

## Determination 2007/15

### Notice to fix for a building at 90 Kurahaupo Street, Orakei, Auckland



#### 1 The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“the Act”) made under due authorisation by me, John Gardiner, Determinations Manager, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department. The applicants are the owners, Mr and Mrs Loughnan (“the applicants”), and the other party is the Auckland City Council (“the territorial authority”).
- 1.2 The initial matter for determination is the territorial authority’s decision to issue a notice to fix. The notice to fix requires the applicants to apply for a certificate of acceptance for the building. However, as a primary concern, I consider that I must also consider the question of the health and safety aspects of the building, which in turn, raises the question of whether the house complies with the requirements of the Building Code.

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<sup>1</sup> The Building Act 2004 is available from the Department’s website at [www.dbh.govt.nz](http://www.dbh.govt.nz)

- 1.3 In making my decision, I have considered the submissions of the parties, and the other evidence in this matter, which includes the report of an independent expert commissioned by the Department to advise on Building Code compliance (“the expert”).

## 2 The building

- 2.1 The building consists of a two-storey detached house situated on a sloping stepped site in a medium wind zone for the purposes of NZS 3604<sup>2</sup>. The house is split-level, with the floors stepped to suit the slope of the site. Construction is generally conventional light timber frame, with a concrete slab and foundations, stepped concrete block retaining walls to the lower floor level, monolithic cladding and aluminium windows. The profiled metal roof is made up of several monopitched sections at varying levels, with the main section at 4° pitch, and lower levels at 25°. A small area of flat membrane roof with a monolithic clad parapet extends over a curved wall projecting area of the living room. Except for gutters, there are no eaves or verge projections.
- 2.2 The upper floor includes a tiled split-level deck along most of the north elevation, which is partly located above bedroom and garage areas below. The upper level of the deck has monolithic-clad balustrades with a top-mounted handrail, while the larger lower deck has a stainless steel balustrade, made up of top rails and uprights which are mounted onto a monolithic clad upstand. Closely spaced stainless steel tensioned cable is strung to infill the spaces in the balustrade. The lower deck has a monolithic clad column and flying beams, with exposed timber beams connecting the flying beams and the exterior wall and forming a pergola over the deck.
- 2.3 The drawings describe the framing as “standard 100mm framing” and the expert noted that the timber he was able to inspect did not appear to be treated. I have received no written evidence as to the treatment, if any, of the external wall framing timber. Based on this evidence and the date of construction of this house, I consider that the external wall framing is unlikely to be treated.
- 2.4 The cladding is a monolithic cladding system described as stucco over a solid backing. In this instance it consists of 4.5 mm “Hardibacker” sheets, which are fixed through the building wrap directly to the framing timbers, thus contributing towards the structural bracing of the walls. The backing sheets are covered by a slip layer of building wrap; “chicken mesh” reinforced solid plaster and a paint coating.
- 2.5 I have seen no evidence of producer statements or warranties for the cladding. I have also seen no evidence of producer statements or calculations for the structure of the house. The expert has supplied copies of a “Certificate of Compliance (electrical)” dated 18 January 2000 and two “Gas fitting Certification Certificates” dated 30 January 2000 and 12 June 2000 respectively.

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<sup>2</sup> New Zealand Standard NZS 3604:1999 Timber Framed Buildings

### 3 Sequence of events

- 3.1 The territorial authority issued a building consent (which I have not seen but which is referenced in the building certifier's summary record), for the house on 11 February 1999 based on a building certificate (which I also have not seen) issued by Approved Building Certifiers Ltd ("the building certifier"). The building certifier carried out various inspections during construction, including prior to lining installation and following lining installation. I note that there is no indication of any inspections made during the application of the stucco.
- 3.2 The building certifier carried out a final inspection on 5 December 2000, and the inspection record notes that this was "approved". The applicants' submission indicates that the building certifier subsequently issued a code compliance certificate, although a copy of the original certificate, which would verify the issue of the certificate, has not been located.
- 3.3 The building certifier was deregistered by the Building Industry Authority under the Building Act 1991 on 6 September 2004.
- 3.4 When preparing to market the property for sale, the applicants discovered that the territorial authority held no records of inspections or the code compliance certificate.
- 3.5 After extensive discussions and correspondence, the territorial authority refused to accept that the evidence presented by the applicants was sufficient to establish that the building certifier had indeed issued a code compliance certificate. That evidence is not discussed in this determination because, although I found that evidence convincing, nevertheless I consider, for the reasons set out below, that the code compliance certificate should not have been issued and is therefore not relevant to my decision.
- 3.6 On 7 July 2005, the territorial authority issued a notice to fix, which required the applicants to apply for a certificate of acceptance for the building under section 96 (1) (c) of the Act. The territorial also noted that the applicants could apply for a determination "as to whether or not your house complies with the Building Code".
- 3.7 The applicants applied for a determination on 21 July 2005. The application stated the matter of doubt or dispute was "that a code compliance certificate be issued for the above building". The cover letter for the application stated that:
- The matter in dispute is whether [the territorial authority] should issue a CCC on the basis of this affidavit [from the building certifier's former director].
- 3.8 In a letter to the applicants dated 10 October 2005, the Department noted that the application for a determination into the territorial authority's "refusal to issue" a code compliance certificate was not a determinable matter. The applicants had not applied to the territorial authority for a code compliance certificate to be issued by the territorial authority, nor had the territorial authority refused to issue such a code compliance certificate. However, the Department considered that the issuing of the

notice to fix was a determinable matter, and that the issue of the code compliance certificate would need to be addressed as part of the determination.

## **4 The submissions**

4.1 The applicants forwarded copies of:

- some of the drawings
- the inspection summary and code compliance certificate
- the sworn affidavit attesting to the validity of the records
- the correspondence with the territorial authority
- the notice to fix.

4.2 The territorial authority forwarded copies of:

- some of the drawings
- the notice to fix.

4.3 Copies of the submissions and other evidence were provided to each of the parties. Neither party made any further submissions in response to the submission of the other party.

4.4 The Department commissioned an independent expert (“the expert”) to advise and report on the building. The expert reported to the effect that the exterior wall cladding was not weathertight, that this might have resulted in damage to wall framing and that there were other comparatively minor defects, see section 5 below. A copy of the expert’s report was provided to each of the parties on 21 March 2006.

4.5 In a letter to the Department dated 22 April 2006 the applicants made various detailed comments on the report, and in particular mentioned defects identified in the report that had since been rectified.

4.6 A draft determination (“the first draft”) was sent to the parties for comment on 20 April 2006. That draft was to the effect that:

- (a) there was sufficient evidence to establish that the building certifier had issued a code compliance certificate
- (b) the expert’s report established that the house was not weathertight and that therefore the code compliance certificate had been issued in error
- (c) the notice to fix was defective in that it purported to require the applicants to apply for a certificate of acceptance, so that

- (d) the notice to fix was to be modified to require that the building be brought to compliance with the Building Code.
- 4.7 In a letter to the Department dated 29 May 2006, the territorial authority said it did not accept the first draft, and made the following submissions:
- 1.1 Paragraph 6.2 [of the draft] finds that a code compliance certificate was issued by Approved Building Certifiers Ltd based on an affidavit by a director of that company
- 1.2 Council submits that an affidavit does not constitute a valid building certificate under the Building Act
- 2.1 Paragraph 5.2 of the draft determination notes that “neither s 164 nor s 96 of the Act empowers the territorial authority to require an owner to apply for a certificate of acceptance”. Council submits that this power is implied by s 96 (1) (c).
- 4.8 The territorial also submitted that:
- . . . the matter in dispute in this determination is whether an affidavit constitutes a building certificate. If the Department finds that the affidavit does constitute a building certificate then it will be appropriate to determine whether a notice to fix requiring an owner to apply for a certificate of acceptance is valid. Whether the building complies with the building code is not in dispute.
- 4.9 On further consideration, and in the light of those comments, I prepared a second draft and sent it to the parties for comment.
- 4.10 The applicants accepted the second draft subject to a minor non-controversial amendment, which has been made.
- 4.11 The territorial authority did not accept the second draft, submitting that:
- The matter for determination had been incorrectly described.
  - The question of the durability of the interior and structure of the building needed to be addressed.
- 4.12 The territorial authority requested a hearing, which was held on 2 November before a tribunal consisting of the Determinations Manager and one Referee acting for and on behalf of the Chief Executive by delegated authority under section 187(2) of the Building Act 2004. At the hearing, the applicants (Mr and Mrs Loughnan) appeared on their own behalf. The territorial authority was represented by its officers. Officers of the Department also attended. The owners and the territorial authority spoke and called evidence. The evidence from those present enabled me to amplify or clarify various matters of fact that were identified in the second draft determination.
- 4.13 At the hearing, the territorial authority suggested that it would be in the best interests of the applicants if I were to confirm the building certifier’s decision to issue a code compliance certificate, and then decide that the building did not comply with the Building Code at the time of the determination. I am not convinced that would in fact be in the applicants’ best interest, but in any case I rejected the suggestion because once it had been accepted that the building was in fact leaking (without any

specific damage or other explanation) then it was impossible to say that it had ever complied with clause E2 of the Building Code. That being the case, it would be improper for me to confirm the building certifier's decision.

- 4.14 Following the hearing, copies of a third draft determination were forwarded to the parties on 15 November 2006. In a document dated 21 November 2006, the applicants accepted the third draft.
- 4.15 The territorial authority responded in a letter dated 18 December 2007. The territorial authority suggested one minor amendment to the draft wording and also that the matter of the building certifier's code compliance certificate be clarified. It was also concerned about the applicants' ability to verify compliance with clause F2 "Hazardous building materials" (refer paragraph 5.4). The territorial authority was also of the opinion that, with regard to the cladding, a new building consent would be required for any remedial work. Finally, the territorial authority would cooperate with the applicants to establish compliance with as much of the building work as possible.
- 4.16 The applicants responded to the territorial authority's submission in a letter to the Department dated 20 December 2006. The applicants noted that the draft determination had discussed the relevance of the code compliance certificate issued by the building certifier. The applicants were able to verify the status of the shower glazing. The applicants did not accept that a new consent would be required in respect of the cladding and requested that the determination reflect this view.

## **5 The expert's report**

### **General**

- 5.1 The expert inspected the interior and exterior of the house on 3 February 2006 and 9 February 2006, and furnished a report that was completed on 10 March 2006. The expert noted that the drawings included limited construction details, and also that the house as built incorporated a number of changes from the consent drawings. The expert also noted that conclusions he reached are based on assumptions made after consideration of available information, including building certifier's records, the expert's own site investigations and overall impressions of the house.

### **Interior and structure**

- 5.2 The expert noted that there was no evidence of significant cracks, deflection or movement and the walls generally appeared "sound and plumb". Where it could be investigated, bracing appeared adequate. Except for the exterior pergola and handrail fixings (which are discussed in paragraph 6.1), there was no indication that the building did not comply with clause B1 Structure.
- 5.3 The expert noted that means of escape from fire appeared adequate, gas appliances and installation appeared satisfactory, and the house generally appeared to comply with the requirements of Building Code clause C1 Fire safety at the time of construction. Stairs were generally satisfactory and appeared to generally comply

with clause D1 Access routes. With minor exceptions, the house appeared to comply with the requirements of clause E3 Internal moisture.

- 5.4 The expert noted that glazing appeared to incorporate 10mm toughened glass where necessary and materials appeared to comply with clause F2 Hazardous building materials, but this should be verified. Sills of opening windows were either high enough or were appropriately protected, and the interior of the house appeared to comply with clause F4 Safety from falling.
- 5.5 The expert noted that services and facilities as required by clauses G1 to G15 all appeared to be more than adequate with no obvious indication of significant problems. Where it could be inspected, insulation appeared adequate and there was no evidence of mould or mildew resulting from condensation; indicating that the requirements of clause H1 had been met.
- 5.6 The expert included the following specific comments on the interior of the house:
- The installation of smoke alarms is recommended, to comply with current Building Code requirements.
  - The ceiling height above the main stairs is 1880mm, which is less than the 2000mm required and the handrail is not continuous above the winders.
  - The shower fittings have been inadequately sealed against the wall tiles.

### **Exterior surfaces and cladding**

- 5.7 The expert noted that, from what he was able to observe, the building generally appeared to comply with the requirements of clause E1 Surface water.
- 5.8 The expert noted that the cladding generally appeared to be to an “average” standard, with the surface “straight and flat” and the paint finish was uniform but was starting to deteriorate.
- 5.9 The expert removed a small section of plaster at the junction of the monolithic clad balustrade with the master bedroom wall. The expert also removed two sections of plaster at the head and sill junctions with the jambs of the garage window to observe the window installation. I accept that the sections exposed are typical of similar areas throughout the house.
- 5.10 The expert took non-invasive moisture readings at skirting level and under windows throughout the house, and the following elevated readings were noted:
- 18% to 49% in the exterior walls of the master bedroom, with signs of decay at the corner of the bottom plate.
  - 18% to more than 30% at the south east corner of the lounge, with signs of decay in the bottom plate near the deck.
  - 18% to 31% in the east wall of the TV lounge.

- 23% under the bathroom window sill.
- 24% to 28% in the lower floor bedrooms, with signs of decay.
- 23% to 80% in the study south wall, with signs of decay.
- 22% under the east window sill in the garage.

Moisture levels above 18% recorded after cladding is in place generally indicate that external moisture is entering the structure. The expert also noted that the inspection of the building took place after three months of dry weather.

5.11 The expert made the following specific comments on the cladding:

- the stucco was crumbling and easy to remove when exposing the window and balustrade junctions, and the chicken mesh reinforcing in the plaster was too close to the Hardibacker. The stucco plaster thickness varied from 15mm to 21mm
- there are signs of efflorescence behind the paintwork in a number of areas, indicating the presence of moisture in the plaster
- there are a number of cracks in the stucco, which are vertical, horizontal and angled (many of which start from window corners)
- there is no evidence of any vertical or horizontal control joints, although the building has two storey high walls and the length of most walls exceeds the 4 metre limit recommended in NZS 4251<sup>3</sup>
- the jamb flashings do not overlap the sill flashings, preventing moisture from draining to the outside, and the head to jamb junction is poorly sealed. There are signs of corrosion and moisture entry, at the garage window, despite that window being sheltered under the projecting upper floor
- the removal of plaster at the balustrade to wall junction revealed no sign of a saddle flashing or flashing under the plaster of the flat balustrade top, and there were signs of moisture penetration and decay in the exposed timber framing. The Hardibacker was also weak and easily broken
- the metal handrails and balustrades are top-fixed into the flat tops of the stucco-covered balustrades and deck upstands, with no indication of sealing. The fixings of the base plates also have little penetration into the deck framing timber and did not appear to be structurally adequate
- the fixings of the timber pergola structure appear inadequate, and the ribbon plate is fixed through unsealed stucco
- there are inadequate overlaps and no drip edges at the base of the stucco; and clearances to ground or paving are inadequate in a number of locations (in

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<sup>3</sup> New Zealand Standard NZS 4251: Solid plastering Part 1: 1998 Cement plasters for walls, ceilings and soffits



particular near the entry and garage doors). The wall and balustrade stucco is buried behind the deck tiles in some areas, and the parapet stucco is sealed against the butynol roof above the living room curved projection

- penetrations through the stucco appear to be unsealed or poorly sealed
- the apron of the upper roof flashing at the north west corner is loose and some barge flashings do not extend over two crests of the roof cladding
- the junctions of the flashings and roof claddings at the mid-roof step are poorly weatherproofed and may not prevent wind-blown rain penetration into the framing
- the junctions of the metal roof with the membrane roof and plastered parapet are poorly constructed and are heavily reliant on sealant for weathertightness
- the “boot” flashing at the gas flue is poorly weatherproofed and not in accordance with good trade practice.

## 6 Evaluation for Building Code compliance

### Interior and structure

- 6.1 Generally, the interior and structure of the building appear to have been constructed in accordance with reasonable trade practice and with the Building Code. However, there are some areas to be checked as complying with Acceptable solutions or the Building Code, and these are as described in paragraph 5.6 and paragraph 5.11 as including but not limited to:
- the non-continuous handrail in the main staircase
  - the lack of sealing of the shower fittings
  - the inadequate fixings of the metal handrail and balustrades to the deck
  - the inadequate fixings of the pergola.
- 6.2 I note the expert’s comment on the ceiling height above the main stairs, and accept that the 1880mm height provided is not in accordance with the 2000mm required by Acceptable solution<sup>4</sup> D1/AS1 of Building Code Clause D1 Access Routes. Notwithstanding this, the stairs in this house appear to provide effective access for the occupants, and I therefore consider that the ceiling height is adequate in this case.
- 6.3 I note the expert’s comment on the lack of smoke alarms and, although smoke alarms were not a requirement at the time of construction, I recommend that they be installed in accordance with the current requirements of the Building Code.

## Exterior cladding

- 6.4 In evaluating the design of a building and its construction, it is useful to make some comparisons with the relevant Acceptable solution, in this case E2/AS1, which will assist in determining whether the features of this house are code compliant. However, in making this comparison, the following general observations are valid:
- Some acceptable solutions cover the worst case, so that they may be modified in less extreme cases and the resulting alternative solution will still comply with the Building Code.
  - Usually, 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.
- 6.5 The approach in determining whether building work is weathertight and durable and is likely to remain so, is to apply the principles of weathertightness. This involves the examination of the design of the building, the surrounding environment, the design features that are intended to prevent the penetration of water, the cladding system, its installation, and the moisture tolerance of the external framing. The Department and its antecedent, the Building Industry Authority, have also described weathertightness risk factors in previous determinations (refer to Determination 2004/1 et al) relating to cladding and these factors are also used in the evaluation process.
- 6.6 The consequences of a building demonstrating a high weathertightness risk is that, in order to comply with the Building Code, building solutions will need to be more robust. Conversely, where there is a low weathertightness risk, the solutions may be less robust. In any event, there is a need for both the design of the cladding system and its installation to be carefully carried out.

## 7 Weathertightness risk

- 7.1 In relation to these characteristics I find that the building:
- is built in a medium wind zone
  - is a maximum of two storeys high
  - has a split-level enclosed deck, situated partly over bedroom and garage areas
  - is moderately complex in plan and in form
  - has monolithic cladding which is fixed directly to the framing
  - has eaves projections of gutter width only, and no verge projections
  - has external wall framing that is untreated, so providing no protection against decay if the framing absorbs and retains moisture.

- 7.2 When evaluated using the E2/AS1 risk matrix, these weathertightness features show that two elevations of the building demonstrate a high weathertightness risk and two a moderate risk rating. The matrix is an assessment tool that is intended to be used at the time of application for consent, before the building work has begun and, consequently, before any assessment of the quality of the building work can be made. Poorly executed building work introduces a risk that cannot be taken into account in the consent stage but must be taken into account when the building as actually built is assessed for the purposes of issuing a code compliance certificate.

## **8 Weathertightness performance: exterior cladding**

- 8.1 I find that the monolithic cladding system generally, including the windows, does not appear to have been installed according to good trade practice. As a result, there are significant defects identified in paragraph 5.11, which are likely to have contributed to the moisture already evident in many areas in the external walls of this house.

## **9 Conclusions on Building Code compliance**

### **Exterior surfaces and cladding**

- 9.1 I am satisfied that the current performance of the monolithic cladding is not adequate because it has not been installed according to good trade practice and is allowing water penetration into the walls at a significant number of locations at present. I have also identified the presence of some known weathertightness risk factors in this design. The presence of the risk factors on their own is not necessarily a concern, but they have to be considered in combination with the significant defects, identified in paragraph 5.11, in the cladding system. It is that combination of risk factors and defects, together with the current moisture penetration, that indicate that the structure does not have sufficient provisions that would compensate for the lack of a full drainage cavity. Consequently, I am satisfied that the cladding system as installed on the building does not comply with clause E2 of the Building Code.
- 9.2 In addition, the building is also required to comply with the durability requirements of clause B2. Clause B2 requires that a building continues to satisfy all the objectives of the Building Code throughout its effective life, and that includes the requirement for the house to remain weathertight. Because the cladding faults on the building are likely to allow the ingress of moisture in the future, the house does not comply with the durability requirements of clause B2.
- 9.3 I find that because of the apparent complexity and extent of the defects that have been identified in this house, I am unable to conclude, with the information available to me, that remediation of the identified defects, as opposed to partial or full recladding, could result in compliance with clauses B2 and E2. I consider that any final decisions on whether compliance can be achieved by either remediation or recladding, or a combination of both, can only be made after a more thorough investigation of the cladding and underlying wall framing. This will require a careful analysis by an appropriately qualified expert as to the correct remedial option to be followed.

9.4 Effective maintenance of claddings (in particular of monolithic cladding) is important to ensure ongoing compliance with clauses B2 and E2 of the Building Code and is the responsibility of the building owner. Clause B2.3.1 of the Building Code requires that the cladding be subject to “normal maintenance”, however, that term is not defined in the Act.

9.5 I take the view that normal maintenance is that work generally recognised as necessary to achieve the expected durability for a given building element. With respect to the cladding, the extent and nature of the maintenance will depend on the material, or system, its geographical location and level of exposure. Following regular inspection, normal maintenance tasks should include but not be limited to.

- where applicable, following manufacturers’ maintenance recommendations
- washing down surfaces, particularly those subject to wind-driven salt spray
- re-coating protective finishes
- replacing sealant, seals and gaskets in joints.

9.6 As the external wall framing of this building is untreated, periodic checking of its moisture content should also be carried out as part of normal maintenance.

#### **Interior and structure: other Building Code clauses**

9.7 Subject to further investigations that may identify other faults, I consider that satisfactory rectification of the non-compliant items outlined in paragraph 6.1 should be expected to result in the building being in compliance with other relevant clauses of the Building Code.

9.8 I note that various engineering calculations and producer statements have not been supplied, and draw this to the attention of the territorial authority.

#### **General**

9.9 It is emphasised that each determination is conducted on a case-by-case basis. Accordingly, the fact that a particular component has been established as being compliant with the Building Code in relation to a particular building does not necessarily mean that the same component will be compliant in another situation.

## **10 Discussion**

10.1 I consider that the notice to fix was defective with respect to the requirement that the owner must apply for a certificate of acceptance, and I therefore consider that the notice was not properly issued.

10.2 As discussed in paragraphs 9.1 and 9.2, I also consider that the building does not comply with all relevant clauses of the Building Code. This being the case, I consider that any decision by the building certifier to issue a code compliance certificate should be reversed.

- 10.3 Based on this decision, I consider it is irrelevant whether the building certifier did actually issue a code compliance certificate. In the same context, it is also irrelevant whether or not the territorial authority should have recognized that fact and therefore not issue the notice in the form that it did.
- 10.4 If a code compliance certificate had in fact been received by the territorial authority, then the territorial authority would have to either:
- accept the code compliance certificate as establishing that the building complied with the Building Code, or
  - dispute the code compliance certificate by way of an application for a determination.
- 10.5 The Department did not receive an application from the territorial authority. However, the first draft of this determination was worded as if there had been such an application. The draft was forwarded to the parties on the basis that if it was accepted, then the lack of an application from the territorial authority would be made good, and the Department could and would determine the Code compliance or otherwise of the building.
- 10.6 Having ruled that the alleged code compliance certificate, if in fact it was issued, is cancelled, I am of the opinion that the territorial authority can issue a valid code compliance certificate under section 436 of the Act, when satisfied that the rectification work as identified in this determination has been properly completed.

## **11 Discussion of the parties' submissions on the third draft determination**

- 11.1 I consider that the matter of the code compliance certificate issued by the building certifier is adequately covered in this determination. I note also that the applicants consider that they can verify the compliance of the shower glazing.
- 11.2 I turn now to the question of whether a new building consent is required in relation to the cladding of the building. In paragraph 10 of Determination 2006/116, which was issued on 30 November 2006, I discussed the matter of the requirement for a building consent in the context of the re-cladding of a house in comparable materials. I continue to hold the views expressed in that determination.
- 11.3 Applying my views as set out in Determination 2006/116 to the house that is subject of this determination, I am of the opinion that, only if the building is completely re-clad in materials that are not of "similar materials and similar configuration", would a new building consent be required. From this statement it follows that if the house is not re-clad or is clad in "similar materials" and to a "similar configuration", then I consider that the remedial work can be carried out under the original consent, which I consider has not been properly concluded by the issue of a valid code compliance certificate.

11.4 I emphasize, for the reasons set out in paragraph 10.1 of Determination 2006/116, that I am of the opinion that the question of whether a building consent is required for the re-cladding of a building is not a matter that can be the subject of a determination by the Department. However, I have reiterated my views in the hope that it will assist the parties to settle this matter.

## 12 The decision

12.1 I hereby modify the territorial authority's decision to issue the notice to fix dated 7 July 2005 to the effect that the territorial authority is to issue a new notice to fix that:

- identifies the "contravention" as being a failure to comply with the Building Code in respect of the items set out in paragraph 5.11 and the non-compliant items outlined in paragraph 6.1
- requires the owners to bring the building into compliance with the Building Code. The notice to fix may list the items to be rectified but it should not specify how compliance is to be achieved as this is for the owners to propose and for the territorial authority to accept or reject. It is important to note that the Building Code allows for more than one method of achieving compliance
- states an appropriate date or time-frame.

12.2 I suggest that the parties adopt the following process to meet the requirements of paragraph 12.1. Initially, the territorial authority should issue the new notice to fix, listing all the items that the territorial authority considers to be non-compliant. The owners should then produce a response to this in the form of a detailed 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.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 7 January 2007.

John Gardiner  
**Determinations Manager**