



## Determination 2019/053

# Regarding the issue of a code compliance certificate for building work that had not been completed at 79 Wakefield-Kohatu Highway, Wakefield

### Summary

This determination considers the decision by the authority to issue a code compliance certificate for building work when some of the work had not been completed. The determination discusses the authority's ability to reverse the code compliance certificate.

## 1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004 (“the Act”) made under due authorisation by me, Katie Gordon, Manager Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.<sup>1</sup>
- 1.2 The parties to this determination are:
  - the owners of the property, C & M Grieder (“the owners”)
  - Tasman District Council, carrying out its duties as a territorial authority or building consent authority (“the authority”), which applied for the determination.
- 1.3 The determination arises from the authority's decision to issue a code compliance certificate for building work carried out at the owners' property. The authority now wishes to withdraw this certificate as it subsequently became aware that only part of the building work covered by the building consent had been completed.
- 1.4 The matter to be determined<sup>2</sup> is whether the authority correctly exercised its powers of decision in issuing a code compliance certificate for the building work carried out under building consent BC180689.
- 1.5 In making my decision, I have considered the submission of the authority and the other evidence in this matter.

## 2. The building work

- 2.1 The owners have a property in Wakefield which includes a residential dwelling, outbuildings associated with the dwelling, and a number of other buildings that are operated as a historic village. The historic village contains a number of colonial-

<sup>1</sup> The Building Act and Building Code are available at [www.legislation.govt.nz](http://www.legislation.govt.nz). The Building Code is contained in Schedule 1 of the Building Regulations 1992. Information about the Building Act and Building Code is available at [www.building.govt.nz](http://www.building.govt.nz), as well as past determinations, compliance documents and guidance issued by the Ministry.

<sup>2</sup> Under section 177(1)(b) and 177(2)(d) of the Act.

style buildings (including for example, a church, grocer's shop and post office) and is open to the public at certain times of the year.

2.2 The owners sought building consent to:

- relocate a building to the property, which was to be converted to a historic display classroom, including new foundations, decking, an accessible ramp, soak pit and freestanding pot belly stove
- construct an accessible carpark and sealed path that forms part of the accessible route<sup>3</sup> for the historic village
- build a detached garage/workshop with soak pit and fireplace.

2.3 Figure 1 illustrates the approximate location of the proposed building work, as adapted from the building consent site plan.



**Figure 1: Building work locations (approximate and not to scale)**

### 3. Background

3.1 On 15 June 2018 the owners applied for building consent to do the building work as described in paragraph 2.2 and shown in Figure 1.

3.2 On 6 May 2019 the authority issued a code compliance certificate for the building work. However, it later realised it had done so in error as not all the building work had been completed; specifically the accessible carpark, sealed path and signage that forms part of the accessible route, the accessible ramp to the relocated building, and the pot belly stove in the relocated building.

3.3 A description of the key events follows, based on information provided by the authority.

<sup>3</sup> 'Accessible route' is defined in Clause A2-Interpretation of the Building Code, which is schedule 1 of the Building Regulations 1992, as: "An access route usable by people with disabilities. It shall be a continuous route that can be negotiated unaided by a wheelchair user. The route shall extend from street boundary or carparking area to those spaces within the building required to be accessible to enable people with disabilities to carry out normal activities and processes within the building."

Date	Event
15 Jun 2018	Owners apply for building consent. Application is made by an agent, who is the architect who designed most of the building work except for the detached garage/workshop. Application describes building work as: "Relocate building to site to be converted to a historic display classroom. Plus addition of [Garage]".
18 Jan 2019	Authority issues building consent BC180689 (I have not seen a copy of the issued building consent, however in its submission the authority states the building consent was issued for a "relocated building to be converted to a historic display classroom and freestanding pot belly stove and detached garage").
Feb - Apr 2019	Authority carries out a number of inspections.
17 Apr 2019	Authority receives application for a code compliance certificate. Application is made by a different agent, who designed and constructed the detached garage/workshop (i.e. not the agent who made the application for building consent).  Application is supported by an as-built drainage plan for the detached garage/workshop and electrical certificate.
6 May 2019	Authority carries out a final inspection and notes the code compliance certificate can be issued.
6 May 2019	Authority issues a code compliance certificate for BC180689, which describes the building work as:  "Relocated building to be converted to a historic display classroom with freestanding pot belly stove and detached".
25 Jul 2019	Authority receives request from plumber for inspection of freestanding pot belly stove in the relocated building. This prompts authority to revisit the building work that was the subject of the building consent and code compliance certificate.
1 Aug 2019	Authority inspects pot belly stove in relocated building. Also observes what building work has been completed. Concludes that the following work is incomplete: <ul style="list-style-type: none"> <li>• Pot belly stove in relocated building</li> <li>• Accessible carpark</li> <li>• Signage associated with accessible route</li> <li>• Sealed path (as part of accessible route for the historic village)</li> <li>• Accessible ramp to the relocated building.</li> </ul>
8 Aug 2019	Authority re-inspects pot belly stove (following request to Authority on 2 Aug 2019) and notes the inspection as a pass.

3.4 On 9 August 2019 the Ministry received the application for a determination.

## 4. Submissions

4.1 The authority provided a submission dated 8 August 2019 with its application for a determination, and also provided copies of:

- the building consent application form dated 15 June 2018
- the building consent plans (stamped as approved by the authority and dated 7 December 2018)
- site inspection reports dated 6 May 2019, 1 August 2019 and 8 August 2019

- the application for code compliance certificate dated 17 April 2019
  - the code compliance certificate for BC180689 issued 6 May 2019
  - photographs of the site, which had been taken on 1 August 2019 during the inspection on that date.
- 4.2 In its submission the authority set out the events leading to the issue of the code compliance certificate, and what had happened since. In the authority’s view, it had incorrectly exercised its powers in issuing the code compliance certificate as the building work was incomplete, and therefore it could not have been satisfied on reasonable grounds that the building work complied with the building consent.
- 4.3 In response to a query from the Ministry regarding a “fireplace” shown on the plan for the garage/workshop, the authority advised the following on 18 September 2019:
- The approved building consent and its supporting specifications included manufacturer’s instructions for a “freestanding wood fire”.
  - The authority believed the fireplace had been installed (based on a photograph taken on 1 August 2019 of the outside of the garage showing a flue), but had no specific record or any inspection report referring to the installed fireplace in the garage/workshop. Accordingly the authority could not confirm whether the fireplace was installed before or after the code compliance certificate was issued.
- 4.4 On 18 September 2019 the owners advised the Ministry that they did not wish to make a submission.
- 4.5 The draft determination was issued to the parties for comment on 14 October 2019. On 15 October 2019 both parties accepted the draft determination without further comment.

## 5. Discussion

### 5.1 Withdrawal of the code compliance certificate

- 5.1.1 In *Suanui v Hi-Qual Builders Limited*<sup>4</sup>, the High Court was considering a payment dispute between parties to a construction contract. The Court made the following comments about a council’s purported withdrawal of a code compliance certificate:<sup>5</sup>

...I have noted above that the Auckland City Council purported to rescind the Code Compliance Certificate. The legal basis on which it did so is unclear. **There is no provision in the Building Act 2004 permitting the rescission of a Code Compliance Certificate.** Normally, once an administrative decision in the exercise of a statutory power has been made, and communicated to the persons to whom it relates in a way that makes it clear that the decision is not of a preliminary or provisional kind, it is final and irrevocable ...

(emphasis added)

- 5.1.2 While it was not necessary for the High Court to reach a conclusion on this point in deciding the case, these comments are persuasive and I adopt them. I consider that the only way an authority can seek to withdraw a code compliance certificate is by applying for a determination under section 177 of the Act to reverse its decision to issue the certificate.

<sup>4</sup> *Suanui v Hi-Qual Builders Limited*, HC Auckland CIV-2008-404-1576, 26 June 2008.

<sup>5</sup> At paragraph [66].

- 5.1.3 This approach has been applied in previous determinations<sup>6</sup>, and since there have been no changes to the Act or the common law regarding this issue, it is my view that the reasoning and decisions reached in those determinations apply equally to the present case.
- 5.1.4 I consider that once a final administrative decision in the exercise of a statutory power has been made and communicated to the people to whom it relates, it is irrevocable and there is no provision in the Act permitting the authority to rescind the code compliance certificate.
- 5.1.5 With respect to the building work covered by the owners' building consent, the evidence shows that it was incomplete as at 6 May 2019 when the code compliance certificate was issued. Accordingly, and by its own admission, the authority was incorrect in deciding to issue a code compliance certificate under section 94(1) of the Act, as it could not have been satisfied on reasonable grounds that the building work complied with the building consent.

## **5.2 What is to be done now?**

- 5.2.1 The authority should withdraw the code compliance certificate in accordance with this determination. The owners may then proceed to complete the building work in accordance with the building consent.
- 5.2.2 As noted in paragraph 4.3, while included in the granted building consent the authority could not confirm whether it inspected the fireplace in the garage/workshop; I leave this to the parties to address. Once the authority is satisfied the building work has been completed and complies with the building consent, it can issue a new code compliance certificate.

## **6. The decision**

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby determine the authority incorrectly exercised its powers of decision in issuing the code compliance certificate for building consent BC180689, and I reverse that decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 30 October 2019.

Katie Gordon  
**Manager Determinations**

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<sup>6</sup> For example, Determination 2019/024 Regarding the issue of a code compliance certificate for a new house (24 June 2019), Determination 2018/049 Regarding the issue of a code compliance certificate three buildings (3 October 2018), and Determination 2016/054 The decision to issue a code compliance certificate in respect of earthquake repairs to a house (7 November 2016).