

Determination 2013/027

Regarding the exercise of powers in refusing to issue a code compliance certificate for a 10-year-old Unit completed under the supervision of a building certifier at 14/307 Evans Bay Parade, 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 and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to the determination are:

- the owner of Unit 14, P Adams (“the applicant”)
- Wellington City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority
- the owners of the remaining units constructed under building consent 72593 (collectively termed “the other owners”):

Units 15 – 24

Units 25 – 38

Unit 46

Unit 47.

1.3 This determination arises from the decision of the authority to refuse to issue a code compliance certificate for a 10-year-old unit. The refusal arose because:

- the unit (“Unit 14”) is one out of 27 units in 5 blocks within a multi-unit development (“the development”) that were constructed under a single building consent, and
- the building work had been undertaken under the supervision of Nationwide Building Certifiers (“the building certifier”), which was duly registered as a building certifier under the Building Act 1991, but which ceased operating as certifiers before it had issued a code compliance certificate for the work.

1.4 The matter to be determined² is whether the authority correctly exercised its powers when it decided to refuse to issue the code compliance certificate.

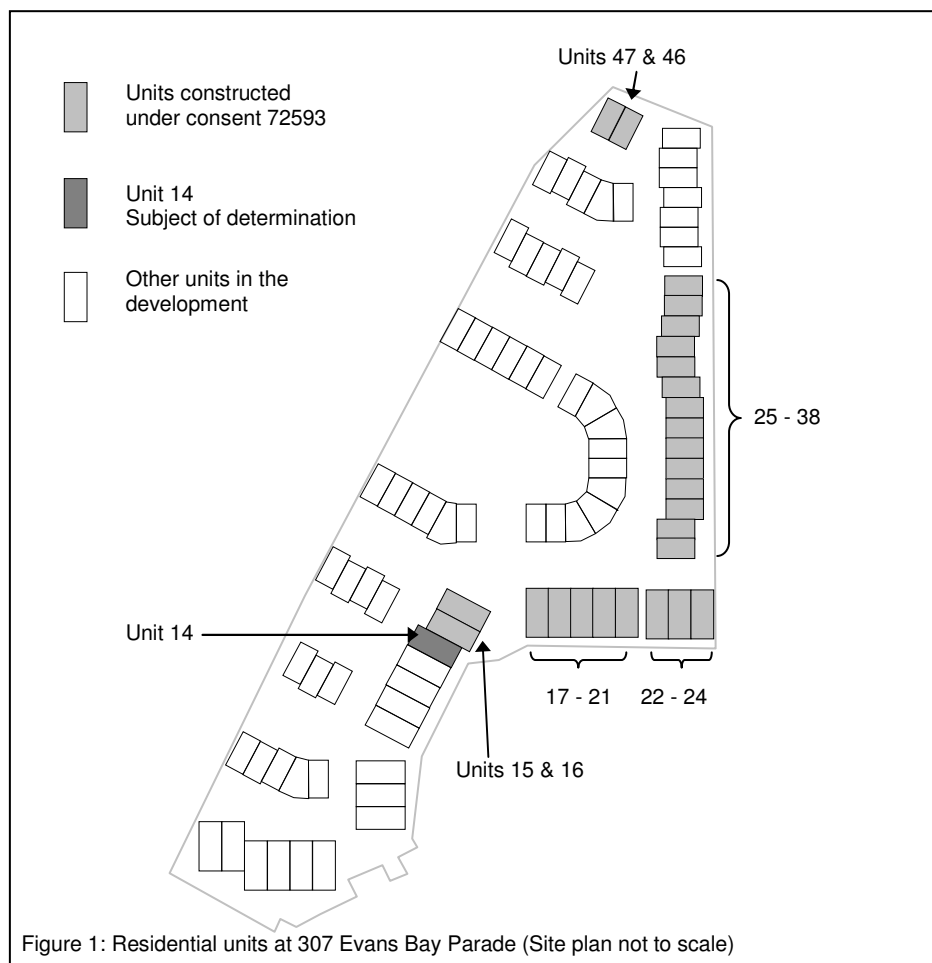
¹ The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.dbh.govt.nz or by contacting the Ministry on 0800 242 243.

² Under sections 177(1)(a), 177(1)(b), and 177 (2)(d) of the current Act

- 1.5 Some of the other owners have expressed an interest in seeking a code compliance certificate for their units. Whilst Unit 14 is the subject unit in this determination, it was constructed under one consent with a number of other units; accordingly I consider that the findings in this determination will also apply to the other units constructed under building consent 72593 and the general processes involved in establishing compliance and obtaining a code compliance certificate will be the same.
- 1.6 In making my decision, I have considered the submissions of the parties, and the other evidence in this matter.
- 1.7 The relevant sections of the current Act are set out Appendix A.

2. The building work and background

- 2.1 Unit 14 is part of a larger complex of 91 residential two and three-storey units comprising 16 free-standing blocks that range in size from 2 semi-detached townhouses to 14 semi-detached townhouses.
- 2.2 On 11 January 2001 one building consent (72593) was issued to cover construction of Units 14 – 24, 25 – 38, 46 and 47 under the Building Act 1991 (“the former Act”). The consent was issued based on a building certificate issued by the building certifier.
- 2.3 The overall development is shown in the following site plan:



- 2.4 Blocks within the development were progressively constructed in eight staged consents, sold and occupied. The units are generally of very similar size, construction and materials. Property titles for the development were finalised progressively, with the certificate of title for Unit 14 issued on 11 June 2002.
- 2.5 Based on an inspection report dated 31 May 2001 and for the period of 1 May 2001 to 31 May 2001, it appears that the certifier carried out inspections of the various units during construction of the development and made a statement to the authority as to compliance of the building work with the plans and specifications. I note that this report refers to an attachment headed 'Progress as at 31.05.01 Monthly Report', and that this indicates there may have been monthly reports by the certifier on progress during construction of the development.
- 2.6 I have not seen any inspection records that relate to Unit 14; however the certifier issued an interim code compliance certificate for Unit 14 on 8 October 2002³. It appears that a final code compliance certificate was not issued as building work to other units under the same consent had not been completed. The applicant has also stated that adjoining units 10 - 13 in the same block, built under a different consent, received code compliance certificates.
- 2.7 On 24 January 2003 the certifier notified the authority that the certifier would not be able to inspect or issue final code compliance certificates for, amongst others, the units constructed under consent 72593.
- 2.8 The applicant purchased Unit 14 in 2011 and subsequently sought to obtain a code compliance certificate from the authority. The applicant has stated that on approaching the authority the advice received was that
- the authority was not prepared to accept liability for building work which was not inspected by the authority, and
 - the authority had not received adequate documentation from the certifier or the developer to enable the issue of a code compliance certificate.
- 2.9 The Ministry received an application for a determination on 30 November 2012.

3. The submissions

- 3.1 The applicant provided no submission in direct support of the application but did provide copies of some drawings, the unit tile, the interim code compliance certificate for Unit 14, a letter from the certifier to the authority (refer paragraph 2.7), and a letter of guarantee dated June 2002 from the supplier of the plaster cladding.
- 3.2 The Ministry sought further information from the applicant on the matters to be determined and received an email on 30 November 2012 outlining the background to the matters. The applicant indicated that the advice received from the authority was that it was not prepared to accept liability for building work that was carried out under the supervision of the building certifier. The applicant also noted that some adjacent units built at the same time have code compliance certificates.
- 3.3 The authority acknowledged the application for determination but made no submission in response.

³ One other owner has confirmed interim code compliance certificates were issued for Units 22 and 26 on 19 September 2001.

- 3.4 On 28 January 2013 the applicant provided a copy of the building consent and a “monthly report” from the certifier for building work carried out during May 2001 (which predates the construction of Unit 14).
- 3.5 On 11 February 2013 the Ministry sought further information from the parties; requesting confirmation from the authority as to whether a final inspection had been carried out, the reasons for refusing a code compliance certificate, and whether those reasons had been provided to the owner in writing. The Ministry also referred the parties to: a previous determination that outlined a methodology appropriate where the building work was carried out under the supervision of a building certifier⁴; a determination that discussed the status under the current Act of interim code compliance certificates issued under the former Act⁵; and a determination where a consent for units within a larger development was amended to allow for code compliance certificates to be sought by the owners of individual unit or blocks⁶.
- 3.6 The applicant responded on 14 February 2013 noting that no formal application for a code compliance certificate had been made as the authority had advised that it had not received adequate documentation from the certifier or the developer and that it ‘would not assume liability in a situation in which it had not conducted building inspections’. The applicant also advised that some units within the same block and built at the same time had received code compliance certificates, and that previous advice given by the authority to owners of other units without code compliance certificates indicated that the authority was not prepared to carry out inspections.
- 3.7 On 6 March 2013 the Ministry sought a response from the authority to the letter of 11 February 2013.
- 3.8 On 11 March 2013 the Ministry sought information from either party as to whether any further building work had been carried out, in particular any re-cladding, since the time the units were constructed, and if so whether that work was subject to building consent.
- 3.9 A draft determination was issued to the parties for comment on 12 March 2013.
- 3.10 The applicant responded by email on 16 March 2013, noting an error in the figure (that has subsequently been corrected). The applicant advised that to his knowledge, and also that of the Body Corporate Secretary, no external building work or re-cladding had been carried out to Unit 14 since its completion. The applicant also submitted that
- the requirement in an application for a code compliance certificate to provide information on the trades-people involved in the building would be difficult to comply with; to satisfy this requirement the authority should take into account the interim code compliance certificates that were issued which were issued on the basis that the work was carried out in a manner that would have met the Building Code requirements at that time

⁴ Determination 2011/116: Refusal to issue a code compliance certificate for a 7-year-old house completed under the supervision of a building certifier

⁵ Determination 2011/015: The refusal to issue a code compliance certificate in respect of three apartments in an apartment complex

⁶ Determination 2010/042: Regarding the refusal to issue a code compliance certificate for a 6-year-old block of four semi-detached townhouses

- the fact the interim code compliance certificates were issued should be acknowledged by the authority and form a part of the evidence base for establishing compliance.
- 3.11 The authority responded to the draft in a letter dated 18 March 2013, making no submission or comment but requesting copies of documentation which were duly provided.
- 3.12 The applicant forwarded a formal acceptance of the draft determination, received by the Ministry on 26 March 2013.
- 3.13 A submission was then received from the authority in a letter dated 7 April 2013 from its legal adviser. The authority generally accepted the conclusion in the determination decision and acknowledged it is obliged to consider applications for code compliance certificates or certificates of acceptance on their merits, and that applications cannot be arbitrarily declined or pre-empted.
- 3.14 The authority also submitted (in summary):
- Whilst acknowledging that the applicant may have been ‘deterred’ from making an application for a code compliance certificate, nevertheless no formal application was received and so there was no written notice of refusal from the authority as required by section 95A.
 - Other than the building consent and the documents provided by the applicant as part of the determination process, the authority does not hold any other relevant documentation for Unit 14.
 - Though the certifier may have generated monthly reports those ‘were not routinely provided’ to the authority; the authority has not located any further similar reports.
 - Information held by the authority indicates that a number of units within the development have suffered from weathertightness failure; the units in the development, including Unit 14, are generally built of the same materials, to similar design, by the same contractor and involving the same certifier.
 - The 15-year durability period for the cladding will expire in June 2017.
- 3.15 The authority acknowledged the principles set out in Determination 2011/116 regarding the assessment of building work carried out under the supervision of a building certifier. The submission went on to set out the documentary evidence available specifically for Unit 14, noting the limited number of relevant documents, and the authority questioned the relevancy of the monthly report given its date relative to the construction of Unit 14. The authority also noted that given the weathertightness failures of other units in the development the authority’s concerns are reasonable, and that the applicant may wish to commission and provide a weathertightness report for Unit 14 as part of the process to obtain a code compliance certificate.
- 3.16 In regards to the process for the applicant to obtain a code compliance certificate the authority outlined a proposed course of action and agreed with the Ministry that
- where an interim code compliance certificate has been issued it is prudent to verify the ongoing compliance of the building work, and in-service history is relevant to an assessment by the authority

- non-invasive inspection by the authority will allow the authority to assess some building elements against the requirements of the Building Code that was in place at the time of the issue of the consent
- without invasive investigation the authority may not be able to ascertain compliance with clauses relating to weathertightness (E2 and B2, and potentially Clause B1 Structure)
- at the request of the applicant the authority can amend the building consent so that an individual code compliance certificate can be issued for Unit 14 (when the authority can be satisfied as to compliance); however the authority sought clarification from the Ministry as to whether all of the other owners must endorse such an approach
- the consent can also be amended to provide for a modification of the durability period in Clause B2.3.1 so that it will commence from the date of the interim code compliance certificate.

3.17 Responses accepting the draft determination were received from some, but not all, of the other owners as follows:

Unit #	Date response received
16	21 March 2013
18	29 April 2013
20	8 April 2103
21	22 March 2013
22*	3 April 2013
25	4 April 2013
46	17 April 2013

* copy of interim code compliance certificate provided

3.18 The applicant responded to the authority's submission by way of email on 7 April 2013, noting the authority's submission was 'generally helpful in identifying a way forward...'. In respect of the evidence base for establishing compliance of the building work the applicant submitted that

- there is a contradiction between the authority's assertion that it holds no relevant documents on Unit 14 and then its statements in respect of information on weathertightness failures of other units within the development. If the authority is considering those other failures to be relevant to the assessment of Unit 14 then that information does relate to Unit 14 and should be disclosed to the applicant
- it is possible that other monthly reports from the certifier are on the authority's files under other consents issued for the development or some other related file
- the authority's line of reasoning in respect of its knowledge of compliance failures in other units in the development is prejudicial, and Unit 14 has had 'no weathertightness issues'
- it is 'premature and unacceptable' for the authority to state that it may not be able to certify compliance of Unit 14 in respect of Clauses E2 and B2 in the

absence of invasive or destructive investigations, on the basis of known problems affecting other units in the development.

- 3.19 I have taken into account all of the responses to the draft determination and amended the determination as I consider to be appropriate.

4. The exercise by the authority of its powers

The amendment of the building consent

- 4.1 The authority sought clarification as to whether the other owners are required to consent to an amendment of building consent 72593 in order to split off a particular unit or block of units from the consent which currently covers 27 units in 5 blocks. In my view it would not be appropriate for the authority to seek the consent of the other owners to what is an administrative matter within the control of the authority. As I stated in Determination 2009/56⁷:

In my view, the authority has the power under the Act to deal with an administrative issue such as splitting a consent where a consent deals with two or more buildings and the owner requests the consent be split to deal with one or more buildings separately. Territorial authorities that are building consent authorities have broad and wide-ranging responsibilities in respect of the building consent process under the Act. The nature and extent of the building work described in a building consent and the management of the building consent process clearly fall within the discretionary powers of building consent authorities under the Act.

The application of section 95A

- 4.2 Section 95A of the Act states that if an authority refuses to issue a code compliance certificate, it:
- ... must give the applicant written notice of—
- (a) the refusal; and
 - (b) the reasons for the refusal.
- 4.3 I note that in this instance the authority's advice to the applicant indicates that an application for a code compliance certificate would be refused. The authority provided no explanation for its refusal to issue a code compliance certificate beyond its observation that the building work was carried out under the supervision of a building certifier and that the authority had not received 'adequate documentation'.
- 4.4 The provisions of section 95A apply irrespective of the background to involvement of a building certifier: if an owner requests a code compliance certificate then an authority is obliged to follow the provisions of section 95A, which is likely to include a detailed assessment of the work concerned. In cases involving a building certifier an authority may suggest an owner to apply for a certificate of acceptance where the issue of the code compliance certificate is refused.
- 4.5 In this instance I do not consider the authority met its obligation in respect of section 95A as it did not place itself in a position where it could make an informed decision about the Building Code compliance of the house.
- 4.6 The authority has submitted, whilst acknowledging that the applicant may have been 'deterred' from making an application for a code compliance certificate, that

⁷ Determination 2009/56: Determination regarding the refusal to amend a consent and issue a code compliance certificate for a 5-year-old block of 5 semi-detached townhouses

in the context of [the applicant's] 'over the counter' query to the [authority] and the absence of the formal application for a code compliance certificate, it is only natural that the [authority] did not provide any sort of formal written confirmation for the purposes of section 95A

- 4.7 I accept that no formal application was made by the applicant for a code compliance certificate; I also accept that the applicant was 'deterred' from making such an application based on the advice received from the authority. I note the authority also did not respond to the Ministry's request for confirmation as to the reasons why the authority considered it would refuse a code compliance certificate.
- 4.8 The information conveyed by the authority to the applicant had the same effect as a refusal to issue the code compliance certificate, but in adopting this approach the authority failed to advise the applicant that it was required to properly assess the application for a code compliance certificate and that this would probably involve inspecting the house and then providing reasons for refusing to issue the code compliance certificate under s 95A. The authority cannot seek to rely on the applicant's failure to make a formal application for a code compliance certificate when that failure was caused by the authority's own failures to follow the proper processes in the Act when responding to the applicant's request for a code compliance certificate.
- 4.9 Section 177(1)(b) provides for a determination to be made on 'the exercise, failure or refusal to exercise, or proposed or purported exercise by an authority in subsection (2), (3), or (4) of a power of decision to which this paragraph applies by virtue of that subsection.' In this case I take the view that the advice received from the authority was effectively a refusal to issue the code compliance certificate.

The establishment of compliance

- 4.10 In regard to this unit, the evidence as to compliance is able to be gathered from the building certifier's records and the issuance of the interim code compliance certificate, the performance of the exterior envelope over the past ten years, and a visual assessment of remaining building elements; which may or may not reveal that further evidence needs to be gathered to determine compliance.
- 4.11 This methodology has been used and articulated in a number of determinations such as 2011/116. I consider the authority was able to apply a similar methodology in reaching a decision in this case.
- 4.12 Had an inspection of the unit been carried out the authority should have been able to identify any defects requiring attention or that raised concerns as to the compliance of the building work; without the applicant needing to apply for a determination.
- 4.13 The authority did not provide the applicant with any evidence of why it considers Unit 14 is not code-compliant. Perception of risk is not an appropriate reason to take this position and I do not believe that this is acceptable. It is important that an owner be given clear reasons why compliance has not been achieved so the owner can either then act on those reasons, or apply for a determination if the reasons are disputed.
- 4.14 In its submission of 7 April 2013 the authority referred to its knowledge of weathertightness failures of other units built in the same development, stated it may not be able to certify compliance of Unit 14 in respect of Clauses B2 and E2, and that in making its decision the authority would also take into account any investigations that might be commissioned.

- 4.15 The applicant is concerned that the performance of his unit is being ‘tarred’ by the performance of other units, that he is not privy to the information on the other units that could influence the authority’s decision in regard to Unit 14, and that the authority’s stance in respect of its ability to establish compliance with Clauses E2 and B2 is ‘premature’.
- 4.16 In making an assessment on compliance where, as in this case, the authority did not carry out the inspections during construction and is now required to form a view as to compliance of the building work, I am of the opinion that the authority is able to take into account its knowledge of the cladding systems and the performance of other units built at the same time using the same cladding systems and construction methods. I note however that though this may inform the authority’s view the authority is still required to consider each application on its own merits.

5. What is to be done now?

- 5.1 If so requested by the applicant, the authority should inspect the house for compliance with the Building Code that was in force at the time the consent was issued. If items of non-compliance are found or further investigation is warranted the authority should provide written reasons for its refusal to issue a code compliance certificate.
- 5.2 In its submission of 7 April 2013 the authority has outlined a proposed course of action and I consider this to be appropriate for Unit 14 as well as other units constructed under this consent.

6. The decision

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority incorrectly exercised its powers in effectively refusing to issue a code compliance certificate without providing adequate reasons for the refusal in accordance with section 95A of the Act; I therefore reverse the authority’s decision to refuse to issue a code compliance certificate.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 23 May 2013.

John Gardiner
Manager Determinations and Assurance

Appendix A

A.1 The relevant sections of the Building Act 2004

95A Refusal to issue code compliance certificate

If a building consent authority refuses to issue a code compliance certificate, the building consent authority must give the applicant written notice of—

- (a) the refusal; and
- (b) the reasons for the refusal.

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.