



Determination 2012/048

The refusal to issue code compliance certificates for a complex of eight five-year old houses at 24, 24A, 26, 26A, 28, 28A, 30A, and 32A Morere Street, Titahi Bay, Porirua

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Ministry of Business, Innovation and Employment (“the Ministry”²), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The parties to the determination are:
 - Titahi Estates Limited (“the applicant”), the owner of 24, 24A, 26, 26A, 28, 28A, 30A, and 32A (“the eight houses”) situated in Morere Street, Titahi Bay
 - Porirua City Council (“the authority”), carrying out its duties as a territorial authority and a building consent authority.
- 1.3 This determination arises because the authority is not satisfied that the eight houses comply with certain clauses³ of the Building Code in respect of the installed foul water drainage systems. The authority has refused to issue code compliance certificates for the eight houses.
- 1.4 The matters to be determined⁴ are therefore whether:
 - the installed foul water drainage systems to the eight houses comply with Clauses B2—Durability and G13—Foul water of the Building Code (Schedule 1 of the Building Regulations 1992)
 - the houses comply with the other relevant clauses of the Building Code
 - the authority correctly exercised its power when it refused to issue a code compliance certificate for the eight houses in question.

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

² After the application was made, and before the determination was completed, the Department of Building and Housing was transitioned into the Ministry of Business, Innovation and Employment. The term “the Ministry” is used for both.

³ 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 Under section 177(1)(a), 177(1)(b) and 177(2)(d) of the Act.

- 1.5 In making my decision, I have considered the submissions of the parties, the report of an officer of the Ministry from whom I sought advice on the matter under dispute (“the expert”), and the other evidence in this matter.
- 1.6 Relevant sections of the Building Code are set out in Appendix A.

2. The building work and background

- 2.1 The eight one and two storey houses are part of a larger development built on sections that slope down steeply from the road. The building work in question relates to the installed unplasticised PVC⁵ foul water drainage systems serving the eight houses. A schematic plan of the houses and the common drain is shown in Figure 1 below.

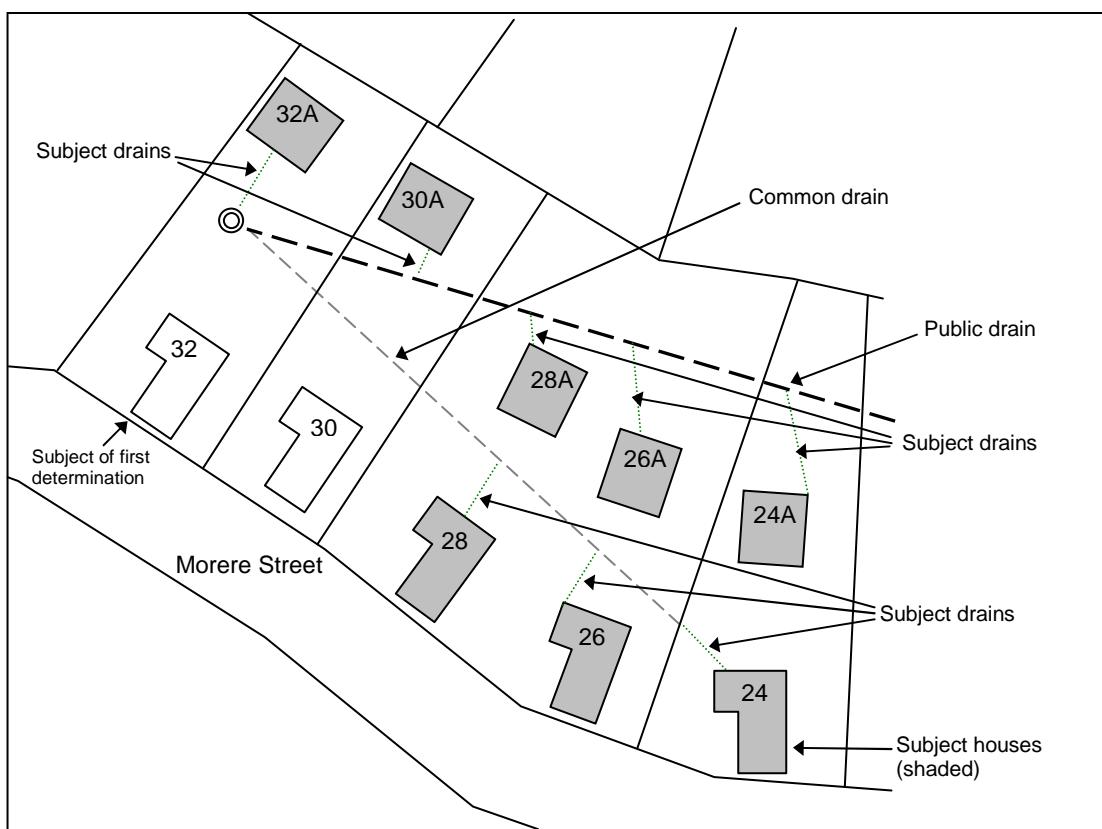


Figure 1: Schematic site plan showing the houses and the common drain (not to scale)

- 2.2 The authority issued separate building consents for each of the eight houses (listed in the table below). I have not seen a copy of those consents, but from an earlier determination⁶ (“the first determination”) regarding house No. 32 in the same development and from the date of construction beginning December 2004, I take it that all of the consents were issued under the Building Act 1991.

⁵ Polyvinyl chloride

⁶ Determination 2010/67: The refusal to issue a code compliance certificate for a four year old house at 32 Morere Street, Titahi Bay, Porirua

House No.	Building Consent No.
24	0187/06
24A	0153/07
26	0186/06
26A	0152/07
28	ABA 40438
28A	0154/07
30A	0938/06
32A	0937/06

- 2.3 Construction took place between 2004 and 2006. The houses fronting the street (No.s 24, 26, and 28) (“the front houses”) were built first and were originally connected to a public drain. The houses built at the rear (No.s 24A, 26A, 28A, 30A and 32A) were constructed at a later date than the front houses. A new ‘private line to service the existing [front] houses’ (“the common drain”) was installed and the drainage systems for the front houses connected to this.
- 2.4 There is dispute between the parties as to whether the authority undertook drainage inspections during construction; this matter has already been canvassed in the first determination and I do not consider it further. There has also been a substantial amount of correspondence between the parties, and although I have taken this into account I have provided only a summary in the paragraphs below.
- 2.5 It appears that concerns regarding the drainage system were raised after an inspection on 11 June 2007. Correspondence continued between the parties with some matters remaining unresolved.
- 2.6 On 18 August 2009 the house at No. 28A failed a final inspection, with the authority noting ‘evidence that drainage inspection has been carried out is required’ and ‘subfloor needs lining or enclosing’.
- 2.7 On 8 September 2009, by way of letter, the applicant sought code compliance certificates for a number of houses in the development including some of the subject houses (No.s 24, 26, and 28). The authority responded in a letter dated 21 September 2009, noting amongst other matters that as-built drainage plans were required and that the authority held no record of drainage inspections having been carried out.
- 2.8 On 25 September 2009 the authority carried out final inspections of houses at No.s 24A, 26A, and 28A.
- 2.9 On 29 September 2009 the applicant wrote to the authority in respect of the subject houses in an effort to resolve matters around the refusal to issue code compliance certificates. The applicant suggested that ‘a video of individual pipes’ be undertaken to progress matters.
- 2.10 On 9 October 2009 the Ministry received an application for the first determination on matters relating to house No. 32. The first determination, issued on 26 July 2010, concluded that there was no evidence of problems related to foul water drainage and suggested that limited investigations should be undertaken to expose a sample joint in the drain connections and video the drains to the house.

- 2.11 Between 10 May and 10 June 2011 the authority carried out a series of final inspections of houses at No.s 24, 26, 28, 30A, and 32A.
- 2.12 The result of the final inspection for all the houses are as follows:

House No.	Date of last final inspection	Inspection comment
24	8 June 2011	Final recheck items now complete [Applicant] to provide letter re head flashing remedial work Engineers PS4 to include deck over 3mtrs Drainage items to be resolved
24A	25 Sept 2009	Final recheck Base boards have been completed Drainage inspection still not resolved
26	8 June 2011	Final recheck items complete Engineers PS4 to cover deck over 3mtrs [Applicant] letter re head flashing remedial work Drainage items to be resolved
26A	25 Sept 2009	Final recheck Base boards have been completed Drainage inspection still not resolved
28	10 June 2011	Overflow relief gully [has been] raised as requested Supply ... documents [from inspection dated 8 June 2011 being]: Engineers PS4 to include deck over 3mtrs [Applicant] letter re head flashing remedial work Drainage issues to be resolved
28A	25 Sept 2009	Recheck items Base boards have [been] completed Drainage inspection still not resolved
30A	8 June 2011	Final recheck items now complete ... Drainage issues to be resolved [Applicant] to provide letter re head flashing remedial work [Authority] to check all documents
32A	8 June 2011	Hooded type vent cover fitted as requested Outstanding items... Drainage issues to be resolved Supply outstanding documents; [Applicant] to provide letter re head flashing remedial work Revised plan for lower level bathroom [Authority] to check all documents

- 2.13 In a letter dated 9 June 2011, the applicant applied for a code compliance certificates for each of the eight houses. The applicant reiterated the opinion that the authority had inspected the drains in question. Reference was also made to the drainage configuration (as described in paragraph 2.3) and to the authority's inspection procedures.

- 2.14 In a letter to the applicant dated 17 June 2011 the authority noted that it was following the suggestion made in the first determination (refer paragraph 2.10) and that it was also applying the principles from that determination to the remaining properties.
- 2.15 The Ministry received an application for a determination in respect of the eight houses on 5 October 2011.

3. The submissions

3.1 The applicant's submission

- 3.1.1 In a letter to the Ministry dated 4 October 2011, the applicant outlined the background to the dispute, and stated that the authority had refused to issue the code compliance certificates mainly on the grounds that the drainage was not code-compliant. The applicant also noted that it was difficult to prove whether the authority had inspected the drains.
- 3.1.2 On 16 November 2011, the applicant wrote again to the Ministry reiterating the arguments previously canvassed.
- 3.1.3 The applicant provided copies of:
 - site drainage plans
 - the invoice from the firm of drainage specialists
 - correspondence with the authority and the Ministry, including some issued prior to the publication of the first determination
 - an undated statement from the builder who constructed the houses.

3.2 The authority's submission

- 3.2.1 In a letter to the Ministry dated 25 October 2011, the authority noted that the applicant had not provided written reasons or reference information for the determination application.
- 3.2.2 The authority wrote to the Ministry on 7 November 2011, stating that the authority was not satisfied that the drains, which the authority considered had not been inspected during the construction process, were compliant with the Building Code. The authority listed the inspections that it had undertaken on the houses in question and noted that the drainage systems had not been inspected. The authority was of the view that because the video of the drains for house No. 32 revealed poor construction, the drains to the other houses also required further inspection.
- 3.2.3 The authority provided copies of:
 - the as-built drainage plan
 - some of the authority's inspection records
 - the two notices to fix dated 6 August 2010 and 15 December 2010 respectively
 - correspondence with the applicant and the Ministry.

4. The expert's report

4.1 General

- 4.1.1 As discussed in paragraph 1.5, I engaged an officer of the Ministry, who is expert in drainage matters, to arrange a closed-circuit television (CCTV) survey of the foul water drainage systems in the complex. The expert was requested to view and report on the survey in relation to compliance with Clauses B2 Durability and G13 Foul Water.
- 4.1.2 The CCTV survey viewed the drains to houses at No.s 24, 26, 26A, 28, 30A and 32A. The drain to No 28A was not viewed as there was no suitable access point. The survey did not include No. 24A, or the common drain.
- 4.1.3 The expert provided me with a report dated 8 February 2012, to which was attached a set of photographs.
- 4.1.4 The report submitted was based on the CCTV survey, supporting documentation, discussions with the registered drainlayer who installed the system, and an email from a technical expert employed by a firm of pipe manufacturers. The expert described the drainage system and noted that information supplied by the authority indicated no drainage inspections were undertaken.

4.2 The individual drains

- 4.2.1 The report listed the expert's observations regarding the CCTV survey, and I summarise these as follows:
- **No 24:** Water retention was visible where the drain connected with the new common drain and there was the potential for the drain to be blocked and thus not comply with Clause G13.3.2(b).
 - **No 24A:** Not surveyed.
 - **No 26:** No issues with this drain were observed.
 - **No26A:** At the connection with the authority's foul water drain, the drain pipe was oval in shape and appears to terminate close to the foul water in the authority's drain. It was suggested that a reducing saddle connection had not been installed. The expert was of the opinion that this house drain required further inspection to verify compliance with Clauses B2.3.1(a) and G13.3.2(b).
 - **No 28:** The vertical section from the above-ground drain is not connected to the in-ground foul water drain and roots are entering the drain at this junction. This drain does not comply with Clauses B2.3.1(a) and G13.3.2(b).
 - **No 28A:** No CCTV observation was possible without undertaking ground excavation.
 - **No 30A:** There appeared to be a hole in a section of the drain pipe wall and stones or a shiny object was visible on the outside of the pipe.
 - **No 32A:** The drain appears to have a particularly sharp bend at the change of direction rather than the maximum-radius bend recommended by the pipe manufacturer. The shape of the drain and the bend at this location appeared to be more oval than circular. Further investigation was required to ensure that compliance with Clauses B2.3.1(a) and G13.3.2(b) has been met.

4.3 Quality of finish

4.3.1 With regard to quality of finish, the expert noted:

- The above-ground drainage systems were to a reasonable standard.
- The internal finish to visible parts of the drains to houses at No.s 24, 26A, 30A, and 32A did not appear to comply with Clauses B2 Durability and G13 Foul Water.
- While the pipe spigots at many of the pipe joints were not fully inserted into the socket, they may still meet the durability requirements of Clause B2. However, this conclusion relied on the drain having the correct fall, the pipe joint being correctly welded, and the spigot pipe inserted into the socket past the interference point.
- Although most of the pipe joints have been primed, the overall pipe jointing workmanship is of a poor quality. Some pipe spigots have not been cut square and burrs have been left on the inside of the pipes. At one location a pipe spigot has not been inserted into a bend socket.

4.4 Conclusions

4.4.1 The expert made the following observations (which I have summarised) regarding the foul water drainage systems:

- Based on the CCTV observations, the drains to houses at No.s 24, 26A, 28, 30A, and 32A may not comply with Clauses B2 or G13.
- Apart from the drain to house No. 26, further investigation of the drains to all other houses will be required.
- The drain to house No. 28 will require excavation and remedial work to achieve compliance with Clauses B2 and G13.

4.5 A copy of the expert's report was provided to the parties for comment on 10 February 2012.

5. The draft determination

5.1 The first draft determination was issued to the parties for comment on 19 March 2012.

5.2 The authority's response

5.2.1 The authority responded in an email to the Ministry dated 28 March 2012. While the authority accepted the draft, it also requested that the following amendments be considered:

- The determination should provide guidance as to future actions, including a requirement for a notice to fix to be issued instructing the applicant to bring the drains into compliance with the Building Code.
- The determination should state that the authority must review and inspect all onsite remediation work carried out on the drains.
- The authority acknowledged the decision regarding No. 26, but requested that a modification of Clause B2.3.1 be included along with a request for an updated application for a code compliance certificate to reflect any ownership changes.

The authority suggested that any Clause B2.3.1 modification be applied from 6 March 2006, which was the date of the post-lining inspection.

5.3 The applicant's response

5.3.1 The applicant responded in a letter to the Ministry dated 2 April 2012, stating that the draft was not accepted. I summarise the main requests submitted by the applicant as follows:

- All the items listed by the authority on its inspection sheets should be considered in the determination, not just the drainage issues.
- CCTV inspections should be completed by the Ministry for all drains. The common drain was part of the respective building consents and it should be inspected and an opinion provided about its compliance.
- As the authority has ignored instructions from the Ministry in the first determination to issue a code compliance certificate, the issues arising regarding No. 32 should be dealt with and concluded in this determination.

5.3.2 The depth of the public drain was referred to. The applicant was of the opinion that the weight burden of the ground due to the depth of the drain could have caused distortions to the drains serving No. 26A and No. 32A. It was submitted that there were no illegal drainage connections associated with the public drain.

5.3.3 The applicant maintained that the authority had inspected the drains when they were being installed and commented on the authority's inspection. The applicant did not think that it was appropriate for a notice to fix to be issued, particularly requiring work to be carried out under any urgency, and that the drains are working now and repairs would be carried out should any of the drains fail.

5.3.4 The applicant also considered that code compliance certificates should be issued once the houses were fully code-compliant and should not be 'backdated'. The applicant provided copies of the drainage drawings previously supplied, and copies of correspondence with the authority regarding the drainage.

5.4 Second draft determination

5.4.1 I carefully considered the submissions of the parties to the first draft determination and amended the determination accordingly. A second draft determination was issued to the parties for comment on 23 April 2012.

5.4.2 In an email to the Ministry on 4 May 2012, the authority accepted the second draft, but again requested that the determination consider a modification of the building consents in respect of Clause B2.3.1 for each of the properties. The authority proposed dates it considered would be appropriate for each property.

5.4.3 In a submission to the Ministry dated 10 May 2012, the applicant did not accept the second draft determination. The applicant submitted that the Ministry still needed to clarify the issue of consent of the common drain and give direction to the parties, rather than leave that matter for the parties to resolve.

5.4.4 The applicant also submitted that the common drain was part of the consented work as it was shown on the site plans, and reiterated the earlier request for the Ministry to undertake CCTV surveys of the common drain and those others not previously

surveyed. A survey plan for the proposed easements for services, including the foul water drains, was provided.

- 5.4.5 The applicant accepted that some repairs were required and requested that guidance be provided in the determination as to what, in respect of a notice to fix, could be considered a ‘reasonable timeframe’ to effect those repairs. The applicant proposed that the timeframe be by May 2013.
- 5.4.6 The applicant sought clarification from the authority in respect of the compliance of remedial work undertaken to head flashings and also on any other documentation that the authority considered may hold up the issue of the code compliance certificates.

Durability matters

- 5.4.7 On 30 May 2012 the Ministry emailed the parties seeking clarification of the authority’s email of 4 May 2012 (regarding modification of the building consents in respect of Clause B2.3.1 for each of the properties) noting that:
- one consent had not yet reached the 5 year minimum period after which a modification would normally be considered
 - the Ministry’s view regarding amendment of the consents in respect of Clause B2.3.1 was that the authority has the ability to carry out the modifications without being directed to do so by the Ministry.
- 5.4.8 In a response to the Ministry dated 5 June 2012 the authority said:
- It accepted ‘the [Ministry’s] view that an authority has the power grant a modification to Clause B2.3.1…’.
 - As the applicant accepted that modification of Clause B2.3.1 was necessary, the authority saw ‘little value in including the requirements for B2.3.1 modifications in the Determination’.

- 5.4.9 In an email to the Ministry dated 12 June 2012, the applicant said he would agree to ‘any reasonable request by PCC to require Clause B2.3.1 modifications or otherwise’.

- 5.5 I have carefully considered the submissions of the parties, and have amended the determination as appropriate.

5.6 My response to the submissions

Inspection of the drains

- 5.6.1 With respect to the applicant’s request that the Ministry inspect all the drains, I engaged the expert to complete an inspection of a sample of the drains to enable me to form a view as to the likely compliance of all the drains. The expert was not asked to provide an opinion on every drain.
- 5.6.2 Under section 188(1)(a) of the Act I am required to make decisions on the exercise of an authority’s powers, in this case in relation to the authority’s refusal to issue a code compliance certificate on the grounds of compliance of the drains to the subject houses. In order to make my decision I am of the opinion I am entitled to gather sufficient information to do so, but I do not consider such a decision needs to be based on a definitive list of matters that may or may not be code compliant.

- 5.6.3 In any event, and for those drains that have been inspected and found to be deficient, further investigation is still considered necessary to confirm the matters at fault, and how they are to be rectified.

Durability matters

- 5.6.4 I welcome the authority's view that it will undertake the modification of Clause B2.3.1 without requiring direction by way of determination, and I leave the resolution of this matter to the parties.

6. Discussion

6.1 The foul water drains

- 6.1.1 In the first determination, which only involved house No. 32, while I was "generally satisfied" that the house complied with Clause G13, I also accepted that some site investigation of the foul water drains should be undertaken and a video made of the drains to confirm this conclusion. Since the first determination was issued, a video inspection has been carried out covering most of the houses in the complex and this has been reviewed by the expert. I accept the findings of the expert's review.
- 6.1.2 Based on the expert's analysis of the CCTV survey and the comments set out in the expert's report, I conclude that:
- the foul water drainage system to house No. 26 is code compliant
 - the foul water drainage system to houses at Nos 24, 26A, 28, 30A and 32A does not comply with the requirements of Clauses B2 and G13.
- 6.1.3 With respect to the pipe distortion noted at paragraph 5.3.2, I note that foul water pipes are designed to withstand earth pressures. The pipe distortion appears to have arisen from the nature of the junction with the public drain where the junction does not appear to have been formed using a propriety saddle fitting.
- 6.1.4 The foul water systems to houses at Nos 24A and 28A and the common drain were not inspected by the expert. However, taking into account the expert's findings for the drains that were inspected, I consider that the drains to Nos 24A, 28A and the common drain are likely to have been installed to a similar level of compliance as the majority of the drains. Therefore the drains to Nos 24A and 28A will need to undergo a detailed inspection to determine whether they are code compliant.

6.2 Outstanding matters

- 6.2.1 The applicant has requested that I consider any remaining compliance matters preventing the issue of code compliance certificates. I note that the authority has undertaken final inspections for these houses (refer table in paragraph 2.12) and I consider it reasonable to rely on the result of those inspections. I note also that the authority has not issued a notice to fix in respect of this work.
- 6.2.2 The final inspection record for Nos 24A, 26A and 28A indicate the only outstanding matter to be the drains. I therefore conclude that the houses at Nos 24A, 26, and 28A are compliant in all other respects.
- 6.2.3 For the houses at Nos 24, 26, 28 it is noted that a PS4 is required from an engineer in respect of decks over 3 metres in height. The first determination considered this requirement and concluded that 'apart from the pole foundations, the construction is

conventional light timber frame, which is not expected to be reviewed by a structural engineer. Such construction is more appropriately included within an authority's normal inspection procedures.' The first determination concluded that an engineer's PS4 was not required in respect of the completed decks. I continue to hold that view.

- 6.2.4 For the houses at No.s 24, 26, 28, 30A and 32A the authority has requested that a letter be provided by the applicant regarding the 'head flashing remedial work'; and for No.s 30A and 32A the authority has said it needs to check what documentation it has in respect of those consents. Neither matter has been clarified in this determination in terms of the matters disputed or what information is still required. I leave both matters to the parties to resolve.

7. What is to happen next?

- 7.1 The authority should issue notices to fix in respect of the foul water drainage systems to the houses at No.s 24, 26A, 28, 30A and 32A that requires the owner to bring the work into compliance with the Building Code, identifying the items listed as being non-compliant as set out in paragraph 4.2.1 and referring to any further the further defects that may be discovered in the course of investigation and rectification.
- 7.2 The applicant should produce a response to the notices to fix 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.
- 7.3 Investigation, similar to that carried out by the expert, should be completed of the foul water drains at No.s 24A and 28A which will inform the authority of the next steps to be taken with respect to those buildings.
- 7.4 The current and future ownership of the common drain is to be confirmed between the parties and the necessary steps taken to formalise this, particularly with respect to the continued right of access to the drain.
- 7.5 In response the applicant's submission regarding the issue of a notice to fix (refer paragraph 5.3.3), I note that the provisions of the Act cater for a wide range of situations, including that the notice must state a 'reasonable timeframe within which it must be complied with'. Although it would be normal practice for resolving most contraventions of the Act or its regulations in the relative short term, there is no requirement for any particular timeframe, only that the timeframe is reasonable. I note that the applicant has proposed completion date of May 2013. Acceptance of this rests with the authority, however, I am of the view that the applicant's proposal may be considered reasonable given the nature of the non-compliances and the remedial work that may be required.

8. The decision

- 8.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:
- the foul water drainage system to house No. 26 complies with Clauses B2 and G13, and the deck complies with Clause B1, and accordingly the authority's decision to refuse to issue a code compliance certificate for house No. 26 based on the non-compliance of the drains and the deck is reversed

- the foul water drainage systems to the houses at No.s 24, 26A, 28, 30A and 32A do not comply with Clauses B2 and G13, and accordingly the authority's decision to refuse to issue a code compliance certificate for the houses at No.s 24, 26A, 28, 30A and 32A is confirmed.

8.2 I consider there is insufficient evidence to establish whether the foul water drainage systems to the houses at No.s 24A, 28A and the common drain comply with Clauses B2 and G13.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 2 July 2012.

John Gardiner
Manager Determinations

Appendix A: The legislation

A.1 The Building Code

The relevant provisions of the Building Code current at the time the building consent was issued are:

Clause B2--DURABILITY

FUNCTIONAL REQUIREMENT

B2.2 Building materials, components and construction methods shall be sufficiently durable to ensure that the building, without reconstruction or major renovation, satisfies the other functional requirements of this code throughout the life of the building..

PERFORMANCE

B2.3.1 Building elements must, with only normal maintenance, continue to satisfy the performance requirements of this code for the lesser of the specified intended life of the building, if stated, or:

- (a) The life of the building, being not less than 50 years, if:
 - (i) Those building elements (including floors, walls, and fixings) provide structural stability to the building or
 - (ii) Those building elements are difficult to access or replace or
 - (iii) Failure of those building elements to comply with the building code would go undetected during both normal use and maintenance of the building

Clause G13--FOUL WATER

FUNCTIONAL REQUIREMENT

G13.2 Buildings in which sanitary fixtures and sanitary appliances using water-borne waste disposal are installed must be provided with—

- (a) an adequate plumbing and drainage system to carry foul water to appropriate outfalls...

PERFORMANCE

G13.3.2 The drainage system shall:

- (b) Be constructed to avoid the likelihood of blockage,
- (c) Be supported, jointed and protected in a way that will avoid the likelihood of penetration of roots or the entry of ground water,
- (d) Be provided with reasonable access for maintenance and clearing blockages...