



Determination 2011/089

The issue of a notice to fix concerning the refusal of a reduced building warrant of fitness for a hotel at 310 Princes Street, Dunedin

1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department.

1.2 The parties to the determination are:

- the owner, Enterprises Properties (“the applicant”), acting through a building inspection company (“the agent”). The agent is also a registered IQP².
- the Dunedin City Council (“the authority”), carrying out its duties and functions as a territorial authority or a building consent authority.

1.3 This determination arises from the decision of the authority to refuse to accept a reduced annual building warrant of fitness (“Form 12³”) for a multi-storey hotel.

1.4 I take the view that the matter to be determined⁴ is whether the authority correctly exercised its powers when it issued the notice to fix in respect of the non-issue of the Form 12A⁵: my reasons for doing so are set out below.

1.5 Jurisdiction as to the matter to be determined

1.5.1 The authority is of the opinion that the matter for determination is the authority’s non-acceptance of the Form 12 and does not accept that the determination should be based on its powers regarding the notice to fix. The agent is of the opinion that the determination is in respect of authority’s policy in ‘not complying with their legal

¹ The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Department are all available at www.dbh.govt.nz or by contacting the Department on 0800 242 243

² Independently qualified person

³ Building (Forms) Regulations 2004, Form 12 - Warrant of fitness

⁴ Under sections 177(1)(b), and 177 (3)(e) of the Act

⁵ Building (Forms) Regulations 2004, Form 12A – Certificate of compliance with inspections, maintenance, and reporting procedures

obligations ... under sections 164 and section 216⁶ of the Act (I note that section 164 relates to notices to fix). In a later submission, the agent noted that the authority's decision to issue a notice to fix was not disputed.

- 1.5.2 Under section 177 the Chief Executive does not have the power to accept a determination where an authority refuses to accept a Form 12. Nor, in my opinion, does the Chief Executive have the power to determine matters under section 216 of the Act⁷
- 1.5.3 However, the Chief Executive has the power to determine matters in relation to a notice to fix. In this respect, the notice to fix issued by the authority specifically referred to the inadequate Forms 12A that had been issued. As the specific content of the notice to fix is the matter disputed by the agent, I am of the opinion that this in turn brings into question the issuing of the notice to fix. Accordingly, I consider that I can determine the matters arising in terms of whether or not this particular notice to fix should have been issued.
- 1.6 In making my decision, I have considered the submissions of the parties and the other evidence in this matter. The relevant legislation is set out in Appendix A.

2. The building

- 2.1 The building in question is a multi-storey hotel building ("the hotel"). The hotel has a compliance schedule requiring the annual completion of a building warrant of fitness.

3. Background

- 3.1 On 11 May 2011, a series of emails were exchanged between the agent and the authority as outlined below.
- 3.2 The agent first emailed the authority advising that:
- We have all the required documents for renewal of the BWOFF at [the hotel] with the exception of confirmation that the Sprinkler Survey remedial items are under way and the outcome of the future for the external Fire Escape landings and stairs has yet to be confirmed.
- As a result the agent would be 'issuing a reduced compliance [Form 12] (1 month)' and requiring the owners to provide a 'Report in lieu of a 12A Certificate ("the Report")'. The report would advise of the owners' intention to make the sprinklers and the fire exit routes compliant.
- 3.3 In response, the authority advised that if a Form 12A cannot be produced, then neither can a Form 12. The authority also noted that it expected to receive copies of Form 12A for all the systems shown on the Compliance Schedule.

⁶ Section 216 of the Act 'Territorial authority must keep information about buildings' – includes 'building warrants of fitness' in section 216(2)(vi)

⁷ 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.

- 3.4 The agent then set out the provisions of the Act that dealt with annual warrants of fitness (sections 108) and referred especially to the word “must” in those sections, in particular that an owner must supply a warrant of fitness to the authority, and that warrant of fitness must be displayed in the building. The agent also noted that some other authorities had procedures that allowed a reduced Form 12 to be issued. These procedures included acceptance of a report prepared by the IQP, and owner’s reports similar to that referred to in paragraph 3.2.
- 3.5 The authority responded by saying that, regardless of the word “must”, if the requirements of section 108(3)⁸ have not been met, then a Form 12 cannot be produced. As Form 12 was ‘a form by Regulation’, the wording on the form could not be changed. The authority reiterated that, unless all the requirements of section 108 had been met, a Form 12 could not be produced or displayed.
- 3.6 The agent’s response to the authority was to set out the requirements of paragraph 6(2) of the Building (Forms Regulations) 2004 (“the Regulations”). This stated that, in certain circumstances, forms other than those prescribed could be considered as being valid documents. The authority’s responded saying that reducing the wording from ‘12 months to 1 month’ on Form 12 was not a minor change as it did not have the ‘same effect’.
- 3.7 The agent noted that, while a building owner cannot display a false or misleading Form 12, a reduced compliance form was acceptable under the Regulations. The agent queried how, if an owner could not display such a form, did this comply with the Act which requires a current Form 12 to be displayed? The agent again noted the acceptance of a reduced Form 12 was allowed by other authorities, and he supplied an example of such a form.
- 3.8 The authority did not accept that the Report fulfilled the intent and purposes of section 108. The authority did not wish to comment on the processes followed by other authorities.
- 3.9 The authority issued a notice to fix (No. 2011-40) dated 27 May 2011. The notice to fix said:
- Particulars of contravention or non-compliance:**
- The Building Warrant of Fitness has not been able to be issued because of the non issue of the Form 12a’s by the [IQP] ... because of deficiencies of the building’s sprinkler system identified in the bi-annual sprinkler survey.
- To remedy the contravention or non-compliance you must:**
- Resolve the issues with the sprinkler system to allow the Form 12a to be issued and then provide the [authority] with a copy of the Form 12a.
- 3.10 The Department received an application for a determination on 27 June 2011.

⁸ Section 108 of the Act: ‘Annual building warrant of fitness’

- 3.11 The authority issued a second notice to fix (No. 2011-65) dated 14 July 2010. The notice to fix said:

Particulars of contravention or non-compliance:

The Sprinkler System in the building is to undergo remedial work to ensure it will perform as designed. This means that presently the sprinkler may not perform adequately in the event of a fire. The non performance of the sprinkler may result in the building being declared dangerous.

To remedy the contravention or non-compliance you must:

Provide evidence from a Fire Sprinkler Engineer to state the limitations of the sprinkler systems performance if a fire were to occur in the building.

4. Submissions

- 4.1 In a covering letter to the Department, dated 20 June 2011, the agent set out the background to the dispute. The agent was of the opinion that the authority was exposing the building owner to risks concerning its insurance policy and its liquor licences. The agent referred to the email correspondence with the authority.
- 4.2 The agent noted that the authority had recently issued another notice to fix (refer paragraph 3.11), and queried how the authority could issue this notice, if the agent could not submit a reduced Form 12.
- 4.3 The applicant forwarded copies of:
- the emails between the authority and the agent dated 11 May 2011
 - the Form 12 for the building for the period up to 4 May 2011
 - two report forms (in the form of Form 12A) relating to automatic doors and the sprinkler system.
- 4.4 In email to the Department, dated 29 July 2011, the authority queried why the matter for determination was in respect of the exercise of the authority's powers in issuing a notice to fix concerning the reduced Form 12. My response to this is noted in paragraph 1.5.2.
- 4.5 The authority forwarded copies of the two notices to fix dated 27 May 2011 and 14 July 2011.

5. The draft determination

- 5.1 The draft determination was issued to the parties for comment on 30 August 2011.
- 5.2 The authority accepted the draft determination. The authority also noted that provisions of section 108(5)(c) which said it was an offence to display 'a building warrant of fitness otherwise than in accordance with this section'.
- 5.3 The agent did not fully accept the draft determination, and in an email dated 31 August 2011, submitted the following:

- The authority's decision to issue a notice to fix was 'never disputed', nor was the action and statement that required the sprinkler defects to be rectified.
- The principal matter at issue was the authority's decision not to accept the Report in lieu of a fully compliant building warrant of fitness.
- The agent queried how, if the owner is unable to obtain a fully compliant Form 12A certificate, does an owner comply with the Act and supply a compliant Form 12, but must, once the defect is fixed, issue either a fully complying Form 12 or no form 12 at all. 'How does an owner comply with the Act and provide a compliant Form 12 if [the owner is] unable to obtain fully complaint [Form 12As]'
- The Department had not addressed the situation where a Form 12 is unable to be issued and the Act offered no 'workable direction' in this eventuality. As a consequence, authorities generally 'accept a reduced Form 12 as a constructive way of obtaining a Form 12 when some specified system does not fully comply with the compliance schedule.'

5.4 The agent referred to section 108 of the Act and the relevant Regulation, and noted that a publication analysing the Building Act 1992 supported the issuing of reducing the actual period that the specified systems have been compliant.

5.5 The agent supplied copies of the following:

- the current 'Amended Compliance Schedule' dated 13 May 2008 (the agent noted that it lacked the specific maintenance requirements for each of the specified systems)
- the clarification letter concerning the non-completion of Form 12A, dated 4 May 2011
- the fire sprinkler inspection report, dated 2 May 2011
- a letter from the predecessor to the Department⁹ to the agent, dated 7 September 2000, that in turn, referred to commentary on the Building Act 1991 which supported the issuing of building warrants of fitness with a time period of less than 12 months.

6. Discussion

6.1 General

6.1.1 The hotel is a building with specified systems, including a sprinkler system. Any building (that is not a single household unit¹⁰) that has one or more specified systems is required to have a compliance schedule detailing the inspection and maintenance procedures for each specified system. A building warrant of fitness (Form 12) is a statement provided by the building owner that all the procedures of the compliance schedule have been carried out for the previous 12 months.

⁹ The Building Industry Authority

¹⁰ unless the household unit has a cable car

- 6.1.2 Form 12As are issued by IQPs in accordance with section 108(3)(c) as an attachment to Form 12 and provide certification that one or more compliance schedule procedures have been carried out. Collectively, all Form 12As cover all procedures of the compliance schedule allowing the Form 12 to be supplied to an authority and displayed in the building. The process is prescribed in sections 100 to 111 of the Act; Forms 12 and 12A are described in the Regulations.
- 6.1.3 The agent has noted that the non-compliant systems present in the hotel are the sprinkler system and the fire exit routes. I am not aware of the reasons why these items are deficient, but I accept that their function is essential to ensure the safety of the occupants of the hotel. As the notice to fix is only concerned with the sprinkler system, I assume that the authority does not now have concern with respect to the fire exit routes.
- 6.1.4 I note that the current compliance schedule does not record the performance standards that are to be met, or list the inspection and maintenance procedures to be undertaken. Accordingly, it is unclear how an IQP will know what procedures are to be followed in order to satisfy the requirements of the compliance schedule. I consider that the authority should amend the compliance schedule to correct these omissions.

6.2 Forms 12 and 12A

- 6.2.1 The authority is refusing to accept a reduced Form 12 from the applicant, on the grounds that the form is not in compliance with the Act and Regulations. Accordingly, the authority is of the opinion that it cannot accept such an amended form, nor as a consequence, can the Form 12 be displayed in the hotel.
- 6.2.2 The agent contends that the reduced Form 12 is not invalid just because it does not fully match the requirements set out in the Regulations. The agent has referred to processes adopted by other authorities have accepted a reduced Form 12 if it is supported by a report similar to that described in paragraph 3.2. The agent contends that an owners' inability to display Form 12 has insurance and liquor-licensing repercussions.
- 6.2.3 I accept the argument presented by the agent that alternative forms may be used other than those set out in the Regulations. In this respect I refer to paragraph 6 of the Regulations, noting that, apart from Form 1, the use of other alternative forms to those set out for Forms 2 to 16 are not invalid if they contain minor differences from that prescribed. However, an alternative form must:
- (a) have the same effect as the prescribed form and is not misleading; and
 - (b) contain all the information required by the prescribed form, and the information is in the same order as appears on the prescribed form.

This is consistent with section 26 of the Interpretation Act 1999, which states:

26 Use of prescriptive forms

A form is not invalid just because it contains minor differences from a prescribed form as long as the form has the same effect and is not misleading.

- 6.2.4 Having accepted that alternative forms can be issued in terms of paragraph 6 of the Regulations, I must consider whether the form proposed on behalf of the applicant is an acceptable alternative to Form 12.
- 6.2.5 As proposed in the agent's email to the authority on 11 May 2011, the Form 12 will not state that all the procedures of the compliance schedule have been carried out for a 12 month period. I also consider the reducing the compliance period on the proposed Form 12 is well outside the parameters required to give it the "same effect" as would a fully compliant Form 12 as described in the Regulations.
- 6.2.6 A Form 12 that does not cover the full 12 month period, and is not supported by Form 12As, which collectively certify that all the compliance schedule procedures have been carried out, means that the requirements of the Act are not being met.
- 6.2.7 For these reasons, I do not accept that the proposed reduced Form 12 is acceptable in terms of section 108 of the Act. Accordingly, I confirm the authority's decision to issue the notice to fix that requires a Form 12A to be supplied in respect of the sprinkler system that, in turn, will enable a fully complying Form 12 to be issued in accordance with section 108.
- 6.2.8 Finally, I note that the agent has referred to a commentary in a publication analysing the Building Act 1991 that supported the issuing of building warrants of fitness with a time period of less than 12 months (refer paragraph 5.5). However, the Regulations now include paragraph 6 (refer paragraph 6.2.3) that sets out the requirements for forms covered by the Regulations. As there was no equivalent to paragraph 6 in the 1992 Regulations, I consider that the commentary referred to by the agent is no longer valid.

6.3 The second notice to fix (No. 2011-65)

- 6.3.1 With respect to the second notice to fix (refer paragraph 3.11) I note the following. The purposes of the Act are set out in section 3: section 3(c) requires that people can escape from a building if it is on fire. Section 116B(1)(b) also states that no person "can knowingly permit another person to use a building" that has an inadequate means of escape from fire. I therefore do not accept that the requirements of the Act are being met if the hotel's sprinkler system is faulty. I consider the second notice to fix was correctly issued.

6.4 Other matters

- 6.4.1 For the avoidance of doubt, there is no requirement in the Act for authorities to formally 'accept' or 'refuse to accept' Form 12s. Rather, the Act requires the building owner to supply the Form 12 to the authority and display a copy in a public place in their building. Therefore, I consider an authority is correct in issuing a notice to fix in respect of a Form 12 that is incorrect, misleading (including where the Form 12As do not collectively cover all the compliance schedule procedures), or for any other non-compliance (see sections 108(5)(aa)-(c) and 164(1)(b) and (c)).
- 6.4.2 Should a notice to fix issued for one or more of the above reasons not be complied with, an authority will need to consider the individual circumstances and the level of non-compliance as to whether further action should be taken.

- 6.4.3 In view of the decision herein, I am concerned that there may be other authorities that are accepting a reduced Form 12 as is contended by the agent. If this is the case, then I suggest that these authorities review their procedures in line with my findings in this instance.
- 6.4.4 While this determination addresses whether the authority was correct in issuing a notice to fix where a Form 12A was not supplied, I am concerned that some Form 12As (in general) are not issued simply because a defect, found during an inspection, is not rectified before the Form 12 is due.
- 6.4.5 I note that both Forms 12 and 12A are issued based on certification that the procedures, as stated in the compliance schedule, have been carried out, which highlights the importance of the compliance schedule in the building warrant of fitness regime. It is possible that, for less significant defects, a compliance schedule may allow a period of time for those defects to be rectified: in my view this period of time may reasonably extend past the Form 12 due date.
- 6.4.6 The agent has also queried how, if the owner is unable to obtain a fully compliant Form 12A certificate, does an owner comply with the Act and supply a compliant Form 12? In response, I consider the owner is to ensure that all the compliance schedule procedures are carried out to enable the IQP to issue the relevant certificates.
- 6.4.7 The agent has expressed concern that the authority's decision affects the insurance for the hotel. However, this is a contractual matter that is outside the matters I can determine under the Act.

7. The Decision

- 7.1 In accordance with section 188 of the Building Act 2004, I confirm that the authority correctly exercised its powers when it issued a notice to fix in respect of the non-issue of the Form 12A.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 4 October 2011.

John Gardiner
Manager Determinations

Appendix A: The relevant legislation

A1 The relevant section of the current Building Act is:

108 Annual building warrant of fitness

- (1) An owner of a building for which a compliance schedule has been issued must supply to the territorial authority a building warrant of fitness in accordance with subsection (3).
- (2) The purpose of a building warrant of fitness is to ensure that the specified systems stated in the compliance schedule are performing, and will continue to perform, to the performance standards for those systems that are set out in the relevant building consent.
- (3) The building warrant of fitness must—
 - (a) be supplied on each anniversary of the issue of the compliance schedule; and
 - (b) state that the inspection, maintenance, and reporting procedures of the compliance schedule have been fully complied with during the previous 12 months; and
 - (c) have attached to it all certificates, in the prescribed form, issued by a licensed building practitioner that, when those certificates are considered together, certify that the inspection, maintenance, and reporting procedures stated in the compliance schedule have been fully complied with during the previous 12 months; and
 - (d) have attached to it any recommendation made by a licensed building practitioner that the compliance schedule should be amended to ensure that the specified systems stated in the compliance schedule are performing, and will continue to perform, to the performance standards for those systems; and
 - (e) be in the prescribed form; and
 - (f) contain the prescribed information.
- (4) The owner must publicly display a copy of the building warrant of fitness in a place in the building to which users of the building have ready access.
- (5) A person commits an offence if the person—
 - (aa) fails to supply to the territorial authority the building warrant of fitness in accordance with subsection (1); or
 - (a) fails to display a building warrant of fitness that is required to be displayed under this section; or
 - (b) displays a false or misleading building warrant of fitness; or
 - (c) displays a building warrant of fitness otherwise than in accordance with this section.
- (6) A person who commits an offence under this section is liable to a fine not exceeding \$20,000.

A2 The relevant sections from the Building (Forms) Regulations 2004 include:

6 Use of forms

- (1) Form 1 may not contain any differences from the form that is prescribed.
- (2) Use of any other form is not invalid only because it contains minor differences from a form prescribed by these regulations as long as the form that is used—
 - (a) has the same effect as the prescribed form and is not misleading; and
 - (b) contains all the information required by the prescribed form and the information is in the same order as appears on the prescribed form.