

Determination 2006/99

Refusal of a code compliance certificate for the interior fit-outs of a bakery, a food bar and a one-bedroom apartment at 19 Mulgrave Street, Wellington

1 The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Determinations Manager, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department. The applicant is Prime Building Compliance Ltd (“the applicant”) which was, until 30 June 2005, a building certifier approved by the Building Industry Authority (“the Authority”) under the Building Act 1991, and the other parties are the Wellington City Council (“the territorial authority”) and the building owner.
- 1.2 The address of the owner was not supplied in the application and I have received no evidence to show that the owner was aware of the application or that copies of the submissions of the other parties were supplied to the owner. However, I have assumed that the applicant, originally engaged by the owner to certify the building work in the fit-out, was acting as agent for the owner.
- 1.3 The application arises because the territorial authority disputes the validity of a code compliance certificate issued by the applicant for the fit-out of a bakery, a food bar, and a one-bedroom apartment (“the fit-out”), as it does not accept that the applicant has the authority to issue such a certificate.
- 1.4 The matter for determination is whether I am satisfied on reasonable grounds that the territorial authority’s decision to decline to accept various code compliance certificates issued by the applicant for the fit-out is correct.
- 1.5 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.

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

2 The building

- 2.1 The building work involves the ground-floor fit-out of a bakery, a food bar, and a one-bedroom apartment in an existing eight-storey building. The complete floor containing the fit-out is designated as Unit G1 and the apartment is designated as Accessory Unit 10 on the unit title detail sheets for the building.

3 Sequence of events

- 3.1 The applicant was approved as a building certifier under section 53 of the Building Act 1991 on 11 February 2000. The Authority issued an approval renewal of approval on 11 February 2003 for the following twelve month period which expired on 11 February 2004. The applicant's approval as a building certifier was subject to a list of "general limitations", which specifically allowed the applicant to approve:

Ordinary residential, community, and commercial buildings having not more than five storeys

- 3.2 The territorial authority issued an "approval of building consent" for the fit-out on 21 March 2003, based on a building certificate issued by the applicant on 18 March 2003. The building certificate only notified the territorial authority that it had been engaged to undertake the inspections, it did not certify any completed work.
- 3.3 On 24 March 2003, the Authority approved an extension to the applicant's scope of approval to enable the applicant to certify the fit-out within the high-rise building. (The applicant informed the territorial authority of this approval in correspondence received by the territorial authority on 24 March 2003.)
- 3.4 The applicant carried out various inspections during construction and undertook a final inspection of the apartment on 17 November 2003. The copy of the "Notice of Final Inspection" relating to this inspection was received by the territorial authority on 29 December 2003. The applicant had also forwarded various "Building Certifier Inspection Reports" to the territorial authority. The last of these covering all of the building work was for the period to November 2003 and was dated 22 December 2003.
- 3.5 On 1 July 2003, the Authority amended the applicant's approval. The "general limitations" noted *inter alia* that the approval did not include "...any unit that is a unit under the Unit Titles Act 1972..." in respect of ordinary residential buildings. The amended approval also contained the requirement that:

[the applicant] is not in any way to undertake work outside the scope of its insurance agreement

3.6 The applicant issued an interim code compliance certificate dated 11 June 2003 and a final code compliance certificate dated 6 May 2004, both in respect of the entire fit-out.

3.7 The territorial authority wrote to the applicant on 9 October 2004, stating that it was unable to accept various code compliance certificates issued by the applicant. In particular, the code compliance certificate relating to the fit-out was outside the scope of the applicant's approval as:

This building consent includes the fitout of a residential unit titled apartment

3.8 The territorial authority wrote to the applicant on 7 September 2005, returning the final code compliance certificate. The territorial authority stated that it was unable to accept the final code compliance certificate as the applicant's consent:

...covers a residential apartment that is "a unit under the Unit Titles Act 1972".

3.9 In a letter to the territorial authority dated 19 September 2005, the applicant stated that it did not accept the territorial authority's ruling as it had specific approval, which had not been withdrawn, to carry out the work.

3.10 The territorial authority wrote to the Department on 10 October 2005 seeking clarification of whether the applicant's approval as at 6 May 2004 allowed it to certify the work. Specifically, the territorial authority required the following advice;

Did the extension granted on 24 March 2003 still apply regardless of the limitations placed on Primes approval from 1 July 2003?

Were Prime approved to certify this work as at 6 May 2004?

3.11 The applicant's approval as a building certifier expired on 21 November 2005.

3.12 The Department responded to the territorial authority's request in a letter dated 16 January 2006. The Department described the background regarding the applicant's approvals. In the view of the Department, the applicant "was acting within its scope of approval on 6 March (sic) 2004 when it certified the commercial parts of the building, but not the residential".

3.13 On 27 January 2006, the applicant wrote to the territorial authority, referring to the Department opinion. The applicant was of the opinion that a determination would be the best way to address the issue. The territorial authority responded by mail on 28 February 2006, agreeing with this proposal.

3.14 The applicant wrote to the Department on 14 June 2006, stating that, following a review of all the documentation in its possession, it found that the apartment was an accessory unit not a residential unit. Accordingly, the original code compliance certificate was not issued incorrectly.

3.15 The Department responded by letter on 28 June 2006, stating that its position remained the same as in its letter of 16 January 2006.

3.16 The Department received the application for a determination on 21 July 2006.

4 The submissions

4.1 In a covering letter to the Department dated 18 July 2006, the applicant set out some of the background and stated that the dispute apparently centred on whether the apartment is a residential or an accessory unit and whether the unit title limitation was applicable. The applicant noted:

The apartment is not unit titled under the unit titles Act 1972 but is incorporated under the unit title for the principal unit G1, a commercial unit which is currently a bakery.

We believe the apartment is an accessory unit to unit G1 as stated in the Certificate of Title not a residential unit in its own right. If the apartment had its own tile and was unit titled we would accept Wellington City Council's assertion.

If indeed the CCC has been issued in error we would like to know what process to follow to allow a CCC to be issued through the WCC.

4.2 The applicant forwarded copies of:

- the plans
- the certificate of title
- some consent and inspection information
- the two code compliance certificates
- the correspondence with the territorial authority, the Authority, and the Department
- the approvals of 10 February 2003 and 1 July 2003.

4.3 In an email sent to the Department on 2 August 2006, the applicant noted that the insurance cover that it had obtained in 21 November 2003 did not have the restriction relating to unit titles that appears on the applicant's approval of 1 July 2003.

4.4 The territorial authority wrote to the Department on 1 August 2006, setting out the background to the dispute and noting the territorial authority's position. The letter submitted that:

If the Department determines that the CCC was issued in error [Council] considers that the provisions of . . . (BAO4) must be taken into consideration . . . the relevant process for resolving this matter is a certificate of acceptance . . . not a CCC.

If the Department determines that the CCC issued by Prime was issued in error, Prime will be unable to issue either a building certificate or a new CCC . . . Section 437(2) specifically provides that in such circumstances, and on application from the building owner, “A territorial authority may . . . issue a certificate of acceptance”.

The Council's position is that this precludes [it] from taking any other action.

- 4.5 The territorial authority forwarded copies of:
- some correspondence with the applicant
 - the final code compliance certificate issued by the applicant.
- 4.6 The owner made no submission (see paragraph 1.2).
- 4.7 Copies of the submissions and other evidence were provided to the applicant and the territorial authority. I do not know whether either of them supplied copies to the owner.
- 4.8 A copy of the draft determination was forwarded to the parties for comment on 25 September 2006. The applicant accepted the draft without comment.
- 4.9 The territorial authority responded to the draft in a letter to the Department dated 7 October 2006. The territorial authority pointed out typographical errors in the draft. The territorial authority accepted the determination but made the following submission:

The application for determination related to [Council's] decision to issue the final code compliance certificate . . . not to [the Council's] decision to decline to issue a code compliance certificate . . .

Council considers that if the Department determines the code compliance certificate was issued in error, then [s437 of BA04] applies. This section provides for a certificate of acceptance to be issued, on application, when a building certifier is unable or refuses to issue a code compliance certificate or a building certificate . . . Council considers that [BA04] does not make provision for the Council to issue a code compliance certificate where a building certifier is unable to issue a building certificate, unless instructed to do so by determination . . .

[Council] has not raised any issues relating to non-compliance as the Council has not carried out inspections of the work. [Council's] involvement in this dispute has been limited to assessing whether certificates and records supplied by [the applicant] after 1 July 2003 were issued within the scope of their approval . . .

I have considered the territorial authority's submission and amended the determination accordingly.

5 Discussion

- 5.1 I note that in July 2003, the applicant's authority was amended so that it did not include "...any unit that is a unit under the Unit Titles Act 1972...in respect of ordinary residential buildings." This amendment was not in place when, on 24 March 2003, the Authority extended the applicant's scope to certify work in a building exceeding 5 storeys in height. I interpret this to mean that as from July 2003, the applicant was not authorised to issue inspection reports and code compliance certificates relating to the apartment segment of the fit-out.
- 5.2 I consider that section 10(1) of the Unit Titles Act 1972 establishes a general rule that no accessory unit may be dealt with except as part of a dealing which includes a principal unit. This leads me to the opinion that the apartment falls within the unit title exception noted on the applicant's approval of 1 July 2003. Accordingly, I accept that the final code compliance certificate dated 6 May 2004 was issued in error and should be withdrawn solely because it included a unit-titled apartment.
- 5.3 I note that the applicant's scope of approval as a building certifier that applied after 1 July 2003 also stated that:
- [the applicant] is not in any way to undertake work outside the scope of its insurance agreement
- As stated in paragraph 4.3 the applicant's insurer at the time has confirmed that the unit-titled apartment was not outside the applicant's insurance cover.
- 5.4 I am therefore of the opinion that the amendment restricting the applicant's scope of approval to exclude unit-titled dwellings which came into effect, in 1 July 2003, did not impinge on the other aspects of the applicant's extension to its scope of approval, which the Authority granted on 24 March 2003.
- 5.5 The territorial authority has submitted that, if the code compliance certificate was issued in error, then the issuing of a certificate of acceptance is the only appropriate process available to it for resolving the issue as set out in section 437 of the Act. However, I am of the opinion that the territorial authority itself could have made a reasonable grounds decision about the code compliance of the work either based solely on the evidence available to it or by inspecting the work itself.
- 5.6 The issuing of a certificate of acceptance would only be a consideration in this determination if this has been sought by either the applicant or the owner. Neither has elected to do so.
- 5.7 I note that the territorial authority has not raised any issues relating to non-compliance with the Building Code in respect of any of the building work making up the fit-out.

6 Conclusion

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby confirm the territorial authority's decision to refuse to issue a code compliance certificate.
- 6.2 However, I consider that the available documentation, which includes the building certifier's inspection reports and the code compliance certificate dated 6 May 2004, allows me to form a view as to the code compliance of these buildings. Based on this information I believe that I have sufficient grounds to form a view that the building work for the fit-out complies with the building code. Accordingly I am of the opinion that a code compliance certificate should be issued for the fit-out.

7 The Decision

- 7.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the territorial authority's decision not to issue a code compliance certificate was correct.
- 7.2 I instruct the territorial authority to issue a code compliance certificate for the fitout (being the bakery, food bar, and one-bedroom apartment).

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 18 October 2006.

John Gardiner
Determinations Manager