MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HIKINA WHAKATUTUKI

Determination 2017/064

Regarding a dangerous building notice for a building at 233-237 Queen Street, Auckland

Summary

This determination considers a dangerous building notice that was issued as a result of notification from the New Zealand Fire Service, and whether there was sufficient evidence to reach the conclusion the building was dangerous. The determination discusses the authority's reliance on the notification issued under the Fire Service Act, the restriction on use for sleeping accommodation included in the notice, and the requirements identified in the notice.

1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004[1] ("the 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:

- Base Backpackers (NZ) Pty Limited ("the applicant"), who leases two levels in the building. For the purpose of the determination the applicant is represented by an agent.
- The owners of the building ("the owners"), represented by Body Corporate 318074.
- Auckland Council ("the authority"), carrying out its duties as a territorial authority or building consent authority.
- The New Zealand Fire Service ("the NZFS" – now called Fire and Emergency New Zealand) under section 176(g) of the Act.

1.3 This determination arises from the decision of the authority to issue a dangerous building notice under section 124 of the Act for a multi-level building. The authority is concerned that the building does not have adequate fire safety systems (active and passive), and has concluded that the building is dangerous as defined in section 121(1)(b) of the Act.

1.4 The matter to be determined[2] is whether the authority correctly exercised its powers of decision in issuing a dangerous building notice for the building. In making my decision I have considered:

[1] The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.building.govt.nz or by contacting the Ministry on 0800 242 243. References to the Act are to the Act current at the time the dangerous building notice was issued.

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

- whether there was sufficient evidence before the authority to reach a conclusion that the building was dangerous as defined in section 121(1)(b) of the Act
- whether the requirement that the building not be used for sleeping accommodation was correctly included in the notice
- whether the remaining list of 'building work required to be carried out' was correctly included in the notice.

1.5 In the application for determination, the agent requested I consider a number of different issues in relation to the exercise of the authority's powers in issuing the dangerous building notice. I have taken into account all of the issues raised by the agent in my considerations of the matters as I have described them in paragraph 1.5 above.

1.6 In making my decision, I have considered the submissions of the parties, and the other evidence in this matter. The relevant sections of the Act current at the time the notice was issued that are discussed in this determination are set out in Appendix A.

1.7 Unless otherwise stated, all references to sections are to sections of the Act and all references to clauses are to clauses of the Building Code (Building Regulations 1992, Schedule 1).

1.8 Matters outside this determination

1.8.1 The applicant's agent has raised concerns regarding the notification issued by the NZFS under section 29(5) of the *Fire Service Act 1975*. I have no jurisdiction under that Act, and I consider the notification only insofar as it relates to the authority's decision to issue the dangerous building notice.

2. The background

2.1 The building is a four-storey circa 1920s commercial building in central Auckland that houses a variety of businesses, including retail and food outlets, a basement level food court, and the applicant's backpacker accommodation. The applicant leases two levels of the building (levels 1 and 2) as well as levels in the adjacent building at 229 Queen Street. Levels 1 and 2 are connected with 229 Queen Street through an automatic fire door.

2.2 The NZFS notification

2.2.1 In an email on 11 May 2016 from an NZFS officer to the authority and a fire consultant acting for the owners (herein after referred to as "the consultant"), NZFS referred to a report from the consultant that raised 'some serious additional concerns' to those that had reportedly been notified in a previous letter. I have not seen the consultant's report or the previous letter referred to in the correspondence. The NZFS requested a meeting with the owners, the consultant, and the authority to discuss the issues, and stated:

> At this stage I cannot call it a dangerous building, however, in my opinion it is very close to one. We need to action this immediately if possible.

2.2.2 Attached to the email was a notice issued under section 29(5)[3] of the *Fire Service Act 1975*[4]. That notice referred to a letter from the consultant and an inspection by NZFS, and notified the authority that the building did not comply with the Act.

2.2.3 On 12 and 13 May 2016 an NZFS officer and two officers of the authority visited the property to carry out an inspection of the building's fire safety systems. The NZFS issued a second notification to the authority and the owners on 13 May 2016 (hereafter referred to as "the s29 notification"). The s29 notification included that the NZFS deemed the building to be dangerous under section 121(1)(b) of the Act.

2.2.4 The notification set out the following issues with regard to the status of the building (in summary):

- The fire alarm system in many parts of the building, including escape routes, had been isolated and not reinstated. The NZFS was concerned that with inadequate fire detection the building was not suitable to use as sleeping accommodation.
- There was a lack of fire separation between occupancies, including:
    - lack of collars around riser pipes on all floors in a main escape route
    - lack of fire separation to ceiling void on third floor due to holes in walls and no rated fire protection
    - lack of fire separation in the basement area (and a door wedged open)
- Fire stop/smoke control doors:
    - wedged open on all floors and damaged (noting that this had been brought to the owners attention on 15 April 2016 and 30 April 2016)
    - with venting that negates the design of the door
    - installed incorrectly that no longer offer fire and or smoke control
- Fire rated windows 'constantly left open'
- Escape routes used as storage areas
- No approved evacuation scheme[5].

2.2.5 The notification also informed the authority that, due to the status of the building, in the event of a fire in the building the firefighting operations would be carried out from the exterior only – meaning fire fighters would not enter the building to carry out rescue or firefighting operations.

2.2.6 In an email from NZFS to the consultant on 16 May 2016, it was noted that 'should a fire occur [the NZFS] have serious concerns of a rapid fire spread throughout the ducting and surrounding area, even though a sprinkler system exists.' The officer's concerns related to the amount and extent of oil residues from the foodcourt, blocked filters, and the extraction system possibly being blocked and ineffective.

2.2.7 A letter from NZFS dated 23 May 2016 refers to an onsite meeting having been held with 'with all of the interested parties', and concludes that the building remains dangerous under section 121(1)(b). The letter reiterated the concerns of the NZFS in relation to lack of fire separation and spread of fire, the food court extraction system, and the lack of an approved evacuation scheme. Item #7 of the letter noted:

[3] s29(5) Where a person having access to land and buildings under this section believes that any building or sitework does not comply with the Building Act 2004, that person shall by notice in writing give to the appropriate territorial authority details of the respects in which the building or sitework is believed not to comply.

[4] Fire Service Act 1975: repealed, on 1 July 2017, by section 195(a) of the Fire and Emergency New Zealand Act 2017 (2017 No 17).

[5] As required under the *Fire Safety and Evacuation of Buildings Regulations 2006*

Even though the fire alarm system appears to be in a better working order the Fire Service still recommends that the sleeping areas should not be occupied until the above matters are dealt with.

2.3 The dangerous building notice

2.3.1 On 30 June 2016 the authority issued a dangerous building notice (no. 6779) under section 124, stating that it deemed the building to be dangerous under section 121(1)(b).

2.3.2 The authority referred to the NZFS notification for the reasons that it considered the building dangerous, which were summarised as follows:

- The fire separations between the various areas of the building have been compromised and will not function as designed contrary to clause C3 of the [Building] Code.
- The fire separations associated with the riser ducts through the building have been compromised and will not function as designed contrary to clause C3 of the [Building] Code.
- The smoke detectors, heat detectors, sounders and emergency lighting systems throughout the building have not been correctly maintained and may not function as designed contrary to the clause C4 of the [Building] Code
- The fire egress routes, including the stairwells, have not been maintained and are being used for storage which may prevent adequate egress in the event of an emergency contrary to clause C4 of the [Building] Code.
- The mechanical ventilation serving the food hall has not been correctly installed or maintained which has increased the risk of the spread of fire contrary to Clause C3 of the [Building] Code.
- The New Zealand Fire Service have deemed the building to be in a state of non-compliance where fire service personnel will not enter the building to undertake fire fighting and rescue operations contrary to clause C5 of the [Building] Code.

(I note here that I have no information in regards to building work carried out to install the mechanical ventilation system serving the food hall, whether it was carried out under a building consent, and whether a code compliance certificate was issued in respect of that building work. Nor have I received any information regarding the building warrant of fitness for the specified systems.)

2.3.3 The authority set out in the notice the building work required to be carried out as follows:

… [the authority] requires that you undertake the following building work, which [the authority] reasonably believes is necessary to reduce or remove the danger:-

- Ensure that the building is not used for sleeping purposes until otherwise notified in writing by [the authority]
- Ensure that all warning, emergency lighting and egress systems are maintained and functioning as designed, at all times.
- Engage independently qualified persons to review all of the specified systems, both active and passive, and provide written reports to [the authority] detailing the condition of the system and any remedial action to achieve practicable compliance with the [Building Code]
- Engage a registered engineer to complete a fire report for the current use of the building detailing the current condition and any remedial works to achieve practicable compliance with the [Building] Code and provide this report to [the authority].

- Undertake all remedial works detailed in the [Independently Qualified Person] and Engineers reports. Note this work will require to be undertaken under the authority of a Building Consent.

2.3.4 The notice required the reports be provided to the authority by 23 September 2016 and all remedial works 'to achieve practicable compliance with the Code' by 23 December 2016.

2.3.5 Under a title 'further particulars' it was noted that 'under s125(1A) this notice restricting entry may be reissued only once and for a further maximum period of 30 days. I note here that the restriction on entry, listed in the notice as described in paragraph 2.3.3 above, is to the effect that the building cannot be used for sleeping accommodation.

3. The submissions

3.1 The application

3.1.1 The Ministry received an application for a determination on 13 October 2016.

3.1.2 On 27 October 2016 I provided a copy of the application to the Body Corporate, who then advised that they were working with the authority to address the issues identified in the notice and would be making a submission. By 14 November 2016 that submission had not been received and I wrote to the Body Corporate seeking confirmation of an expected date it would be provided.

3.1.3 On 1 November 2016 the NZFS returned a completed form relating to the application, indicating it would be making a submission on the matter and intended this to be provided by 18 November 2017. No submission was subsequently received in response to the application for determination.

3.1.4 The Body Corporate provided a draft[6] letter dated 24 November 2016 which set out some of the background to the events and actions that had been taken since the notice was issued. It was noted that work to seal and cap the ventilation shaft was expected to be completed before the 23 December 2016 deadline.

3.1.5 On 7 December 2016 I emailed a request to the authority for clarification regarding the remediation of the issues identified in the notice; that request for information was copied to the other parties. The authority did not respond to this request.

3.1.6 On 20 December 2016 I emailed the authority to get clarification of the status of the dangerous building notice. The authority responded on 21 December, noting that there had been 'no progress other than discussions about methods to achieve compliance'.

3.1.7 On 22 February 2017 I wrote to the parties with a proposal to close the application for determination, on the basis that the owners had accepted the issue of the dangerous building notice and remedial works were proposed that would address the notice.

3.1.8 On 22 March 2017, the applicant's agent advised that remedial work had been carried out and the applicant had reoccupied levels 1 and 2. However, the applicant was concerned that the status of the dangerous building notice would become

[6] It was noted that the letter was draft only as it required confirmation from the Committee Chairperson 'but changes will be minor and not material'.

"uncertain" if the application for determination was withdrawn, and requested the determination proceed.

3.2 The direction under section 183(1) and the reissuing of the notice

3.2.1 On 12 April 2017 I contacted the authority to request confirmation of the status of the dangerous building notice and whether it had been lifted. The authority advised that the riser was still not sealed and pending the outcome of the determination the authority would be reissuing the dangerous building notice.

3.2.2 On 19 April 2017 I wrote to the parties to notify them of my intention to issue a direction under section 183(1) to reverse the suspension of the notice while the determination proceeded; meaning that the dangerous building notice remained in force and would continue to have full effect. In order to consider whether the direction should be made, I requested the authority confirm: whether or not the Independently Qualified Person (IQP) and fire reports had been provided; whether remedial works had been carried out in full or in part; whether the warning, emergency lighting and egress systems were currently functional; and whether remedial works had been carried out such that the authority considers the building can now be used for sleeping accommodation.

3.2.3 The authority responded on 21 April 2017 as follows:

> 1. Documents from IQP's have been received confirming remedial works undertaken but no Fire Report has been received.
> 2. Items to be addressed have still to be fully assessed, but are mainly related to the warning systems on level three and the fire separations throughout the building.
> 3. Full compliance has not been achieved, as indicated above, but as level three is not occupied the fire service have advised they are comfortable with this short term if the other works are completed.
> 4. … on the direction of the fire service all sleeping within the building is required to cease. … there appeared to be persons sleeping in areas of the building other than the backpackers during [the authority's site] visit on 19/4/17.

3.2.4 On 26 April 2017 the authority advised it had been working with the owners to resolve matters and that the works were almost complete, with the exception of the capping of the riser with a fire-rated system and that this work was 'waiting on a building consent'. (It is unclear to me whether the authority was waiting on an application for a building consent to be made or whether the owners were waiting on the building consent application to be processed and consent granted.)

3.2.5 On 26 April 2017 the applicant's agent provided a submission on my intention to issue a direction under section 183. The agent included his own assessment of levels 1 and 2 of the building (dated 7 March 2017) and a statement that the levels occupied by the applicant are not dangerous under section 121 of the Act. The agent also provided floor plans and a series of undated photographs that appear to show remedial work carried out to seal penetrations. He noted that a meeting had been held with the authority and a fire safety consultant acting on behalf of the applicant, and stated that the authority accepted the applicant would reoccupy their two levels after repairs and maintenance of fire separations and alarms were carried out to those two levels. (I have seen no confirmation of that agreement from the authority).

3.2.6 With the submission received on 26 April, the applicant's agent provided a copy of:

- A letter of confirmation (dated 19 December 2016) that

  > [the author of the letter] has completed the enhancements to the Fire Alarm System installed in Levels 1 & 2 [of] the Strand Arcade to align with [the applicant's fire engineer's] requirements … [including] sounders 'in all rooms required' and tested to 75db at the bed head.

- A "certificate of conformance" from a passive fire protection engineer (dated 19 December 2016) confirming installation of 60 minute fire rated penetration seals for the applicant's business but at the address of the adjacent building at 229 Queen Street.
- An email of 19 December 2016, referring to a visit undertaken by a consultant in October 2016 and recommendations for repair of fire doors to a compliant standard, noting that the main issue was missing intumescent strips and smoke seals, and holes in the leafs, lack of latching of the doors. The consultant noted a site visit would be required to confirm the repairs had been carried out.

3.2.7 By email on 27 April 2017, NZFS confirmed it had not re-inspected the building but was aware that remedial works had been done and that fire separation issues were not yet completely resolved; the intertenancy riser was yet to be capped and it was understood that the work was likely to require a building consent. The NZFS remained of the view that no part of the building should be used for sleeping accommodation while the building remained 'in a dangerous state'.

3.2.8 By email on 27 April 2017 the applicant's agent queried why the delay to resolving the outstanding issue was caused by the wait for a building consent when works could have been carried out under urgency as provided for under section 41(c).

3.2.9 On 2 May 2017 I issued a direction under sections 183(1) to the effect that the suspension of the dangerous building notice issued under section 124 was reversed. It was noted in the direction that the restriction on entry for the purpose of sleeping accommodation under section 124(2)(d) is spent, and accordingly the direction only applied to the notice issued in respect of section 124(2)(c)(i).

3.2.10 On 2 May 2017 the authority reissued the dangerous building notice (no. 6779). The reasons it provided for considering the building dangerous were identical to the notice issued on 30 June 2016. The requirements for building work to be carried out were separated under two sections: the first "To reduce the danger", which required that the building not be used for sleeping purposes; and the second "To remove the danger", repeated the remaining requirements listed in the first version. The notice required compliance be achieved by 11 August 2017.

3.2.11 The applicant's agent emailed the Ministry on 2 May 2017 with a list of concerns regarding the reissued notice, in particular that it did not recognise that remedial works had been undertaken and it continued to restrict use of the building for sleeping accommodation.

3.2.12 On 3 May 2017 I discussed the concerns raised by the applicant's agent with the authority, and on 4 May 2017 the authority advised by email that it would be carrying out an assessment and would then review the situation with respect to the dangerous building notice.

3.2.13 On 10 May 2017 I requested the authority provide an update on the status of the building: in a reply email the authority confirmed that it had visited the site and that as people were sleeping in the building the authority had decided to 'correct the

notice'. The authority attached a copy of a new version of the reissued dangerous building notice no. 6779, dated 9 May 2017 and marked as 'corrected 9 May 2017'. The notice:

- repeated the same reasons the authority considered the building to be dangerous as those listed in the notice issued in June 2016 (refer paragraph 2.3.3), with the exception that the item relating to the fire egress routes had been removed
- repeated the list of building work required to be carried out as listed in the notice issued in June 2016, with the exception of the requirement that the building not be used for sleeping accommodation
- included in the section titled 'restricted entry':

  Under section s124(2)(d) entry to the building may be restricted for 30 days:-

Entry is permitted for the following purposes	Immediately cease all sleeping activities
Entry is permitted for the following particular persons or classes of persons	N/A
Restricted entry expires on:	3 June 2017

3.2.14 I note here that the notice issued on 9 May 2017 was addressed to the owners of the building; I am not aware of whether or not the notice was provided to the tenants of the various levels of the building as required under section 125(2)(b).

3.3 Submissions on the matters

The applicant's agent

3.3.1 The agent made a detailed submission in support of the application for determination. While I have taken into account the full submission in my considerations, I have only summarised the points raised by the agent here:

The status of the building

- It is not a dangerous building if fire alarms are working and the means of escape is adequate and there are no fire hazards.
- The fact that the building does not comply with the Building Code or there is non-compliance with the Building Act does not mean it is dangerous.
- Issues raised in May 2016 regarding alarm operation, obstructions and wedged doors were rectified at that time; the remaining concerns were the extract duct and damage to fire separations.
- The extract duct issue (whether it is adequate for the number of food outlets, and its cleanliness and maintenance) is not related to the applicant's occupation of the building. In addition, the duct is sprinkler protected.
- A report from an IQP dated 16 May, that shows results of a 13 May assessment, indicates a proactive response and that the issues were being addressed. (I have not seen a copy of the IQP report referred to.)
- The building has a current Building Warrant of Fitness (BWOF).
- Although the owners have not fulfilled their obligation to provide an evacuation plan, the applicant has an evacuation plan in place.

The dangerous building notice

- The reasons provided for deeming the building to be dangerous are not sufficient.
- References to compliance with the Building Code are inappropriate.
- The directive to bring the building into full compliance with the Building Code is unlawful; the notice can only require the owners to bring the building into a condition that is no longer dangerous.
- The dangerous building notice is 'incorrect in its content'.
- Stopping the building being used for sleeping accommodation while allowing others to occupy the building would not address the 'dangerousness' of the building; the requirements in the notice were discriminatory to some tenants and occupants over others.

The NZFS advice to the authority

- The opinion offered by the NZFS in relation to the building being dangerous is outside the meaning in section 121(1)(b).
- The NZFS were wrong to refuse to enter the building in the event of a fire; there is no fire hazard or condition of the building that warrants this concern.
- The s29 notification on 13 May 2016 did not provide reasons for the conclusion that the building was dangerous; non-compliance with the Building Code does not mean the building is dangerous, and it appears the NZFS has confused its role under section 29 of the Fire Service Act relating to breaches of the Building Act and its role under section 121(2) of the Building Act relating to providing advice to the authority on dangerous buildings.
- The NZFS had stated on 11 May 2016 that it could not call the building dangerous; it follows therefore that any subsequent improvements would make the building less likely to be dangerous.
- The NZFS can enforce the requirement for an evacuation plan through the courts.
- Because there is no obligation to maintain the building in a compliant condition, with the exception of compliance schedules and BWOFs, it is arguable whether the Building Act is not being complied with.

The authority's decision to issue the notice

- The authority incorrectly exercised its powers in issuing the dangerous building notice because the building was not dangerous under s121 – injury or death was not likely in the event of fire at the time the authority made its decision to issue the notice.
- The authority has accepted an incorrect interpretation from NZFS and should not have acted on it.
- The authority did not seek the advice of NZFS, and if it had, it should only have given it due regard (section 121(2)(a) and (b)). The advice from NZFS was unsolicited and does not have to be accepted by the authority.
- The authority issued the notice 'due to external and internal pressures' and not on the considered opinion of competent authority officials.

The section 121 test

- The test of dangerous is 'in the event of fire' and is concerned with likely injury and death to persons; it doesn't relate to protection of property or spread of fire – it is distinct from the behaviour of the fire, and normal fire risk and the fire's ability to spread after people have been alerted.
- While the lack of fire separation to the riser ducts affects the fire behaviour, the risers are discrete from the means of escape.
- Lack of fire separations relates to compliance with current Building Code requirements and is not a matter for determining whether a building is dangerous unless associated with the means of escape.

3.3.2 The applicant's agent also submitted that the requirement to stop using the building for sleeping accommodation was 'unfair and punitive given none of the matters [at issue] related to [the applicant's] activities and [the applicant] had no power to remedy the issues'.

3.3.3 The applicant's agent made a further submission on 26 April 2017. The agent advised that, of the levels occupied by the applicant only level 1 is used for sleeping accommodation, and level 2 is used for 'communal facilities, laundry and offices'. The agent referred to building work having been carried out to levels 1 and 2 that included upgrading and servicing of the alarm system, repairs to smoke doors and locks, and fire separations. The agent noted that the items identified by the NZFS in the s29 notification (refer paragraph 2.2.4) no longer applied to the levels occupied by the applicant, and the fact that the foodcourt had been vacated and the extract duct fire hazard removed, meant the danger had been reduced. The agent maintained the view that the building was not dangerous at the time the notice was issued, and furthermore is not dangerous in its current state.

3.4 The draft determination

3.4.1 A draft determination was issued to the parties for comment on 15 May 2017.

3.4.2 The NZFS and the authority responded to the draft on 29 and 31 May respectively; both accepted the draft and made no further comment on the matters.

3.4.3 The applicant's agent responded to the draft on 29 May 2017. The agent did not accept the decision in the draft and provided a detailed submission. I have summarised the main points in the submission as follows with the exception of points made earlier that were reiterated:

- The authority's analysis of the non-compliant features and how it reached the view that the building met the test of a dangerous building under section 121 isn't apparent. The authority has only provided the opinion of NZFS and has not set out its own grounds for considering the building dangerous.
- The authority hasn't reconsidered the status of the building subsequent to the remedial work that has been carried out.
- The draft relies on the s29 notification; the Ministry has not carried out its own assessment to determine whether the building is dangerous.
- The NZFS notification was carried out in May 2016 and the notice was not issued until 30 June 2016 (and later reissued on 2 and 9 May); if the authority is relying on the NZFS notice in reaching the decision that the building is

dangerous, then NZFS should have carried out a new assessment to take into account the remedial works already completed.

- The reissued notice has added to the applicant's confusion about the restriction on sleeping and is contradictory to the direction made under section 183 and commentary in the draft regarding section 124(2)(d).

3.4.4 With the submission in response to the draft the applicant's agent requested a hearing be held on the matter and further confirmed that request in correspondence on 6 June 2017.

3.4.5 On 8 June 2017 I wrote to the applicant's agent clarifying the purpose of a hearing, noting that a hearing would be held if the applicant wished to provide new evidence or explain or expand on evidence already presented.

3.4.6 On 12 June 2017 the authority advised it would not attend a hearing if one was held. In further correspondence on 16 June 2017 the authority advised it was intending to withdraw the dangerous building notice once a PS3 had been received, and subsequently on 23 June 2017 that it had withdrawn the dangerous building notice.

3.4.7 On 26 June, and again on 7 August 2017, I wrote to the applicant's agent for confirmation as to whether the applicant wished to proceed with the determination given the change in circumstance. The agent responded on 7 August, advising that the applicant no longer wished to have a hearing and requesting the determination be made.

4. Discussion

4.1 The legislation[7]

4.1.1 Section 121(1)(b) of the Act provides the definition for "dangerous building" in relation to a fire event as follows:

> 121 Meaning of dangerous building
>
> (1) A building is dangerous for the purposes of this Act if,—
>
> …
>
> (b) in the event of fire, injury or death to any persons in the building or to persons on other property is likely.

4.1.2 The agent has submitted that the issues relating to fire separation at the riser ducts and the risk of rapid spread of fire and fire behaviour generally is unrelated to the means of escape, and with regard to the fire separation and spread of fire the building is not dangerous.

4.1.3 I disagree with the agent's interpretation. The likelihood of injury or death to a person in the building is directly affected by the spread and speed of fire growth and smoke, in combination with the time taken for occupants to become aware of the need to evacuate and the time taken to reach a place of safety. Accordingly, while the fire separation issue may not be directly related to the means of escape in terms of their relative locations within the building (and I do not have sufficient information to comment on that) the behaviour of the fire and smoke spread within the building does affect the life safety of the occupants in a fire event.

[7] Section 121 was amended on 1 July 2017, by section 197 of the Fire and Emergency New Zealand Act 2017 (2017 No 17) , and sections 124 to 130 were amended on amended, on 1 July 2017, by section 17(2) of the Building (Earthquake-prone Buildings) Amendment Act 2016 (2016 No 22).

4.1.4 Subsection 121(2) provides for territorial authorities to seek advice from the NZFS for the purpose of determining whether a building is dangerous in relation to a fire event:

> (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.

4.1.5 The applicant's agent has submitted that the advice provided by NZFS in the s29 notification on 13 May 2016 was not 'sought' by the authority, and the authority did not need to accept or perhaps shouldn't have interpreted the s29 notification as advice provided under section 121(2)(b) of the Building Act.

4.1.6 On basis of the information provided to me, it appears that the authority did not formally 'seek' the advice of NZFS with regard to the building's status; the authority was aware of the concerns regarding the fire safety systems, and the advice from NZFS relating to the building's status as a dangerous building under the Act was offered as a part of the s29 notification.

4.1.7 I am of the opinion that the authority cannot ignore the views of the NZFS offered as part of a s29 notification in relation to whether the building is dangerous under section 121(1) of the Act simply on the basis that the advice had not be formally sought under section 121(2). If the reference in section 121(2)(b) to the authority seeking advice is to be read as narrowly as the applicant's agent suggests, it would be a simple administrative issue for the authority to follow up on the receipt of such information in a s29 notification with a formal request for advice under section 121 of the Act – which in my opinion is an unnecessary administrative step when the advice has already been offered.

4.1.8 In regards to the agent's submission '[in] the event that the advice was sought [the authority] have not given due regard to it'; I note here that due regard requires the authority to give fair consideration and sufficient attention to all of the facts before it. I have discussed this further in relation to the particular circumstances in this case in paragraphs 4.2.3 and 4.2.4.

4.2 The authority's decision to issue the dangerous building notice

4.2.1 Sections 124 to 130 set out the powers of territorial authorities in respect of dangerous, affected, and insanitary buildings. Of relevance in this case is sections 124 and 125, relating to the powers of territorial authorities to issue notices if satisfied that a building is dangerous (refer Appendix A).

4.2.2 Section 124(2) provides:

> (2) In a case to which this section applies, the territorial authority may do any or all of the following:
>
> (a) put up a hoarding or fence to prevent people from approaching the building nearer than is safe:
>
> (b) attach in a prominent place on, or adjacent to, the building a notice that warns people not to approach the building:
>
> (c) except in the case of an affected building, issue a notice that complies with section 125(1) requiring work to be carried out on the building to—
>
> (i) reduce or remove the danger; …:

(d) issue a notice that complies with section 125(1A) restricting entry to the building for particular purposes or restricting entry to particular persons or groups of persons.

(3) This section does not limit the powers of a territorial authority.

4.2.3 At the time the authority made its decision to issue the dangerous building notice, it had received the s29 notification from NZFS which highlighted a number of defects in the building's active and passive fire safety systems, and the advice of the NZFS that the current status of those systems meant that the building met the definition of a dangerous building under section 121 of the Act. It is my understanding that officers of the authority were also present during the site visit on 12 and/or 13 May 2016 and would have been able to corroborate the observations of the NZFS and form their own view with regard to the defects.

4.2.4 In light of that, I am of the view that the authority had sufficient evidence before it to reach a conclusion that the building was dangerous as defined in section 121(1)(b) of the Act, and that the authority gave due regard to the advice of the NZFS notwithstanding that the advice was not formally sought but was offered as a part of the s29 notification.

4.2.5 The s29 notification was issued on 13 May 2016, and the authority issued the dangerous building notice on 30 June 2016. It is my understanding that no building work had been carried out in the time between the s29 notification and the issue of the dangerous building notice.

4.2.6 The applicant's agent has submitted that the earlier email from an officer of the NZFS (refer paragraph 2.2.1) in which the officer stated 'I cannot call it a dangerous building' should be preferred over the s29 notification. I am not aware of the context of that correspondence and whether or not the officer had had the opportunity to carry out an assessment of the building. I am of the view that the general tenor of the email supports the assessment being carried out; that assessment was done on the two days following the email and resulted in the s29 notification. I see no basis on which the email should be preferred over the s29 notification.

4.2.7 The applicant's agent has also raised issue with references in the dangerous building notice to non-compliance with the Building Code and the requirements to 'achieve practicable compliance' with the Building Code.

4.2.8 While it is correct to say that non-compliance with the Building Code does not necessarily mean that a building is dangerous, that does not mean that the references to non-compliant features of the building in the reasons set out in the notice do not support the conclusion that the building is dangerous. Many of the performance requirements of the Building Code relate to life safety in the event of a fire.

4.2.9 There is always a risk that in the event of a fire death or injury to persons will occur, but there must be particular features of a building for this risk to be 'likely' to occur. It is my view that the analysis for a dangerous building notice in relation to fire must first focus on whether the building complies with the Building Code. If this answer is in the negative, then the next analysis will focus on what features of the building that do not comply with the Building Code make it dangerous for the purposes of section 121(1)(b). A building may be non-compliant with the Building Code but additional analysis of the particular configuration and features of the building will need to be undertaken to establish whether or not the non-compliance amounts to 'dangerous' so as to warrant the seriousness of a dangerous building notice.

4.2.10 In this case it was clear at the time the authority first issued the dangerous building notice on 30 June 2016 that the building did not comply with the Building Code.

The NZFS had also provided advice in relation to the building being dangerous under the Act and the authority had been present during an assessment of the building. I conclude that on 30 June 2016 when the authority first issued the dangerous building notice, there was sufficient evidence for the authority to be satisfied that the building was dangerous.

4.3 Restriction on use for sleeping accommodation

4.3.1 When an authority is satisfied that a building is dangerous, it has available to it under section 124(d) the power to restrict entry to the building for particular purposes or to particular persons or groups of persons. In this case the authority exercised that power in respect of the use of the building for purposes other than sleeping accommodation. I note also that the foodcourt was subsequently closed down and vacated, though this was not a stated requirement of the notice.

4.3.2 The agent has submitted that the restriction on the use of the building for sleeping accommodation was discriminatory to some tenants over others and would not address the danger presented to other tenants in the building.

4.3.3 The clauses of the Building Code relating to protection from fire (C Clauses) are framed around providing means of escape, fire safety precautions and fire service access appropriate to the vulnerability of occupants within the building (referred to in the Acceptable Solutions for C Clauses as "Risk Groups"). In summary, the more vulnerable the occupants the more onerous the fire safety features required to meet the Performance Requirements of the Building Code.

4.3.4 Occupant behaviour and their ability to evacuate influence their vulnerability in a fire. Backpackers are a transient occupancy; the majority are unfamiliar with their environment and have limited social cohesion with other residents. In a sleeping situation, pre-movement times for this group of occupants are extended due to the need for occupants to be woken by the alarm, orientate themselves, prepare to evacuate and make their way to an escape route which may not be known to them. Sleeping accommodation is considered more vulnerable when compared to other groups of occupants, such as offices where occupants are awake, alert and practice trial evacuations.

4.3.5 In the s29 notification, in relation to the use of the building for sleeping accommodation, the NZFS stated:

> The fire alarm system in many parts of this building including escape routes have been isolated due to construction work being carried out, and not re-instated, leave the building with inadequate fire protection. We understand this building has sleeping accommodation and with so many areas of the fire alarms system inoperable, the NZFS has fire safety concerns over its suitability to be used as sleeping accommodation.

4.3.6 Given the above, I conclude that the authority correctly exercised its powers of decision when it issued the notice including a restriction on entry under section 124(2)(d) relating to the use of parts of the building for sleeping accommodation.

4.4 The requirements included in the notice

4.4.1 The applicant's agent has submitted that the requirements set out in the notice (refer paragraph 2.3.3) were not lawful, in that the only requirement under section 124(2)(c)(i) is for building work to be carried out to 'reduce or remove the danger' and it is not for the authority to prescribe the means of achieving that through the list of actions it required.

4.4.2 I agree with the agent that the mandatory requirement under the Act is for building work to be carried out to ‘reduce or remove the danger’. In this case that would include, for example, building work to address deficiencies in the warning systems, emergency lighting systems, and fire separations.

4.4.3 The restriction on using the building for the purpose of sleeping accommodation was incorrectly included in the section relating to building work required.

4.4.4 The list of “requirements”, or actions to be taken, was prefaced with the following statement

> In accordance with section 124(2)(c)(i) of the Act, Council requires that you undertake the following building work, which Council reasonably believes is necessary to reduce or remove the danger:

4.4.5 I am of the opinion that it was reasonable for the authority to recommend the actions that it considered would need to be taken to address the notice, either as a part of the notice (and clearly identified as recommendations) or in a covering letter. The list of actions set out by the authority in the notice provided the owners with the option of reviewing the authority’s recommendations and it was for the owners to propose an alternative means to reduce or remove the danger if they wished to do so.

4.4.6 However the notice was not written in a way that made it clear that these were not a mandatory requirement under section 124(2)(c)(i). Authorities may offer guidance on what options are available to an owner, but care should be taken to ensure that any guidance or recommendations are not interpreted as mandatory actions the building owner must take or presented as the only available option.

4.4.7 The fact that the restriction on entry for the purpose of sleeping accommodation was included in the same list under section 124(2)(c)(i), indicates that the notice was not carefully drafted.

4.5 Conclusion

4.5.1 Taking into account the discussion above, I conclude:

- there was sufficient evidence before the authority to reach a conclusion that the building was dangerous as defined in section 121(1)(b) of the Act when it issued the dangerous building notice on 30 June 2016
- the authority was correct in the exercise of its powers of decision in restricting entry under section 124(2)(d) to the building for purposes other than sleeping accommodation, albeit that the notice did not correctly set out this restriction as being the exercise of the authority’s powers under section 124(2)(d)
- the authority correctly exercised its powers of decision in requiring building work be carried out to reduce or remove the danger, albeit that the notice did not clearly distinguish between the mandatory requirements and the authority’s recommendations for actions the owners should take.

4.6 The reissued notices

4.6.1 While the matter for determination concerns the authority’s exercise of its powers of decision in issuing the notice on 30 June 2016, given the authority has elected to reissue the notice (on 2 and 9 May 2017), I provide the following comments in relation to the reissued notice.

4.6.2 Section 124(2)(d) allows an authority to restrict entry to an earthquake-prone, dangerous, affected, or insanitary building for particular purposes or to particular

persons or groups of persons, and section 125(1A) sets out the specified period of time that restriction can have effect. The notice issued on 30 June 2016 had the effect of restricting entry under section 124(2)(d) for the use of the building other than for sleeping accommodation.

4.6.3 The purposes for which territorial authorities typically allow people to enter a dangerous building are for activities such as assessments of the building or to carry out necessary building work to address the deficiencies in the building.

4.6.4 Under section 125(1A) a notice issued under section 124(2)(d) has a temporary effect; it may only be issued for a maximum period of 30 days and may be reissued once only for a further maximum period of 30 days. I consider its use is appropriate in circumstances where the danger posed is temporary, where it is reasonable to allow limited entry to the building, or where the matter giving rise to the notice is able to be remedied within this time.

4.6.5 At the expiry of the first 30 days, the expectation is that the relevant territorial authority will carry out an assessment to establish whether the building is still dangerous (or affected, earthquake-prone, or insanitary as may be the case) and at that point consider whether the notice issued under section 124(2)(d) should be reissued. Once a restriction on entry under section 124(2)(d) expires it is of no further effect and the authority has no further power to reissue a notice under section 124(2)(d).

4.6.6 Based on the circumstances in this case, the restriction on entry provided for the building to continue to be used for purposes other than sleeping, as the risks to other occupant groups was considered by the authority to be less than for those who were sleeping in the building. However, I am of the view that the delay between the authority first issuing the dangerous building notice on 30 June 2016 and ‘reissuing’ the notice on 2 and 9 May 2017 means that the 30 + 30 day period provided for in section 125(1A) has been spent.

4.6.7 I note also that even if I am wrong about the 30 + 30 day period being spent, the reissued notice has a deadline of 11 August 2017. This deadline is beyond 30 days from the date the notice was issued.

4.6.8 The authority has also indicated that there are other areas of the building that are being utilised as sleeping accommodation. I note here for the benefit of the owners that there are provisions in sections 114 and 115 of the Act relating to the uses of the building and it is an offence to change the use of a building (or part of a building) without giving written notice to the authority.

5. The decision

5.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority correctly exercised its powers of decision in issuing the dangerous building notice no 6779 on 30 June 2016 notwithstanding the errors in the drafting of the notice as discussed in this determination.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 11 August 2017.

John Gardiner
Manager Determinations and Assurance

Appendix A

A.1 The relevant legislation current at the time the dangerous building notice was issued:

121 Meaning of dangerous building

(1) A building is dangerous for the purposes of this Act if,—

…

(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.

124 Dangerous, affected, earthquake-prone, or insanitary buildings: powers of territorial authority

(1) This section applies if a territorial authority is satisfied that a building in its district is a dangerous, affected, earthquake-prone, or insanitary building.

(2) In a case to which this section applies, the territorial authority may do any or all of the following:

(a) put up a hoarding or fence to prevent people from approaching the building nearer than is safe:

(b) attach in a prominent place on, or adjacent to, the building a notice that warns people not to approach the building:

(c) except in the case of an affected building, issue a notice that complies with section 125(1) requiring work to be carried out on the building to—

(i) reduce or remove the danger; … :

(d) issue a notice that complies with section 125(1A) restricting entry to the building for particular purposes or restricting entry to particular persons or groups of persons.

(3) This section does not limit the powers of a territorial authority.

125 Requirements for notice requiring building work or restricting entry

(1) A notice issued under section 124(2)(c) must—

(a) be in writing; and

(b) be fixed to the building in question; and

(c) be given in the form of a copy to the persons listed in subsection (2); and

(d) state the time within which the building work must be carried out, which must not be less than a period of 10 days after the notice is given or a period reasonably sufficient to obtain a building consent if one is required, whichever period is longer; and

(e) state whether the owner of the building must obtain a building consent in order to carry out the work required by the notice.

(1A) A notice issued under section 124(2)(d)—

(a) must be in writing; and

(b) must be fixed to the building in question; and

(c) must be given in the form of a copy to the persons listed in subsection (2); and

(d) may be issued for a maximum period of 30 days; and

(e) may be reissued once only for a further maximum period of 30 days.

(2) A copy of the notice must be given to—

(a) the owner of the building; and

(b) an occupier of the building; and

(c) every person who has an interest in the land on which the building is situated under a mortgage or other encumbrance registered under the Land Transfer Act 1952; and

(d) every person claiming an interest in the land that is protected by a caveat lodged and in force under section 137 of the Land Transfer Act 1952; and

(e) any statutory authority, if the land or building has been classified; and

(f) Heritage New Zealand Pouhere Taonga, if the building is a heritage building.

(3) However, the notice, if fixed on the building, is not invalid because a copy of it has not been given to any or all of the persons referred to in subsection (2).