

Determination 2006/42

A dispute over a notice to fix for a building with a “monolithic” cladding system at 1/18 Tunis Road, Panmure, Auckland

1 The dispute to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004 (“the Act”) made under due authorisation by me, John Gardiner, Determinations Manager, Department of Building and Housing, for and on behalf of the Chief Executive of that Department. The applicant is the owner, Alan Robertson, (“the applicant”) and the other party is the Auckland City Council (“the territorial authority”).
- 1.2 The application arises over the issue by the territorial authority of a notice to fix. A previous determination (Determination 2005/48) concerning the same building, the same parties, and the same broad issues was made on 15 April 2005, following consideration of written submissions by the parties, and an independent expert’s report. That determination stated that a drained and ventilated cavity behind the wall cladding was not necessary in the case of this house, but that certain remedial work should be carried out before the territorial authority should issue a code compliance certificate. The territorial authority nonetheless subsequently issued a notice to fix, which among other issues, required unspecified drainage and ventilation upgrading to be carried out.
- 1.3 The question to be determined is whether the items of rectification, as set out in the notice to fix issued on 20 June 2005, are necessary to ensure that the house will comply with the Building Code (see sections 177 and 188 of the Act).
- 1.4 In making my decision, I have not considered any other aspects of the Act.

2 Procedure

The building

- 2.1 The building is a single-storey detached house, which was described, together with its cladding system, in the previous determination.

Sequence of events

- 2.2 On 15 April 2005, the Department determined that there was evidence of external water entering the building, and also that the cladding system as installed did not comply with clause B2 of the Building Code. The Department also determined that the territorial authority was to issue a new Notice to Rectify (since replaced by the term “notice to fix” under the Building Act 2004) requiring the applicant to bring the building into compliance with the Building Code, but without specifying the features required to be incorporated. Paragraph 6.10 of that determination listed items that were not well constructed, as follows:

- The lack of jamb and sill flashings and jamb sealant/ in seal strips to the external windows and doors;
- The lack of a drip detail or flashing above the recessed garage door installation;
- The lack of kick outs to the ends of the apron flashings;
- The inadequate clearance between the base of the cladding and the finished deck surface, and the skew nailing of a deck joist directly through the cladding;
- The lack of a textured coating behind the gutter installation at the rear pitched roof abutment; and
- The lack of a horizontal flashing over the top of the meter box.

- 2.3 The territorial authority carried out an inspection of the property on 8 June 2005.

- 2.4 In a letter to the applicant dated 20 June 2005, the territorial authority advised the applicant that it was not satisfied that the house complied with the Building Code in a number of respects. The territorial authority also advised the applicant to engage the services of a suitably qualified person to review the notice to fix that was attached to the letter. The territorial authority also noted that if the applicant wished to dispute the notice to fix and/or the proposed scope of works, an application should be made to the Department for a determination.

- 2.5 The notice to fix was also dated 20 June 2005, and the “Particulars of contravention or non-compliance” attached to the notice listed requirements under the following headings:

- cladding items not installed per the manufacturer's specifications

- cladding items not installed in accordance with the relevant acceptable/alternative solutions approved under the building consent
 - drainage and ventilation
 - other building related issues (smoke detectors and glazing to “the bathroom window” (the house has two bathrooms))
 - durability issues.
- 2.6 The territorial authority also required the applicant to address and rectify the items set out in the notice, which would include the applicant lodging a proposed scope of works. If the proposal was accepted by the territorial authority it would form the basis of an amended building consent for the property. The territorial authority also stated that the applicant would need to engage a recognised building expert to prepare the scope of work pertaining to the durability issues.
- 2.7 The applicant wrote to the Department on 22 June 2005, enclosing the notice to fix and noting that the territorial authority still required the finished floor levels adjoining the driveway to be rectified and for safety glass to be installed in the bathroom windows, both being matters addressed in the previous determination. The applicant also described the territorial authority’s request for a building expert to be engaged by the applicant.
- 2.8 The Department responded to the applicant’s queries in a letter dated 7 July 2005. The Department was of the opinion that if the items listed in the abovementioned paragraph 6.10 of Determination 2005/48 were attended to, the house would comply with the Building Code. The Department noted that the applicant needed to carry out all remedial work to the satisfaction of the territorial authority. The Department could not dictate how any remedial work to the windows should be carried out and there were several options that could overcome the lack of flashings.
- 2.9 James Hardie Ltd sent a facsimile to the applicant on 1 August 2005, confirming its view that following a visual site inspection:
- the drainage gap at the sill of the windows and the sealing of the window frames were acceptable
 - as the sill flashing detail was not visible, no comment could be made on this
 - the bottom edge of the “Harditex” sheet must maintain a clearance of 35mm from the top of the deck.
- 2.10 The applicant engaged a building consultant to comment on the sealing around the exterior joinery units. The consultant, in a letter to the applicant dated 19 September 2005, stated that he was of the opinion that the joinery units were installed in accordance with the trade practice current at the time the property was constructed

- 2.11 In a letter to the applicant dated 15 August 2005, the territorial authority acknowledged receipt of the “scope of works” and noted the actions that the applicant was taking in relation to the notice to fix. The territorial authority accepted the applicant’s comments or suggested rectification of the following clauses of the notice to fix:
- 2.1(c) moisture at the window sills
 - 2.1(e) texturing and painting exposed fibre-cement areas
 - 2.3(a) kick-out flashings
 - 2.3(b) pergola protection
 - 2.3(e) drip edge installation
- 2.12 The territorial authority also noted that the applicant had not commented on the remaining items of the notice to fix.
- 2.13 The applicant made an application for a determination dated 16 September 2005, which was received by the Department on 26 September 2005.
- 2.14 The Department wrote to the applicant on 24 November 2005, noting the position as to the items in contention with the territorial authority. The Department also noted that in some previous determinations face-fixed windows in “Harditex” based claddings were found to be code compliant. The Department was of the opinion that as the facsimile from James Hardie of 1 August 2005 was based on only a visual inspection, it did not alter the views already held by the Department based on its own expert’s advice regarding the windows. The Department set out two options that could be considered to fix the question of the code compliance of the windows. Finally, the Department gave its opinion as to the territorial authority’s requirement for safety glass in the bathroom windows.
- 2.15 The territorial authority wrote to the applicant on 25 November 2005. The territorial authority was of the opinion that the “scope of works” indicated by the Department in paragraph 6.10 of Determination 2005/48 was not part of that determination and was offered as “advice only”. The territorial authority considered that there were items additional to those described by the Department that required rectification and these were listed on the notice to fix. However the territorial authority confirmed that the following items had been addressed to the territorial authority’s satisfaction:
- the garage door head
 - the kick-out flashings
 - the deck clearance and nailings
 - the missing texture coat
 - the meter box head flashing.

- 2.16 The territorial authority also noted that as the applicant was going to install an early-warning moisture detection system under each window, this would be an acceptable alternative to the installation of flashings.

3 The submissions

- 3.1 In a covering letter to the Department dated 15 September 2005, the applicant queried:
- If the clearance to the bottom edge of the cladding and the floor levels were not code-compliant will they meet the standards required by the territorial authority?
 - Apart from the meter box, which will be rectified, do all other penetrations, including the pergola fixings comply with the Building Code?
 - If the Department considers that the exterior joinery units are not installed in accordance with the Building Code, will “mechanical” flashings be required?
 - In relation to the territorial authority requirements for drainage and ventilation, does the cladding comply with code requirements?
 - Does the current glazing to the bathroom windows comply with the Building Code?
- 3.2 In a letter to the Department dated 22 September 2005, the applicant noted that the second notice to fix issued by the territorial authority included two further items of rectification, namely the installation of smoke detectors and provision of safety glass in the bathroom windows (as required by clauses F2 and F7, respectively, of the Building Code). The applicant had since installed smoke detectors but did not see the need for the safety glass. The applicant intended to carry out work to protect the pergola at a later date. The applicant stated that he would address all the items set out in paragraph 6.1 of Determination 2005/48, with the exception of that concerning the jamb and sill flashings and sealant to the exterior joinery units. The applicant noted that the inspections undertaken around selected windows had not revealed any evidence of leakage. The fixing of the deck to the bottom plates had been rectified to the satisfaction of the territorial authority.
- 3.3 In a further letter to the Department dated 26 January 2006, the applicant stated that agreement had been reached with the territorial authority regarding all the items listed in paragraph 6.10 of Determination 2005/48. However, the territorial authority had raised additional items in its notice to fix. The applicant had commissioned two building inspections and both had concluded that the house is sound and well built. The applicant asked the following question:

Can and will the DBH now instruct Auckland City Council to issue a C.O.C. [presumably a code compliance certificate] once safety glass and Mdu probes to measure moisture are installed and passed by A.C.C. as acceptable including all other items mentioned on A.C.C. Notice to Fix 2228 to be included in this instruction[?]

3.4 The applicant also provided copies of the:

- notice to fix
- correspondence with the territorial authority and the Department
- letter of 19 September from the building consultant
- fax from James Hardie Ltd of 1 August 2005.

3.5 In a covering letter to the Department dated 15 November 2005, the territorial authority listed the particulars of contravention.

3.6 The territorial authority also provided a copy of the notice to fix.

3.7 Copies of the submissions and other evidence were provided to each of the parties.

3.8 On 3 March 2006 a draft determination was prepared and distributed to the parties for comment. The draft was accepted by the applicant on 12 March 2006.

3.9 In an email to the Department dated 6 April 2006, commenting on the draft determination, the territorial authority said:

I notice that the determination related to a number of areas and the decision has omitted some of these – noticeably the issue of safety glass in the bathroom, whether or not all the other penetrations (other than the meter box) and including the pergola fixings comply with the building code and whether or not the exterior joinery units as currently installed meet the building code requirements (see 3.1 of the draft determination).

These issues do need to be addressed otherwise the final determination will not provide the necessary clarity.

4 The expert's report

4.1 As described in the first Determination 2005/48, the Building Industry Authority commissioned an independent expert (“the expert”) to inspect and report on the cladding. The expert inspected the building and furnished a report in January 2005, which was forwarded to the parties. I refer to this report later in this determination and also note that the report established that external moisture was entering the building at only one location at the time of the expert’s inspection.

5 Discussion

- 5.1 I have considered the submissions of the parties, the previously published expert's report and the other evidence in this matter.
- 5.2 I consider that it is not necessary for me to comment on the items that have been agreed between the parties as being required to be addressed by the applicant and which are referred to in the correspondence forwarded to the Department. This correspondence states clearly that all of the items noted as requiring attention are now subject to agreement between the parties and therefore no longer require a determination. Our view of the window flashings and installation is set out in the first determination but as this matter is included in those now resolved we make no further reference to them. To clarify issues for the parties, any item not mentioned as requiring attention in the original determination can be assumed to comply with the building code. I note that the issue of the pergola ribbon beam was not mentioned as being non-compliant in the original submissions from the parties, and that, in any event, the expert considered all penetrations to be satisfactory with the exception of the meter box. However, I will comment on the remaining clauses of the notice to fix that are at issue between the parties, which are in general terms:
- 2.1(b) and 2.2 floor level clearances
 - 2.4 drainage and ventilation
 - 2.6 durability
 - 2.5(b) installation of safety glass
- 5.3 Based on the expert's report, I am prepared to accept that, as the floor levels in question (clauses 2.1(b) and 2.2 references) occur at the garage and the garage slab slopes and drains away from the garage, the floor levels are at present code compliant.
- 5.4 I have already decided as set out in paragraph 6.12 of the original Determination 2005/48 that a full drainage and ventilation cavity (clause 2.4 in the Notice to Fix) is not required for the cladding of this house.
- 5.5 As to the question of durability (clause 2.6 in the Notice to Fix). I note that the relevant provision of clause B2 of the Building Code is that building elements must, with only normal maintenance, continue to satisfy the performance requirements of the Building Code for certain periods "from the time of issue of the applicable code compliance certificate".
- 5.6 As set out in clause 2.6 of the notice to fix, the territorial authority has concerns about the durability, and hence the compliance with the Building Code, of the elements of the building listed in the notice. I am of the opinion that the territorial authority should amend the original building consent by making it subject to a modification of the Building Code in accordance with section 34(4) of the Act to the effect that the durability of the elements about which they have concerns is to be measured from the date of the substantial completion of the building instead of

from the time of the issue of the code compliance certificate. The land information memorandum relating to this house should also be amended in line with the above. For the purposes of this determination I am of the opinion that “substantial completion” of the building is achieved when the building is ready for occupation.

- 5.7 I therefore determine that the territorial authority is to amend the original consent to incorporate a modification of clause B2 of the Building Code to the effect that the required durability periods for the elements of concern to the territorial authority are to be measured from the date of the substantial completion of the building and not from the date of the issue of a code compliance certificate. If the durability period relating to any element would have expired under the above criteria, consideration should be given to waiving the B2 requirement for these items.
- 5.8 Following this amendment, any code compliance certificate subsequently issued by the territorial authority should be issued in line with the amended building consent.
- 5.9 Requirements for smoke detectors are detailed in Acceptable Solution F7/AS1. The applicant advises that smoke detectors have been installed although compliance with F7/AS1 has not been confirmed.
- 5.10 Table 3.D4 in Acceptable Solution F2/AS1 requires that “glazing within 1500mm of the abutting finished floor level or standing area of a bath or shower” shall be “Grade A safety glazing material . . .”. However, paragraph 1.2.1 says this requirement applies except where there is a vanity or bench of specified minimum dimension located in front of the window.
- 5.11 I note that in respect of both bathrooms there is a toilet located directly under the window. The location of the toilet together with the window’s sill height of 1230mm and relatively narrow width means the likelihood of a person colliding with the glass is significantly reduced and the installation of safety glass is not necessary in this instance to achieve code compliance.
- 5.12 I note the territorial authority’s email dated 6 April 2006 (see paragraph 3.9), and draw its attention to paragraph 3.3 which I believe provides an adequate response. My conclusions about the status of the matters raised in Determination 2005/48 are set out in paragraphs 5.2 and 5.4.

6 Conclusion

- 6.1 I consider that, once the items agreed between the parties that the applicant has yet to fix are remedied, to the satisfaction of the territorial authority, and it has been verified that the smoke detectors as installed comply with the requirements of F2/AS1, the house will be code-compliant. In addition, the issues of durability are to be subject to the waiver procedure as set out in paragraphs 6.5 to 6.8.

7 The decision

- 7.1 In accordance with section 188 of the Act, I determine that once all the items of non-compliance that have been agreed by the parties are to be fixed by the applicant, are rectified to the approval of the territorial authority, together with any other instances of non-compliance that become apparent in the course of rectification or inspection and the waivers set out above, the house will comply with the Building Code, notwithstanding the lack of a drained cavity.
- 7.2 I therefore instruct the territorial authority to withdraw the notice to fix that it has already issued. Should any of the rectified items in the opinion of the territorial authority not meet the requirements of the Building Code on reasonable grounds, then a new notice to fix should be issued listing such items.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 19 May 2006.

John Gardiner
Determinations Manager