



Determination 2011/015

The refusal to issue a code compliance certificate in respect of three apartments in an apartment complex at 20 Egmont Street, Te Aro, Wellington

1. The matter to be determined

1.1 This is a Determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the current 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 parties to this determination are:

- A and J Briscoe the owners of Apartment 14, T and J Ellis the owners of Apartment 15, and C R E Temple-Camp the owner of Apartment 17 (the “applicants”). All the owners are acting through one agent.
- Wellington 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 matters for determination² are whether:

- the fit out of the three apartments in a complex as constructed complies with Clauses³ B2 ‘Durability’, D1 ‘Access routes’, E2 ‘External moisture’ E3 ‘Internal moisture’, and F4 ‘Safety from falling’ of the Building Code (Schedule 1, Building Regulations 1992)
- the authority acted correctly when it refused to issue final code compliance certificates in respect of the three apartments.

¹ The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Department are all available at www.dbh.govt.nz or by contacting the Department on 0800 242 243.

² In terms of sections 177(1)(a), 177(1)(b) and 177(2)(d) of the Act

³ 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.

- 1.4 Also leading from these matters, I must determine whether any amendment of the original building consent is required (refer paragraph 3.2).
- 1.5 In making my decision, I have considered the submissions of the parties, the report from an independent expert (“the expert”) commissioned by the Department to advise on this dispute, and the other evidence in this matter. I also note that the relevant provisions of the former and current Acts, and the Interpretation Act 1999 are set out in Appendix A.

2. The building work

- 2.1 The building work relates to three separate apartments (Nos 14, 15, and 17), which have been fitted out within a four-storey building (“the complex”) that accommodates a total of 19 separate apartments.

3. The background

- 3.1 In 1999 the authority issued a building consent (No SR 49615) for the conversion and strengthening of a “Heritage Listed” complex including the provision of “shell” spaces that would accommodate individual apartments. The project description was for ‘additions and alterations, conversion of existing building to apartment spaces. Not a fit out building consent’. This building consent and the subsequent building consents were all issued under the Building Act 1991 (“the former Act”).
- 3.2 On 9 March 2000 (the authority states this date is 8 July 1999), the authority issued a building consent (No SR 55154) for the fit out of Apartments 14, 15, 16, and 17 and carried out various inspections during the fit outs of Apartments 14, 15, and 17.
- 3.3 The authority issued the following interim code compliance certificates:
- For Apartment 14 on 21 September 2000, which excluded electricity and gas fitting.
 - For Apartment 15 on 14 November 2000, which excluded electricity and gas fitting and noted that a final code compliance certificate would not be issued until all the work under consent No 49615 was completed.
 - For Apartment 17 on 14 August 2002, which noted that a final code compliance certificate would not be issued until all the work under consent No SR 49615 was completed.
- 3.4 Following the presentation of amended plans, the authority issued a building consent (No SR 99964) some time in 2002 for the fit out of Apartment 16. I note at this stage that the issuing of this consent apparently amended the requirements of building consent No SR 55154.
- 3.5 On 9 August 2002, an architect acting on behalf of the owners of Apartment 17 requested that the handrail arrangement in that apartment be considered as an alternative solution to the requirements of Clause D. The architect described the arrangement of the handrails and the reasons for his request.

- 3.6 On 12 August 2005, the authority issued a final code compliance certificate in respect of building consent No SR 49615.
- 3.7 On 7 March 2006, the authority issued a final code compliance certificate for Apartment 16 in regard to building consent No SR 99964.
- 3.8 In an email dated 22 March 2007, an officer of the authority noted that the interim code compliance certificate for Apartment 15 did not exclude a window sill detail that was under discussion. Based on the reasons given, the officer was of the opinion that the sill detail would meet the requirements of the Building Code as an alternative solution
- 3.9 The applicants and the authority exchanged correspondence and held meetings to discuss the applicants' application for final code compliance certificates to be issued for the fit outs to Apartments 14, 15, and 17.
- 3.10 The authority advised the applicants of its position relating to this application, and I summarise the authority's conclusions in the following paragraphs.
- 3.11 For each of the Apartments 14, 15, and 17:
- A written statement is required from the external joinery manufacturer as to the status of the joinery.
 - Cracking was evident at the sills of some windows fitted into the brick walls.
- 3.12 For Apartment 14 only:
- Provide a copy of the electrical certificate.
 - The authority had concerns regarding the tiled shower cubicles, including their compliance with the Building Code.
 - The owner can apply for a waiver/modification of the Building Code in respect of Clause B2 'Durability'.
 - Specific regard must be given to Clauses B1 and E2.
- 3.13 For apartment 15 only:
- Provide copies of the electrical and gas certificates.
 - Eliminate the toe holds in one of the mezzanine floor barriers.
- 3.14 For Apartment 17 only:
- Graspable handrails are required where there are three or more stairs.
 - The barrier beside the lower-level bi-fold windows does not meet the requirements of Clause F4.
 - The lower-level tiled floor to the shower unit is not containing the shower water.

3.15 An application for a determination was received by the Department on 29 July 2010.

4. The submissions

4.1 In a covering letter addressed to the Department, the applicants described the background to the dispute. The applicants were of the opinion that the authority had inspected the fit out work during the construction phases. It was the view of the applicants that by issuing the interim code compliance certificates the authority must have been satisfied that the 'building work complies with the building code that applied at the time the building consent was granted'.

4.2 The applicants supplied copies of:

- the three interim code compliance certificates for the fit out of Apartments 14, 15, and 17
- the final code compliance certificate for the building shell
- some of the authority's inspection records
- the correspondence between the parties.

4.3 In a letter to the Department dated 13 August 2010, the authority noted that it had explained its position regarding the interim code compliance certificates. The authority stated that it had not been notified that the work it had requested be carried out had been completed.

4.4 The authority forwarded an electronic copy of its files concerning the matters at issue and this included:

- some of the plans
- the four interim code compliance certificate described in paragraph 3.3
- the final code compliance certificate for the building shell
- some of the authority's inspection records
- the gas certification certificate for Apartment 14
- a sketch of the barrier at the ground floor of Apartment 17
- correspondence between the parties.

4.5 Copies of the submissions and other evidence were provided to the parties.

5. The expert's report

General

- 5.1 As described in paragraph 1.5, I engaged an expert who is a Registered Architect⁴, to provide me with an expert opinion regarding the matters at issue.
- 5.2 The expert examined the authority's files and the other documentation that has been provided by the parties, visited the complex, and provided me with a report that was dated 23 November 2010. The report described the background to the dispute and expressed concern regarding the records kept by the authority. I summarise below the expert's comments and conclusions.

Building Act requirements

- 5.3 The expert discussed the requirements of the former Act in relation to the issuing of code compliance certificates and how these applied to the certificates issued by the authority:
- Under section 43(3) of the former Act, the authority could only issue code compliance certificates if the completed building work complied with the building code. If the authority had correctly issued the interim code compliance certificates, in that the work did comply with the Building Code, then it must have been satisfied that all the work carried out under building consent No SR 55154 was code-compliant.
 - In order to obtain final code compliance certificates, the applicants should only have to fulfil those conditions set out in the interim code compliance certificates, provided that these could be legitimately imposed and enforced.

The code compliance certificates

- 5.4 The expert noted the following regarding the code compliance certificates issued by the authority:
- Consent No SR 55154 did not contain a condition that work under consent No SR 49615 had to be completed prior to its issue and, unlike those issued for Apartments 15 and 17, the interim code compliance certificate issued for Apartment 14 did not contain this requirement.
 - The interim code compliance certificate issued for Apartment 17 did not have a condition relating to electrical and gas work.
 - As the authority by late 2002 had issued the three interim code compliance certificates without any attached conditions relating to non-compliant building work, it must have deemed that all work on Apartments 14, 15, and 17 was code-compliant at that date.

⁴ Under the Registered Architects Act 2005, Registered Architects are treated as if they were licensed in the building work licensing class Design 3 under the Building (Designation of Building Work Licensing Classes) Order 2010.

5.5 The expert commented on the interim code compliance certificates issued by the authority as follows:

- As the condition requiring work under consent No SR 49615 to be completed was not noted on the SR 55154 consent, the applicants were entitled to apply for final code compliance certificates without meeting this condition.
- Section 34(3) of the former Act required the authority to issue the SR 55154 consent only if it was satisfied that the requirements of the Building Code would be met if the work was properly completed in accordance with the plans and specifications submitted with the application.
- Accordingly, if the completion of consent No SR 49615 was not specifically included as a requirement of consent No SR 55154, then the authority could not seek this as a precondition in respect of the issue of a final code compliance certificate for consent SR 55154.
- The expert was of the opinion that the owners of Apartments 14 and 15 had only to provide the required electrical and gas certificates to obtain the final code compliance certificate.
- There had been a substantial delay on the part of these two owners in providing the required information. However the expert, in referring to previous determinations issued by the Department, considered that the provision of the required certificates could be treated in the same way as had the Clause B2 issues in those determinations.

The authority's concerns regarding the issuing of final code compliance certificates

5.6 The authority expressed a number of concerns to the applicants at the time they applied for a final code compliance certificate. The expert commented on the concerns expressed by the authority as follows:

- The expert did not accept the authority's approach that the building work must comply with the Building Code in force 'at the time that the code compliance certificate is issued'. Rather, in terms of the transitional provision under section 436(3)(b)(i) of the current Act, the building work must comply with the Building Code that applied 'at the time that the building consent was issued'.
- Likewise, the authority, in assessing the building in hindsight, is not following the requirements of section 436, and no specific E2 items were raised by the authority during its inspections.
- The expert considered the process suggested by the authority to obtain an amendment for the Clause B2 durability requirements was rather onerous. It was the expert's opinion that these requirements applied from the time that an interim code compliance certificate was issued. There was no need for the applicants to seek the suggested consent amendments. Instead, performance as required by Clause B2.3.1 applied as follows:
 - For Apartment 14 21 September 2000

- For Apartment 15 14 November 2000
- For Apartment 17 14 August 2002.
- From these dates Clause B2.3.1 only requires normal maintenance to be carried out to satisfy the performance requirements of this clause.

The code-compliance of the building work

5.7 The expert commented on the issues that the authority had raised concerning the code-compliance of certain building elements as follows:

- There was no evidence that the external joinery was non-compliant regarding durability, and the cracking of the window sills was a normal maintenance issue.
- The expert considered that the window sill detail in Apartment 14 was code-compliant.
- There was no evidence that the tiled shower bases in Apartment 14 were non-compliant, and the localised water damage was a maintenance issue.
- As the toe holds in the mezzanine floor barriers in Apartment 15 have been covered with plastic sheeting, the barrier was now code-compliant.
- It was not accepted that the lack of a handrail on the lower rise of the stairs in Apartment 17 provided for the “safe and easy movement of people”. It was therefore not compliant with Clause D1.
- The configuration of the upstand wall beneath the bi-fold windows in Apartment 17 was such that it did not restrict the passage of children to at least the same extent as required by paragraph 4.0.2 of Acceptable Solution F4/AS1⁵. The expert noted that the authority should have been aware of both this item and the stair handrail when it carried out its inspections. These matters should have been recorded on the interim code compliance certificate.
- There was localised damage to the lower tiled shower base in Apartment 17. However the expert was of the opinion that its repair could be considered as being a maintenance issue.

5.8 Copies of the expert’s report were forwarded to the parties for comment on 24 November 2010.

6. The draft determination

6.1 The draft determination was forwarded to the parties for comment on 9 December 2010. The applicants accepted the draft determination without comment.

6.2 The authority did not accept the draft determination, and its legal advisors forwarded a submission dated 23 December 2010 to the Department. I summarise the main points of this submission as:

⁵ 2nd Edition 28 February 1998

- Section 438 of the current Act establishes that code compliance certificates are treated differently from interim code compliance certificates. The context of each reference to a code compliance certificate in the former Act, the Building Code or the current Act must be individually examined to determine whether the reference to code compliance certificate also includes a reference to an interim code compliance certificate.
- For example, section 438 of the current Act treats interim code compliance certificates differently from code compliance certificates because it ‘transforms’ a code compliance certificate issued under section 43 of the former Act into a code compliance certificate issued under section 95 of the current Act. If section 438 applies to interim code compliance certificates in this way then it would deem them to have the status of ‘full’ code compliance certificates. This cannot have been Parliament’s intention.
- Section 50(1) of the former Act, as referred to in the draft determination, cannot apply to an interim code compliance certificate as the section only applies to a code compliance certificate issued by a building certifier. Therefore, it follows that an interim code compliance certificate issued by an authority could only be one of ‘the various range of factors taken into account when deciding whether reasonable grounds existed for a belief that building work complies with the building code’.
- The authority expressed concern that the expert had based his conclusions on the condition of the shower in Apartment 17 on a visual inspection only, and queried the expert’s opinion that some areas of damage related to maintenance.

6.3 I have considered the authority’s submission and amended the determination accordingly.

7. Discussion

Matters of code-compliance

7.1 I accept the opinions of the expert with regard to the code-compliance matters raised by the authority. In particular, I note that the authority did not raise these matters during its inspections of the fit outs or when it issued the interim code compliance certificates.

7.2 In respect of Apartment 17, I note the expert’s opinion that the upstand wall under the bi-fold windows and the handrail to the lower stair are not code compliant. I have not been asked to consider whether the authority was correct to issue the interim code compliance certificate for Apartment 17 and I have not done so. In my view both items should be rectified before the final certificate is issued as both have life safety implications.

- 7.3 In addition, I also accept that the performance requirements of Clause B2.3.1 commence from the following dates:
- Apartment 14: 21 September 2000
 - Apartment 15: 14 November 2000
 - Apartment 17: 14 August 2002.
- 7.4 I strongly suggest that the authority record this determination, and any modification resulting from it, on the property file and also on any LIM issued concerning this property.

Interim code compliance certificates

- 7.5 The effect of an interim code compliance certificate has not been altered by the repeal of the former Act. This view is based on the provisions of the former Act and the current Act discussed below, and on section 17 of the Interpretation Act 1999 as set out in Appendix A.
- 7.6 Section 43 of the former Act provided for the issue of a code compliance certificate if a territorial authority was 'satisfied on reasonable grounds that the building work to which the certificate relates complies with the building code'. Section 43(4) provided that 'the provisions of this section shall be deemed to enable interim code compliance certificates to be issued ... in respect of any part of any building work for which a building consent had previously been issued ... but those interim certificates shall be replaced by the issue of a single code compliance certificate for the whole of the building work at the time the work is completed'.
- 7.7 The definition of a code compliance certificate included an interim code compliance certificate as section 2 of the former Act and Clause A2 of the Building Code provides that 'code compliance certificate means a certificate to that effect issued by a territorial authority ... pursuant to section 43 of [the former] Act'.
- 7.8 Therefore, sections 2 and 43 of the former Act, and Clause A2 of the Building Code establish that an interim code compliance certificate is of a similar nature and effect as a code compliance certificate, but an interim code compliance certificate is limited in its scope to only 'part' of the building work for which the building consent was issued.
- 7.9 I do not accept the authority's view of the effect of section 438 of the current Act. The authority notes that section 438 of the current Act 'transforms' a code compliance certificate issued under section 43 of the former Act into a code compliance certificate issued under section 95 of the current Act. I note that code compliance certificates issued under the former Act were issued on different grounds to code compliance certificates issued under the current Act. The authority argues that if section 438 was to be applied to interim code compliance certificates then it would deem them to have the status of 'full' code compliance certificates which cannot have been intended.

- 7.10 In my view section 438 provides for the continuing “effect” of an interim code compliance certificate. Therefore an interim code compliance certificate issued under section 43 of the former Act has the same effect as if it had been issued under section 95 of the current Act. It does not mean the grounds on which the interim code compliance certificate was issued have changed or its scope altered. An interim code compliance certificate continues to mean the formal acceptance of part of the consented building work as being code compliant.
- 7.11 The authority’s view is that an interim code compliance certificate ‘can only be one of the various range of factors taken into account [by the authority] when deciding whether reasonable grounds existed for a belief that building work complies with the building code’. By issuing an interim code compliance certificate under the former Act, the authority has decided that part of the building work complies with the Building Code. I do not believe the authority can then subsequently decline to accept the validity of that certificate when deciding whether to issue a code compliance certificate for the whole of the building work covered by the building consent.
- 7.12 However, while an interim code compliance certificate may have been issued, I accept that in the period since the issue of the certificate, the knowledge and understanding of how compliance can be achieved with respect to some Building Code clauses may have changed. In addition, the actual performance of the building against the requirements of the Building Code can be determined by inspection.
- 7.13 In such circumstances I believe it may be prudent to verify the ongoing compliance of the completed work, particularly work with a high consequence of failure. Should matters of non-compliance be identified an authority may, depending on the circumstance and extent of the non-compliance, do one or a combination of:
- advise the owner that remedial work is necessary to make the building code compliant
 - seek a determination reversing the interim code compliance certificate
 - declare the building dangerous or insanitary should the circumstances warrant it.
- 7.14 I agree with the view of the expert that, for work completed under the former Act when sections 2 and 43 of that legislation were still in force, the durability period commenced from the date of issue of the interim code compliance certificates. This is the effect of the reference in the “limits on application” part of Clause B2.3.1 to the period commencing ‘from the time of issue of the applicable code compliance certificate’. At the time the interim code compliance certificates were issued under the former Act, and assuming they covered compliance with Clause B2 (an issue not referred to by the authority during its inspection processes), the interim code compliance certificates were deemed to be code compliance certificates in respect of the parts of the building work to which they related. Therefore, I am of the opinion that, for the purposes of Clause B2.3.1, the durability period commenced on the date that the individual interim code compliance certificates were issued.

- 7.15 I agree with the expert's view that the issuing of a code compliance certificate cannot be contingent on the completion of building work under a separate building consent (unless, of course, the completion of building work under a separate building consent is an express condition of the building consent in respect of which a code compliance certificate is being applied for). Providing that a code compliance certificate application is correctly made and the fee is paid, then the only grounds for refusing to issue a code compliance certificate are set out in section 94 of the current Act (or if the former Act applies, section 43 of that Act). I am of the opinion that none of the grounds set out in that section permit an application for a code compliance certificate to be refused because work has not been carried out in respect of a separate building consent.
- 7.16 The authority has issued separate interim code compliance certificates for each of the three apartments. However, these are in respect of the one building consent (SR 55154) that covered all three apartments. Accordingly, only one final code compliance certificate should be issued by the authority for this consent.
- 7.17 Finally I note that the authority has not issued any notices to fix regarding the work that it considers to be non-complaint.

Conclusions

- 7.18 Based on the discussions set out in paragraph 7, I conclude that the authority can issue a final code compliance certificate covering the three apartments that relate to building consent No SR 55154 once the following matters have been attended to:
- The modification of the building consent to accommodate Clause B2 matters.
 - For Apartment 14, the provision of the electrical certificate (I note here that authority has provided me a copy of the gasfitting certificate in regard to this apartment).
 - For Apartment 15, the provision of the electrical and gas certificates.
 - For Apartment 17, the rectification of the window upstand wall and the handrail to the satisfaction of the authority.

8. The decision

- 8.1 In accordance with section 188 of the Act, I hereby determine that:
- the fitouts to Apartments 14 and 15 as constructed comply with all the requirements of the Building Code
 - the fit out to Apartment 17 as constructed complies with the provisions of the Building Code, with the exceptions of Clauses D1 and F4
 - the decision of the authority not to issue a final code compliance certificate for building consent No 55154 is confirmed.

8.2 I also determine that:

- (a) all the building elements installed in the apartment fit outs, apart from the items that are to be rectified as described in Determination 2011/115, complied with Clause B2 on the dates the interim code compliance certificate were issued, as follows:

Apartment 14: 21 September 2000

Apartment 15: 14 November 2000

Apartment 17: 14 August 2002.

- (b) building consent No 55154 is hereby modified as follows:

The building consent is subject to a modification to the Building Code to the effect that for all of the building elements, with the exception of the items to be rectified as set out in paragraph 7.8 in Determination 2010/115, the durability periods stated in Clause B2.3.1 run from the date the interim the code compliance certificates were issued.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 4 March 2011.

John Gardiner
Manager Determinations

Appendix A: The relevant legislation

A.1 The relevant section of the former Act include:

43 Code compliance certificate

- (1) An owner shall as soon as practicable advise the territorial authority, in the prescribed form, that the building work has been completed to the extent required by the building consent issued in respect of that building work.
- (2) Where applicable, the owner shall include with that advice either---
 - (a) Any building certificates issued by building certifiers under section 56 of this Act to the effect that any items of the building work comply with specified provisions of the building code; or
 - (b) A code compliance certificate issued by a building certifier under this section and section 56 (3) of this Act to the effect that all of the building work complies with each of the relevant provisions of the building code.
- (3) Except where a code compliance certificate has already been provided pursuant to subsection (2) of this section, the territorial authority shall issue to the applicant in the prescribed form, on payment of any charge fixed by the territorial authority, a code compliance certificate, if it is satisfied on reasonable grounds that---
 - (a) The building work to which the certificate relates complies with the building code; or
 - (b) The building work to which the certificate relates complies with the building code to the extent authorised in terms of any previously approved waiver or modification of the building code contained in the building consent which relates to that work.
- (4) The provisions of this section shall be deemed to enable interim code compliance certificates to be issued, subject to specified conditions, in respect of any part of any building work for which a building consent had previously been issued, whether or not it was previously intended that different parts of that building work were to have been completed in stages, but those interim certificates shall be replaced by the issue of a single code compliance certificate for the whole of the building work at the time the work is completed, to the extent required by the building consent.
- (5) ...

A.2 The relevant sections of the current Building Act include:

436 Transitional provision for code compliance certificates in respect of building work carried out under building consent granted under former Act

- (1) This section applies to building work carried out under a building consent granted under section 34 of the former Act.
- (2) An application for a code compliance certificate in respect of building work to which this section applies must be considered and determined as if this Act had not been passed.
- (3) For the purposes of subsection (2), section 43 of the former Act—
 - (a) remains in force as if this Act had not been passed; but
 - (b) must be read as if—
 - (i) a code compliance certificate may be issued only if the territorial authority is satisfied that the building work concerned complies with the

building code that applied at the time the building consent was granted;
and

- (ii) section 43(4) were omitted.

A.3 The relevant provision of the Interpretation Act 1999 is:

Section 17 Effect of repeal generally

- (1) The repeal of an enactment does not affect—
- (a) The validity, invalidity, effect, or consequences of anything done or suffered:
 - (b) An existing right, interest, title, immunity, or duty:
 - (c) An existing status or capacity:
 - (d) An amendment made by the enactment to another enactment:
 - (e) The previous operation of the enactment or anything done or suffered under it.