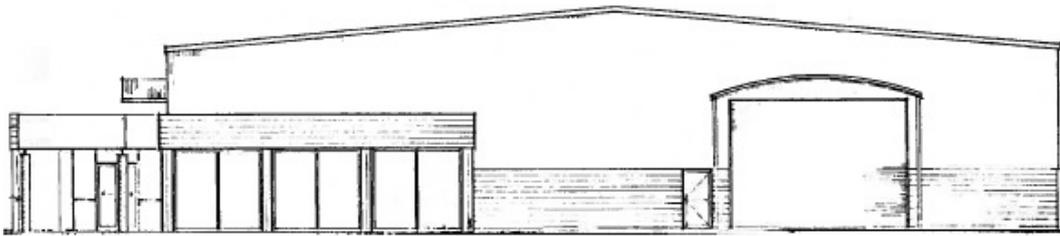




Determination 2019/032

Regarding the refusal to issue a code compliance certificate for a 21-year-old commercial building at 2 Northpark Drive, Te Rapa, Hamilton



Summary

The determination considered whether the authority correctly exercised its powers of decision in refusing to issue a code compliance certificate. The determination considered the authority's decision to refuse a code compliance certificate without inspecting the building.

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, Katie Gordon, Manager Determinations, 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, Kelton Tubbs Property Partnership, (“the applicant”) represented by an agent
- Hamilton City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

1.3 This determination arises from the decision of the authority to refuse to issue a code compliance certificate for a 21-year-old building. The refusal arose because the authority is not satisfied that the building work complies with certain clauses² of the Building Code (First Schedule, Building Regulations 1992). The authority's concerns relate to the weathertightness and durability of the building.

1.4 The matter to be determined³ is therefore whether the authority has correctly exercised its powers of decision in refusing to issue a code compliance certificate.

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, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.building.govt.nz or by contacting the Ministry on 0800 242 243.

² In this determination, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

³ Under sections 177(1)(b) and 177(2)(d) of the current Act

2. The building work

- 2.1 The building is an approximately 28m long by 30m wide detached building on a large level site. The building is 6m high at the eaves.
- 2.2 As shown in Figure 1, the building includes on the ground floor a factory, with adjacent rooms including a showroom, office, and toilets. The mezzanine level contains a lunch room.

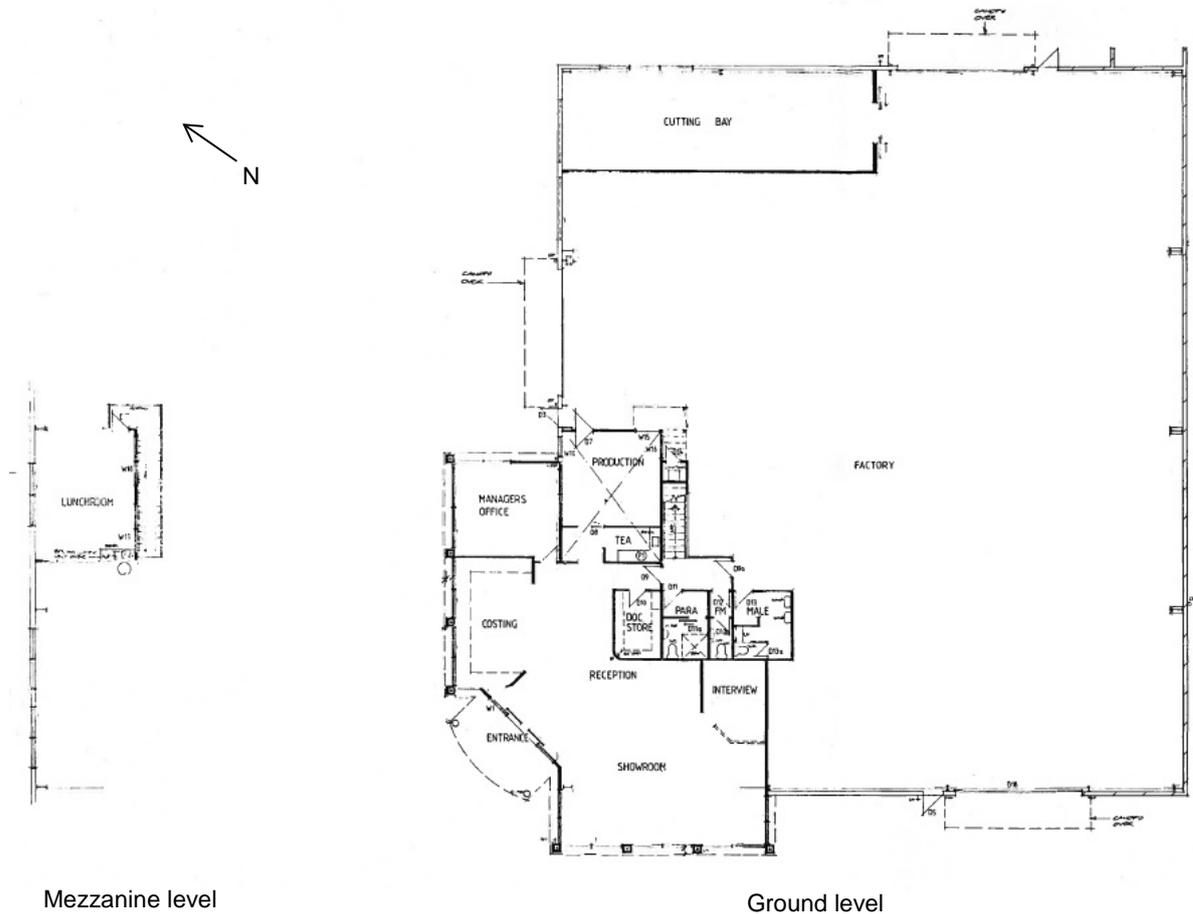


Figure 1: Floor plan of the building as consented (not to scale)

- 2.3 The structure consists of specifically engineered steel portal frames and a concrete slab foundation. Blockwork and steel framed walls form the external walls, and the internal walls are timber-framed. The external walls are mostly clad with direct-fixed metal sheet cladding, with the lowermost 2m clad with direct-fixed rusticated cedar weatherboards.
- 2.4 The main roof is constructed from steel members forming a gable roof with a 5° pitch and is clad with metal long run roofing. The lower level timber trussed roofs, on the south and west side of the building, also have a 5° pitch and are clad with metal long run roofing. The rounded canopies on the north and west side of the building are also clad with metal long run roofing.

3. Background

- 3.1 On 28 October 1997 the authority issued a building consent (no. 97/1995) for ‘new showroom, offices, and factory’.
- 3.2 The authority carried out various inspections from November 1997, including siting, foundation, concrete, pre-lining, and drainage inspections. On 3 March 1998 the authority carried out a final inspection, identifying that the following building work needed to be completed:
- Underside of stairs to be stopped – Footpath breaks to be repaired.
- 3.3 The authority did not carry out any further inspections, and in 2000 after no communication from the owner decided to not issue the code compliance certificate.
- 3.4 On 26 June 2006 the authority received an application for a building consent for alterations to the building. On 3 July 2006 the authority issued the building consent for the alterations, and later issued a code compliance certificate for that building work. (I have not seen the 2006 building consent.)
- 3.5 On 12 April 2019 the agent contacted the authority regarding applying for a code compliance certificate for the 1997 building consent. The agent also applied for a modification of Clause B2 Durability on 13 May 2019⁴. The agent and authority communicated during April – May 2019, with a summary of their respective views below.

Table 1: Summary of the parties’ correspondence

Authority	<ul style="list-style-type: none"> • Due to the age of the building the authority requires evidence to show the building is weathertight and durable. The authority suggested engaging a building surveyor to undertake an inspection and this report can be submitted as evidence. Provided the report identifies the building meets the weathertightness and durability requirements, then the authority will be in a position to consider issuing the code compliance certificate. • The building was constructed 21 years ago, and verification of compliance including durability is required. The sampling and testing required to verify durability may necessitate the engagement of a qualified building surveyor. • Prior to considering a code compliance certificate an independent code compliance report, including a weathertightness inspection, is required from a suitably qualified expert. • In regard to section 95A the authority does not have sufficient evidence to be satisfied on reasonable grounds that the building complies with the weathertightness and durability aspects of the Building Code. • A modification to the building consent is applicable in the circumstances.
Agent	<ul style="list-style-type: none"> • The authority did not raise any specific concerns apart from the age of the building, which makes it difficult to provide the appropriate evidence. • The authority holds a significant amount of information regarding the building, and it was regularly inspected during the construction. • The two items identified in the final inspection were unrelated to the structure or durability of the building and have been fixed.

- 3.6 The Ministry received an application for a determination on 16 May 2019.

⁴ I have not seen any further discussion regarding the modification and I leave this to the parties to resolve.

4. The submissions

- 4.1 The agent provided a submission with the application that included a summary of the background that led to the determination application. The submission also included the agent's views that were previously expressed to the authority (refer paragraph 3.5). In summary, the agent raised concerns regarding the authority's request to engage a building surveyor and the age of the building as the only reason given for refusing the code compliance certificate.
- 4.2 The agent also has referred to the fact the authority did not consider the building under section 112 when issuing the 2006 building consent. I note here that the assessment carried out by a building consent authority for the purposes of considering what may be required under section 112 is different to the assessment required for issuing a code compliance certificate.
- 4.3 On 10 June 2019 the authority responded to a request from the Ministry to identify the particular aspects of the building that did not comply:

The building was constructed some 20 years ago and in order to be in a position to issue a Code Compliance Certificate [the authority] need to verify that all provisions (*sic*) of the building code have been met, this includes weathertightness and durability. Many of the building elements have passed their durability requirements under the building code and [the authority] are not in a position to undertake the necessary testing for potential weathertightness issues. [The authority] had suggested to the [the applicant] in order to establish weathertightness that [the authority] would accept an independent report from a competent registered building surveyor in order to verify compliance...and the owner has chosen not to carry out this process. [The authority] welcome the [the applicant] to submit verifiable evidence that the building is not compromised and subject to any weathertightness issues. That verification is required to confirm that the building is code compliant and will perform as required by the code.

- 4.4 A draft determination was issued to the parties for comment on 17 June 2019.
- 4.5 On 25 June 2019 the agent accepted the decision of the draft determination. On 1 July 2019 the authority accepted the decision of the draft determination.

5. Discussion

- 5.1 The building consent was issued under the former Act, and accordingly the transitional provisions of the current Act apply when considering the issue of a code compliance certificate for work completed under this consent. Section 436(3)(b)(i) of the transitional provisions of the current Act requires the authority to issue a code compliance certificate only if it 'is satisfied that the building work concerned complies with the building code that applied at the time the building consent was granted'.
- 5.2 If the authority refuses to issue a code compliance certificate, the Act states in section 95A:

If a building consent authority refuses to issue a code compliance certificate, the building consent authority must give the applicant written notice of—

- (a) the refusal; and
- (b) the reasons for the refusal.

5.3 The authority's regulatory actions

- 5.3.1 Section 95A requires the authority to at least identify the particular aspects of the building that do not comply with the Building Code or the Act. The authority has not

provided me with any evidence of why it considers the building is not compliant with the Building Code.

- 5.3.2 The authority has not made an informed judgement about the compliance of the building work before making a decision regarding compliance under section 95A, and has said that it is unable to carry out weathertightness assessments. The authority did not inspect the building work in order to observe how it had performed over the past 21 years, which would have allowed it to identify any areas of concern or non-compliance.
- 5.3.3 In this instance, I do not consider the building's weathertightness risk profile is such that any compliance assessment would be beyond the authority's capability. There would appear to be no reason why the authority is unable to inspect the building to identify particular areas of concern or non-compliance that require further evidence in order for the authority to be satisfied as to compliance.
- 5.3.4 I reiterate the view previously expressed in Determination 2017/037⁵ and Determination 2016/006⁶ that the authority has failed to satisfy the requirements of section 95A as it did not attempt to identify whether the building work was compliant.
- 5.3.5 The authority is required to make a current decision about the compliance of the building work. This is likely to include an inspection and a detailed assessment of the building work concerned. The authority can rely on its own inspections records, and the performance of the building work over the past 21 years based on a visual assessment of the building elements; which may or may not reveal that further evidence needs to be gathered to determine compliance. The authority has instead refused to issue the code compliance certificate in respect of its general concerns regarding weathertightness and durability based solely on the age of the building.
- 5.3.6 The previous determinations informed the authority on the importance of giving an owner clear and appropriate reasons when refusing to issue the code compliance certificate. This is to allow the owner the opportunity to act on those reasons.
- 5.3.7 A generalised refusal that fails to identify non-compliant aspects of the building work is not sufficient to comply with section 95A. If the authority believes compliance with the Building Code has not been achieved in any given situation it must formally advise an owner of the reasons for the refusal.

6. What happens next?

- 6.1 The applicant should request an inspection from the authority. After that inspection the authority should make an assessment on whether it is satisfied that the building work complies with the Building Code that applied at the time the building consent was granted. The authority should issue the code compliance certificate if it is satisfied with the compliance of the building work. If the authority is not satisfied it should issue a section 95A notice that identifies the specific issues of concern or non-compliance for the owner to address.
- 6.2 If necessary, any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.

7. The decision

⁵ Determination 2017/037 Regarding the refusal to issue code compliance certificates for a 13-year-old house (31 May 2017).

⁶ Determination 2016/006 Regarding the refusal to issue a code compliance certificate for a 20-year-old house with brick and weatherboard claddings (15 February 2016).

7.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority incorrectly exercised its powers of decision in refusing to issue a code compliance certificate. Accordingly, I reverse the authority's decision to refuse to issue the code compliance certificate and require the authority to make a new decision taking into account the findings of this determination.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 11 July 2019.

Katie Gordon
Manager Determinations