



Determination 2018/059¹

Regarding the issue of a notice to fix in respect of the compliance schedule and building warrant of fitness for a building at 29 Matipo Street, Palmerston North

Summary

This determination concerns a notice to fix issued by an authority in respect of the specified systems in a building, the compliance schedule, and the building warrant of fitness. The determination considers whether the notice to fix was correctly issued, the information to be provided in a compliance schedule, and the issue of the building warrant of fitness.

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004² (“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 property, Indoquin Limited (“the applicant”), represented by a director of the company
 - Palmerston North City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 This determination arises because of a dispute about the issue of a notice to fix in respect of the specified systems in a building, the compliance schedule, and the building warrant of fitness. A number of notices to fix were issued in respect of the building but this determination is about the fourth notice to fix (“the subject notice”) issued on 24 October 2017.
- 1.4 The matter to be determined³ is therefore whether the authority correctly exercised its powers of decision in issuing the subject notice to fix.
- 1.5 In making my decision, I have considered the submissions of the parties, the report of the independent 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 Act and the relevant regulations are set out in Appendix A.

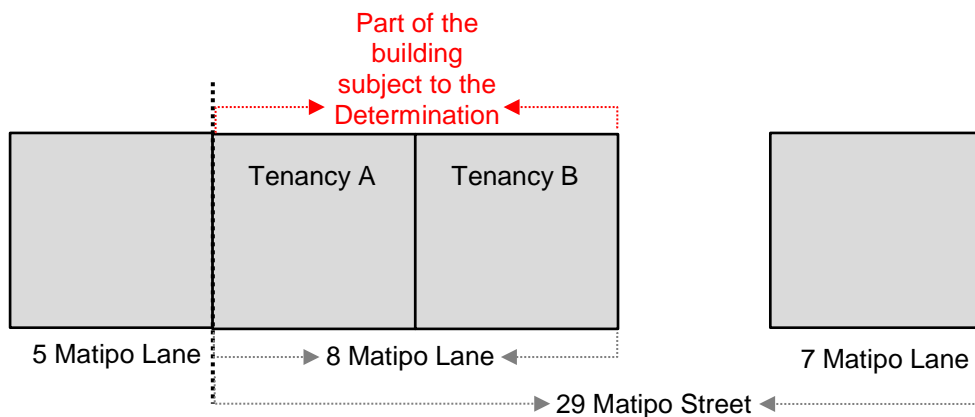
¹ This determination is subject to a clarification under section 189 of the Building Act 2004. The determination was originally issued on 30 November 2018.

² 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.

³ Under sections 177(1)(b) and 177(2)(f)

2. The property and the building

- 2.1 The property at 29 Matipo Street is located in an area that was originally a large site that has been subdivided into several commercial lots with numerous small businesses operating.
- 2.2 The building that is the subject of this determination is a large building that is part of two separate property titles; 29 Matipo Street and 5 Matipo Lane. The part of the building that is the subject of this determination is on the 29 Matipo Street property, and is also known as 8 Matipo Lane (“the building”). 8 Matipo Lane contains two tenancies (“Tenancy A” and “Tenancy B”), and 5 Matipo Lane contains one tenancy.
- 2.3 There is a separate building adjacent to 8 Matipo Lane also on the 29 Matipo Street property, known as 7 Matipo Lane. The configuration of the properties and buildings is illustrated in the schematic plan below.



Schematic plan 1: 29 Matipo Street and 5 Matipo Lane buildings (not to scale)

- 2.4 The building is a single level, steel portal frame structure with a mixed external wall cladding system and long run metal roof. The building has a fire separation between 5 Matipo Lane and 8 Matipo Lane.
- 2.5 Tenancy A is a workshop. Tenancy B has offices and a small warehouse area, and offices at mezzanine level, with a set of stairs providing the means of escape from the mezzanine level.

3. The background

- 3.1 On 10 February 2005, the authority received an application for a building consent for the construction of a new internal fire wall (building consent No. 54131) between 5 Matipo Lane and 8 Matipo Lane. A code compliance certificate was issued for this building work, however, I have not seen a record of the date of issue.
- 3.2 On 11 January 2006, the applicant’s fire engineer wrote to the authority stating that he had carried out an assessment of the building and was of the view that a fire alarm system was not required to satisfy Building Code requirements. The fire engineer requested that the building be removed from the compliance schedule that covered several detached buildings at the site (refer to paragraph 2.1), and that work to disconnect the fire alarm system be carried out as exempt building work under Schedule 1 of the Act.

- 3.3 On 1 February 2006, the authority wrote to the applicant in response to this request. The authority stated:
- Based on the information you have provided we formally accept that the building does not require a fire alarm system, and agree that the disconnection of the fire alarm may proceed as exempt work under Section k of the 1st Schedule providing it is undertaken by a registered electrician.
- Because of your assessment under the [Act] and New Zealand Fire Service Evacuation Regulations the compliance schedule No1321 will remain in place against all other buildings not noted in your report.
- 3.4 On 2 June 2006, the authority received an application for a building consent for the addition of sanitary facilities to Tenancy A (building consent No. 61751). On 27 June 2011, the authority issued a code compliance certificate for building consent 61751.
- 3.5 On 13 May 2008, the authority received an application for building consent for the building work to extend the existing portal framed workshop and install a mezzanine floor (building consent No. 06190) to Tenancy B. The building consent documentation included a fire safety report (“the fire safety report”) for the building dated 6 March 2008 and an amended fire safety report dated 7 October 2008. The fire safety report states the fire hazard category for the building is FHC⁴ 2 and that a fire alarm system was not required given the purpose group WL (Working Low) and limited occupant load (<50).
- 3.6 On 5 September 2013, the authority issued compliance schedule No. 2025, and a code compliance certificate for the building described in building consent No. 06190.
- 3.7 Compliance schedule No. 2025 states the purpose/risk group is WL, the highest fire hazard category for the building is FHC 2, and the maximum occupant load is 50. The compliance schedule covers the following systems:
- SS 4 Emergency lighting systems
 - SS 14/2 Signs
 - SS 15/2 Final exits
 - SS 15/3 Fire separations
 - SS 15/4 Signs for communicating information to facilitate evacuation.
- 3.8 On 8 December 2016, the authority carried out building warrant of fitness audit of the properties at 29 Matipo Street and 5 Matipo Lane.
- 3.9 On 12 December 2016, the authority issued a notice to fix to the applicant (“the first notice”). With respect to the particulars of contravention or non-compliance, the notice stated:
- The building is being used for sleeping. It has several bedrooms in the building. Exits are blocked and some exit doors contain key locks and have not been installed with a building consent, when a building consent is required. Signs for the egress are insufficient in the building. Mechanical ventilation exists in the building but is not noted on the compliance schedule and it appears to have been altered by changes in the layout of the building. The building contains a fire alarm that is not working and not listed on the compliance schedule. Information required by [the Act] has not been supplied for the specified systems in the building. The building use group has changed and the [authority] has not been informed by the building owner. ...

⁴ Fire hazard categories (“FHC”) were described in the Acceptable Solution, C/AS1, for the Fire Safety Clauses that was in force at the time the consent for this work was issued. FHC was graded 1 to 4 in order of increasing severity in respect of the danger of potential harm and degree of exposure arising from a fire. (Fire Hazard categories are no longer used. It is accepted that the category used at time of consent was to be nominated on the Compliance Schedule Form 12 described in the regulations that were in force at the time.)

3.10 The remedies were listed as follows:

1. Provide a letter informing [the authority] that a change of use has occurred in the building; And;
2. Remove all obstructions from the means of escape including the potential to require a key to unlock the door. Or obtain a certificate of acceptance for the work done installing the locks requiring keys. And;
3. Provide a fire design report and an accessibility report for the building. A building consent may be required for remedial work to be done on the building for the change of use. And;
4. Provide all information and details for each specified system in the building including; the performance standard, type, inspections, maintenance and reporting procedures and descriptions. And;
5. Provide all information as above for the mechanical ventilation and fire alarm in the building. Provide a report on the mechanical ventilation from a suitably qualified person. And;
6. Provide a building warrant of fitness that will comply with the prescribed form 12 from the Building (Forms) Regulations 2004. And;
7. Provide sufficient signs throughout the building so that the occupants can be fully informed regarding the means of escape from fire. And;
8. Provide details for how the building occupants will be provided with safety while the items above are being addressed. Particularly the means of escape from the building.

3.11 On 14 February 2017, the authority issued a site instruction notice for the building reiterating the requirements set out in the first notice.

3.12 On 31 August 2017, the authority issued an additional site instruction notice for the building, providing additional notes about the items in the first notice and site instruction notice. In respect of the fire alarm system, the notice stated:

The fire alarm exists in the building. Your IQP⁵ has provided details for it. The auditor who carried out the inspection noted it as a type 3 alarm. [The authority] did see the alarm. A form 11 was provided by you for amending the compliance schedule. You have stated that your IQP has been carrying out inspections on it.

If you want to remove this alarm from the building, provide a letter or report from a suitably qualified person outlining how the building will comply without the alarm. Please note an IQP statement is not sufficient and old documents are not sufficient, although they may be used by the person providing the letter to ascertain what is required.

3.13 The authority issued a notice to fix to the applicant (“the second notice”) on 14 March 2017, and a further notice on 21 September 2017 (“the third notice”).

3.14 On 24 October 2017, the authority issued a fourth notice to fix to the applicant (“the subject notice”) and an infringement notice under section 373 of the Act. With respect to the particulars of contravention or non-compliance, the subject notice stated:

Exits are blocked (car park and isolated step) and some exit doors contain key locks and have not been installed with a building consent, when a building consent was required. Signs for the egress are insufficient in the building. Mechanical ventilation exists in the building but are not noted on the compliance schedule and it appears to have been altered by changes in the layout of the building. The building contains a fire alarm not listed on the compliance schedule. Information required by [the Act] has not been supplied for the specified systems in the building. ...

⁵ An independent qualified person (IQP) is a person or firm approved by a territorial authority as qualified to inspect compliance schedule items

3.15 The remedies were listed as follows:

1. Remove all obstructions from the means of escape including removal of the isolated step. Remove the car parked over the exit door which is blocking it and ensure cars cannot park there.
2. Provide all information and details for each specified system in the building including; the performance standard, type, inspections, maintenance and reporting procedures and descriptions. And;
3. Provide all information as above for the mechanical ventilation, emergency lighting and show that the fire alarm is still in the building. Provide a report on the mechanical ventilation from a suitably qualified person. And;
4. Provide a building warrant of fitness that will comply with the prescribed form 12 from the Building Forms Regulations 2004. And;
5. Provide sufficient signs through the building so that the occupants can be fully informed regarding the means of escape from fire. ...

3.16 On 16 November 2017, the applicant's legal representative wrote to the authority commenting on the items in the fourth notice to fix. The letter set out the applicant's views as follows:

- The authority issued a code compliance certificate on 5 September 2013. The building has not been subsequently altered.
- There is no mechanical ventilation in the building.
- There is no fire alarm in the building, and no fire alarm is required.
- The warrant of fitness as provided does comply.

3.17 The applicant subsequently made a complaint to the Ministry under section 200 of the Act.

3.18 The Ministry received a complaint from the applicant under section 200 of the Act on 9 February 2018. On 21 February 2018, the Ministry advised the applicant that the authority's decision to issue the notices to fix is a determinable matter under section 177 of the Act.

3.19 The Ministry subsequently received an application for determination on 1 March 2018.

4. The submissions

4.1 The application for determination included copies of:

- correspondence between the applicant and the authority from 2006 relating to the disconnection of the fire alarm system
- the subject notice issued on 24 October 2017
- the applicant's response to the authority dated 8 December 2017.

4.2 In the accompanying submission, the applicant noted that the authority 'refuses to accept [its] own building file as proof of compliance on the matter'. The submission noted the applicant's response to each item in the notice to fix:

Item 1: We have remedied item 1 and advised [the authority], we have not had any response to that advice...

Item 2: We have advised [the authority] but [the authority] will not accept the [file] and [insists] that an alarm is in the building and likely a [mechanical ventilation] system

Item 3: There is no fire alarm or ventilation system in the building, [the authority's files] are up to date. We have been advised by [the authority] not to remove the redundant heat detectors which is the only remnant of the old removed system. The emergency lighting is on the file.

Item 4: Is correct

Item 5: Is as described in the fire report

4.3 The following information was provided with the complaint (refer paragraphs 3.17 and 3.17) in addition to the documents provided in the application for determination:

- a submission setting out the background to the dispute
- emails between the applicant and the authority during the period 16 January 2017 to 4 August 2017
- compliance schedule No. 2025 dated 5 September 2013
- information about the emergency lighting system dated 4 July 2012
- the authority's specified systems form dated 23 May 2008, identifying:
 - SS 4 Emergency lighting systems
 - SS 14 Emergency power systems for, or signs relating to, a system or feature specified in any clauses 1-13
 - SS 15/2 Final exits, SS 15/3 fire separations, SS 15/4 signs for communicating information intended to facilitate evacuation
- a PS3⁶ for the relocation of two heat pumps, noting no ventilation or extract work was carried out
- a letter dated 16 May 2017 to the applicant from an IQP advising:
 - ... the systems do not introduce fresh air into the building and are 100% recirculated air and not able to be inspected and maintained to meet SS9 requirements. They do not meet criteria A1.1 – A 4.3 [of the Ministry's compliance schedule guidance ("the Ministry's guidance")]⁷ and failure of the system will be readily apparent.
- documentation for building consent No. 06190
- the code compliance certificate dated 5 September 2013 for building consent No. 06190.

4.4 The authority acknowledged the application for determination in a submission dated 7 March 2018 and received on 12 March 2018. The authority is of the view that it has correctly carried out its responsibility in issuing the notices to fix requiring the applicant to remedy the contraventions. The submission included copies of:

- the warrant of fitness and certificate of compliance with inspection, maintenance and reporting procedures, dated 9 June 2015
- the authority's warrant of fitness checklist dated 8 December 2016 and the photographs from the inspection
- copies of emails between the authority and the applicant from the period 16 January 2017 to 4 August 2017

⁶ Producer statement - construction

⁷ Compliance Schedule Handbook 14 February 2014

- copies of the site instruction notices, the four notices to fix, and the infringement notice.
- 4.5 A draft determination was issued to the parties for comment on 13 September 2018.
- 4.6 The applicant responded to the draft determination on 13 September 2018. The applicant accepted the draft determination and noted that it would not have been possible to comply with the notice to fix. The applicant also expressed the view that the notice to fix must be taken in total rather than parts of it in isolation.
- 4.7 The authority responded to the draft determination on 28 September 2018. The authority did not accept the draft and submitted the following comments (in summary):
- With respect to building consent No. 6190, the application for building consent noted, against Clause F7 Warning Systems, ‘smoke fire alarm at each level’ and “the compliance schedule list includes SS 2⁸”.
 - The determination should clarify if there is problem with the way the emergency lighting system has been installed.
(I consider the determination is clear in what the expert considered was necessary.)
 - The determination notes that exit signage has been installed in response to the notice to fix. The authority sought to have the compliance of the signage to be confirmed.
(I consider the authority is able to make this assessment.)
- 4.8 The authority also noted that items that were not Building Code compliant at the time the code compliance certificate was issued should not be allowed to remain unremedied because they have been overlooked or otherwise. The authority referred to specific determinations⁹ that have taken this same approach to historical non-compliance with the Building Code. The authority provided specific commentary from two determinations (2011/093¹⁰, and 2015/060¹¹) with respect to what were new elements in existing buildings needing to comply fully with the Building Code. The authority said the same principle applied to this building, and that it is important for life safety issues, noting that signs and isolated steps do not comply with the Fire Safety Clauses, Clause D1 Access, and Clause F8 Signs.
- 4.9 The authority also noted that:
- Section 116B is an appropriate mechanism for ensuring ongoing compliance and is “not dependent on the dates for commencement for the [Act] or building code”. The authority must issue a notice to fix under section 164 because of the substandard exit signs and isolated step. This constitutes a breach of section 116B as included on the notice to fix.
 - The substandard exit signs and isolated step were looked at “in real time” so the building has inadequate means of escape and is not safe.

⁸ Specified System SS 2 Automatic or manual emergency warning systems

⁹ Determinations 2001/8, 2002/1, 2011/093, 2015/060, 2016/017, and 2017/085

¹⁰ Determination 2011/093 The issuing of a code compliance certificate for a relocated house and associated alterations at (21 October 2011)

¹¹ Determination 2015/060 Regarding the compliance of concrete exterior stairs (28 September 2015)

5. The expert's report

5.1 As mentioned in paragraph 1.5 I engaged an independent expert to assist me. The expert is a building compliance specialist and an IQP. The expert inspected the building on 16 May 2018 and provided a report on 29 July 2018. The report was sent to the parties on 30 July 2018.

5.2 Tenancy A

5.2.1 The expert inspected Tenancy A and noted: there were no specified systems observed that would drive the need for a compliance schedule.

5.2.2 The expert observed that old butterfly heat detectors are located within the roof that are not active, as there is no fire alarm panel. The expert noted the authority had given consent for the fire alarm system to be removed, however, the heat detectors should have been removed as part of this work. The expert did not observe any manual call points, and noted that these were not required as part of the consent and would have been able to be removed.

5.3 Tenancy B

5.3.1 The expert inspected Tenancy B. The expert observed the following specified systems, which are also listed on the compliance schedule:

- SS 4 Emergency lighting systems
- SS 14/2 Signs relating to clauses 1-13
- SS 15/2 Final exits
- SS 15/3 Fire separations
- SS 15/4 Signs for communicating information intending to facilitate evacuation.

5.3.2 The expert noted that the building has a heat pump system that does not have any fresh air intake and is not a specified system as per the Ministry's guidance.

5.3.3 The expert noted that the Building Warrant of Fitness Form 12 was not displayed. However, a form 'certificate of compliance with inspection maintenance, and reporting procedures' form 12A was displayed.

5.4 The subject notice to fix dated 24 October 2017

5.4.1 With respect to each of the items listed in the subject notice, the expert's comments can be summarised as:

- Item 1 Remove obstructions to means of escape, removal of the isolated step, and ensure cars cannot park in front of the exit door.
- The issue was in relation to the means of escape from the side exit door where a car was blocking the door. A concrete ramp has been installed from this exit so there is now no chance that the door can be blocked by a car.
- Item 2 Provide information to amend the compliance schedule to make it site specific.
- The compliance schedule is not site-specific and needs to be amended to reflect what is on site.

- The responsibility for this rests with the owner, assisted by the relevant IQPs.

Item 3 Provide all information for mechanical ventilation, emergency lighting and show that the fire alarm is still in the building.

- There was approval given by the authority to have the fire alarm system removed. There is no complete fire alarm system within the building with some existing detectors remaining or encased within a wooden box.
- A code compliance certificate was issued in 2013 (for building consent No. 6190) which did not require an emergency warning system.
- The mechanical ventilation system has no fresh air intake and is a heat pump system. A letter has been issued by an IQP to the authority confirming this.
- It was unclear how the emergency lighting system is tested as neither the emergency lighting circuit breaker nor timer for testing the system was identified on the distribution board. If the gates are the final exit, emergency lighting is required outside the building.

Item 4 Provide a BWOF¹² document that complies with the prescribed Form 12.

- The current BWOF says “highest fire category: W2 2”, however, the fire safety report had a maximum fire hazard category of FHC 2.
- The number of occupants per level must be included and is not listed on the current BWOF.

Item 5 Provide sufficient signage for means of escape from fire.

- Signage had been installed, but it is not clear what signage existed at time of the authority’s inspection.

5.4.2 The expert considered there were two outstanding items from the subject notice being:

- the compliance schedule was not site-specific, and
- Form 12 needed to be corrected with respect to occupancy numbers and the fire hazard category.

5.5 Building work

5.5.1 The expert observed a storage unit had been constructed in Tenancy B that includes a small mezzanine floor. The expert noted that the mezzanine floor requires a 30-minute fire rating to the floor and supporting structure, and there may be seismic performance requirements that apply.

¹² Building Warrant of Fitness

6. Discussion

6.1 General

6.1.1 This determination relates to the authority's decision to issue the subject notice because it was of the view that the applicant had not met the requirements of the Act relating to compliance schedules and building warrants of fitness.

6.1.2 Section 103 of the Building Act requires that:

- (1) A compliance schedule must—
 - a) state and describe each of the specified systems covered by the compliance schedule, including a statement of the type and (if known) make of each specified system; and
 - b) state the performance standards for the specified systems; and
 - c) describe the inspection, maintenance, and reporting procedures to be followed by independently qualified persons or other persons in respect of the specified systems to ensure that those systems are capable of, and are, performing to the performance standards.
- (2) For the purposes of subsection (1)(c), the inspection, maintenance, and reporting procedures of the compliance schedule may be identified—
 - a) by description in the compliance schedule; or
 - b) by reference to—
 - (i) a prescribed acceptable solution or prescribed verification method in a regulation referred to in section 20; or
 - (ii) an acceptable solution or a verification method issued under section 22; or
 - (iii) a building method or product.

6.1.3 The Ministry's guidance describes the responsibilities of an owner as follows:

Owners of a building for which a compliance schedule has been issued also have a responsibility to ensure:

- each of the specified systems are performing and will continue to perform to the performance standards for that system
- they provide the territorial authority with an annual [building warrant of fitness] on the anniversary of the issue of the compliance schedule, accompanied by Form 12A(s) from an IQP for each specified system and any recommendations to amend the compliance schedule by an IQP
- the compliance schedule is kept at the place stated on the schedule and agreed to by the owner and the territorial authority
- the compliance schedule is available for inspection by any person or organisation with the right to inspect the building under any Act
- for the first 12 months after the compliance schedule is issued, a compliance schedule statement is displayed in a public place within the building
- they obtain annual written reports ... relating to the inspection, maintenance, and reporting procedures of the compliance schedule signed by the IQP
- they keep the annual written reports together with the compliance schedule for a period of 2 years and produce these reports when required by the territorial authority or person/ organisation that has the right to inspect the building.

- 6.1.4 The systems or features that are specified systems for the purposes of the Act are set out in Schedule 1 of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005.
- 6.1.5 In order to determine whether the authority correctly exercised its powers in issuing the subject notice for the building, I have considered the following:
- whether compliance schedule No. 2025 meets the requirements of the Act for the specified systems listed
 - whether there are any specified systems that are not listed on compliance schedule No. 2025 as required
 - whether the building warrant of fitness has been issued as required.

I consider each of these matters in turn below.

6.2 Whether the compliance schedule meets the requirements of the Act for the specified systems listed

- 6.2.1 The key obligation that is relevant to considering whether the compliance schedule meets the requirements of the Act for the specified systems listed is that the owner is required to ensure that each of the specified systems stated in the compliance schedule is performing and will continue to perform to the performance standards for that system.
- 6.2.2 The Ministry's guidance outlines what the compliance schedule is required to state, as follows:

System description

It is essential that a compliance schedule is specifically tailored to a building and its specified system(s). This is important to ensure the ongoing performance of the specified systems to the required performance standards and to allow those carrying out and auditing the compliance schedule requirements to understand what is required.

As a minimum, a basic description of the system, its purpose, location and extent of installation should be provided on the compliance schedule to assist those carrying out the inspection and maintenance procedures.

It can be helpful to include the relevant building consent documentation or drawings and specifications on the compliance schedule.

Inspections and maintenance

The [Act] requires that each specified system have inspection and maintenance procedures to ensure the system is performing, and continues to perform, to the performance standards set out for that specified system.

The inspection, maintenance, and reporting procedures need to be relevant to the performance standard, and therefore the way the system was designed, to ensure the specified system continues to perform in the way it was intended.

Often a New Zealand or international Standard will be suitable for the inspection and maintenance procedures for a particular specified system. In other cases it may be an inspection and maintenance document provided by the manufacturer/designer of the system, or it may be an inspection document prepared by a person qualified to do so (this may be developed using a combination of manufacturers' specifications and other inspection Standards).

The inspection and maintenance procedures, including frequency, need to be appropriate to the particular specified system and its purpose within a building. This may include considering the age of the system, the system's historical performance, or a change in the use of the building.

- 6.2.3 The specified systems listed on the compliance schedule No 2025 (refer paragraphs 3.6 and 3.7) are:
- SS 4 Emergency lighting system
 - SS 14/2 Signs
 - SS 15/2 Final exits
 - SS 15/3 Fire separations
 - SS 15/4 Signs for communicating information intended to facilitate evacuation.
- 6.2.4 I have considered the content of the compliance schedule and note that:
- it is not tailored to the building
 - it does not adequately describe each specified system, including the type and make (if known)
 - it does not state the performance standard that applies for each system
 - it does not include specific and appropriate statements relating to the inspection, maintenance and reporting procedures for each specified system.
- 6.2.5 With respect to the emergency lighting system, I note that the expert observed that it was unclear how the emergency lighting system is tested as neither the emergency lighting circuit breaker nor timer for testing the system was identified on the distribution board.
- 6.2.6 With respect to the final exits, I note the evidence provided about the exit door to Tenancy B being blocked. The authority has also stated that the isolated step did not comply with Clause D1.3.3(i). With respect to signs, the expert noted that signage has been installed in response to the subject notice.
- 6.2.7 The isolated step is not related to the compliance schedule so it was not a matter that had to be certified by the IQP under section 108(3)(c) for the purposes of the building warrant of fitness.
- 6.2.8 Previous determinations¹³ have taken the view that once a code compliance certificate has been issued for building work, an authority is unable to take any action in respect of that work unless:
- the building is dangerous, or insanitary, or
 - the owner decides to alter the building, change its use, or change its intended life.

I am of the view that this continues to be the correct approach.

- 6.2.9 It appears the isolated step was existing and associated with consented building works, given the configuration of the building. The authority was unable to require, through a notice to fix, the isolated step to be remedied or the installation of exit signs additional to that consented. Rather the authority should have considered whether the issues it identified were sufficiently serious that it made the building

¹³ For example, Determination 2010-053 The issue of a notice to fix for a house with a code compliance certificate (12 July 2010)

- dangerous. If the authority believed the test for a dangerous building under section 121 had been met, it could have issued a notice under section 124 of the Act.
- 6.2.10 As noted in paragraph 6.2.8, no action can be taken in respect of existing buildings, including their specified systems, to require them to be upgraded to comply with the current Building Code unless an alteration, change of use, change its intended life, or certain types of subdivision take place in the building.
- 6.2.11 The authority has referred to section 116B as a mechanism for addressing historical non-compliance in relation to matters concerning safety, health and functionality of the building's means of escape, and stated that under section 164 of the Act the authority must issue a notice to fix in response to such issues (see paragraph 4.9). Section 116B says it is an offence for a person to use a building that has "inadequate means of escape from fire". The offence is a medium level offence that contains a penalty not exceeding \$100,000.
- 6.2.12 To establish a contravention of section 116B the evidence would have to show that not only did the means of escape not comply with the Building Code, but also that the means of escape was "inadequate". "Inadequate" means "lacking the quality or quantity required; insufficient for a purpose"¹⁴.
- 6.2.13 In my opinion, for the means of escape to be inadequate there would have to be evidence that the means of escape would not be able to perform as a means of escape. There is no suggestion that the isolated step meant that the means of escape would not be available. The isolated step may present a risk of tripping or stumbling but the means of escape would still be able to operate as a means of escape.
- 6.2.14 Further, it would be unusual for a notice to fix to be issued for a contravention of a provision that is also an offence. While it is theoretically possible to issue a notice to fix for an offence (as a notice to fix may be issued under section 164(1)(a) for a contravention of the Act), if there is evidence that an offence has occurred then consideration should be given to laying charges against the person who is considered to have committed the offence, and not just issuing a notice to fix.
- 6.2.15 The authority has also referred to six previous determinations that have considered non-compliance with the Building Code after a code compliance certificate has been issued (refer paragraph 4.8). However, none of those determinations are examples of enforcement action being taken in respect of non-compliant building work where a code compliance certificate had already been issued for that building work. Four of the determinations (2001/008, 2002/001, 2011/093, 2017/085) concerned the situation where the applicant had applied for a determination to reverse a code compliance certificate because the applicant considered the code compliance certificate was wrongly issued. Determination 2015/060 considered whether building work that was undertaken without a building consent complied with the Building Code. In Determination 2016/017 the territorial authority concerned applied for the determination because the code compliance certificate had been issued for an incorrect scope of building work and the territorial authority could not correct the error itself, so required a determination to reverse the code compliance certificate first.

¹⁴ *Oxford Dictionary of English* (3rd ed., Oxford University Press, 2010).

6.3 Whether there are any specified systems that are not listed on the compliance schedule as required

Mechanical ventilation system

6.3.1 The authority has requested information for the mechanical ventilation system.

6.3.2 Mechanical ventilation or air conditioning systems are listed in the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 as a system for which a compliance schedule is required.

6.3.3 The Ministry's guidance outlines that a mechanical ventilation or air conditioning systems is required to be listed on a compliance schedule if it meets the following criteria:

A.1. Building Code requirements

A1.1 is required to be installed for the purposes of the Building Code.

A.2. Outdoor air

A2.1 is used to deliver outdoor air to the occupants of one of more spaces that cannot be provided with adequate outdoor air from natural ventilation.

...

A.4. Fire or smoke control

A4.1 Or part of the system, passes through a fire separation and could spread fire or smoke to other firecells.

...

A mechanical ventilation or air conditioning system is not required to be listed on the compliance schedule if:

- it does not meet any of the criteria A1.1-A4.3..., and
- failure of that system or unit is readily apparent and likely to result in occupant complaints before health or safety is threatened.

Examples:

Examples of mechanical ventilation or air conditioning systems not to be incorporated in a compliance schedule include ...:

- (i) a split air conditioning unit that does not introduce fresh air into the building ...

6.3.4 The expert noted that the system has no fresh air intake and is a heat pump system, and noted that a letter has been provided to the authority from an IQP confirming this.

6.3.5 The heat pump system does not meet any of the criteria in the Ministry's guidance. The system is not required for Building Code compliance, and failure of the system will be readily apparent.

6.3.6 I am therefore of the view that the system is not required to be on the compliance schedule.

Emergency warning system

6.3.7 For Tenancy B, an emergency warning system¹⁵ was not required as part of building consent No. 06190. A code compliance certificate for this work was issued by the authority.

¹⁵ also referred to in this determination as the "fire alarm system"

6.3.8 The authority gave approval for the fire alarm system to be removed (refer to paragraph 3.3). The basis for this decision by the authority was information provided by the applicant's fire engineer. In a memo to the authority, dated 11 January 2006, the engineer stated:

I have undertaken an assessment of the building and can confirm that all tenancies have a fire hazard category of not more than FHC 2, have less than 10 employees, have two means of escape from fire, have design occupant loads of less than 50 people, and the escape route length from each tenancy is less than the maximum distance permitted by [the Acceptable Solution].

I conclude that the tenancies in this building do not require a fire alarm system installed to satisfy [Building Code] provisions for means of escape from fire or to satisfy [New Zealand] Fire Service Fire Evacuation Regulations.

6.3.9 I concur with this view. I note that Table 4.1 in C/AS1¹⁶ that was current at the time the building consent was issued made provision for low rise buildings within a purpose group WL (Working low) to not contain a manual fire alarm system, provided the escape routes serve an occupant load of no more than 50 people.

6.3.10 For Tenancy A, the expert noted there were butterfly heat detectors from an old fire alarm system, but that these are not connected as there is no fire alarm panel within the building. The expert also noted that there were no manual call points in the building. I accept the view of the expert that there is no complete fire alarm system within the building.

6.3.11 I note the authority has stated that the application for building consent form included reference to a "smoke fire alarm at each level" for compliance with Clause F7 (refer to paragraph 4.7). I note the compliance schedule section of the application form also says, "smoke alarms", and "smoke alarms to be added". I note this requirement was only noted on the application form and does not appear to be included in the consented plans and specification. I also note that the fire report for this work says that a fire alarm system was not required (refer paragraph 3.5) and the associated compliance schedule (No. 2025) does not list fire alarm systems (refer paragraph 6.2.3).

6.3.12 With respect to the work carried out to disconnect the system, the expert noted that the heat detectors should have been removed so there is no misunderstanding in regards to there being protection from a fire alarm system within the building.

6.3.13 I note that the definition of a specified system under section 7 of the Act is:

Specified system

- (a) means a system or feature that—
 - (i) is contained in, or attached to, a building; and
 - (ii) contributes to the proper functioning of the building (for example, an automatic sprinkler system); and
 - (iii) is declared by the Governor-General, by Order in Council, to be a specified system for the purposes of this Act; ...

6.3.14 The heat detectors that remain from the fire alarm system are not a complete system. I note the authority gave permission for the system to be removed as it was not required under the Building Code. Given these facts, I am of the view that the remaining decommissioned heat detectors in this case are not a specified system or feature for the purposes of the Act and are not required to be listed on the compliance

¹⁶ The Acceptable Solution for the fire safety clauses (C1 to C4) that were in force at the time the consent was issued

schedule. However, I suggest that the heat detectors be removed to avoid any confusion.

6.4 Whether the building warrant of fitness has been issued as required.

- 6.4.1 Section 108 of the Act requires the building warrant of fitness to be issued on the prescribed form.
- 6.4.2 While the details about the building and owner/leaseholder are in accordance with Form 12 of the Building Forms Regulations 2004, and the specified systems are those listed on the compliance schedule, the expert noted that the building warrant of fitness states a fire hazard category of “W2 2” which is an incorrect reference and should be modified to FHC 2. The number of occupants per level is required to be nominated and this is not listed on the building warrant of fitness.
- 6.4.3 The expert also noted that the building warrant of fitness was not displayed as required.

6.5 Conclusions

- 6.5.1 I am of the view that the compliance schedule does not meet the requirements of section 103 of the Act. Information is required to be provided by the applicant in respect of the specified systems presently listed in the compliance schedule. The authority should subsequently amend the compliance schedule on application from or in consultation with the applicant.
- 6.5.2 I also am of the view that the building warrant of fitness has not been issued in accordance with section 108 of the Act.
- 6.5.3 In respect of these matters the authority was correct to issue a notice to fix.
- 6.5.4 I am of the view that no additional systems are required to be added to the compliance schedule. The mechanical ventilation system and the decommissioned heat detectors are not specified systems and are therefore not required to be listed on the compliance schedule.
- 6.5.5 The authority required the isolated step to be removed and additional exit signs to be installed as noted in paragraph 6.2.6. It was not able to require this work to be done under a notice to fix. In respect of these matters the authority was incorrect to issue a notice to fix. The notice to fix is to be modified so it only applies to the items listed in paragraphs 6.5.1 to 6.5.2.
- 6.5.6 I note that the notices issued do not clearly state the contraventions of the Act or its regulations, with reference to the relevant sections or subsections. The authority should ensure the modified notice states the contraventions clearly and references the correct sections of the legislation.
- 6.5.7 With respect to the building work described by the expert in paragraph 5.5.1, I leave this to the parties to resolve.

7. The decision

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

- The authority was correct to issue the subject notice to fix in respect of:
 - the compliance schedule not providing the information required by section 103 of the Act, and
 - the building warrant of fitness not being correctly issued as required by section 108 of the Act.
- The authority was incorrect to issue the subject notice to fix in respect of:
 - requiring the isolated step to be removed and additional exit signs to be installed, and
 - requiring the mechanical ventilation system, and the decommissioned heat detectors to be listed as specified systems.
- The notice to fix is to be modified to take account of the findings in paragraphs 6.5.5 and 6.5.6 of this determination.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 22 January 2019.

Katie Gordon
Manager Determinations

Appendix A: The legislation

A.1 Relevant sections of the Building Act 2004:

7 Interpretation

In this Act, unless the context otherwise requires,—

Specified system

- (a) means a system or feature that—
 - (i) is contained in, or attached to, a building; and
 - (ii) contributes to the proper functioning of the building (for example, an automatic sprinkler system); and
 - (iii) is declared by the Governor-General, by Order in Council, to be a specified system for the purposes of this Act; ...

100 Requirement for compliance schedule

- (1) A building not used wholly as a single household unit—
 - (a) requires a compliance schedule if—
 - (i) it has a specified system; ...; and
 - (b) requires the schedule for all specified systems it has ...

103 Content of compliance schedule

- (1) A compliance schedule must—
 - a) state and describe each of the specified systems covered by the compliance schedule, including a statement of the type and (if known) make of each specified system; and
 - b) state the performance standards for the specified systems; and
 - c) describe the inspection, maintenance, and reporting procedures to be followed by independently qualified persons or other persons in respect of the specified systems to ensure that those systems are capable of, and are, performing to the performance standards.
- (2) For the purposes of subsection (1)(c), the inspection, maintenance, and reporting procedures of the compliance schedule may be identified—
 - a) by description in the compliance schedule; or
 - b) by reference to—
 - (i) a prescribed acceptable solution or prescribed verification method in a regulation referred to in section 20; or
 - (ii) an acceptable solution or a verification method issued under section 22; or
 - (iii) a building method or product.

116B Offence to use building for use for which it is not safe or not sanitary, or if it has inadequate means of escape from fire

- (1) No person may—
 - (a) use a building, or knowingly permit another person to use a building, for a use for which the building is not safe or not sanitary; or
 - (b) use a building, or knowingly permit another person to use a building, that has inadequate means of escape from fire.
- (2) A person who fails to comply with subsection (1) commits an offence.
- (3) A person who commits an offence under this section is liable on conviction to a fine not exceeding \$100,000 and, in the case of a continuing offence, to a further fine not exceeding \$10,000 for every day or part of a day during which the offence has continued.

A.1 Relevant clauses of the *Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005*

Clause 4 Systems or features prescribed as specified systems

The systems or features specified in Schedule 1 are specified systems for the purposes of the Act.

Schedule 1 Specified systems

- 1 Automatic systems for fire suppression (for example, sprinkler systems).
- 2 Automatic or manual emergency warning systems for fire or other dangers (other than a warning system for fire that is entirely within a household unit and serves only that unit).
- 3 Electromagnetic or automatic doors or windows (for example, ones that close on fire alarm activation).
- 4 Emergency lighting systems.
- 5 Escape route pressurisation systems.
- 6 Riser mains for use by fire services.
- 7 Automatic back-flow preventers connected to a potable water supply.
- 8 Lifts, escalators, travelators, or other systems for moving people or goods within buildings.
- 9 Mechanical ventilation or air conditioning systems.
- 10 Building maintenance units providing access to exterior and interior walls of buildings.
- 11 Laboratory fume cupboards.
- 12 Audio loops or other assistive listening systems.
- 13 Smoke control systems.
- 14 Emergency power systems for, or signs relating to, a system or feature specified in any of clauses 1 to 13.
- 15 Any or all of the following systems and features, so long as they form part of a building's means of escape from fire, and so long as those means also contain any or all of the systems or features specified in clauses 1 to 6, 9, and 13:
 - (a) systems for communicating spoken information intended to facilitate evacuation; and
 - (b) final exits (as defined by clause A2 of the building code); and
 - (c) fire separations (as so defined); and
 - (d) signs for communicating information intended to facilitate evacuation; and
 - (e) smoke separations (as so defined).