



Determination 2011/096

The refusal to grant an amendment to a building consent for proposed remedial work, and the issuing of a notice to fix for a 13-year-old house with monolithic cladding at 54 John Rymer Place, Kohimarama, Auckland



1. The matters to be determined

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

1.2 The parties to this determination are:

- the licensed building practitioner and designer of the proposed remedial work, I Beattie (“the LBP”), who is the applicant
- the owners of the house, C and S Taylor, and E Wilson (“the owners”) acting through the LBP as their agent
- the Auckland Council, including in its previous capacity as Auckland City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

- 1.3 This determination arises from the authority's decisions to:
- issue a notice to fix because it was not satisfied that the 13-year-old house complied with certain clauses² of the Building Code. The authority's concerns primarily related to the weathertightness and durability of the existing house, including the condition of the original timber framing.
 - refuse to grant an amendment to the building consent for proposed remedial work, because it is not satisfied that the information provided satisfied the requirements of section 45 of the Act and that the proposed work did not adequately demonstrate compliance with the Building Code (Schedule 1, Building Regulations 1992).
- 1.4 The matters to be determined³ are therefore whether the authority correctly exercised its powers in issuing the notice to fix and in refusing to grant an amendment to the building consent for the proposed alterations. In deciding these matters, I must also consider:
- the scope of the proposed amendment, and the compliance of the proposed work. (I consider this matter in paragraph 7.)
 - whether the documentation submitted in respect of the proposed remedial work meets the requirements of section 45 of the Act. (I consider this matter in paragraph **Error! Reference source not found.**)
- 1.5 The LBP has stated (refer paragraph 3.3.5) that the remedial work has been presented to the authority with the intention of achieving a code compliance certificate upon its completion. The determination therefore considers the above matters against the requirements of the Act and the Building Code in that respect.
- 1.6 I note that the LBP has defined his application for determination, and repeatedly in submissions to the determination, in terms of the authority 'refusing to process the application to amend the building consent' (refer paragraph 4.1.5). I note here that the authority's actions in processing an amendment to a consent, rather than an authority's decisions made in respect of an amendment, is not a matter that I can determine under section 177 of the Act. However, it is clear from the correspondence between the LBP and the authority that the authority had assessed the proposal submitted by the LBP, and I therefore consider that there has been no refusal to process the application.
- 1.7 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.

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

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

2. The existing house and the proposed work

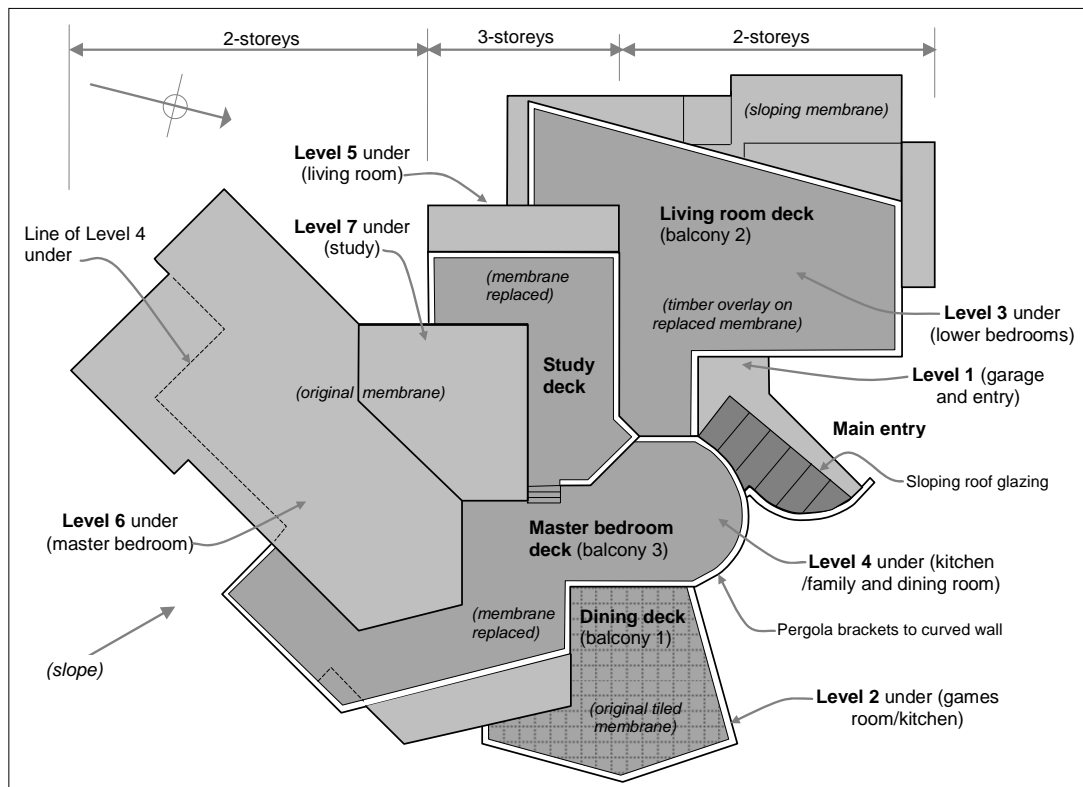


Figure 1: Layout of the existing house

2.1 The existing house

- 2.1.1 The proposed remedial work is to a large house that is three-storeys high, in part, and is situated on a steep northwest-sloping site in a low wind zone for the purposes of NZS 3604⁴.
- 2.1.2 Construction is a mix of specifically engineered concrete foundations, floors, and concrete block retaining walls to lower levels, with conventional light timber frame to the upper two storeys. The existing house has monolithic wall claddings, aluminium windows, membrane decks with clad balustrades and flat membrane roofs.
- 2.1.3 The north and south ends of the house are two-storeys-high, with the central section 3-storeys high. The house steps up the slope, with decks provided at the upper four levels and walls set at varying angles as shown in Figure 1.
- 2.1.4 The house is very complex in plan and form and is assessed as having a high to very high weathertightness risk.
- 2.1.5 The expert was unable to find evidence as to timber treatment. The owners have advised that the timber is 'Boric treated'.

⁴ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

The decks

- 2.1.6 The house has four decks situated above lower level rooms, which have monolithic-clad balustrades that are parapet extensions of lower walls.
- 2.1.7 The dining deck is on the northeast corner above the games room. This deck retains its original tiled floor and has a timber pergola, supported on a timber post fixed via a metal bracket through the top of the balustrade.
- 2.1.8 The living room deck is a large deck on the northwest corner. The original floor has been replaced or overlaid with a synthetic EPDM⁵ membrane and a spaced timber slat floor surface has been installed above the membrane.
- 2.1.9 The master bedroom deck extends around the northeast of the master bedroom. The study deck adjoins the bedroom deck, with steps accommodating the floor level change. Deck floors and steps have been overlaid with synthetic EPDM membrane.

The wall cladding

- 2.1.10 The monolithic wall cladding appears to consist of 4.5mm fibre-cement sheets fixed through the building wrap directly to the framing timbers, and covered with a painted plaster system.

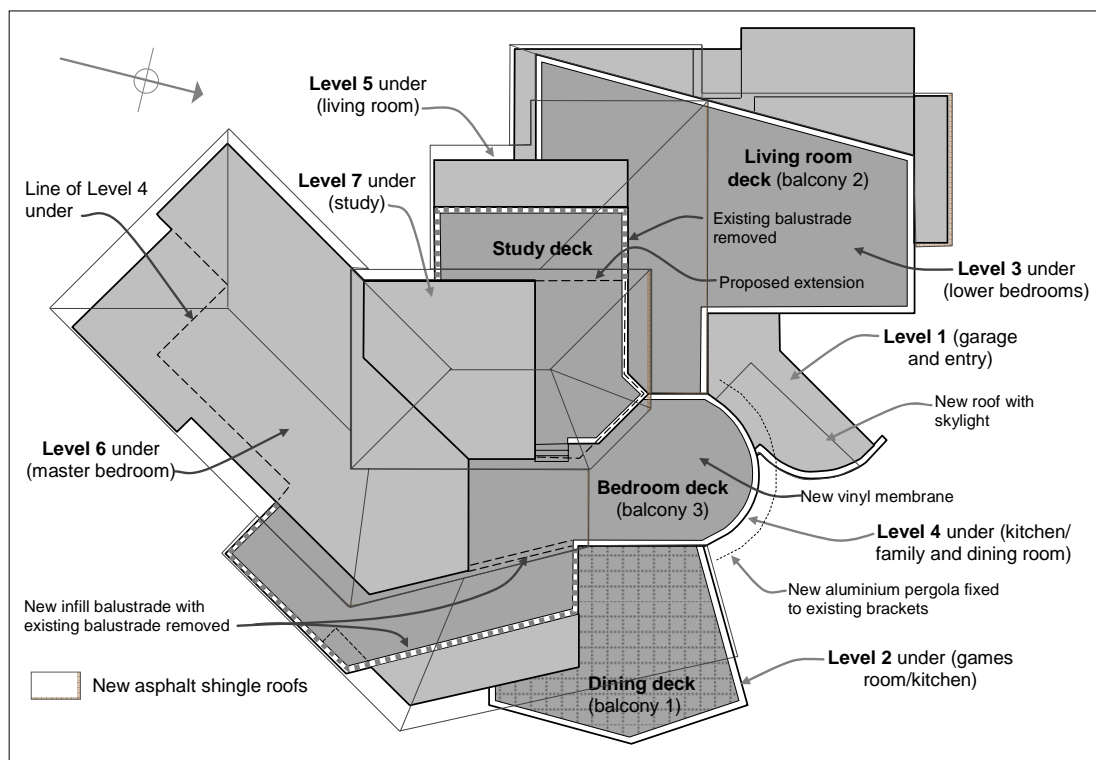


Figure 2: The work in the proposed amendment

⁵ Ethylene propylene diene monomer

2.2 The proposed remedial work

- 2.2.1 The proposal is to extend the study and add new timber-framed asphaltic shingle roofs above most existing membrane roofs. Except for making good around new elements, no work is proposed for existing wall and balustrade cladding. The limited new areas of cladding are specified as a proprietary system of flush-finished fibre-cement incorporating a cavity.
- 2.2.2 The extent of the proposed remedial work is shown in Figure 2 and includes:
- removal of balustrades to reduce sizes of study and master bedroom decks
 - extending study to close in the reduced study deck, with a pitched hipped roof to the extended Level 7
 - pitched hipped roof to Level 6, extending as a lean-to above part of the reduced master bedroom deck, which is re-graded with a new membrane floor
 - new pitched lean-to roofs to Levels 3, 4 and 5
 - new roof with skylight to replace the existing entry roof glazing to Level 1, which is extended to cover the top of the curved parapet wall.

3. Background

- 3.1 The LBP is in the process of seeking approval from the authority for an amendment to building consent (No. B/1997/3800670) for the house.

3.2 The building consent

- 3.2.1 The authority issued a building consent for the house in February 1997 under the Building Act 1991 (“the former Act”). There is no suggestion that the authority did not carry out various inspections during construction in 1997 and 1998: thirty five inspections are recorded. I have only seen a summary record of the inspections undertaken.

- 3.2.2 I have seen no correspondence between the owners and the authority until 2009. No code compliance certificate was sought for the house.

3.3 The proposed amendment to the consent

- 3.3.1 The LBP prepared a proposal for ‘Modification to roof structure’ dated September 2009, and submitted it to the authority on 2 October 2009 with an application to amend the original building consent.
- 3.3.2 The LBP wrote to the authority on 23 November 2009 following a meeting with the authority on 13 October 2009. In the letter, the LBP referred to other determinations, in particular 2007/134, that he believed were relevant to this situation, contested the authority’s position with respect to the adequacy of the drawings and some technical matters, and submitted, in summary that:

- ‘The application [to the authority to undertake the remedial work] must be an amendment to the existing building consent’ rather than be completed under a new consent
- ‘[The authority] has already satisfied itself as to the integrity of the exterior envelope when a pre-lining inspection was undertaken in 1998.’
- ‘The intent of the application is to provide improvement to a sound building which will eliminate numerous high risk elements ...’

3.3.3 The authority accepted the application for processing in January 2010.

3.3.4 In a letter to the LBP dated 19 January 2010, which included a number of concerns about the proposal and the plans, the authority noted the LBP’s aim was to seek a code compliance certificate ‘at some point’. The authority pointed out that it would need to be satisfied on reasonable grounds that the original parts of the house complied with the Building Code, including weathertightness, and ‘suggest[ed] strongly ... that a final inspection of the dwelling, prior to starting any alterations be undertaken by [the authority]’ to ‘address any issues there may be which could be addressed while or as part of the alteration work’.

3.3.5 Correspondence continued, with the LBP disagreeing with the authority’s concerns about the quality of the submitted drawings and also about the need for a final inspection. Following a meeting with the authority, the LBP stated in a letter to the authority dated 20 August 2011 that a ‘final inspection has been arranged’ and also clarified that:

The application to amend the building consent is exclusively to provide –

1. New pitched roofs over all butynol membrane roofs which includes a minor extension of Level 7 in a comparable cladding type that exists.
2. Repitch and new surface to one balcony.
3. Replace the entry glazed atrium with a pitched roof.
4. Address any other work that is required to achieve the issue of a Code Compliance Certificate.
5. There is no need or intention to reclad the dwelling although the exterior will receive maintenance repainting at the completion of the roof reinstatement.

3.4 The final inspection and the notice to fix

3.4.1 The authority carried out a final inspection on 31 August 2010 and identified a number of items, including signs of moisture penetration in some rooms and some problems associated with the wall cladding and decks.

3.4.2 In a letter to the owners dated 27 September 2010, the authority noted it was not satisfied that the house complied with the Building Code ‘in a number of respects’; recommending that:

...you engage the services of a suitably qualified person to review the attached [notice to fix] and to develop a proposed scope of work, which in their view would address all the areas of contravention. [The authority] will then review this proposal and if it agrees with it, will then advise you as to whether a building consent needs to be applied for.

3.4.3 The attached notice to fix dated 27 September 2010 listed defects identified during its final inspection, and noted

- defects related to the cladding
- the lack of general maintenance to the external envelope
- likely lack of durability of underlying construction at some ‘high risk’ areas.

3.4.4 The notice to fix noted that to remedy the contravention the owners were to

lodge with [the authority] a proposed scope of works, outlining how each area of non-compliance is to be addressed and rectified. This proposal, if accepted, may then form the basis for you to make an application for a Building Consent confirming compliance with the building code.

This notice must be complied with by 5 November 2010

3.5 Correspondence and discussions about the notice to fix and the application documentation continued between the parties without resolution. In a letter to the LBP dated 25 January 2011, the authority formally refused to grant the amendment to the building consent.

4. The submissions

4.1 The initial submissions

4.1.1 In a letter accompanying the application, dated 8 March 2011, the LBP referred to other determinations that he considered supported his position. The letter referred to requests made of the authority for the internal processing documentation it had used to assess the application. The LBP also stated that it was not ‘appropriate to issue a notice to fix for outstanding [code compliance certificate] issues’, contending that this precedent had been set by Determination 2009/109.

4.1.2 The LBP outlined the background to the dispute and provided copies of:

- the original consent drawings
- application documents for the consent amendment dated September 2009
- the notice to fix dated 27 September 2010
- correspondence with the authority.

4.1.3 The authority forwarded a CD-Rom, entitled ‘Property File’. The property file did not contain records of any inspections during construction of the house in 1997 and 1998, but contained some documents pertinent to this determination including a record of the August 2010 inspection.

4.1.4 On 4 April 2011 the Department sought clarification and comment from the parties on the matters to be determined. Advice was also sought from the authority on ‘aspects of the building consent amendment (as it currently stands)’ that were considered not to demonstrate compliance.

4.1.5 The LPB’s response, dated 14 April 2011, contended that:

The issue is not about refusing to amend the building consent but one of refusing to process the application to amend the consent

A notice to fix should only be issued for acts of non-compliant construction. There is no obligation under the ... Act to ever obtain a [code compliance certificate] and thus there should not be any imposition on a consent holder by way of notice to fix to complete those items. The items raised in the notice to fix should have been communicated in a response to the final inspection.

The submission requested that the matters to be determined be amended to reflect these two issues. I have responded to the LBP's view of the matters to be determined in paragraphs 1.6 and 6.2.

- 4.1.6 The authority responded to the Department's request in a letter dated 18 April 2011. The authority commented on the building consent application, stating that its primary concern was the 'quality and clarity' of the documentation provided. This applied particularly to the drawings, which were 'not of a sufficient standard' for processing the application.
- 4.1.7 A draft determination was issued to the parties for comment on 8 July 2011. The authority accepted the draft without comment.
- 4.1.8 The LBP did not accept the draft and sought a hearing. The LBP reiterated his view the matters to be determined were:
- the refusal by the authority to process the proposed amendment to the building consent
 - the issue of the notice to fix requiring rectification of all the non-complaint items noted during the September 2010 site inspection was 'inappropriate'.

The LBP submitted that the draft determination 'reflects an imposition that the owners should ... re-clad the house to address minor maintenance issues ...'. The proposed amendment 'was never intended to be "a full remediation proposed for the building as a whole" ...'. The LBP also did not accept the technical opinions of the expert.

4.2 The hearing

- 4.2.1 I arranged a hearing at Auckland on 8 September 2011, which was attended by the LBP, two of the owners, and two representatives of the authority. I was accompanied by a Referee engaged by the Chief Executive under section 187(2) of the Act, together with two officers of the Department.
- 4.2.2 The matters raised by the LBP are summarised as follows:
- A full survey of the house was completed in January 2009, but this was solely for the use of the owners.
 - The proposal was to 'alleviate' defects in building and represented the 'first steps to make the house more liveable'. It 'covers the bulk of work in notice to fix'. The scope of work in the proposed amendment was 'solely to address the flat roofs and the redundant balcony spaces'.
 - The determination application was about the authority's refusal to process the amendment and about the issue of the notice to fix
 - The work to the roofs would expose other parts of the house that would help determine the next stage in the process.

- The items in the notice to fix were not disputed but these should have been conveyed to the owners via a memorandum as the remedial work was ‘already ... in hand’.
- A notice to fix was a ‘persecutory device to get things done’ and was the ‘end of the line when you cannot let someone go back into their house when it is dangerous’. It was not to be used ‘as if the owners have contrived to build something that is not code-compliant’.
- The work would be supervised by the LBP, but it was the ‘trade of builder to put the work together onsite’. The LBP said he had ‘no problem’ with providing more information.
- The LBP was willing to provide the additional information sought by the authority, but requested that the authority clarify what was wanted. The LBP also sought the opportunity to discuss the proposed work with the ‘[consent] processing officer’
- The LBP insisted that the work be done as amendment, rather than new consent, because of overlap of the proposed work with original consent. The LBP also insisted that the determination overturn the issuing of the notice to fix.

4.2.3 The owners submitted, in summary, that

- ultimately they wanted the whole building to be code-complaint
- it appeared that the authority was unable to process the amendment because it was not familiar with the job, yet after its 2010 inspection and it had issued the notice to fix, the authority’s actions had caused remediation process to come to a halt
- the owner did not object to undertaking remedial work, but sought a logical process so remediated items were not affected by later work
- the owners were not aware of any weathertightness problems apart from one instance where a window had been installed incorrectly.
- the owners believed the authority and the LBP needed to get to a point where they could agree on the work required.

4.2.4 The matters raised by the authority are summarised as follows:

- The amendment of the consent was declined because the documentation was not to the required standard; the authority made reference to the Department’s guidance material, and examples of acceptable documentation.
- The documentation must meet the test of enabling the authority to be ‘satisfied on reasonable grounds’ that proposed work would comply with the Building Code; that test was not met.
- The critical feature of any drawing was that it clearly showed the proposed work. The authority cited an example where flashings not dimensioned, underlay not shown and fixings not stated.
- The authority had not got to the stage where the work could be discussed in detail as the detailed information was missing.

- The owners had engaged an expert to consider their house.
- The authority could not place reliance on the work being done by a particular designer, or builder, as this can change at construction stage. The consent documents therefore needed to be complete in themselves.
- The notice to fix requested a remediation plan; it did not require that specific items be fixed. The remediation plan was to cover all matters of non-compliance. The authority freely accepted the staging of remedial work.
- The proposed work did not reference the notice to fix, or indicate it was stage of the work required to remediate the house.
- A notice to fix served to disclose matters to current and future owners, and was issued in respect of significant matters.

4.2.5 The LBP also provided a detailed submission to the Department dated 13 September 2011. The submission restated many of the matters raised at the hearing and in summary contended that

- the documentation held in the authority's files was questionable noting that '30 inspections took place' including 7 inspections of the cladding and that this 'should impart some reassurance that the construction of the dwelling has some integrity'. The LBP contended that this provided credible evidence that the building was code-complaint.
- various sections in the draft determination should be redrafted or removed, and that the evidence obtained by the expert and the authority was in doubt
- the defects in the notice to fix are 'either due to consented design in the original building consent or were approved in the process of construction and have simply deteriorated as is inherent in any building product.' The notice to fix had been issued in respect of 'natural degradation of a code-compliant situation'.
- the LBP had 'no problems in providing further information to 'reasonably satisfy' the issue of a building consent amendment to a dwelling that was constructed within an intensive inspection [by the authority]'
- it was 'acknowledged that numerous elements remain unidentified but ... all suspect elements will be revealed and decision taken accordingly with the full knowledge and approval of [the authority] ...

4.2.6 I note that the hearing brought to light the matter of communication between the owners and the authority. The owners were working through an agent and I accept that an authority would not normally wish to circumvent that arrangement. However, I acknowledge that in this case it led to a situation whereby the owners saw the issue as having no clear way of being resolved. I suggest that in the future the authority reconsider its communication strategy should difficulties arise in similar situations where the consenting process is becoming unnecessarily protracted.

4.3 The second draft determination

- 4.3.1 I considered the submissions of the parties in response to the hearing, and the first draft determination, and issued a second draft determination for comment on 20 September 2011. The authority accepted the second draft without comment.
- 4.3.2 The LBP did not accept the second draft determination. In a letter to the Department dated 3 October 2011, the LBP reiterated earlier comments he had made, and provided the following additional submissions (in summary):
- The LBP reiterated his view of the matters to be determined being that the authority had '[refused] to process the consent application'. The matter to be determined and the decision were requested to be amended accordingly.
 - The LBP disputed statements made in the determination attributed to him and others made in written correspondence between the parties, and in statements made at the hearing.
 - The LBP maintained the cladding was a 'traditional stucco system'.
 - The owners had informed the Department that the timber framing to the house was 'Boric' treated.
 - The LBP referred to the 'extensive research' he had undertaken of the existing structure. The LBP also referred to 'further assessment would be undertaken' once scaffolding was in place when the remedial work was being completed.
 - The LBP referred to the obligations of LBP's under the Act, noting that the LBP scheme became mandatory 'after March 2012'.
 - In the LBP's view, the issue of a notice to fix for 'incomplete construction is an abuse of the Act and the powers of the [authority]'.
- 4.3.3 The LBP also referred to another job within the authority's jurisdiction where the authority had not issued a notice to fix but the 'building consent application was accepted and processed resulting in the attached letter being received by the designer.' The Department requested advice from authority about background of the particular job, but the authority advised that the LBP had 'not been named on the building consent application as a party to the ... [consent] application, and on this basis it is inappropriate for Council to disclose detailed information on it'.
- 4.3.4 In a response received on 28 October 2011, the LBP said that he believed the 'pro-activity in the processing of the application is most relevant' and that a notice to fix was not issued by the authority in this instance. The LBP restated that the determination was to:
- ... seek a directive from the Department ... to have the application to amend the building consent ... processed in the usual manner and to have the Notice to Fix withdrawn.
- 4.3.5 I have considered the LBP's comments and amended the determination as I consider appropriate.
- 4.3.6 The owners made no submission to the second draft determination.

5. The expert's report

5.1 General

- 5.1.1 As mentioned in paragraph 1.7, I engaged an independent expert to assist me. The expert is a Registered Architect⁶. The expert inspected the house on 13 May 2011, providing a report dated 1 June 2011.
- 5.1.2 The expert considered the condition of the existing house, and made an assessment of the proposed work and the adequacy of the documents submitted for the alteration to the consent. The expert noted that his inspection was limited to visual inspection and non-invasive moisture testing. He was not given approval to carry out invasive moisture testing and cut-outs required to fully assess the construction.

5.2 Plaster cladding

- 5.2.1 The expert described the wall cladding as an 'ad hoc plaster system' which the expert was unable to identify. The expert noted the system appeared to include components similar to several different proprietary systems in common use at the time of construction. The expert noted that no control joints were installed to any walls.
- 5.2.2 Clearances below the wall cladding and the uPVC base mouldings appeared satisfactory, but plastering of the block retaining walls had resulted in closing any capillary gap and trapping moisture behind the cladding. The expert observed cladding cracks and noted various surface repairs had been attempted to balustrade cappings, wall areas and windows.

5.3 Windows and doors

- 5.3.1 The expert observed that windows and doors were generally face-fixed against the fibre-cement backing sheets, with metal head flashings, sealants at jambs and uPVC mouldings visible at sills, with the latter not extended past jamb flanges. However, at the curved dining room wall, window jamb flanges were flush with the plaster. The expert noted some evidence of moisture penetration associated with windows and doors.

5.4 Decks

- 5.4.1 The expert noted that for all decks, apart from the dining room deck, retrofitted membrane turned up against adjacent wall and balustrade cladding, with a metal clamp at the junction. At the living room deck, the clamp had been covered with a fibreglass mesh, while elsewhere, sealant was used. The expert noted that plastered cappings to deck balustrades were cracking.
- 5.4.2 The retrofitted membrane to the master bedroom and study decks extends over stairs that accommodate the level change. The expert observed that the deck was ponding and the membrane was poorly adhered, with bubbles apparent.

⁶ Registered Architects are under the Registered Architects Act 2005 are treated as if they were licensed in the building work licensing class Design 3 under the Building (Designation of Building Work Licensing Classes) Order 2010.

5.5 Roof junctions

- 5.5.1 The expert noted that where the original flat membrane roof surfaces met walls, plaster butted against the membrane with no clearance at the junction, allowing moisture to wick up the plaster and possibly into framing. The expert considered that junctions required invasive moisture testing and investigation to assess underlying upstands and the presence of saddle flashings.
- 5.5.2 Where membrane had been replaced to some roof areas, the membrane overlapped the wall cladding, with a metal clamp at the junction which relied on sealant only. I note that replacement of membrane areas indicates that these areas must have had a history of moisture penetration, which may have caused timber damage at the time.

5.6 Moisture levels

- 5.6.1 The expert inspected the interior of the house and noted signs of moisture damage to carpet, skirtings, linings and plastered blockwork in a number of areas. As he was unable to carry out invasive moisture testing, the expert relied on assessing variations of non-invasive readings from 'baseline' readings at known dry areas.
- 5.6.2 Signs of moisture and/or significant variations of internal and external moisture readings above 'baseline' readings were noted in 10 locations. The expert concluded that there was moisture penetration into the balustrades and into some timber-framed walls and floors, which would need to be confirmed with invasive moisture testing, with the full extent of any leaks established.

5.7 Other matters

- 5.7.1 The expert commented on items identified in the notice to fix, and agreed that most were correctly stated. The expert also noted various changes from the original consent drawings.

5.8 The proposed remedial work

- 5.8.1 The expert discussed the proposed remedial work with the LBP, noting that the LBP:
- did not have a process for identifying all likely decay and did not mention any expected laboratory testing of timber samples to identify treatment or decay
 - expected some decay would be found but considered a building surveyor would not be needed to advise on identification and replacement
 - considered the games room plaster to be a 'maintenance issue'.
- 5.8.2 The expert noted that he had assessed the proposal on the basis that the amendment to the consent would be made as if it is an application for building consent under Section 45(5) of the Act.
- 5.8.3 The expert assessed the LBP's proposal commenting in detail on various elements. His more general comments on the approach and some proposed details, included:

The overall concept

- Adding roofs can eliminate many roof to wall junctions and provide shelter to window heads below new eaves, therefore improving weathertightness.
- The new asphalt shingles and the deck membranes are alternative solutions, but both have BRANZ appraisal certificates.

Roof junctions

- Many new roofs form lean-tos against existing plastered walls, with the specification describing cuts and repairs to existing plaster that will risk
 - cracks at joints between new and existing plaster
 - damage to the original building wrap and plaster above the cut, due to new blocking and fixings needed for fixing existing backing sheets.
- Some roofs also form lean-tos against existing balustrades, but
 - balustrade framing is likely to be decayed below capping cracks and investigation is needed to assess extent and replacement
 - rafter fixings are not shown
 - the aluminium flashing at the balustrade junction is not shown.
- For the asphalt shingle roofing, there are
 - references to metal flashings and folded shingle flashings, which are not supported by manufacturer's instructions or the BRANZ Appraisal
 - metal horizontal apron flashings intersect with standard, with no details at junctions.

Wall cladding

- New infill cladding with timber framing lacks details to appropriately cover
 - horizontal junctions at new framing under the ends of lean-tos
 - the new framed walls above the existing study deck balustrade
 - the thickness difference between new cladding and the existing plaster
 - the new and re-used windows in the study extension
 - the balustrade infill framing.
- There are no details of capping to the master bedroom deck infill balustrade.

Structure

- Some roofs are to be fixed to existing roof or balustrade framing, but there is no process for the investigation that will be required to determine the
 - locations of underlying original framing members
 - adequacy of the original framing at high risk areas and balustrades
 - adequacy of proposed fixings.
- There is information lacking in a number of other areas, including
 - revised calculations for new loads from the study extension
 - information on aluminium posts supporting roof extensions
 - post fixing details
 - revised bracing calculations and information on the new roof trusses.

5.9 A copy of the expert's report was provided to the parties on 10 June 2011.

Discussion

6. The notice to fix

6.1 General

6.1.1 The expert's report clearly establishes that the cladding to the house does not comply with the Building Code and there is evidence of significant long-term moisture penetration that is likely to have reached the underlying structure and led to decay in some timber framing.

6.1.2 The expert also commented on the items included in the notice to fix and agreed with most of them. I note that the individual items in the notice to fix are not in dispute.

6.2 Was the issue of a notice to fix the correct regulatory action?

6.2.1 The LBP contends that the issue of the notice to fix was inappropriate in this instance and the matter should have been dealt with by way of a memorandum to the owners. The LPB has provided his reasons for this view. The authority is of the view that the defects in the building were significant and that the issue of the notice to fix was the appropriate regulatory action.

6.2.2 The authority noted that the notice to fix required the owners to advise the authority of a 'proposed scope of works, outlining how each area of non-compliance is to be addressed and rectified'. The authority confirmed at the hearing that this is its normal approach to remedial work, and that it did not place an immediate requirement on the owner to fix the building's defects.

6.2.3 The Act makes it clear that notices to fix are to be complied with, and matters of non-compliance are not to be left unattended. It would have been inappropriate for the authority to close its mind to the matters arising from its site inspection and leave them until the owner decided to apply to a code compliance certificate. In this respect I consider the authority was acting in accordance with its obligations under section 164 of the Act by issuing the notice to fix.

6.2.4 In Determination 2009/109 I discussed, at paragraph 9.2, the choices an authority could make when deciding whether to issue a site notice or a notice to fix and stated:

While I consider an authority has considerable discretion when considering the appropriate means of notifying non-code compliance, the authority should be consistent in their use to avoid possible complications later. An authority will likely consider that a site notice may be more appropriate for minor matters, as unlike notices to fix, they do not impose major legal consequences for the owner.

This stance is equally relevant in this instance.

6.2.5 In this case I am satisfied that the nature and significance of defects identified are such that it was appropriate for the authority to notify the owners of this by way of a notice to fix, and not in the form of a site notice or similar. In this respect I consider the authority was acting in accordance with its obligations under section 164 of the Act in issuing the notice to fix.

6.2.6 I do not accept the LBP's contention that notices to fix should only be used when an owner has 'contrived to build something that is not code compliant' and in circumstances when a building is considered dangerous. In the first case; a notice to fix is issued in respect of work that is in breach of the Act or the Regulations: its issue is not dependent on how the breach has been arrived at. In the second case; if a building is considered dangerous, an authority should issue a dangerous buildings notice under section 124 of the Act.

6.3 Conclusion

6.3.1 The defects listed in the notice to fix are not disputed by the parties.

6.3.2 The expert's report clearly establishes that the cladding to this house does not comply with the Building Code. There is evidence of significant long-term moisture penetration that is likely to have reached the underlying structure and led to decay in some timber framing. I accept that the house as it currently stands does not comply with the Building Code.

6.3.3 I therefore accept that the authority was correct to issue the notice to fix, and that the issue of the notice was the appropriate course of action.

6.3.4 I accept the authority's position that the notice to fix places no immediate burden on the owners to remedy specific items, rather that it be advised of the proposed means by which the possible defects are to be investigated and remedied. I consider this a reasonable approach by the authority.

7. The proposed amendment to the consent

7.1 General

7.1.1 In considering the proposed amendment I have taken into account:

- the scope of the proposed amendment as part of the overall remedial work to the building
- the compliance of the proposed work
- the investigation of the existing building.

7.2 Scope of the proposed amendment

7.2.1 The LBP submitted at the hearing that the proposed amendment was 'solely to address the flat roofs and the redundant balcony spaces' and it was not the intention to seek a code compliance certificate at the completion of the work. This contrasts with the statement made by the LBP in his letter to the authority dated 20 August 2011 where he advised that the proposed work was to '[a]ddress any other work that is required to achieve the issue of a Code Compliance Certificate'.

7.2.2 The LBP has addressed some of the weathertightness features of the building that constitute a high risk, and I accept that the proposed work is limited 'solely to address the flat roofs and the redundant balcony spaces' and that this work represents the first stage of the required remedial work for the building.

7.2.3 I consider the proposed amendment needs to be clarified in terms of satisfying the relevant items in the notice to fix. I do not accept that the proposed amendment will address the majority of the items in the notice to fix as is contended by the LBP (refer paragraphs 3.3.5 and 4.2.2).

7.3 The compliance of the proposed amendment

7.3.1 Irrespective of the scope of the proposed amendment, all new building work is required to comply fully with the requirements of the Building Code.

7.3.2 The expert has provided his opinion of the proposed amendment (refer paragraph 5.8.3), which includes:

- his view of necessary additional assessment
- matters that had not been addressed in the proposal
- questions arising from some of the details proposed
- additional information required.

I accept the expert's opinion.

7.3.3 In my view the completion of a detailed assessment of the existing building is critical in order to identify the significance and extent of the defects in the external envelope, and the extent of moisture penetration, timber treatment (if any), and damage to the original underlying framing. The lack of such an assessment does not provide an adequate basis on which to develop a satisfactory remediation proposal, or to allow that proposal to be properly assessed.

7.3.4 The LBP considers he has completed a 'full survey' of the building that is sufficient to determine the extent and nature of the proposed remedial work. The survey report has not been provided to any party, apart from the owners, and I am therefore unable to consider it.

7.3.5 I note that the Department has produced a guidance document on weathertightness remediation⁷. I consider that this guide will assist the parties in the processes involved in remediation work and the available options for repair.

7.4 Conclusion

7.4.1 I accept that the proposed amendment may be completed as the first stage in response to the notice to fix. However, I am not satisfied that the work as detailed in the proposed amendment will meet the provisions of Building Code.

7.4.2 I consider that further investigation is necessary to confirm the condition of the building elements that the new work is to be fixed to; however, the amendment may make reference to this being undertaken as part of the proposed work. If that is the case, the proposed amendment shall detail the steps to be taken should defective or damaged timber and the like be encountered.

⁷ Weathertightness: Guide to Remediation Design, May 2011. This guide is available on the Department's website, or in hard copy by phoning 0800 242 243

8. The documentation submitted for amendment of the consent

8.1 General

8.1.1 The Act allows the authority to set reasonable requirements for documentation that accompanies applications for building consents and, by extension, for documentation of amendments to building consents. The relevant section of the Act is:

45 How to apply for building consent

1. An application for a building consent must-
 - (a) be in the prescribed form; and
 - (b) be accompanied by plans and specifications that are-
 - (i) required by regulations made under section 402; or
 - (ii) if the regulations do not so require, required by a building consent authority; and
 - (c) contain or be accompanied by any other information that the building consent authority reasonably requires...

8.1.2 In my view plans and specifications submitted in support of a consent, or alterations to a consent, must:

- a) provide a compliant solution, and
- b) must also be sufficiently clear to describe how that solution is to be achieved through the construction process
- c) detail critical features.

8.1.3 In the case of the proposed remedial work the authority must have reasonable grounds to be satisfied that the provisions of the Building Code will be met if the remedial work is built in accordance with the plans and specifications submitted. The authority maintains that the quality and clarity of drawings submitted with the application to amend the consent is not of a sufficient standard and consequently it is not satisfied that compliance will be met. The LBP considers that the documentation is adequate, given his position as an LBP and his expected input during construction.

8.2 The expert's opinion of the documents submitted for the amendment of the consent

8.2.1 The expert provided comment on the standard of the documentation. The expert assessed the documentation against standards considered reasonable for an authority to apply⁸, noting that the authority can reasonably require the drawings to be consistent with those standards and to be 'readily comprehensible by all those involved in consent processing, construction and inspection'.

8.2.2 Commenting generally on the documentation quality, the expert noted:

⁸ Such as NZ/AS 1100:1986 Technical drawing – Part 301 Architectural drawing, BRANZ Bulletin 505:2008 Acceptable plans and specifications, Guide to applying for a building consent (simple residential buildings): Department of Building and Housing, January 2007, and other normal drawing conventions.

- Information is not presented in a logical and clear form to allow the authority, builder and other trades to work easily with the information given in the drawings and/or the specification.
- The plans are not drawn to appropriate scales with sections clearly labelled and cross-referenced to plans, elevations and expanded details.
- Colour is used to describe various elements, which can be affected by copying, making different colours difficult to distinguish. (This was evident at the hearing as elements that were orange on an original drawing appeared to be reproduced as red.)
- Line conventions are inconsistent and unclear, making it difficult to clearly distinguish between new and existing work.
- There are insufficient expanded details and dimensions to demonstrate junctions, flashings, overlaps, fixings etc.
- The accuracy of details is questionable.
- There are many critical junctions that are not detailed.
- The plans used in the original consent remain current and should be amended to reflect the proposed remedial work.

8.2.3 The expert concluded that plans were not of a ‘standard suitable for issue for building consent or construction’ and did not ‘provide reasonable grounds to conclude that remedial work carried out in accordance with the amendments proposed would comply’ with the Building Code.

8.3 My response to the matters raised at the hearing

8.3.1 At the hearing the LBP considered that to properly describe the proposed work required discussion with the authority’s consenting officer. The LBP maintained that the work would be completed under his direct supervision, and that details such as flashings, would be discussed with the builder on site.

8.3.2 The authority maintained that the documents submitted for the amendment of the consent needed to stand on their own merits and satisfy the authority that compliance would be achieved if the work was completed in accordance with the documents. The authority believed it could not reasonably place reliance on the work being undertaken by a particular party and therefore accept plans with less detail than might otherwise be the case. I accept this view and consider it appropriate in order to meet the requirements of section 49.

8.3.3 As was pointed out at the hearing, the achievement of weathertight solutions requires attention to critical details to a building’s envelope: the drawings did not provide this. More information was required to be shown in the proposed details, as well as a clarification of the existing structure the new work was being fixed to.

8.3.4 The LBP agreed that he could provide further details. However, the LBP sought advice from the authority about what details were required. In my view this stance is unreasonable as the LBP should already be fully aware of the level of detail required. An LBP working in the area of remediation would be expected to be aware of the

documentation required to describe a compliant solution for the purposes of obtaining a building consent, or an amendment thereto.

- 8.3.5 I do not consider whether the drawings employ colour, or are machine or free hand drawn, is important: what is important is that the plans clearly describe the proposed work. As observed at the hearing (refer paragraph 8.2.2) the level of clarity required has not been achieved. I note that the Department has also provided guidance information on how to apply for a building consent which includes information on the preparation of plans⁹.

8.4 Conclusion

- 8.4.1 Without adequate documentation, the authority cannot be satisfied on reasonable grounds that the provisions of the Building Code will be met if the proposed remedial work is completed in accordance with the plans and specifications that accompanied the application to amend the consent. I consider an authority is entitled to set minimum requirements to ensure that the proposed work is clearly documented and in an appropriate format.
- 8.4.2 In conclusion I consider the plans do not meet the requirements of section 45. I consider the authority was correct to refuse the amendment to the building consent on that basis.

9. The decision

- 9.1 In accordance with section 188 of the Act, I hereby determine that the house does not comply with the Building Code and accordingly I confirm the authority correctly exercised its powers in issuing the notice to fix.
- 9.2 I also confirm the authority's decision to refuse to issue an amendment to building consent B/1997/3800670 because the requirements of section 45 of the Act have not been met.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 16 November 2011.

John Gardiner
Manager Determinations

⁹ Guide to applying for a building consent (simple residential buildings): Department of Building and Housing, January 2007