



Determination 2017/026¹

Regarding a notice to fix issued in respect of a commercial laundromat at 180 Featherston Street, Palmerston North

Summary

This determination was sought by the authority in regards to whether a notice to fix was correctly issued to the designer as a specified person, and whether the sprinkler system is a specified system for the purpose of the compliance schedule and building warrant of fitness. The determination also considers the compliance of particular features of the building, and discusses the various contraventions listed in the notice to fix.

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004² (“the current Act”) made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, 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:
 - Palmerston North City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority. The authority applied for the determination.
 - the owners of the property, D & C Bell and A Cochrane (“the owners”), under section 176(c) of the current Act;
 - the designer, R Partington, (“the designer”) who was acting on behalf of the owners with respect to the relevant building consents and who was issued with a notice to fix³;
- 1.3 I consider the IQP⁴ who issued the Building Warrant of Fitness dated July 2015 to be a person with an interest in this determination (“the IQP”).
- 1.4 I have provided the New Zealand Fire Service Commission (“the NZFS”) with the determination documentation for comment. This was done by way of consultation under section 170 of the current Act⁵.
- 1.5 The determination arises from the issuing of “notice to fix 2” dated 7 March 2016 (“the notice to fix”) to the owners as well as to the designer in respect of the specified systems and building work carried out under two building consents. The

¹ Subject to a clarification under section 189 of the Building Act 2004.

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 As such the designer is considered a party under section 176(da) of the Act

⁴ Independently qualified person

⁵ In this determination, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code (Schedule 1, Building Regulations 1992).

designer disputes that he is a specified person under section 163 of the current Act and holds the view that the notice to fix should not have been issued to him. The designer also disputes the breaches listed in the notice to fix.

1.6 The matter to be determined⁶ is the authority's exercise of its powers of decision in issuing the notice to fix. In deciding this, I must consider:

- whether the designer is a specified person under section 163 of the Act with respect to the notice to fix issued to him; and
- whether the notice to fix has been correctly issued in respect of the breaches listed in the notice; and
- whether the following building work complies with the Building Code to the extent required by section 17 of the Act current at the time⁷:
 - fire separations to the boiler room
 - an isolated step at a final exit
 - roller doors on final exits
 - a lockable gate outside a final exit.

1.7 Matters outside this determination

1.7.1 The authority requested I determine the compliance of the building with respect to means of escape from fire. From the application I take it that the authority is questioning whether the building, after the consented alterations, complies to the extent required by section 38 of the former Act. I note that an assessment of compliance with section 38 (or section 112 of the current Act) is undertaken when a building consent authority considers the granting of a building consent for alterations to existing buildings, and in some cases may arise where an existing building to which alterations are being made is found to be deficient in some way.

1.7.2 The authority issued two building consents and the assessment of compliance to the extent required under section 38 would have or should have occurred at that time. The authority has not applied for a determination on the matter of its decision to grant the building consents; accordingly, I have not considered the application of section 38 further in this determination.

1.7.3 During the determination process, the authority raised a number of additional items and I have included those matters as set out in paragraph 1.6 that I have been able to address based on the information provided by the parties and observations made during the site visit.

1.7.4 This determination is limited to the matter outlined in paragraph 1.6. I have not considered any other aspects of the Act or compliance of the building work in other respects.

1.8 In making my decision I have considered the submissions received and the other evidence in this matter.

⁶ Under sections 177(1)(b), 177(2)(f) and 177(3)(e) of the Act

⁷ The relevant legislation that applies is the Act and the regulations that were current at the time the application for building consent(s) were lodged, or if the building work was not consented the Act and the regulations that were current at the time the building work was carried out.

2. The building work

2.1 The building is a single-storey structure, with mezzanine levels in two areas. The building has evolved over a number of years through additions to an original building (see Figure 1). It contains a commercial laundromat, with the office in one of the mezzanine areas and a staff room in the other. The building's construction is a mix of light timber-framed and concrete block walls.



Figure 1: Aerial view⁸ showing the building additions and the relevant building permits and consents

2.2 The specified systems

2.2.1 Based on the observations made during the site visit, the specified systems included in the building are as follows:

- SS1 – sprinkler system (which the owners contend is not required)
- SS2 – a Type 2 fire alarm⁹
- SS9 – mechanical ventilation
- SS14 – signs
- SS15(b) – final exit signs
- SS15(c) – fire separations
- SS15(d) – signs for communicating information intended to facilitate evacuation.

⁸ Provided by the designer

⁹ For alarm types, refer *Approved Document for New Zealand Building Code Fire Safety Clauses C1, C2, C3, C4 (Amendment 2)*, 24 April 2003, Building Industry Authority

(I note that the parties dispute the specified systems listed above; the authority has submitted the list is incomplete, and the designer has submitted that some items should not be included.)

- 2.2.2 An automatic backflow preventer (SS7) was listed in the Building Warrant of Fitness (BWF) inspection for 2015 (see Appendix B), however no backflow preventer to the sprinkler system was observed during the site visit. I requested further information from the designer, who advised by email on 20 December 2016:

... there is not one on the valve train coming into the building. What we thought was one is in fact a pressure reducing valve to limit the incoming supply to 30psi.

I leave this matter to the parties to resolve.

2.3 The permitted work

Pre-1991

- 2.3.1 The building was originally constructed under permit No. P7202 in 1966 as premises for a taxi company. It was a single-storey, with concrete floor slab, concrete block external walls, timber-framed internal walls and a timber-framed roof.
- 2.3.2 Building permit No. F027584 was issued in January 1988 for building work in association with the laundromat – which was described as ‘drive in laundry’. The building work included the removal of existing internal walls and the extension of the building to accommodate the reception, office, and then self-service area, with the addition of a canopy over a ‘drive in entry’ (see Figure 2).

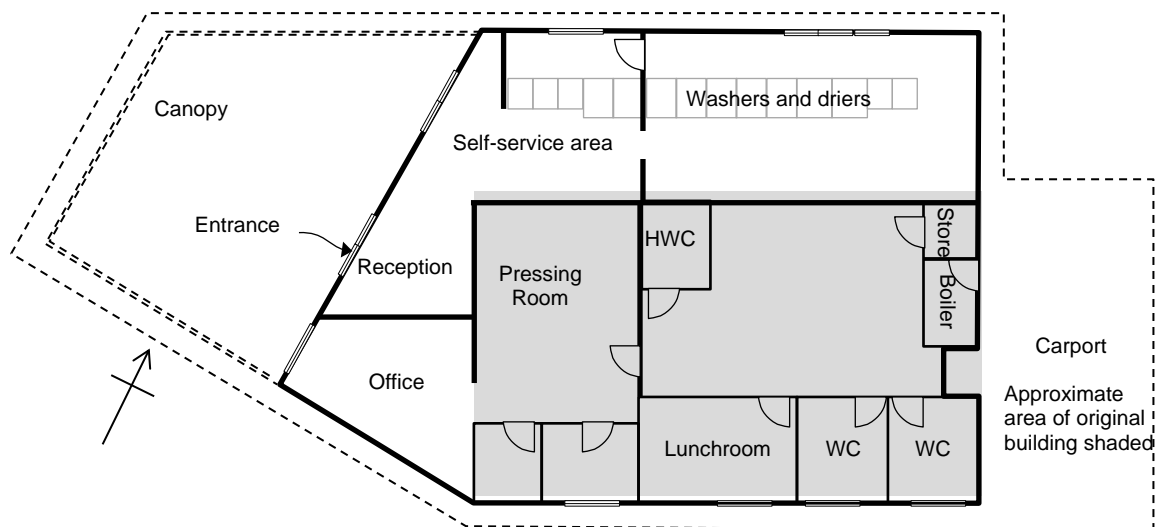
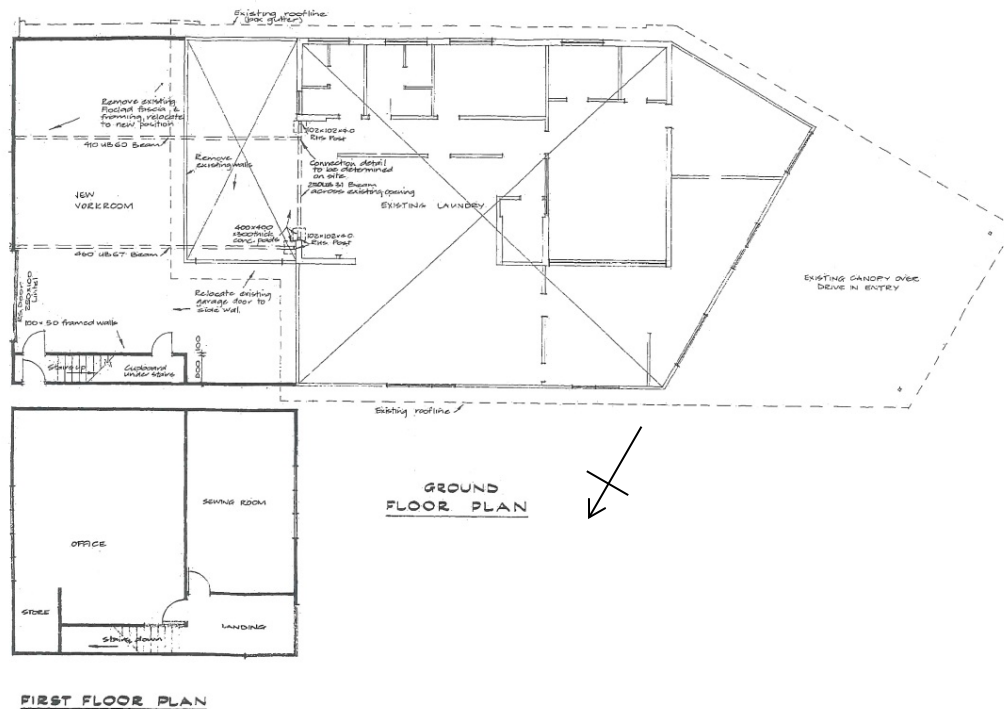


Figure 2: Floor plan (from 1988 permit drawings, not to scale)

1992

- 2.3.3 Building permit No. J67192 was issued by the authority in April 1992 for additions and alterations. The plans indicate an addition to the northeast with the office on the mezzanine level (see Figure 3). I note that the plans provided do not show the location of a boiler as shown in Figure 2; the 1992 additions meant that this boiler was no longer accessible through an external door.

Figure 3: Floor plan (from 1992 permit drawings, not to scale)

- 2.3.4 Construction was carried out during 1992, with the last inspection recorded on 3 December 1992 noting ‘Type B alarm installed. Job complete’. The consent record is signed as “completed” on 1 January 1993.
- 2.3.5 Permit No J67427 was issued in June 1992, for the addition of a carport (see Figure 1). I have not seen plans associated with this permit, however I note that the plans for J67192 indicate an existing carport and concrete slab to the east corner of the building adjacent to the new workroom.
- 2.3.6 Noted on an inspection summary sheet, is an inspection dated 18 September 1992 with the comment ‘roof almost complete. Sprinklers extended to carport.’

2.4 The consented work

The 1997 consent

- 2.4.1 The authority issued BC 14662¹⁰ on 28 April 1997 under the Building Act 1991 (“the former Act) for a relatively small extension to the southern side of the building ‘to house new machinery’.
- 2.4.2 The authority issued BC 16159 in 1997 under the former Act for additions and alterations described as ‘Erect stage 1 of a boiler shed’ which was proposed as the first stage of a three-stage development. The building work included the construction of the new boiler building that is the subject of this determination (refer Figure 4). The building was constructed of concrete block walls on a concrete foundation, and a timber rafters and purlins on a low-pitched profiled metal roof: no fire rating is shown to the roof/ceiling. It appears the boiler shed had two roller doors; one opened into the existing building to the northwest, and the other opened to the exterior to the southeast.

¹⁰ Building consents herein after are described as BC 14662, etc

2.4.3 BC 16159 was issued with the following condition:

The boiler is to be a separate fire cell located with at least one wall on an exterior wall. The location will not comply when stage 2¹¹ is carried out. The location of the boiler will need to be relocated and direct access to the outside provided. Any interior access is to be through a protected path, protected with a heat detector connected to warning alarms in frequently occupied spaces in the building'

2.4.4 An entry on the inspection record dated 1 April 2003 notes the boiler as having been installed, and that 'the rear wall of the building is open to the existing building'. The final entry in the inspection record, dated 10 April 2003, notes 'Final all ok ... No producer statement req'd for the boiler as it is not part of the building.'

The 1998 consent

2.4.5 The authority issued BC 21118 in 1998 under the former Act for additions and alterations described as Stage 2 of the three-stage development (see Figure 4). The addition shown as stage 2 did not enclose the boiler shed.

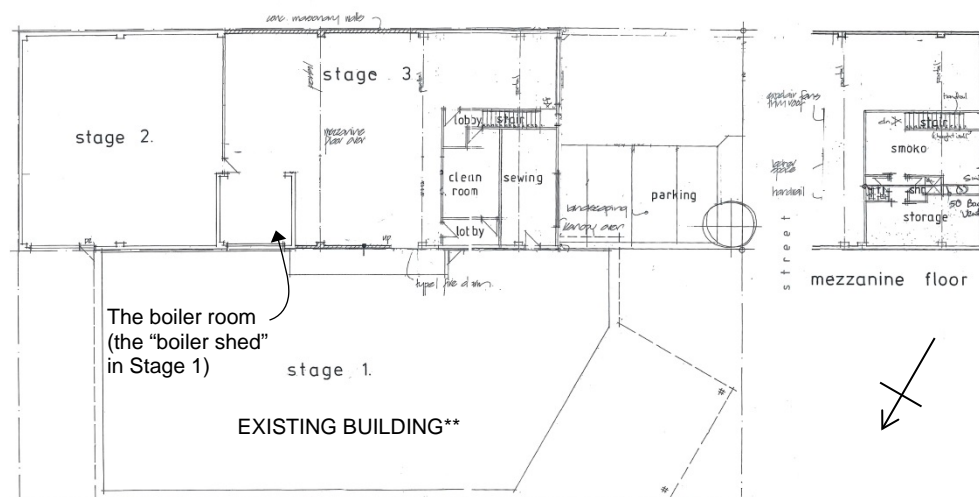


Figure 4: Floor plan showing stages 2 & 3 (from 2014 as-built plans, not to scale)

** The existing building was incorrectly identified on the plans as 'Stage 1'.

The 2003 consent

2.4.6 During mid-2003 the authority issued BC 43992¹² under the former Act for additions of approximately 196m² that were described as Stage 3. The building's intended use was noted as 'completion of warehouse' and the additions as comprising a covered loading and unloading facility, new toilet facilities and a mezzanine staff room area.

2.4.7 The building work in Stage 3 enclosed the boiler shed (see Figure 4) and the boiler shed became a room within the altered building. The plans for BC 43992 do not take account of the conditions for BC 16159 (refer paragraph 2.4.3) as the boiler was not relocated, nor direct access to the outside provided. It appears no work was done to provide fire separation between the boiler room and the stage 3 work.

2.4.8 An unsigned 'Fire Fact Sheet' dated 4 August 2003 was provided to the authority, indicating the laundromat was wholly contained in one fire cell, the purpose group was WM, Fire Hazard category 3, and the alarm system was Type 2.

¹¹ It appears this reference should be to stage 3

¹² I note here that the designer for the 2003 additions is the predecessor who founded the practice that the designer, who is a party to this determination, has since taken over.

- 2.4.9 A summary of inspections carried out in 2003 refer generally to foundations; an annotation that appears added at a later date notes ‘Type 2 alarm to be fitted (extend existing)’. The last inspection recorded is a pre-line inspection on 9 June 2004, which noted significant changes to the first-floor layout¹³ and that amended plans were required, issues regarding the stairs, and:
- 1st floor area increased in size – builder aware of “F” [Fire] ratings and the need to provide protection to load bearing wall and to ceilings. ...
- I have not been provided with any further inspection records that show the progress made during construction, or that the issues noted in the 2004 inspection were resolved.
- 2.4.10 On 15 March 2010 the authority wrote to the owners with regard to the two outstanding building consents, recommending a final inspection be booked and an application for a code compliance certificate be lodged. A site inspection record dated 8 June 2010 indicated seven items to be addressed, including the provision of a producer statement from the installer of the fire alarm (item 4) and fire exit signage to be installed (item 6). The record (item 7) also refers to the need for an amended first floor layout: the item is ‘ticked’ suggesting this was received.
- 2.4.11 It is unclear why the satisfactory completion of the building work and issue of the code compliance certificates remained unresolved. It appears from the authority’s records that the owners or the designer sought an extension of time in which to complete some building work, and that this was declined in February 2014.
- 2.4.12 As-built drainage plans were provided to the authority on 14 May 2014. An internal memorandum or file note dated 20 May 2014 recorded by an officer of the authority indicates the two code compliance certificates would be issued together and notes a number of items to be addressed, including fire alarm type, a door to open outwards, and a producer statement required for the fire alarm.
- 2.4.13 On 26 November 2014 the authority wrote to the owners providing notice of its refusal to issue code compliance certificates for BC 43992 and 21118. The authority listed three reasons for its refusal for both consents, one of which was that the specified systems had not been inspected as required by legislation.
- 2.4.14 On 25 February 2016 the owners applied for a code compliance certificate for BC 43992, noting that the building work was completed some two years prior and listing the sprinkler system as one of the specified systems with reporting frequency as ‘3 monthly & annually by IQP’. The application was supported with as-built floor plans provided by the designer.
- 2.4.15 On 7 March 2016 the authority wrote to the owners to advise that BC 21118 and 43992 were “cancelled”. The authority noted: insufficient inspections had been carried out; there was a lack of “follow up”; some building work had been carried out without amendment to the consent; and ‘work done outside of the consent has created a change of circumstances in respect of the consent’. The authority also noted that notices to fix had not been complied with.
- 2.4.16 I note here that there are no provisions in the current Act that relate to the cancellation of consents. Section 433, a transitional provision for building consents granted under former Act, provides building consents granted under section 34 of the former Act must be treated as if they are building consents granted under section 49

¹³ A Site Instruction Notice from the authority’s records, dated 8 June 2010, also refer to the need for an amended layout. The item is ‘ticked’ suggesting this was received.

of the current Act. Section 52 of the current Act provides for the lapse of a building consent when building work to which it relates does not commence within 12 months after the date of issue of the building consent (or any further period that the authority may allow). From the description of the background to the events and the inspection records available, I am of the view that work was undertaken within this period and this work was generally within the scope of the work approved in the building consent. Accordingly, the building consent did not lapse and section 52 does not apply.

2.5 Building work carried out without consent

- 2.5.1 In correspondence with the Ministry in January 2016, the authority has referred to building work carried out without building consent having been obtained and the notice to fix refers to a fire alarm and a boiler installed without consent (refer paragraph 3.3.4). However, it appears that the boiler was installed under a consent approved by the authority (refer paragraph 2.4.2), and the fire alarm was installed as part of the building work carried out under BC 43992 with the authority's knowledge (refer paragraph 2.4.9).
- 2.5.2 In a submission to the second draft determination the authority referred to differences between the approved plans and the as-built plans (which I understand are for BC 43992). I have addressed this matter in paragraphs 7.5.4 to 7.5.7.

3. Background

3.1 Building Warrants of Fitness ("BWOs")

- 3.1.1 BWOs were issued between 1995 and 2005 with largely identical specified systems included (refer Appendix B). During those years the sprinkler system was included in the listed specified systems. The BWO issued on 31 July 2006 did not include automatic sprinkler systems (SS1).
- 3.1.2 On 23 August 2013 an IQP that had previously been engaged by the owners, wrote to the authority to inform the authority that he had recently completed a BWO inspection. The IQP attached a copy of a letter from himself to the owners which had identified 'several deficiencies' as follows:
1. Approximately 75% of the building had a Sprinkler System installed. We were unable to locate the valve set or water supply to this system.
 2. The Means of Escape in several locations was via Roller Doors. This is feasible but would need some form of management plan and approval from [the authority].
 3. The Gas Fired Boiler is located in the middle of the facility. A brief review of the situation indicates that when the building was extended the Acceptable Solutions may have required the Boiler to be Fire Separated from the remainder of the building.
 4. [The authority's] records indicate that they notified [person named] of several specific requirements for Fire Rating the stair enclosure, beneath the stairs, and the doors. There is a letter on file acknowledging the requirements, from [the named person], but some of the items requested are incomplete.

The letter concluded that given the issues identified a BWO was not able to be issued.

- 3.1.3 On 4 September 2013 the authority wrote to the owners to advise that the BWOFF had expired and that the owners were required to provide a copy of the current BWOFF and associated 12A certificates. A further letter on 22 October 2013 noted that the renewal documents had not been received and that the authority would carry out an audit (see paragraph 4.1).

3.2 The designer's involvement and the consented building work

- 3.2.1 It appears from correspondence that the owners sought assistance from the designer in regards to completion of consented building work and obtaining of code compliance certificates. I note that the building consent application for Stage 3 (BC 43992) was lodged by a predecessor of the designer who founded the practice that the designer has since taken over.
- 3.2.2 On 26 November 2014 the authority wrote to the owners under section 95A of the Act, stating that the authority was refusing to issue the code compliance certificate for two building consents: BC 43992 and BC 21118. Included in the reasons for refusal was that 'specified systems are not inspected as required by legislation'.
- 3.2.3 In email correspondence on 12 December 2014 the authority noted the designer had been engaged by the owners to act on their behalf, describing the designer as a "specified person".
- 3.2.4 An email from the designer to the authority on 12 December 2014 indicates that the designer was of the understanding that all outstanding issues had been resolved. In regards to specified systems included in the notices, the designer stated:
- The alarm system is the only one of [previously identified] items ... we believe that this information has been issued to the [authority] ...
- The fire separations installed as part of the building consent have all been inspected and passed by [the authority].
- There is a small area of the existing building that has an old sprinkler system in it. However Sprinklers are not required for this building, so they have not been included as a specified system. The owner has chosen to retain it only because it is already there.
- 3.2.5 In a number of emails during December 2014, the designer set out his view that the notice to fix should not have been issued and nor should the code compliance certificate have been refused. The designer stated that the Fire Safety systems had been installed in accordance with BC 43992.
- 3.2.6 Correspondence between the designer and the authority continued, without the matter reaching resolution. In an email on 28 January 2015 the authority advised the designer that if the owners disputed the notices to fix they could apply for a determination on the matter. No such application was made to the Ministry by the owners.
- 3.2.7 There was further email correspondence between the designer and the authority with regards to whether the designer was a specified person, and whether the term "supervise" relates only to Restricted Building Work.
- 3.2.8 In January 2016 the authority sought advice from the Ministry regarding the interpretation of "specified person". In an email on 12 January 2016 an officer of the Ministry noted that a notice to fix could be issued to a person supervising building work actively being carried out or where that person 'has control over what is happening and hence [the] ability to rectify the situation'.

3.3 The notices to fix

- 3.3.1 The authority issued a series of notices to fix to the owners on 26 November and 23 December 2014, 27 January, and 2 and 23 March 2015. The particulars of contravention in these notices are similar to those stated in the notice to fix that is subject to this determination, with additional references to consented building work that was not completed at that time. It appears from correspondence that the owners disputed the notices to fix being issued.
- 3.3.2 I have not set out the details of those earlier notices to fix in this determination nor have I considered whether the authority correctly exercised its powers in relation to those notices. I only refer to those earlier notices in providing context to the matters in dispute.
- 3.3.3 On 7 March 2016 the authority issued the notice to fix 2¹⁴ to the owners and to the designer as a specified person. It is this notice that is the subject of the determination, and it is my understanding that it supplants the previous notices issued.
- 3.3.4 The particulars of contravention or non-compliance were stated as:

The buildings contain a number of specified systems that have not been listed on the compliance schedule and no information has been supplied. These systems are required on the compliance schedule. The sprinkler system in the building was listed on the compliance schedule until 2007 and information has not been supplied when requested for this system. Information has been requested for all the specified systems and has not been supplied. A fire alarm has been installed without a building consent (previously consented for extending not a full system). An audit carried out on the building identified the specified systems in the building include 6 that have not been included on the building warrant of fitness. The building warrant of fitness is misleading and was not displayed in the building during the audit. A boiler has been installed without a building consent (no energy certificate supplied) and is not in accordance with the building code. No records existed on site for regular IQP inspections, maintenance or reporting. This is not in accordance with the Building Act 2004, including sections; 17, 40, 101, 103, 105, 106, 108, 110 and 116B. Previous notices to fix have not been complied with.

A copy of all of the sections of the Act listed above was included in the particulars.

- 3.3.5 The notice to fix set out the following remedy:
1. Provide a fire safety report from a suitably qualified person. Eg. fire engineer
And;
 2. Apply for a certificate of acceptance for the work done without a building consent, including the full alarm installation and the boiler installation (certification required). And;
 3. Provide full details of each specified system, type make and model (if available), installation maintenance and reporting standards, inspections required, locations of components and full descriptions. For the following systems;
 - SS1 Automatic systems for fire suppression
 - SS2 Automatic and manual emergency warning system
 - SS6 Riser mains
 - SS7 Automatic backflow preventers
 - SS9 Mechanical ventilation or air conditioning systems
 - SS14/2 Signs
 - SS15/2 Final exits
 - SS15/3 Fire separations
 - SS15/4 Signs for communicating information intended to facilitate evacuation
 - SS15/5 Smoke separations

¹⁴ The notice to fix does not include a unique identifier but the covering letter describes it as "Notice to fix 2"

And;

4. Provide all records relating to inspection, maintenance and reporting for all the specified systems for the past two years. Include owner's and IQP inspections carried out. And;
5. Provide a new building warrant of fitness with all items listed above and ensure the form 12a's are supplied and correct.

3.4 The 2015 BWOF

3.4.1 On 3 June 2015 the IQP issued a BWOF dated 31 July 2015, which listed a limited number of specified systems but did not include the sprinkler system (refer Appendix B).

3.4.2 The Form 12A, dated 3 June 2015, referred to an attachment authored by the IQP regarding the basis on which the BWOF was issued ("Attachment A"). The attachment included the following comment:

...part of the building is covered by a sprinkler system. The owner installed this years ago as an added safety measure for himself as he is rather safety conscious. As the building does not require any form of sprinkler system it is deemed not required to be listed on the compliance schedule. The Fire Service also agrees.

3.4.3 On 29 June 2015 the authority wrote to the IQP regarding the BWOF. The letter noted that the sprinklers had not been included on the BWOF, and in the authority's view the sprinklers must be added to the compliance schedule whether or not the sprinklers are required. The authority also commented that the notice to fix had not been addressed and that a fire design report from a suitably qualified person had not been provided.

3.4.4 The authority emailed the NZFS regarding their advice, which the authority did not believe was 'correct' concerning the compliance schedule and the sprinkler system.¹⁵ In a response on 16 June 2015, an officer of the NZFS stated that its own records did not indicate there was ever a requirement for a sprinkler system and that 'it would appear not to be a requirement of the previous by-laws and is not regarded as a specified system under today's Building Code requirements. The [NZFS] was not aware of this system.'

3.4.5 On 29 October 2015 the authority carried out building warrant of fitness inspection (refer Appendix B), which did not pass. The inspection record indicates that the BWOF was not visible to the officer and previous years inspection records were not sighted. In regards to the sprinkler system and boiler the record stated:

- Sprinkler system in some parts of building
- Boiler fire rated on two sides only (front open, unable to see the back of the boiler). Timber floor joist and timber/chipboard floor above boiler
- If the owner wants to remove the sprinkler system a building consent is required to do so.

The inspection record also noted:

- Exit ways to be kept clear (stuff stored too close to exit door)
- Also an isolated step outside the exit door (from staff room)

The inspection record states that the authority should issue a notice to fix.

3.4.6 On 7 December 2015 the authority wrote to the Ministry to seek advice, noting that 'the compliance schedule handbook'¹⁶ clearly lists the scope for SS1 as 'an automatic

¹⁵ As a result of the clarification the emphasised text has been altered. Please refer to paragraph 9 for further explanation.

¹⁶ *Compliance Schedule Handbook*, Ministry of Business, Innovation and Employment (Amendment 3 effective from 14 February 2014)

fire suppression system is required to be listed on a compliance schedule in all cases'. The authority noted systems in the building that were not on the compliance schedule as follows:

- 1) Sprinklers (removed on the building warrant of fitness from 2007) SS1
- 2) Riser main SS6
- 3) Mechanical ventilation SS9 (several types)
- 4) Fire separations SS15/3 (but unable to determine the extent)
- 5) Automatic backflow preventers SS7

The authority noted also its concerns regarding adequacy of ventilation and the boiler not being fully separated or accessible on an external wall.

3.4.7 An officer of the Ministry responded in emails on 8 and 17 December 2015, in summary:

- All specified systems, including the fire sprinkler systems, are required to be included in a compliance schedule regardless of whether they have been installed over and above the requirements of the Building Code.
- Under section 100(1)(b) of the Act each of the systems identified (see items 1 to 5 in paragraph 3.4.6 above) is required to be on the compliance schedule; guidance is available in the compliance schedule handbook.
- Under section 106(2)(b) an owner must apply for an amendment to the compliance schedule if the compliance schedule no longer complies with the requirements of the Act or regulations, or it contains information that is no longer required under the Act or regulations.

3.5 The Ministry received the application for this determination from the authority on 9 May 2016.

4. The initial submissions

4.1 Included in the documents provided by the authority in the application for this determination is an unsigned, undated record which appears to be a file note or internal correspondence relating to the audit (see paragraph 3.1.3). It notes that the building had sprinklers on the compliance schedule and BWOFF from 1994-2006, but that the sprinklers did not appear on the schedule from 2007 on. The document lists specified systems evident in the building that were not included in the compliance schedule, saying:

- This type of business uses a large number of chemical processes which must remain separated from drinking water in the building. It is unusual that the machines in a laundry are not fitted with check valves.
- This building has at least 8 gas powered dryers they use a large amount of air this requires ventilation.
A large gas boiler exists internally in the building.
Mechanical lint collection.
Ventilation to the rooms.
All these show the building may have insufficient ventilation. The building requires a lot.
- It appears that a boiler has been installed at some time, (all plans on file show hot water cylinders). The boiler is not separated in accordance with the building code. It is also not on an external wall and we do not have

evidence to show any containment in case of failure. Otherwise the building is an importance category 4.

- Other items picked up in the audit carried out 29/3/2015; BWOFF not displayed on site, no records on site, bwof supplied incorrect.

- 4.2 With the application for determination, the authority provided copies of a number of other documents relevant to the matter. I have set out those documents in Appendix C.1.
- 4.3 On 24 June 2016 I requested further information from the parties; this was followed by a reminder on 22 July 2016.
- 4.4 The authority provided additional information dated 26 July 2016 (see Appendix C.1) and clarified the section references that had been included in the notice to fix (refer paragraph 7.4.3).
- 4.5 By email on 1 July 2016 the designer confirmed he disputed all of the contraventions listed in the notice to fix, and indicated an intention to make a submission on the matter.
- 4.6 On 29 August 2016 I sought further information from the authority on the building work that had been carried out and in relation to the authority's request that I determine the compliance of the means of escape from fire, fire separations, and the boiler 'installation and location'.
- 4.7 The authority responded on 1 September 2016 with a brief submission and provided a CD ROM with relevant documents from the property file. The authority noted it had 'not been able to access a gasfitting certification certificate for the boiler installation' and that the boiler is now located internally with 'a lack of sufficient separations'. The authority suggested this be investigated on a site visit.
- 4.8 In response to the authority's suggestion that the location and compliance of the boiler installation be 'investigated on a site visit', I note here that as the authority has issued a notice to fix in respect of non-compliance and has applied for this determination it should be able to provide sufficient evidence of its concerns regarding this matter.
- 4.9 At the time of writing no submission has been received from the owners.

5. The first draft determination and submissions received

- 5.1 A first draft of this determination, dated 30 September 2016, was issued to the parties and NZFS for comment. The draft concluded: the sprinkler system is a specified system; the authority correctly issued the notice to fix in respect of contraventions of some of the sections of the Act listed; the designer is not a specified person for the purpose of the issuance of the notice to fix. The determination modified the notice to fix to remove the designer as a specified person and in regard to the breaches listed.
- 5.2 No submission or response to the draft determination was received from the owners or from the NZFS.

5.3 The authority's submission

- 5.3.1 The authority responded on 26 October 2016, providing contact details for the IQP, along with additional detail or clarification of background events, and submitting (in summary):

Scope of matters (paragraph 1.6)

- The notice to fix was in respect of ‘building warrant of fitness and building works, along with matters relating to who is a specified person’
- The compliance of the isolated step and the roller doors fitted on the final exits should also be considered.

Compliance

- An isolated step exists on an exit door and is not compliant with Clause D1.3.3(i).
- There are roller doors fitted to final exits, which the authority considers does not comply in respect of the means of escape from fire.
- The fire separations do not comply ‘with C3.3.3 or with the current Building Code C3.9’. The fire separations are missing from the ceiling above and on two walls of the boiler room. The boiler is not accessed from an external wall.

Specified systems

- The list of specified systems in the determination appears incomplete (refer paragraphs 2.2.1 and 3.4.6)
- Sprinklers were required from the time the building permit was granted in 1988; this is supported by the reference to the sprinkler system in 1992 (see paragraph 2.3.6).

The compliance schedule

- The authority holds the view that section 103 of the Act requires all specified systems to be included in the compliance schedule.
- The compliance schedule is out of date, the owners have not provided the correct information as required by the notices to fix.

Specified person

- The designer provided supervision, has been involved with two consents and has given advice on the specified systems. The designer has been ‘engaged to act on the building consents for a number of years, including giving direction and oversight...’.
- The authority provided an extract from a legal opinion it sought on the definition of a “specified person”.

5.3.2 Without confirmation that the building is safe with respect fire safety the authority considers section 116B of the Act is applicable. I note here in respect of fire safety and means of escape from fire, if the authority is of the view that in the event of a fire injury or death to any person in the building is likely, the authority has the ability under section 121(2) of the Act to seek the advice of NZFS on this matter and take appropriate regulatory action as a result of that advice.

5.4 The designer’s submission

5.4.1 The designer provided a submission in response to the draft determination dated 27 October 2016. The designer provided additional information on the history of the building and submitted (in summary):

- Stage 2 (BC 21118) is complete and ‘awaiting final sign-off & code compliance certificate only’.
- Correspondence from the authority indicates that the code compliance certificates for Stages 2 and 3 are to be issued together. The designer noted the Stage 3 drawings are the only ones completed by his company.
- All items identified on the site instruction notice from the inspection carried out on 8 June 2010 have been completed (refer paragraph 2.4.10). All outstanding amended drawings, producer statements and certificates have been supplied. A re-inspection of the exit sign and WC/shower vents is all that is required in order for the code compliance certificate to be issued.
- The authority refused to re-inspect the building for the purpose of issuing the code compliance certificate.

Compliance

- All of the building work has been completed in accordance with the relevant building consents.
- The construction of the boiler shed was ‘signed off’ by the authority on 10 April 2003. What is now the boiler room, is enclosed within and not fire separated from the rest of the building due to the work completed under BC 21118 and 43992 (Stages 2 and 3) issued under the former Act – those consents were assessed by the authority under section 38 of the former Act, and the authority was aware of the boiler room’s position and construction.
- The boiler room complied with the Building Code that was current at the time BC 43992 was issued. Compliance was in accordance with C/AS1 Amendment 2 – which, in paragraph 6.11.2 states that boilers, when in a support role (purpose group ID¹⁷), need not be fire-separated. The boiler room is less than 20% of the fire cell floor area and therefore meets paragraphs 5.6.7 and 5.6.8 of C/AS1 current at the time of issue.

Work done without building consent

- There has been no work done that is not included in the building consents that have been issued for this property.
- The Type 2 alarm system was installed as required under BC 21118 and 43992 and the exit door as part of BC 43992; these consents called for a Type 2 alarm system and did not suggest an extension of an existing Type 2 system. The only reference to extending an existing alarm system is an internal record of the authority’s which is not part of the consent documentation. When the Type 2 alarm was installed there was no fully compliant Type 2 alarm in the building.

Specified systems, compliance schedule and BWOFF

- The compliance schedule requires updating to include all specified systems.
- A new specified systems form was supplied when the code compliance certificate was applied for in February 2016; the authority has refused to accept the form.

¹⁷ ID (Intermediate activities) “Spaces for intermittent occupation or providing intermittently used support functions – medium fire load”

- Some of the specified systems listed by the authority do not exist in the building – for example:
 - there is no riser main in the building
 - the authority’s reference to mechanical ventilation must either be the extract fans in the staff toilets or extract systems that are part of the machinery within the building. The designer is of the view that the mechanical venting of the driers does not meet the definition of a specified system as it is not required for the day to day functioning of the building. The building is ventilated through openings & vents in the building itself.
- The owners have been attempting to obtain a BWOF but have been prevented from doing so by the actions of the authority.
- A BWOF has been in place consistently until the authority refused to accept the issue of one on the basis that not all specified systems are included.
- The designer agreed with the findings of the draft determination in regards to sections 106, 110 and 116B.

Sprinklers as a specified system

- Though sprinkler systems can contribute to a number of functional requirements within the Building Code, in this case the building and subsequent additions were based around a manual alarm system only.
- The sprinkler system plays no part in the normal functioning of the building but was an added safety feature for the owners’ peace of mind. As the building did not require a sprinkler it was not a specified system.
- The sprinkler has not been extended to all parts of the building, and if it was to be removed the building would still meet the requirements of the Building Code.

Fire safety and means of escape from fire

- The means of escape from fire were addressed in both BC 21118 and 43992; the length of travel, width of openings, alarm systems, etc, were all in accordance with C/AS1 (effective 1 June 2001) and compliant with the code in force at that time. The authority accepted that compliance had been met when it issued the building consents.
- The roller doors can be used on the escape path – paragraph 3.17.3 of C/AS1 2001 (effective 1 June 2001) stipulates that the requirement for the direction of opening for doors does not apply when the occupant load is less than 20 in an open path; building consents designated an occupant load of 8 for the building.
- The items identified by the authority as requiring remedial work have been addressed – means of escape from fire was not one of these.
- The NZFS ‘has been through the building and has no issue with it.’
- There are numerous safety systems in place to ensure the safety of the occupants of the building – these systems need annual approval from external agencies such as Work Safe NZ, etc.

- The obstructions to the means of escape were not permanent but were easily moveable items placed in the wrong area temporarily.

Specified person

- The designer's involvement took place after the first notice to fix was issued, meaning that he cannot be held responsible for events that happened prior to that date. He submitted that he has not completed or supervised any building work; his role has been 'a technical advisory position as a designer' in relation to the notice to fix and not with building work carried out under the building consents.

5.4.2 The designer submitted that the correspondence from the IQP, that had previously been engaged by the owners (refer paragraph 3.1.2), contained information that was not correct.

6. The site visit and the second draft determination

6.1 On 13 December 2016 two officers of the Ministry carried out a site visit at the laundromat. In attendance were the owner, the designer, and an officer of the authority. A second officer of the authority, who had issued the notices to fix, was present and remained available but stayed outside the building.

A second draft determination, taking into account the observations made during the site visit, was issued on 30 January 2017 to the parties, and person with an interest, for comment. In addition to the conclusions reached in the first draft determination (refer paragraph 5.1), the second draft found the boiler room did not comply in regard to fire separations, the isolated step does not comply with Clause D1.3.3(i); and the water supply and sprinkler system without an automatic backflow preventer does not comply with Clause G12.3.2¹⁸. The determination modified the notice to fix to remove the designer as a specified person and in regard to the breaches listed.

6.2 The authority's submission

6.2.1 On 10 February 2017 the authority advised it did not accept the findings of the second draft determination and provided a submission (in summary):

- In regard to building work carried out without approval first being granted either through a building consent or an amendment to a building consent (refer paragraph 2.5.1): 'an extra means of escape had been installed' and as-built plans provided to the authority indicate building work was carried out without approval.
- The authority reiterated concerns expressed during the site visit relating to vehicles blocking a final exit and lockable gates on the boundaries of the property.
- Supervision is not limited to restricted building work, and the authority maintains the view that the designer had a supervisory role given:
 - correspondence with the authority identifying the designer as the person tasked to 'get the final points completed' for the open building consents;
 - the technical advice given by the designer, and the responsibilities under section 14D of the Act;

¹⁸ As a result of the clarification the emphasised text has been altered. Please refer to paragraph 9 for further explanation.

- the authority's belief that the designer's activities included supervising and not just design work or plans
- The authority is of the view that the details provided in the notice to fix were sufficient that the designer, with his knowledge of the industry and regulations, 'could extrapolate from these'. The authority also contended that 'the contraventions on this notice to fix are also written in lay terms'.
- It is reasonable to conclude the building fails to comply with section 116B(1)(b) on the grounds that:
 - the placement of items in the building had blocked the egress route;
 - the isolated step;
 - the means of escape to a safe place is obstructed (by vehicles, locked boundary gates);
 - specified systems not being included on the compliance schedule
- Backflow preventers are likely to be on individual appliances/fixtures or on a pipes leading to these.

6.3 The designer's submission

6.3.1 The designer responded to the second draft determination with a submission on 17 February 2017. The designer does not agree that the sprinkler system is a specified system or that the boiler room does not comply with the requirements of the Building Code. The designer submitted (in summary):

- The authority's inspections records from 9 June 2004 indicate full knowledge and acceptance of the changes to the mezzanine area, requiring only amended plans be provided, and the exit door facing Bourke St was shown on the original consented plans for BC 43992 and is not a variation.
- The sprinkler system plays no part in contributing to the functional requirements of the Building Code. The objectives of clauses C2 to C6 are satisfied by the features of the building; it does not require a sprinkler system in order to comply with the Building Code, protection of other property is afforded by the fire-rated exterior walls, and no reliance is placed on the sprinkler system for fire-fighting purposes.
- The boundary gates are locked open when the building is occupied and only closed when the building is unoccupied.
- The boiler room would have been assessed as part of the process of issuing the later consents in accordance with section 38 of the former Act and deemed to meet those requirements to comply with the provisions for means of escape from fire and for the building to continue to comply with the other provisions of the Building Code to at least same the extent as it did prior to the alterations. At the time it was installed under BC 16159, the drawings showed the boiler room as open into the existing building on one side.
- Based on the Acceptable Solution that was current at the time the authority issued the building consents, the authority was correct to issue the building consents.

6.4 The New Zealand Fire Service's submission

- 6.4.1 On 20 February 2017, NZFS advised that it had no comment to make regarding the determination but noted the fire alarm panel 'did not reflect' the building's specified systems, given the details in the draft determination.

6.5 The independently qualified person's submission

- 6.5.1 On 20 March 2017 the IQP advised he would not be making a submission.

6.6 Further submissions

- 6.6.1 On 12 April 2017, I requested the authority clarify its statement that the BC 16159 for the boiler shed 'identifies the fire separations that were required for the boiler. These separations are missing on the ceiling above and on two walls.' The authority responded in the same day with the conditions under which BC 16159 was issued: these are recorded in paragraph 2.4.3.
- 6.6.2 On 12 April 2017, the designer provided a cross section view from the consent drawings through the boiler shed showing no fire rating to the roof or ceiling; and that plans show the shed 'opening' in to the existing building, which the authority's inspection record shows it was aware of at the time. The relevance of the page from which the conditions for BC 16159 are taken from was questioned as the text also includes the statement 'This is not a building consent'.
- 6.6.3 In an email dated 13 April 2017, the designer reiterated several points already made noting that the authority had 'no avenue to enforce [the] requirements of one building consent onto another separate building consent.'¹⁹

I note here that the designer is incorrect in his view that consents for stages 2 and 3 were unable to consider the compliance of the existing boiler room: the boiler room was an existing feature and its ongoing compliance was a necessary assessment of the compliance of the building as a whole under section 38 of the former Act.

7. Discussion

7.1 General

- 7.1.1 This determination considers whether the designer is a specified person under section 163 of the Act with respect to the notice to fix issued to him, and whether the notice to fix has been correctly issued in respect of the breaches of the Act as listed.
- 7.1.2 It is noted that a number of the breaches listed on the notice to fix concern the sprinkler system not having been included as a specified system in the compliance schedule. Accordingly, I have also considered whether the sprinkler system is a specified system for the purpose of the compliance schedule under sections 100 to 107 of the Act regardless of whether it is required for the purpose of meeting the performance requirements of the Building Code.
- 7.1.3 The authority has indicated that there are a number of specified systems that are not on the compliance schedule (refer paragraph 3.4.6). While these were not included in the notice to fix, I am of the view that the analysis provided below can also be applied to other specified systems.

¹⁹ As a result of the clarification the emphasised text has been altered. Please refer to paragraph 9 for further explanation.

7.2 Specified person

- 7.2.1 The authority issued the notice to fix that is the subject of this determination to both the owners and the designer as a specified person. The designer has disputed that he falls within the definition of a specified person for the purpose of this notice to fix.
- 7.2.2 Section 163 of the current Act sets out the definitions for Subpart 8 relating to the issue of notices to fix. A “specified person” is defined as:
- (a) the owner of a building; and
 - (b) if the notice to fix relates to building work being carried out,—
 - (i) the person carrying out the building work; or
 - (ii) if applicable, any other person supervising the building work.
- 7.2.3 The question in this case is whether the designer is a “person carrying out the building work or a person supervising the building work”. The building work identified in the notice to fix included the installation of a fire alarm, and the installation of a boiler. Clearly, the designer is not carrying out the building work, so the issue becomes whether the designer was supervising the building work.
- 7.2.4 Section 7 of the Act defines “supervise” in relation to building work as follows:
- supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—
- (a) is performed competently; and
 - (b) complies with the building consent under which it is carried out
- 7.2.5 In two previous determinations²⁰ I have considered the definition of a “specified person” in relation to the supervision of building work. Section 163 is the only place in the current Act where the term “supervise” is not used expressly in conjunction with the role of licensed building practitioner (LBP). In Determination 2013/080 I held the view that the term “supervise” in section 163 should be interpreted in accordance with the definition of “supervise” in section 7 and the degree of control and oversight usually expected from a supervising LBP. In paragraph 5.4.7 of Determination 2013/080 it was stated:
- In interpreting the term “specified person” it is also important to keep in mind the purpose of subpart 8 (sections 163-168) relating to notices to fix, as a notice to fix should only be issued to persons who are able to comply with the notice in that they have authorisation to access the building and to carry out any necessary building work required by a notice to fix. This is the reason why notices to fix are issued to the owner, but may only be issued to others when particular requirements are satisfied, such as the express requirement in section 163(b) that a notice to fix can be issued to the person carrying out or supervising the building work only when “the notice to fix relates to building work being carried out”.
- 7.2.6 I am of the view that the same approach taken in Determinations 2010/073 and 2013/080 can be applied in this case to determine whether the designer is a specified person. In taking this approach I must consider whether the designer was providing “control or direction and oversight” of the building work to an extent that was sufficient to ensure that the building work was performed competently and complies with the building consent under which it was carried out.

²⁰ *Determination 2010/073 The issuing of a notice to fix to the owner only of a house at 16A Lyall Parade, Lyall Bay, Wellington*, Department of Building and Housing (23 August 2010), and *2013/080 The issuing of notices to fix only to the owners of townhouses*, Ministry of Business, Innovation and Employment (17 December 2013)

- 7.2.7 Correspondence from the designer to the authority indicates the designer provided some as-built plans, acted as an agent in discussions with the authority, and provided advice to the owners. It appears the designer continues to act in this capacity for the owners. However, I disagree with the authority's view that this means the designer is acting in a supervisory role such that the designer is a specified person for the purpose of section 164. While the designer has responsibilities under section 14D of the Act to ensure that plans, specifications and advice provided are sufficient to result in building work complying with the Building Code, it does not necessarily follow that the designer is the 'person supervising the building work'.
- 7.2.8 I am of the view the evidence provided does not indicate the designer had taken on a quality assurance role to ensure building work carried out under the two consents was performed competently and complies with the relevant consents and with the Building Code. For example, there is no indication that the designer was engaged to oversee the building work on site. Accordingly, I conclude the designer is not a specified person for the purpose of the notice to fix that is the subject of this determination.

7.3 Specified systems

- 7.3.1 In considering whether the sprinkler system must be included in the compliance schedule, I must decide whether it is a "specified system" as defined in section 7 of the Act.
- 7.3.2 Section 7 of the Building Act provides the interpretation for the term "specified system" as follows:
- 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); ...
- 7.3.3 Section 4 of the *Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005* ("the Regulations") defines the systems or features prescribed as specified systems for the purposes of the Building Act as those specified in Schedule 1 of the Regulations (refer Appendix A.2). Included in the schedule is:
- 1 Automatic systems for fire suppression (for example, sprinkler systems)
- 7.3.4 Additional guidance has been provided by the Ministry in the Compliance Schedule Handbook²¹ ("the Handbook"), which notes:
- Specified systems are systems or features that contribute to the proper functioning of the building. Specified systems require ongoing inspection and maintenance to ensure they function as required, because if they fail to operate properly, they have the potential to adversely affect health or life safety.
- The specified systems are listed in Schedule 1 of the [Regulations] and are listed below. Where one or more of these systems exist in a building (except a single household unit), a compliance schedule is required.
- SS 1 Automatic systems for fire suppression
- ...

²¹ *Compliance Schedule Handbook (Amendment 3)*, Ministry of Business, Innovation and Employment (14 February 2014)

- 7.3.5 Part two of the Handbook sets out guidance for each of the specified systems, in which it states:
- An automatic fire suppression system is required to be listed on a compliance schedule in all cases.
- 7.3.6 The sprinkler system satisfies the requirements of being a specified system in that it is one of the systems listed in Schedule 1 of the Regulations and is (a) a system or feature, and (i) is contained in the building.
- 7.3.7 I have also considered whether the sprinkler system “contributes to the proper functioning of the building” ((a)(ii)). The designer submitted that as the building already complies with the fire safety provisions of the Building Code the sprinkler adds nothing to the functioning of the building. While it is claimed that the sprinkler system has been installed in excess of the requirements of the Building Code (which I note the authority disputes) I do not consider that it necessarily follows that the sprinkler does not contribute to the proper functioning of the building.
- 7.3.8 The requirement in section 7(ii) of the definition of a “specified system” that it “contributes to the proper functioning of the building” is not a test of whether the specified system is required by the Building Code. The word “contributes” clearly requires something less than words such as “required by” or “is necessary for”. Further, there are a number of systems listed in Schedule 1 of the Regulations that are not required by the Building Code, such as audio loops and laboratory fume cupboards, so it cannot be a requirement that all specified systems comply with Building Code requirements. The “proper functioning of the building” must mean something more general and wide ranging than being required by the Building Code.
- 7.3.9 Notwithstanding these observations about the breadth of the requirement “contributes to the proper functioning of the building”, I note that in this case the sprinkler system contributes to a number of functional requirements in the Building Code, including clauses relating to fire affecting areas beyond the fire source, movement to a place of safety, and access and safety for firefighting operations. I am of the view that based on the functional requirements in Clauses C3, C4 and C5, the sprinkler system contributes to the proper functioning of the building and is therefore a “specified system” and is required to be on the compliance schedule. Further, even if the building still complied with the Building Code in the absence of the sprinkler system, the sprinkler system clearly still “contributes” to the building’s fire safety features and thus the proper functioning of the building.
- 7.3.10 In addition, a sprinkler system would contribute to the objectives in Clause C1, which includes safeguarding people from an unacceptable risk of injury or illness caused by fire, protection of other property from damage caused by fire, and facilitating firefighting and rescue operations. This supports the conclusion that the sprinkler system contributes to the proper functioning of the building.
- 7.3.11 I also note that the owners specifically included the sprinkler system to provide additional protection for the building and its occupants that was stated to be in excess of the requirements of the relevant building requirements at the time (although that is disputed by the authority). Having included a system for additional protection, and having maintained that system in accordance with the requirements of the compliance schedule for the building for some years (from 1994-2006), the owners cannot now decide to simply drop the system from the compliance schedule because it is considered unnecessary.

- 7.3.12 It would be misleading to have a system in a building such as a sprinkler that did not work. The building warrant of fitness that must be displayed by the owners under section 108(4) is public notice to all users of the building that the building's systems have been maintained, inspected and are performing as required. I note it is an offence under section 108(5)(b) to display a misleading building warrant of fitness.
- 7.3.13 Of course, if the owners wished to remove the system or close off the system (and a building consent would be required for any such work) then it may be that an amendment could be sought to the compliance schedule under section 106 to remove the sprinkler from the compliance schedule.
- 7.3.14 However, that is not what the owners have sought to do here. The owners are seeking to remove the sprinkler system from the compliance schedule while leaving the sprinkler system in place in the building; but there is no scope within the provisions relating to compliance schedules and building warrants of fitness (sections 100 to 111) for an owner to have a specified system removed from a compliance schedule while that specified system remains in or attached to the building and contributes to the proper functioning of the building. The amendments provided for in sections 106 and 107 are to ensure that the specified systems will continue to meet the performance standards, and for amendments where the compliance schedule no longer complies with the Act or regulations because of an amendment to the Act or regulations.
- 7.3.15 In conclusion, I have reached the view that the sprinkler system is a specified system that contributes to the proper functioning of the building and that it must be included in the compliance schedule. Accordingly, I consider the authority correctly exercised its powers in its decision to issue a notice to fix. I have discussed the breaches listed in the notice to fix further in paragraph 7.4.

7.4 Breaches listed in the notice to fix

- 7.4.1 Section 164(1) of the Act provides for the authority to issue a notice to fix if it considers on reasonable grounds that
- (a) a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent); or
 - (b) a building warrant of fitness ... is not correct; or
 - (c) the inspection, maintenance, or reporting procedures stated in a compliance schedule are not being, or have not been, properly complied with.
- 7.4.2 Table 1 sets out the sections of the Act listed in the notice to fix as being contravened and the relevant building work or building elements as advised by the authority:

Table 1

Section of the Act		Building work/building elements
17	Compliance with Building Code	Boiler as installed
40	Work done without consent	Installation of a fire alarm
		Installation of a boiler
101	Owner to comply with requirement for compliance schedule	(see paragraph 7.4.3 below)
103	Content of compliance schedule	Some specified systems are not on the compliance schedule and no application was made under s106 to amend the compliance schedule
105	Obligations of owner; availability of compliance schedule for inspection	The compliance schedule was not available for inspection.

Section of the Act		Building work/building elements
106	Application by owner for amendment to compliance schedule	See comment against section 103 above.
108	Supply of annual BWOF	(see paragraph 7.4.3 below)
110	Reports on compliance schedule	(see paragraph 7.4.3 below)
116B	Use of building that is not safe or has inadequate means of escape from fire	(see paragraph 7.4.3 below)

7.4.3 The notice to fix did not provide a direct correlation between the contraventions identified in the particulars and the sections listed in the notice to fix. At my request the authority provided the following further information:

Section 101 in relation to failing to comply with section 100(1)(b)

Section 108 Failed to include sprinklers in building warrant of fitness in 2008 and every year after that. ...

Section 108(5)(b) Supplied a building warrant of fitness 3/6/2015 with an attachment [refer paragraph 3.4.2]

Section 110 Reports not available for inspection. Reports not obtained on SS1.

Section 116B:

- No reports available on specified systems
- Six further systems not on compliance schedule
- Information requested but not supplied on the systems
- A gas boiler installed and no certification or building consent
- Boiler separations incomplete within the building including walls and ceiling
- Isolated steps and work done on means of escape (noted on BWOF attachment A)
- [BWOF] audit identified blocked escape routes.

7.5 Contraventions of section 40 – building work done without consent

7.5.1 In regard to the installation of the boiler and the fire alarm system being building work carried out without consent (section 40): the permitted plans dated 1988 (F027584) show a boiler, and later plans refer to alarm systems having been installed and an approval to extend the existing alarm system. A second boiler was installed under BC 16159 approved by the authority in 1997.

7.5.2 I am of the view that the installation of either boiler and fire alarm system was carried out as approved building work and were incorrectly included in the notice to fix as a breach of section 40.

7.5.3 In response to the second draft of this determination the authority submitted that as-built plans indicate ‘extra works’ and ‘alterations’ carried out without approval, including the provision of an additional means of escape and the addition of a new external door and the associated isolated step. The changes are to the layout of the mezzanine floor and stairs serving the mezzanine floor.

7.5.4 The authority is correct in stating that the as-built plans differ from that consented, however, the authority has been aware of the changes for some time. The authority’s inspection record of 9 June 2004 notes:

1st floor layout – amended plans reqd – stairs with winders, as part of changes from approved plans are not acceptable as accessible stairs. 1st floor increased in size – builder aware of “F” [Fire] ratings and the need to provide protection to load bearing wall and to ceilings. ... Builder to discuss stair winders with owner & designer.

- 7.5.5 I am of the view that the authority's inspection records indicate the amendments to the layout were approved as a minor variation during construction, subject to the provision of compliant stairs to the mezzanine. This also appears to be addressed in the authority's site inspection record as noted in paragraph 2.4.10.
- 7.5.6 The plans provided for the approval of stage 3 (stamped as received on 20 August 2003) under BC 43992 show an external door installed to the Bourke Street side of the building (labelled on the plans as D1). It is my understanding that the exit door was not installed during the construction of stage 3, but was installed later in response to concerns raised by the authority regarding the use of the adjacent roller door as a final exit.
- 7.5.7 The changes resulted in a difference in height at the final exit door from the internal stair landing to the ground level. The owner constructed the isolated step to address this issue, but did not seek the approval of the authority before carrying out the building work. I am of the view that subject to achieving compliance with the Building Code this can be dealt with as a minor variation to BC 43992. (I have considered the isolated step at paragraph 7.6.9.)

7.6 Contraventions of section 17 – building work not compliant with Building Code

The boiler room

- 7.6.1 In regard to the contravention of section 17, the authority identified in the notice to fix that 'a boiler' has been installed 'not in accordance with the Building Code'. However, no clauses of the Building Code or specific features of the installation were identified in the notice to fix or the covering letter.
- 7.6.2 When a building consent authority issues a notice to fix for a contravention of section 17, it is important that the non-compliance is clearly identified, both in terms of the Building Code clause(s) and the building element(s) or features, so that the building owner or specified person can take appropriate steps to remedy the contravention.
- 7.6.3 At the time the boiler was installed (as the boiler shed) under BC 16159 it was not fully enclosed within a building but it was to be fire separated from any adjacent buildings.
- 7.6.4 Taking into account the observations during the site visit, I conclude that the boiler room at the time of its inclusion in the work for BC 43992 (stage 3) did not comply with regard to fire separation. Fire separation at that time could have been achieved by extending the block walls to the underside of the roof or providing partial height fire rated walls with a fire rated ceiling. I note that the version of C/AS1 current at the time of construction required the boiler room to have fire separation (refer paragraph 6.11.3 of C/AS1).
- 7.6.5 The fact that the boiler room is now enclosed by Stage 3 is a consequence of building work that has been carried out under a building consent granted by the authority, and brings into question whether the authority was correct to issue BC 43992 given that it enclosed the boiler shed in the consented addition, and the conditions the authority has placed on BC 16159. The matter for determination does not include the authority's exercise of its powers of decision to issue that consent.
- 7.6.6 During the design and consent stage for BC 43992, an assessment of the existing building against the requirements of the Building Code should have been carried out

and any areas of non-compliance reviewed, which would have included the boiler room area. Any upgrade work regarding the fire safety should then have been assessed on the basis of compliance as nearly as reasonably practicable, inclusive of a cost vs benefit analysis. Although, compliance of the building under section 38 of the former Act is outside the ambit of this determination, I note that the owner has relied on the BC 43992 for the construction of Stage 3. As the building work does not comply with the Building Code that was current at the time the various consents were issued, it now falls to the owner to address an issue of compliance that would have been much more easily addressed before the consent was issued.

Roller door on a final exit and an isolated step

- 7.6.7 An isolated step outside a final exit door and roller doors fitted to final exits were also identified by the authority in its submission (refer paragraph 5.3.1) as not being in compliance with the Building Code.
- 7.6.8 In correspondence to authority (refer paragraph 3.1.2) an IQP advised that having roller doors on a final exit was ‘feasible but would need some form of management plan’. I note that a number of roller doors exist internally where additions to the building abutted the existing, and many existing internal roller doors are no longer in use (one of which also had a pedestrian doorway cut in it).
- 7.6.9 The roller door on the final exit facing Bourke Street, which formed part of the Stage 3 construction, remains open during operating hours. In response to the authority’s concerns about the door, the owner installed a new exit door adjacent to it. The exit door has been installed at the landing of the set of stairs that leads from the delivery area to the mezzanine level staff room. When installing the new exit door, the owner constructed a single step down on the outside of the building to address the difference in height between the landing and the ground level. I agree with the authority that the step does not comply with the Building Code; I note that this matter would be easily addressed, for example, by installing a suitably-sized landing and a small number of steps alongside the building with a handrail on the outside.

Escape routes

- 7.6.10 The authority also raised concerns about a blocked escape route. It is my understanding that the concerns were raised in relation to the placement of equipment; the owner subsequently moved the items that were blocking the path.
- 7.6.11 At the end of the site visit, and in a response to the second draft determination, one of the authority’s officers also commented on vehicles parked close to or ‘blocking’ the final exit door facing Bourke Street that leads out to the parking area, and raised a concern that lockable gates on the boundaries of the property may impede egress in an emergency.
- 7.6.12 The operation of vehicles on the property is not a matter that falls under the ambit of the Building Act. I note for completeness that during the site visit the attendees were not impeded from exiting the building by the vehicles parked in this area, and that the isolated step outside the exit door would prevent a vehicle from blocking the exit route.
- 7.6.13 During the site visit the owner confirmed that the boundary gates are unlocked during the business’s operating hours and locked outside of those hours. I am of the view that the Building Code does not prevent the owner from securing the property in this manner outside of the business’s operating hours.

7.6.14 In its submission in response to the second draft determination, the authority also referred to additional building work carried out without approval, and that this ‘is not in accordance with section 40 and with section 17’. Other than the additional issues described above, I have not received any further information regarding specific items of building work that the authority considers do not comply with the Building Code.

7.7 The compliance schedule and BWOF

7.7.1 The remainder of the sections of the Act listed in the notice to fix are in relation to the compliance schedules and BWOFs. There appears to be no dispute that the sprinkler system was not included in the compliance schedules for a number of years, in that respect I concur that there has been a contravention of section 100(1)(b), which requires a compliance schedule ‘for all specified systems [the building] has...’, and of section 101 that requires an owner obtain a compliance schedule for the specified systems.

7.7.2 Section 105 sets out the obligations of the owner if a compliance schedule is issued and provides in section 105(b) that the owner must ensure an annual BWOF is provided to the authority in accordance with section 108. Under section 108(5)(b) a person commits an offense if the person ‘displays a false or misleading building warrant of fitness’. In this case the BWOF is misleading as it doesn’t contain all of the specified systems in the building. I note that the authority has also stated that the compliance schedule was not available for inspection. The authority has not identified in the notice to fix the separate subsections within section 105 contravened; if the authority considers that there has been a contravention of section 105(d) then this should have been identified in the notice to fix.

7.7.3 While I consider the authority was correct to issue a notice to fix for contraventions of sections 101, 105(b) and 108(5)(b), I consider it was incorrect to include the following sections:

- Section 103 sets out the details for the information that must be included as it relates to the specified systems covered by that schedule; the fact the compliance schedule is incomplete in regard to the specified systems not included is not a contravention of section 103.
- Section 106 sets out the obligations to apply for an amendment to ensure the specified systems are performing to the standards for those systems, i.e. adjusting the procedures, maintenance and reporting requirements to correctly match the specified system. The compliance schedule not having some specified systems listed is not a contravention of section 106.
- Section 110 sets out the owner’s obligation to obtain, keep, and produce reports. Not obtaining reports for specified systems that are not included in a compliance schedule is not a contravention of section 110.

7.7.4 The authority also included section 116B in the notice to fix, and provided further information on the reasons for its belief this section has been contravened (refer paragraph 7.4.3). Under section 116B it is an offence to use a building or knowingly permit another person to use a building that has inadequate means of escape from fire.

7.7.5 I am of the view that the fact the compliance schedule is incomplete and that there are no reports available on the specified systems that are not on the compliance schedule does not of itself mean that the building ‘has inadequate means of escape from fire’. Whether the means of escape is adequate will involve a number of

different systems and features in the building; whether or not the sprinkler system contributes or is required in order that occupants have adequate time in which to escape is a separate question from whether or not the sprinkler system should be included in the compliance schedule.

7.7.6 However, with some specified systems not being included in the compliance schedule it isn't possible to establish whether the systems are performing and will continue to perform, and this is of particular concern with respect to those systems that are relied on in the event of a fire.

8. The decision

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

- the sprinkler system is a specified system and accordingly I consider the authority correctly exercised its powers in its decision to issue a notice to fix, albeit that the relevant contraventions with regard to the sprinkler system are limited to sections 101, 105(b), and 108(5)(b) of the current Act
- the building work does not comply with the Building Code that was current at the time the various consents were issued in respect of fire separations to the boiler shed constructed under BC 16159
- the isolated step outside the final exit door facing Bourke Street does not comply with Clause D1.3.3(i)
- the water supply without an automatic backflow preventer to the sprinkler system does not protect the building's occupants in accordance with Clause G12.3.2²²
- the designer is not a specified person for the purpose of the notice to fix that is the subject of this determination, and accordingly I consider the authority incorrectly exercised its powers in its decision to issue a notice to fix to the designer
- the notice to fix is to be modified to remove the designer as a specified person, and to take account of the findings of this determination with regards to the breaches listed in the particulars of contravention.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 26 April 2017.

John Gardiner
Manager Determinations and Assurance

²² As a result of the clarification the emphasised text has been altered. Please refer to paragraph 9 for further explanation.

9. The clarification

- 9.1 Following the issue of the determination on 26 April 2017, the authority sought a clarification under section 189 of the Act on 3 May 2017. In general terms, the request for clarification concerned the sprinkler system, the notice to fix, the means of escape, and the backflow preventer.
- 9.2 On 18 May 2017 I wrote to the parties with a proposal for amendments to the determination to clarify the sprinkler system advice, the notice to fix and the water supply to the building. The parties were requested to respond by 1 June 2017. The authority responded on 22 May 2017 broadly accepting the clarification, but requested a further grammar clarification, which was accepted. No responses were received from the other parties, and a reminder was sent on 16 June 2017.
- 9.3 The designer responded on 21 June 2017, and requested a clarification regarding his correspondence in paragraph 6.7.3, which has now been amended.
- 9.4 In addition to the above the clarification corrects two incorrect references to Clause G12.3.7; these references have been amended to Clause G12.3.2.
- 9.5 The amended determination was issued on 4 October 2017.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 4 October 2017.

Katie Gordon
Manager Determinations

Appendix A

A.1 Sections of the Building Act 2004 discussed in this determination

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; ...
 - (b) requires the schedule for all specified systems it has and any cable car it has attached to it or servicing it.
- ...
- (3) Before 31 March 2008,—
- (a) a building not used wholly as a single household unit—
 - (i) requires a compliance schedule only if it has a specified system other than a cable car; and
 - (ii) does not require a compliance schedule for any cable car attached to it or servicing it; and
- ...
- (5) Except to the extent that it provides, subsection (4) does not relieve an owner of any of the obligations under sections 105 to 110.

101 Owner must comply with requirement for compliance schedule

- (1) An owner of a building for which a compliance schedule is required under section 100 must obtain the compliance schedule.
- ...

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.
- ...

105 Obligations of owner if compliance schedule is issued

An owner of a building for which a compliance schedule has been issued must ensure—

- (a) 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; and
- (b) that the owner provides to the territorial authority an annual building warrant of fitness in accordance with section 108; and
- (c) that the compliance schedule is kept—
 - (i) in the building; or
 - (ii) in another building in the district of the territorial authority; or

- (iii) in some other place agreed on by the owner and the territorial authority; and
- (d) that the compliance schedule is available for inspection by any person or organisation who or that has a right to inspect the building under any Act; and
- (e) that, for the first 12 months of the period of the compliance schedule, there is displayed publicly in the building so that users of the building can have access to it a statement by the territorial authority in the prescribed form that contains the following information:
 - (i) the specified systems covered by the compliance schedule; and
 - (ii) the place where the compliance schedule is held; and
 - (iii) any other prescribed information.

106 Application by owner for amendment to compliance schedule

- (1) An owner of a building that has 1 or more specified systems may, at any time and entirely at the owner's discretion, apply to the territorial authority of the district in which the building is situated for an amendment to a compliance schedule for the building.
- (2) However, the owner must apply to the territorial authority for an amendment to a compliance schedule for the building if—
 - (a) the owner considers that the amendment is required to ensure that the specified systems are performing, and will continue to perform, to the performance standards for those systems; or
 - (b) as a result of an amendment to this Act or any regulation made under it, the compliance schedule—
 - (i) no longer complies with the requirements of this Act or any regulations made under it; or
 - (ii) contains information that is no longer required under this Act or any regulations made under it.

...

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 an independently qualified person 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 an independently qualified person 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 or, if the compliance schedule relates only to a cable car, publicly display the copy of the building warrant of fitness in or near the cable car.
- ...
- (7) In subsection (3)(d), a reference to an independently qualified person is a reference to the independently qualified person or independently qualified persons who carried out or supervised the inspection, maintenance, and reporting procedures stated in the compliance schedule during the previous 12 months.

110 Owner must obtain reports on compliance schedule

An owner of a building for which a compliance schedule has been issued must—

- (a) obtain annual written reports relating to the inspection, maintenance, and reporting procedures of the compliance schedule signed by each independently qualified person or other person who carried out 1 or more of those procedures; and
- (b) keep those reports, together with the compliance schedule, for a period of 2 years; and
- (c) produce those reports for inspection, when required, by—
 - (i) the territorial authority; and
 - (ii) any person or organisation who or that has the right to inspect the building under any Act; and
- (d) show the location of those reports and the compliance schedule on the building warrant of fitness displayed in accordance with section 108(4).

111 Inspections by territorial authority

- (1) An agent of a territorial authority authorised for the purposes of this section is entitled, at all times during normal working hours, to inspect—
 - (a) a building for which a compliance schedule has been issued; and
 - (b) the specified systems in the building.
- ...
- (3) In this section, inspection means the taking of all reasonable steps to ensure that—
 - (a) an annual building warrant of fitness supplied under section 108 is correct; and
 - (b) every report under section 110 is correct.

121 Meaning of dangerous building

- (1) A building is dangerous for the purposes of this Act if,—
 - (a) ...
 - (b) in the event of fire, injury or death to any persons in the building or to persons on other property is likely.
- (2) For the purpose of determining whether a building is dangerous in terms of subsection (1)(b), a territorial authority—
 - (a) may seek advice from members of the New Zealand Fire Service who have been notified to the territorial authority by the Fire Service National Commander as being competent to give advice; and
 - (b) if the advice is sought, must have due regard to the advice.

A.2 Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005:

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).

Clause 15: added, on 12 January 2006, by regulation 3 of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Amendment Regulations 2005 (SR 2005/338).

Appendix B

B.1 Specified systems listed in the various BWOFs and in the 2015 BWOF inspection

Specified systems (as per Schedule 1 of the Regulations)	1995-2005 BWOFs	2015 BWOF	2015 BWOF inspection
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).	✓	✓	✓ (Alarm Type-7)
3 Electromagnetic or automatic doors or windows (for example, ones that close on fire alarm activation).	n/a		
4 Emergency lighting systems.	n/a		
5 Escape route pressurisation systems.	n/a		
6 Riser mains for use by fire services.			✓
7 Automatic back-flow preventers connected to a potable water supply.			✓
8 Lifts, escalators, travellers, or other systems for moving people or goods within buildings.	n/a		
9 Mechanical ventilation or air conditioning systems.	✓ (1995 & 1998 only)		✓
10 Building maintenance units providing access to exterior and interior walls of buildings.	✓ (1995 only)		
11 Laboratory fume cupboards.	n/a		
12 Audio loops or other assistive listening systems	n/a		
13 Smoke control systems.	n/a		
14 Emergency power systems for, or signs relating to, a system or feature specified in any of clauses 1 to 13.			
Signs		✓	✓
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;	n/a		
(b) final exits (as defined by clause A2 of the building code);	✓	✓	✓
(c) fire separations (as so defined) ²³ ;			✓
(d) signs for communicating information intended to facilitate evacuation		✓	✓
(e) smoke separations (as so defined)			✓
	n/a		
Other	n/a		
Means of escape from fire	✓		
Hand held hose reels for fire fighting	✓		

²³ Clause A2 of the Building Code defines "fire separation" as: any building element which separates firecells or firecells and safe paths, and provides a specific fire resistance rating

Appendix C

C.1 Documents provided by the authority with its application for determination:

With the application for determination, the authority provided copies of:

- a “timeline” setting out some of the background to the dispute
- the notice to fix dated 7 March 2016 and covering letter
- the previous issued notices to fix, dated 23 February 2016, 2 March 2015, 27 January 2015, 23 December 2014, 26 November 2014
- various items of correspondence between the parties regarding the issuing of the notices to fix and the refusals to issue code compliance certificates
- a building warrant of fitness issued on 31 July 2015, with attachments
- historical building warrants of fitness dated July for each year between: 1997 to 2006, and undated BWOFF with expiry of July 1996
- building warrant of fitness inspection checklists dated 30 October 2015
- drawings (site plan, floor plan, elevations) dated February 1988
- statement dated 12 March 2014 from the installer of the Type 2 alarm system, and an electrical certificate of compliance dated 25 October 2004
- the notices of refusal to issue code compliance certificates, both dated 26 November 2014
- various items of correspondence between the authority and the Ministry.

C.2 Additional documents provided by the authority on 28 July 2016:

- documentation from building permit no. F027584 issued in on 21 January 1988, including:
 - a ‘fire protection’ sheet which references the original boiler room
 - a ‘building inspections field sheet’
 - a floor plan, which indicates an ‘existing central heating boiler’
 - specifications (including those for doors, and ceiling and wall linings to a “furnace room”, which I take to mean the original room housing the boiler)
 - a site plan and elevations for the permitted additions
- a copy of BC 43992 issued on 3 September 1993 under the Building Act 1991 (“the former Act”) for additions and alterations
- a ‘fire fact sheet’ stamped as received by the authority on 14 August 2003, noting the alarm type as “2”
- an inspection record, with inspection dates from 18 June to 6 November 2003, which notes ‘Type 2 alarm to be fitted (extend existing)’
- a ‘site instruction notice’ dated 8 June 2010 in respect of consent 43992, noting among other items ‘producer statement from the fire alarm installer’ and ‘fire exit sign to install’.