

# ***Determination***

## ***under the***

### ***Building Act 1991***

#### **No. 97/004: Code compliance certificate for the ventilation and air conditioning system in a tavern**

##### **1. The matter to be determined**

- 1.1 The matter before the Authority is whether a code compliance certificate should have been issued in respect of the installation, in a tavern, of a ventilation and air conditioning system, referred to below as “the system”.
- 1.2 The Authority takes the view that it is being asked in effect to determine whether the system as installed complied with clause G4 of the building code (the First Schedule to the Building Regulations).
- 1.3 In making its determination, the Authority has not considered whether the system and any associated building work complies with any other provisions of the building code.

##### **2. Background**

- 2.1 The system was installed as part of a “tenant’s internal fitout” converting commercial premises to a tavern. A building consent for the fitout was issued in October 1993. The applicant for that building consent leased the premises from the landlord and was to be the operator of the tavern. The company concerned is referred to below as “the original operator”. The application for building consent was accompanied by a letter from the landlord saying that it “has no objection” to the application.
- 2.2 A code compliance certificate for the fitout was issued in December 1993.
- 2.3 About a year later, the business of the tavern was purchased by another company, referred to below as “the current operator”. The purchase contract included a warranty by the original operator as to compliance with statutory requirements. The current operator says that in making the purchase it relied on the code compliance certificate as establishing that the system did in fact comply with the building code.
- 2.4 After the purchase, the current operator became dissatisfied with the system, and a firm of consulting building services engineers, referred to below as “the review engineers”, was commissioned to report on it. The report was made in July 1995, and was to the effect that the system did not comply with the relevant provisions of the building code.

2.5 The current operator therefore disputed the issuing of the code compliance certificate, and has submitted that dispute to the Authority for determination.

### **3. The Authority's jurisdiction to determine the matter**

#### *3.1 The matter before the Authority*

3.1.1 The matter before the Authority arises out of a dispute about the issuing of a code compliance certificate, which is a dispute within section 17(1)(b)(i) of the Building Act. The matter itself is whether the system complies with the building code, which is a matter within section 18.

3.1.2 The question of whether the territorial authority had reasonable grounds on which it could be satisfied as to compliance when it issued the code compliance certificate does not come within section 18 and the Authority has not considered it.

#### *3.2 The parties*

3.2.1 The application for determination was made by the current operator. That application identified the territorial authority and the landowner as parties. The territorial authority has completed and returned the Authority's form acknowledging receipt of the application and its supporting documents. The current operator said that it had sent the form and relevant documents to the landlord, but had received no acknowledgment.

3.2.2 The Authority is of the view that section 17(1) requires an application for determination to be made by a party or someone acting for and on behalf of a party. "Party" is defined in section 16, which reads as follows:

**16. Definition of "party"** - In sections 17 to 21 of this Act, "party" means -

- (a) The territorial authority affected; and
- (b) Any building certifier affected; and
- (c) The owner affected; and
- (d) The owner of other property (if the matter for determination relates to a provision in the building code that has the purpose of protecting that other property); and
- (e) Any affected person who, or organisation which, (pursuant to any other Act) has a right or an obligation to give notice in writing to a territorial authority in respect of matters to which this Act relates.

"Owner is defined in section 2 as:

"Owner", in relation to any land, including any buildings on that land, means the person who is for the time being entitled to the rack rent thereof or who would be so entitled if the land were let to a tenant at a rack rent; and, for the purposes of sections 30, 33, and 43 of this Act, includes the -

- (a) Owner of the fee simple of the land; and
- (b) Any person who has agreed in writing, whether conditionally or unconditionally, to purchase the land or any leasehold estate or

interest in the land, or to take a lease of the land, while the agreement remains in force -

and “ownership” has a corresponding meaning:

- 3.2.3 Thus there are two definitions of “owner”, a narrow definition that the owner is the person entitled to the rack rent and an extended definition which includes the additional people mentioned in paragraph (b). The extended definition applies for the purposes of sections 30 (project information memoranda) 33 (building consents) and 43 (code compliance certificates).
- 3.2.4 The landlord clearly comes within both definitions of “owner”. However, the current operator did not purport to be acting for and on behalf of the landlord when it applied for a determination because it named the landlord as a separate party. For that application to be valid, therefore, the current operator must come within the applicable definition of “owner”. The current operator appears to come within the extended definition but not the narrow definition. Thus the question is which definition of “owner” applies for the purposes of section 16.
- 3.2.5 At first impression, because the extended definition is specified as applying to sections 30, 33, 43, it does not apply for the purposes of any other section. However, section 17 provides that determinations are to be in respect of doubts or disputes arising in respect of specified interactions between an owner, in the extended sense, and a territorial authority or building certifier. It would be surprising if an application for the determination arising from one of those interactions could be made by an owner in the narrow sense but not by an owner in the wider sense.
- 3.2.6 This determination arises from the issuing of a code compliance certificate under section 43. The Authority therefore takes the view that because the extended definition of “owner” applies to section 43 it applies also to determinations arising out of the issuing of code compliance certificates. Thus the Authority accepts that the current operator was entitled to apply for a determination. From here on, therefore, the current operator is referred to as “the applicant”.
- 3.2.7 The landowner has not been treated as a party separate from the applicant, and therefore has not been sent any of the documentation which the Authority has sent to the applicant and the territorial authority.

### 3.3 *Time limits*

- 3.3.1 There was a period of approximately three and a half years between the issuing of the code compliance certificate and the application for a determination. The Authority does not consider that to be significant in this case. However, the Authority observes that a code compliance certificate is generally taken as marking the transition from a building under construction to an existing building. Once it has issued a code compliance certificate therefore, the territorial authority may require the building to be upgraded only under sections 38 (alteration), 46 (change of use etc), 64 (buildings deemed to be dangerous or insanitary), or 66 (buildings deemed to be earthquake prone). It therefore seems undesirable

that a code compliance certificate should be subject to reconsideration a long time after it was issued.

- 3.3.2 In this case about a year and a half elapsed between the review engineers' report and the application for determination, but during that time there were discussions between the applicant and the territorial authority so that the Authority does not consider that there was any unreasonable delay.

#### 3.4 *Conclusion and consequences*

- 3.4.1 The Authority concludes, therefore, that the applicant was entitled to make the application and that the Authority is entitled to issue a corresponding determination.

- 3.4.2 It follows, therefore, that as a consequence of the submission, the code compliance certificate was automatically suspended by virtue of section 17(4), which reads as follows:

(4) Any consent, notice, certificate, or schedule issued by a territorial authority that is or arises out of a matter submitted to the Authority under subsection (1) of this section shall be deemed to be suspended pending the determination of that matter, but any direction in a notice under section 42 of this Act to cease building work for safety reasons shall remain in force pending the determination.

- 3.4.4 When the code compliance certificate was suspended, the Authority takes the view that the original building consent came back into force notwithstanding the lapse of time during which no progress was made with the work under.

### **4. The submissions**

- 4.1 The application was accompanied by correspondence between the parties and by the investigating engineers' report together with an estimate from another consultant of the costs of rectifying the costs of the deficiencies identified in that report.

- 4.2 The territorial authority made no specific submissions.

- 4.3 To assist it in understanding the technical points involved, the Authority obtained a report from a firm of consulting engineers with experience in ventilation and air conditioning. The firm was given the investigator's report and visited the premises. Its own report generally agreed with the investigating engineers' report, although there were comparatively minor differences.

- 4.4 The report obtained by the Authority was sent to the applicant and the territorial authority. The applicant submitted some comments prepared by the firm responsible for the estimate mentioned in 4.1 above. The territorial authority did not comment.

### **5. Discussion**

- 5.1 *Shortcomings of the system*

- 5.1.1 The investigating engineers' report and the report commissioned by the Authority establish that the system does not comply with the building code. In particular:
- (a) Several rooms are not served by the system and do not have opening windows;
  - (b) The capacity of the system is inadequate for the numbers of people likely to be present; and
  - (c) There are problems with the exhaust hood.
- 5.1.2 The two reports do not agree on all details, but on balance, and taking account of both reports and the comments on them submitted by the applicant, the Authority considers that:
- (a) The rooms currently not served by the system, namely the office, the dishwashing and food preparation area, and the storeroom, need to be served by the system or to be provided with opening windows.
  - (b) The capacity of the system is currently 944 l/s. In order to comply with the acceptable solution G4/AS1, and to serve the rooms not currently served by the system, that capacity would need to be increased to achieve an outdoor ventilation rate of 2,805 l/s. That acceptable solution may be used as a benchmark or guideline for considering any proposed alternative solution.
  - (c) The exhaust hood is of adequate capacity but needs more cleaning than would be expected for a well designed and constructed hood. It has not been well maintained, which has resulted in an unsatisfactory discharge of the exhaust air. The Authority has not seen a compliance schedule for the building, but assumes that one has been issued under section 44(1)(i). That compliance schedule needs to be amended to require more frequent cleaning and replacement of filters than has been undertaken to date.

## 5.2 *Procedure*

- 5.2.1 As discussed in 3.4 above, the code compliance certificate is currently deemed to be suspended and the building consent has come back into force. As the Authority considers that the system does not comply with the building code, the code compliance certificate cannot come back into force, so that a notice to rectify needs to be issued as required by section 43(6).
- 5.2.2 It is not for the Authority to direct the applicant as to precisely what work is to be done on the system in order to bring it to compliance with the building code. That is for the applicant to specify in an application to the territorial authority for an amendment to the building consent to cover alterations to the system.

## 6. **The Authority's decision**

- 6.1 In accordance with section 20(a) of the Building Act the Authority hereby determines that:

- (a) The territorial authority is to issue a notice to rectify requiring the system to be altered as indicated above in order to bring it to compliance with the building code;
- (b) The applicant is to apply to the territorial authority for an amendment to the building consent to cover that alteration; and
- (c) If the alterations do not include replacement of the exhaust hood, the territorial authority is to amend the compliance schedule to require cleaning and replacement of filters at appropriate intervals taking account of the design and construction of the hood.

Signed for and on behalf of the Building Industry Authority on this 30<sup>th</sup> day of  
May 1997

J H Hunt  
Chief Executive