

## **Determination 2006/30**

### **A dispute over a notice to fix for a building with a “monolithic” cladding system at 165A Campbell Road, One Tree Hill, 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 applicants are the two joint-owners, John and Judith Lewins (“the applicants”) and the other party is the Auckland City Council (“the territorial authority”).
- 1.2 The dispute for determination arises over the issue by the territorial authority of a notice to fix. A previous determination (No 2005/135) concerning the same building, the same parties, and the same broad issues was made on 29 September 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 required the provision of adequate ventilation and drainage and also the requirement for safety glass to some windows. The notice also stated that the territorial authority could not satisfy itself as to the durability of building elements that were required to last for no less than 5, 15, or 50 years.
- 1.3 The question to be determined is whether items set out in the notice to fix issued on 28 October 2005 that are in dispute between the parties, are necessary to ensure that the house will be Code compliant (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 two storey detached house with a single-storey attached garage, 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 no evidence of external water entering the building, but 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 code, but without specifying the features required to be incorporated.
- 2.3 The territorial authority carried out an inspection of the property on 19 October 2005.
- 2.4 The territorial authority issued a notice to fix dated 28 October 2005 and the “Particulars of contravention or non-compliance” attached to the notice listed the following issues:
- the drainage and ventilation of the cladding
  - the glazing to the family room bay, ensuite, and bathroom windows
  - the durability of building elements.
- 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.
- 2.5 In a letter to the Department dated 16 December 2005, the applicants noted that the territorial authority had issued the notice to fix. The applicants did not agree with the territorial authority’s requirements contained in the notice to fix that required the provision of adequate ventilation and drainage and that also raised issues relating to durability. The applicants were confident that the issues listed as requiring rectification in the previous determination had been resolved and had also been passed by the territorial authority.
- 2.6 The applicant’s application for a determination was received by the Department on 31 January 2006.

### **3 The submissions**

- 3.1 In a covering letter to the Department dated 25 January 2006, the applicant noted that the notice to fix had been issued by the territorial authority and that the parties had resolved all the issues raised in the notice, with the exception of the cladding. In the view of the applicants there was sufficient ventilation and drainage within the cladding to comply with clause E2 of the Building Code. This was disputed by the territorial authority that required either a drainage or ventilation capacity, or alternatively, the installation of early warning devices. The territorial authority also had durability concerns with elements required to last for 5 or 15 years. (I note that the notice to fix also refers to the 50 year durability requirements)
- 3.2 The applicant also provided copies of the plans detailing how the various items of rectification were to be carried out.
- 3.3 In a covering letter to the Department dated 1 March 2006, the territorial authority listed the particulars of contravention and also provided a copy of the notice to fix.
- 3.4 Copies of the submissions and other evidence were provided to each of the parties.

### **4 The expert's report**

- 4.1 As described in the first Determination 2005/135, 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 that was forwarded to the parties. I refer to this report later in this Determination and also note that the report established that no external moisture was entering the building at the time of the expert's inspection.

## **5 Discussion**

### **General**

- 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 that require to be addressed by the applicant and which are referred to in the correspondence forwarded to the Department. The remaining clauses of the notice to fix that are at issue between the parties are, in general terms:

- 2.0 drainage and ventilation
- 4.0 durability

- 5.3 I have already decided as set out in paragraph 6.10 of the original Determination 2005/135 that a full drainage and ventilation cavity (clause 2.0 reference) is not required for the cladding of this house.
- 5.4 This leaves the question of durability (clause 4.0 reference). 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 code for certain periods “from the time of issue of the applicable code compliance certificate”.
- 5.5 As set out in 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, on receipt of a request from the applicants to do so, 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.
- 5.6 I advise the applicants to take independent advice as to the consequences of amending the original building consent, as described in paragraph 5.5, before requesting the territorial authority to make that amendment.
- 5.7 I therefore determine that the territorial authority is, on receipt of a request from the applicants to do so, 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 criterion, 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.

## **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, the house will be code-compliant. In addition, the issues of durability are to be subject to the modification or waiver procedure as set out in paragraphs 5.4 to 5.7 inclusive.

## **7 The decision**

7.1 In accordance with section 188 of the Act, I determine that:

1. 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
2. the modifications or waivers are issued as set out in paragraphs 5.4 to 5.7,

the house will comply with the building code, notwithstanding the lack of a drainage 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 27 April 2006.

**John Gardiner**  
Determinations Manager