



Determination 2013/012

Regarding the refusal to issue a code compliance certificate for a 10-year-old commercial fitout to a building carried out under the supervision of a building certifier at 173 Victoria 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 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 the building, JLM International Limited (“the applicant”)
 - Wellington City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 This determination arises from the authority’s decision to refuse to issue a code compliance certificate. The authority’s concerns relate to the fact that the building work was carried out under the supervision of Nationwide Building Certifiers (“the building certifier”), which was duly registered as a building certifier under the Building Act 1991 (“the former Act”), but which ceased operating as a certifier before it had issued a code compliance certificate for the building work.
- 1.4 The matter to be determined² is therefore whether the authority correctly exercised its powers in refusing to issue a code compliance certificate. In making this decision, I must consider
- the grounds on which the authority based its decision to refuse to issue the code compliance certificate, and
 - whether the decision to refuse to issue the code compliance certificate was correct. In making this decision, I must also consider whether the completed building work complies with the relevant provisions of the Building Code³ (First Schedule, Building Regulations 1992) that was current at the time the building consent was issued

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)(b) and 177(2)(d) of the current Act

³ In this determination, unless otherwise stated, references are to sections of the current Act and references to clauses are references to the Building Code

1.5 In making my decision, I have considered the submissions of the parties, the report of the expert commissioned by the Ministry to advise on this dispute (“the expert”), and the other evidence in this matter.

1.6 The relevant sections of the current Act are set out Appendix A.

2. The building work

2.1 The building work in question consists of an alteration to the ground floor of a multi-storey building to form a bakery and café (“the fitout”).

2.2 The fitout largely consisted of new exterior walls with aluminium joinery, internal partitioning, ceilings, fittings and toilet facilities, together with associated plumbing, drainage, and services, and the addition of a sprinkler system and fire safety signage. A suspended timber landing, under one metre in height, and steps were constructed at the rear of the building and a canopy was constructed on the Victoria street frontage.

2.3 The exterior wall on the Victoria Street frontage is timber framed and clad on the outside with an EIFS⁴ system, directly fixed to the wall framing. The treatment of the framing timber has not been confirmed by the expert.

3. Background

3.1 A firm of building certifiers produced a building certificate dated 2 May 2002 for the fitout, and the scope of the building certifiers’ engagement was described as

NATURE OF ENGAGEMENT

Building; Plumbing; Drainage

PLAN PROCESSING

FIELD INSPECTIONS

ISSUE OF CODE COMPLIANCE CERTIFICATE

3.2 Based on this certificate, the authority approved building consent No 87858 for the fitout on 3 May 2002, under the Building Act 1991 (“the former Act”). The authority noted that the building certifiers were ‘undertaking all inspections and they will be issuing the Code Compliance Certificate’.

3.3 I have not been provided with any information on inspections undertaken during construction or whether a final inspection has been carried out. The building certifier ceased to operate as a building certifier without having a code compliance certificate being issued.

3.4 Following a meeting between the parties, the authority emailed the applicant on 28 November 2012 stating that

[The authority] will not issue a Code Compliance Certificate (CCC) for consent SR87858 as [the authority] did not issue the consent, it was issued by Nationwide Building Certifiers. We have no records of inspections by others.

3.5 On 9 November 2012, the authority emailed the applicant and provided a list of the documents that the authority would require to support an application for a code compliance certificate. The authority also stated that

... 87858 has been issued by a private certifier, who is no longer in business. This [consent] will need to be sorted by either a Certificate of Acceptance (COA) or a

⁴ Exterior Insulation and Finish System

determination. A Certificate of Acceptance (COA) would need to comply with the building code as at the day of application for the COA. This can be very hard to achieve as there have been a number of changes to the building code since this consent was unpredictable (sic).

3.6 The Ministry received an application for a determination on 30 November 2012.

4. The submissions

4.1 In a covering letter forwarded with the application, the applicant described the background to the dispute and attached copies of the following:

- plans and specifications
- the building certificate issued by the building certifier
- the authority's approval of the building consent
- relevant correspondence with the authority.

4.2 The authority acknowledged the application for determination but made no submission in response and provided no further information.

4.3 A draft determination was issued to the parties for comment on 14 February 2013.

4.4 Both parties accepted the draft without further comment in responses received on 25 and 28 February 2013.

5. The expert's report

5.1 As described in paragraph 1.5, I engaged the services of an expert, who is a registered building surveyor, to assist me. The expert examined the fitout on 22 January 2013 and produced a report completed on 28 January 2013. Copies of this report were forwarded to the parties on 1 February 2013.

5.2 The report described the fitout in general terms and gave some of the background to the dispute. In the expert's opinion, the construction was of a 'generally average quality' and there were areas where maintenance is required.

5.3 The expert noted the following differences between the fitout as constructed and the consented plans:

- An additional door in the wall behind the refrigeration cabinets.
- The sink in the preparation bench was in a different location, as is the kitchen fire extinguisher.
- Many of the installed waste pipes were of a lesser diameter than those indicated on the plans.
- The grease trap installed in the pot wash area was not shown on the consented plans.
- Additional sprinkler heads were installed.

5.4 The expert carried out non-invasive moisture measurements at many locations around the building on the inside face of the external walls and all these were within an acceptable range. No evidence of moisture ingress was observed and while water staining was evident on the ceiling tiles, information provided by the tenant showed this to be caused by leakage from an upper-floor tenancy.

5.5 The expert examined the various elements making up the fitout and I summarise the expert's comments below:

Clause C2—Means of escape

- The lockable fly screen door at the rear exit swings incorrectly and should be removed or suitably amended to be code-compliant.

Clause D1—Access routes

- The support frame for the chiller unit at the back door sits 1.825 above the line of the step nosings, which is less than the 2m stipulated in D1/AS1.
- The rear access stair is on a fire egress route and is an access route.
- The stair handrail is non-compliant and is loose.

Clause E2—External moisture

- The back door is not of exterior quality and is showing signs of water damage and delamination; the door lacks a weather deflector and the door head is not sufficiently weatherproof.
- Some window jamb and sill sealants have failed in places.
- The external cladding was damaged at the sills and at one corner, there is a fine hair line crack in one area and the paint finish is in poor condition.
- One service penetration had not been sealed and there is damage to the cladding.

Clause E3—Internal moisture

- Sealant between the wash-hand basins is absent or damaged.
- Sealant at some stainless steel sink upstands has failed.
- There is a gap between the servery bench upstand and the wall.
- The floor vinyl is cracked at the floor outlet in the pot wash area and other isolated small areas, and vinyl joint welds have cracked in many locations.
- The wall lining to the kitchen back wall has moved away from one jointer.
- Some kitchen wall panels above the extract hood are loose.
- The sealant between the extract duct and the wall lining has failed.

Clause G1—Personal hygiene

- The seat to the accessible toilet is 445mm high instead of the 450mm stipulated in G1/AS1.

Clause G3—Food preparation

- Items listed above under Clause E3 are also relevant in terms of this clause.

Clause G13—Foul water

- The diameter of some of the pipework conveying foul water is less than specified on the plans. Some waste pipes were fitted with air-admittance valves.
 - The expert recommended that the drainage system be assessed by a suitably qualified person to determine the system's compliance.
 - The timber edging to the grease trap is loose and not sealed with a paint system to enable hygienic cleaning.
- 5.6 The expert also recommended that the sprinkler heads, exit signs, alarm points, and fire extinguishers should also be indicated on amended plans. In addition, "as built" drawings should be supplied showing pipe layout and sizes and the compliance verified by a suitably qualified person.
- 5.7 The expert investigated the fitout in respect of other Building Code elements and has not raised any non-compliance issues with the following clauses:
- B2—Durability
 - F7—Warning systems
 - F8—Signs
 - G4—Ventilation
 - G11—Gas as an energy source
 - G12—Water supplies
- 5.8 The expert also noted that a health certificate for the premises was not evident at the time of his inspection and that the building has a current building warrant of fitness that includes inspections and testing for emergency lighting and the sprinkler system.

6. Discussion**6.1 The authority's refusal**

- 6.1.1 In its correspondence to the applicant, the authority has claimed that it did not issue the building consent (refer paragraphs 3.4 and 3.5), and has stated this as a reason for its refusal to issue a code compliance certificate.
- 6.1.2 I note here that under the former Act a building certifier had no power to issue a building consent. A building certifier could issue a building certificate that an authority could rely on in order to issue a building consent. It is clear from the information that I have received that that was the procedure adopted by the authority in this instance. I therefore consider that the authority did issue the building consent under section 35 of the former Act.

6.2 The application of section 95A

- 6.2.1 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—
 - the refusal; and
 - the reasons for the refusal.

- 6.2.2 The provisions of section 95A apply irrespective of the 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 if the issue of the code compliance certificate is refused.
- 6.2.3 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 code compliance of the building work. Given the nature of the building work I consider that the assessment required was relatively straight forward.
- 6.2.4 In light of the above I conclude that the authority incorrectly exercised its powers under section 95A in respect of the reasons provided for its refusal to issue a code compliance certificate.
- 6.2.5 In its email of 9 November 2012 (refer paragraph 3.5) regarding an application for a certificate of acceptance the authority's advice to the applicant was that 'this can be very hard to achieve as there have been a number of changes to the building code since this consent was [issued]'.
- 6.2.6 I note that when an authority is considering the issue of a certificate of acceptance it is able to consider the compliance of each element of the building work against the relevant clauses of the Building Code. A certificate of acceptance can then be issued in respect of those Building Code clauses that the authority is satisfied comply with the Code, but exclude those clauses for which it is not satisfied⁵. The fact that the building work as a whole may not comply with all the relevant clauses of the Building Code does not of itself mean that a certificate of acceptance cannot be issued.

6.3 Compliance with the Building Code

- 6.3.1 The test whether compliance has been achieved for consents issued under the Building Act 1991 ("the former Act") applies irrespective of the involvement of a building certifier or not. Section 436 requires the assessment or code compliance to be made against the requirements of the Building Code that were in force at the time the consent was issued. The involvement of a building certifier does not effect the application of the transitional provisions.
- 6.3.2 The evidence as to compliance of the building work carried out to fitout the bakery and cafe is largely able to be gathered from the performance over the past ten years based on a visual assessment of the various building elements.
- 6.3.3 I consider the authority was able to apply a similar methodology in reaching a decision as to compliance itself. While it may not have come to a position where it believed it was able to issue a code compliance certificate, it would, at the very least, have been able to reach a decision in respect of the issue of a certificate of acceptance (refer also paragraph 6.4).
- 6.3.4 Had an inspection of the building work been carried out, the authority should have been able to identify any defects requiring attention; without the applicant needing to apply for a determination. Any requirement for a determination should follow such an inspection, not precede it.

⁵ For further information on the issue of certificates of acceptance refer to Determinations 2010/097, 2010/008 and 2009/113

- 6.3.5 The authority has not provided me with any evidence of why it considers the building work is not code-compliant. 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 owners can either then act on those reasons, or apply for a determination if the reasons are disputed.
- 6.3.6 I accept the findings of the report provided by the expert establishes that the current performance of the elements comprising the fitout do not comply with the following clauses of the Building Code:
- Clause C2 in respect of the swing direction of the rear exit fly-screen door.
 - Clause E2 in respect of the weathertightness of the rear door, the damaged external cladding, and the lack of sealant around one penetration.
 - Clauses E3 and G3 in respect of the lack of sealant to wash-hand basins, the gap between the servery bench upstand and the wall, the loose kitchen wall panels above the extract hoods, and the loose and unsealed timber edging to the grease trap.
- 6.3.7 In respect of Clause G13, and given the as-built variations from the consented plans, I accept the expert's recommendation that the drainage system be assessed by a suitably qualified person to determine its compliance.
- 6.3.8 In respect of Clause D1 I note that the height clearance from the step nosing to the support frame of the chiller at the rear steps is less than that set out in D1/AS1, however I am unaware of whether there are any constraints limiting the positioning of the support frame. I consider that where the support frame intrudes into the height clearance of the stairway it should be fitted with some form of cushioning material to lessen the risk of injury from impact from users. It also appears from the photographs provided in the expert's report that the handrail may not be compliant in terms of its profile and that pipework and the like may be protruding into the access route. The authority should satisfy itself as to the compliance of the stairs as an access route with Clause D1.3.3(b) and (j).
- 6.3.9 I also acknowledge that the seat height to the accessible toilet is 5mm lower than the height set out in G1/AS1; however I consider that this difference is not a significant departure from the Acceptable Solution.
- 6.3.10 I note also the change in the diameter of pipework conveying foul water is less than as specified on the plans and will require verification from a suitably qualified person before compliance can be established.
- 6.3.11 I consider the following items to be matters of maintenance:
- The loose handrail to the rear stairs.
 - Failed sealant at window jambs, wash-hand basins, some stainless sink upstands, and the extract duct and wall lining.
 - Painting of the cladding.
 - Cracking of the vinyl floor and vinyl joint welds in various places.
 - The wall lining to the kitchen back wall that has moved away from the jointer.

6.3.12 Based on the expert's report I consider that the fitout complies with the following clauses of the Building Code that was current at the time of the issue of the consent:

- Clause B2
- Clause F7
- Clause F8
- Clause G4
- Clause G11
- Clause G12

6.4 The appropriate certificate to be issued

6.4.1 Having found that the building work can be brought into compliance with the Building Code, I must now determine whether the authority can issue either a certificate of acceptance or a code compliance certificate.

6.4.2 Section 437 of the Act provides for the issue of a certificate of acceptance where a building certifier is unable or refuses to issue either a building certificate under section 56 of the former Act, or a code compliance certificate under section 95 of the current Act. In such a situation, a building consent authority may, on application issue a certificate of acceptance. Section 437 does not prevent an authority from issue a code compliance certificate if it believes the work is fully compliant. In the case of this building, the applicant is seeking a code compliance certificate.

6.4.3 In this situation, where I have reasonable grounds to conclude that the building work can be brought into compliance with the Building Code that was in force at the time the building consent was issued, I take the view that a code compliance certificate is the appropriate certificate to be issued in due course.

6.4.4 I also accept that, in considering the issue of a code compliance certificate, the age of the building work raises concerns regarding the durability, and hence the compliance with the Building Code, of certain elements of the house, taking into consideration the age of the building work.

6.4.5 I continue to hold the views expressed in previous relevant determinations; that an authority, following the appropriate application from the owner, has the power to grant a modification to the Building Code requirements of an existing building consent without a determination (refer also to the article titled 'Modification of durability periods' in Codewords Issue 39, August 2009⁶). As such I leave this matter to the parties to resolve in due course.

6.4.6 I strongly suggest that the authority record this determination and any modifications resulting from it, on the property file and also on any LIM issued concerning this property.

6.5 Conclusion

6.5.1 I take the view that the involvement of a building certifier is in itself not an adequate reason for refusal of a code compliance certificate in terms of section 95A, nor can it be taken as evidence that building work is not code-compliant. As the authority had

⁶ Codewords articles are published by the Ministry and are available on the Ministry's website at www.dbh.govt.nz/codewords-index

not inspected the work, it was not in a position to form a view on reasonable grounds as to the compliance of the building work.

6.5.2 Notwithstanding that this determination has found that the building work does not comply with the Building Code in some limited respects, I am not satisfied that the authority acted in accordance with Section 95A of the Act in the provision of reasons for its refusal to issue a code compliance certificate for the house.

7. What happens next?

7.1 Once the items listed in paragraphs 6.3.1 6.3.7 and 6.3.8 have been rectified to the satisfaction of the authority the authority shall issue a code compliance certificate in respect of the building consent amended as outlined in paragraph 6.4.5.

7.2 I also note that the expert has described some differences between the fitout as constructed and the consented plans. I recommend that the parties take the necessary steps to amend the consent to record the as-built construction.

8. The Decision

8.1 In accordance with section 188 of the Building Act 2004, I determine that:

- the authority incorrectly exercised its powers in respect of the reasons provided for refusing to issue the code compliance certificate
- the fitout does not comply with Clauses C2, D1, E2, E3, G3 of the Building Code that was current at the time the building consent was issued, and accordingly I confirm the decision of the authority to refuse to issue a code compliance certificate for consent No 87858
- I have insufficient evidence to determine whether the fitout complies with Clause G13.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 4 March 2013.

John Gardiner
Manager Determinations and Assurance

Appendix A

A.1 The relevant sections of 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.

A.2 The relevant paragraphs of the Acceptable Solutions current at the time the consent was issued.

Acceptable Solution C/AS1: Part 3 Means of escape

Direction of opening

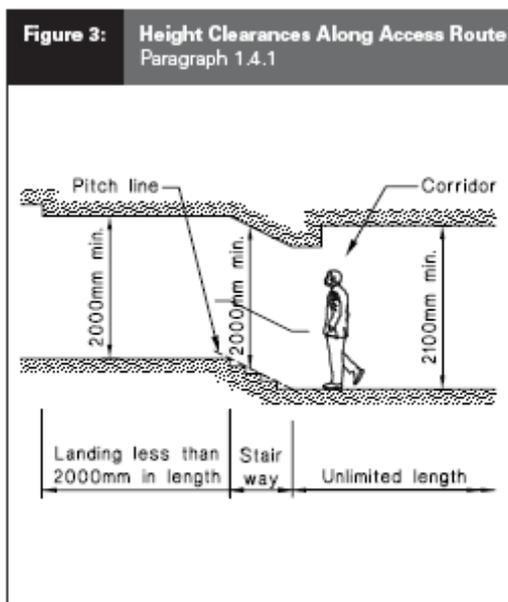
- 3.17.3 Doors on *escape routes* shall be hung to open in the direction of escape, and where escape may be in either direction doors shall swing both ways. These requirements need not apply where the number of occupants using the door is no greater than:
- a) 20 in an *open path*, or
 - b) 10 into and within an *exitway*.

Acceptable Solution D1/AS1:

1.4 Height clearances

- 1.4.1 Access routes shall have height clearances complying with Table 1 and as shown in Figure 3.

Prone access spaces (e.g. sub-floor access, limited length)	450 mm
Crawl spaces for servicing (30 m max length)	800 mm
Pedestrian access routes (unlimited length)	2100 mm
Landings, stairways and corridors (less than 2 m in length)	2000 mm



6.0 Handrails

6.0.7 Handrail profiles – Handrails shall have a profile which can be readily grasped by an adult hand and shall be installed in a way that avoids the likelihood of personal injury. An acceptable handrail shall be shaped and located to ensure that, under normal usage, a person's hand will not contact adjacent walls, supporting brackets or fixings, or any other obstruction.

6.0.8 A graspable handrail profile shall have:

- A flat or convex upper surface,
- Arrised or radiused edges,
- A minimum cross section width of 20 mm, and
- A "relevant width" (as illustrated in Figure 26 (a)) across the top surface of no greater than 80 mm. Figure 26 (a) and (b) indicates some acceptable profiles but others may also be acceptable.

6.0.9 Acceptable handrail profiles for accessible stairways and accessible ramps are shown in Figure 26 (b).