

Determination 2008/30

The issuing of a code compliance certificate for a multi-storey apartment building at 1 Victoria Street, Whitianga (“the First Light Apartments”)



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, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department.
- 1.2 The applicants are the prospective proprietors of eight of the individual units contained in the building, who have yet to finally settle the sale and purchase agreements (“the applicants”), all of whom are acting through the same firm of barristers and solicitors (“the applicants’ legal advisers”).
- 1.3 The other parties are:
 - the Thames-Coromandel District Council (“the territorial authority”), acting through a firm of barristers and solicitors (“the territorial authority’s legal advisers”)

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

- Marina Holdings Ltd, the current owner of the building (“the developer”), acting through a firm of barristers and solicitors (“the developer’s legal advisers”).

The building designer and the builder have been included as persons with an interest in this determination. A further prospective proprietor requested a copy of the first draft determination, which was forwarded to him. However, I have not received any further comments from that particular proprietor.

1.4 This determination arises from the decision of the territorial authority to issue a code compliance certificate for a multi-storey apartment building.

1.5 The application for a determination relates to whether:

- the territorial authority’s decision to issue a code compliance certificate was correct
- a notice to fix should be issued requiring the current owner to ensure that the building complies with the Building Code² (First Schedule, Building Regulations 1992).

In order to determine the first of these two matters, I have discussed it in terms of:

- the classified use of the building
- the compliance of the building with the building consent.

1.6 The applicants have submitted that one of the matters I should consider is whether the building complies with the Building Code. However, the first step I am required to undertake is to consider whether the territorial authority had reasonable grounds to be satisfied the building complied with building consent. When considering compliance of the building with the building consent there will be instances where the consent documentation lacks all the details required to establish compliance with the Building Code. In these instances, the second step is to consider whether these aspects of the building, that are not detailed in the building consent documentation, comply with the Building Code. The basis for referring to the Building Code in the second step is section 49(1). Such details could only have been included in the building consent documentation if the territorial authority was satisfied on reasonable grounds that the provisions of the Building Code would have been met if the details were properly completed in accordance with the plans and specifications.

1.7 In making my decision, I have considered the submissions of the parties, the report of an independent expert (“the expert”) commissioned by the Department to advise on this dispute, and the other evidence in this matter.

1.8 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. The building

2.1 The ownership of the building in question is proposed to be in accordance with the Unit Titles Act 1972. The building has four levels as follows:

- The basement, containing car parks, a foyer and laundry.

² The Building Code is available from the Department’s website at www.dbh.govt.nz.

- Levels 1 and 2, each containing five residential units.
 - Level 3, containing four residential units.
- 2.2 The building is situated on a level site that is adjacent to a marina and is in medium wind zone and a severe sea spray zone for the purposes of NZS 3604³. The basement is generally constructed with a concrete floor and concrete block walls. The upper levels are steel-framed, with concrete floors poured over precast concrete formwork, timber-framed external walls, and proprietary fire-rated party walls made of roll-formed galvanised steel shells filled with aerated concrete. The low pitched roof has minimal eaves and verge projections and is clad with a 4mm thick membrane that discharges into domed outlets. The building is reasonably complex in shape and form, with some circular formed elements on the upper levels.
- 2.3 The offsets resulting from the decreased dimensional footprint of each upper level form balconies or walkways. Levels 1 and 2 each have one balcony and one continuous walkway and level 3 has one continuous walkway. The concrete slabs forming the balcony and walkway decks are finished with a torched-on bituminous membrane, and hardwood close-boarded decking on timber framing is fixed over the membrane. The balconies and walkways are generally protected by glazed stainless steel balustrades but there are also some timber-framed monolithic-clad balconies at some locations. There are also horizontal projecting fire baffles and fascias that provide some weather protection to the external joinery units.
- 2.4 The external timber-framed walls of the building are clad with 9mm thick fibre-cement sheets that are finished with textured plaster and paint system. The sheets are fixed over timber battens, to form a 50mm deep cavity behind the sheets. While an amended set of architectural plans does show the revised cladding, I am not aware if this change and the associated detail amendments have been recorded by the territorial authority. I have referred to this change in more detail within the summary of the expert's report.
- 2.5 The cladding applicator has issued a producer statement, dated 30 January 2006, for the cladding system. However, I note that the date of this document pre-dates the time when the cladding was installed.

3. Background

- 3.1 The territorial authority issued a land use consent "to construct a proposed travellers accommodation facility" on 30 July 2004. This consent stated that "the residential use of the complex shall operate only as travellers' accommodation".
- 3.2 The developer wrote to the territorial authority on 30 May 2005, stating that, following an Environment Court ruling⁴, in regard to the building in question and two other developments, it was intended "*that each unit identified in the land and building consents as "Travelers' (sic) Accommodation" might be used for "Travelers' (sic) Accommodation" or permanent residential accommodation, or any other permitted use under the relevant zone*".
- 3.3 The territorial authority issued an amended land use consent on 29 September 2004 for the building that confirmed that either use, whether as travellers' accommodation or as permanent accommodation, was a permitted activity.

³ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

⁴ *First Light Holdings Limited v Thames-Coromandel District Council* (A130/2004)

- 3.4 The applicant applied for a building consent on 5 April 2005. Included in the consent application documents was a fire report prepared on behalf of the developer (“the original fire report”).
- 3.5 The building consent documentation was reviewed by the New Zealand Fire Service (“the NZFS”). Following this review, some amendments relating to the fire design were made to the documentation by the developer’s fire design consultants who had prepared the initial fire report.
- 3.6 The territorial authority issued building consent No. ABA/2005/461 on 19 January 2006. The building description set out on the consent was “Commercial apartments x 14 & pool”.
- 3.7 I note that two complete sets of documents existed at the time that the consent was issued. The first of these (“set one”), which was stamped and dated by the territorial authority, showed the external cladding to be 75mm aerated autoclaved concrete panels finished with a selected coating. A second set of documents (“set two”), which was not stamped or dated by the territorial authority, and only contained an anonymous handwritten comment, was subsequently produced. Set two showed the external cladding as texture-finished fibre-cement sheet. It was only when the hearing (described in paragraph 8.3) took place that I became aware that set two existed and formed part of the consented documents (refer also to paragraph 8.3.5).
- 3.8 The building was duly erected, during which time the territorial authority inspected and passed various stages of the construction.
- 3.9 Following a final inspection on 1 February 2007, the territorial authority issued a code compliance certificate dated 4 April 2007 for building consent No. ABA/2005/461, describing the building as “Commercial Apartments x 14”. The certificate noted that the territorial authority was satisfied on reasonable grounds that the building work complied with the building consent.
- 3.10 Once the building had been erected it was to be subdivided by the deposit of a unit plan and a body corporate was to be created. However, to date, this has not been completed as the prospective proprietors have yet to sign their individual sale and purchase agreements. I note that in accordance with section 364, a code compliance certificate is normally required before a residential property developer can complete a sale of a household unit.
- 3.11 The Department received the application for a determination on 11 July 2007.
- 3.12 The developer faxed the territorial authority’s legal advisors on 17 July 2007 stating that the building “*is an apartment building and not a hotel or motel and is intended to be used as a residential apartment dwelling and not as traveller accommodation for the general public*”. Accordingly, the building only needed to comply with the current sleeping residential (SR) purpose group.
- 3.13 The NZFS wrote to the territorial authority on 24 July 2007, noting that it believed the building did not comply with the Act. In particular it noted that
- “information obtained since construction, including the body corporate rules, now indicate an intention to use the building for traveller’s accommodation [and that] if the building were used for traveller’s accommodation it would be classed as an SA purpose group.”
- Therefore, the NZFS said it had re-evaluated the building under that group and had noted the deficiencies that were set out in an attachment to its letter.

4 The reports prepared on behalf of the parties

4.1 Various reports were prepared by consultants engaged by the parties. While these are detailed and informative, I have mainly based my findings on the report of the independent expert commissioned by the Department. Accordingly, I have listed only the main points set out in the reports provided on behalf of the parties.

4.2 The applicants' weathertightness report

4.2.1 The applicants engaged the services of a firm of consultants to investigate the weathertightness of the building and other related issues and to produce a report on these matters. A report ("the applicants' weathertightness report") dated 11 July 2007 was issued following a site visit undertaken on 6 July 2007. The report listed various items that were considered to be defective and I summarise these as being:

- the external joinery
- the decks
- the walkways
- the fire baffles
- the wing walls
- the storage lockers
- the structural steelwork in the basement
- some additional concerns.

4.2.2 The report also noted that there were "many locations where external moisture has penetrated the external cladding and around waterproof membranes". In addition, the cavity behind the external cladding had no provision for drainage or ventilation.

4.3 The applicant's fire safety reports

4.3.1 The applicants engaged a firm of fire safety consultants to appraise the building for compliance with the fire safety requirements of the Building Code for a building used for "Travellers Accommodation", which is within the definition of an SA purpose group. The applicants' consultants inspected the building on 2 July 2007 and produced a report ("the applicants' first fire safety report"), issue 2 of which was dated 5 July 2007. In terms of the SA purpose group, the following did not comply:

- The fire alarm system.
- The internal safe path stair.
- The safe path open walkway.
- The lobby doors.
- The service ducts.

The report also noted the following:

- That fire hose reels should be installed.
- The fire walls of the units abutting the walkways should be inspected.
- The penetrations, and the like, required inspection.

- The plans should be reviewed to determine compliance.
- Certain disabled access requirements were not met.

Finally, the report noted that while the non-compliance issues were common to both the SA and SR purpose groups, certain additional fire safety elements not included above, were required for the building to comply with SR purpose group requirements.

4.3.2 The applicants also engaged the fire safety consultants to ascertain whether the fire safety design information as consented was applied to the “as-built” building. The consultants provided a report (“the applicants’ second fire safety report”) dated 14 August 2007 that listed the reviewed documentation and commented on observations made during a site visit that took place on 2 July 2007. I summarise the main matters raised in the report as follows:

- The original fire report (see paragraph 3.4) was compiled for a residential unit title apartment complex (SR purpose group) and the NZFS had first reviewed the report on this basis (refer to paragraph 3.5).
- There were alterations, non-complying items, and omissions regarding to the means of escape.
- The ducts and wall penetrations do not comply with the original fire report.
- The fire alarm system as installed does not appear to be consistent with the type of system consented to by the territorial authority.

4.4 The territorial authority’s reports

4.4.1 The territorial authority engaged the services of a firm of consultants to complete a moisture ingress thermal imaging report for the building and also provide a response to the applicants’ weathertightness report. The consultants inspected the building on 30 July 2007, rechecked it again on 26 August 2007, and produced a report (“the territorial authority’s first report”). The report noted that the units had been unoccupied and unventilated since February 2007 and went on to list findings against each of the items raised in the applicants’ weathertightness report. Some of these items were accepted but the remainder were not, and recommendations were made as how to rectify the accepted items. The report concluded that, while there were some minor concerns regarding moisture ingress, there were no major weathertightness or durability concerns.

4.4.2 The territorial authority’s consultant also provided a second report (“the territorial authority’s second report”) to the developer, based on site visits conducted on 16 August 2007 and 29 August 2007, and also, in part, on the first report. This report responded to the two fire reports prepared for the applicants, the territorial authority’s fire consultants’ response and the applicants’ weathertightness report. It was considered that the survey undertaken by the applicants’ fire safety consultants was, in many ways invalid, as it had used the wrong (SA) purpose group. The territorial authority’s second report also set out the remedial work that had been undertaken and described those issues where it was considered that no action was required. It concluded with the statement that as from 26 August 2007, “*with the exception of the capping of the deck division walls all other work is complete*”.

4.5 The response to the reports

4.5.1 The territorial authority's fire consultant wrote to the developer on 24 July 2007, in response to queries raised by the developer regarding the applicants' first fire safety report. The consultant noted that, while the original design was based on C/AS1, this document was not the only means whereby code-compliance can be achieved. The consultant addressed the queries that were set out under the following headings:

- Service ducts.
- Ground floor lobby.
- Basement swing doors.

4.5.2 In a fax to the developer dated 6 August 2007, the builder noted the various reports that had been received, and fully described the actions taken to remedy those items, raised in the reports, that were considered to be relevant.

4.5.3 In response to the applicants' weathertightness report (see paragraph 4.2.1), the project architect wrote to the developer on 8 August 2007, noting that:

- due to the lack of performance data concerning the "Hebel" cladding, an alternative system had been substituted
- a drained cavity is not required to the edge of the deck
- the "floating" timber deck complies with section E2 of the Building Code Handbook
- the ambient air moisture levels would not be sufficient to cause damage to the exterior walls, which are non-load-bearing and are constructed with H3.1 timber
- it had rained significantly on the days leading up to the time of the applicants' weathertightness consultants' inspection
- the structural steel problems that were noted were of concern and would be attended to.

5. The submissions from the parties

5.1 The applicants' submission

5.1.1 The application for a determination, dated 31 July 2007, included submissions that described the dispute for determination and listed the items that were considered appropriate to be included in a notice to fix. These listed items can be summarised as follows:

- The fire design.
- Control of internal fire spread.
- Fire ratings to penetrations.
- Access requirements.
- Weathertightness performance – exterior cladding.

- The apartments do not comply with the fire safety clauses of C/AS1 for a building used as “Travellers’ Accommodation”, which is in within the definition of a SA purpose group.
- The apartments did not comply with the fire safety clauses of C/AS1 for residential apartments, which is within the definition of a SR purpose group.

The submission also noted that the applicants were relying on the various reports provided by the applicants’ consultants.

5.1.2 The applicants’ legal advisers noted in an email to the Department on 14 August 2007 that the code compliance certificate permits commercial usage of all the 14 apartments. All the potential owners had purchased their apartments on the basis that these could be used for short-term accommodation.

5.1.3 The applicants forwarded copies of:

- the plans and specifications
- the building consent documentation
- the code compliance certificate
- some of the territorial authority’s inspection documentation
- the sale and purchase agreement, including the proposed body corporate rules
- the letting agreement
- the applicants’ weathertightness report
- the applicants’ two fire safety reports
- the correspondence between the developer and the territorial authority
- a set of photographs showing aspects of the building.

5.2 The territorial authority’s submission

5.2.1 In a covering letter to its submission dated 20 August 2007, the territorial authority stated that the building consent application did not seek approval for a hotel, motel or other premises providing accommodation for the public. Accordingly the building did not have to comply with the requirements of Schedule 2 of the Act and did not fall within the SA purpose group. The territorial authority had engaged a consultant to report on the building and the builder had undertaken to rectify any faulty building work by 17 August 2007. The territorial authority considered that the code compliance certificate had been correctly issued and there was no need to issue a notice to fix.

5.2.2 The territorial authority’s submission set out the background to the matters in dispute and stated that the building was appropriately classified within the SR use category. It was noted that the applicants’ fire safety consultant’s first report had assessed the building as an SA purpose group rather than a SR purpose group. The submission then responded to the fire-safety issues raised in both the applicants’ first and second fire design reports. The territorial authority also commented on the issues raised in the applicants’ weathertightness reports and stated that the territorial authority had fulfilled its obligations in regard to inspections and the issuing of a code compliance certificate. A territorial authority could not be expected to identify every defect in building work during a final inspection. Nor did the Act require a territorial

authority to guarantee that building work is free from defects when it issued a code compliance certificate.

5.2.3 The territorial authority forwarded copies of:

- some resource consent documentation, including the land use consent
- the decision in the *First Light Holdings Ltd* case
- the building consent documentation
- the subdivision consent
- the code compliance certificate
- the developer's fire consultant's reports
- some of the territorial authority's inspection documentation
- the proposed body corporate rules
- the letting agreement
- both of the territorial authority's reports
- the applicants' second fire safety report
- the correspondence between the parties and other involved organisations
- various producer statements, certificates and technical data.

5.3 The Developer's submission

5.3.1 The developer's submission set out the background to the dispute and stated that the developer supported the submissions made on behalf of the territorial authority. The submission listed some of the matters raised by the determination application and these were:

- The building consent and code compliance certificate were properly issued on the basis that the apartments were categorised by the purpose group SR.
- The issues raised in the applicant's two fire design reports had been addressed.
- The rectification recommendations set out in the territorial authority's reports had been addressed. I note that this occurred after the code compliance certificate was issued.

The developer concluded that the applicants' weathertightness report was unreliable as it was based on an inspection made following a severe storm. The apartments met the relevant fire safety standards of the SR purpose group, which is consistent with the consent and code compliance certificate. Therefore, the code compliance certificate, which should not be "revoked", was correctly issued. Accordingly, there was no requirement for a notice to fix be issued.

5.4 The draft determinations

5.4.1 I issued a draft determination and forwarded copies to the parties on 24 October 2007. The applicants accepted the draft determination. However, neither the territorial authority nor the developer accepted the draft, and both these parties requested a hearing. This duly took place on 14 and 15 February 2008, as described in paragraph 8.

5.4.2 Following the hearing, I produced a second draft determination, copies of which were forwarded to the parties on 1 April 2008. The territorial authority accepted the second draft without further comment.

5.4.3 The developer accepted the draft but subject to what were described as non-contentious amendments, which were listed in a submission to the Department dated 14 April 2008. In summary, the submission noted:

- The two-tier test proposed in paragraph 6.1 was confusing.
- The “second step” stated by the Department in paragraph 6.1 is misconceived and its adoption may have enabled the Department to reach the conclusions set out in paragraph 11.4 without assessing what decisions or processes were adopted by the territorial authority with regard to those issues.
- If the Department is clear that the matters listed in paragraph 11.3 were so evident from an inspection on site that no reasonable territorial authority could have overlooked them in issuing a code compliance certificate, then this fact should be clearly stated.
- The use of the wording “could have” or “may have” in paragraphs 8.3.6 and 10.3 do not clearly establish whether certain matters were overlooked or what the matters were. If the Department considers that the territorial authority unreasonably issued a code compliance certificate because certain issues were overlooked, then the Department should specifically state this, and identify the issues.

5.4.4 The applicants also accepted the second draft determination subject to the following “non-contentious” matters that were noted in emails sent on 8 and 16 April 2008:

- The lack of reference to the variation in the riser height of the common stairs and to the swing of the doors to the landings and stair wells.
- Agreement in principle with the developer’s contentions set out in the third and fourth bullet points of paragraph 5.4.3, and noting that the listed defects were patent and should have been noted by the territorial authority before it issued the code compliance certificate.

5.4.5 I have taken note of the comments made on behalf of the applicants and the developer and have amended this final determination as I consider to be appropriate.

6. The legislation

6.1 The following section of the Act is relevant to this determination:

94 Matters for consideration by building consent authority in deciding issue of a code compliance certificate

(1) A building consent authority must issue a code compliance certificate if it is satisfied, on reasonable grounds, --

(a) that the building work complies with the building consent...

6.2 The following provisions of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations are relevant to this determination:

6 Uses of buildings for purposes of regulation 5

- (1) For the purposes of regulation 5, every building or part of a building has a use specified in the table in Schedule 2.
- (2) A building or part of a building has a use in column 1 of the table if (taking into account the primary group for whom it was constructed, and no other users of the building or part) the building or part is only or mainly a space, or it is a dwelling, of the kind described opposite that use in column 2 of the table.

Schedule 2: Uses of all or parts of buildings

Uses related to sleeping activities		
Use	Spaces or dwellings	Examples
SC (Sleeping Care)	spaces in which people are provided with special care or treatment required because of age, or mental or physical limitations	hospitals, or care institutions for the aged, children, or people with disabilities
SD (Sleeping Detention)	spaces in which people are detained or physically restrained	care institutions for the aged or children and with physical restraint or detention, hospitals with physical restraint or with detention quarters, detention quarters in police stations, prisons
SA (Sleeping Accommodation)	spaces providing transient accommodation, or where limited assistance or care is provided for people	motels, hotels, hostels, boarding houses, clubs (residential), boarding schools, dormitories, halls, wharehousi
SR (Sleeping Residential)	attached and multi-unit residential dwellings, including household units attached to spaces or dwellings with the same or other uses, such as caretakers' flats, and residential accommodation above a shop	multi-unit dwellings, flats, or apartments
IA (Intermittent Low)	spaces for intermittent occupation or providing intermittently used support functions—low fire load	car parks, garages, carports, enclosed corridors, unstaffed kitchens or laundries, lift shafts, locker rooms, linen rooms, open balconies, stairways (within the open path) ⁵ , toilets and amenities, and service rooms incorporating machinery or equipment not using solid-fuel, gas, or petroleum products as an energy source

⁵ Open path: That part of an *escape route* (including dead ends) not protected by *fire or smoke separations*, and which terminates at a *final exit* or *exitway*.

7. The expert's report

- 7.1 As mentioned in paragraph 1.7, I engaged an independent expert who is an engineer, and a member of the New Zealand Institute of Building Surveyors, to provide an assessment of the condition of those building elements that are subject to the determination, including some that relate to fire safety.
- 7.2 The expert visited the site on 13 and 14 September 2007 and produced a report that was completed by October 2007. In the first draft determination I summarised the expert's findings as set out in his report. However, as a result of the discussions that took place between the parties at the subsequent technical meeting and the hearing, the issues raised by the expert have been refined and are summarised in paragraphs 10.3 and 10.5.
- 7.3 The expert also noted that as-built details used by the builder differ in some respects from the details shown in the building consent documents. In general, the as-built details relate to the cladding, the fire baffles, the decks and balconies, and the balustrades.

8 The hearing and technical meeting

- 8.1 The territorial authority requested a hearing, which was held on 14 and 15 February 2008 before me. I was accompanied by a Referee engaged by the Chief Executive under section 187(2) of the Building Act 2004. Prior to the commencement of the hearing in Auckland, a technical meeting, including a visit to the building site, was held on 13 February 2008.

8.2 The technical meeting

- 8.2.1 The meeting was attended by:
- the applicants represented by two legal advisors accompanied by three consultants, one of whom was a fire-safety expert
 - the territorial authority represented by two of its officers and a legal adviser accompanied by a consultant
 - the developer represented by a legal advisor accompanied by the builder and a subcontractor
 - the building designer appearing on his own behalf
 - four other staff members of the Department accompanied by the Department's expert.

All the parties and the building designer spoke and called evidence at the meeting. The evidence from those present enabled me to amplify or clarify various matters of fact that were of assistance to me and the parties at the subsequent formal hearing.

- 8.2.2 I summarise the applicant's presentation as follows:

- It was submitted that the two major issues related to fire-safety and the cladding. It was suggested that the cladding was a radical change from the

consented plans and that the additional fire-safety items were not consented to or inspected.

- One of the applicant's consultants stated that if there were any doubts at all about code compliance, the building would not be compliant. The consultant had concerns about the drainage and ventilation aspects of the cladding cavity and the window installation. There was evidence of moisture ingress into the fascia of the fire baffle, and the plans for the building differed from the work that had been carried out.
- The fire-safety consultant raised concerns regarding the swing direction of some fire doors, the glazing of bedroom fire windows, the non-fire-rated ducts and stairwells, and the lack of fire stopping to some wall penetrations.

8.2.3 The territorial authority submitted that the initial building reports were of a "light" nature, and referred me to the detailed report prepared by the territorial authority's consultant. The Department was urged to have an open mind regarding the issues and consider how the building had been constructed. The territorial authority also provided a summary of the compliance matters in dispute to assist the subsequent consultants' discussions.

8.2.4 The developer submitted that it was common ground that the consultants could assist the Department. The builder noted that the fire window glazing fault was the result of an ordering error and had been rectified. The fire doors in question had been omitted from the architectural drawings and the extra fire doors could be removed and the openings filled in. Signs had been provided in the basement and stair cupboards and the Speedwall linings removed the necessity to fire rate the socket penetrations.

8.2.5 The architect noted that he observed the work on a fortnightly interval basis.

8.2.6 The Department's expert and the parties' consultants discussed each of the items set out on the summary provided by the territorial authority. While final consensus was not achieved, the discussions formed the basis for the conclusions that I have reached as set out in paragraph 10.

8.2.7 All the participants at the meeting visited the building to examine and discuss the elements as summarised, and the builder described various aspects of the construction. In particular, the issues relating to fire safety, deck drainage, and the structural steel were considered in detail. The variation in the heights of the stair risers was also discussed and while subsequent comment was made regarding this matter at the hearing and technical meeting, it did not feature as an item of major concern.

8.3 The hearing

8.3.1 The hearing, which took place over two days, was attended by:

- the applicants represented by two legal advisors accompanied by three consultants, one of whom was a fire-safety expert
- the territorial authority represented by two of its officers and a legal adviser accompanied by a consultant
- the developer represented by a legal advisor accompanied by the builder
- the building designer appearing on his own behalf

- the developer's fire consultant
- four other staff members of the Department accompanied by the Department's expert and a legal adviser.

All the parties, the architect, and the builder spoke at the hearing. The evidence from those present enabled me to amplify or clarify various matters of fact and was of assistance to me in preparing the second draft determination.

- 8.3.2 The applicants' consultant noted that the window junctions, the joints and other cladding details were different from the latest set of consent plans.
- 8.3.3 The developer's fire consultant stated that his last involvement in the fire design was to comment on the Fire Service report. The consultant accepted that the additional fire doors and the swing of other fire doors were departures from the consent drawings and were either not code-compliant or unnecessary. While the cupboards on the stair landings were a departure, they were management, rather than compliance issues. As the maximum occupancy of the basement at any one time was 13, it is not far removed from the requirements of the Acceptable Solution. While the fire report made reference to Hebel cladding, the consultant was of the opinion that the change of cladding would not have affected the report. The consultant had only described what fire-rating were applicable, it being up to the designer to apply the appropriate linings.
- 8.3.4 The applicants' fire consultant accepted that the risk concerning the basement egress was low. However, the swing of the basement fire doors did not meet the requirements of the Acceptable Solution and there were concerns regarding the landing cupboards.
- 8.3.5 Considerable discussion took place regarding which set of documents the territorial authority had in its possession and therefore considered during its approval of the building consent (this is discussed in paragraph 3.7). The territorial authority described how, following a thorough research of its records the previous night; it had ascertained that set two formed part of the consented documents.
- 8.3.6 A territorial authority noted that, in order to confirm whether the building as constructed complied with the consent, its officials check from the plans that are on site. It was accepted by the territorial authority that it could have missed the fire-safety on-site changes.
- 8.3.7 The territorial authority's consultant confirmed that both the building in question and a similar local apartment building being constructed at approximately the same time had references to "First Light".
- 8.3.8 The Department's expert listed those items that were still considered to be non-compliant or that differed from the consented drawings or from the respective manufacturers' or product appraisal recommendations. He also noted that changes and additional maintenance had taken place since he and the other consultants had carried out their inspections. It was accepted that the 50mm cavity enhanced the performance of the cladding. It was also noted that while the specification described the alternative steel protection coatings it did not describe the locations where these were to be applied.
- 8.3.9 The applicants' consultant agreed in general with the expert's opinion, however there were additional concerns in relation to the column drainage and ventilation and the

wing wall saddle flashings. The consultant did not consider that the structural engineer's statements covered clause B2.

8.3.10 The territorial authority's consultant did not agree with the majority of the conclusions reached by the other two consultants and also noted that a guarantee had been provided for the finishes applied to the structural steelwork. The consultant had fully inspected the cladding and only one section was not passed at that time.

8.3.11 I summarise the applicants' closing remarks as follows:

- The applicants' position had not shifted as claimed by the other parties. This was because non-compliance with the consent equated to the non-compliance of the building.
- It was conceded that the set two documents were received by the territorial authority prior to it issuing the building consent. However, the lack of dates and stamps on the revised set was of concern.
- The technical discussions showed that the drawings and technical details had not been complied with, as there were significant departures from the plans such as the cladding jointing and window details. These departures should have been detailed on additional drawings.
- There were serious issues of non-compliance when the code compliance certificate was issued and these related to the fire windows, the structural steelwork, and the fire protection provisions.
- There are reasonable grounds to show that the building consent and the code compliance certificate are not compatible and compliance with the Building Code did not exist when the latter was issued.
- The Department was invited to reverse the code compliance certificate and require the territorial authority to consider the issuing of a notice to fix.

8.3.12 The territorial authority raised four main issues in its closing statements as follows:

- The set two plans were received by the territorial authority prior to the issue of the building consent.
- The comments from the consultants were basically conjecture and the builder was prepared to carry out destructive investigations. The building inspector has done his job properly and the cladding was working correctly.
- The problems relating to the structural steelwork were maintenance issues. The engineers had issued a producer statement and, while there is no reference to Clause B2, this is implicit when considering Clause B1. The territorial authority's consultant had explained the durability of the paint systems, which had been accepted by the building inspector. The steelwork problems could be rectified and the work complied with the building consent plans.
- The developer's fire consultants' report was provided some 3 months after the code compliance certificate was issued. However, if it had been provided prior to this event, it would have drawn the territorial authority's attention to the noted defects. The fire code was open to interpretation and there was only a small number of defects.

Apart from these four issues, the outstanding items were of a minor nature and could be rectified as maintenance issues. In conclusion, it was submitted that it was appropriate for the territorial authority to have issued the code compliance certificate.

8.3.13 The developer raised the following points in a closing submission:

- The wording of the 2004 Act requires that a building consent authority must issue a code compliance certificate if it is satisfied on reasonable grounds. The issue facing the Department was one of review and it must keep in mind the purpose of the Act. The Department should take into account the commercial implications resulting from the withdrawal of a code compliance certificate and the damage and consequences flowing from such an action. A code compliance certificate should only be withdrawn in extreme circumstances.
- The territorial authority was entitled to rely on producer statements and there was no suggestion that the building inspections were carried out negligently.
- This was not a case involving an unsafe or unsanitary or unduly dangerous building and the Department should leave the code compliance certificate in place and settle the issues by issuing a notice to fix.
- The Department might well conclude that the hearing was being used for a collateral purpose, other than the question of safe buildings and habitations for people in accordance with the Act.

8.3.14 The building designer noted that fire glass had been installed in the bedroom windows but it did not meet the appropriate insulation requirements, which were difficult to identify. While the building in question was subject to practical completion, it had not achieved final completion and the completion list of items paralleled the determination issues. The column distress could be caused by the H3 treated timber still being wet and the wing wall issues were due to the shrinkage of the timber framing.

8.3.15 The builder stated that he had been in control of the whole building process and was prepared to deal with any outstanding issues. Documents could differ during the construction process, and in the case of a smaller territorial authority, changes were carried out by agreement on site.

8.3.16 I have carefully considered the opinions given by all the legal advisors, the technical consultants, and the Department's expert as regards the matters to be determined, and the conclusions that I have reached are set out in paragraph 10.

9. The classified use of the building

9.1 Discussion

9.1.1 At the hearing described in paragraph 8.3, none of the parties disputed that the specified use of the building is SR. However, I consider that the discussion that was provided on this matter in the first draft determination that was provided to the parties prior to the hearing will be of assistance to those involved in the construction of similar buildings.

9.1.2 Section 94(1) requires a territorial authority to issue a code compliance certificate if it is satisfied on reasonable grounds that the building work complies with the building consent. Accordingly, I was of the opinion that, in order to determine the

specified use of the building against which the code compliance certificate was issued, I had to investigate the grounds on which the building consent was issued.

- 9.1.3 Section 49 requires the territorial authority to grant a building consent if it is satisfied on reasonable grounds that the provision of the Building Code would be met “if the building work were properly completed in accordance with the plans and specifications that accompanied the application”.

The definition of “plans and specifications” in section 7 requires the use of a building to be described in those documents. However, I had not been able to find a recognised use description on the documents provided to me for the building in question.

- 9.1.4 I therefore needed to establish the specified use of the building that was implicit in the building consent application and therefore against which a code compliance certificate was issued. The two alternatives are SR as argued by the territorial authority and the developer, and SA as argued by the applicants.

Evidence implying intent for an SR Building

- 9.1.5 Along with the consent application, the territorial authority received the developer’s fire design consultants’ report clearly stating that the building has been assessed as being within the SR purpose group as regards fire safety. I note however, that the specification of SR was in the context of the purpose group in the Acceptable Solution C/AS1. However these groups are very similar to those described in the Change of Use Regulations.

- 9.1.6 The design of the building itself indicated to me that it was intended to be a building with a classified use complying with the SR purpose group. For example, there was no obvious allowance for the facilities required for persons with disabilities such as appropriate access paths, sanitary facilities and car parks. Nor was there provision for a check-in lobby or other facilities which would imply travellers’ accommodation.

- 9.1.7 I also note, as set out in paragraph 3.13, the NZFS believed that the building, based on the classification of the SR purpose group, did comply with the Act but would not if it was classified SA.

- 9.1.8 Neither the building consent application Form 3, nor the building consent Form 4, (Building (Forms) Regulations 2004) requires the use of a proposed building to be set out on the face of these documents, other than in the case of an alteration to an existing building.

Evidence implying intent for an SA Building

- 9.1.9 The “description” reference on both the building consent and the code compliance certificate to “Commercial apartments” raised doubt as what the territorial authority considered to be the consented “use” of the building.

- 9.1.10 As accepted by the territorial authority, the term “Commercial apartments” is not a term defined in the Act. The term “Commercial” is defined in clause A1 “Classified Uses” of the Building Regulations. The definition states that the term “*applies to a building or use in which any natural resources, goods, services, or money are either developed, sold, exchanged or stored*”. Neither this description nor the examples set out in the clause appear to include apartments of any kind. However, the territorial

authority's use of the term "commercial" as distinct from "residential" led me to believe that the territorial authority was at least aware of the possibility that the apartments were not all residential.

- 9.1.11 I noted that the application for a building consent described the building work as being "to construct new apartment building" and also stated that there was a new use described as "apartments". Again the terms "apartment" or "apartments" are not specifically defined in the Act.
- 9.1.12 In the resource consent process needed for the building (as described in paragraphs 3.1 to 3.3) the territorial authority ultimately issued a revised land use consent that allowed for both travellers' accommodation and permanent residential accommodation usage within the building. At no time during the building consent and compliance processes was either of the uses specifically described or excluded.
- 9.1.13 I had seen the proposed Body Corporate Rules, which are attached to the "Agreement for Sale and Purchase" between the developers and the prospective apartment owners. While, as is the case for the resource consents, this document is not related directly to the Act, it provides an insight into the intended uses of the building. Rule 2.1(m)(i) states that "*use of a unit as part of the Letting Service ...shall, subject to the Rules be a permitted use of the building*" Rule 2.2(h) states "[w]hile the resource consent dated 2004 shall apply and shall not be varied the property shall be used only as travellers' accommodation in accordance with the definition in section 9 of the Thames Coromandel Proposed District Plan". The term "travellers' accommodation service" is also defined in the agreement.
- 9.1.14 I noted that the submission made on behalf of the territorial authority refers to the standard body corporate rules from Schedules 2 and 3 of the Unit Titles Act being adopted by the developer. However, the Body Corporate rules for the units as supplied by the applicants, clearly state that Schedules 2 and 3 are repealed and the specific rules, which I referred to in the previous paragraph, are substituted.
- 9.1.15 I also observed that some building developers have been known to develop a building for residential use, and immediately upon completion, change the use to travellers' accommodation. In the change of use process they argue that the sacrifice to achieve code compliance for fire egress and disabled access is disproportionate to the benefits thereby attempting to by-pass the need to achieve full code compliance.

Conclusion as to use

- 9.1.16 Having considered all the contradictory information, I came to the conclusion that the use of the building was intended to be SR. I based this conclusion on the fact that the material submitted relating to building matters (as opposed to resource management and unit title matters), such as the fire report and the fundamental design itself are unequivocally SR. Apart from the use of the undefined term "commercial" by the territorial authority on the code compliance certificate, the other information provided concerns matters regulated by other Acts. I fully understood how the applicants could be confused as to the intended use of the building.
- 9.1.17 In order to remove this confusion I am of the opinion that the territorial authority should clearly state on all relevant documentation that the specified use is SR (sleeping residential).

10. Compliance with the building consent

- 10.1 As previously described, in accordance with the requirements of section 94(1)(a) of the Act, the territorial authority can only issue a code compliance certificate if it is satisfied, on reasonable grounds, that the building work complies with the building consent.
- 10.2 Both the developer and the territorial authority submitted that this determination should be confined to whether the territorial authority was satisfied on reasonable grounds the building work complied with the building consent at the time the code compliance certificate was issued. I agree with the approach put forward by the developer and the territorial authority but, as set out in paragraph 1.6, I have accepted that there are some circumstances where I need also to consider the code-compliance of the building as well as its compliance with the consent.
- 10.3 Both the expert and the applicants' consultant are of the opinion that there are departures from the set two documents, especially as regards the jointing of the cladding, the window details and the fire safety of the building. I accept these opinions and also note that the territorial authority has acknowledged that it may have overlooked some of the changes made to the fire safety features.
- 10.4 Accordingly, I have reached the conclusion that, as the building work as constructed differs in several significant respects from the set two documents, it does not comply with the building consent. In doing so, I have taken into account that the set two documents were provided to the territorial authority prior to the issuing of the consent. However, I do share the applicants' concerns as to the lack of dates and approval stamps on these particular documents. I have found that there are some significant differences between the building work as constructed compared with the building work included in the consent. I am of the opinion that this finding alone gives me sufficient grounds to determine that the issuing of the code compliance certificate should be reversed.
- 10.5 I would suggest that the territorial authority request that a set of as-built drawings and specifications be provided for any work that was amended during the construction of the building and that the original consent is amended once the territorial authority is satisfied that they are satisfactory. These revised documents should also be accompanied by verification (such as in a producer statement) from the developer's fire consultant that the revisions meet all the necessary fire safety requirements of the Building Code.
- 10.6 Both the developer and the territorial authority submitted that the determination should confine itself to considering information that was available to the territorial authority and the aspects of the building work that would have been apparent to the territorial authority when carrying out its inspections. I am of the opinion that the matters referred to in paragraph 10.4 were matters that the territorial authority should have seen and considered during its inspection processes.

11. Compliance with the building code

- 11.1 I have found, as set out in paragraph 10.4, that the building as constructed does not comply with the original building consent and that is in itself is sufficient to require the reversal of the territorial authority's decision to issue the code compliance certificate.

- 11.2 My approach to this determination is set out in paragraph 1.6 and notes that when considering compliance of the building with the building consent there will be instances where the consent documentation lacks all the details required to establish compliance with the Building Code. In these instances, my approach is to consider whether these aspects of the building, that are not detailed in the building consent documentation, comply with the Building Code. I am also of the view that I can consider evidence that may come to light during the determination process if that evidence helps to establish the compliance of the building at the time that the code compliance certificate was issued and that evidence was apparent or should have been apparent to the territorial authority at the time it issued the code compliance certificate.
- 11.3 The expert's report initially called into question the adequacy of the current performance of some of the building elements at present. Subsequent to this report there has been intensive debate between the expert and the parties' consultants regarding the performance of some of the building elements.
- 11.4 Having carefully examining all the arguments put before me, I have reached the conclusion that the defects listed below were present or non-compliant with the Building Code at the time that the code compliance certificate was issued:
- The lack of saddle flashings where the timber-framed balustrades adjoin the main walls of the building.
 - The lack of a seal between the fibre-cement sheets at the base of the balustrade columns and the deck tiles and where the columns extend to the walkway, together with the lack of drainage or ventilation behind the cladding.
 - The perimeter details at the fire-baffles not being adequately sealed at the junction of the baffle membrane and the fibre-cement fascia. This also applies to the junction between the fire-baffle and the deck.
 - The lack of a saddle flashing to the top end of the wing walls.
 - The unsealed joint in the cladding to the northern face of the wing wall between units 304 and 305 and at a similar position between units 401 and 402.
 - The areas where moisture can be trapped between the basement steel beams and columns and other surfaces.
 - The clear opening height of the ground floor access doors to the lift and the stairwell being less than the 2000mm set out in D1/AS1.
 - The clear opening height of the doors at the northern ends of the two upper level walkways being only 1930mm.
 - The corners and edges of all the doors described above being too sharp.
 - The non-compliant swing of the fire doors at the landings and stair wells.
- 11.5 Taking into account the matters identified in paragraph 11.4, I am of the opinion that the building did not comply with various clauses of the Building Code at the time that the code compliance certificate was issued and that this was apparent or should have been apparent to the territorial authority at the time it issued the code compliance certificate. This is especially so as regards the cladding, the basement structural steel, and the fire safety of the building.

- 11.6 In reaching this conclusion, I was not convinced by the territorial authority's submission that the structural steel concerns are merely maintenance issues. The building is in an area that is subject to severe marine exposure and this should have led the territorial authority to ensure that the consent documentation adequately allowed for the protection the steel basement members. While the requirements for Clause B2 durability may be implicit in a Producer Statement that relates to Clause B1 only, in this instance, it would have been appropriate to have such a statement specifically referring to Clause B2. I note also that, while there were specifications covering various alternative treatments that were to be applied to the steelwork, there were no specific instructions as to the respective locations where they were to be applied.
- 11.7 The expert also noted other non-compliant elements, which in my opinion would not have been evident to the territorial authority when it carried out its inspections of the building. Accordingly, the following items should be included in any notice to fix that the territorial authority decides to issue.
- The locations where water drains out of the overflows rather than the adjacent outlets.
 - The water ingress problems posed by the timber plates to the edge of the decks.
 - The cracking at the outside edge of the baffle membrane.
- 11.8 I am of the opinion that the items listed in paragraphs 11.4 and 11.7 as requiring attention can be satisfactorily rectified so as to make the building code-compliant.
- 11.9 I also consider that the items are of a relatively minor nature and, once they are rectified to the satisfaction of the territorial authority, and the building work has been made compliant with the revised building consent, a new code compliance certificate can be issued for the entire building.

12. Maintenance

- 12.1 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).
- 12.2 The specific maintenance for the building in question should include those items that were listed by the expert but which I have considered to be outside the matters of non-compliance that are set out in paragraphs 11.4 and 11.7.

13. The notice to fix

- 13.1 The second matter listed in the application for a determination requested that a notice to fix should be issued requiring the current owner to ensure that the building complies with the building consent and the Building Code. Section 177(b)(iv) states that a party may apply to the Chief Executive for a determination in relation to a building consent authority's decision to issue a notice to fix. In this instance, as there is no evidence of any such decision having been made by the territorial authority I am of the opinion that I cannot determine the second matter.

14. What is to be done now?

14.1 I suggest that the territorial authority issues a notice to fix that requires the current owner to bring the building up to compliance with the Building Code. The notice should identify the requirements needed to amend the building to meet the SR purpose group requirements and to remedy the defects listed in this determination, and also refer to any further defects that might be discovered in the course of rectification. It is not for the notice to fix to specify how the defects are to be fixed. That is a matter for the current 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.

14.2 I would suggest that the parties adopt the following process to meet the requirements of paragraph 14.1. Initially, the territorial authority should issue the notice to fix. The owner should then produce a response to this in the form of a technically robust proposal, together with suitable amendments to the plans and specifications, produced in conjunction with a competent and suitably qualified person, as to the rectification or otherwise of the specified issues. The objective is to ensure that:

- The revised building consent complies with the Building Code, and
- The building work complies with the amended building consent

Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.

15. The decision

15.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the territorial authority's decision to issue a code compliance certificate is reversed.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 5 May 2008.

John Gardiner
Manager Determinations