

Determination 2007/48

Issue of a notice to fix by a territorial authority regarding a house with a monolithic cladding system at 32C McArthur Avenue, St Heliers (to be read in conjunction with Determination 2006/86)

Applicant: Robbrett Holdings Ltd (the owner)

Territorial authority: Auckland City Council

Site Address: 32C McArthur Avenue, St Heliers, 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, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department. The application for determination arises because the territorial authority has refused to issue a code compliance certificate for the house. I determined certain building matters with regard to this house, which are described in an earlier determination, Determination 2006/86 (“the first determination”).
- 1.2 The matter for determination is whether the territorial authority’s decision to issue a notice to fix, dated 27 October 2006, which listed specific requirements, is correct.
- 1.3 The question to be determined is whether I am satisfied that the content of the territorial authority’s notice to fix is correct having regard to my decision regarding the issuing of a new notice to fix in paragraph 9.3 of the first determination.

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

1.4 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.

2. Sequence of events

2.1 The first determination was issued on 11 September 2006.

2.2 In paragraph 6.3.1 of the first determination 6.3.1 I said:

Generally the cladding appears to have been installed in accordance with good trade practice. However, some junctions, penetrations and edges are not well constructed, and these areas are as described in paragraph 5.5 and in the expert's report as being the:

- lack of a kickout at the end of one apron flashing above the entrance
- inadequate clearance of the chimney cladding above the roof cladding
- inadequate overlap of the chimney cap flashing
- inadequate weatherproofing of the vertical junction where a uPVC starter strip is used
- lack of drainage gaps at the window sills
- the junctions of the ends of the timber fascias with the plastered EIFS.

2.3 In paragraph 9.2 of the first determination I said:

I also find that rectification of the items outlined in paragraph 6.3.1 will consequently result in the house remaining weathertight and in compliance with clauses B2 and E2. Work to correct these items may expose additional associated defects that are not yet apparent. All rectification work is to be completed to the approval of the territorial authority.

2.4 In paragraph 9.3 of the first determination I said:

I note that the territorial authority has issued a notice to rectify. This should now be withdrawn and a new notice to fix (restricted to the items outlined in paragraph 6.3.1) should now be issued requiring the owner to bring the house 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 that is for the owner 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.

2.5 On 27 October 2006 the territorial authority issued a notice to fix. This notice contained most of the items listed in the withdrawn Notice to Rectify, along with some additional requirements and a "Water Management Capacity" contravention that replaced the previous "Ventilated cavity system" contravention. In addition, paragraph 1.0 of the notice contained a general statement that the building work has not been undertaken in accordance with clauses B1, B2, C1, E2, E3, F4, F7, G12, and H1 of the Building Code. However, while the notice does contain details of these contraventions relating to clauses E2 and B2, it contains no details of contravention relating to clauses B1, C1, E3, F4, F7, G12, or H1.

- 2.6 The contents of the notice to fix can be categorised as follows (references in parentheses are to those used in the notice to fix).
- 2.6.1 Items included in the notice to fix but which the first determination considered did not need to be rectified:
- The ground clearances (paragraph 2.1(a)).
 - The gap to the back of the cladding (paragraph 2.1(b)).
 - The balcony handrail penetrations (part-paragraph 2.3(a)).
 - The lack of a garage head flashing (paragraphs 2.3(f) and 2.3(i)).
- 2.6.2 Additional requirements resulting from paragraph 9.2 of the first determination:
- The chimney cap flashing (paragraph 2.3(b)).
 - The uPVC starter strip (paragraph 2.3(c)).
 - The fascia ends (paragraph 2.3(e)).
- 2.6.3 Duplicated items:
- Fascia boards listed in both paragraphs 2.3(e) and 2.3(g).
 - Garage head flashing listed in both paragraphs 2.3(f) and 2.3(i).
- 2.7 The application for a determination was received by the Department on 23 January 2007.

3. The submissions

- 3.1 The applicant submitted a file of information relating to the remedial work carried out since the date of the first determination and specified in paragraph 6.3.1 of that determination, correspondence with the territorial authority and a copy of the notice to fix issued by the territorial authority on 27 October 2006.
- 3.2 In a letter to the Department dated 5 February 2007, the territorial authority set out the clauses that it considered still did not comply with the requirements of the Building Code. It also attached the notice to fix and other information contained in a CD-ROM.
- 3.3 A copy of the draft determination was sent to the parties for comment on 7 March 2007. In a submission to the Department dated 18 April 2007, the territorial authority accepted the draft saying that:
- Council accepts the findings of this draft determination, in that the department determined that the Notice to Fix should be modified as per paragraph 5.1 of the draft determination. Council will reissue the Notice to Fix, subject to these modifications, if this is what is required in the final determination.
- 3.4 In a letter to the Department dated 18 April 2007, the applicant said it did not accept the draft and wished to record that it did not receive the letter from the Council, dated 5 February 2007, and that:

We wish it to be recorded . . . that we received neither, acknowledgement from [Council] of our scope of work, nor any advice as to what aspects of the proposed work are defective or not acceptable . . .

The addition . . . of further items to the Second Notice to Fix and the inclusion of items on which you have made a determination cause us concern as we do not know from where [Council] will be coming from with any third Notice to Fix.

Requiring [Council] to modify the Second Notice to Fix without also directing them to respond to the Scope of Work and rectification work completed, could see further obfuscation and delays . . .

- 3.5 In response to the applicant's submission, I note that the territorial authority has accepted the draft determination and said that it will abide by my decision. Therefore I believe there is no need for me to direct the territorial authority to respond specifically to the applicant's scope of works as the need for this will be satisfied by the modified notice to fix.

4. Discussion

- 4.1 The notice to fix issued on 27 October 2006 included items not outlined in paragraph 6.3.1 of Determination 2006/86. In particular, I refer to:

- items still included but which the first determination considered did not need to be rectified as described in paragraph 2.6.1 above
- the generalised code contraventions described in paragraph 2.5 above.

- 4.2 With regard to the general contraventions, the additional Building Code clause breaches listed in the notice have not been specifically identified, nor have they been the subject of any previous submissions made by the territorial authority. Indeed, the territorial authority's submission to the Department of 15 June 2006, for the first determination, states:

As detailed in the NTR the areas of contravention relate to one clause of the Building Code, namely . . . E2 external moisture

I note that since making this submission, the territorial authority has added additional Building Code clauses about which it has concerns.

- 4.3 The territorial authority's latest submission of 5 February 2007, refers only to clauses B1, B2, E2, E3 and H1 and not to the additional C1, F4, F7, and G12 clauses set out in the notice to fix. I am puzzled by the apparent discrepancy, but I have treated the notice to fix as the more authoritative document because it is the notice to fix that has officially been sent to the owner.
- 4.4 Paragraph 2.4 of the notice to fix states that the "water management capacity" of the building has not been allowed for. I note that this assertion replaces that relating to the "ventilated cavity system" described in the Notice to Rectify. However, as I am of the opinion that it is still the "cavity" argument in a different form, my decision in determination 2006/86 is not altered by what is, in effect, merely a change of title.

- 4.5 I therefore believe the notice to fix was issued without proper regard to paragraphs 9.2 and 9.3 of the first determination. Section 188(2) of the Act states that determinations issued by the Department are binding on the parties. Neither of the parties in this case is entitled to ignore the explicit directions as to the notice to fix that I set out in paragraphs 9.2 and 9.3 of the first determination. If either party disagrees with the determination it may appeal to the District Court under section 208 of the Act.
- 4.6 I also express my concern as to the content of the notice to fix issued by the territorial authority. As that document points out, there are potentially major legal and financial consequences resulting from the failure to comply with a notice to fix. Accordingly, such a notice should accurately set out the non-compliant matters that a territorial authority requires an owner to fix to ensure that the building work is code-compliant. I have pointed out that the notice to fix in question contains duplications of contraventions and references to Building Code clause contraventions that are not in question. I would suggest that the territorial authority carefully considers its processes to better ensure the accuracy of the documents that it issues, especially those that so clearly emphasise to the owner the heavy monetary penalties for which the Act provides.

5. The decision

- 5.1 In accordance with section 188 of the Act, I hereby modify the territorial authority's notice to fix dated 26 October 2006 by:
- (a) deleting reference to the items listed in paragraph 2.6.1 of this determination (being items that Determination 2006/86 considered did not need to be rectified)
 - (b) correcting the duplication of the items described in paragraph 2.6.3 of this determination
 - (c) deleting reference to Code clauses B1,C1,E3,F4,F7,G12 and H1 in paragraph 1 of the notice (since no details of contravention of those Code clauses appear in the notice).

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 9 May 2007.

John Gardiner
Manager Determinations