



## Determination 2019/069

# Regarding the need for a compliance schedule for a cable car servicing a residential dwelling at 55 Pohutukawa Avenue, Shelly Park, Auckland

### Summary

This determination considers whether the owner of a cable car built in 2000 (servicing the owner's house) was required to obtain a compliance schedule for the cable car, given there was no such requirement when the cable car was built. The determination also considers how to interpret the requirement for the compliance schedule to include performance standards for the cable car.

## 1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004 ("the Act") made under due authorisation by me, Katie Gordon, Manager Determinations, Ministry of Business, Innovation and Employment ("the Ministry"), for and on behalf of the Chief Executive of the Ministry.<sup>1</sup>
- 1.2 The parties to the determination are:
  - Auckland Council carrying out its duties and functions as a territorial authority or a building consent authority ("the authority"); the authority is the applicant in this determination, and is acting through its lawyers as its agent ("the authority's lawyer")
  - the owner of the building and cable car, M Ford ("the owner").
- 1.3 This determination arises from the decision of the authority's predecessor to issue a compliance schedule for a cable car attached to or servicing the owner's house; and the subsequent decisions of the authority to amend that compliance schedule, and subsequently to cancel it and request that the owner obtain a new one.
- 1.4 Accordingly, the matter to be determined<sup>2</sup> is whether the authority correctly exercised its powers of decision in requiring the owner to apply for a compliance schedule for the cable car.
- 1.5 In making my decision, I have considered the application, the submissions of the parties, and the other evidence in this matter. I have not considered any other aspects of the Act or Building Code, beyond those required to decide on the matter to be determined. The relevant legislation referred to in this determination is included in Appendix A.

<sup>1</sup> The Building Act and Building Code are available at [www.legislation.govt.nz](http://www.legislation.govt.nz). The Building Code is contained in Schedule 1 of the Building Regulations 1992. Information about the Building Act and Building Code is available at [www.building.govt.nz](http://www.building.govt.nz), as well as past determinations, compliance documents and guidance issued by the Ministry.

<sup>2</sup> Under section 177(1)(b) and (2)(e) of the Act.

## 2. The building work and background

- 2.1 The owner's property (Lot 40 DP 17401) is in a residential area in Auckland. The property is a large waterfront section, which fronts a tidal inlet of the Waitemata Harbour and the Maungamangaroa Creek. The owner's house is located at the waterfront, south-eastern end of the section, and is used as a single household unit. The opposite north-western end of the property fronts the road, and contains a double garage. The north-western end of the property is dominated by a steep slope or cliffs, which fall between the higher road-end of the property, and the lower part where the house is built.
- 2.1.1 In September 2000, the owner built a cable car on his property. I have not been provided with any details of the cable car or its construction, but I assume it runs between the garage and the lower part of the property (or thereabouts), and enables people to access the owner's house with ease from the road. The cable car did not require a building consent, as cable cars were specifically excluded from the definition of a building in the Building Act 1991.
- 2.2 On 8 May 2008, the authority's predecessor, Manukau City Council, issued a compliance schedule No. 3869 ("the original compliance schedule") for the cable car as a specified system under the Building Act 2004. The authority's predecessor made the decision to issue the schedule of its own accord, as the owner had not applied for one.
- 2.3 The compliance schedule stipulated 'Inspection, Maintenance and Reporting Procedures' for the cable car, in accordance with New Zealand Standard NZS 5270:2005: Cable-cars for private residences – design, construction, installation and maintenance. Inspections were to be carried out six-monthly, in accordance with Appendix C of the standard, and annually, in accordance with Appendix D. For the annual inspection, the compliance schedule listed the minimum inspections and tests that were to occur. Maintenance was also to be carried out in accordance with the standard. The owner was responsible for undertaking the maintenance and six-monthly inspections. The annual inspections were to be undertaken by an independently qualified person.
- 2.4 I understand that, from the date it was issued, the owner has disputed (with the authority's predecessor and subsequently the authority) the validity of the compliance schedule, on the grounds that his cable car did not require one under the Act.
- 2.5 On 13 December 2011, the authority amended the compliance schedule for the cable car, by changing the annual anniversary date for the schedule from 8 May to 7 October. The amendment was made so that the anniversary date coincided with the annual inspections and maintenance. The rest of the schedule remained the same. Again, this decision to amend was made by the authority of its own accord, without an application or request being received from the owner.
- 2.6 On 10 September 2013, the authority issued a notice to fix to the owner for failing to provide a building warrant of fitness. The authority advises that the owner did not comply with the notice, but that it decided not to prosecute.
- 2.7 The authority cancelled the compliance schedule for the cable car on 2 June 2015.
- 2.8 On 28 February 2018, the authority again wrote to the owner stating that it had come to its attention that his 'property does not have a compliance schedule for the cable

car where one is required', and requesting that he applied for one. The authority cited sections 100 and 102A of the Act in support of its request.

2.9 The authority's lawyer applied for a determination about the matter, and this was accepted by the Ministry on 9 January 2019.

### **3. The submissions**

#### **3.1 The authority's submission**

3.1.1 The authority's lawyer made a submission with the application for determination. The submission stated that the authority was seeking a determination about:

- its predecessor's decision to issue a compliance schedule for the owner's cable car on 8 May 2008
- its own decision to amend the compliance schedule on 13 December 2011
- its subsequent requests for the owner to obtain a compliance schedule for the cable car in accordance with the Building Act 2004.

3.1.2 In the authority's opinion, this required the following questions to be answered:

- Whether the Building Act 2004 applies to all cable cars.
- If so, whether sections 100, 101 and 102A require the owner of a cable car to obtain a compliance schedule.
- If a compliance schedule was required, what performance requirements would apply to the cable car under section 103(1)(b)?

3.1.3 The authority's lawyer submitted (in summary) that:

- a building used wholly as a household unit that has a cable car attached to or servicing it requires a compliance schedule (section 100(2))
- this requirement did not apply before 31 March 2008 (section 100(3)(b))
- the owner of the building is required to obtain the compliance schedule (section 101(1))
- section 102A covers situations where a compliance schedule is required, but a building consent is not. In this situation, the owner must supply the territorial authority with a description of the specified systems in the building (including cable cars), the performance standards that relate to those systems, and the proposed inspection, maintenance and reporting procedures for them
- a territorial authority must issue a compliance schedule when one is applied for under section 102A, if it is satisfied that certain criteria have been met (section 102(3))
- a compliance schedule must state the performance standards that apply to a specified system (section 103(1)(b))
- performance standards for specified systems are not defined in the Act, but are mentioned in relation to both building consents (section 51(1)(c)) and code compliance certificates (section 94(1)(b)).

3.1.4 The authority's lawyer also stated that the authority had been requesting the owner to obtain a compliance schedule for his cable car 'since around 2008', but that the

owner did not consider that a schedule was required, due to the date his cable car was constructed and the absence of performance standards that apply to it.

3.1.5 The authority's lawyer made a further submission dated 8 March 2019. This submission made the following additional points.

- That at various times from when the first compliance schedule was issued, the owner had declined to provide a building warrant of fitness and declined to apply for amendments in the compliance schedule to address 'shortcomings within it', on the grounds that the compliance schedule was 'invalidly issued'.
- That at various times since it cancelled the compliance schedule in 2015, the authority had requested the owner to obtain a new one, but the owner had declined to do so.
- The requirement in section 101(1) – for an owner of a building for which a compliance schedule is required under section 100 to obtain that compliance schedule – 'is mandatory and applies regardless of when the building and the specified system were constructed'.
- Where a building contains a specified system, the owner must apply for a compliance schedule for it, whether or not building work is being carried out.
- Where a compliance schedule has been issued, the building owner must supply an annual building warrant of fitness in respect of it, under section 108.
- Performance standards for a specified system can be set either when a building consent is applied for in respect of that system (section 51(1)(c)(ii)) or when an application is made under section 102A (section 102A(2)(a)).
- Performance standards are not prescribed by the Act or Building Code. The Building Code instead sets functional requirements and performance criteria for buildings. The Act provides who is responsible for determining the performance standards, and when they are to be determined, but not what they are.
- Taking the ordinary meaning of the term, performance standards are 'standards that a specified system is required to satisfy in performing its function'. 'When s 51(1)(c)(ii) applies they may be determined by reference to what is required by the building code', but this will not necessarily be the case when s 102A(2)(a) applies. In the current case, it would be 'inappropriate to determine the relevant performance standards only by reference to the building code...because the cable car was constructed in 2000 and did not require building consent.'

Instead, it is submitted that it should be determined what function the cable car performs. It then can be determined what components of the cable car contribute to the cable car performing its function. Given the definition of 'building' in s 8 there should be consideration of both the non-moving and moving parts of the cable car. Following on from that, it can be determined what level of performance is required from each component to ensure that the cable car performs (and will continue to perform) its function.

- Determining what performance standards for the cable car should be contained in the compliance schedule 'is largely a question of fact'. Ultimately, the performance standards should 'ensure that people who use the cable car can continue to do so safely and without endangering their health'.

- The Act clearly contemplates that all specified systems must have compliance schedules stating their performance standards and that all specified systems continue to perform to those standards. Therefore, the cable car is not exempt from the requirement for a compliance schedule, and therefore the authority exercised its powers of decision correctly.

### 3.2 The owner's submission

3.2.1 The owner acknowledged the application for determination and made a submission dated 19 December 2018, but received 9 January 2019.

3.2.2 The main points of the owner's submission can be summarised as follows:

- Section 100 of the Act requires a cable car to have a compliance schedule, and section 103 requires a compliance schedule to stipulate performance standards.
- 'There are no **objective** performance standards for the owner's cable car i.e. there is nothing tangible in the way of "*an Acceptable Solution, Verification Method, Standard or specific documentation*" that "could set performance standards".'
- The authority's view that performance standards can be set 'subjectively', by contemplating what the cable car was intended to achieve, is logically invalid.
- As a matter of statutory interpretation the literal meaning of the provisions relating to compliance schedules in the Building Act 2004 do not establish an obligation for a cable car designed and installed without an intention to meet and continue to meet a level of performance to require a compliance schedule and otherwise require modification in order to avoid 'absurdity and inconvenience'.
- The owner's cable car was 'bespoke', and at the time it was constructed, there was no requirement to obtain a building consent for it, the Building Code did not apply to it, and there was no other applicable compliance regime, therefore there were no performance standards relating to the cable car at the time it was built or subsequently.
- Cable cars were included in the Building Act for the first time on 31 March 2008 'with no retrospective application' to the extent that if a cable car did not have performance standards at the time it was designed and installed, no performance standards could be subsequently applied to it.
- The first 'universal performance standards for cable cars' were introduced by Standards New Zealand in 2005, but existing cable cars were not required to comply with them.
- The authority's predecessor issued a compliance schedule for the owner's cable car in 2008 'on the basis the cable car complied with the 2005 performance standards', but the owner 'believed this was the wrong approach', as these standards did not exist when the car was designed and installed.
- The authority has relied on the compliance handbook<sup>3</sup> originally issued by a predecessor of the Ministry, and its discussion of performance standards, but there was never any intention that the owner's cable car would 'meet a level of

<sup>3</sup> The current version of the Compliance Schedule Handbook is the 2014 version issued by the Ministry, but the document was originally issued in 2007 by a predecessor of the Ministry.

performance' when it was designed and installed as those performance standards didn't exist at the time.

The [Ministry's] comments only have logical validity where a specified system **was** specifically designed and installed when there was a specific intention to meet a level of performance at the time it was designed and installed, (say, for instance, to meet a compulsory requirement to comply with a building consent or building code requirement). With the owner's cable car, however, there was no intention to meet a performance level because there was no reason to do so, and it is completely fallacious to conclude performance standards must necessarily exist and can be necessarily inferred from the cable car's design and installation.

- Section 102A of the Act also does not apply to the owner's cable car, as the car was 'never designed or installed with an intention to require a building consent', or to be 'captured under any compliance regime'.
- On the contrary, the owner's cable car was specifically designed to ensure it did not
- Since the authority cancelled the owner's original compliance schedule, the owner has refused to apply for a new one, due to 'the impossibility of applying for a compliance schedule where no performance standards exist'.
- Statutory interpretation requires the purpose for which the legislation was enacted to be taken into account. The purpose of the Building Act 2004 was to 'introduce a standards-based regime for new buildings' and 'not to create a retrospective regulatory regime for cable cars then in existence'. A retrospective obligation has not been created by section 102A.
- The authority's literal interpretation of section 100 'creates an absurd outcome'. The correct interpretation of the Building Act requires that section to be read in conjunction with section 103, such that 'only some cable cars require compliance schedules, the exemption being those cable cars built before 2005 installed or constructed without reference to performance standards, however defined'.

3.2.3 In his submission, the owner also stated that he did not consider that the determination process applied to the dispute between the parties because his cable car was 'not subject to the legislation', and that he had already started proceedings about the matter in the District Court. However, he had agreed to be part of the determination process to enable the arguments surrounding the need for a compliance schedule for his cable car to be 'fully canvassed'. The owner provided an extensive list of questions that he would like the determination to discuss.

### **3.3 Draft determination and submissions in response**

3.3.1 A draft determination was issued to the parties for comment on 24 July 2019.

3.3.2 The owner responded to the draft determination on 1 August 2019, advising that he did not accept the draft determination. The owner made a number of suggestions for how paragraphs of the draft determination should be amended. The owner was also of the view that the draft determination misrepresented his argument, and submitted:

- the draft determination presupposes the correct interpretation of the Building Act is that all cable cars require compliance schedules. However, there is an alternative position that only cable cars with performance standards require compliance schedules

- the draft determination does not address whether relying on section 100 alone is sufficient, or whether section 100 must be read in conjunction with section 103 (with reference to common law and section 5 of the Interpretation Act 1999) to establish the alternative interpretation that only cable cars with performance standards require compliance schedules
- the prevailing view, implicit in the draft determination, is that all cable cars have performance standards and that it is impossible to design and install a cable car without performance standards
- the cable car was designed and installed nearly 20 years ago, at which time there were no ‘building rules’ that applied
- the authority’s lawyer says the natural and ordinary meaning of the term performance standards is ‘standards that a specified system is required to satisfy in performing its function’. Performance, however, means ‘the action or process of performing a task or function’, while standard means ‘something used as a measure in comparative evaluations’; so the literal meaning of performance standard is ‘a comparative evaluation that measures the action or process of a performed task or function’
- this would suggest, therefore, that performance standards are calibrated against an objective and ‘existing yardstick’ and a compliance schedule evidences success in a simple pass or fail test. Performance standards would, therefore, need to exist before a cable car was designed and installed so any intention to meet and continue to meet a level of performance could be established legitimately at the outset.

3.3.3 The authority, through the authority’s lawyer, responded to the draft determination on 8 August 2019. The authority accepted the draft determination, noting minor points in respect of the background and submissions on the determination, and submitted:

- The authority agrees with the overall conclusion reached in the determination that sections 100, 101 and 102A of the Act require the owner of the cable car to obtain a compliance schedule.
- The authority agrees that section 103 sets out what a compliance schedule must contain. In addition, the section in isolation does not provide any specific guidance on what performance standards are, or suggest that they are not able to be determined in some situations. The overriding duty in section 101(1) of the Act is that an owner of a building for which a compliance schedule is required must obtain one. Any difficulty in determining what appropriate performance standards are cannot extinguish this duty.

3.3.4 The owner made further submissions on 30 September 2019 and 1 October 2019, in response to correspondence from the Ministry about the next steps in the determinations process. The owner submitted that:

- the draft determination does not address the fundamental issue i.e. does the cable car require a compliance schedule if it has no performance standards?
- the draft determination assumes that the Building Act covers his cable car, but does not articulate why that is or why the owner’s arguments to the contrary are not valid.

3.3.5 The owner made a further submission on 8 November 2019, and submitted:

- There are two possible interpretations of whether the Act requires all cable cars to have compliance schedules. The first is that all cable cars require compliance schedules whether or not they have performance standards and arises from the reading of section 100 of the Act in isolation. The second is that only cable cars with performance standards require compliance schedules and arises from the reading of section 100 of the Act in conjunction with section 103.
- The principles of statutory interpretation set out by the Court of Appeal in a previous case<sup>4</sup> support the second interpretation:
 

The words of the section are not, however, to be viewed in isolation. Section 5(1) of the Interpretation Act 1999 provides that the meaning of an enactment must be ascertained from its text and in the light of its purpose. While the reference to context in the original Law Commission draft Interpretation Act was not enacted, there is no doubt that the text of a provision must be interpreted having regard to the Act as a whole and the legal system generally. The process of interpretation is an evaluative one.
- Performance standards are the level of performance something was intended to achieve when it was designed and installed and if there was no intention to achieve a level of performance when something was designed and installed then it has no performance standards.
- Existing cable cars not previously subject to a compliance regime when they were designed and installed and which are not subject to the application of any retrospective legislation requiring compliance with any past or present compliance regime since, have no performance standards and do not require a compliance schedule.
- Some cable cars, including those built in Manukau before 2004, were designed and installed without having to meet the requirements of any compliance regime, and these cable cars do not have performance standards. The Act has no retrospective application for existing cable cars in terms of requiring them to subsequently comply with any past or present compliance regime.

## 4. Discussion

- 4.1 The matter to be determined is the authority's exercise of its decision-making powers in requiring the owner to obtain a compliance schedule for his cable car in accordance with the Building Act 2004. The authority made this request in its letter of 28 February 2018, after it cancelled the compliance schedule issued by its predecessor.
- 4.2 To determine this matter, I must decide whether the provisions in the Act relating to compliance schedules for cable cars apply to the owner's cable car. The owner is of the opinion that they do not, as these provisions are not intended to apply retrospectively. He also considers that there are no performance standards that apply to his cable car, and accordingly it is not possible to have a compliance schedule for it. The authority is of the opinion that the provisions do apply and that it is the owner's responsibility to identify appropriate performance standards for his cable car and apply for a compliance schedule for it.

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<sup>4</sup> *Agew v Pardington* [2006] 2 NZLR 520 CA.

### 4.3 The law relating to compliance schedules and cable cars

- 4.3.1 The provisions in the Act that relate to compliance schedules can be found in sections 100 to 107.
- 4.3.2 Compliance schedules are issued for certain types of buildings that contain specific safety and essential systems. These systems are known as specified systems and include cable cars (refer to section 7 of the Act for definition of specified system). Where, as is the case with the owner's house, the building is a 'single household unit' a compliance schedule is only required if the household unit has a cable car attached to or servicing it (i.e. no compliance schedule is required for other specified systems in single household units, other than cable cars).
- 4.3.3 Section 100 came into force on 31 March 2005. Before this date, there was no requirement for buildings with cable cars to obtain compliance schedules. Section 100(3) contains transitional provisions, which meant that buildings with cable cars did not require compliance schedules for them until 31 March 2008. In other words, there was a 3-year delay before the provisions in the section, as they related to buildings with cable cars, took effect.

#### 100 Requirement for compliance schedule

- (1) ...
- (2) A building used wholly as a single household unit—
- (a) requires a compliance schedule only if it has a cable car attached to it or servicing it; and
  - (b) requires the schedule only for the cable car.
- (3) Before 31 March 2008,—
- (a) ...
  - (b) a building used wholly as a single household unit does not require a compliance schedule.

- 4.3.4 Where a compliance schedule is required, section 101 of the Act makes it the building owner's obligation to obtain one.

#### 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.
- (2) A person commits an offence if the person fails to comply with subsection (1). ...

- 4.3.5 Where a compliance schedule relates to a new building, or alterations to an existing building, the need for a compliance schedule would arise at the time that the building consent was required for building work related to a specified system. However, section 102A covers situations where no building consent is required. Section 102A was inserted as an amendment to the Act on 13 March 2012.

#### 102A Procedure for obtaining compliance schedule where building consent not required

- (1) This section applies when an owner of a building for which a compliance schedule is required under section 100 must obtain a compliance schedule but is not required to apply for a building consent in relation to the building because, for example, no building work is being carried out.
- (2) The owner must apply in the prescribed form (if any) to the appropriate territorial authority for the issue of a compliance schedule by providing the authority with—
- (a) a description of all specified systems for the building and the performance standards for each of them; and

(b) the proposed inspection, maintenance, and reporting procedures for the specified systems.

- 4.3.6 Section 102 covers the circumstances in which a compliance schedule must be issued. Where the need for a compliance schedule has arisen independently of building work, the relevant provision is section 102(3).

**102 When compliance schedule must be issued**

...

- (3) A territorial authority must issue a compliance schedule on an application under section 102A if the territorial authority is satisfied, on reasonable grounds, that the specified systems for the building are capable of performing to the performance standards for those systems.

- 4.3.7 Section 103 sets out what a compliance schedule must contain.

**103 Content of compliance schedule**

- (1) A compliance schedule must—

- (a) state and describe each of the specified systems covered by the compliance schedule, including a statement of the type and (if known) make of each specified system; and
- (b) state the performance standards for the specified systems; and
- (c) describe the inspection, maintenance, and reporting procedures to be followed by independently qualified persons or other persons in respect of the specified systems to ensure that those systems are capable of, and are, performing to the performance standards.

- (2) For the purposes of subsection (1)(c), the inspection, maintenance, and reporting procedures of the compliance schedule may be identified—

- (a) by description in the compliance schedule; or
- (b) by reference to—
  - (i) a prescribed acceptable solution or prescribed verification method in a regulation referred to in section 20; or
  - (ii) an acceptable solution or a verification method issued under section 22; or
  - (iii) a building method or product.

- 4.3.8 Once a compliance schedule is issued, the building owner is responsible for ensuring that the inspection and maintenance of the cable car (or other specified systems) occurs, that it continues to meet its identified performance standards and that this is duly reported on. To discharge these responsibilities, a building owner must engage an independently qualified person to verify that the inspection, maintenance and reporting procedures in the compliance schedule have been fully complied with. The independently qualified person does this by issuing a ‘Form 12A: Certificate of compliance with inspection, maintenance and reporting procedures’ for each specified system in the building. Once this has been done, the owner must complete and sign a building warrant of fitness for the building, which must then be supplied to the authority and displayed in a public place. A building’s warrant of fitness is renewed annually. The relevant provisions are sections 105, 108 and 110.

- 4.3.9 A compliance schedule may also be amended once issued. This can be done on the application of the owner (section 106), at the recommendation of the independently qualified person (section 109) or by the authority on its own initiative (section 107).

#### **4.4 The obligation to obtain a compliance schedule for the owner's cable car**

- 4.4.1 The authority's predecessor issued the compliance schedule for the owner's cable car on 8 May 2008. At this point, the transitional period stipulated in section 100(3) had passed and section 100(2) created a clear requirement for a single household unit with a cable car attached to or servicing it to have a compliance schedule. In my opinion, this requirement applied to the owner's house and cable car.
- 4.4.2 Under section 101(1), the owner of a building for which a compliance schedule is required must obtain one. It is an offence not to do so.
- 4.4.3 Section 102A(2) requires that, when that section applies, the owner must 'apply' for the compliance schedule in the prescribed form (if any). However, this provision only came into force on 13 March 2012, and would not have applied when the authority's predecessor's decided to issue the original compliance schedule. Although I do not have the details of the background to the decision, it seems likely that once the transitional period had passed, the authority's predecessor asked the owner to apply for a compliance schedule and, when he declined to do so, the authority decided to issue one itself.
- 4.4.4 The owner has submitted that the obligation to obtain a compliance schedule for a cable car in section 100 was not retrospective. In other words, that section 100(2) did not apply to existing household units with cable cars, only to those built or otherwise subject to building work after the provision came into force.
- 4.4.5 I do not agree with this submission. While I agree with the owner that section 100 was not retrospective, the application of section 100(2) after 31 March 2008 is clear and applies to any building used wholly as a single household unit with a cable car attached to or servicing it. This would include the owner's house. Section 100(2) is not retrospective because it does not apply to anything done before 31 March 2008. The provision simply requires those persons with a single household unit that has a cable car attached to it to obtain a compliance schedule after 31 March 2008. While the trigger for many of the obligations in the Building Act is the carrying out of building work, the compliance schedule provisions are different. The trigger is not the carrying out of building work but whether the building has a specified system (in this case a cable car).
- 4.4.6 The laws that Parliament makes can apply in a variety of ways. The most common method is to state the date from which the new law will apply. The new law will apply to certain activities or things on a certain date (like here, the law applies to a building used as a single household unit that has a cable car). Before the law comes into force those activities or things will not be subject to the new law (as was the case here before 31 March 2008). After the law comes into force those activities or things will be subject to the new law (as is the case here after 31 March 2008). This method that Parliament uses to apply new laws is not retrospective. The situation is the same here in respect of the obligations of an owner of a building used wholly as a single household unit that has a cable car attached to it or servicing it after 31 March 2008.
- 4.4.7 Section 102A was subsequently added, and makes clear what process is to be followed to obtain the compliance schedule where a such a building had a cable car but did not require a building consent. It did not change the obligation in section 100, it merely clarified the process to be used (the owner must apply for it).
- 4.4.8 In my view the addition of section 102A also reinforces the argument that it was Parliament's intention that the obligation in section 100 was not retrospective.

Section 102A simply sets out the procedure for applying for a compliance schedule where a building consent is not required. Section 102A expresses in a more detailed way the obligation that already existed in sections 100(2) and 101(1) that if an owner requires a compliance schedule they must obtain one – “an owner of a building for which a compliance schedule is required under section 100 must obtain the compliance schedule”. I also note that there are no circumstances where section 102A would require an owner of a building used as a single household unit (in terms of section 100(2)) to obtain a compliance schedule except where there is a ‘pre-existing’ cable car, because the new installation of one would always require a building consent.

- 4.4.9 In reaching this conclusion I have also had regard to the importance of “the setting of performance standards for buildings to ensure that people who use buildings can do so safely and without endangering their health” as provided for in the purpose of the Act in section 3(a)(i), and taking account of the principles in section 4(2)(a), such as the role that household units play in the lives of the people who use them, the need to ensure maintenance requirements of household units are reasonable, and the desirability of ensuring that owners of household units are aware of the maintenance requirements of their household units.
- 4.4.10 The owner has also submitted that as there were no performance standards specified at the time that his cable car was built, it cannot have a compliance schedule issued in respect of it. As I understand it, the basis of his argument is that section 103(1)(b) requires a compliance schedule to ‘state the performance standards for the specified systems’ it covers, and that as there was no requirement to obtain either a building consent or a compliance schedule for the owner’s cable car at the time it was constructed, no performance standards were envisaged or set for it at that time. The owner argues that as there were no performance standards specified for the cable car at the time it was built, the requirement in section 103(1)(b) cannot be fulfilled, and no compliance schedule can be issued or required.
- 4.4.11 Again, I do not agree with this submission. As discussed in paragraph 4.4.5, I consider it clear that the legislators intended the requirement in section 100 to apply both existing and new cable cars. For existing cable cars, this would be a requirement that did not exist at the time they were constructed, but that was subsequently applied. It follows that the requirement for compliance schedules to contain performance standards cannot be limited to those performance standards that were articulated at the time of construction.
- 4.4.12 That performance standards or expectations would have existed cannot be doubted, as no owner would have a cable car constructed that posed a safety risk to its occupants, or failed to otherwise function as intended. Where these standards have not been recorded anywhere, the task becomes to determine, at the time the compliance schedule is applied for, what the performance standards were likely to have been, given the function that the cable car was expected to perform at the time it was designed and built. This can be done with reference to any standards or other guidance that applied at the time (if any). Where such guidance did not exist, then modern iterations can be used, and adapted as appropriate, taking into account changing expectations of functions and performance.
- 4.4.13 I have discussed what performance standards might apply to the owner’s cable car in more detail in paragraph 4.6. However, I note here that if an authority receives an application for a compliance schedule, but does not consider that the performance standards proposed for the specified system in the schedule are sufficient or correct it

can decline to issue the compliance schedule under section 102(3). What this shows is that, contrary to what the owner submits, the performance standards for his cable car did not need to be requirements in law at the time that the cable car was built, but instead can be subsequently decided on, in the context of issuing a compliance schedule.

- 4.4.14 I note here also, that in the original compliance schedule, the authority's predecessor specified the 'Inspection, Maintenance and Reporting Procedures' that would apply to the owner's cable car, as required under section 103(1)(c). I assume this was done to assist the owner with his new obligations. However, the authority's predecessor neglected to state the performance standards for the cable car under section 103(1)(b). This was clearly an oversight on behalf of the authority's predecessor, but could have been rectified by the owner at any stage by applying to amend the compliance schedule under section 106.
- 4.4.15 As it transpires, the original compliance schedule was amended in 2011. I am unsure if this amendment was made on the authority's own initiative (under section 107) or at the recommendation of the independently qualified person (under section 109). The authority then cancelled the original compliance schedule on 2 June 2015.

#### **4.5 The authority's request that a new compliance schedule be applied for**

- 4.5.1 It is not necessary, for the purpose of this determination, for me to decide whether the authority's predecessor acted within its powers in issuing the original compliance schedule relating to the applicant's cable car. This compliance schedule has since been withdrawn and is no longer in effect.
- 4.5.2 The question I do have to consider is whether the authority acted correctly in requesting the owner to obtain a new compliance schedule. In my opinion it has.
- 4.5.3 As discussed in paragraphs 4.3 and 4.4, where a compliance schedule is required for a building, it is the owner's obligation to obtain one (section 101) and where the requirement arises independently of the need for a building consent this must be done by application to the authority (section 102A).
- 4.5.4 These requirements apply to the owner's building and cable car and are mandatory. The owner has stated that he has refused to apply for a new one, due to 'the impossibility of applying for a compliance schedule where no performance standards exist'. However, I have already discounted this argument in relation to the original compliance schedule, and for the same reason do not think it holds force here.
- 4.5.5 The owner has neglected to obtain a compliance schedule when one is required, and as such he has committed an offence under section 101(1). The authority's responsibility is to enforce this obligation, and this is what it is attempting to do in writing to the owner (refer paragraph 2.8).
- 4.5.6 It was open to the authority to issue a notice to fix to enforce this matter. Instead, the authority has chosen to apply for a determination, so that the grounds for the owner's reluctance to act can be discussed and addressed. However, I note that the option to issue a notice to fix is still available to the authority, should this become necessary.
- 4.5.7 In conclusion, I consider that the authority has acted correctly in requiring the owner to apply for a compliance schedule in relation to his cable car, as a schedule is required under section 100, and it is the applicant's responsibility to apply for one under section 102A.

## 4.6 What are the performance standards that apply?

- 4.6.1 Although it does not form part of the matter for determination, I will now provide some guidance for the parties on the question of the performance standards that might apply to the owner's cable car.
- 4.6.2 Paragraph 6 of the Ministry's Compliance Schedule Handbook<sup>5</sup> provides guidance on what is meant by the requirement for performance standards in the Act.

### 6.0 Performance standard

The term 'Performance standard' for a specified system is not defined by the Building Act. However, it can be interpreted as the level of performance a specified system was intended to meet, and to continue to meet, at the time it was designed and installed in a building.

The Building Act requires that a specified system must be inspected and maintained in order to ensure that it performs, and continues to perform, to that standard.

If a specified system is designed and installed to an Acceptable Solution, Verification Method, Standard or specific documentation, this will set the performance standard for that specified system. An example is the level required by NZS 4541 for sprinkler systems.

- 4.6.3 Part 2 of the handbook provides a 'content guide' for compliance schedules relating to particular specified systems, including 'SS 16 Cable Cars'. The guide provides an overview of the expected inspection and maintenance requirements, and a checklist for use with cable cars complying with NZS 5270<sup>6</sup>.
- 4.6.4 Undoubtedly, the situation would be clearer where a compliance schedule is being devised for a new cable car, as in this situation the relevant performance standards could be determined with reference to the relevant Building Code provisions currently in force and, where such methods are selected, the Acceptable Solutions, Verification Methods and/or standards.
- 4.6.5 I agree with the authority's submission that it would be inappropriate to simply apply these standards retrospectively to the owner's cable car. However, this does not mean that they cannot be referred to for guidance in setting the performance standards recorded in the compliance schedule.
- 4.6.6 I also agree with the authority's approach, as outlined in its submission of 8 March 2019 that instead the performance standards can be established by reference to the function that the cable car is intended to perform, and the components or elements of the cable car that contribute to this function, including both the moving and non-moving parts. It can then be determined what level of performance is appropriate and is required from each component to ensure the cable car continues to perform its intended function, appropriate maintenance is carried out and the cable car poses no risks to the health or safety of its users, which is the purpose of the compliance schedule regime.
- 4.6.7 Such an approach would not be retrospectively applying standards on the owner's cable car that it was never intended to perform. Instead, it would be looking at what function it was designed for, then considering what performance standards must continue to be met, both by the cable car as a whole and its constituent parts, in order to achieve that. An example of where this framework has been widely applied is for older lifts installed in buildings, for which there were no standards at the time of

<sup>5</sup> Ministry of Business, Innovation and Employment (2014). Compliance Schedule Handbook, published pursuant to section 175 of the Building Act 2004.

<sup>6</sup> New Zealand Standard NZS 5270:2005 Cable cars for private residences - Design, construction, installation and maintenance

installation. These lifts are not now required to meet current standards, but rather have compliance schedules based on performance standards established for the lift.

- 4.6.8 In setting the performance standard for the cable car, the owner can usefully look at the current New Zealand Standard that applies to cable cars, notably NZS 5270. This document will be useful for understanding what aspects of his cable car's performance require a performance standard attached to them and at what level this should be expressed. It will also provide guidance on how such performance standards, once set, are to be monitored and measured. The Ministry's Compliance Schedule Handbook will also be useful in this regard.
- 4.6.9 The owner may also find it helpful to engage an independently qualified person to set the performance standards for his cable car, and devise an appropriate inspection and maintenance regime for it. Independently qualified people are experts in their fields and will be able to advise what is appropriate and required.
- 4.6.10 Whatever approach is taken, section 101 of the Act makes it clear that the responsibility for obtaining a compliance schedule rests with the owner, and that continuing to fail to do so constitutes an offence, which upon conviction can attract a significant fine.

## **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-making in requiring the owner to obtain a compliance schedule for his cable car and I hereby confirm that decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 23 December 2019.

Katie Gordon  
**Manager Determinations**

## Appendix A

### Relevant sections of the Building Act 2004

#### 100 Requirement for compliance schedule

- (1) ...
- (2) A building used wholly as a single household unit—
  - (a) requires a compliance schedule only if it has a cable car attached to it or servicing it; and
  - (b) requires the schedule only for the cable car.
- (3) Before 31 March 2008,—
  - (a) ...
  - (b) a building used wholly as a single household unit does not require a compliance schedule.

#### 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.
- (2) A person commits an offence if the person fails to comply with subsection (1). ...

#### 102 When compliance schedule must be issued

- (1) ...
- (3) A territorial authority must issue a compliance schedule on an application under section 102A if the territorial authority is satisfied, on reasonable grounds, that the specified systems for the building are capable of performing to the performance standards for those systems.

#### 102A Procedure for obtaining compliance schedule where building consent not required

- (1) This section applies when an owner of a building for which a compliance schedule is required under section 100 must obtain a compliance schedule but is not required to apply for a building consent in relation to the building because, for example, no building work is being carried out.
- (2) The owner must apply in the prescribed form (if any) to the appropriate territorial authority for the issue of a compliance schedule by providing the authority with—
  - (a) a description of all specified systems for the building and the performance standards for each of them; and
  - (b) the proposed inspection, maintenance, and reporting procedures for the specified systems.

#### 103 Content of compliance schedule

- (1) A compliance schedule must—
  - (a) state and describe each of the specified systems covered by the compliance schedule, including a statement of the type and (if known) make of each specified system; and
  - (b) state the performance standards for the specified systems; and
  - (c) describe the inspection, maintenance, and reporting procedures to be followed by independently qualified persons or other persons in respect of the specified systems to

ensure that those systems are capable of, and are, performing to the performance standards.

- (2) For the purposes of subsection (1)(c), the inspection, maintenance, and reporting procedures of the compliance schedule may be identified—
- (a) by description in the compliance schedule; or
  - (b) by reference to—
    - (i) a prescribed acceptable solution or prescribed verification method in a regulation referred to in section 20; or
    - (ii) an acceptable solution or a verification method issued under section 22; or
    - (iii) a building method or product.

### **107 Territorial authority may amend compliance schedule on own initiative**

- (1) This section applies if a territorial authority considers that an amendment to a compliance schedule is required to ensure that a specified system stated in the compliance schedule is performing, and will continue to perform, to the performance standards for that system.
- (2) If this section applies, the territorial authority may amend the compliance schedule—
- (a) on its own initiative; and
  - (b) without an application for an amendment to the compliance schedule being made under section 106.
- (3) However, before making an amendment to a compliance schedule under this section, the territorial authority must—
- (a) advise the owner of its intention to do so; and
  - (b) give the owner a reasonable opportunity to make submissions on the matter; and
  - (c) consider those submissions.
- (4) If the territorial authority amends a compliance schedule under this section, the territorial authority must—
- (a) give written notice of the amendment to the owner; and
  - (b) attach a copy of the amended compliance schedule to the notice.

### **176 Meaning of party**

In sections 177 to 190, party, in relation to a determination, means any or all of the following persons affected by the determination:

- (a) the territorial authority;
- (b) the building consent authority;
- (c) the owner or, if there is more than 1 owner, any of the owners:

### **177 Application for determination**

- (1) A party may apply to the chief executive for a determination in relation to either or both of the following:
- (a) whether particular matters comply with the building code;
  - (b) the exercise, failure or refusal to exercise, or proposed or purported exercise by an authority in subsection (2), (3), or (4) of a power of decision to which this paragraph applies by virtue of that subsection.

(2) Subsection (1)(b) applies to any power of decision of a building consent authority in respect of all or any of the following:

(a) ...

(e) a compliance schedule: ...

(3) Subsection (1)(b) applies to any power of decision of a territorial authority in respect of, or under, all or any of the following:

(a) ...

(d) an amendment to a compliance schedule under section 106, 107, or 109: ...