



Robert Touma
17 Gelling Ave
Strathfield NSW 2135

CAS Ref: 10931169

Service: By email

29 August 2023

Building Work Rectification Order

Section 33 of the Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020

Robert Touma (Builder's Licence No. 135073C) is being given this Building Work Rectification Order (Order) in relation to 530-532 Liverpool Road, Strathfield South, NSW 2136 (SP 94197; Lot 2 & 3 DP 18100).

Robert Touma is required to cause building work to be carried out to remediate the serious defects as set out in below in this Order.

Failure to comply with the requirements in this Order is a criminal offence.

Background

1. The Department of Customer Service (**the Department**) administers the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (**the Act**).
2. Under section 33 of the Act, if the Secretary of the Department, or their authorised delegate, has a reasonable belief that building work was carried out in a manner that could result in a serious defect in relation to the Building, they may order the developer to rectify building work to remediate the serious defect or potential serious defect.
3. Section 3 of the Act defines a serious defect. Section 3 of the Act also defines the term “building element” by reference to the *Design and Building Practitioners Act 2020* (**DBP Act**). Section 4 of the Act defines the term “developer”. Section 6 of the Act provides the building work to which the Act applies. Relevant excerpts from sections 3, 4 and 6 of the Act and section 6 of the DBP Act are **Attachment A** to this Order.
4. Matthew Whitton, Assistant Building Commissioner (Building & Construction Compliance: NSW Fair Trading, Department of Customer Service) is an authorised delegate of the Secretary of the Department.
5. **Robert Touma** is the developer of the residential apartment building known as **530-532 Liverpool Road, Strathfield South, NSW (SP 94197; Lot 2 & 3 DP 18100) (the Development)** for the purposes of section 4 of the Act.
6. On 30 June 2022 and 22 July 2022, authorised officers conducted a lawful inspection of the Development.
7. On 11 April 2023, the Developer submitted Façade Remediation Report No. 22-3492.RE02-02 prepared by Zait Engineering Solutions Pty Ltd, dated 6 April 2023.

Requirements in relation to Serious Defects

8. I, Matthew Whitton, under section 33 of the Act, require you, **Robert Touma**, to do the things specified in column 4 in Table 1 to eliminate, minimise or remediate each respective serious defect described in columns 1, 2 and 3 of Table 1. Each requirement must be complied with by the time set out in column 5 of Table 1:

Table 1: Requirements in respect of Serious Defects

Serious Defect Reference No.	Location of Serious Defect	General description of Serious Defect	Requirement under section 33(2)(a) to carry out the following specified building work	Time for compliance with Requirement (commencing from the date this Order is given)
1.	East facing wall façade which forms the external wall of unit 2, on ground level.	Inadequate installation of Autoclaved Aerated Concrete on the façade without the support of lightweight steel stud wall causing active water penetration.	<p>In accordance with the Façade Remediation Report No. 22-3492.RE02-02 prepared by Zait Engineering Solutions Pty Ltd, dated 6 April 2023, as submitted by the Developer:</p> <ol style="list-style-type: none"> 1. Water testing for the bathroom area is to be undertaken to ensure there is no leakage within the area in focus. Zait are to be notified of the testing results, and final work method statement will be provided prior to any works commencing. 2. Prop and brace external Hebel panel prior to any works commencing. Props are to be designed and installed in accordance with manufacturer's specifications. Prop spreader plates and connection details are to be used where required in accordance with manufacturer's specifications. 3. Clear all weepholes that were closed during investigation, and clear cavity of all debris. 4. Install waterstop angles at the base and to the soffit. Waterstop angle to be caulked and sealed. Where required, locally demolish Hebel panel to allow for works to be completed. 5. Where required locally remove Hebel & lap flashing around vertical elements. Install new flashing in accordance with manufacturer's specifications. New flashing to overlap existing flashing and extend 150mm above the external finish level. 6. Install top hats to manufacturer's specifications, where required, locally demolish Hebel panel to allow for works to be completed. 	6 months

			<ol style="list-style-type: none"> 7. Install sarking in accordance with manufacturer's specifications. Sarking to be taped to the waterstop angles to prevent gaps that allow moisture or air to enter the building. Where sarking is required to lap, minimum lap length to be 150mm. 8. Reinstall vertical stud framing in accordance with manufacturer's specifications. Top hats to be secured to stud framing. 9. Reinstall Hebel panels that were demolished during the completion of works. 10. Reinstall the wall insulation in accordance with the manufacturer's specifications. Insulation to meet BCA requirements. 11. Reinstall internal plasterboard, ceiling, flooring and skirting. 12. Remove existing sealant and replace with new sealant compatible with substrate material. Sealant to be weather and UV resistant. Installation to be in accordance with manufacturer's specifications. <p>Refer to Figure 1 and 2 below for the methodology details to be adopted.</p> <p>Figure 1: Stud wall to soffit detail</p>	
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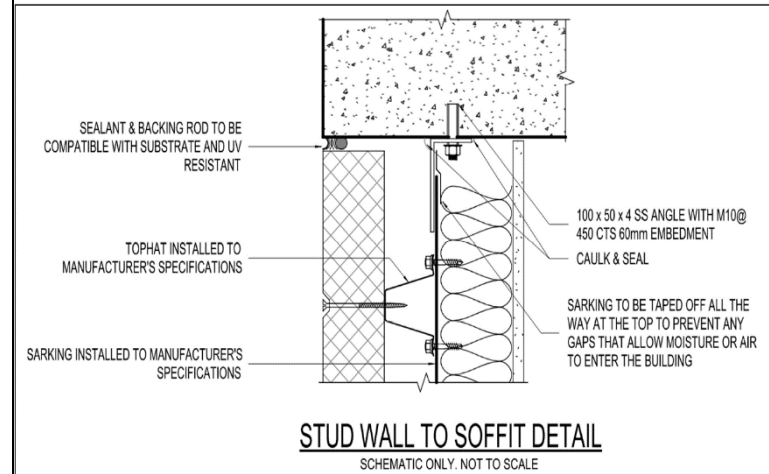
			<p style="text-align: center;">STUD WALL TO SOFFIT DETAIL SCHEMATIC ONLY. NOT TO SCALE</p>	
			<p>Figure 2: Stud wall to floor detail</p> <p style="text-align: center;">STUD WALL TO FLOOR DETAIL SCHEMATIC ONLY. NOT TO SCALE</p>	
2.	North facing wall forms the external	Partial demolition of the stud wall causing the external façade to be unsupported.	In accordance with the Façade Remediation Report No. 22-3492.RE02-02 prepared by Zait Engineering Solutions Pty Ltd, dated 6 April 2023, as submitted by the Developer:	6 months

	wall of unit 2, on ground level.		<ol style="list-style-type: none"> 1. Water testing for the bathroom area is to be undertaken to ensure there is no leakage within the area in focus. Zait are to be notified of the testing results, and final work method statement will be provided prior to any works commencing. 2. Prop and brace external Hebel panel prior to any works commencing. Props are to be designed and installed in accordance with manufacturer's specifications. Prop spreader plates and connection details are to be used where required in accordance with manufacturer's specifications. 3. Clear all weepholes that were closed during investigation, and clear cavity of all debris. 4. Install waterstop angles at the base and to the soffit. Waterstop angle to be caulked and sealed. Where required, locally demolish Hebel panel to allow for works to be completed. 5. Where required locally remove Hebel & lap flashing around vertical elements. Install new flashing in accordance with manufacturer's specifications. New flashing to overlap existing flashing and extend 150mm above the external finish level. 6. Install top hats to manufacturer's specifications, where required, locally demolish Hebel panel to allow for works to be completed. 7. Install sarking in accordance with manufacturer's specifications. Sarking to be taped to the waterstop angles to prevent gaps that allow moisture or air to enter the building. Where sarking is required to lap, minimum lap length to be 150mm. 8. Reinstall vertical stud framing in accordance with manufacturer's specifications. Top hats to be secured to stud framing. 9. Reinstall Hebel panels that were demolished during the completion of works. 	
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10. Reinstall the wall insulation in accordance with the manufacturer's specifications. Insulation to meet BCA requirements.
11. Reinstall internal plasterboard, ceiling, flooring and skirting.
12. Remove existing sealant and replace with new sealant compatible with substrate material. Sealant to be weather and UV resistant. Installation to be in accordance with manufacturer's specifications.

Refer to Figure 1 and 2 below for the methodology details to be adopted.

Figure 1: Stud wall to soffit detail



			<p>Figure 2: Stud wall to floor detail</p> <p>Labels in diagram:</p> <ul style="list-style-type: none"> TOPHAT RONDO STEEL STUD FRAMING SYSTEM HEBEL PANEL SARKING INSTALLED TO MANUFACTURER'S SPECIFICATIONS TAPE SARKING TO FLASHING REINSTATE WEEPHOLES SEALANT & BACKING ROD TO BE COMPATIBLE WITH EACH OTHER AND SUBSTRATE. FIRE REQUIREMENT TO BE CONFIRMED BY FIRE ENGINEER. GYPROCK PLASTERBOARD AS PER SYSTEM REQUIREMENT NEW FLASHING INSTALLED TO MANUFACTURER'S SPECIFICATIONS 100 x 50 x 4 SS ANGLE WITH M10@450 CTS 60mm EMBEDMENT EXISTING FLASHING CAULK & SEAL <p>STUD WALL TO FLOOR DETAIL SCHEMATIC ONLY. NOT TO SCALE</p>	
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Duration of this Order

9. This Order remains in force until it is revoked by the Secretary.
10. This Order is given on the date that is listed above in accordance with section 67 of the Act.

Matthew Whitton
Assistant Building Commissioner
Building and Construction Compliance
NSW Fair Trading
Department of Customer Service

Reasons for Building Work Rectification Order

1. These Reasons for Order are with respect to the Order dated 29 August 2023 issued to **Robert Touma** under the *Residential Apartment Buildings (Compliance and Enforcement Powers Act 2020* (the **Order**). These Reasons for Order adopt the Background to the Order and any definitions within the Order, unless otherwise specified in the Reasons for Order.
2. I, Matthew Whitton, have formed a reasonable belief that the Development has serious defects.
3. I have formed this belief after reviewing:
 - a) the technical report dated 28 July 2022, prepared by authorised officers of the Department, who conducted an inspection of the Development pursuant to s 20 of the Act in the Building on 30 June 2022 and 22 July 2022, and
 - b) Façade Remediation Report No. 22-3492.RE02-02 prepared by Zait Engineering Solutions Pty Ltd, dated 6 April 2023.
4. My belief is also based upon the following matters, set out in Table 3. I note that Column 1 of Table 3 refers to the Serious Defect with corresponding numbering that appears in Table 1 of the Order, located as described in the corresponding Column 2 of Table 1.

Table 3 – Basis of reasonable belief as to serious defects

Serious Defect Reference No.	Building element in which serious defect has been identified	Defect	Reason why defect is a serious defect	Applicable approved plan, Code or Australian Standard	Consequences of serious defect
1.	Waterproofing	Incorrect installation of Autoclaved Aerated Concrete (ACC) panels on the East facing wall façade and North facing wall façade:	The failure to correctly install the ACC panels enables the ingress of water resulting in the continuing degradation to the affected area and structure of the	BCA Volume One, Section F, Part F1 Damp and Weatherproofing, Performance Requirement FP1.4, states: “A roof and external wall (including openings around	The failure to correctly install the AAC panels on the façade could, in the event of continuing water penetrating, contribute to inability

		<ol style="list-style-type: none"> 1. Incorrect flashing terminations at the base of the ACC panels; 2. Inadequate laps in the wall sarking; 3. No weepholes at the base of the AAC panels; 4. Misalignment of external AAC panel elements. 	building and is a failure to comply with BCA Volume One, Section F, Part F1 Damp and Weatherproofing, Part FP1.4.	<i>windows and doors) must prevent the penetration of water that could cause –</i> <ol style="list-style-type: none"> (a) <i>Unhealthy or dangerous conditions, or loss of amenity for occupants; and</i> (b) <i>Undue dampness or deterioration of building elements.”</i> 	to inhabit or use the building (or part of the building) for its intended purpose, and damage to property.
2.	Internal or external load-bearing component	Incorrect installation of ACC panels on the east facing wall façade and north facing wall façade through the partial demolition of the stud wall causing the external façade to be unsupported.	The failure to correctly install the ACC panels is a serious defect in a building element being an internal or external load-bearing component of a building that is essential to the stability of the building and is a failure to comply with BCA: Volume One, Section B, Part B1 Structural Provisions, BP1.1.	BCA Volume One, Section B, Part B1 Structural Provisions, Performance Requirement BP1.1, states: <p><i>“(a) A building or structure, during construction and use, with appropriate degrees of reliability, must –</i></p> <ol style="list-style-type: none"> <i>(i) perform adequately under all reasonably expected design actions; and</i> <i>(ii) withstand extreme or frequently repeated design actions; and</i> <i>(iii) be designed to sustain local damage, with the structural system as a whole remaining stable and not being damaged to an extent disproportionate to the original local damage; and</i> 	The failure to correctly install the AAC panels on the façade could, in the event of continuing water penetrating and continuing internal or external load-bearing pressures of the building, contribute to inability to inhabit or use the building (or part of the building) for its intended purpose, and loss of life and/or damage to property.

				(iv) <i>avoid causing damage to other properties, by resisting the actions to which it may reasonably expect to be subjected.</i> ..."	
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Consideration of written representations

5. On 9 May 2023, a notice of intention to issue a building work rectification order, including a draft copy of the Order, was served on the Developer, Local Council, Office of the Registrar General, Certifier, and Owners Corporation. The served parties were invited to provide written representations relating to the Order to the Department by 16 May 2023 (for the Developer) and 30 May 2023 (for the Owners Corporation). An extension of time to respond was requested by the Owners Corporation which was granted. The same liberty was extended to the Developer, with the date for written submissions to be provided by 16 June 2023.
6. The following representations were received:
 - a) From the Developer, on 17 May 2023, 18 May 2023, and 9 June 2023, and
 - b) From the legal representatives of the Owners Corporation on 30 May 2023.
7. My consideration of the submissions is set out below.

Developer

8. In summary, the Developer wants to proceed with the works as per the draft Order. The Developer has been in communication with the Owners Corporation but has experienced difficulty in the past in obtaining access to relevant areas of the building for works. The Developer sought that the Order not be issued on the basis that they have agreed to complete the works.
9. I am of the view that it is appropriate to issue the Order in all of the circumstances.

Owners Corporation

10. Legal representatives of the Owners Corporation provided extensive submissions challenging the validity of the Order, have questioned the expertise of the author of the Zait report, have included "Expert feedback" from "a general building and waterproofing

expert” (without including a copy of any report on which the representations are based), have identified further defects that they allege are present in the building, and have raised a host of further issues relating to the terms of the Order.

11. The Owners Corporation submits that the Order does not set out “specified building work” that needs to be carried out. I do not agree with this submission. The scope of works sets out in detail what is required to eliminate, minimise or remediate the serious defect. In particular:
 - a) I am of the opinion that water testing is “building work” as defined in the Act, as it is a step in the repair of part of a building;
 - b) The installation of props in accordance with the manufacturer’s specifications has occurred. Further, the suggestion by the Owners Corporation’s legal representatives to set out the manufacturer’s specifications in a Draft Order would be impractical and serve no utility;
 - c) I am of the opinion that the requirement set out to install waterstop angles, including cross sections and performance requirement of the BCA is a specified scope and will sufficiently eliminate, minimise or remediate the serious defect.
12. In respect of the “expert feedback” provided by RHM, it is noted that the Department has not been provided with a copy of the report on which these submissions are based. In addition:
 - a) The Owners Corporation have identified the presence of mould growth in Unit 2. I am of the view that mould growth is a consequence of the serious defect and can be correlated to the lack of action of the Owners Corporation. The extent of mould would be smaller had the defect been remediated sooner. The Department is aware there have been previous attempts to rectify the defect in concordance with the advice of the Owners Corporation which has been unsuccessful, and the builder has had difficulty in obtaining access to the site to conduct building works;
 - b) There is no evidence to substantiate the claims made by the Owners Corporation that there is a waterproofing defect under the sliding doors, and this was not observed during inspection;
 - c) The expert feedback from RHM asserts that the design provided by the Builder does not match the CSR Hebel Design and Installation Guide (“Hebel Manual”) without providing specifics on what those differences are and if they are materially significant. It should be noted that the Hebel Manual is intended as a guide aimed at new build construction and this is a rectification of an in-situ installation. It would be generally expected that the rectification may differ from the Hebel Manual given this context;
 - d) The expert feedback also asserts that strict compliance with the Hebel Manual is required to comply with the BCA. The Department disagrees with this assertion because there is no direct pathway between the BCA and the Hebel Manual since the latter is not a referenced document within the BCA. It is true that in the absence of a Deemed-to-Satisfy pathway a Performance Solution is required to achieve compliance with the BCA. However, as there is no requirement to engage a Principal Certifying

Authority (PCA) and the Department is not a PCA (and nor is the expert engaged by the Owners Corporation), the value of requiring the Developer to produce a report which cannot be assessed by an appropriate authority is questionable;

- e) It is noted that the requirements of the *Design and Building Practitioners Act 2020* (DBP Act) apply regardless of the terms of the Order. Where relevant, the developer will be required to obtain and lodge declared designs in accordance with the DBP Act, but enforcement of that Act is outside of the terms of the Order;
 - f) In relation to the submissions concerning the scope of works, no alternative scopes have been provided for consideration. Further, Mr Zaiter has sufficient qualifications and licences to undertake the design and having reviewed the Zait report, I am satisfied that it is comprehensive and addresses the serious defects identified.
 - g) To the extent that there are further serious defects, the Department is unable to verify the representations made absent supporting expert evidence but is not prohibited from issuing a further Order in circumstances where there is a reasonable belief that the building has a serious defect.
13. In respect of the “Further issued” issues raised by the Owners Corporation’s legal representatives, I am not satisfied that the RAB Act requires, or indeed in many cases allows for the provision of any of the issues suggested. Furthermore, as stated above, I am satisfied that Mr Zaiter has the sufficient qualifications and experience to provide the scope of work set out in the Zait report, which has been considered for the purpose of this Order.
14. In summary, I do not agree with the Owners Corporation representation that there are serious deficiencies in the Order, that there are further serious defects that can be included at this stage, or that the scope of work as set out in Table 1 is insufficient. Accordingly I propose to issue the Order without modifications suggested in the Owners Corporation representations.

Why is it appropriate to give the Building Work Rectification Order?

15. I am of the view that the periods above for Defects 1 and 2 are reasonable periods for compliance in all the circumstances for the specified actions required by the Order to be carried out. I have formed this belief balancing the risks that the serious defects pose against the period of time it will take to carry out the specified actions.
16. Considering the potential consequences as outlined in my reasons and the order, I give greater weight to the seriousness of the Serious Defects identified and the associated failures to comply with the BCA and approved plans and the benefits arising from remediating the Serious Defects and I find that it is appropriate, in the exercise of my discretion, to make the Order to carry out the specified actions in the Order within the time specified in the Order.

17. I have considered all of the circumstances. I accept that the Order requires specified actions that are likely to be costly. I give this consideration moderate weight. However, the cost to the developer must be balanced against the benefit to the occupiers to be gained from identifying the specific building work that will eliminate the Serious Defects.

Attachment A

Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020.

3 Definitions

(1) In this Act —

approved plans, in relation to building work, means the following —

- (a) approved plans and specifications issued with respect to a construction certificate or complying development certificate for the building work under the *Environmental Planning and Assessment Act 1979*, together with any variations to those plans and specifications for the purposes of those certificates effected or approved in accordance with that Act,
- (b) regulated designs under the *Design and Building Practitioners Act 2020*,
- (c) any other plans prescribed by the regulations for the purposes of this definition.

Building Code of Australia has the same meaning as in the *Environmental Planning and Assessment Act 1979*.

Building Commissioner means the Building Commissioner referred to in section 61.

building element has the same meaning as in the *Design and Building Practitioners Act 2020*, and includes any element of a building that is prescribed by the regulations for the purposes of this definition.

building product means any product, material or other thing that is, or could be, used in a building.

building work — see section 5.

building work rectification order — see section 33.

class of building means a building of that class as recognised by the *Building Code of Australia*.

completion, in relation to building work, means the date that the occupation certificate for the building or part of a building to which the building work relates was issued.

Department means the Department of Customer Service.

developer — see section 4.

expected completion amendment notice — see section 8.

expected completion notice — see section 7.

expected date — see section 7(2).

function includes a power, authority or duty, and **exercise** a function includes perform a duty.

occupation certificate means an occupation certificate issued under the *Environmental Planning and Assessment Act 1979*.

owners corporation for a strata scheme means the owners corporation for the strata scheme constituted under the *Strata Schemes Management Act 2015*.

prohibition order — see section 9.

rectification bond — see section 28.

residential apartment building means a class 2 building within the meaning of the *Building Code of Australia*, and includes any building containing a part that is classified as a class 2 component, but does not include any building or part of a building excluded from this definition by the regulations.

Secretary means the Secretary of the Department.

serious defect, in relation to a building, means —

- (a) a defect in a building element that is attributable to a failure to comply with the performance requirements of the *Building Code of Australia*, the relevant Australian Standards or the relevant approved plans, or
- (b) a defect in a building product or building element that —
 - (i) is attributable to defective design, defective or faulty workmanship or defective materials, and
 - (ii) causes or is likely to cause —
 - (A) the inability to inhabit or use the building (or part of the building) for its intended purpose, or
 - (B) the destruction of the building or any part of the building, or
 - (C) a threat of collapse of the building or any part of the building, or
- (c) a defect of a kind that is prescribed by the regulations as a serious defect, or
- (d) the use of a building product (within the meaning of the *Building Products (Safety) Act 2017*) in contravention of that Act.

stop work order — see section 29.

strata building means a building containing a lot or part of a lot that is the subject of a strata scheme.

strata plan has the same meaning as in the *Strata Schemes Development Act 2015*.

strata scheme has the same meaning as in the *Strata Schemes Development Act 2015*.

Note. The *Interpretation Act 1987* contains definitions and other provisions that affect the interpretation and application of this Act.

(2) Notes included in this Act do not form part of this Act.

4 Meaning of “developer”

For the purposes of this Act, a **developer**, in relation to building work, means any of the following persons, but does not include any person excluded from this definition by the regulations —

- (a) the person who contracted or arranged for, or facilitated or otherwise caused, (whether directly or indirectly) the building work to be carried out,
- (b) if the building work is the erection or construction of a building or part of a building — the owner of the land on which the building work is carried out at the time the building work is carried out,
- (c) the principal contractor for the building work within the meaning of the *Environmental Planning and Assessment Act 1979*,
- (d) in relation to building work for a strata scheme — the developer of the strata scheme within the meaning of the *Strata Schemes Management Act 2015*,
- (e) any other person prescribed by the regulations for the purposes of this definition.

6 Act applies only to residential apartment building work

- (1) The exercise of any function under this Act applies only to building work in respect of a residential apartment building that —
 - (a) is or was authorised to commence in accordance with a construction certificate or complying development certificate issued under the *Environmental Planning and Assessment Act 1979*, or is required to be authorised by a construction certificate or complying development certificate, and
 - (b) has not been completed or has been completed within the period of 10 years before the exercise of that function.

- (2) The regulations may provide that a specified provision, or specified provisions, of this Act extend to other classes of buildings (within the meaning of the *Building Code of Australia*).

Design and Building Practitioners Act 2020.

6 Building elements

- (1) For the purposes of this Act, building element means any of the following —
- (a) the fire safety systems for a building within the meaning of the Building Code of Australia,
 - (b) waterproofing,
 - (c) an internal or external load-bearing component of a building that is essential to the stability of the building, or a part of it (including but not limited to in-ground and other foundations and footings, floors, walls, roofs, columns and beams),
 - (d) a component of a building that is part of the building enclosure,
 - (e) those aspects of the mechanical, plumbing and electrical services for a building that are required to achieve compliance with the Building Code of Australia,
 - (f) other things prescribed by the regulations for the purposes of this section.
- (2) The regulations may exclude things from being building elements for the purposes of this Act.
- (3) In this section —

above grade wall means a wall above the level of the ground surrounding a building.

below grade wall means a wall below the level of the ground surrounding a building.

building enclosure means the part of the building that physically separates the interior environment of the building from the exterior environment, including roof systems, above grade and below grade walls (including windows and doors).