

Determination 2006/35

A dispute over a notice to fix for a building with a “monolithic” cladding system at 46A Ladies Mile, Remuera, 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 joint owners, Mr and Mrs Koppens, (“the applicants”) and the other party is the Auckland City Council (“the territorial authority”). The application arises over the issue by the territorial authority of a notice to fix. A previous determination (Determination 2005/50) concerning the same building, the same parties, and the same broad issue was made on 12 May 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 such a cavity.

- 1.2 The question to be determined is whether the items of rectification, as set out in the notice to fix issued on June 29 2005, are necessary to ensure that the house will comply with the Building Code (see sections 177 and 188 of the Act).
- 1.3 In making my decision, I have not considered any other aspects of the Act.

2 Procedure

The building

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

Sequence of events

- 2.2 On 12 May 2005, the Department determined that, while there was no evidence of external water entering the building, 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 fix requiring the owner to bring the building into compliance with the Building Code, but without specifying the features required to be incorporated.
- 2.3 The territorial authority carried out an inspection of the property on 22 June 2005.
- 2.4 In a letter to the applicants dated 30 June 2005, the territorial authority advised the applicants that it was not satisfied that the house complied with the building code in a number of respects. The territorial authority also advised the applicants 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 applicants 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. A set of photographs illustrating the territorial authority's concerns was also attached to the letter.
- 2.5 The notice to fix was dated 29 June 2005 and the "Particulars of contravention or non-compliance" attached to the notice listed requirements under the following headings:
- items not installed per the manufacturer's specifications;
 - items not installed in accordance with the relevant acceptable/alternative solutions approved under the building consent
 - items not installed per accepted trade practice
 - drainage and ventilation
 - changes to the building consent
 - other related building issues

- durability issues.

2.6 The territorial authority also required an “advice of the completion certificate”, and listed the requirements that would remedy the items of contravention or non-compliance.

2.7 At a meeting with the territorial authority on 10 August 2005, the applicants provided the territorial authority with a “scope of works” document. This listed the work that the applicants considered necessary to make the house comply with the Building Code. The items that the applicants considered not to require any remedial work were:

- sill flashings
- minimum floor level to deck
- flashing installation
- clearance to cladding
- 15 degree slope to horizontal surfaces
- horizontal control joints
- drainage and ventilation.

2.8 In a letter to the applicants dated 16 August 2005, the territorial authority acknowledged receipt of the “scope of works” and noted the actions that the applicants were taking in relation to the notice to fix. The parties agreed that the owner was to address some of the issues raised in the notice to fix. The relevant clauses of the notice to fix that the owner was to address (using the corrected numbering of clause 2.3) were:

- 2.1(b) Uncoated cladding
- 2.2(b) Cladding cracks
- 2.3(c) Penetrations
- 2.3(e) Decking clearances
- Changes to the building consent
- Other building related issues

2.9 The territorial authority did not agree with the applicants’ contention that remedial work was not required to the following notice to fix clauses:

- 2.1(a) Sill flashings
- 2.2(a) Floor level clearance
- 2.3(a) General flashings

- 2.3(b) Cladding clearances
- 2.3(d) Balcony balustrade top slopes
- 2.3(f) Horizontal control joints
- 2.4 Drainage and ventilation.

- 2.10 The territorial authority accepted the comments made by the applicants regarding durability and listed 3 items that were changes from the original consent and for which no consent amendment had been made.
- 2.11 The applicants applied for a determination that was received by the Department on 10 October 2005.

3 The submissions

- 3.1 The applicants forwarded a letter to the Department dated 4 October 2005, which supported the application for a determination. In this letter, the applicants listed in detail their arguments relating to the issues set out in the notice to fix.
- 3.2 The owner also provided copies of:
- the notice to fix
 - the applicants' "scope of works"
 - the letter dated 30 June 2005 from the territorial authority to the applicants
 - a producer statement dated 11 April 2005 from Progressive Building Systems Ltd for the "Eterpan" cladding
 - the "Statement of Evidence" from a technical representative of PBS Distributors Ltd that had been supplied for the previous determination
 - the expert's report
 - a facsimile from PBS Distributors Ltd dated 24 February 2005, describing how the finish of the cladding on the inside face of the upper deck handrail met its minimum standard requirements
 - two drawings showing the balcony balustrade details.
- 3.3 In a covering letter to the Department dated 17 October 2005, the territorial authority listed the particulars of contravention. The territorial authority sent another copy of this letter to the Department dated 15 November 2005.
- 3.4 The territorial authority also provided copies of:
- the building plans and specifications
 - the building consent documentation.

- the letter to the applicants of 30 June 2005
- the notice to fix.

3.5 Copies of the submissions and other evidence were provided to each of the parties, as was the draft Determination, which was sent to the parties on 13 February 2006. The territorial authority did not comment but the applicant sent an e-mail to the Department on 3 March 2006 regarding the draft. The applicant stated that the 30mm clearance to the base of the cladding was sufficient. This contention was based on 3 mitigating factors, which were:

- “1. There is a two layer system and a drip edge formed by the front sheet;
2. The catchment area to the deck is very small – risk of ponding is minimal;
3. The walls are only 1.0m high and protected from the weather – run off from the walls is minimal.”

4 The dispute

4.1 The dispute for determination is whether all the items of rectification set out in the notice to fix issued on 29 June 2005, are necessary to ensure to the house will comply with the Building Code.

5 The expert’s report

5.1 As described in the first determination, Determination 2005/50, 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 dated 17 November 2004, which was forwarded to the parties. I refer to this report later in this determination and also note that the report established that there was no evidence that external moisture was entering the building at the time of the expert’s inspection.

6 Discussion

General

- 6.1 I have considered the submissions of the parties, the previously published expert’s report and the other evidence in this matter.
- 6.2 I consider that it is not necessary for me to comment on the items listed in paragraph 2.7 which the parties have agreed will be addressed by the owner. I note also that the question of durability raised in clause 5.0 of the notice to fix has also been settled between the owner and the territorial authority.

6.3 The remaining clauses of the notice to fix that are at issue between the parties are, in general terms:

- 2.1(a) Sill flashings
- 2.2(a) Floor level clearance
- 2.3(a) General flashings
- 2.3(b) Cladding clearances
- 2.3(d) Balcony balustrade top slopes
- 2.3(f) Horizontal control joints
- 2.4 Drainage and ventilation.

6.4 Based on the expert's report, I am prepared to accept that the items covered by clauses 2.1(a), 2.2(a), 2.3(a), 2.3(d) and 2.3(f) of the notice to fix presently comply with the Building Code. Regarding clause 2.4, I have already decided, as set out in paragraph 6.12 of the original Determination 2005/50, that a full drainage and ventilation cavity is not required for the cladding of this house.

6.5 This leaves the question of cladding clearances set out in clause 2.3(b) of the notice to fix in Determination 2005/50 and as referred to in the applicant's response to the draft of that determination. After consideration of that information, I agreed with the contention of the territorial authority that these clearances are inadequate. With respect to this current determination I have received a further submission from the owner, dated 1 March 2006. Notwithstanding the owner's latest submission on the matter, I believe the question of cladding clearances requires careful consideration of the extent to which these need to be modified to make them code compliant.

It may be helpful for the parties to consider why clearances are specified in the Acceptable Solution E2/AS1. In my view the clearances are intended to:

- Assist in preventing wicking of moisture into the cladding sheets. (In that regard the careful sealing or painting of the lower edges of the sheets also makes a contribution).
- Ensure that the lower edge of the cladding sheets will work as an effective drip edge, clear of the ground or deck surface, but still shielding the wall frame, particularly the bottom plates, from rain impinging on the cladding or splashing off the deck.
- Ensure that the junction of the cladding sheets with the ground or deck surface can be easily kept clear of accumulated debris which might otherwise bridge the gap and transfer moisture from the ground or deck surface to the lower edge or back of the cladding.

The importance of clearances is such that while the requirements of E2/AS1 for a 35mm clearance need not be followed exactly, the combination of lower edge

treatment of the cladding sheets, and the clearances, should achieve the intention I believe is expressed in E2/AS1, especially taking into account the small area of the deck concerned and its relatively sheltered location.

- 6.6 For the sake of clarity, I repeat here the statement I made in the earlier determination regarding this house (Determination 2005/50). In paragraph 4.3 of that determination I said:

“In several previous determinations, the Authority (the former Building Industry Authority) has made the following general observations about acceptable solutions and alternative solutions, which in my view remain valid in this case.

- *Some acceptable solutions cover the worst case, so that in less extreme cases they may be modified and the resulting alternative solution will still comply with the building code.*
- *Usually, however, when there is non-compliance with one provision of an acceptable solution, it will be necessary to add some other provision to compensate for that in order to comply with the building code.”*

In my view these observations should be kept in mind by the territorial authority when it considers the circumstances described in paragraph 6.5.

- 6.7 Section 94 (1) of the Act requires a building consent authority to issue a code compliance certificate if it is satisfied, on reasonable grounds, that the building work complies with the building consent. In this particular case I believe the territorial authority could decide that it was satisfied, on reasonable grounds, by a combination of factors described in paragraph 6.5.
- 6.8 In this case, because there exists compensating factors with respect to the of the small size of the deck and its sheltered location, I am of the view that the objectives outlined in Paragraph 6.5 can be achieved by a deck-to-cladding clearance of not less than 30mm.

7 Conclusion

- 7.1 I consider that, apart from the items agreed between the parties that the owner is to fix, the expert’s report establishes that, with the exception of the cladding ground and deck clearances, the house complies with the Building Code at the present time.
- 7.2 In addition, the territorial authority should carefully inspect those items that were unauthorised changes to the original building consent and check if these too comply with the Building Code. If this is the case, the necessary amendments should be made to the consent.

8 The decision

- 8.1 In accordance with section 188 of the Act, I determine that once the cladding ground and deck clearances as discussed above, and the items of non-compliance that have been agreed by the parties are to be fixed by the owner, 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, the house will comply with the Building Code, notwithstanding the lack of a drainage cavity.
- 8.2 I therefore instruct the territorial authority to withdraw the notice to fix that it has already issued and replace it with a new notice to fix. This new notice should not include the matter listed as *2.4 Drainage and ventilation* in the original notice to fix dated 29 June 2005, but it should include the matter of the cladding ground clearances, together with any item that the parties have agreed to be fixed or were not part of the original consent, but that, in the opinion of the territorial authority on reasonable grounds, do not meet the requirements of the Building Code.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 12 May 2006.

John Gardiner
Determinations Manager