Determination 2006/77

Upgrading the means of escape from fire in the alteration of a high-rise office building at 66 Wyndham Street, Auckland

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 authorisation by me, John Gardiner, Determinations Manager, Department of Building and Housing, for and on behalf of the Chief Executive of that Department.

1.2 The application for determination was made by Multiplex Funds Management Limited ("Multiplex" or "the owner"), the owner of 66 Wyndham Street, Auckland ("the building") acting through its legal advisers. The other parties are:

- the Auckland City Council ("the territorial authority");
- the New Zealand Fire Service Commission ("the Fire Service"), as an organisation that has the right or obligation to give written notice to the territorial authority in respect of the relevant matters;
- the following tenants of the building (collectively "the tenants"):
    - British American Tobacco (New Zealand) Limited ("BAT"), the lessee of Levels 13 and 14 of the building;
    - Telecom New Zealand Limited ("Telecom"), the lessee of Levels 9 (in part) and 10 (in part) of the building;
    - BMC Software (New Zealand) Limited ("BMC"), the lessee of Level 15 (in part) of the building.

1.3 For the reasons set out in 5.2 below, I took the view that the matter for determination is the territorial authority's decision to refuse to issue the necessary building consents and corresponding code compliance certificate for certain proposed alterations (being

fit-outs of those parts of the building leased by the tenants together with associated upgrading of the rest of the building). That matter turned on the question of whether, after the alterations, the building will comply as nearly as is reasonably practicable with the provisions of the Building Code (the First Schedule to the Building Regulations 1992) that relate to means of escape from fire as required by section 112 of the Act.

1.4 However, during the course of the determination, see 3.1.7 below, the territorial authority itself reversed its previous decision, so that there was no longer any disputed matter for me to determine. Nevertheless, the owner did not withdraw its application for determination, which I accordingly made.

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

2 The building

2.1 The building is an existing office block tower that is 22 stories high above ground level, constructed above three levels of basement carparking. The ground floor of the building comprises retail and administration premises and the remaining floors consist of office premises.

2.2 All of the office premises open onto internal horizontal corridors, which provide access to the two stairway and five lifts. The building currently has:

- Fire rating of 90 minutes (F 90) between floors and for stairwell enclosure except that doors are F30
- Type 6 automatic sprinkler system with manual call points augmented by dual water supplies
- Type 9 smoke control in air handling system
- Type 14 fire hose reels
- Type 15 Fire Service lift control
- Type 16 emergency lighting system in exitways
- Type 18 fire hydrant system

2.3 If the building had been designed so as to comply with C/AS1 it would have had:

- F 60 fire cell rating
- Type 7 automatic sprinkler system with smoke detectors and manual call points
- Type 9 smoke control in air handling system

- Type 13 pressurisation of safe paths
- Type 15 Fire Service lift control
- Type 16 emergency lighting system in exitways
- Type 18 fire hydrant system
- Type 19 refuge areas
- Type 20 fire systems centre

3 The sequence of events and the submissions

3.1 The sequence of events

3.1.1 The tower was constructed in 1988, with fire precautions in accordance with the then current NZS 1900 Chapter 5. Each of the three tenants applied to the territorial authority for separate building consents in respect of their individual fit-outs. At the time of the application for determination, some of those building consents had been granted and some of the building work concerned had been done, but no code compliance certificates had been issued. The BAT applications and the territorial authority's responses outlined below are typical, with the other tenants having much the same experience.

3.1.2 BAT lodged 2 applications for building consents confined to building work on Levels 13 and 14. The territorial authority issued a building consent for the first application, which related to demolition work. The second application, which was lodged on 11 November 2005, was supported by two reports from a firm of consulting engineers ("the fire engineer"):

(a) A report ("the base report") describing itself as an egress assessment of the base building and stating that "tenancy fitout on any floor will need to be covered in separate fire reports". That base report was used in support of the other tenants' applications for building consents.

(b) A report ("the BAT report") covering the fit-out on Levels 13 and 14 to the effect that "the proposed alteration . . . complies with the performance requirements of Clause C2 of the Building Code subject to [certain listed items of upgrading on the floors concerned]". The fire engineer also acted as consultants to the other tenants and provided corresponding reports ("fit-out reports") were used in support of the other tenants' applications for building consents.

3.1.3 The base report concluded that:

> . . . the building complies 'as nearly as is reasonably practicable' with Clause C2 of the Building Code subject to the work below being completed:

- Provide and install new planted stops, incorporating cold smoke seals and intumescent seals, to all tower stair doors on Levels B3 to L19 inclusive.

3.1.4 The BAT Report stated that, subject to certain listed work, the proposed fit-out would comply with the performance requirements of clause C2 of the Building Code.

3.1.5 Another firm of consulting engineers ("the adviser") appointed by the territorial authority to provide advice on the base report, advised the fire engineer that:

> [The base report] does not detail how the Means of Escape provisions of the NZ Building Code are met for the entire building. For example if it was to be designed under C/AS1, stair pressurisation and a Type 7 fire safety precaution is required.

(In terms of C/AS1, Type 7 is an automatic fire sprinkler system with smoke detectors and manual call points.)

3.1.6 After further correspondence and meetings relating to the fit-outs for each of the tenants, Multiplex applied for this determination on 10 February 2006.

3.1.7 However, on 26 April 2006 the territorial authority wrote to the Department (copies to the owner and the Fire Service) saying:

> In terms of reasonably practicable – [the territorial authority] is accepting that:
>
> If a building meets the following criteria:
>
> - WL Purpose Group
> - Type 6 - Sprinkler protected
> - F Rating maintained
> - Escape height 46 m and greater
> - Occupant load per WL firecell up to 500
> - 2 means of escape or more as appropriate
>
> No further justification or alternative solution required in the fire report.
>
> NOTE: If smoke detectors are required for other reasons such as lift lobby, type 9 etc – they are still required.
>
> Should the Department of Building and Housing publish different guidance – the issue will be re-addressed at that time.
>
> Given the above, it may be that the applicant wishes to withdraw their application. . . .

3.1.8 I took that to mean that the territorial authority had changed its mind and decided to:

(a) Issue all necessary building consents for the tenants' fit-outs and associated upgrading as detailed in the fit-out reports and the base report, and

(b) Issue the corresponding code compliance certificates when satisfied that the building work concerned had been properly completed in accordance with the building consent concerned.

3.1.9 The owner replied (copy to the Department) asking for clarification of the territorial authority's approach and asking the territorial authority to meet the owner's costs of the determination, estimated as approximately $35,000.

3.1.10 The owner also wrote to the Department (copy to the territorial authority) advising that:

(a) The owner did not withdraw its application for determination.

(b) If the territorial authority did not meet the owner's costs, the owner would apply to the Chief Executive for a declaration as to costs under section 190(2), outlining reasons for such a declaration (see 6 below).

3.2 The submissions and the draft determination

3.2.1 The owner's application for a determination was supported by extensive submissions, including references to several previous determinations, accompanied by fire reports, correspondence between the parties, and other documentation. Relevant points in the owner's submissions are set out in relation to the various topics discussed below.

3.2.2 The territorial authority did not make any specific submissions, but relevant points made by the territorial authority in correspondence with the owner are also set out in relation to the various topics discussed below

3.2.3 The Fire Service did not make any submissions until the territorial authority had decided to issue the necessary building consents and code compliance certificates, see 3.1.7 and 3.1.8 above. The Fire Service's submissions are also set out in relation to the various topics discussed below.

3.2.4 I prepared a draft determination ("the draft") and sent it to the parties for comment.

3.2.5 The territorial authority accepted the draft.

3.2.6 The Fire Service accepted the draft subject to certain non-contentious amendments, which have been made.

3.2.7 The owner did not accept the draft and listed various concerns that it wished to see recorded in the final determination. Those concerns were:

(a) Certain minor errors of fact, which have been corrected.

(b) A perceived lack of clarity in the territorial authority's letter quoted in 3.1.7 above. That is addressed in 4.2 below.

(c) My interpretation of section 112. That is addressed in 5.1 below.

(d) My jurisdiction to determine disputes about "procedural" matters. That is addressed in 5.2 below.

4 Discussion

4.1 As the owner has not withdrawn the application, I consider that I must proceed with the determination. However, I do so on the basis that:

(a) In terms of section 177(d), the relevant exercise by the territorial authority of its powers under section 112 is its decision that the owner's proposed upgrading will bring the building to comply as nearly as is reasonably practicable with the provisions of the Building Code for means of escape from fire. That is not disputed by the owner.

(b) Statements and submissions by the territorial authority that are not compatible with that decision are superseded and cannot be taken into account in this determination.

(c) The fact that the territorial authority appears to have changed its mind in the course of the determination is not relevant to the determination itself although it may be relevant to the question of costs, see 6 below.

4.2 The owner did not accept my interpretation of the territorial authority's letter quoted in 3.1.7 above, saying:

> Although [the owner] interpreted the letter to mean that the restrictions imposed by the Council on the tenant's applications for building consent and code compliance were removed, it was not apparent . . . whether other restrictions would be imposed (in particular, the Council noted that smoke detectors may be required for reasons such as "lift lobby, type 9 etc", which are required under C/AS1). [The owner] required clarification of some of the items in the letter (which has not been received) and did not withdraw its Application for Determination . . . given the Council's failure to indicate that it would not require compliance with C/AS1 again in the future . . . .

4.3 As to the interpretation of the letter set out in 3.1.8 above, the territorial authority accepted the draft and therefore must be taken to have accepted that interpretation. Furthermore, the decision as set out in the draft (now 7.1 below) specifically refers to "building consents for the tenants' fit-outs and associated upgrading as detailed in the fit-out reports and the base report". Accordingly, I consider that the owner's concern in that regard is unnecessary.

4.4 As to the owner's concern about the territorial authority's "failure to indicate that it would not require compliance with C/AS1 again in the future", I cannot require the territorial authority to give any such indication (although guidance information as to comparisons with acceptable solutions is set out in 5.2 below). Accordingly, I consider that the owner's concern in that regard has been met to an appropriate extent.

4.5 Given that the territorial authority has now taken the decisions set out in 3.1.8 above, I take the view that, I have no alternative but to confirm those decisions. (It might be

different if I decided to make a determination on my own initiative under section 181, which I have not done in this case.)

4.6 I must emphasise that this determination relates to this building only, I do not make any determination in respect of the territorial authority's general criteria quoted in 3.1.7 above.

4.7 That disposes of the matter (except as to costs, which are discussed in 6 below). However, I recognise that the owner applied for the determination in the hope of practical guidance on various other matters which are not directly relevant to the determination, and that hope was also expressed by the Fire Service. Certain such matters are discussed in 5 below, but I emphasise that the any views expressed in that discussion are not binding decisions but are offered as general information.

5 Other matters

5.1 Interpretation of section 112

5.1.1 The owner referred to the difference in wording between section 112 (as amended by the Building Amendment Act 2005) and the corresponding section 38 of the former Building Act 1991. The same difference occurs between the other provisions for mandatory upgrading in the two Acts. The difference is that whereas the Act requires compliance with certain provisions of the Building Code "as nearly as is reasonably practicable", the former Act required compliance "as nearly as is reasonably practicable, to the same extent as if it were a new building".

5.1.2 The owner argued that section 112 was "less onerous" than previously. In the draft, I said that I did not agree, and in particular that:

(a) Although the owner's original submissions referred to acceptable solution as being "for new buildings", in fact the Building Code makes no distinction between new and existing buildings; and

(b) I took the Act's reference to compliance "as nearly as is reasonably practicable" to recognise that in many cases it would be both unreasonable and impracticable to require an existing building to be made as safe as a new building. However, it must be made as safe as is reasonably practicable.

5.1.3 Responding to the draft, the owner accepted those comments but said:

> Parliament's intention (as set out in the Bills Digest for SOP361 . . .) that the removal of the words "and to the same extent as if it were a new building" was intended to "weaken" the requirements of s 112, has not been addressed.
>
> The amendment to s 112 clearly supports the position that acceptable solutions (which are primarily designed for new buildings) should not be mandatorily applied to existing buildings (as the Council had done). The intent of s 112 is that existing buildings should be assessed for compliance with the Building Code as nearly "as is reasonably practicable", not by assessing how they measure up to C/AS1 (although [the owner] accepts that comparisons with acceptable solutions may be appropriate). . . . However, the point is that s 112 no longer makes it a requirement

> that existing buildings be compared to new buildings and in that regard must be less onerous than s 38.

5.1.4 As to Parliament's intention, I note that the *Bills Digest* is published by the Parliamentary Library to assist consideration of Bills by members of Parliament. It has no official status. Whatever the author of the *Bills Digest* might have thought Parliament would have intended if it enacted the amendment:

(a) The corresponding section 38 of the former Act used the phrase:

> comply . . . as nearly as is reasonably practicable, to the same extent as if it were a new building

(b) Section 112 originally included the phrase:

> comply as nearly as is reasonably practicable **and** to the same extent as if it were a new building (emphasis added)

In other words section 112 originally required both compliance "as nearly as is reasonably practicable" and compliance "to the same extent as if it were a new building", which must mean complete compliance subject to any waivers or modifications granted under section 67. Those requirements were clearly mutually incompatible.

(c) Section 112 as amended now uses the phrase:

> comply as nearly as is reasonably practicable

which removes the incompatibility.

(d) In my view, the fact that section 112 no longer refers to "a new building" does not have any substantive effect because, as the owner accepted, the Building Code makes no distinction between new and existing buildings.

5.1.5 As to the owner's statement that section 112 "no longer makes it a requirement that existing buildings be compared to new buildings and in that regard must be less onerous than [section 38 of the former Act]", I do not agree that there was ever such a requirement. The requirement was and remains compliance as nearly as is reasonably practicable with the Building Code, and neither section 112 nor section 38 of the former Act specifies any particular method by which compliance to that extent is to be assessed. As to such assessments, see 5.2 below.

5.2 Comparisons with acceptable solutions

5.2.1 In the application for determination, the owner identified the matters for determination as being in effect:

(a) Whether the territorial authority had wrongly exercised its powers under section 112 by asking the owner to provide a "benchmark comparison" with C/AS1, so that "as a result, Multiplex must upgrade the fire escape mechanisms in the Building to comply with C/AS1 regardless of whether they are reasonably practicable to implement".

(b) Whether the territorial authority had wrongly decided to refuse to issue certain building consents and code compliance certificates "on the basis that the comparison [with C/AS1] is required and that Multiplex must upgrade the Building".

5.2.2 As to the matter for determination, in the draft I took the view that the matters for determination stated in the application, see 5.2.1 above, were not appropriate because:

(a) I have no power to determine disputes about procedural matters as distinct from matters of building technology involving compliance with the Building Code (whether completely, or subject to waivers or modifications, or as nearly as is reasonably practicable).

(b) I was not satisfied, from the documents supporting the application, that the territorial authority had in fact required the building to be brought to comply completely with C/AS1.

Accordingly, as indicated in 1.3 above, I took the view that the real matter for determination was the territorial authority's original decision, which it has now reversed, to the effect that, after the proposed fit-outs and associated upgrading, the building would not comply as nearly as is reasonably practicable with the provisions of the Building Code that relate to means of escape from fire.

5.2.3 The owner expressed concern about the question of my jurisdiction, saying:

> [The owner] does not agree that the matter for determination is simply a dispute about a "procedural" matter, which the Department does not have jurisdiction to determine. The Council's requirement that a comparison with C/AS1 be made under s 112 was, in [the owner's] view, based on an incorrect interpretation or exercise of its powers under that section. It therefore involved the "exercise by a territorial authority of its powers under" s 112, which the Department has jurisdiction to consider under s 177(d) of the Act.
>
> As the Council declined to change its position, [the owner's] only recourse was to seek a determination as it is barred from commencing proceedings in the District/High Court under s 182 of the Act. There does not appear to be any basis for the Department to restrict its power to determine disputes in the manner indicated.

5.2.4 Section 177(d) provides that a party may apply for a determination in relation to:

> (d) the exercise by a territorial authority of its powers under sections 112 and 115 to 116 (which relate to alterations to, or changes in the use of, a building) . . .

5.2.5 With respect, the owner's comments overlook the distinction between a territorial authority's procedures, policies, and practices on the one hand and a particular decision made in accordance with those policies and practices on the other. In that regard, I note that section 177(d) refers to "a building", not to "any buildings". Accordingly, I remain of the view that my jurisdiction is limited to particular decision not to the procedures the territorial authority follows for making such decisions. I also consider that the owner's concerns about being required to make a comparison with the acceptable solution C/AS1 is adequately addressed below.

5.2.6 On the question of comparisons with the acceptable solution, the Fire Service said:

> The principal matter that appears to be at issue is whether or not [the territorial authority] is able to require that the fire engineering report in respect of this building should benchmark its alternative solution against the provisions in the current acceptable solutions. Section 112 of [the Act] provides for a comparison with the Building Code. A mechanism to demonstrate compliance with the Building Code is to assess a particular building against a building that is built in accordance with the Acceptable Solutions. This approach has been adopted in . . . recent . . . determinations. Similarly a comparison could be made against an alternative design that has proven to be code compliant by the issue of a code compliance certificate. Either approach is valid as both provide a mechanism that quantifies what the Building Code actually means. Our submission is that it is open to the building consent authority to use the Acceptable Solutions as a guide to the level of fire safety/facilities for disabled persons as representing a building that the building consent authority knows is code complaint and then to adopt the reasonably practicable test to that level of fire safety/facilities for disabled person. This is not to say that the fire safety features of the Acceptable Solution must be assessed under the second limb of [section] 112 merely that the safety level achieved is assessed.
>
> The question that remains is to what extent the building consent authority can require the applicant to undertake the assessment. We form no view on this.

5.2.7 I agree in general with that Fire Service submission, but do not agree that "a comparison could be made against an alternative design that has proven to be code compliant by the issue of a code compliance certificate". That statement is too general because:

(a) A territorial authority must treat each application for a building consent on its merits, and cannot simply rely on another territorial authority's decision in respect of another building.

(b) In Determinations 2005/109, 2005/134, 2005/168, and 2005/169, about "single means of escape" buildings, the point was not the specifics of the alternative solutions (by which I mean the plans and specifications for which building consents were granted) but the methodology of the comparative risk analyses that were used to arrive at those solutions.

5.2.8 The owner disputed the statement in the draft (see 5.2.2(b) above) to the effect that I was not satisfied that the territorial authority had in fact required the building to be brought to comply completely with C/AS1. The owner said:

> [The owner's] complaint concerned the Council's approach in requiring a comparison with C/AS1 and the obvious implications of this. The first indication of which was [a] fax . . . which stated that [the territorial authority] was "unable to accept whether particular requirements (eg exitway pressurisation and smoke detection" are not "reasonably practicable" to install". This was a clear indication that the Council was not prepared to consider the building consent applications in accordance with the criteria of s 112, rather the Council intended to determine the applications by reference to C/AS1. This became apparent from the dealings that [the fire engineer] and each of the tenants subsequently had with the Council and was confirmed in [the territorial authority's] fax of 9 December 2005 . . . which stated that "an alternative solution presented to demonstrate compliance with s112 of the Building Act 2004 **must** include a comparison to the Approved Documents" (our emphasis).

> While the Council may not have required the Building to be brought to comply completely with C/AS1, the clear implication was that the Council would require [the owner] to implement some or all of those features of the acceptable solution . . . that were not currently present in the building regardless of whether these were "reasonably practicable" to install. The Council indicated that the only way it was going to progress [a tenant's] consent was if [the owner] agreed in writing to do the fire upgrade work required as a result of the process, which implied that fire upgrade work beyond [the fire engineer's] reports would be required . . . . [The owner] was reluctant to commit to a process using the Council's methodology, which it regarded as fundamentally flawed. . . .

5.2.9 As to what the territorial authority did or did not "require", whether directly or by implication, I remain of the view that the real matter for determination is whether, after the proposed fit-outs and associated upgrading, the building would comply as nearly as is reasonably practicable with the provisions of the Building Code that relate to means of escape from fire.

5.2.10 Nevertheless, as I said in the draft, I consider that the procedural matters raised in the application indicate a need for guidance and also might be relevant to the question of costs.

5.2.11 The owner in effect says that a building consent authority (in this case the territorial authority) is not entitled to demand a comparison with the acceptable solution, in this case C/AS1, because such a comparison is only one way of assessing whether a particular proposal complies, or complies as nearly as is reasonably practicable, with the Building Code. That is true as far as it goes, but does not take account of the following considerations.

5.2.12 I take the view that a territorial authority cannot demand that the owner provide such a comparison, but that is of academic interest only. As discussed in previous determinations and following with the judgment in *Auckland CC v NZ Fire Service* [1996] 330, there is no doubt that comparison with the acceptable solution is a legitimate method of assessing whether a proposal complies with the Building Code either completely or as nearly as is reasonably practicable as the case may be. If an owner does not make a clear case that proposed alterations will comply to the required extent, then it would appear to be reasonable for the territorial authority to make or obtain such a comparison for the purpose of making its own assessment (as I did, see 2.2 and 2.3 above). If so, the territorial authority could recover the cost involved by way of its fee or charge in relation to the building consent under section 219.

5.2.13 The owner expressed the following concern about the preceding passage:

> The Department's draft view is that a territorial authority cannot demand that the owner provide a comparison with the acceptable solution, which is in accordance with [the owner's] position. While the Department regards this as being of "academic interest" (presumably because the Council has now changed its position), the Department's view would have dispensed with the need for the Application.

5.2.14 As I attempted to explain in the draft (see 5.7.12 above), I considered that whether a territorial authority did (or could) "demand" that an owner provide a comparison with an acceptable solution was of "academic interest" because the territorial

authority itself could have made such a comparison, where reasonable, and recovered the cost from the owner.

5.2.15 As to whether "the Department's view would have dispensed with the need for the Application", I consider that to be relevant only to costs, see 6.1 below, and not to this determination, which is about compliance with the Building Code.

5.2.16 In *Auckland CC v NZ Fire Service* [1996] 330 it was held that a territorial authority could use an acceptable solution "as a guideline or benchmark, but may not regard it as an exclusive solution". Whereas the Building Code uses qualitative words such as "appropriate" and "adequate", an acceptable solution prescribes quantitative measures which must be accepted as being appropriate or adequate in the context of all of the other quantitative measures prescribed by the acceptable solution. In some areas of building design it is comparatively simple to identify what is adequate or appropriate without reference to an acceptable solution. In fire design, however, it is more difficult to identify quantitative travel distances or escape route widths, for example, that can be accepted as being adequate or appropriate in isolation from all of the other fire safety precautions that affect those measures. In other words, with fire design it is difficult to identify useful guidelines or benchmarks other than C/AS1.

5.2.17 The owner had originally submitted that:

> [the fire engineer] has some concerns about the level of safety provided by compliance with C/AS1. It appears to be the Council's view that C/AS1 has defined and understood the appropriate level of safety, yet this has not been proven [and] it is possible that a performance-based design may provide a higher level of safety than C/AS1 and, on that basis, should not be benchmarked against C/AS1.

After reading the draft, the owner also submitted:

> [the fire engineer] disagrees with the content of the last sentence of [5.2.16 above] on the following basis:
>
> (a) There are the International Fire Engineering Guidelines ("IFEG"), which have been developed using internationally accepted practices to assist fire engineers and others involved in the building industry, to follow an agreed process within which solutions can be developed. The Department, as was its predecessor, the Building Industry Authority, is a sponsor of the IFEG.
>
> (b) The Society of Fire Protection Engineers Handbook, and other internationally recognised reference texts provide design solutions.

5.2.18 As to the level of safety represented by C/AS1, the Fire Service's submission said:

> We note that part of the case that is made in the application for the determination relies on the assertion that the smoke detection system and the stair pressurisation system that would be required by the acceptable solutions do not contribute to the fire safety in the building . . . . We consider that [those] assertions . . . are not correct. When the compliance documents were drafted, the relevant committee considered that to meet the performance requirements on the building code for a building of this size and use, not only were sprinklers required, but also smoke detection and pressurised stairs. The arguments presented in [support of the assertions] suggest that the compliance documents should not have included these features as they do not provide greater protection to human life. In our view this

> argument is flawed as early warning and protection of escape routes are fundamental principles in fire safety design. An alternative solution might remove these features, but the analysis would have to include a method to demonstrate compliance with the building code in some other way. In our view benchmarking against the acceptable solutions is a way of quantifying the level of safety envisaged by the Building Code. As has become clear in previous determinations, a comparison with the acceptable solutions is used, because the Building Code itself gives no clue as to the level of safety to be achieved.

5.2.19 In response to those comments, the owner said:

> The New Zealand Fire Service ("NZFS") and the Department have interpreted [the fire engineer's] submission that C/AS1 was not yet proven as an assertion that acceptable solutions do not contribute to the fire safety of a building. That was not the intention of the comment. Rather, [that] comment was intended to support the position that alternative solutions should not simply be disregarded in favour of the acceptable solution (as the Council appeared to do) and that it is possible, in certain circumstances, that an alternative solution could provide a higher level of safety than C/AS1.

5.2.20 I agree with the comments by the Fire Service, particularly regarding the use of acceptable solutions as a means of quantifying levels of fire safety required by the Building Code. I consider that the owner's response misses the point that a proposed solution cannot properly be called an alternative solution unless it complies with the Building Code. The discussion is about how that compliance is to be established. One means of doing so is by comparison with the corresponding acceptable solution.

5.2.21 I disagree with the owner's submission set out in 5.2.17 above because:

(a) As to the owner's "concerns about the level of safety provided by . . . C/AS1", I welcome discussion about the level of safety that should be achieved by an acceptable solution. However, once any particular acceptable solution has been issued in a compliance document, then under section 19(1)(b) that acceptable solution must be accepted as establishing compliance with the Building Code unless and until the acceptable solution is amended or revised by the consultative procedures of section 29. To say that an acceptable solution is "not proven" is to misunderstand its legal status.

(b) As to the owner's submission that documents such as the IFEG or the *Society of Fire Protection Engineers Handbook* could be used as benchmarks or guidelines instead of C/AS1:

(i) Whether or not those documents are sufficiently prescriptive for that purpose, they have not been subject to the specific consultative process defined in section 29.

(ii) I understand that those documents relate to the "best practice" methodology for fire design and are different in kind from the prescriptive C/AS1 (although such documents could be used to address matters not specifically covered by C/AS1). To suggest that they could be used as a benchmark or guideline instead of C/AS1 is to misunderstand the nature of the documents or the nature of C/AS1.

(iii) I recognise that some items that have been used and accepted in comparable jurisdictions may, for that reason, be used as alternative solutions in New Zealand, see Determination 99/104 re imported Canadian weatherboards for example. However, fire safety levels involve such complex interactions that that the level achieved by an overseas document is not necessarily the same as, or higher than, that achieved by C/AS1.

(c) The owner did not in fact claim that its proposal achieved a higher level than C/AS1 but that it complied as nearly as is reasonably practicable with the relevant provisions of the Building Code.

5.2.22 As regards the weighing of sacrifices and benefits involved in deciding whether proposed upgrading would in fact bring the building to comply as nearly as is reasonably practicable, the Fire Service said:

> The application for determination makes the 'sacrifice' required to undertake the upgrade clear . . . but we do not consider that the benefits of making the upgrade have been assessed for comparison.

To which the owner responded that:

> The benefit of additional fire safety systems is the greater protection of human life. However, [the fire engineer's] view was that greater protection would not be gained if additional systems from C/AS1 were installed in the Building, as addressed [in the owner's application for this determination].

5.2.23 I offer no opinion on the point because now that the territorial authority has accepted the owner's proposed upgrading I am no longer called upon to determine whether that upgrading meets the "as nearly as is reasonably practicable" test.

5.3 Fire reports

5.3.1 I regard fire reports, fire assessments, and the like as documents supporting the plans and specifications submitted for building consent. Those plans and specifications are defined as the "documents according to which [the] building is proposed to be constructed, altered, demolished, or removed". I recognise that in practice owners and territorial authorities discuss fire reports before the corresponding plans and specifications are finalised, but under section 49 a building consent must be issued in terms of the plans and specifications, not the fire report. Fire reports generally (and particularly in this case) are a basis for design of the fire precautions within a building and subsequent preparation of the plans and specifications, but are not a substitute for them. It is therefore important to ensure that the fire precautions identified in a fire report are properly detailed in the plans and specifications.

5.3.2 In this case the base fire report covered the building as a whole, while the fit-out reports covered the fit-outs in particular tenancies. That seems to be a sensible approach provided that the base fire report does in fact cover the entire building, including tenancies that are or are not being altered by way of fit-out.

5.3.3 This determination distinguishes between "the tenants" and "the owner". However, each tenant appears to comes within the section 7 definition of "owner" in relation to any land and any buildings on the land as a "person who has agreed . . . to take a

lease on the land". Thus the tenants are individually entitled to apply for building consents (and for determinations). Nevertheless, it seems appropriate that the owner of the fee simple of the land should coordinate all of the fire reports and all of the building consents so as to avoid confusion between alterations within a tenancy and associated upgrading that is not within that tenancy.

5.3.4 Obviously, consideration of what is "practicable" for upgrading of multi-tenanted buildings must be viewed in a broad context. It is not sufficient for a fire report, or an application for building consent, to consider only the most onerous upgrading measures, in this case stairway pressurisation and a building-wide smoke -detection installation, and compare that to the "do nothing" option. A consideration of the sacrifices and benefits of a range of options, between those extremes, should be presented, and the territorial authority is justified in rejecting the application if the proposal is too narrowly drawn.

5.4 Upgrading of the whole building

5.4.1 I read section 112 as requiring consideration of upgrading the whole of the building if any part of it is to be altered to an extent that requires a building consent. In other words, the first alteration, in this case the first fit-out, triggers consideration of the need to upgrade the whole building, including not only the fit-out tenancy but all other tenancies.

5.4.2 That raises obvious questions with multi-tenancy buildings (and similar questions arise with unit-titled buildings), including but certainly not limited to:

(a) How is the cost of upgrading (as distinct from fit-outs) to be apportioned between owner and tenants. It is obviously unrealistic to expect all upgrading costs to be met by the first tenant to undertake a fit-out or by the owner without recourse to the tenants

(b) Can the upgrading be postponed until all fit-outs have been completed, or done in stages, whether or not corresponding to fit-outs?

5.4.3 As to the cost of upgrading, I take the view that the Act requires upgrading but is not concerned with who is to pay for it. That is a matter for private agreement between owners and tenants, or between bodies corporate and unit title holders. The Act's requirements for mandatory upgrading are essentially the same as those of the former Building Act 1991 and have therefore been in place since 1993 so that I would expect commercial leases and body corporate rules to cover the question of upgrading costs.

5.4.4 As to postponing upgrading, or undertaking it in stages, as currently advised I take the view that proposals along those lines may be taken into account by a territorial authority when it is considering what is "reasonably practicable". However, the territorial authority will also need to take into account that:

(a) The test remains the balance between benefits and sacrifices

(b) Postponing or staging any particular item of upgrading will frequently reduce the corresponding sacrifice by minimising disruption and reducing

costs, or at least by improving cash-flow. However, the delay will always reduce the corresponding benefit.

(c) There might be enforcement difficulties. If the upgrading is not in fact completed on time, the territorial authority could refuse to issue any outstanding code compliance certificates, but that could well be ineffective. Similarly, the territorial authority could threaten prosecution under the dangerous and insanitary buildings provision of the Act, but the fact that a building that does not comply as nearly as is reasonably practicable with certain provision of the Building Code does not necessarily mean that the building is dangerous or insanitary in terms of sections 121 and 123.

5.4.5 The Fire Service asked for guidance on the balancing of sacrifices against benefits, referring to it as "a type of cost benefit analysis". In *Auckland CC v NZ Fire Service* [1996] 330, it was held that:

> A weighing exercise is involved. The weight of the considerations will vary according to the circumstances and it is generally accepted that where considerations of human safety are involved, factors which impinge upon those considerations must be given an appropriate weight.

5.4.6 I consider that, at least in respect of fire safety, it is not yet possible to express all of the relevant considerations in the same terms, so that one must inevitably compare apples with oranges, although I understand that there are some emerging tools and techniques that will improve the quality of decision-making. In other words, in the present state of knowledge there must be a subjective element in the decision as to what items of upgrading are reasonably practicable in any particular case. That being so, it seems appropriate that the decision must be made by a territorial authority or by the Chief Executive, being persons acting independently in the public interest.

6 Costs

6.1 Because the owner had reserved the right to apply for a direction as to costs under section 190, the draft included some discussion of costs. After reading the draft the owner formally applied for such a direction. I take the owner's submissions in support of that application to supersede the corresponding submissions considered in the draft.

6.2 Because the territorial authority has not yet responded to that application, the draft's discussion of costs has been omitted from this determination and will be addressed in a separate decision.

7 Decision

7.1 In accordance with section 188 of the Act, and in the absence of any submissions to the contrary, I hereby confirm the territorial authority's decision to:

(a) Issue all necessary building consents for the tenants' fit-outs and associated upgrading as detailed in the fit-out reports and the base report, and

(b) Issue the corresponding code compliance certificates when satisfied that the building work concerned had been properly completed in accordance with the building consent concerned.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 25 August 2006.

John Gardiner
Determinations Manager