



Determination 2009/31

Amendment to a compliance schedule for a an industrial building at 11 Mahunga Drive, Mangere Bridge, Manukau City



1 The matters 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 the Department.
- 1.2 The applicant is the owner of the building, Gartner Superlux (“the applicant”), acting through its general manager. The other party is the Manukau City Council carrying out its duties and functions as a territorial authority and a building consent authority (“the authority”).
- 1.3 I take the view that the matter for determination in terms of sections 177(c)(iii) and 188² is whether the decision of the authority not to amend a compliance schedule for an industrial building is correct.
- 1.4 In making my decision, I have considered the submissions of the parties, the report of the independent expert commissioned by the Department to advise on this dispute (“the expert”), and the other evidence in this matter.

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

² 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 work

- 2.1 The building is a manufacturing and office building (“the building”) totalling approximately 5896m², consisting of two-storey offices and a single-storey manufacturing area with a partial mezzanine floor. The building contains ventilation and air conditioning systems that have been verified by the expert as being:
- Item 1 Factory toilets/change area - consists of male (2 toilets) and change/locker room, served by a single extract system to all areas, and which was installed about 15 to 20-years ago.
 - Item 2 Top floor general offices - served by window mounted air conditioners, with fresh air available through air conditioning unit, and which is about 10 to 15-years old. The room also has opening windows judged to be of an area exceeding 5% of the floor area.
 - Item 3 Ground floor general offices - served by window mounted air conditioners, with fresh air available through an air conditioning unit, and which is about 10 to 15-years old. The room also has opening windows judged to be of an area exceeding 5% of the floor area.
 - Item 4 Lunch room - served by a wall mounted split air conditioner that does not provide fresh air, and which is about 5 years old
 - Item 5 Design room - served by a ducted reverse-cycle split system air conditioner that does not provide fresh air, and which is about 2-years old.
 - Item 6 Meeting room - served by a window/wall mounted air conditioner, with air available through an air conditioning unit but sourced from the factory area, and which is about 2 years old.
 - Item 7 Call centre - served by a ducted reverse cycle split system air conditioner that does not provide fresh air, and which is about 1 year old.
 - Item 8 Main toilets - consists of male (2 toilets), female (1 toilet), and accessible (1 toilet, 1 shower), served by a single extract system to all areas, and which was installed about 2008.

3 Background

- 3.1 The authority issued Compliance Schedule No 1320 for the building on 3 August 1994. Eight specified systems were covered by the schedule including:
- SS 9 Mechanical Ventilation or Air Conditioning Systems
- 3.2 An independent qualified person (“the IQP”) wrote to a building inspection company engaged by the applicant (“the inspection company”) on 16 July 2008. The IQP noted that the mechanical services installed in the building should not form part of the building’s 12A certificate of compliance. It was stated:
- 1. A mechanical ventilation or air conditioning system is required by section 44(1)(i) to be on the compliance schedule only if serving all or a major part of the building

The mechanical services installed to the above are limited to -

- small split systems or window mounted units serving individual offices
- mechanical ventilation only serving toilets.

Based upon the above, mechanical ventilation or air conditioning systems do not serve all or a major part of the building and none of the installed systems can spread pathogens or toxic gases from their source to other building spaces, so I suggest removal of mechanical services from the Building Warrant of Fitness.

3.3 In a fax to the inspection company dated 20 July 2008, the applicant requested that two items be removed from the building warrant of fitness relating to the building. These were:

- the fusible link sliding door, and
- the mechanical ventilation.

3.4 The authority wrote to the inspection company on 31 July 2008, stating that the authority declined the request to amend the compliance schedule. The authority also said:

As you have indicated that a Specified System listed in the Building Regulations 2005 no longer exists within the Building you are now required to apply for and obtain a Certificate of Acceptance in accordance with Section 96 of the Act at which time the Specified System will be added to your Compliance Schedule.

3.5 The inspection company wrote to the authority on 3 August 2008, referring to certain matters relating to the building's warrant of fitness. The letter also noted that the fusible link fire doors and the ventilation and air conditioning systems should be removed from the compliance schedule as 'these systems have never been installed in the building'.

3.6 The inspection company attached a Form 11 "Application for amendment to compliance schedule number 1320", dated 25 July 2008, to their letter. The form requested that the compliance schedule be amended as follows:

Delete SS 3/3 Fusible Link Doors. SS9 Ventilation and Air Conditioning.

3.7 The application for a determination was received by the Department on 2 October 2008.

4 The submissions

4.1 In a covering letter to the Department dated 30 September 2008, the applicant stated that the building owners wished to have the "Ventilation and Air Conditioning" removed from the compliance schedule.

4.2 The applicant forwarded copies of the:

- ground and first floor plans
- floor area calculations for the building
- correspondence referred to in paragraph 3.

- 4.3 The authority emailed the Department on 22 October 2008, stating that as there was mechanical ventilation in the building, the mechanical ventilation would not be removed from the compliance schedule.
- 4.4 In an email to the Department dated 18 November 2008, the authority noted that the applicant acknowledged that there was air conditioning in the building. The authority said that the air conditioning covers the ground and first floors and was supplying fresh air. There was also a new ducted system to an office refurbishment that required air conditioning as the building did not have opening windows.
- 4.5 The authority forwarded copies of:
- the compliance schedule
 - some photographs showing the exterior of the building and the air conditioning units.
- 4.6 Copies of a draft determination were sent to the parties for comment on 3 March 2009 and both parties accepted the draft.

5 The legislation and references

- 5.1 Relevant provisions of the Building Act 1991 (“the former Act”) include:

Section 44 Compliance schedules—(1) (A compliance schedule shall be required for any new building (other than a building used only as a single residential dwelling), if the building contains any of the following systems:

- (i) Mechanical ventilation or air conditioning systems serving all or a major part of the building;

- 5.2 Relevant provisions of the Building Act 2004 (“the current Act”) include:

Section 100 requirement for compliance schedule

- (1) A building not used wholly as a single household unit—
- (a) requires a compliance schedule if—
- (i) it has a specified system;

Section 106 Application by owner for amendment to compliance schedule

- (1) An owner of a building that has 1 or more specified systems may, at any time and entirety at the owner’s discretion, apply to the territorial authority of the district in which the building is situated for an amendment to a compliance schedule for the building.

Section 108 Annual building warrant of fitness

- (2) The purpose of a building warrant of fitness is to ensure that the specified systems stated in the compliance schedule are performing, and will continue to perform, to the performance standards for those systems that are set out in the relevant building consent.

- 5.3 The relevant provision of Schedule 1 of the Building (Specified Systems, Change the use, and Earthquake-Prone Buildings) Regulations 2005 is

Specified Systems

- 9 Mechanical ventilation or air conditioning systems

- 5.4 The relevant paragraphs of the Compliance Schedule Handbook (“the Handbook”) issued by the Department on 25 May 2007 include:

SS 9 Mechanical ventilation or air conditioning systems

A. Scope

A mechanical ventilation or air conditioning system is required to be listed on a compliance schedule where the system:

A.2. Outdoor air

A2.1 Is used to deliver outdoor air to the occupants of one or more spaces that cannot be provided with adequate outdoor air from natural ventilation

A.3. Safety

A3.1 Or part of the system is used to collect potentially harmful material and either capture it (eg by filtration or absorption) or discharge it to a safe place (this includes associated make-up air systems)

Examples:

Examples of mechanical ventilation or air conditioning systems to be incorporated in a compliance schedule include, but are not limited to:

- (ii) a ducted ventilation or air conditioning system
- (ix) a split air conditioning unit that introduces fresh air into the building

Examples of mechanical ventilation or air conditioning systems not to be incorporated in a compliance schedule include, but are not limited to:

- (i) a split air conditioning unit that does not introduce fresh air into the building (eg, a high-wall split air conditioning unit, a cassette-type split air conditioning unit without a fresh air intake duct)

6 The expert’s report

- 6.1 As described in paragraph 1.4, I engaged an expert, who is an engineering consultant to provide a review of the installed systems in question. The expert visited the building on 21 January 2009, and furnished a report dated 27 January 2009.
- 6.2 The report identified and described the individual systems and was of the opinion that only paragraphs SS9 A.2. and A.3. of the Handbook were relevant to the systems installed in the building. The report concluded that the systems to the design room, the lunch room, the call centre, and the two general offices did not need to be included in a compliance schedule (refer items 2, 3, 4, 5, and 7 in paragraph 2.1). With regard to the air conditioning unit in the meeting room and the toilet extract systems (refer items 1, 6 and 8 in paragraph 2.1), it was considered that any failure of these systems would be readily apparent to the rooms’ occupants.

7 Discussion

7.1 The applicant has applied for an amendment to the building's compliance schedule in terms of section 106(1) of the current Act. The authority has refused this request.

7.2 The applicant is of the opinion that section 44 of the former Act should apply to the system in question. The authority takes the opposing view that the requirements of the current Act are relevant. This difference of opinion is of consequence as the wording of section 44 is narrower in restricting mechanical ventilation or air conditioning systems to those *servicing all or a major part of the building* (my emphasis). This emphasised qualification does not appear in the 2004 legislation.

7.3 From the information provided by the expert, the following systems were installed in terms of the former Act:

- The factory toilets change areas (item 1).
- The top floor general offices system (item 2).
- The ground floor general offices system (item 3).
- The lunch room system (item 4).

7.4 I note that the compliance schedule in question was issued on 3 August 1994. Accordingly, in general terms, as the four systems described in paragraph 7.3 do not serve "all or a major part of the building," I am of the opinion that none of these systems should have been included in a compliance schedule. This opinion is reinforced by a more specific reference in the BIA News No 26 that was published by the Building Industry Authority in October 1993, which said:

It is not considered necessary to include on the compliance schedule, individual air conditioning package units serving a single office or simple extractor fans used in cooking areas, toilet spaces and similar areas, where users will soon complain if fumes or odours are apparent. Failure to maintain these systems may cause annoyance or discomfort, but the effects are unlikely to be life-threatening, and users are usually able to control the systems.

7.5 The expert also considered that occupants of the areas served by the toilet extract systems would soon be aware that the systems were malfunctioning. Taking into account this opinion, and the arguments set out in paragraph 7.4, I am of the opinion that the authority erred when it included items 1 to 4 (refer paragraph 2.1) on the compliance schedule issued in 1994.

7.6 The expert has assessed that the lunch room system (item 4 in paragraph 2.1) is approximately 5 years old. Accordingly, there is some doubt as to whether this system has to be assessed in terms of either the former or the current Act. For the reasons set out in paragraphs 7.4 and 7.5, under the previous Act the system would not require to be included in a compliance schedule. If it was installed after December 2004, despite the fact that the system is a split air conditioner, it does not fall within example (ix) of paragraph SS9 of the handbook as it does not introduce fresh air into the building. Therefore, even in terms of the current Act it should not be included in a compliance schedule.

- 7.7 According to the expert, the systems to the design room, the call centre, the meeting room and the main toilets (refer items 5 to 8 in paragraph 2.1) have been installed within the past two years. Accordingly all these systems come within the ambit of the current Act.
- 7.8 The design room and call centre (refer items 5 and 7 in paragraph 2.1), are ducted but do not supply fresh air, therefore in my view they fall within example (i) of paragraph SS9 of the Handbook, as a system not requiring to be listed in a compliance schedule.
- 7.9 The meeting room system (refer item 6 in paragraph 2.1) provides fresh air therefore it falls within example (ix) of paragraph SS9 of the Handbook, as a system to be listed in a compliance schedule.
- 7.10 The main toilet area system (refer item 8 in paragraph 2.1) is a ducted ventilation system, therefore it falls within example (ii) of paragraph SS9 of the Handbook, as a system to be listed in a compliance schedule.
- 7.11 The question of the fusible link sliding door entry on the compliance schedule (see paragraphs 3.3 and 3.6) has not been raised as a matter to be decided in this determination. I assume that this matter has been resolved between the parties and therefore I make no ruling on it.
- 7.12 The authority noted in its letter to the inspection company dated 31 July 2008, that a certificate of acceptance should be applied for in relation to a specified system that no longer existed. In this respect, I consider that the authority was in error in believing that a ventilation system had been removed from the building and that no building consent had been obtained for that work. However, the applicant could apply for a certificate of acceptance in relation to the systems that have been installed or removed and for which no consent has been obtained.
- 7.13 Summary table showing the ventilation and air conditioning systems for each item (refer paragraph 2.1), the applicable Building Act and Compliance Schedule Handbook paragraph.

Item	Ventilation and Air conditioning systems			Approx. year of installation	Applicable Building Act	Applicable schedule paragraph
1	Single extract system			1988–1994	1991	Not required on the compliance schedule
2	Window mounted air conditioners	Fresh air available through air conditioning unit	Opening windows exceeding 5% of floor area	1994–1999	1991	Not required on the compliance schedule
3	Window mounted air conditioners	Fresh air available through air conditioning unit.	Opening windows exceeding 5% of floor area	1994–1999	1991	Not required on the compliance schedule
4	Wall mounted split air conditioner	Does not provide fresh air		2004	1991	Not required on the compliance schedule

Item	Ventilation and Air conditioning systems			Approx. year of installation	Applicable Building Act	Applicable schedule paragraph
5	Ducted reverse-cycle split system air conditioner	Does not provide fresh air		2007	2004	Not required on the compliance schedule
6	Window/wall mounted air conditioner	Fresh air available through air conditioning unit		2007	2004	SS9 (ix)
7	Ducted reverse-cycle split system air conditioner	Does not provide fresh air		2008	2004	Not required on the compliance schedule
8	Single extract system			2008	2004	SS9 (ii)

8 Conclusion

8.1 Based on the discussion set out in paragraph 7, I am of the opinion that the specified system 9- “Mechanical ventilation or air conditioning systems” should be not removed from Compliance Schedule No 1320, but that only items 6 and 8 are required to be listed on the compliance schedule.

9 The decision

9.1 In accordance with section 188 of the Act I hereby:

- confirm the authority’s decision not to not amend Compliance Schedule No 1320 to remove the reference to specified system 9- “Mechanical ventilation or air conditioning systems”
- modify the authority’s decision with respect to the Compliance Schedule No 1320 so that specified system 9- “Mechanical ventilation or air conditioning systems” lists only the window/wall mounted air conditioner to the meeting room (item 6) and the extract system to the main toilets (item 8).

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 30 April 2009.

John Gardiner
Manager Determinations