

Determination 2022/009

Regarding the purported refusal of a code compliance certificate for building work undertaken in 1997

9 Bicknell Road, Favona, Auckland

Summary

This determination considers building work that was carried out to a boarding house in 1997 and how the transitional provisions of the Building Act 2004 relating to code compliance certificates apply to building work that differed from the granted building consent.



The legislation which is discussed in this determination is contained in Appendix C. In this determination, references to:

- “the 1991 Act” are to the Building Act 1991
- “the 2004 Act” are to the Building Act 2004
- “section 436” are to section 436 of the 2004 Act
- “sections” are to sections of the 1991 Act, unless otherwise stated
- “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

The 2004 Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (e.g., Acceptable Solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matter to be determined

1.1. This is a determination made under due authorisation by me, Rebecca Mackie, Principal Advisor Determinations, Building Resolution, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.¹

1.2. The parties to the determination are:

1.2.1. Pacific Pearl Accommodation Limited (“the leaseholder”)², the tenant of 9 Bicknell Road, Favona, Auckland (“the property”)

1.2.2. K Zhou and N Sang, the owners of the property

1.2.3. Auckland Council (“the authority”)³, carrying out its duties as a territorial authority or building consent authority.

¹ The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

² Under a deed of lease, the leaseholder has exclusive right to possession of the property from 15 May 2013 to the 15 May 2023.

³ The building consent was originally granted and issued by Manukau City Council. Before the application was made, Manukau City Council transitioned into Auckland Council; the term “the authority” is used for both.

- 1.3. The matter has arisen following an inspection of building work carried out at the property under building consent No. BCO10215165, originally issued in January 1997 under the 1991 Act as building consent No. 96 6343.⁴ There is no dispute about the authority's original decision to grant and issue this building consent.
- 1.4. In 1997, building work was carried out at the property ("the completed building work"), but the authority was not called on to undertake a final inspection; it was another 23 years later that the authority undertook a final inspection of the building work. The inspection was failed by the authority on the basis that the "[building work] was not per the plans".
- 1.5. In the authority's view, before a code compliance certificate can be issued the leaseholder must choose to either:
 - 1.5.1. "build in accordance with the granted building consent", or
 - 1.5.2. "apply for an amendment for the many areas where the work on site has or is departing from that granted consent".
- 1.6. In the leaseholder's view, a transitional provision in the current Act – namely, section 436⁵ – applies to the completed building work. Therefore, when considering whether to issue a code of compliance certificate, the authority must assess all the completed building work against the Building Code that was in force when the consent was granted.
- 1.7. Under sections 177(1)(b) and 177(2)(d), the matter to be determined is the authority's purported refusal to issue a code compliance certificate for building consent No. BCO10215165 on the grounds an amendment was required for building work that departed from the building consent.
- 1.8. To determine this matter, I must consider the extent to which section 436 applies to the completed building work.
- 1.9. I have not considered the compliance of the building work itself.

⁴ For simplicity, I refer to the consent number as BCO10215165 throughout.

⁵ Transitional provision for code compliance certificates in respect of building work carried out under building consent granted under former Act.

2. The building work and background

- 2.1. The property was previously Mangere Hospital and Training School pre-1991 and is situated at Favona, Auckland. It was subdivided in 1993 and sold as a boarding house.⁶
- 2.2. The building is constructed around an internal courtyard. It houses a manager's flat, sleeping accommodation for boarders, recreation rooms, personal hygiene facilities, storage rooms and a large kitchen. For simplicity, in this determination I refer to the various wings that make up the sleeping areas (shown shaded) as labelled in Figure 1.

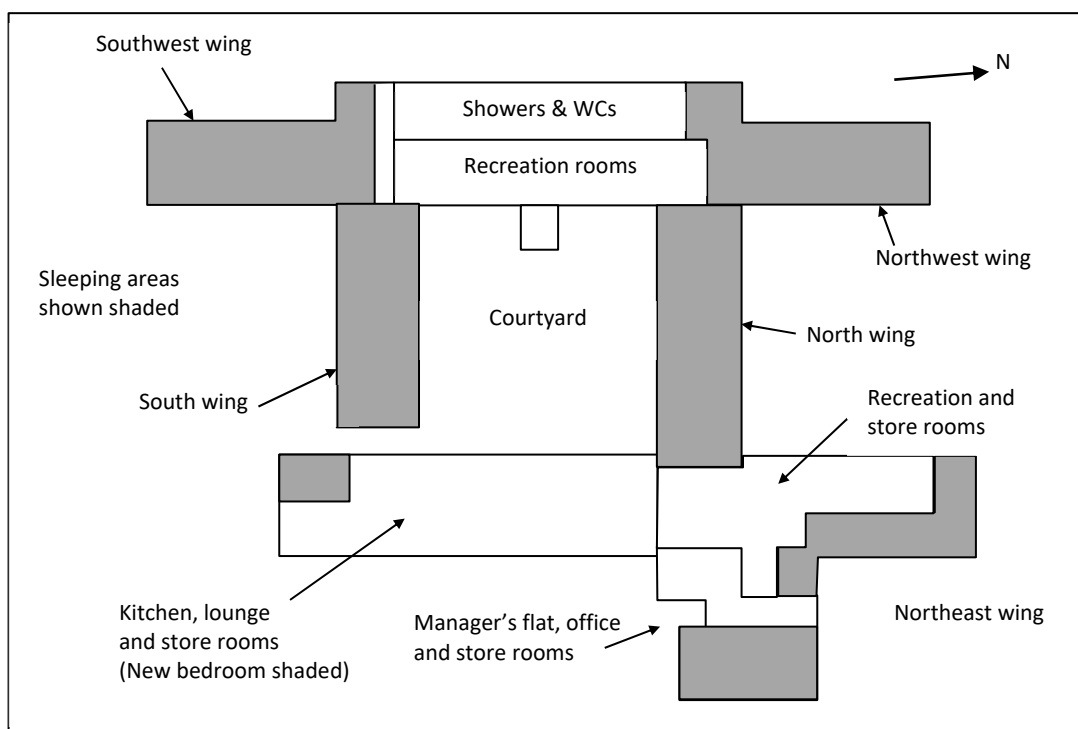


Figure 1: General floorplan/layout of the building.

⁶ I have no information about whether the 1991 Act was in force at the time the use of the building was changed, and if so whether approval under section 46 was granted. I note the Building Code requirements for carrying out alterations to existing buildings under section 39 of the 1991 Act are different to those under section 46 for changing the use of a building.

The building consent

- 2.3. Building consent was granted to the then owner by the authority to alter the existing building. The application for building consent described the nature of the work as “Internal partitioning at boarding house”. The building work related to accommodation areas and included construction of internal partitions to create new bedrooms. The application for building consent was supported with one plan drawing with a single cross section⁷, which I refer to as “the approved plan”, and an undated “Fire Design Assessment”.
- 2.4. The approved plan⁸ (shown in Figure 2A and Appendix A) shows:
- 2.4.1. new timber framed partitions to create new bedrooms in the northwest and northeast wings, and the southwest and south wings
 - 2.4.2. doors to the new bedrooms fire rated to –/15/15
 - 2.4.3. two new fire exits in the north and south wings, with new smoke lobbies fire rated to 15/15/15
 - 2.4.4. new smoke-stop doors rated to –/15/15sm
 - 2.4.5. a new fire exit in the northeast wing
 - 2.4.6. new smoke detectors
 - 2.4.7. new sprinkler heads in corridors.
- 2.5. An annotation on the drawing stamped as approved by the authority notes “Max. 45 persons as discussed with [the builder⁹] 30/12/96”. The drawing shows 44 bedrooms in the various wings plus one bedroom in the manager’s flat consistent with the annotation.
- 2.6. The Fire Design Assessment noted the building’s use was for sleeping accommodation and the intended maximum occupancy was 50 beds. The assessment stated smoke stop doors were required where the length of escape routes exceed 25m and noted that these doors had been indicated on the plan. The assessment also referred to safe path requirements; in order to meet these requirements, new fire separated safe paths were created that open through final exits into the courtyard.

⁷ Indicated on the authority’s “preliminary checklist” as being the minimum required.

⁸ The plan drawing is marked “approved” but the authority’s fire & egress inspector on 30 December 1996 and approved by the authority’s building inspector on 31 December 1996.

⁹ The builder applied for the building consent on behalf of the then owner.

- 2.7. Conditions on the consent called for as-built plans detailing location of call points, sounders and detectors, an emergency lighting system, and sprinkler head layouts. Ten inspections were listed as required at various stages of construction. I note I have received only one inspection record, dated May 2020, and there is no information that suggests inspections were called for or carried out during construction.

The variation

- 2.8. Based on the information provided by the leaseholder, a number of changes were made from the approved plan during construction in 1997 (I refer to these changes as “the variation”). Generally the variation appears to include an increase in the number of bedrooms, the proposed smoke lobbies not constructed, one of the final exits not constructed and alteration to two other final exits where egress now occur through sleeping rooms. Refer to Figure 2B over page and Appendix B for more details (with reference numbers).

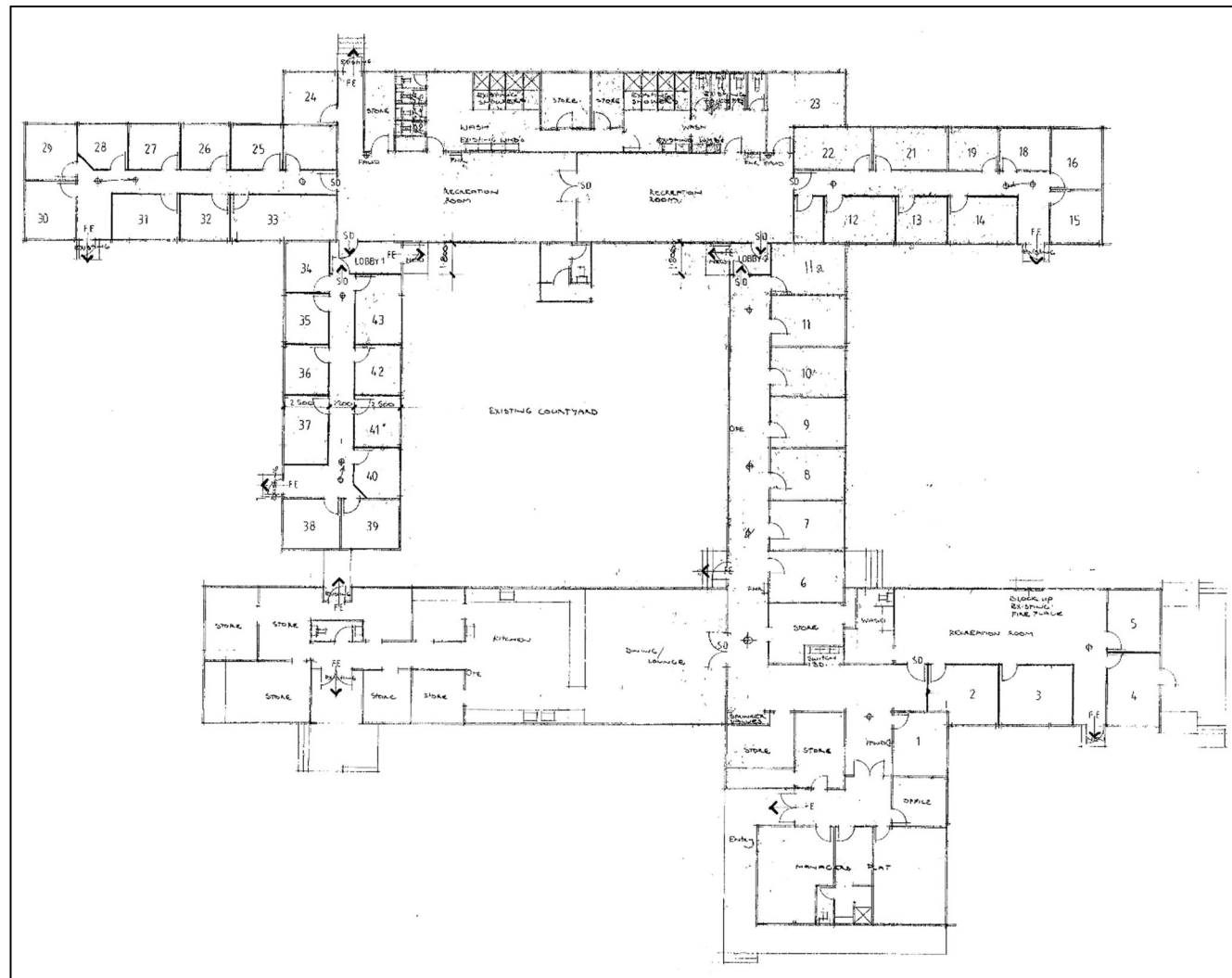


Figure 2A: General layout from approved plans.

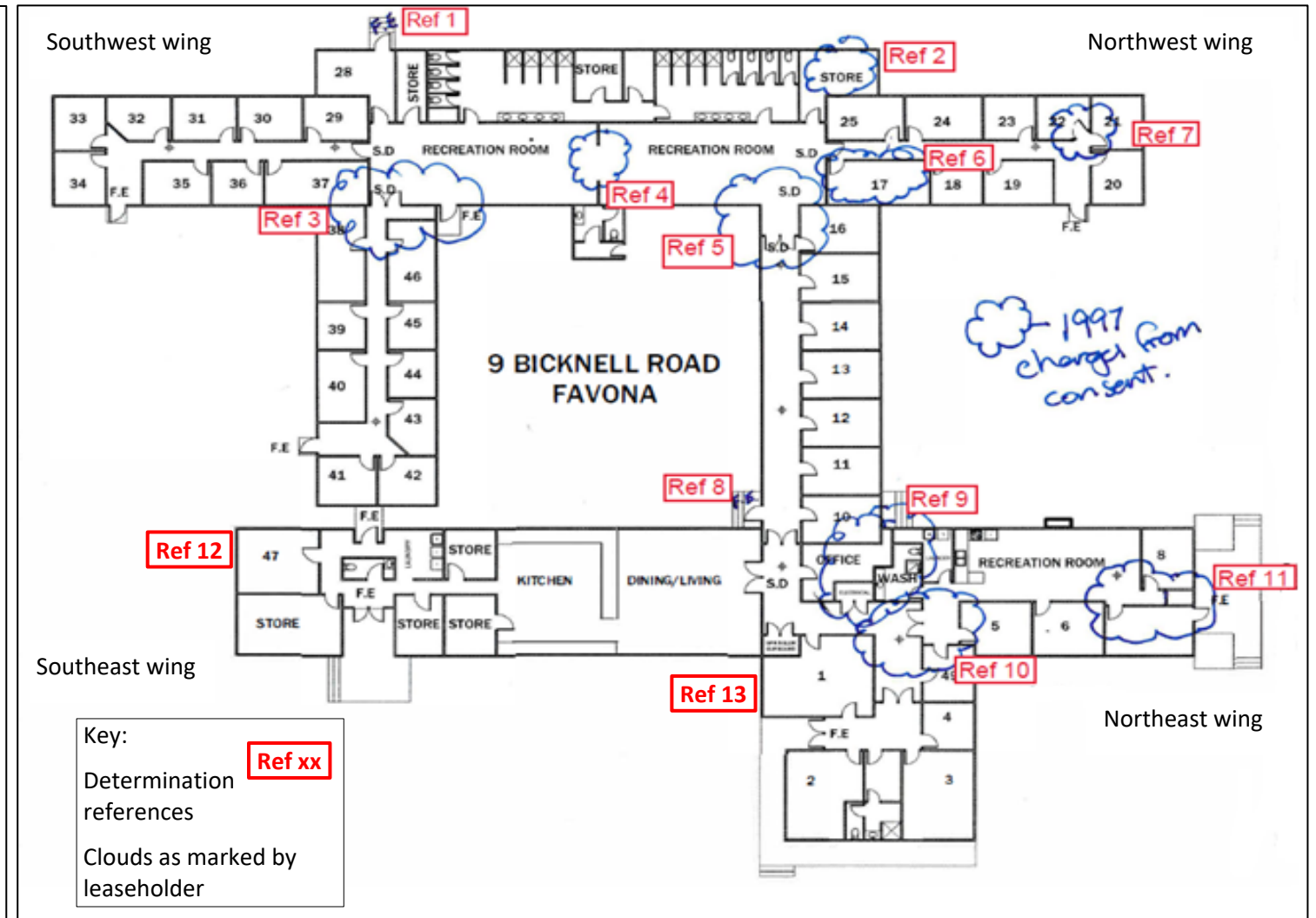


Figure 2B: General layout showing changes from approved plans

Southwest wings

- 2.8.1. Final exit at southwest now serves only one room (Ref 1).
- 2.8.2. Smoke lobby 1 removed and fire exit relocated to the south recreation room (Ref 3).
- 2.8.3. Smoke-stop doors have been removed between the two recreation rooms (Ref 4).

Southeast wing

- 2.8.4. Store rooms altered to incorporate new bedroom (ref 12)

Northwest wing

- 2.8.5. Room now labelled as store (Ref 2).
- 2.8.6. Smoke lobby 2 and fire escape removed, and smoke-stop doors repositioned and direction of swing changed (Ref 5).
- 2.8.7. Partition not installed, meaning what was originally proposed as two rooms is now one larger room (Ref 6).
- 2.8.8. Bedroom door repositioned changed (Ref 7).

Northeast wing

- 2.8.9. New doors added between the northeast wing and the hallway of the north wing (Ref 8).
- 2.8.10. Change of room use and layout: A store has become an office and the wash facility has been redesigned to accommodate a laundry area (Ref 9). A new set of doors installed and small passageway (Ref 10), change of a room use from store to bedroom (ref 13).
- 2.8.11. Northeast wing fire exit removed, bedroom extended, and bedroom door repositioned. External door to northeast bedroom (previously room 4, now room 7) nominated as fire exit for that room (Ref 11).

- 2.9. In May 2017, the leaseholder, applied for and was granted a resource consent¹⁰ to increase the occupancy of the boarding house to 100 boarders.
- 2.10. No building consent was sought in relation to this increase in occupancy because the leaseholder considered the increase in occupancy could be accommodated within existing spaces without the need for additional building work.

The fire report

- 2.11. In 2020 the leaseholder engaged a firm of consultants to carry out an assessment of the building against Acceptable Solutions for clauses C2 Means of escape, C3 Spread of fire and C4 Structural stability during fire that were current at the time the building consent was granted in 1997.¹¹
- 2.12. In the report¹² the fire engineer noted rooms¹³ that “are not permitted to be sleeping spaces as they do not open directly into a safe path or to the outside” and parameters relevant to their compliance assessment¹⁴. The fire engineer also noted the design standard of the sprinkler system should be confirmed by a suitably qualified sprinkler agent and made comment about the bedroom doors. The fire engineer also recommended the leaseholder:
- Engage the services of a suitable qualified person to appropriately fire stop all visible penetrations through fire separations and provide a PS3 on completion.
- 2.13. The report concluded that the fire engineer was satisfied, save for the issue above concerning clause C3 Spread of fire, that “the intent of the Acceptable Solutions C2, C3, C4 as at the time the Building Consent was issued in 1996 have been satisfied...”.
- 2.14. The leaseholder sought to have the code compliance certificate issued as a way of confirming occupancy to 100 was “acceptable and within the design of the 1996 consent that indicates a [sic] occupancy of up to 121 people”. A final inspection was called for, at which time the leaseholder provided the authority with the fire report and an updated floor layout (“the as-built drawings”). The leaseholder has acknowledged that some walls were not accurately indicated on the as-built

¹⁰ Under the Resource Management Act 1991.

¹¹ The report cited Approved Document C2: Means of Escape (October 1994), Approved Document C3: Spread of Fire (19 August 1994), Approved document C4: Structural Stability During Fire (October 1994).

¹² Building Compliance to Acceptable Solutions C2, C3, C4 1997. 5 March 2020 Issue 1 Ref: 20-0340.

¹³ The report refers to these as numbered above the room doors as 26, 27, 48 and 50. It is unclear to me whether the numbering corresponds with the drawing provided to this determination (Figure 2B)

¹⁴ For example, the fire engineer noted fire alarm systems meet the requirements for an occupant load of 100 people (sleeping) provided the maximum of people sleeping per wing is 20.

drawings and “further revision is required for minor variations”, but the leaseholder would agree to amending the plans “for the record”. It is not clear to me whether the drawings submitted for this determination (Figure 2B) represent the as-built drawings provided to the authority at the final inspection or are a later revision.

- 2.15. A final inspection was undertaken on the 25 May 2020 by the authority. The inspection record notes that only one area of the building was inspected, and the inspection was discontinued because in the authority’s view there were too many items that were not constructed as per the approved plan and a number of items that were not compliant with the Building Code. The inspection failed on 23 items, many of which related to fire safety. The inspection record noted about the variations:

...[inspected] rooms 1 to 5 and recreation room noting multiple changes including egress routes paths, room layouts, final exits moved etc. Due to the amount of changes to plan and non-compliance found ended the inspection as evident not as per the consented plans ...

- 2.16. The inspection record also noted:

Works not as per plan. works need to be as per the consented plans, if you would like to make changes an amendment will be need before making the changes and these new works will need to comply with todays [sic] current Building code requirements.

- 2.17. The parties then fell into dispute and the Ministry received an application for a determination on 4 June 2020.

3. Submissions

The leaseholder

- 3.1. The leaseholder submitted their intention was to seek a code compliance certificate for the 1997 building consent as a way to confirm the occupancy was within the design limitations of the building work in terms of the building consent. The leaseholder acknowledged the building consent was originally approved for a total of 45 occupants but said advice the leaseholder had received was that no additional building work was required for an increase occupancy to 100.

3.2. The leaseholder submits:

[The authority] have incorrectly exercised their power of decision in respect to a purporting to refuse a [code compliance certificate] by requiring an amendment that they say will be assessed as a new building consent application under s112^[15] of the Building Act 2004.

- 3.3. The leaseholder's concern is the authority's indication that an amendment to the building consent is required and its stated intention to apply current Building Code requirements to the amended building consent. The leaseholder maintains the view that all the building work carried out in 1997¹⁶ is subject to section 436 of the 2004 Act.
- 3.4. The leaseholder contends the authority is incorrectly applying the test for issuing the code compliance certificate under section 94 of the 2004 Act¹⁷ – that is whether the building work complies with the building consent – and instead should apply the transitional provisions in section 436.¹⁸ In the leaseholder's view, section 436 applies to all the building work that was carried out in 1997 (being the work described in the approved plans plus the variation as built) – meaning when considering whether to issue the code compliance certificate the authority should assess all the building work carried out in 1997 against the Building Code that was in force at that time.
- 3.5. The leaseholder advised that they would agree to amending “the plans for the record” but disagrees that an amendment of the building consent is required. In the leaseholder's view, the changes to layout and “other minor design changes” could be considered a “minor variation”.¹⁹
- 3.6. The leaseholder clarified the dispute does not relate to the whether the work carried out complies with the Building Code nor to the matter of the process of applying for/obtaining a code compliance certificate for the work. Rather in the first instance, the dispute specifically relates to the authority's view that the variation requires an amendment to the building consent and assessment against the current Building Code requirements, therefore the matter for determination should be limited to this matter.

¹⁵ Alterations to existing buildings.

¹⁶ I have made no findings of fact on when the work was carried out.

¹⁷ 94 Matters for consideration by building consent authority in deciding issue of 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; ...

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

¹⁹ Section 45A of the 2004 Act provides for “minor variations” to building consents that are notified to the authority before the relevant work is done and are recorded in writing but do not require an amendment to the building consent. This provision was inserted in the Building Act on 1 February 2010.

The authority

- 3.7. The authority confirmed that an application for a code compliance certificate had not been received, and on that basis a notice under section 95A of the 2004 Act was not triggered.
- 3.8. The authority explained that the changes apparent between the approved plan and the as-built layout would mean an amended building consent application would be required.
- 3.9. The authority submitted:
- ...in failing the inspection, [the authority] has not stated that the only option is to apply for an amendment. Rather [the authority] has left the compliance path open to the owner/designer/ agent or parties involved. The consent holder has the choice to either build in accordance with the granted building consent or to apply for an amendment for the many areas where the work on site has or is departing from that granted consent. Technically the amendment is a building consent application and therefore compliance needs to be demonstrated [against the Building Code] in force at the time of issue [of the amendment]. It is a perfectly appropriate expectation for any works that are to be included in that amendment to have to comply with today's building code.
- 3.10. Regarding section 436, the authority submitted that “the transitional provisions simply provide that work undertaken under a building consent issued under the 1991 Building Act is assessed as if the 2004 Building Act did not exist”.
- 3.11. Further to this the authority submitted:
- ...There is still an obligation for any work undertaken under that early consent to follow that building consent and to be compliant with the Building Code at that time. In this instance not only does the work depart (significantly) from the consented plans, the work also does not comply with the building code [that was in force] then. The option remains for the consent holder to return the building to the layout in the already consented building consent/plans to enable a CCC to be issued under s436.
- 3.12. In summary, the authority is of the view the leaseholder is required to either carry out the building work in accordance with the building consent or apply for an amendment to the building consent for the variation. The authority is also of the view the building work subject to any amendment would need to comply with the Building Code currently in force.
- 3.13. I note for completeness the authority has also stated it considers the building work does not comply with the Building Code that was in force at the time the building consent was issued. However, the dispute raised by the leaseholder in this

application relates only to the requirement to amend the consent and whether the variation must comply with the current Building Code.

4. Discussion

- 4.1. The authority has submitted that for a code compliance certificate to be issued, the building work can either be completed in accordance with the building consent or an amendment applied for “where the work on site has or is departing from that granted consent”. The authority also submitted that the building work covered in the amendment would have to comply with the current Building Code, contrary to the leaseholder’s view that in order for the authority to issue a code compliance certificate for the work in reliance of section 436 of the 2004 Act, the work must comply with the Building Code that was in force at the time the building consent was granted. In deciding the matter, I first consider whether the authority was correct to purportedly refuse to grant the code compliance certificate on the basis that an amendment was required for the building work.
- 4.2. It was not uncommon in the past for authorities to have policies where they would issue ‘retrospective’ building consents (or amendments to building consents) for building work that had been carried out without approval – this was recognised in *Brodie v Wellington City Council*²⁰ and *Morressey v Palmerston North City Council*.²¹
- 4.3. However, there was no statutory basis for such retrospective approval. The retrospective granting of building consents was considered in *Environment Waikato v Sutherland*²², where Tuohy J stated:

[29] ... I do not consider the two cases cited [Brodie and Morressey] provide support for an interpretation of either Act which would permit the issue of building consents after the work had been carried out.
- 4.4. Accordingly, I conclude the authority was incorrect to purportedly refuse to grant the code compliance certificate on the basis that an amendment was required for the building work that departed from the approved plans, as the work had already been carried out and the former and current Act do not provide for the retrospective granting of amendments to building consents.
- 4.5. As the dispute specifically relates to the authority’s view that the variation must comply with the current Building Code, I now consider the application of section 436 of the 2004 Act (which concerns the issuing of code compliance certificates for building work carried out under a building consent granted under the 1991 Act) to

²⁰ HC Wellington AP186/00 (2000).

²¹ DC Palmerston North CIV-454-463 (2008).

²² *Environment Waikato v Sutherland* District Court Wellington CIV-2010-085-629, 1 March 2011.

the circumstances of this case, in particular whether this transitional provision applies to the variation.

4.6. Section 436 provides:

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.

4.7. Section 43 of the 1991 Act provides:

(3) *... the authority shall issue ... 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.

4.8. Section 436(1) applies to “building work **carried out under** a building consent granted under section 34 of the former Act” (my emphasis). In considering whether to issue a code compliance certificate under section 436, the first step is for the authority to consider whether the building work was carried out under a building consent. If the conclusion is that the work was carried out under a building consent, then the second step is to consider the compliance of that building work “with the building code that applied at the time the building consent was granted” (section 436(3)(b)(i)).

- 4.9. For the purpose of this determination the dispute concerns the first step; the question is whether all the building work carried out in 1997 – including the building work that departed from the approved plans – is “building work carried out under” BCO10215165. This determination does not consider the second step.
- 4.10. In general terms, the Building Act (both 1991 and 2004) is a permitting regime where approval is sought from a building consent authority prior to carrying out building work. An application for a building consent must be lodged prior to undertaking building work.²³ The building work for which approval is sought is described in the plans and specifications that accompany the building consent application²⁴, and the authority can require further reasonable information to support the application.²⁵ To grant a building consent, the authority must be satisfied on reasonable grounds that the provisions of the Building Code would be met “if the building work was properly completed in accordance with the plans and specifications submitted with the application”.²⁶
- 4.11. The 1991 Act also provided for amendments to a building consent²⁷, which was a means by which proposed changes could be approved after the consent had been granted.
- 4.12. The granting of building consent BCO10215165 was an approval to carry out alterations as depicted in the building consent application documents. The plans and specifications supporting the building consent were limited to one plan drawing, a single typical section, specifications for timber framing and lining, and the fire design assessment. This appears to have met the authority’s requirements at the time for the purpose of granting the building consent.
- 4.13. Changes were made to elements of the planned work, as described in paragraph 2.8 and Figure 2B. It is common for completed building work to differ in some way from the plans and specifications that are lodged with a building consent application. Changes often occur during construction, especially when alterations are carried out to an existing building, to accommodate or remediate aspects of the existing features that are not known at the design stage, to account for changes in supplies of materials and products, and for other reasons. The changes may be of little or no significance in terms of achieving or assessing compliance with the Building Code, or they may be more significant in nature.
- 4.14. Further to the code compliance certificate provisions discussed earlier, under section 43 of the 1991 Act, the owner was to advise the authority on completion “that the building work has been completed to the extent required by the building

²³ Section 33(1).

²⁴ Section 33(2).

²⁵ Section 34(2).

²⁶ Section 34(3).

²⁷ Section 33(4).

consent issued in respect of that building work”.²⁸ If it was satisfied that compliance with the Building Code had been achieved, the relevant authority could then certify the work by issuing a code compliance certificate.²⁹

- 4.15. It is important to note here, for context, that the 2004 Act differs from the 1991 Act in a number of respects. Firstly, on considering issuing a code compliance certificate for building work consented under the 2004 Act the relevant authority must be satisfied that the building work complies with the **building consent**³⁰ (my emphasis). In addition, the 2004 Act has a framework for regularising “minor variations”³¹ from the issued building consent (in addition to amendments to a building consent), and the ability to certify building work already done where building consent was required but not obtained.³²
- 4.16. In issuing a code compliance certificate, authorities must identify the relevant building consent.³³ This suggests the code compliance certificate is issued only in respect of the building work that is approved under the referenced building consent, and that the certificate is limited in its application to the building work set out in the plans and specifications approved under the referenced building consent.
- 4.17. When considering building work that departs from a building consent granted under the 1991 Act, the relevant test for issuing a code compliance certificate is whether the building work complies with the Building Code (not the building consent). In my opinion it would not be reasonable if all departures from approved plans or specifications became an impediment to issuing a code compliance certificate under the transitional provisions regardless of their significance. It is a matter of degree as to whether those departures can properly be considered building work “carried out under” the building consent.
- 4.18. Prior to the repeal of the 1991 Act, departures from approved plans and specifications are unlikely to have prevented a code compliance certificate from being issued, provided the building work was within the nature and scope of the work authorised by the grant of the building consent, the building work had been inspected and complied with the Building Code, and any variations were recorded against the building consent.
- 4.19. I am of the view that if the departures from approved plans are within the nature and scope of the proposed works for which the building consent was issued, it should not prevent the issuing of the code compliance certificate under the transitional provisions.

²⁸ There was no provision in the 1991 Act for an application to be made for a code compliance certificate.

²⁹ Section 43(3)

³⁰ Section 94(1)(a)

³¹ Section 45A Minor variations to building consents

³² Section 96 Territorial authority may issue certificate of acceptance in certain circumstances

³³ Refer Form 7 in the Schedule to the Building (Forms) Regulations 2004 for code compliance certificates.

- 4.20. Some aspects of the variation, such as repositioning a bedroom door, are minor and of little or no significance in terms of assessment of compliance with the Building Code. Such minor changes may have been able to be addressed through the provision of revised drawings, during construction or on completion, that accurately reflected the as-built work.
- 4.21. Other aspects of the variation are more significant in terms of assessing or establishing compliance with the Building Code. As an example, the as-built work does not conform with the plans underpinning the fire design assessment that was submitted with the building consent application, in particular occupant numbers and various features of the means of escape from fire differ – there are changes to the safe paths, smoke lobbies have been removed and final exits removed or repositioned.
- 4.22. I acknowledge the leaseholder engaged a firm of consultants to carry out an assessment of the building against Acceptable Solutions for fire safety clauses of the Building Code that were current at the time the building consent was granted in 1996. However, an assessment for the purpose of establishing whether building work complies with the Building Code in force in 1997 is not an assessment of whether the variation can properly be said to be building work “carried out under” BCO10215165 for the purpose of section 436.
- 4.23. In this case I am of the view that the variation is not so significant in terms of the nature and scope of the building work for which the building consent was granted that it cannot be considered building work carried out under BCO10215165. The approval was for alterations to increase the number of bedrooms in the accommodation wings and the installation of new fire safety features. The building work that was carried out, while it differed from the approved plans in several respects, remained within the scope of the consent with regard to the nature and extent of the proposed works. On that basis I conclude, the building work carried out in 1997 was work carried out under a building consent, therefore section 436 applies to that work carried out in 1997 that varied from the approved plans.
- 4.24. I note for completeness, despite my conclusion that the work carried out in 1997 was carried out under building consent No. BCO10215165 and is subject to section 436, before a code compliance certificate can be issued by the authority the compliance of the building work must be assessed. On application for a code compliance certificate, it is for the authority to consider the compliance of all of the completed work with the Building Code that was in force at the time the building consent was granted, including with regard to section 38 of the 1991 Act. I note the authority (in their inspection) and the fire report have identified some initial matters of code compliance; I leave the matter of code compliance of the work for the parties to address. It remains for the leaseholder to provide accurate records of the as-built work, of which is also a matter for the parties to address.

4.25. I emphasise that each determination is conducted on a case-by-case basis and is made on the information provided to me.

5. Conclusion

5.1. Having considered the matters in this case, I conclude:

- 5.1.1. an amendment cannot now be issued for building work that was carried out in 1997;
- 5.1.2. section 436 applies to the building work carried out in 1997 as building work “carried out under” building consent No. BCO10215165, including those parts of the building work undertaken in 1997 that varied from the approved plans;
- 5.1.3. the authority was incorrect in its purported refusal to grant the code compliance certificate on the basis that an amendment was required for the variation.

6. Decision

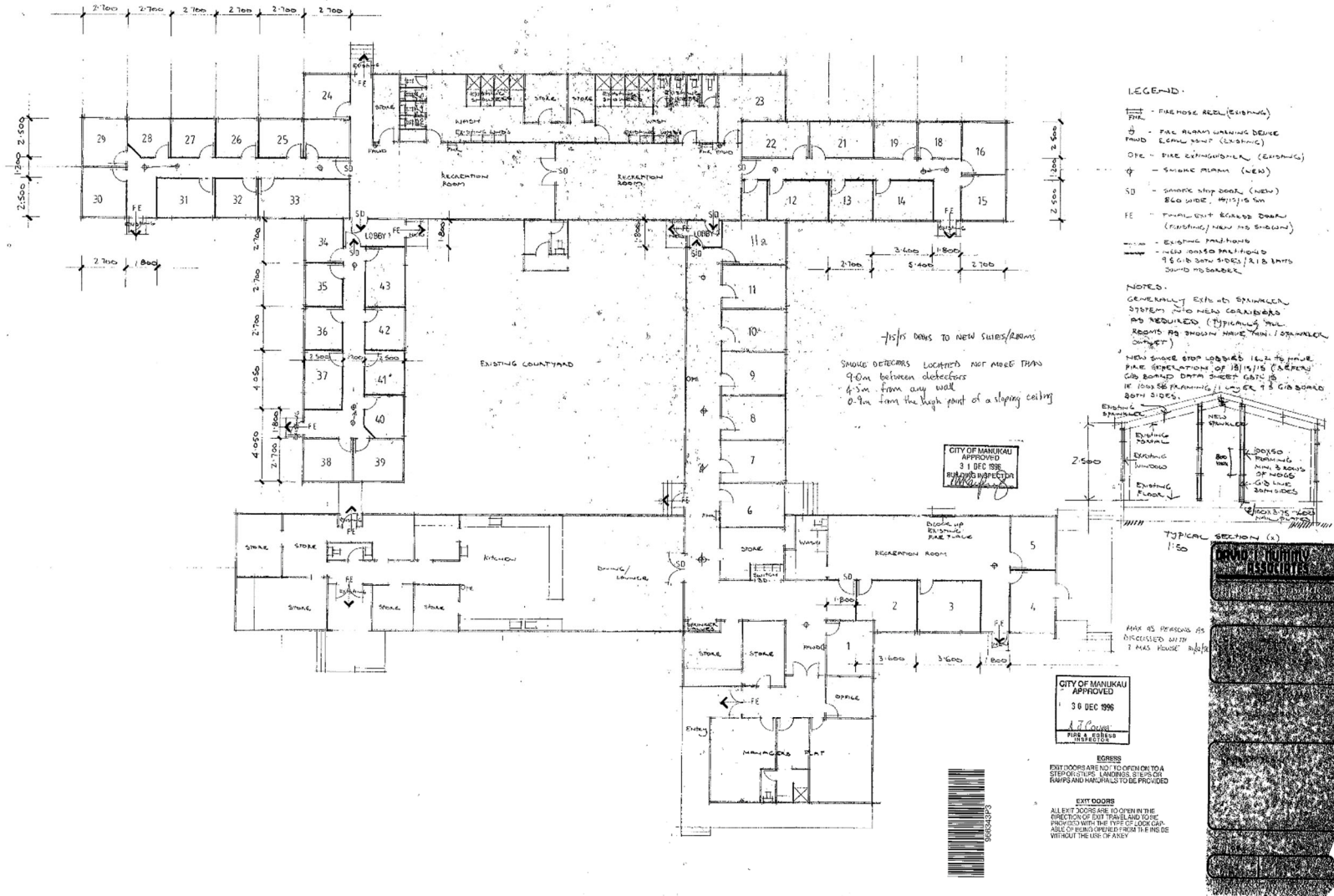
6.1. In accordance with section 188 of the Building Act 2004, I hereby determine the authority was incorrect in its purported refusal to grant the code compliance certificate on the basis that an amendment was required.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 28 June 2022.

Rebecca Mackie

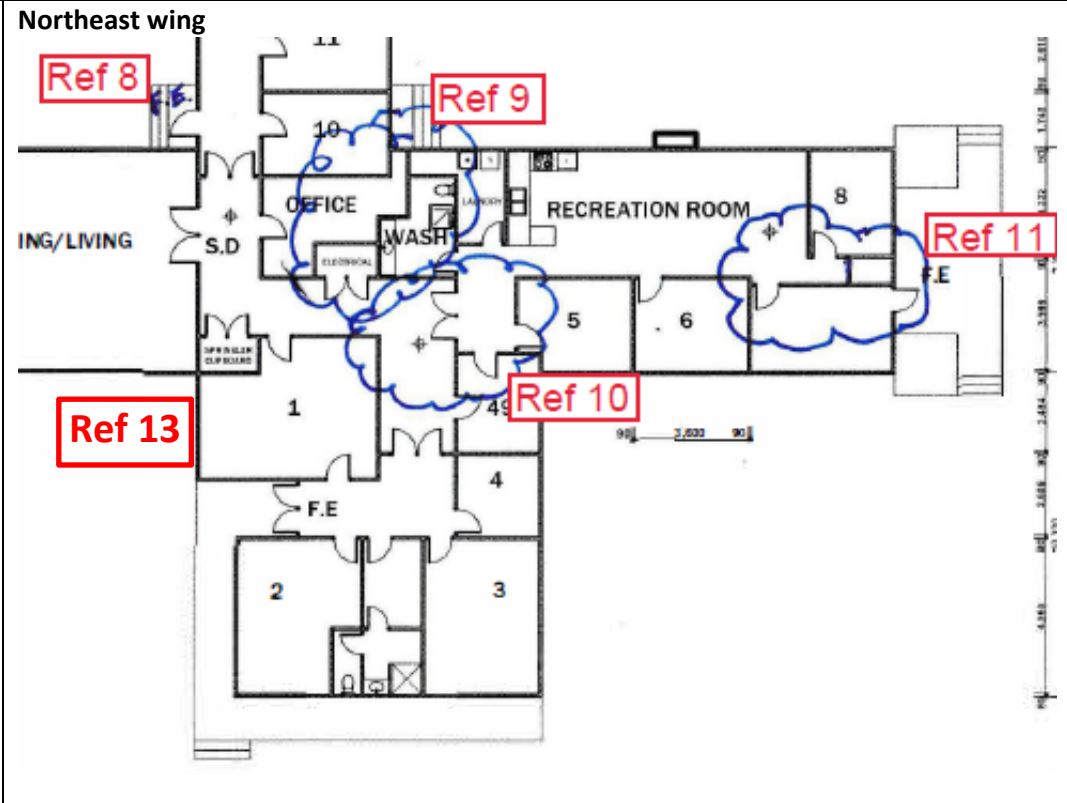
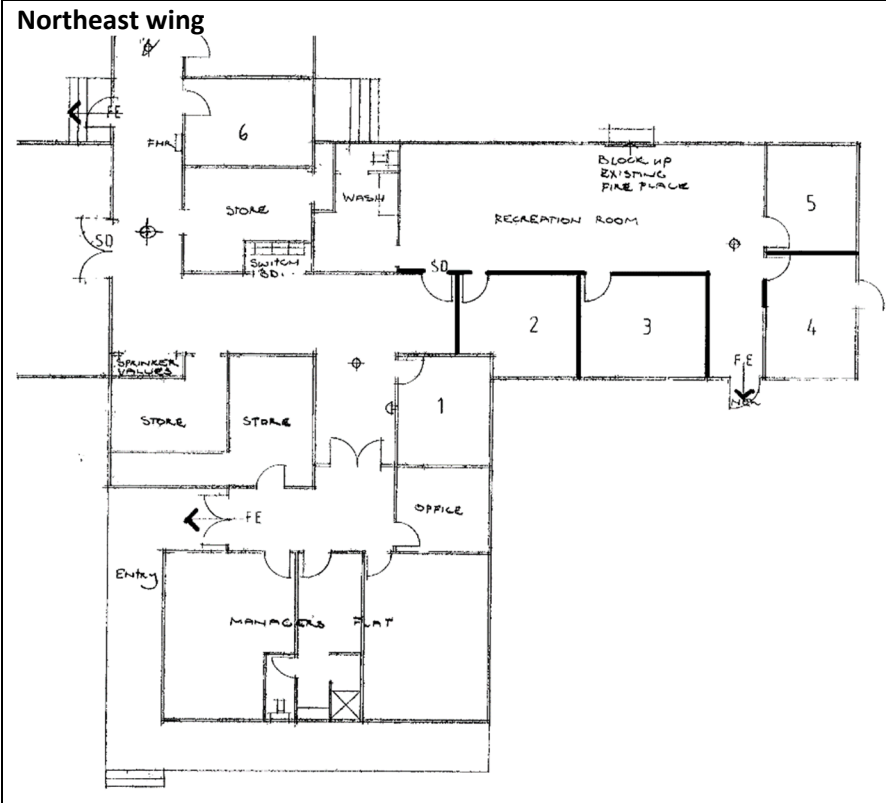
Principal Advisor Determinations

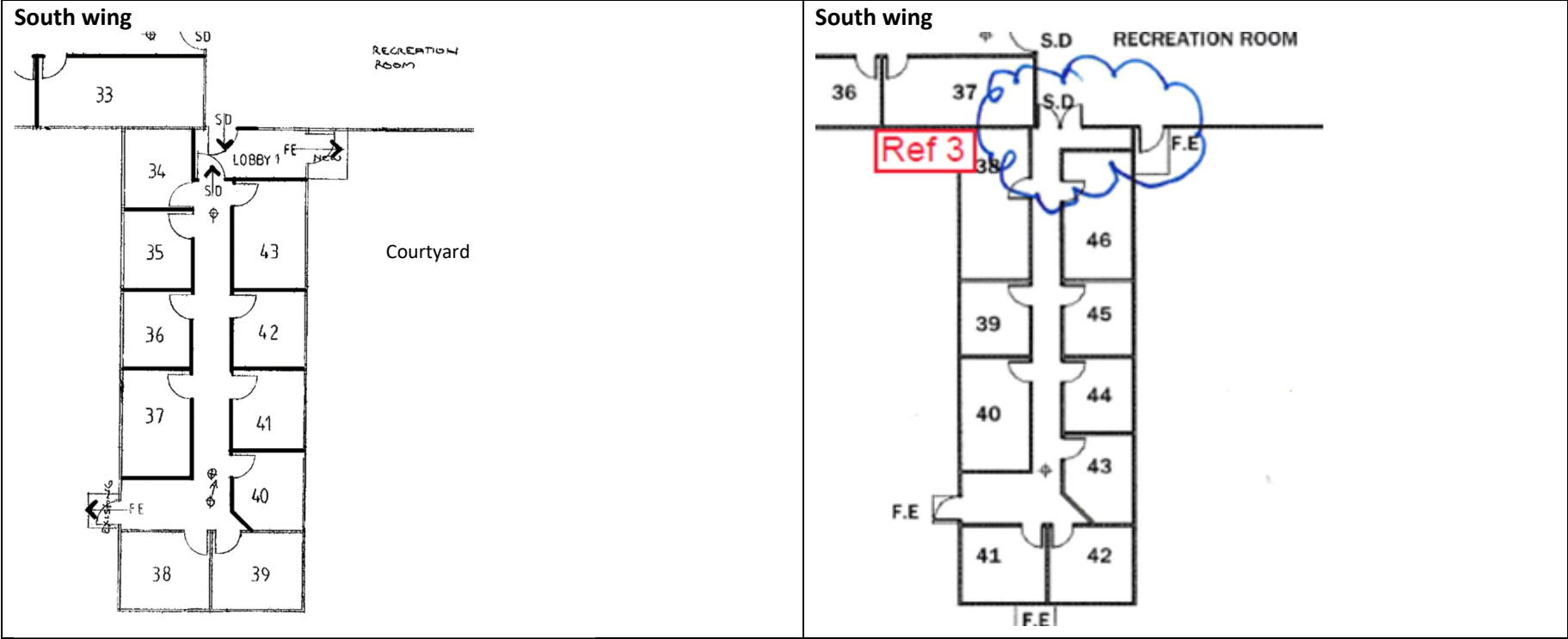
Appendix A: The approved plans



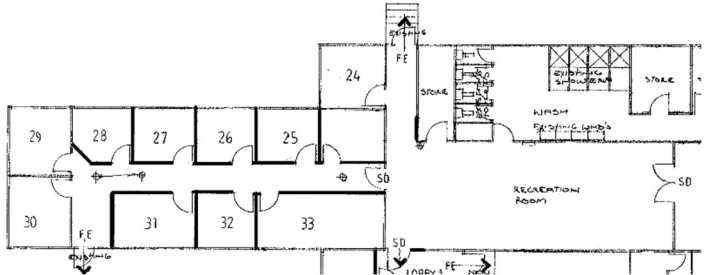
Appendix B: Comparison of 1996 approved plans and the variation

<p>From 1996 approved drawings (New partitions shown with solid lines)</p>	<p>The variation (Added references – see paragraph 2.8)</p>
<p>Northwest wing and north wing fire exit</p>	<p>Northwest wing and north wing fire exit</p>

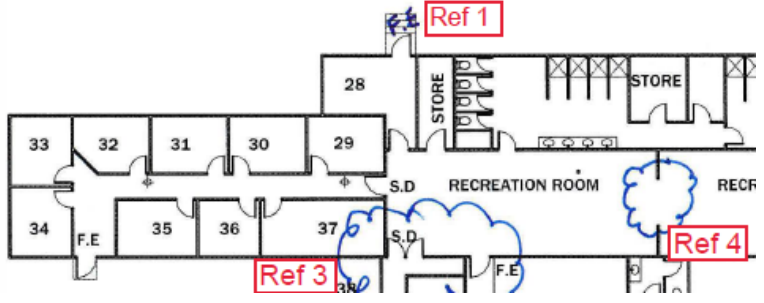




Southwest wing



Southwest wing



Appendix C: The legislation

The Building Act 1991

s32 Buildings not to be constructed, altered, or demolished without consent

(1) It shall not be lawful to carry out building work except in accordance with a consent to carry out building work (in [the 1991 Act] called a “building consent”), issued by a territorial authority, in accordance with this Act.³⁴

s33 Applications for building consents

(1) An owner intending to carry out any building work shall, before commencement of the work, apply to the territorial authority for a building consent in respect of the work.

(2) Every application for a building consent shall be in the prescribed form and be accompanied ... by such plans and specifications and other information as the territorial authority reasonably requires.

(4) An application for an amendment to a building consent shall be made in the same manner as the original application.

s34 Processing building consents

(3) After considering an application for building consent, the territorial authority shall grant the consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work was properly completed in accordance with the plans and specifications submitted with the application.

s38 Alterations to existing buildings

No building consent shall be granted for the alteration of an existing building unless the territorial authority is satisfied that after the alteration the building will—

(a) Comply with the provisions of the building code for means of escape from fire, and for access and facilities for use by people with disabilities (where this is a requirement in terms of section 47A of [the 1991 Act]), as nearly as is reasonably practicable, to the same extent as if it were a new building; and

(b) Continue to comply with the other provisions of the building code to at least the same extent as before the alteration.

s43 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.

³⁴ Section 32(2) specified building work which did not require consent under section 32(1). There is no suggestion that the owner considers this provision applied in connection with the variation from the approved building work.

- (3) ... the territorial authority shall issue to the applicant in the prescribed form, ..., 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.

The Building Act 2004

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.