has no power to withdraw a building consent once it has been issued, either on the application of an owner or otherwise.[6] The authority clearly has powers to amend a building consent (ref section 45(5)) but only if the owner makes an application in the form prescribed. It has no power to amend the

[6] The general principles relating to the power of a decision-maker to alter a decision are discussed and applied by the Court of Appeal in *Goulding v Chief Executive, Ministry of Fisheries* [2004] 3 NZLR 173. Once a decision has been made and communicated then, in the absence of a specific statutory power or the application of section 13 of the Interpretation Act 1999 to correct certain errors, a decision is irrevocable.

consent of its own volition. The situations when a consent lapses in terms of section 52 are very narrow.

5.2.3 It is unclear what the authority has actually done to withdraw the consents. However, given the authority had no power to withdraw the building consents, I consider that the consents can be treated as still in existence.

5.2.4 It is also necessary to consider the issue of the certificate of acceptance, given that the authority sought remedies in the notice to fix that were outside the scope of a notice to fix and "withdrew" the building consents without having the power to do so.

5.2.5 I consider that it is appropriate to reverse the authority's decision to issue a certificate of acceptance, given that the applicant only applied for it because of the remedies sought by the authority in the notice to fix and that I have found that the building consents can be treated as still in existence.

5.2.6 I note that as the first building consent was granted by the authority based on a building certificate issued by a building certifier registered under the former Act, it is appropriate to consider the application of the section 437 transitional provisions which can include the consideration of a certificate of acceptance. I have considered the framework I have established in previous determinations and I have discussed this in paragraph 6.1.1.

5.3 Conclusion

5.3.1 I conclude that:

- the authority incorrectly exercised its powers in respect to the issue of the notice to fix
- the authority had no power to withdraw the building consents and therefore the consents can be treated as being in existence
- the decision to issue a certificate of acceptance is subsequently reversed.

6. Discussion: The code compliance of the building work

6.1 Framework for assessing the appropriate certificate to be issued for first consent

6.1.1 In previous determinations[7], I have used the following framework to consider the Building Code compliance of building work and the application of the transitional provisions where a building certifier was involved in approval of the completed building work:

(a) Is there sufficient evidence to establish whether the building as a whole complies with the Building Code?

(b) Can a code compliance certificate be issued forthwith?

(c) If a code compliance certificate cannot be issued forthwith, are there sufficient grounds to conclude that, once any outstanding items are fixed and inspected, a code compliance certificate could be issued?

(d) If there are insufficient grounds to issue a code compliance certificate even after outstanding items are fixed and inspected, are there parts of the building work that can be confirmed, on reasonable grounds, as complying with the Building

[7] For example, Determination 2007/94

Code in order that a certificate of acceptance can be issued in respect of these parts?

6.2 Grounds for the establishment of code compliance

6.2.1 I note that previous determinations also provided a framework for establishing reasonable grounds to consider the code compliance of building work where building work is completed and some of the elements are not now able to be cost-effectively inspected.

6.2.2 In order for me to form a view as to the code compliance of the building work, I have established what evidence was available and what could be obtained considering that the building work is completed and some of the elements were not able to be cost-effectively inspected.

6.2.3 The authority believes that any decision it makes with respect to compliance of the house is limited by what items it is able to inspect. In my view it is reasonable to rely on the inspections that were undertaken particularly in regard to inaccessible building components, but it is also important to look for evidence that can be used to verify that the inspections that were undertaken were properly conducted.

6.2.4 In summary, I find that the following evidence allows me to form a view as to the code compliance of the building work as a whole:

- the inspections carried out by the structural engineer
- the inspections carried out by the authority pertaining to the certificate of acceptance process, which includes pre- and post-line inspections, and visible components at the final inspection
- the expert's report (refer paragraph 6.3).

6.3 The expert's report

6.3.1 As mentioned in paragraph 1.6, I engaged an independent expert to assist me. The expert is a member of the New Zealand Institute of Architects. The expert inspected the house on 23 and 29 March 2011, providing a report dated 31 March 2011. A copy of the expert's report was provided to the parties on 4 April 2011.

General

6.3.2 The expert noted that the overall construction quality appeared satisfactory and the house was generally well maintained except for some debris in the gutters. The expert commented that there were variations from the drawings, the lack of a roof plan, and some missing details and dimensions.

6.3.3 With respect to the windows and doors, the expert observed that the windows and doors are generally sheltered beneath deep eaves. House windows are face-fixed over the weatherboards, with metal head flashings, timber scribers at the jambs and drainage gaps provided at the sill flanges, and the construction photographs show the openings wrapped and taped at corners. Garage windows are recessed within the concrete blockwork and face-fixed against rebated blocks, with sloping sill blocks and flexible sealant at junctions. The expert considered that the installation appeared satisfactory and generally accorded with the manufacturer's instructions.

Moisture levels

6.3.4 The expert inspected the interior of the house, taking non-invasive moisture readings, and noted no evidence of moisture. The expert also took non-invasive moisture readings of weatherboards installed over the steel-framed walls and noted that, remote from the steel members, all readings were uniformly low.

6.3.5 The expert also took three invasive moisture readings of timber framing to the second floor service room, using long probes through internal linings and trim. Readings were taken adjacent to a door sill, under a window jamb to sill junction and beneath the corner window and were all about 11%, which allowed a large margin for any potential increases during wetter seasons.

Clause E2

6.3.6 Commenting specifically on the external envelope, the expert noted that

Penetrations

- although recessed gas heater boxes are flashed and sealed, there are unsealed penetrations inside the boxes that risk water penetration into the wall
- the meter box is recessed into concrete blockwork, with unsealed junctions
- butyl rubber boot flashings to roof pipe penetrations lack overflashings

Roofs and gutters

- there is a small area of ponding on the membrane to the middle roof
- the membrane to the service room roof lacks a UV-resistant coating
- liquid-applied membrane 'gutter flashings' at junctions of roof-lights to asphalt shingles require further investigation to assess long term weathertightness
- at the northeast corner of the deck, a small apron flashing overlaps the adjacent shingles, creating a vulnerable junction at the upper edge
- some edges of the fibre-cement sheets to soffits and fascia bands are unpainted
- some sections of the hidden gutters are ponding, with the lack of gutter or downpipe guards leading to leaf accumulation adding to the risk of corrosion of the metal gutters. The risk is higher here as the house is close to the beach and within the associated corrosion zone.

6.3.7 The expert also noted:

- An internal corner beside the curved window to the east elevation lacks a scriber or evidence of an underlying flashing, however, this junction is sheltered beneath a 900mm deep eave.
- Although plaster to concrete blockwork extends below the pebble drainage strip, with no evidence of membrane applied below ground level, the area is well-drained and is sheltered beneath 900mm deep eaves with no evidence of moisture in adjacent unlined or lined rooms.
- Although window head reveals to the concrete block lack drip grooves, the heads are sheltered beneath 900mm eaves.

G12 Water Supplies

6.3.8 The expert observed that water pressure in bathrooms and the kitchen appeared adequate, noting that the pump system from the water tanks was therefore likely to be operating satisfactorily.

6.3.9 The expert also noted that some of the pipework and compression fittings were visible within the sub-floor areas. These components have been appraised by BRANZ and appear to have been installed competently, with no evidence of leaks.

G13 Foul Water

6.3.10 I note that the sewer connection to the house, including 'bedding, backfill and pressure test' was inspected and passed by a registered engineer, with a producer statement provided on 13 October 2006 (see paragraph 3.7).

6.3.11 The expert was able to observe waste pipes installed within sub-floor spaces, noting that the size and gradient of the main discharge pipe accorded with G13/AS1 for the facilities in the house. However the expert also noted that the pipe supports and blocks exceeded maximum spacing, and additional supports were needed.

6.3.12 The expert observed that the facilities and systems appeared to be operating, with toilets flushing satisfactorily and the kitchen sink draining freely. The expert also noted that the pipework layout and workmanship he was able to observe appeared 'tidy', with the system generally fixed as shown in the drawings.

6.4 Weathertightness

Weathertightness evaluation

6.4.1 The evaluation of building work for compliance with the Building Code and the risk factors considered in regards to weathertightness have been described in numerous previous determinations (for example, Determination 2004/1).

6.4.2 This house is assessed as having a moderate to high weathertightness risk rating. I note that the weatherboard cladding incorporates a drained cavity in accordance with the details shown in E2/AS1 for elevations with a high weathertightness risk rating.

Weathertightness performance

6.4.3 Generally the claddings appear to have been installed in accordance with good trade practice and the manufacturers' instructions. However, taking account of the expert's report, I conclude that further investigation and remedial work is necessary in respect of the areas identified in paragraph 6.3.6.

6.4.4 I note the expert's additional comments in paragraph 6.3.7, and accept that these areas are adequate in these particular circumstances.

Weathertightness conclusion

6.4.5 I consider the expert's report establishes that the current performance of the building envelope is adequate because it is preventing moisture penetration at present. I am therefore satisfied that the building complies with Clause E2 of the Building Code.

6.4.6 However, the building is also required to comply with the durability requirements of Clause B2. Clause B2 requires that a building continues to satisfy all the objectives of the Building Code throughout its effective life, and that includes the requirement to remain weathertight. Because the identified faults are likely to allow future ingress of moisture, the building work does not comply with the durability requirements of Clause B2.

6.4.7 Because the faults identified with the claddings occur in discrete areas, I am able to conclude that satisfactory rectification of the items outlined in paragraph 6.3.6 will result in the external envelope being brought into compliance with Clauses B2 and E2 of the Building Code.

6.4.8 Effective maintenance of claddings is important to ensure ongoing compliance with Clauses B2 and E2 of the Building Code and is the responsibility of the building owner. The Department has previously described these maintenance requirements (for example, Determination 2007/60).

6.5 The remaining code clauses

Evaluation of compliance

6.5.1 With respect Clause B1 and the structure of the building, I make the following observations:

- The geotechnical engineer's producer statement confirms that the bored pile excavations for the timber retaining wall were reviewed (see paragraph 3.4).
- The engineer's producer statements confirm that all specifically engineered elements of the building were reviewed during construction (see paragraphs 3.3 and 3.6).
- The authority's certificate of acceptance includes 'framing, bracing, floor joists, roof framing and associated fixings' (see paragraph 3.11).
- The expert observed no indications of failure after 6 years.

6.5.2 An 'Electrical Certificate of Compliance' dated 12 July 2005 was provided for the electrical work to the building. Energy work certificates dated 26 March 2006 and 20 December 2006 were provided for the gas water heater and cook tops installed in the building.

6.5.3 Taking account of the expert's report, I conclude that remedial work is necessary in respect of the inadequate support for the main discharge foul water pipe (Clause G13).

Conclusion

6.5.4 Taking the above observations into account, I am able to conclude that there are reasonable grounds to come to the view that the building complies with Clauses B1, G8, G11 and G12 of the Building Code.

6.5.5 Taking account of the expert's report, I conclude that remedial work is necessary in respect of the inadequate support for the main discharge foul water pipe (Clause G13).

7. The appropriate certificates to be issued

7.1.1 I have found that further investigation and remedial work is necessary in respect of the areas identified in paragraphs 6.3.6 and 6.5.5. I have not seen the building consent documentation, only the application certificate of acceptance. I have considered the compliance of the building as a whole and concluded that remedial work is necessary in respect of the consented building work, but have not considered which of the items of work relate to which consent.

7.2 Having found that the building work can be brought into compliance with the Building Code, I must now determine whether the authority can issue either a certificate of acceptance or a code compliance certificate for the first consent (ABA 41654).

7.3 In respect of the first consent, Section 437 of the Act provides for the issue of a certificate of acceptance where a building certifier is unable or refuses to issue either a building certificate under section 56 of the former Act, or a code compliance certificate under section 95 of the current Act. In such a situation, the authority may, on application, issue a certificate of acceptance (a new certificate of acceptance for this set of circumstances). In this case, the applicant is seeking code compliance certificates for the building work.

7.4 Applying the decision framework described in paragraph 6.1.1, I consider I have reasonable grounds to conclude that the building work under the first consent can be brought into compliance with the Building Code. I am therefore of the view that a code compliance certificate is the appropriate certificate to be issued in due course.

7.5 In accordance with the framework described in paragraph 6.1.1, I also consider I have reasonable grounds to conclude the building work under the second consent (ABA 43201) can be brought into compliance with the Building Code.

8. What is to be done now?

8.1 The authority should issue a notice to fix that requires the owner to bring the building work into compliance with the Building Code, identifying the items listed in paragraph 6.3.6 and 6.5.5 and referring to any further defects that might be discovered in the course of investigation and rectification. The applicant should then produce a response to this in the form of a detailed proposal, produced in conjunction with a competent and suitably qualified person, as to the rectification or otherwise of the specified matters.

8.2 The applicant will also need to apply to amend the building consents to reflect the as built construction (as per the certificate of acceptance application).

8.3 Once these items are satisfied, including any further defects discovered during investigations, the applicant should apply for code compliance certificates, including the appropriate evidence and an application for the appropriate modifications of the Building Code.

9. The decision

9.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority incorrectly exercised its powers in issuing the notice to fix with respect to the contraventions and remedies that were set out in the notice to fix.

9.2 I also determine that the authority's decision to issue a certificate of acceptance is reversed, as the authority did not have power to withdraw the building consents.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 31 August 2011.

John Gardiner
Manager Determinations