



Determination 2009/9

Determination regarding a notice to fix for alterations to a house at 75 Patteson Avenue, Mission Bay, Auckland (to be read in conjunction with Determination 2008/31)



Owner:	the de Lacey Family Trust (“the applicant”)
Agent:	Mr K Bisman (“the agent”)
Territorial Authority:	Auckland City Council (“the authority”)
Site Address:	75 Patteson Avenue, Mission Bay, Auckland

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Determinations Manager,

¹ The Building Act 2004 is available from the Department’s website at www.dbh.govt.nz.

In this determination, unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department.

- 1.2 I have previously described certain building matters regarding these house alterations, which are described in Determination 2008/31 (“the first determination”) issued on 7 May 2008.
- 1.3 The matter to be determined is whether the authority’s decision to issue a notice to fix, dated 5 September 2008, is correct, having regard to my recommendation regarding the issuing of a new notice to fix in paragraph 8.2 of the first determination.

2. Background

- 2.1 The first determination concerned a Notice to Rectify issued by the authority on 26 July 2004. This notice was confined to matters related to weathertightness resulting from a cladding inspection undertaken by the authority on 9 July 2004.
- 2.2 The first determination found that the upper deck and the wall and roof claddings did not comply with Clauses B2 and E2, and confirmed the authority’s decision to issue the notice.

- 2.3 In paragraph 6.3.1 of the first determination I said:

Taking account of the expert’s report, I conclude that remedial work is necessary in respect of:

- the inadequate clearance from the bottom of the EIFS cladding to the paving at parts of the east elevation
- the small crack in the EIFS above the upper window on the north elevation
- the lack of drainage gaps at window and door sill flanges
- the unsealed pipe penetrations through the weatherboards into the subfloor
- the unsealed electrical cable penetrations through the EIFS
- the inadequate clearances from the bottom of the EIFS wall and balustrade claddings to the deck tiles
- the inadequately weatherproofed timber balustrade capping, including at the junctions with the wall
- the inadequately weatherproofed deck outlets
- the lack of adequate slope to the deck
- the inadequate deck membrane under the tiles
- the lack of drip edge at the bottom of the EIFS cladding on the outer side of the deck balustrade
- the inadequate clearance from the bottom of the weatherboard cladding on the upper floor to the lower lean-to roofs
- the inadequately weatherproofed joints in the roof parapet cappings
- the inadequately weatherproofed ends of the skylight gable
- the inadequately weatherproofed vent pipe penetration through the roof.

2.4 Paragraph 6.3.4 of the first determination noted that moisture penetration “appears to be limited to the upper deck area”. However, paragraph 5.5 of the first determination also noted that the moisture readings were taken after an extended dry spell and the expert appointed to assist me “considered that moisture levels would increase at other times of year” (refer paragraph 3.4 below).

2.5 In paragraph 7.3 of the first determination I said:

Because the faults identified with the upper deck and the wall and roof cladding systems and occur in discrete areas, I am able to conclude that satisfactory rectification of the items outlined in paragraph 6.3.1 will result in the building work being brought into compliance with Clauses B2 and E2.

2.6 In paragraph 8.2 of the first determination I said:

I suggest that the . . . authority withdraw the Notice to Rectify and issue a notice to fix that requires the owners to bring the extension into compliance with the Building Code, referring to the defects listed in paragraph 6.3.1 and referring to any further defects that might be discovered in the course of rectification. It is not for the notice to fix to specify directly how the defects are to be remedied and the extension brought to compliance with the Building Code. That is a matter for the owner to propose and for the territorial authority to accept or reject.

2.7 In paragraph 8.3 of the first determination I said:

I suggest that the parties adopt the following process to meet the requirements of paragraph 8.2. Initially, the . . . authority should issue the notice to fix. The owner should then produce a response to this in the form of a technically robust proposal, produced in conjunction with a competent and suitably qualified person, as to the rectification or otherwise of the specified issues. Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination

3. The notice to fix

3.1 As more than 4 years had passed since the authority’s last inspection that resulted in the Notice to Rectify, the authority undertook a further inspection of the alterations on 17 July 2008. The authority issued a notice to fix dated 5 September 2008 including a photographic record of the defects found.

3.2 Item 1.0 of the notice to fix contained a general statement that the building work has not been undertaken in accordance with Clauses B1, E1, E3, G9, G13, and H1 of the Building Code (in addition to Clauses B2 and E2). I note that these additional clauses appear to result either from the recent inspection by the authority, or correspond indirectly to defects identified in the first determination.

3.3 In addition to items identified in the first determination, the notice included the following additional defects (references in parentheses are to those used in the notice to fix):

- Lack of spreaders from the upper roof (item 2.2(a)).
- Lack of handrails to internal access stairs (item 2.2(m)).
- Lack of vent cowls (item 2.2(n)).
- Lack of support to waste pipes (item 2.2(o)).

- Exposed unsafe wiring (item 2.2(p)).

3.4 Within the notice to fix, reference was also made to the moisture readings noted in paragraph 5.5 of the first determination, with item 2.2(e) of the notice stating:

[The authority acknowledges] that invasive Moisture readings by the [Department's] expert were taken during a '...long dry period...' (i.e summer). [The authority] believes that if such readings are to be deemed accurate than subsequent readings need to be taken throughout the various seasons of the calendar year this will determine if any moisture is entering the building.

3.5 In item 5.0 of the notice to fix , the authority required the applicant to submit:

...a proposed 'scope of works' (usually in writing and prepared by a recognised building expert), outlining how each area of non-compliance is to be addressed and rectified. This proposal, if accepted, may then form the basis for you to make an application for a Building Consent confirming compliance with the building code.

3.6 The application for this determination was received by the Department on 14 November 2008.

4. The submissions

4.1 In the statement that accompanied the application the agent stated:

This cladding is not leaking but the [authority is] seeking us to reclad as part of the notice to fix.

Within the application form, the agent referred to paragraph 2.2(e) of the notice to fix, which required further moisture testing as outlined in paragraph 3.4.

4.2 The agent forwarded a copy of the notice to fix.

4.3 The draft determination was issued to the parties for comment on 19 December 2008. Both parties accepted the draft without comment.

5. Discussion

5.1 The agent has submitted that the specific requirements in the notice to fix amount to a requirement to replace the cladding. However, I can see no evidence for this in the notice to fix, and I have received no other information that would lead me to believe that the authority requires the cladding to be replaced.

5.2 The agent has also made specific reference to the requirement for further moisture testing as described in paragraph 3.4. Taking into account the expert's comments on the moisture tests undertaken for the first determination and the length of time since they were taken, I consider that the further moisture testing required by the authority is not unreasonable.

5.3 The notice to fix did not clearly correspond to the items in paragraph 6.3.1 in the first determination. However, it included:

- the generalised Building Code contraventions in paragraph 3.2, and

- items to be rectified that were not included in paragraph 6.3.1 of the first determination that are described in paragraph 3.3.
- 5.4 With regard to the general contraventions, the additional Building Code breaches listed in the notice to fix correspond to either:
- the possible consequences of the defects identified in the first determination, or
 - result from the recent inspection.
- 5.5 Taking into account the 4-year lapse between the authority's inspection in 2004 and that carried out on 17 July 2008 which resulted in the notice to fix, the addition of both the generalised Building Code breaches, and new items to be rectified and/or requiring further investigation, appear reasonable.
- 5.6 I am therefore of the view that the notice to fix was issued with proper regard to the recommendations made in paragraphs 7.3 and 8.2 of the first determination.

6. The decision

- 6.1 In accordance with section 188 of the Act, I hereby confirm the authority's decision to issue the notice to fix dated 5 September 2008.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 18 February 2009.

John Gardiner
Manager Determinations