

Determination 2008/52

Dispute about a Notice to Fix issued in respect of a house at 13 North Way, Oratia, Waitakere City (to be read in conjunction with determination 2007/122)

Applicant: J Dillon, acting through a legal adviser (“the applicant”)
Territorial authority: Waitakere City Council (“the territorial authority”)

1. The matter 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, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department. The matter for determination concerns the inclusion of certain items contained in a notice to fix issued by the territorial authority.
- 1.2 Certain building matters were described in an earlier determination concerning the same house, Determination 2007/122 (“the first determination”). That determination decided that, while the cladding and roofing of the building did not comply with clauses B2 and E2 of the Building Code, once certain identified faults were rectified, the building would be code-compliant.

2. Sequence of events

- 2.1 On 24 October 2007, the Department issued the first determination, which confirmed the territorial authority’s decision that the building did not comply with the Building Code. Paragraph 8.3 of the first determination stated:

Because the faults identified with the cladding and roofing systems occur in discrete areas, I am able to conclude that satisfactory rectification of the items outlined in paragraph 7.3.1 will result in the building remaining weathertight and in compliance with clauses B2 and E2.

- 2.2 The territorial authority subsequently issued a notice to fix dated 27 November 2007, under a covering letter of the same date, which provided a list of defects to be

remedied. The notice to fix included the defects identified in paragraph 7.3.1 of the first determination, together with an additional requirement to provide head flashings to the external joinery units.

- 2.3 The notice also required three other matters to be attended to (“the additional matters”) together with the provision and adoption of a “method to enable checking of the moisture content of the framing”.
- 2.4 The applicant’s legal adviser wrote to the territorial authority on 13 December 2007, querying the requirement for head flashings and stating that it was understood that the additional matters listed on the notice to fix had been dealt with. The territorial authority was also asked what method it would consider appropriate to check the moisture content of the framing.
- 2.5 The territorial authority wrote to the applicant’s legal adviser on 9 January 2008, stating that while the question of head flashings was not listed in paragraph 7.3.1 of the determination, the expert engaged by the Department (“the expert”) had mentioned their omission and they were also a requirement of the cladding manufacturer. In the territorial authority’s opinion, while the eaves projections helped protect the windows, the wind velocity affecting the site and the requirement to wash down the cladding would impact on the window head details. The territorial authority also accepted that the additional matters listed on the notice to fix had been dealt with. However, the territorial authority still required the issues to be covered off in writing. The territorial authority stated that the usual method to check the moisture content of the framing was to install moisture-detection probes.
- 2.6 The applicant’s legal adviser again wrote to the territorial authority on 11 February 2008, noting that the previous determination had not required the installation of head flashings. It was also pointed out that the additional matters set out in the notice to fix had been “covered off” in writing and that the installation of moisture meters could not be insisted upon to ensure the compliance of the building.
- 2.7 The territorial authority wrote to the applicant’s legal adviser on 26 February 2008, reiterating its view that the head flashings were required. While the territorial authority accepted that the additional matters set out on the notice to fix had been attended to, there were still some inspections outstanding. The installation of a moisture probe system would satisfy the ongoing need to monitor framing moisture content. The territorial authority would not be re-issuing the notice to fix and it required a proposal from a suitably qualified weathertightness expert as to the remedial work that was to be carried out.
- 2.8 The application for this determination was received on 7 April 2008.

3. The submissions

- 3.1 In a covering letter dated 2 April 2008, the applicant’s legal adviser noted that:
- the requirement that head flashings be installed exceeded the requirements of the Building Code and the requirements of the previous determination
 - the additional matters listed on the notice to fix had been dealt with
 - the Building Code did not require provision of an ongoing method to check the moisture content of framing.

The submission also queried the “excessively short” time limit to remedy the defects as set out on the notice to fix.

3.2 The applicant forwarded copies of the:

- notice to fix
- previous determination
- expert’s report relating to the previous determination
- correspondence with the territorial authority.

3.3 The territorial authority responded in a letter to the Department dated 16 May 2008. The territorial authority stated:

- While the determination did not specify that head flashings were required, the report of the expert noted that flashings were absent from the heads and jambs of the external joinery units. The territorial authority considered that the house is not watertight without flashings.
- The territorial authority accepted that additional matters set out on the notice to fix had been attended to.
- While the territorial authority did not require any specific method to be adopted regarding the detection of moisture, it was the territorial authority’s view that such detection is part of the required maintenance system for the cladding in question.

3.4 The draft determination addressing these matters was sent to the parties on 9 June 2008. Both parties accepted the draft without comment.

4. Discussion

4.1 I note that the territorial authority now only has concerns regarding the lack of head flashings to the exterior window joinery and the question of a moisture monitoring system.

4.2 The first determination found that rectification of the faults identified in that determination will result in the building being in compliance with clauses B2 and E2. In arriving at that decision, I gave consideration to the question of head flashings over the external joinery units and reached the conclusion that, in this instance and taking into account all the construction factors, they would not be required to ensure that the house was code-compliant. I am still of that opinion.

4.3 While I consider that monitoring moisture levels in untreated timber framing may be advisable, the first determination did not find that moisture monitoring was necessary for the treated timber framing of this house. I am still of that view and I observe that, in any event, the installation of a moisture monitoring system does not, by itself, assist a building to comply with the building code. However, in reaching this conclusion, I accept the territorial authority’s concerns that efficient on-going monitoring of potential moisture ingress into the building is a necessary part of the maintenance of the house.

- 4.4 Effective maintenance of building elements is important to ensure that a building has ongoing compliance with the clauses of the Building Code and this is the responsibility of the building owner. The Department has previously described these maintenance requirements, (for example, Determination 2007/60).
- 4.5 The specific maintenance for the building in question should include efficient ongoing moisture monitoring although it is not appropriate for me to specify a particular method in this case.
- 4.6 As set out in section 183 of the Act, the decision of the territorial authority regarding the notice to fix is suspended by the determination process. This would include the requirement that the notice be complied with by 27 May 2008. As I have determined that the territorial authority should issue a new notice to fix, such a notice should include a revised compliance date that gives the applicant a reasonable time in which to complete the remedial work.

5. The decision

- 5.1 In accordance with section 188 of the Act, I hereby determine that:
1. the building without head flashings installed over the exterior joinery fittings will comply with clauses E2 and B2 of the Building Code
 2. the territorial authority is to modify the notice to fix dated 27 November 2007. The modification should delete:
 - the three “additional matters” (items 2, 3, and 4)
 - the provision and adoption of a “method to enable checking of the moisture content of the framing” (item 5)
 - the words “and head” from bullet point two of the seven remaining matters (listed under item 1).

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 23 June 2008.

John Gardiner
Manager Determinations