



## Determination 2014/035

# The issue of a notice to fix for weathertightness remedial work carried out by a previous owner at 16B Sunbrae Grove, Tauranga



### 1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to the determination are:

- the owner of the house, The Harris Family Trust (“the applicant”), acting through one of the Trustees
- Tauranga City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

1.3 This determination arises from the decision of the authority to issue a notice to fix to the applicant for building work carried out by the previous owner. The authority holds the view the building work was carried out without consent when consent was required and the building does not comply with certain clauses<sup>2</sup> of the Building Code (First Schedule, Building Regulations 1992); in particular Clauses B2 Durability and E2 External moisture.

1.4 The matter to be determined<sup>3</sup> is therefore the authority’s exercise of its powers of decision in issuing the notice to fix to the applicant.

1.5 In making my decision, I have considered the submissions of the parties, the report of the property inspection company commissioned by the applicant to investigate

<sup>1</sup> The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at [www.dbh.govt.nz](http://www.dbh.govt.nz) or by contacting the Ministry on 0800 242 243.

<sup>2</sup> In this determination, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

<sup>3</sup> Under sections 177(1)(b) and 177(2)(f) of the Act.

moisture levels in the framing (“the inspection company”) and the other evidence in this matter.

1.6 The relevant sections of the Act are set out in Appendix A.

## 2. The building work

2.1 The house is a two storey timber framed dwelling with brick veneer and fibre cement cladding finished with an acrylic plaster finish. The foundations are concrete with a particleboard intermediate floor, and aluminium joinery. The house has a high level of complexity in relation to weathertightness risk.

2.2 On 11 March 1994 the authority issued a code compliance certificate for the original construction of the house.

## 3. Background

3.1 On 11 April 2013 the applicant commissioned a pre-purchase inspection (“the pre-purchase inspection report”) from the inspection company. The report was based on visual observation and non-invasive moisture readings and described the condition of the house at that time. In the conclusion, the pre-purchase inspection report notes:

- No internal elevated moisture levels readings were detected at the time.
- Elevated non-invasive moisture in various locations. There was evidence of past moisture damage in some areas. The report noted the installation of two monolithic direct fixed cladding systems (EIFS<sup>4</sup> cladding installed over the textured fibre cement cladding) posed a greater risk to the weathertightness of the cladding and further investigation must be carried out in these areas.
- The house has some features on the list provided by the Ministry<sup>5</sup> identifying risk features that may contribute to weathertightness problems.

3.2 On 17 April 2013 the applicant’s inspection company conducted invasive moisture testing to determine whether the dwelling met the requirements of Clause E2 ‘External Moisture’ of the Building Code. In summary:

- Invasive probe testing was carried out at nine locations after they showed high non-invasive moisture meter readings. These were all located on the east elevation of the house and the conservatory.
- The evidence suggests diffusion into concealed timber framing is taking place and at that time the dwelling was not meeting the requirement of Clause E2 of the Building Code.
- The report advised further investigations need to be carried out including a full building survey. The elevated probe readings provided confidence the problem was widespread enough to cause ‘serious concern’.

3.3 The previous owner of the house (“the previous owner”) engaged a licenced building practitioner (“the LBP”) to carry out building work on the house between 17 April 2013 and 17 May 2013. The applicant was not involved in this engagement. The LBP wrote a report dated 17 May 2013 detailing the building work carried out. The building work has not been described clearly by the LBP. I understand the building work took place on the east elevation of the house as per the nine locations

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<sup>4</sup> Exterior Insulation Finishing System

<sup>5</sup> The report refers to ‘a statement in September 2009’ released by the Department of Building and Housing

noted by the applicant's inspection company. My understanding of the building work is as follows:

- the polystyrene was removed and the timber checked. New wool insulation was fitted followed by fibre-cement sheet
- the fibre cement cladding had a textured finish and painted
- butyl rubber membrane on the area above the conservatory was repaired and repainted. The spouting and downpipe was repaired
- the 'areas of concern' in the nine locations were repaired as above, namely the external corner of the downstairs bedroom, the external corner of the downstairs lounge and the conservatory
- the cladding to ground clearances were addressed.

3.4 On 5 July 2013 the applicant purchased the house from the previous owner. The sale and purchase agreement contained a warranty from the previous owner that where building work had been carried out that:

any permit, resource consent, or building consent required by law was obtained; and to the [previous owner's] knowledge, the works were completed in compliance with those permits or consents; and

where appropriate, a code compliance certificate was issued for those works

3.5 In late July/early August 2013 the authority state it received a copy of the pre purchase inspection report with photographic evidence and a statement from the LBP that indicated building work had been carried out without a building consent.

3.6 Between 26 September 2013 and 16 October 2013 the authority made inquiries to the applicant's wife, a sub-contractor, the building surveyor who undertook the invasive moisture testing report, the real estate agent who sold the house and the partner of the previous owner. The authority was concerned about the building work, when the building work was done and whether the applicant knew about the building work.

3.7 On 22 October 2013 the applicant was telephoned by the authority. The nature of this phone conversation was in relation to the LBP involved in carrying out the building work being investigated by the authority for working on properties without first obtaining the required building consents. The authority state the applicant confirmed he organised the pre-purchase inspection report and the building work was organised by the previous owner.

### **3.8 The notice to fix**

3.8.1 On 23 December 2013 a notice to fix was issued to the applicant and the LBP. The notice to fix contains the following:

1. Failure of the external durability of the cladding which is not exempt under schedule one of [the Act]
2. Compromising clause B1 (Structure) B2 (Durability) and E2 (External Moisture) in respect of the building

The remedy stated:

1. Obtain a survey and report of the entire building from a suitably qualified person such as a Building Surveyor to determine the full extent of the damage and details of suitable remedial work to be carried out

2. Supply a set of plans and the relevant documentation for a building consent prior to the commencement of any such work
- 3.8.2 The applicant met with the authority on 10 January 2014. The applicant states they discussed their intention to remodel and undertake renovation works to the building which could include altering the layout, conservatories, windows and possibly adding a deck.
- 3.8.3 On 23 January 2014 the applicant engaged in a lawyer to act on their behalf. The applicant's lawyer wrote to the authority providing background information and noting that:
- the house presents no safety risk to the applicant or the public and there is no reason to immediately require work to be completed
  - the authority should re-issue the notice to fix
  - the applicant's lawyer provided a suggested template for a notice to fix
- 3.8.4 On 3 February 2014 and on 4 February 2014 the authority wrote to the applicant stating its intention to reissue a notice to fix and noted the following matters:
- a full report and survey from a registered surveyor is required, involving full invasive testing and samples taken to determine the condition of the framing
  - the applicant's inspection company's report was only an 'interim invasive test'
  - the authority is also aware that some framing was removed during the course of the unconsented work performed by the LBP
  - there is a 'concern for the safety of the occupants'.
- 3.8.5 On 10 February 2014 the notice to fix was re-issued to the applicant, stating:
- Failure to comply with section 40 of [the Act] and obtain the required building consent in relation to work carried out on the Eastern side of the dwelling in 2013.
- There has been a failure in the framing on the eastern side of the dwelling in relation to water ingress under clause E2 (External moisture) and compromises clause B1 (Structure) and clause B2 (Durability) of the Building Code.
- The non-consented building work carried out in 2013 is not considered exempt under Schedule 1(a) of the Act...
- [to remedy] obtain a full invasive report and survey from a suitably qualified person such as a registered building surveyor in relation to the work carried out in 2013 to determine the full extent of the damage and details of suitable remedial work to be carried out to ensure the house fully complies with the Building Code
- 3.9 On 27 February 2014 a second meeting was held between the applicant and the authority. The applicant sent a follow up letter to the authority. In summary:
- The applicant referred to Determination 2014/002<sup>6</sup> which said that a survey is not an appropriate remedy in a notice to fix and they did not believe this was an appropriate course of action
  - the applicant's intention to remodel the eastern side of the house was restated, which they would obtain the required building consents for.
- 3.10 On 27 April 2014 the applicant emailed the authority an attached letter again noting Determination 2014/002 and suggesting a meeting as a way forward for the parties.

<sup>6</sup> Determination 2014/002 Regarding the issuing of a notice to fix for repairs to a house (*Ministry of Business Innovation and Employment*) 22 January 2014

- 3.11 On 2 May 2014 the authority acknowledged receipt of the letter and requested a timeline of the proposed work that was referred to by the applicant.
- 3.12 The Ministry received an application for a determination on 16 May 2014.

## **4. The submissions**

### **4.1 The initial submissions**

4.1.1 The applicant provided a written submission dated 6 May 2014 providing a detailed background of the correspondence and meetings held with the authority. In summary:

- The remedy in the notice to fix, having a survey done is not a satisfactory means of resolving the situation. Determination 2014/002 was provided to the authority as evidence that obtaining a survey is not a ‘means to a resolution’.
- The applicant is not responsible for the work which the notice to fix relates to. The work was commissioned by the previous owner.
- The applicant understood that the works were maintenance and therefore exempt under Schedule 1 of the Act, as they were a ‘like for like’ replacement of an area of cladding and materials nearly 5 years past their durability criteria.
- It has been made clear to the authority the applicant’s intention to renovate the house including replacing the windows and monolithic cladding.

4.1.2 The applicant forwarded copies of:

- the code compliance certificate and related elevation drawings
- a timeline of events
- the pre-purchase inspection report
- the builders report
- the invasive moisture testing report
- copies of the two notices to fix
- various correspondence between the applicant and the authority
- the applicant’s notes relating to the meeting on 10 January 2014.

4.1.3 A draft determination was sent to the parties for comment on 16 June 2014.

### **4.2 The further submissions**

4.2.1 The applicant sent a second submission in response to the draft on 25 June 2014. The applicant noted minor factual corrections which I have taken into account where appropriate. In summary:

- The applicant agreed that the authority should note on the property file when it has clear evidence the Act has been contravened. However, the applicant submitted it is unclear in this case whether the Act has been contravened and the concerns about the occupant’s safety are ‘without substantiation’.

- A letter dated 28 May 2014 from the authority detailed a meeting between the parties on the 20 May 2014. The letter proposed an approximate timeline for the applicant's renovation work incorporating the affected area referred to in the notice to fix.
- The applicant had contacted an architect to develop drawings for the renovation work.

The authority responded with a submission dated 30 June 2014. The authority did not accept the draft determination. It provided extensive investigative information of the interactions between the parties including email correspondence and the authority's own 'investigation notes' (refer paragraph 3.6). The authority concluded that the applicant was 'a party to the owner, or specified person'. In relation to the substantive issue, the authority stated in summary:

- The applicant was aware of the unconsented building work that was carried out and took an 'active role in ensuring the work was completed prior to them purchasing the property'.
- The authority does not believe the building work carried out by the previous owner is compliant with the Building Code.
- The authority is concerned the ramifications of the determination mean it will have no opportunity to remedy unconsented, and unsafe, building work where a property has been on-sold by the person who completed the unconsented work.
- The authority question whether the inability to issue a notice to fix to a subsequent owner is consistent with the principles of the Act, namely sections (4)(2)(c), (f) and (q).

4.2.2 On 7 July 2014 the applicant responded to the submission from the authority. The applicant disputed being involved in the building work for the building, noting he had no involvement in procuring the LBP, specifying the work, supervising the work or paying for the work. The applicant visited the site on a limited number of occasions. In summary:

- There are factual inaccuracies in the authority's investigation notes.
- The applicant provided a letter from the real estate agent engaged in selling the house to the applicant disagreeing with the information recalled from the authority. The real estate agent stated the applicant had no involvement in the building work.
- The applicant provided relevant correspondence relating to the sale and purchase of the property, the negotiation for which took place after the building work had been completed.
- The applicant engaged the LBP to complete a small job in August 2013 relating to damaged cladding. (This did not relate to the work that is the subject of this determination.)

4.2.3 On 8 July the authority responded to the applicant's recent submission. The authority disagreed with the applicant's version of events. The authority provided an email from the previous owner's partner which stated the following, in summary:

- The applicant's inspection company's report showed some areas with high moisture readings in the building.

- ‘In discussion with the builder and purchaser it was agreed to expose the areas of concern and remedy any issues’.
- All work carried out was with full knowledge of the applicant and the real estate agent. The applicant inspected the work in progress on several occasions.

## 5. Discussion

### 5.1 Schedule 1 exemption

- 5.1.1 The applicant has stated they believe the building work was maintenance and therefore exempt under Schedule 1(a)<sup>7</sup> of the Act as ‘a like for like replacement of an area of cladding and materials nearly 5 years past their durability criteria.’
- 5.1.2 Under Building Code Clause B2 Durability, the building envelope was required to have performed for the full 15 years with normal maintenance as set out in Clause B2.3.1. Schedule 1(a) states any lawful repair or maintenance using comparable materials, or replacement with a comparable component or assembly in the same position, of any component or assembly incorporated or associated with the building is exempt. There are three exceptions; Schedule 1(a)(iii) being repair or replacement other than maintenance of any component or assembly that has failed to satisfy the provisions of the Building Code for durability for example through a failure to comply with the external moisture requirements of the Building Code.
- 5.1.3 It is difficult to qualify in this situation whether moisture ingress has occurred within the 15 year time period or after the 15 year time period has passed. In a situation where moisture ingress causing weathertightness issues has only occurred after the 15 year time period has passed, Schedule 1(a) will apply. However, if it is a situation where it is clear moisture ingress has occurred within the 15 year time period, the building work will not be exempt under Schedule 1(a)(iii).

### 5.2 The notice to fix

- 5.2.1 An authority has the power to issue a notice to fix under section 164(1) of the Act:
- (1) This section applies if a responsible authority considers on reasonable grounds that—
- a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent); or
  - a building warrant of fitness or dam warrant of fitness is not correct; or
  - the inspection, maintenance, or reporting procedures stated in a compliance schedule are not being, or have not been, properly complied with.

A notice to fix is an enforcement notice that requires a person to remedy the contravention of, or to comply with, the Act or regulations under section 164(2)(a). A notice to fix will specify a time period for compliance<sup>8</sup> and can be enforced by a prosecution for failure to comply with the notice.<sup>9</sup> The legislation that governs notices to fix can be found under subpart 8 of the Act.

<sup>7</sup> The legislation that was current at the time the building work was carried out

<sup>8</sup> Section 165(1)(b) of the Act

<sup>9</sup> Section 168 of the Act

### 5.3 Who can be issued with a notice to fix?

5.3.1 The main purpose of a notice to fix is to ensure compliance with the Act and Building Code and provide effective penalties for those that do not comply.<sup>10</sup> A notice to fix can be issued to a ‘specified person’ under section 164(1)(a) of the Act. The definition of a ‘specified person’ is found under section 163 of the Act stating:

specified person means—

- (a) the owner of a building; and
- (b) if the notice to fix relates to building work being carried out,—
  - (i) the person carrying out the building work; or
  - (ii) if applicable, any other person supervising the building work.

5.3.2 Under this definition the ‘owner’ of a building is a specified person. However, one needs to read the definition in conjunction with section 164(1)(a) of the Act, which states that the specified person is contravening or failing to comply with the Act. In my view a notice to fix can only be issued to an owner in respect of a contravention or failure to comply with the Act or Regulations. If the person who contravened the Act is no longer the owner of the building, a notice to fix cannot be issued to a subsequent owner who did not contravene or fail to comply with the Act or Regulations.

5.3.3 I am aware this decision takes a different approach from previous determinations.<sup>11</sup> While earlier determinations focused on whether a person was an “owner” and hence a “specified person” to whom a notice to fix could be issued, the nature of the contravention also needs to be considered.

5.3.4 A notice to fix is issued to a specified person as opposed to being issued in respect of the building, in contrast to a building consent or a dangerous buildings notice which is specific to the building itself. A notice to fix is focused on a person and the ability for that person to be prosecuted for failure to comply with the notice under section 168 of the Act.

5.3.5 The wording of section 164 indicates that the specified person must do something, for example carry out building work without a building consent and contravene section 40, in order to be issued with a notice to fix. If a person carries out building work without a building consent a notice to fix can be issued *to that person* (my emphasis).

5.3.6 If a person as a new owner purchases a house on which a previous owner has carried out building work without a building consent, a notice to fix cannot be issued to the new owner as they have not contravened the Act in that they did not carry out the building work that contravened section 40.

5.3.7 Under section 163 a notice to fix can also be issued to the person carrying out the building work. For example, if a builder is carrying out the building work they can be issued with a notice to fix, however where the builder has no legal right to carry out the building work<sup>12</sup> and therefore has no ability to remedy the contraventions and non-compliances listed in the notice to fix; the builder cannot be included as a

<sup>10</sup> 2013/015 The refusal to issue a code compliance certificate and the simultaneous issue of a notice to fix for a 14-year-old house, 8 April 2013

<sup>11</sup> 2011/033 Notices to fix issued in respect of the conversion of a storage shed to a sleep-out and alterations to the sleep-out (*Department of Building and Housing*) 13 April 2011

<sup>12</sup> For example; is not engaged to carry out the building work, or is restricted from doing so.

specified person on the notice to fix.<sup>13</sup> The legislation makes it clear that the builder can only be a specified person when they are carrying out the building work. The same reasoning applies to an owner, if the owner did not carry out the contravention of the Act under section 164(1), they cannot be held accountable.

- 5.3.8 Where an authority intends to issue a notice to fix, they should identify the provision of the Act or Regulations that has been contravened and they should check that it was the person to whom the notice to fix is going to be issued who contravened the provision and not a previous owner.
- 5.3.9 In relation to the current building, the notice to fix issued by the authority dated 10 February 2014 states the contravention being a failure to comply with section 40 of the Act as building work was undertaken without a building consent. There is no dispute the building work in question was carried out by the previous owner in April-May 2013. The applicant's purchased the property in July 2013. The applicant's did not carry out the building work described on the notice to fix, and therefore cannot be issued with a notice to fix.
- 5.3.10 The authority has submitted the applicant was fully aware of the unconsented building work that had been carried out. In my view this is not relevant to the notice to fix. The evidence provided is clear that the applicant was not the owner at the time the building work was carried out, and did not engage the builder to complete the building work. It is not for me to determine, based on evidence from other people in the course of the authority's investigations, whether the applicant was aware of the building work being carried out. This falls outside of the matters I can determine under the Act.
- 5.3.11 In relation to the principles of the Act under section 4, in my view the general principles of the Act cannot override a specific section, in this case relating to section 164 of the Act.

## 5.4 The remedy

- 5.4.1 Although I have determined in paragraphs 5.3 above that the notice to fix cannot be issued to the applicant as a subsequent owner, I will comment on the remedy contained in the notice to fix as this was an issue raised by the applicant in their application. The remedy stated in the notice to fix is noted in paragraph 3.8.5.
- 5.4.2 As stated in Determination 2014/002, the remedy sought should have been limited to bringing the building work into compliance with the Building Code. The requirement to have a full survey undertaken for the whole building is outside of the scope of section 164(2)(a) of the Act. The notice to fix should relate to the actual building work that contravened the Act, not the entire building. The rest of the building has a code compliance certificate and was building work completed under a valid building consent. The authority cannot include the remainder of the original building unless it falls under section 121 of the Act as a dangerous or insanitary building.

## 5.5 Other powers and remedies

- 5.5.1 If the building reaches the threshold of a dangerous building under section 121 of the Act, a dangerous building notice can be issued to a subsequent owner as it relates to the current condition of the building, it is not relevant how the building became dangerous nor whether an individual contravened the Act in putting the building into

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<sup>13</sup> 2010/073 The issuing of a notice to fix to the owner only of a house (*Department of Building and Housing*) 23 August 2010.

a dangerous state. I note that for the current building there is no indication it meets the definition of a dangerous building.

- 5.5.2 If building work has been carried out by a previous owner without a building consent when one was required and the building does not satisfy the dangerous building test for a section 124 notice, the authority has no alternative regulatory means to enforce compliance of the building with the Act and Regulations. It is at an owner's prerogative to decide whether they wish to remedy the previous owner's contravention or not. In this case the applicant has indicated their intention to carry out renovations, which will require a building consent. The authority will have an opportunity to inspect the framing and ensure a fully weather tight solution with the applicant at that time.
- 5.5.3 Notwithstanding the inability of the authority to issue a notice to fix to the current owner, it is important that when such situations occur the authority's conclusions regarding the clear contravention of the Act by the previous owner should be drawn to the attention of the current owner and recorded on the property file so they will appear in any future LIM report for the property. This will ensure the current owner has the opportunity to consider undertaking appropriate remedial work, and will inform the current owner of possible issues that could arise if/when the current owner comes to sell the property. Where there is a determination made regarding the property, such as in this case, the determination should be included on the property file.
- 5.5.4 The limits on issuing a notice to fix to a subsequent owner where the building work was carried out by the previous owner in contravention of the Act mean an authority should follow up any contraventions of the Act promptly. That is reinforced by the six month time limit in section 378 of the Act on filing a charging document for an offence against the Act. However, this is no criticism of the authority in this case as the contravention of the Act occurred immediately before the property was transferred to the applicant. There was no opportunity for the authority to issue a notice to fix to the previous owner before the property was sold.
- 5.5.5 The applicant may also have a potential remedy against the previous owner under the warranties in the Sale and Purchase agreement, but that is not a matter that can be considered under the Act in this determination.

## **6. The decision**

- 6.1 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 and I therefore reverse the authority's decision to issue the notice to fix.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 15 August 2014.

John Gardiner  
**Manager Determinations and Assurance**

## Appendix A

A1 The relevant sections of the Act include:

### 164 Issue of notice to fix

- (1) This section applies if a responsible authority considers on reasonable grounds that—
  - (a) a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent); or
  - (b) ...
- (2) A responsible authority must issue to the specified person concerned a notice (a notice to fix) requiring the person—
  - (a) to remedy the contravention of, or to comply with, this Act or the regulations; or
  - (b) to correct the warrant of fitness; or
  - (c) to properly comply with the inspection, maintenance, or reporting procedures stated in the compliance schedule.

### 165 Form and content of notice to fix

- (1) The following provisions apply to a notice to fix:
  - (a) it must be in the prescribed form:
  - (b) it must state a reasonable timeframe within which it must be complied with:
  - (c) ...

### 168 Offence not to comply with notice to fix

- (1) A person commits an offence if the person fails to comply with a notice to fix.
- (2) A person who commits an offence under this section is liable on conviction to a fine not exceeding \$200,000 and, in the case of a continuing offence, to a further fine not exceeding \$20,000 for every day or part of a day during which the offence has continued

### 378 Time limit for filing charging document

Despite anything to the contrary in section 25 of the Criminal Procedure Act 2011, the limitation period in respect of an offence against this Act ends on the date that is 6 months after the date when the matter giving rise to the charge first became known, or should have become known, to any of the following persons:

- ...
- (b) a territorial authority
- ...