

Determination 2023/038

Date: 28 November 2023

The authority's decision to issue a notice to fix in relation to weathertightness remedial work to a 17-year-old building

16 Oriental Terrace, Oriental Bay, Wellington

Summary

This determination considers the authority's decision to issue a notice to fix. The matter concern alleged contraventions with Building Code clause E2 External moisture, building work carried out other than in accordance with a building consent, and the timeframe and remedies in the notice.



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

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

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by Andrew Eames, Principal Advisor, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.¹
- 1.2. The parties to the determination are:
 - 1.2.1. D Jaquierey of JVL Contractors Ltd, the applicant and the licensed building practitioner who carried out the building work and who was issued a notice to fix² (“the builder”).
 - 1.2.2. the owners of the four units in the multi-unit building, collectively referred to as “the owners”; G & L Stratton (Unit 1), A & S McPhail and Mackrell Trustees Ltd (Unit 2), R & M Mexted and Y Zhang (Unit 3), C & J Harlety and J Vegar (Unit 4).³
 - 1.2.3. other recipients of the notice to fix, R Johnston & F Taylor and W McDermott.⁴
 - 1.2.4. Wellington 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 decision to issue a notice to fix for building work the authority considers does not comply with Clause E2 External moisture, and carried out other than in accordance with a building consent.
- 1.4. The builder disputes the issue of the notice to fix and applied for this determination. The builder maintains that the building work complies, and the work that was carried out before the building consent was issued is within the parameters of

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

² A notice to fix is a statutory notice requiring a person to remedy a breach of the Building Act 2004 or regulations under that Act.

³ While the NTF lists units 1 through 4, as well as all of the owners, the building work for which the notice was issued was carried out on units 3 and 4.

⁴ Under section 176(da).

various sections of the Building Act 2004. The builder also considers the notice is invalid with regard to the timeframe and remedy set out in the notice.

- 1.5. The matter to be determined, under section 177(1)(b) and (2)(d), is the decision by the authority to issue a notice to fix. In making this decision, I will consider the alleged contraventions identified in the notice to fix and the form and content of the notice:
 - 1.5.1. Section 17 – Non-compliance with the building code and whether the building work complies with clause E2 External moisture and clause B2 Durability.
 - 1.5.2. Section 40 – Non-compliance with building consent and whether the building work is in accordance with the approved plans and specifications.
 - 1.5.3. Whether the remedy provided on the notice was appropriate and the timeframe in which to carry it out was reasonable.

Matters outside this determination

- 1.6. I have not considered any other aspects of the Act or of the Building Code, nor have I considered the Building Code compliance of the proposed building work covered by the building consent, other than as outlined in paragraph 1.5.1.

2. Background and building work

- 2.1. To remedy existing weathertightness issues, on 8 January 2020, the builder applied for a building consent on behalf of the owners.
- 2.2. The building work described in the building consent application was for all four units and included:
 - 2.2.1. Removal of existing tiles and the installation of a new waterproofing membrane on the roof decks, creating new falls to all decks.
 - 2.2.2. Replacement of singled glazed windows to double glazed windows.
 - 2.2.3. Replacement and repairs of the balustrade to the decks including new concrete nib.
 - 2.2.4. The painting and repair of external and internal walls where required. This includes timber framing and plasterboard replacement where specified.

- 2.3. The specified waterproofing membrane is a spray-on waterproofing system that has a CodeMark Certificate.⁵ The data sheet included in the building consent documentation states:

The [waterproofing membrane] System complies with the following performance clauses of the New Zealand Building Code:

B1 - Elasticity B1.3.2
B2 - Durability B2.3.1 (a), (b) & (c)
C3 - Fire Affecting Areas beyond the Fire Source C3.3, C3.7
E2 - External Moisture E2.3.2
E3 - Internal Moisture E3.3.3
F2 - Hazardous Building Materials F2.3.1

- 2.4. The building consultant report supplied with the building consent application [noted above] states:

All areas are to be inspected and work must be carried in accordance with the approved building consent and approval letter. Photos aren't acceptable in lieu of inspections and areas will need to be deconstructed for inspection.

- 2.5. The parties do not dispute that building work began before the building consent was issued. The builder advised that "setup site work" commenced on 14 January 2020, the waterproofing work commenced on 20 January 2020 and window replacement on unit 4 commenced on 5 March 2020.
- 2.6. The authority issued building consent No. BC457516 on 2 July 2020.

The inspections

- 2.7. Prior to the first council site inspection, a building surveyor ("the building surveyor") was engaged to carry out timber remediation to levels 2 and 3. The building surveyor provided a report on 25 June 2020 which highlighted several areas of concern around high moisture levels, wide-spread water staining, and that new joinery was being installed over or adjacent to decaying timbers. There was also a note that newly sealed decks had threshold clearances of only 20mm in some cases.
- 2.8. On 13 July 2020, the authority conducted its first inspection. The authority became aware that work had been carried out that the authority had not had the opportunity to inspect. The site notice states that no further work is to be carried out, and a failure to stop work would result in a notice to fix. It notes the authority, the builder and a surveyor need to "discuss project and what work needs to be removed for council inspection."

⁵ CodeMark is a voluntary product certification that must be accepted by Building Consent Authorities as meeting the requirements of the Building Code, provided the certificate is current and the product or method is used in accordance with details noted on the certificate.

- 2.9. The authority's site notice also noted the following items the authority considered were not compliant (in summary):
- 2.9.1. Membrane decks to units 3 and 4 have been redone, along with new joinery. The tiles have been installed, yet there has been no inspection of the membrane or upstands.
 - 2.9.2. However, the deck upstands have been installed under engineer supervision, with site notes "to be supplied at the next inspection".⁶
 - 2.9.3. There has been no assessment of the framing where the new joinery was replaced.
 - 2.9.4. "There appears to be insufficient upstands to joinery".
 - 2.9.5. The pre-clad inspection also hasn't been carried out.
 - 2.9.6. The deck membrane is covering the cladding, preventing moisture in the cavity from escaping.
 - 2.9.7. The gaps between the cladding and the deck are insufficient.
 - 2.9.8. No surveyor has been engaged, with the builder stating rotten timber has been replaced.
- 2.10. On 30 July 2020, the authority conducted its second inspection. During this site visit the builder had engaged a different "second building surveyor" to carry out the timber remediation noted in the report dated 25 June 2020. This second building surveyor was present from the second council inspection onwards.
- 2.11. A remediation proposal was presented to council in August 2020 for Units 3 and 4 prior to the NTF being issued. Email correspondence continued between the council and the building surveyor.
- 2.12. On 10 September 2020, the authority conducted its third site visit. The authority's site notice reiterated the non-compliant items referenced in paragraph 2.9 from the first site visit on this site notice. It also noted the following additional non-compliant items:
- 2.12.1. The scupper sizes in the decks do not comply with E2.
 - 2.12.2. The decks do not have the minimum falls required by E2.
- 2.13. The site notice again stated that no further work was to be carried out. However, work continued onsite despite direction from the authority to stop.

⁶ The builder has since confirmed that the engineer has issued a PS4 for this work.

2.14. The authority notified the builder that it would soon issue a notice to fix on the basis that building work was continuing without resolution of the previously identified issues, “lack of inspections and not complying with the building code requirements”.

The notices to fix

2.15. The authority issued a notice to fix on 28 September 2020, which stated the notice needed to be complied with by 26 September 2020.

2.16. The authority then issued a second notice to fix on 9 October 2020 to supersede the first. This second notice had the same particulars, but the timeframe for the notice to be complied with was amended to 9 November 2020.

2.17. The particulars of contravention or non-compliance were set out as follows:

1. Non-compliance with the building code.

On the 10th September 2020 the above property was inspected by a Council officer. Building work, namely the weather tightness detailing has been done that does not comply with E2 of the Building Code. Section 17 of the Building Act 2004 requires that all building work must comply with the Building Code.

2. Non-compliance with building consent

On the 10th September 2020 the above property was inspected by a Council officer. Building work, namely all the construction to date has been done which does not comply with building consent No SR457516 for the above property. Section 40 of the Building Act 2004 requires that all building work must be done in accordance with a building consent.

2.18. The notice required the following remedial action to remedy the contravention or non-compliance:

1. Non-compliance with the building code and with the building consent.

You must remove the work back to a strip off stage. This will require the removal of the cladding, window joinery and linings back to the framing in the areas forming part of the consent. This will allow [the authority] to carry out the required inspections in the building consent and ensure the construction is carried out in accordance with the consent plans. This strip off inspection must be within 20 working days of the date of this notice.

The following inspections are required with respect to all the remedial work;

Strip off inspection

Pre wrap, to sight remediated framing

Pre Clad

Preline

- 2.19. While the notice to fix lists units 1 to 4, the particulars of the notice refer to the third inspection on the 10th of September. That inspection was only of work on units 3 and 4.
- 2.20. Email correspondence continued between the building surveyor and the council on the remediation. However, a request to extend the timeframe to the NTF was declined in November 2020
- 2.21. The Ministry received an application for determination on 18 January 2021.
- 2.22. The authority conducted several other site visits, mainly involving building work in unit 2 in March 2021. This includes two strip-off inspections, as well as one for the pre-wrap.

The Building Practitioners Board complaint

- 2.23. The authority filed a complaint against the builder with the Building Practitioners Board (“the BPB”). The board’s decision was made on 9 March 2022.⁷
- 2.24. To assist the BPB’s investigation, the board engaged an expert who is a registered architect as a special adviser to the board (“the BPB expert”) to complete a desktop review of the property and files. The expert reviewed photographs and documents and identified five potential issues:
- (a) Membrane has been taken from deck up over the cladding preventing moisture in the cavity from escaping;
 - (b) Insufficient upstands to joinery;
 - (c) Insufficient gaps between the cladding and the deck;
 - (d) Scupper sizes in the deck do not comply with E2; and
 - (e) The decks do not have the minimum fall required by E2.
- 2.25. The BPB expert concluded that items (a) through (d) above were not built in accordance with the building consent. However, as the expert did not have any measurement of the as-built decks, they were unable to reach an opinion on point (e).
- 2.26. In addition, the BPB expert stated:

In my opinion, and based on the information available to me, where the original cladding was installed over a cavity, the cladding would no longer comply with

⁷ <https://www.lbp.govt.nz/complaints-and-past-decisions/past-complaint-decisions/jaquery-2022-bpb-cb25632-substantive-decision/>.

these performance criteria of Clause E2 after the application of continuous coat of [spray-on waterproofing membrane].

- 2.27. A hearing took place on 18 January 2022, and the board reached its decision regarding the complaint on 3 March 2022. One of the findings of the board was that the builder had carried out or supervised building work “that was contrary to the building consent”, which is a breach of section 40.
- 2.28. The board considered the justifications advanced by the builder for commencing work prior to the building consent being issued. The builder contends the work was carried out in reliance on section 41(1)(c); section 40 allows for building work to commence once a building consent has been applied for. There is no requirement to wait until the building consent is issued; and a building consent was not necessary because the work was exempt under Schedule 1 of the Act. The board did not accept any of the justifications put forward and addressed each in detail in their decision.

3. Submissions

The builder

- 3.1. The applicant’s submission includes (in summary):
- 3.1.1. Photos of the building work, including the windows, decks, exterior walls, roof, and water proofing membrane.
 - 3.1.2. Site reports from the authority.
 - 3.1.3. Building consent documentation.
- 3.2. The builder’s argument about whether they have breached section 17⁸ of the Act includes:
- 3.2.1. The step down from the doorway varies from unit to unit, between 80mm to 120mm. Apartments one, three and four have not been altered from their original construction. Apartment two has been altered.
 - 3.2.2. Regarding the area below each doorway, all apartments have been built as per the original building consent drawings. The structural floor is concrete, and the framing under the door is timber.
 - 3.2.3. The exterior wall has a 20mm cavity over building wrap fixed to the framing. The cavity batten has “7mm fire rated fibre-cement board fixed directly to

⁸ Section 17 All building work must comply with building code.

it”, while the cement board has a 12mm thick three-layer plaster render applied over it. Over the plaster system, “which was applied under the building consent now in question”, is 1.5mm of liquid-applied roof membrane with a .5mm topcoat.

3.3. With regard to the contravention of section 40⁹, the builder submits:

3.3.1. All of the building work has been completed as per the approved building consent documents. They also stated:

The LBP designer was correct when designing the weathertightness of the building to assume the existing work was building code compliant. This is because the [authority] approved drawings that were indeed (1) code compliant and (2) a *Code of Compliance* Certificate had been issued for this work.

3.3.2. The builder believes he was “legally right to start the repair work before the Building Consent was issued” under section 41(c)¹⁰ which provides:

Despite section 40, a building consent is not required in relation to—(c) any building work in respect of which a building consent cannot practicably be obtained in advance because the building work has to be carried out urgently — (i) for the purpose of saving or protecting life or health or preventing serious damage to property...

3.3.3. The builder is of the view that the weathertightness issues were affecting the health of the owners such that this provision applied. To add to that, the builder continues:

... all the owners was (sic) conveyed to the LBP with several requests asking please start ASAP to prevent further serious damage to our property.

3.3.4. The builder also considers that section 44(1) requires only that an owner must **apply** for a building consent before beginning building work, not that building work cannot start until the building consent is granted.

3.3.5. Regarding the replacement of the new doubled glazed windows, the builder believes this work falls under Schedule 1¹¹, clause 8 (in reliance on section 41(b)¹²).

⁹ Section 40 Building work not to be carried out without consent.

¹⁰ Section 41(c) and (c)(i).

¹¹ 2017 version 3, clause 8.

¹² Section 41(b) states, “any building work described in Schedule 1 for which a building consent is not required.”

The authority

- 3.4. The authority holds the view that it was correct in its decision to issue a notice to fix on the basis that the work does not comply with Building Code clause E2 External moisture and that the work is not in accordance with the building consent.
- 3.5. The authority's submission includes (in summary):
 - 3.5.1. building consent documentation
 - 3.5.2. site reports from the inspections
 - 3.5.3. proof of payment records
 - 3.5.4. correspondence with the applicant.
- 3.6. In response to the Ministry's request for information, the authority noted (in summary):
 - 3.6.1. There are several areas of work that do not meet the Building Code.
 - 3.6.2. Three sliding doors mentioned in the notice to fix do not achieve "compliant ground levels"; the existing level has also been altered with a new membrane, particularly the screed and tiles.
 - 3.6.3. This made "the clearances worse than what was [there] before even if the levels did not comply with the code".
 - 3.6.4. This area of work to Units 3 and 4 was carried out without inspection by the authority. Because of this, the exact construction is unknown.
 - 3.6.5. Inspections carried out by the authority in March 2021 to Unit 2 required remedial work to be in accordance with the consented plans. The authority believes it is reasonable to assume the work already completed to Units 3 and 4 was carried out in a similar manner.
 - 3.6.6. The waterproofing membrane was applied up and over the cladding for units 3 and 4.
 - 3.6.7. The waterproofing on these decks prevents the existing cladding from draining and venting. It does not follow the consented plans or "even meet the function[al] requirements of the code".

The owners

- 3.7. The owners did not make a submission prior to the draft determination being issued.

Responses to the draft determination

- 3.8. On 14 October 2022, a draft of this determination was issued to the parties for comment.

The authority

- 3.9. The authority accepted the draft.

The owners

- 3.10. The owners did not accept the draft. The owners of Unit 4 provided a submission which clarified:

- 3.10.1. The owners were not aware that a number of inspections referred to in the determination had been carried out, and they requested copies of any site visit reports.
- 3.10.2. Regarding the commencement of work, it does not appear that the BPB expert report acknowledged that the invasive testing undertaken had led to leaks that did not previously exist and which needed to be addressed urgently. The leaking was causing damage to the units as well as stress and anxiety to the owners. The authority was informed of this but did not change its position regarding the notice to fix (which prevented the leaks from being remedied) “until some months later when it finally allowed building work on units 1 and 2 to proceed”.
- 3.10.3. Regarding the ponding of water, the work on the decks of level 4 was not finished as the aluminium rods (at the junction of the tiles and gutters) had not been levelled, at that time. The notice to fix prevented this work from being undertaken, resulting in water “ponding on the deck because the raised height of the aluminium rods at the junction prevented the water from flowing into the gutters”. The owners also noted that the scuppers are original and were inspected and approved by the authority when the building was constructed in 2005, and therefore section 112 of the Act applied.
- 3.10.4. The owners of unit 4 are “ultimately neutral” in respect of the determination.

The builder

3.11. The builder did not accept the draft determination. They provided an annotated copy of the draft responding to various points from their perspective:

3.11.1. There needs to be a site inspection (on behalf of the Ministry).. The builder also requested the authority carry out several site inspections with them on site which the authority refused.

3.11.2. The disputed building work relates to work that has not yet been carried out, as “the authority stopped the work at 50% of the contract so no further work has been done since work stopped”. The matters in the notice to fix are not able to be addressed “until the stop work notice is lifted”.

3.11.3. Regarding work continuing following the authority’s site notice, the builder submits that “the authority instructed that the work under the engineer’s supervision could continue”.

3.11.4. On the issue of joinery being installed over or adjacent to decaying timbers, the builder submits that “no decaying structural timber has been found or replaced anywhere in the whole building”.

3.12. Regarding the authority’s site notices (see paragraphs 2.9 and 2.12), the builder noted:

3.12.1. An inspection of the waterproofing membrane has been “done by the CodeMark [waterproofing membrane] applicator as per the CodeMark requirements”.

3.12.2. A PS4 [producer statement for construction review]¹³ has been issued by the engineer for the installation of the deck upstands.

3.12.3. Several of the items mentioned, including the upstands to the joinery, the deck membrane covering the cladding, and insufficient gaps between the cladding and deck, are “work in progress”.

3.12.4. No rotten timber was replaced, however “Concrete timber Formwork under the original slab had been left in place and was rotten so it was removed”.

3.12.5. A pre-clad inspection was not required as no new cladding was to be installed.

¹³ A producer statement is a professional opinion based on sound judgement and specialist expertise. It is not a product warranty or guarantee of compliance. Refer: <https://www.building.govt.nz/projects-and-consents/apply-for-building-consent/support-your-consent-application/producer-statements/> (accessed 30 July 2023).

- 3.12.6. The building consent was “approved with an [approved] solution not E2” and “the scuppers were constructed as per the building consent drawings, not as per E2[/AS1]”.¹⁴
- 3.12.7. With regards to the falls required for the decks, “the building consent was approved with a 1% fall, the decks were all constructed with falls”.
- 3.13. The builder disagrees that the work did not comply with the Building Code and building consent. In their view, the authority did not have reasonable grounds to issue a notice to fix, as “work was in progress with a building consent”. The builder also submits that “all the work completed to date is now compliant” and no further work should be required.
- 3.14. Regarding the remedial action set out in the notice to fix, the builder states that “The building consent did not have any exterior cladding noted in it to be removed, all was to remain in place and be overcoated with [the waterproofing membrane]”. As such, the authority “has asked for work that was not in the building consent to be now done without seeking a new building consent or an amendment to the existing consent”. In terms of the further inspections required, the builder noted:
- 3.14.1. Regarding the pre-wrap inspection - no framing was ever proposed to be replaced
- 3.14.2. Regarding the pre-clad and pre-line inspections – none of this work was in the building consent conditions, and it would require a new building consent.
- 3.15. In terms of the BPB’s investigation, the builder stated:
- 3.15.1. The ‘potential issues’ identified by the BPB’s expert (see paragraph 2.24) were all items of “work in progress”.
- 3.15.2. The scuppers and falls were built as per the building consent and “not E2[/AS1]”.¹⁵
- 3.15.3. The BPB’s expert never did a site visit to “confirm or prove wrong the claims made by the authority”, and the BPB’s decision was based only on the report from the BPB expert.

¹⁴ It appears that the builder is referring to Acceptable Solution E2/AS1, rather than clause E2 of the Building Code.

¹⁵ As above, it appears that the builder is referring to Acceptable Solution E2/AS1, rather than clause E2 of the Building Code.

- 3.15.4. The draft determination has been heavily influenced by the BPB decision, and the decision by the BPB should have been suspended until the determination was finalised.¹⁶
- 3.15.5. The BPB expert's report agreed that the replacement of windows "where there have been no failures of weathertightness can be done under Exemption 1 Schedule 1".
- 3.16. In terms of the 'step down' of the units' doorways, these had not failed after 13 years, and are code compliant. Likewise, the cladding system has not failed in 16 years and does not need to be fixed. The only work carried out to Units 3 and 4 was the replacement of windows and doors and application of the waterproofing membrane.
- 3.17. With regards to section 112, the building was leaking in a number of places before the work started. In the past two years, there have not been any leaks where the waterproofing membrane has been applied. The building is now "fully compliant with the building code as to watertightness".
- 3.18. The builder considers that all items which the draft determination found do not comply with the approved plans in the building consent (refer to paragraph 4.18) are "work in progress". They also noted that:
- 3.18.1. The falls approved in the building consent were 1% (not 1 degree as stated in the draft determination), and any deck that is not at 1% is "work in progress".
- 3.18.2. The door thresholds are "work in progress", but the upstands have not failed so are compliant with the Building Code.
- 3.18.3. The cladding clearances are "work in progress but also if the existing has not failed then it should not require fixing".
- 3.18.4. The waterproofing membrane "cannot be applied under E2/AS1, it must be applied under the CodeMark requirement as an Approved Solution". The membrane system "complies with E2 but does not comply with AS1 as it is a CodeMark product".¹⁷ The builder disputes that the application of the waterproofing membrane does not follow the consented plans or meet the requirements of the code.

¹⁶ The builder referenced sections 182 and 183 in support of this claim; however, these sections do not apply to decisions by the BPB.

¹⁷ Paragraph 8.5.1 Limitations of E2/AS1 (page 89) states that "This Acceptable Solution is limited to membranes composed of butyl or EPDM installed over plywood substrates for...".

3.19. The builder also claimed that the work which the draft determination found does not comply with the Building Code in (refer to paragraphs 4.22-4.27) is “work in progress”. They also noted:

3.19.1. The roofs do shed moisture (as required by E2.3.1).

3.19.2. The BPB’s expert found that the as-built scuppers would satisfy the Building Code.

3.19.3. The “only change to the decks from the original code compliant building is the decks have been raised at one end up to 30mm so they have a fall, the original decks did not have enough fall”.

3.20. The builder disagreed with the conclusion of the draft determination, submitting that:

3.20.1. By issuing a “stop work notice”, the authority did not take all reasonable steps to ensure work is carried out in accordance with the building consent. The notice to fix required work to be carried out that is either in the building consent or required a new building consent, and “neither could be done with a stop work notice in place”.

3.20.2. The builder disagrees that the time frame in the notice to fix was reasonable. If the exterior cladding had to be removed, the residents of the building would need to move out, scaffolding would need to be installed on the 5-story building and a new building consent would be required, and “these 3 matters alone could not have been achieved under 8 weeks”.

4. Discussion

The legislation

4.1. An authority has the power to issue a notice to fix where the authority considers, on reasonable grounds, a specified person is contravening or failing to comply with the Act (section 164(1)(a)). “Specified person” is defined in section 163 and includes the owner of the building and, if the notice relates to building work being carried out, the person carrying out or supervising the building work.¹⁸

4.2. A notice to fix is an enforcement notice which:

4.2.1. requires the specified person to remedy the contravention of, or to comply, with the Act (section 164(2)(a)).

¹⁸ Section 163 Specified person (a) and (b).

- 4.2.2. specifies a reasonable timeframe for complying with the notice (section 165(1)(b)) .
- 4.2.3. may be enforced by a prosecution for failing to comply with the notice (section 168).
- 4.3. For an authority to be able to issue a notice to fix, there must be a contravention (or breach) of the Act. In this case the contraventions listed in the notice were sections 17 and 40

17 All building work must comply with building code

All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.

40 Buildings not to be constructed, altered, demolished, or removed without consent

(1) A person must not carry out any building work except in accordance with a building consent.

(2) A person commits an offence if the person fails to comply with this section.

(3) 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 \$10,000 for every day or part of a day during which the offence has continued.

- 4.4. Because the building work is an alteration to an existing building, section 112 also applies when considering how the building might comply in accordance with section 17:

112 Alterations to existing buildings

- (1) A building consent authority must not grant a building consent for the alteration of an existing building, or part of an existing building, unless the building consent authority is satisfied that, after the alteration,—

...

(b) the building will,—

(i) if it complied with the other provisions of the building code immediately before the building work began, continue to comply with those provisions; or

(ii) if it did not comply with the other provisions of the building code immediately before the building work began, continue to comply at least to the same extent as it did then comply.

- 4.5. In short, other than for provisions relating to means of escape from fire, if the building did not comply with the provisions of the Building Code before the building work began, the building after the alterations needs to at minimum continue to comply to at least the same extent as it complied before the building work took place.

Compliance with the building consent

- 4.6. In relation to section 40 of the Act, the particulars of the notice to fix state that “all the construction to date has been done which does not comply with [the building consent].”
- 4.7. The documents submitted for consent included E2/AS1 details and reference. When the consent was issued, the consent officer confirmed that the building work is utilised E2/AS1 as means of compliance and noted it in the authority’s files.
- 4.8. The authority has identified the following variance from the approved plans:
- 4.8.1. Deck thresholds around the joinery are not 100 mm.
 - 4.8.2. The decks did not achieve the falls detailed in the building consent.
- 4.9. The BPB expert’s investigation found:
- 4.9.1. Some deck thresholds are a maximum of 80mm.

Deck thresholds

- 4.10. In the plans approved under the building consent, the thresholds show 100mm minimum height from the top of the tiles to the door threshold, with the waterproofing membrane wrapped up and over the bottom plate.
- 4.11. Based on the photographs provided by the authority, which show ponding water, and the expert’s report to the BPB that the decks did not have “the minimum fall required”, I conclude the decks did not meet the falls shown in the building consent.
- 4.12. Based on the photographs and the submissions from the authority, the door thresholds do not achieve the heights specified in the building consent.

Cladding clearance & ventilation

- 4.13. The building consent showed the cladding clearance with reference to E2/AS1, which specifies a minimum of 35mm clearance between the cladding and roof deck.
- 4.14. The cladding clearance as constructed is less than 35mm, and in some cases nil, and so is not in accordance with the information in the building consent.

- 4.15. All of the details in the documents submitted for the building consent show the base of the cladding with a cavity closure and minimum 6 mm for ventilation as per E2/AS1.
- 4.16. With regard to the CodeMark for the waterproofing membrane product, the waterproofing membrane and its associated details must only be applied in accordance with the technical literature which references E2/AS1. The waterproofing membrane technical manual, which is referred to in the building consent documents, details a cavity with 6mm allowance for cavity ventilation. This is not achieved in the construction.
- 4.17. Where the cladding clearance is minimal, the addition of the waterproofing membrane and tiles results in obstruction of the cladding cavity in multiple areas of the decks on units 3 and 4, which obstructs airflow and moisture drainage from the cavity. This is not in accordance with E2/AS1, nor the membrane technical manual, and accordingly does not comply with the building consent.

Conclusion

4.18. It is clear to me that the following items do not comply with the building consent:

- Deck thresholds at the doors
- Cavity closure, ventilation, and clearances from cladding to the deck
- Deck falls.

4.19. I conclude a notice to fix could be issued in respect of a contravention of section 40 of the Act.

Compliance with the Building Code

4.20. The notice to fix described the non-compliance with s17 simply as “weather tightness detailing has been done that does not comply with E2 of the Building Code”. However, the notice to fix referenced the site inspection of 10 September 2020, and the site report provided detailed information on the aspects of the building work that the authority considered were not compliant. I have taken those items set out in the site report (refer to paragraph 2.12) as being the “weather tightness detailing” referred to in the notice to fix.

4.21. The relevant Building Code clauses in E2 External Moisture are:

E2.3.1 – Roofs¹⁹ must shed precipitated moisture

¹⁹ In this case the decks are the roof structure

E2.3.2 – Roofs and exterior walls must prevent the penetration of water that could cause undue dampness, damage to building elements or both

- 4.22. The appearance of ponding water on ceramic tiles would indicate that the decks on units 3 and 4 do not achieve the performance criteria in clause E2.3.1. The inability to shed moisture is due to the lack of falls on the decks and exacerbated by reduced scupper/outlet size.
- 4.23. The cladding clearance is further reduced by the mortar and tiles laid over the membrane on the existing decking substrate, increasing the overall height of the deck assembly, bringing the surface closer to the bottom edge of the cladding.
- 4.24. The combination of reduced clearance, the lack of slope of the deck assembly, the reduced door thresholds and absence of membrane into these areas would place timber walls and structural elements in close contact to the deck, leading to moisture being drawn into structural building elements such as the timber framing.
- 4.25. The obstruction of the drainage cavity does not allow adequate ventilation of the cavity. With the air flow obstructed, moisture in the cavity cannot dissipate, and the lack of drainage prevents any moisture present in the cavity from escaping along the bottom edge.
- 4.26. The combination all these factors will result in moisture accumulating within the cavity and framing, which will likely cause undue dampness and damage to building elements in the wall assembly – meaning it does not comply with clause E2.3.2.
- 4.27. I note the builder submitted that as the membrane has a CodeMark certificate it meets the Building Code requirements. This pathway to compliance applies in respect of the performance of the product when it is installed in accordance with the manufacturer's instructions. In this case, most notably, the cladding clearances, ventilation and door thresholds are not in accordance with the manufacturer's technical literature.
- 4.28. I conclude that a notice to fix could be issued for a contravention of section 17, non-compliance with the building code.

Work carried out without building consent

- 4.29. The builder has acknowledged that the building work to units 3 and 4 began before the consent was issued, but contends he is not in breach of the Act as outlined in his submissions in paragraphs 3.3.2 to 3.3.5.
- 4.30. In submission to this determination, the builder submitted that in the report provided in the building consent, it noted the windows in unit 4 were not failing. They were replaced with comparable single glaze to double glaze windows, so this

falls under Schedule 1 exemption clause 8. This reference to Clause 8 is not correct as the building is more than two stories. No other clause of Schedule 1 has been provided in submissions so I have not considered the issue further.

- 4.31. An owner can choose to apply for building consent for building work that is exempt from building consent. If the building work is included in the building consent, then that building consent process should be followed and the work proceed in accordance with it. If an owner makes a decision to proceed with any work they consider exempt from building consent and wish to do so outside of the building consent, they, or their agent at their direction, should inform the council that they wish to remove the work from the building consent and follow the relevant process to change or amend the building consent. This did not occur and work proceeded not in accordance with the building consent.
- 4.32. I conclude that a notice to fix could be issued for a contravention of section 40.

The remedy provided for in the notice to fix

- 4.33. As discussed in paragraphs 4.1 to 4.5, the authority has the power to issue a notice to fix when it considers someone has contravened or failed to comply with the Act. The remedies required by a notice to fix may provide options for the owner to make an application for a certificate of acceptance, to undertake building work to bring it into compliance with the Building Code and or to apply for a building consent to carry out the remedial building work. Note these are not an exhaustive list of potential options, just examples.
- 4.34. A notice to fix must be in the prescribed form²⁰ and contain:
- 4.34.1. “the failure or error”²¹ in order to clearly identify the work concerned
 - 4.34.2. the building work that must be carried out, as well as whether a certificate of acceptance must be applied for
 - 4.34.3. the specified person to contact the authority on completing this building work.
- 4.35. The remedy in the notice to fix required removal of work that had already been done “back to the framing”, and in doing so it specified how to achieve the outcome for compliance. Prescriptive or directive remedies have been discussed in a previous determination involving a dangerous building notice²². I consider the same principle applies to remedies in a notice to fix, in that there may be a number of options

²⁰ Building (Forms) Regulations 2004: Form 13.

²¹ Taken from Form 13 Notice to fix as described in the Building (Forms) Regulations 2004.

²² Determination 2020/027, Regarding the issue of a dangerous building notice requiring repair work to be carried out to the building at 40 Rankin Avenue, New Lynn, Auckland.

available to achieve the required outcome, and a focus on the outcome required can be made clear without being prescriptive or limiting or on the other hand, providing an exhaustive list of options.

- 4.36. The required outcome, for building work that is not compliant with the Building Code, is that it is made code compliant, and for building work carried out without building consent, the options can include seeking a certificate of acceptance or removing the building work.²³
- 4.37. I note there are unique circumstances in this situation. Because it appears the authority had already formed the view that the building work did not comply with the Building Code, and it felt it would not have been able to issue a certificate of acceptance. Seeking a certificate of acceptance was not provided as a means to remedy the notice to fix as it would be denied anyway. I caution against this approach of limiting possible remedies that could be proposed that would still be in accordance with the Act.
- 4.38. However, in this particular case I have reached the view that the building work does not comply with the Building Code. I also note the directive nature of the remedy (unwinding the building work) may have been influenced by the fact that a remediation proposal was already before the authority which would have involved taking those actions. On this basis, there is no value in now modifying the remedy in the notice to fix.

The timeframe

- 4.39. The first notice to fix required the notice to be complied with by a date that had already passed when the notice was issued. This is clearly a clerical error; it was not possible to comply with notice by that date and failure to do so could not have been enforced.
- 4.40. However, the administrative error in the notice does not impact the decision to issue the notice in this case – that turns on whether or not there was a contravention of the Act.
- 4.41. I note the authority issued another notice to fix to supersede the first one in order to fix this error. I am of the view that the timeframe provided to carry out the remedy in the second notice (ie to strip back and deconstruct work) was a reasonable period of time.

5. Conclusion

²³ I note that removal or deconstruction may require building consent.

- 5.1. There was a contravention of section 40 for the building work that was not in accordance with the building consent.
- 5.2. There was a contravention of section 17 with respect to building work that does not comply with the building code.
- 5.3. Although the remedy in the notice to fix was overly directive, in the particular circumstances of this case I consider it does not now warrant modification by way of this determination.
- 5.4. The timeframe in the second notice was reasonable with regard to the remedy provided for in the notice.

6. Decision

- 6.1 In accordance with section 188 of the Building Act 2004, I determine there were grounds to issue a notice to fix and I confirm the notice to fix.

Andrew Eames

Principal Advisor, Building Resolution

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 28/11/2023.