



Determination 2011/070

Regarding the authority's exercise of its powers in respect of a notice to fix for a tiled deck membrane to a house at 10 Gollan Road, Mt Wellington, 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, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department.

1.2 The following are the parties to this determination:

- The owner of the property, Mr C J Field (“the applicant”)
- The Auckland Council carrying out its duties and functions as a territorial authority or building consent authority (“the authority”).

1.3 The dispute arises from the decision of the authority to issue a notice to fix dated 19 January 2011 (“the notice to fix”). The item in dispute between the parties is item 2.1(g) on the notice which relates to the house’s deck.

1.4 I therefore consider the matter to be determined² is whether the authority correctly exercised its powers in issuing the notice to fix with respect to the deck.

2. The building work and background

2.1 The building work that is the subject of the notice to fix consists of major alterations to a 1920s bungalow, including a new deck area to the ground floor.

2.2 The deck is constructed of 17.5mm high density fibre-cement board installed over 200×50 H3 treated timber joists at 400 centres. The deck surface is constructed with

¹ The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Department are all available at www.dbh.govt.nz or by contacting the Department on 0800 242 243

² In terms of sections 177(1)(b) and 177(2)(f)

tiles installed over a waterproof liquid membrane system (“the membrane”). The deck has cross fall of 1.6°.

- 2.3 The applicant’s submission notes that the deck was constructed in accordance with the building consent. A code compliance certificate was not sought until recently due to constraints delaying completion.
- 2.4 The authority conducted a final inspection on 29 November 2010 and subsequently issued a notice to fix that included a number of items that contravened the ‘acceptable/alternative solutions approved under the building consent’. The applicant has noted that all items are being addressed, however, item 2.1(g) is in dispute.
- 2.5 The authority has detailed the contravention on the notice to fix as:

2.0 Issues Related to Cladding

2.1 The following items have not been installed in accordance with the relevant acceptable/alternative solutions approved under building consent no: B/2002/3608136

- (g) At the time of inspection [the authority] was unable to confirm whether the waterproof membrane on the deck is performing, nor whether it will continue to perform as intended over its expected life as tiles have been laid on top of it. Waterproof membranes are required to be accessible for maintenance.

3. Submissions

- 3.1 The applicant provided a cover letter explaining the background to the dispute. The application contained a copy of building consent B/2002/3608136, the notice to fix, and some of the consented drawings showing the configuration of the deck area.
- 3.2 The authority acknowledged the application on 5 April 2011 and provided an electronic copy of all documents held on the property file.
- 3.3 The draft determination was sent to the parties for comment on 27 May 2011. The applicant accepted the draft without comment in a response received on 10 June 2011.
- 3.4 The authority made no response to the draft despite being reminded of the need to do so, and an extension being given to the time in which to respond. I consider that the lack of any response from the authority is unacceptable and has caused unnecessary delay in issuing this determination and bringing closure to this matter for the applicant.

4. Discussion

- 4.1 The authority’s position is that it was unable to confirm the current and continuing performance of the membrane because tiles have been laid over the membrane.
- 4.2 I have recently issued a number of determinations, to which the authority has been a party, that have canvassed various issues relating to decks including the fixing of tiles to membranes of decks. These determinations include 2010/78, 2010/102,

2010/106, 2010/143 and 2011/029. I have discussed these situations in the determinations and I note, as I have previously, that:

- In general, leaks to membrane decks or roofs, by their very nature, are not readily detectable. It is questionable, however, whether the presence of tiles on a deck will, of itself, make a defect to the deck membrane less easy to detect.
- The likely maintenance as a result of the membrane being tiled can be offset by the reduced risk of the membrane being punctured and the reduced exposure to the elements. Appraisals of deck membranes have concluded that in these circumstances, membranes do not require maintenance.
- The presence of tiles on a deck membrane does not, of itself, prevent the maintenance of the membrane, i.e. the removal of the tiles is not deemed necessary to maintain the membrane.
- The failure of the tiles or sagging will be readily observable. Any loose and broken grout at failed tile joints should be corrected as a matter of regular maintenance.

4.3 I do not accept that the consequence of the presence of tiles on a deck is that the authority cannot reach a decision about Building Code compliance. I have discussed in detail the factors that I have considered, in order to form a view about Building Code compliance. In previous determinations, I have considered a number of factors, including:

- the quality and type of materials used
- the quality of the workmanship
- the size of the tiles and the number of control joints
- the slope of the cross fall of the deck
- the accessibility to the underside of the deck
- the evidence available about the efficacy of the liquid applied membrane, such as the product, the installer, and whether producer statements and similar have been provided
- the history of performance or non-performance of the deck.

4.4 I have considered the documentation provided to me in this case, and it is my view that the authority should have taken the following factors into account, in order to make an adequate decision about the Building Code compliance of the deck:

- The building work appears to have been done in accordance with the consent (an inspection by the authority would be able to confirm this).
- High quality materials have been used, such as compressed sheet.
- The size of the tiles, which appear to be large, and the number of control joints.
- The underside of part of the deck is visible, with only a small part of the deck above a non-habitable space, and there are inspection panels for other parts of the deck, so it would be straight forward for the authority to be able to confirm the configuration of the construction and confirm the integrity and compliance of the deck.

- The deck slopes towards a perimeter drip edge along its full length with a cross fall of 1.6°.
- The building work appears to be approximately six years old and therefore provides some evidence of performance.

4.5 I take the authority's statement to mean that there was also no evidence the membrane is not performing. I note the construction has been in place for a number of years, and that there is no specific sign of E2 failure during this time or any specific faults that the authority was able to identify.

4.6 In the previous determinations that considered the compliance of similar decks (refer to paragraph 4.2), I engaged independent experts who undertook simple inspections and formed a view about the Building Code compliance, or otherwise, of the decks in question.

4.7 It is my view that it is within the ambit of the authority to undertake inspections of this nature. I note, for example, when the authority undertakes preline inspections for new construction, it records moisture content readings of the timber framing based on data it collects and measures onsite. In my view the assessment necessary in respect of completed membrane desks requires a similar methodology and level of investigation.

4.8 Under section 164 of the Act, the authority is required to have reasonable grounds to issue a notice to fix. Based on the actions of the authority evident from the reasons given in respect of item 2.1(g), I conclude that the authority did not make an adequate decision about the compliance of the deck because the assessment it carried out was inconsistent with the Act's intent that such decisions be based on being satisfied on reasonable grounds.

4.9 In my view, if the authority was unable to conduct such an assessment itself because of the configuration of the deck or other such factors, it was entitled to have the owner obtain the necessary information or evidence to assist the authority. It is unreasonable for the authority simply to say that is unable to confirm the matter.

5. The decision

5.1 In accordance with section 188 of the Act, I hereby determine that the authority incorrectly exercised its powers in respect to item 2.1(g) on the notice to fix.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 18 July 2011.

John Gardiner
Manager Determinations