



Department of  
Building and Housing  
*Te Tari Kaupapa Whare*

# Technical Review

## of the territorial authority functions of Invercargill City Council

### Summary Report

October 2011



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# Important notice to readers of this report

This report is only to be used by the building consent authority or territorial authority that is the subject of our review, for the purpose of improving the performance their building control operations.

The report should not be used by any other person for any purpose. In particular, it:

- should not be used as evidence of the compliance or non-compliance of a particular building with the Building Code
- should not be used as evidence that the building consent authority or territorial authority under review has failed to exercise reasonable care when carrying out their functions.

An owner of a building considered as part of a technical review should seek advice from an independent building expert and/or a legal expert regarding any issues that might arise from the review, such as compliance with the Building Code.

## **The purpose of technical reviews**

The Department of Building and Housing (the Department) carries out technical reviews as part of its function to monitor and review the performance by building consent authorities, territorial authorities, and regional authorities of their functions under the Building Act 2004.

The purpose of a technical review is to monitor the performance of and assist the authority under review to improve its building control operations.

A technical review is not a comprehensive audit. It is a performance review based on a snapshot in time of information about the building control activities of the building consent authority, territorial authority, or regional authority. It cannot be taken as a full and comprehensive assessment of the competency and quality of all of those activities.

A technical review is carried out by:

- assessing whether the processes and procedures used by the building consent authority, territorial authority, or regional authority under review are sufficient to enable it to satisfy the requirements of the Building Act 2004, Building Regulations, and the Building Code
- assessing the building compliance and regulatory outcomes achieved by the authority
- providing advice and assistance on best practice building control to help the building consent authority, territorial authority, or regional authority under review to achieve an effective building control system that is consistent with national best practice
- enabling the Department to receive feedback from the building consent authority, territorial authority, or regional authority under review about its practical operations, ability to assess building compliance, and the role of the Department in the regulatory process.

# 1. Overview

## Purpose and scope

This report sets out the key findings and recommendations from a technical review of the building control operations of Invercargill City Council (the Council). The on-site stage of the review process was undertaken by the Department of Building and Housing (the Department) from 26-29 April 2011.

The review primarily focused on how the Council was undertaking some of its statutory responsibilities under the Building Act 2004 – specifically around its territorial authority functions. The terms of reference for this review are set out in Section 4 (Figure 2) of this report.

## Reasons for the review

The Department undertook the review as part of its ongoing performance monitoring function. This aims to help councils across the country to strengthen and improve how they undertake their core territorial authority building control functions under the Building Act 2004. Some aspects are very topical since the 2010/11 Canterbury earthquakes, such as their functions relating to earthquake-prone, dangerous or insanitary building policies.

The implementation of the building consent authority accreditation scheme also identified a need for councils, industry professionals, and building owners to better understand their responsibilities under the Building Act 2004<sup>1</sup>. For example, an assessment by the Department on the progress of all building consent authorities to become accredited undertaken in 2007/2008 found that three quarters of building consent authorities needed to improve their policies and procedures for issuing (or refusing to issue) code compliance certificates, compliance schedules, and/or notices to fix.<sup>2</sup>

## The Council

Invercargill, with a population of 50,328,<sup>3</sup> is the southernmost city in New Zealand and lies in the heart of the Southland Plains on the Oreti River. The 491 square kilometre area under the jurisdiction of the Invercargill City Council extends from the northern fringes of the city to the region's seaport of Bluff, some 18 kilometres south.

Invercargill is within easy travelling distance to several national and forest parks including Fiordland National Park, Rakiura National Park on Stewart Island and Catlins Forest Park.

At the time of the Department's review visit, the Council's Building Regulation Services group allowed for 24 staff divided into three teams - building, plumbing and drainage, and the building consents administration.

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<sup>1</sup> This scheme is one of a number of reforms introduced by the Building Act to help improve the control of, and encourage better practice and performance in, building design, regulatory building control and building construction. Information about the scheme is available at: [www.building.dbh.govt.nz](http://www.building.dbh.govt.nz)

<sup>2</sup> *Summary of findings report: 2007/08 building consent authority accreditation assessments*. Published by the Department in November 2008 and available at: [www.building.dbh.govt.nz](http://www.building.dbh.govt.nz)

<sup>3</sup> 2006 census figures.

## Statistical information provided by the Council

The following statistical information was requested and provided prior to undertaking the technical review to indicate the volume and type of work the Council managed.

**Figure 1: Statistical information**

#	Subject	Total for the 12 month period ending 30.06.10 (unless mentioned otherwise)	
1	Building consents issued.	2053	
2	Buildings that have compliance schedules at 30.06.10.	809	
3	Amended compliance schedules issued.	40	
4	Value of consented building work.	\$97,103,069	
5	On-site building warrant of fitness audits carried out.	1	
6	Exemptions issued under Schedule 1, clause (k).	Nil	
7	Building consents issued with PIMs since 31.01.10 and ending 31.07.10.	Unknown (system unable to differentiate)	
8	Building consents issued since 31.01.10 and ending 31.07.10.	1000	
9	Waivers and modifications issued.	6	
10	Notices to fix issued.	3	
11	Certificates for public use issued.	40	
12	Certificates of acceptance issued.	21	
13	Infringement notices issued.	Nil	
14	Section 124 notices issued for dangerous, earthquake-prone or insanitary buildings.	Unknown (system not set up to differentiate these from other documentation)	
15	Estimated percentage of building consents for new buildings.	Residential <sup>4</sup>	Commercial <sup>5</sup>
		12.5%	1%
16	Estimated percentage of building consents for additions and alterations to buildings (s112).	12%	3%
17	Number of buildings that have undergone a change of use (s115)	Unknown (system unable to differentiate)	Unknown (system unable to differentiate)
18	Number of buildings that have undergone subdivision (s116A)	Nil	Nil

<sup>4</sup> Includes detached and multi-unit dwellings, and their associated ancillary/out-buildings from Building Code Clause A1.

<sup>5</sup> Includes communal residential/ non-residential, commercial, industrial, and their associated ancillary/ out-buildings from Building Code Clause A1.

## 2. Executive findings and recommendations

### Findings

The review found the Council was performing adequately in a number of areas. For example it:

- documented its policies and procedures for various building control functions (for example, project information memoranda, dangerous and insanitary buildings, various notices and certificates it issues, change of use, extension of life, sub-division of buildings and auditing compliance schedules)
- considered site-specific project information memorandum information when it undertook building consent processing functions
- recommenced building warrant of fitness on-site auditing from November 2010
- proactively monitored and enforced the dangerous and insanitary building requirements when necessary. Council had sound record keeping, evidence gathering and document control in relation to dangerous building notices
- placed specific expiry dates on some certificates for public use
- endeavoured to be customer-focused by attempting to achieve compliance primarily through negotiation and discussion
- appropriately implemented a means of issuing code compliance certificates for long-standing building consents through the use of modifications (although Council is incorrectly referring to them as 'durability waivers')
- recognised its shortcomings in regard to existing compliance schedules and was implementing a system to ensure site-specific information was provided by owners in order to update and amend them.

### Performance improvement areas

The review identified four key areas where the Council could strengthen and improve its operations. Addressing these issues would enhance the quality of its service to customers, alleviate confusion for building owners and independent qualified persons, and assist the sector to comply more consistently with the Building Act 2004. These key areas were:

- improve understanding and application of certain building control functions as required under the Building Act 2004
- ensure documented policies and processes comply with legislative requirements and are being effectively implemented
- ensure collective technical knowledge is sufficiently spread across the building control unit
- implement mechanisms to improve customer service.

### Recommendations

Some of the key recommendations to the Council under the four key areas noted above are summarised as follows.

## Understanding and applying the Building Act 2004

- Review its current number of considerations under clause (k) of Schedule 1<sup>6</sup> of the Building Act 2004, document its policy around using clause (k), and communicate this (and the potential benefits of using it) to building control staff and external stakeholders.
- Ensure all mandatory information required under the Building Act 2004 is included in any project information memoranda it is requested to produce (for example, a statement that the building must comply with section 118 of the Building Act 2004 in relation to access and facilities for persons with disabilities).
- Council should utilise the recently developed guidance produced for the sector by the Department (for example, around waivers and modifications).<sup>7</sup>
- Staff need to strengthen their understanding of the waiver and modification provisions, and earthquake-prone building requirements and when they are applicable.
- Ensure a single code compliance certificate is issued per building consent regardless of the number of amendments (particularly for durability modifications).
- Building control staff should better understand the different purposes of compliance schedule statements, compliance schedules, and building warrants of fitness, the information required on each, and when they are to be issued.<sup>8</sup>
- All necessary information fields should be completed on the Council's building control forms (for example, notices to fix).
- Consider strengthening Council's stance on earthquake-prone buildings as the current policy would be best described as passive as it solely relies on notifications through building consent applications involving change of use.

## Implementation of legislatively correct policies and processes

- Cease the practice of issuing project information memoranda as a matter of course. Project information memoranda should be issued only upon request as they are not always required (Building Amendment Act 2009 refers).
- Cease issuing 'amended compliance schedules' in the guise of a Form 12A template.
- All compliance schedules issued should clearly identify all the installed specified systems, their required inspection/ maintenance/ reporting procedures and responsibilities, plus their location in the building.
- Ensure the following Council forms fully comply with the Building (Forms) Regulations 2004:
  - Form 9 (certificate of acceptance)
  - Form 12 (warrant of fitness)

<sup>6</sup> Schedule 1 lists a range of types of building work that does not require a building consent. Clause (k) provides a catch-all category whereby councils can use their discretion to exempt building work from the requirement to obtain a building consent.

<sup>7</sup> To download the Department's waiver and modification form refer to the following link:  
<http://www.dbh.govt.nz/building-code-waiver>.

<sup>8</sup> *Owners' responsibilities to ensure their buildings are safe to use (Guidance on building warrants of fitness and compliance schedules)*. Published by the Department in November 2010 and available at [www.building.dbh.govt.nz/building-warrant-of-fitness-guide](http://www.building.dbh.govt.nz/building-warrant-of-fitness-guide)

- Form 12A (certificate of compliance with inspection, maintenance, and reporting procedures)
  - Form 15 (application for certificate for public use)
  - Form 16 (certificate for public use).
- Ensure any work covered, or not covered, by the certificate of acceptance is identified in relation to Building Code performance clauses.

#### Collective knowledge across the building control unit

- Ensure its policy on clause (k) of Schedule 1 (building consent exemptions) is clearly understood by all building control staff so that they can apply it, have a sound understanding about when it is appropriate to use clause (k), and understand the process they need to follow when seeking to use it (for example, discussing with a team leader or manager first).
- Ensure appropriate advisory notes are attached to project information memoranda (for example, one advisory note specified an acceptable solution for fire fighting access).
- For some building control functions the Council would benefit from greater sharing of knowledge and skills across a number of staff members, rather than only one individual (for example, notices to fix).
- Implement quality assurance initiatives for its building warrant of fitness and compliance schedule systems, including:
  - undertaking training of staff in the application of relevant provisions of the Building Act 2004
  - requiring internal peer review by dedicated staff with expertise in these areas (or consolidating responsibility for these functions to a smaller, dedicated, number of staff until others have been up-skilled).

#### Simple ways to improve customer service

- Ensure its public information sufficiently covers the use of clause (k) of Schedule 1 so that applicants (or their agents) are aware of clause (k) and the Council's information expectations for using clause (k) if it is to be proposed as grounds for exempting a specific building project from the requirement to obtain a building consent.
- Ensure its public information about project information memorandum clearly explains that they are not always required and the key value/benefits to building owners when considering project information memoranda information.
- Issue certificates for public use with clear expiry dates, track all certificates for public use it issues, and follow-up on expired certificates for public use.
- Enhance its certificate of acceptance system to:
  - record any suspensions and their reasons
  - ensure it only accepts complete applications for processing that contain all of the supporting information the Council's needs to process it efficiently.

## 3. Roles and responsibilities

### **The Department's role**

The Department is responsible for conducting technical reviews of territorial authorities and building consent authorities. This is part of its wider statutory responsibilities for building and housing, and administration of New Zealand's building legislation. In summary, the Department's key building control functions include:

- advising the Minister for Building and Construction on matters relating to building control
- administering and reviewing the Building Code
- producing compliance documents that specify prescriptive methods as a means of complying with the Building Code
- providing information, guidance, and advice on building controls to all sectors of the building industry and consumers
- implementing, administering and monitoring a system of regulatory controls for a vibrant, innovative sector with skilled building professionals
- making determinations, or technical rulings, on matters of interpretation, doubt, or dispute relating to compliance with the Building Code or certain decisions of building consent authorities and territorial authorities.

### **Role of the Consent Authority Capability and Performance Group**

The Department's Consent Authority Capability and Performance Group are responsible, among other functions, for technical reviews. The Group's broad functions include:

- monitoring, reviewing and improving performance outcomes of the regulatory building control system
- managing and strengthening relationships with building consent authorities, territorial authorities, regional authorities, and other key industry stakeholders
- providing advice and guidance to the regulatory building control sector
- undertaking investigations into complaints about building consent authorities.

### **Role of territorial authorities**

The core building control functions of a territorial authority under the Building Act 2004 include:

- issuing project information memoranda
- granting building consents where the consent is subject to a waiver or modification of the Building Code
- issuing certificates of acceptance
- issuing compliance schedule statements
- amending and issuing amended compliance schedules
- granting waivers and modifications (with or without conditions) of building consents
- issuing notices to fix
- administering annual building warrants of fitness
- enforcing the provisions relating to annual building warrants of fitness

- deciding the extent to which certain buildings must comply with the Building Code when they are altered, subdivided or their use is changed
- performing functions relating to dangerous, earthquake-prone or insanitary buildings
- determining whether building work is exempt from requiring a building consent under Schedule 1(k) of the Building Act 2004
- carrying out any other functions and duties specified in the Building Act 2004.

### **Role of building consent authorities (that are territorial authorities)**

Building consent authorities (that are territorial authorities) perform the following functions:

- inspect building work for which they have granted a building consent
- issue notices to fix
- issue code compliance certificates
- issue compliance schedules
- receive, consider, and make decisions on applications for building consents within set time limits
- determine whether applications for a building consent is subject to a waiver or modification of the Building Code, or any document for use in establishing compliance with the Building Code, should be granted or refused
- ensure compliance with the Building Code and Building Regulations.

## 4. Process

### Purpose of technical reviews

Technical reviews are undertaken to monitor the performance of, and assist building consent authorities and territorial authorities to, fulfil their obligations under the Building Act 2004. The review is a tool which helps authorities to:

- enhance the performance of their building control activities
- implement appropriate systems, processes, and resources so they can carry out their building control operations
- effectively fulfil their obligations under the Building Act 2004 and Building Regulations
- be held accountable for their performance and legislative obligations.

Technical reviews also examine whether territorial authorities or building consent authorities have the appropriate systems and resources to enable their building control personnel to undertake their work effectively and efficiently.

Technical reviews are not intended to evaluate the performance of individual staff and are not comprehensive audits involving detailed examinations of all aspects of a territorial authority's building control operations. Nor do they assess the territorial authority against a particular model or measure it against the performance of other territorial authorities.

### Legislative basis

This review was initiated under sections 204 and 276 of the Building Act 2004. It is a function of the Chief Executive to monitor and review the performance of territorial authorities and building consent authorities to determine whether they have properly exercised their powers and performed their functions.<sup>9</sup>

### Scope of the review

This review's terms of reference covered seven areas which collectively covered the key components of the Council's territorial authority functions. The terms of reference are set out below.

**Figure 2: The terms of reference for the technical review**

5.1	Process for determining whether building work is exempt under Schedule 1, clause (k)
5.2	Producing (voluntary) project information memoranda
5.3	Considering additions and alterations, change of use, and subdivisions
5.4	Issuing building consents subject to waivers or modifications of the Building Code (including natural hazards)
5.5	Amending compliance schedules and enforcing building warrants of fitness
5.6	Issuing certificates (including notices to fix, certificates for public use, certificates of acceptance, and infringement notices)
5.7	Undertaking functions in relation to earthquake-prone, dangerous or insanitary buildings.

<sup>9</sup> The Building Act 2004 is available at [www.legislation.govt.nz](http://www.legislation.govt.nz)

## **Method**

The Department used four broad approaches to gather information about the Council's building control activities. These were:

- observing staff undertaking work
- reviewing written material used and produced by staff (eg, policies, procedures, processing check-lists and records, manuals and approved consent documentation)
- interviewing staff about their use of material and their work
- assessing a random sample of building projects (case studies) that the territorial authority has been involved with, just before or during the review visit.

For this review, six case studies were undertaken to assess compliance with the Building Act 2004 and its associated Regulations, with particular focus on the terms of reference noted in Figure 2. Council records were reviewed to assess the adequacy and effectiveness of the Council's systems.

The Council was given the Department's draft report and was given the opportunity to respond to the Department's recommendations. The Council's responses are set out in section 5 of this report. Please note that the Council's responses included in this report do not necessarily reflect the views of the Department.

## **Acknowledgement**

The Department would like to thank Invercargill City Council's building control management and staff for their cooperation and assistance during the review.

## 5. Review findings and recommendations

### 5.1 Process for determining whether building work is exempt under Schedule 1, clause (k)

#### Purpose

To examine the Council's procedure for determining if building work is exempt under clause (k) of Schedule 1 to the Building Act 2004 (the Building Act).

#### Background

Schedule 1 of the Building Act 2004 lists the types of building work for which a building consent is not required. Clause (k) covers situations where a territorial authority considers that a building consent is not necessary because the building work:

- (i) is unlikely to be carried out otherwise than in accordance with the Building Code; or
- (ii) if carried out otherwise than in accordance with the Building Code, is unlikely to endanger people or any building, whether on the same land or on other property.

#### Findings

The Council did not have documented policies and procedures to guide staff decision-making around clause (k) of Schedule 1. The Department was advised the Council has historically very rarely used their discretion under clause (k) and was unable to provide an example.

The Council had recently considered using clause (k) for three bus shelters, however, they elected to receive building consent applications in order to further evaluate the proposed building work.

The Council was not applying a risk-based approach or seeking to realise the benefits and efficiencies that clause (k) can bring to its decision-making and applicants' (or their agents') time and resources when it is used and applied appropriately. It is particularly valuable for building work where the Council's building consent processing and building inspection activities may not add value to the process if there are other more appropriate checks and balances that are being applied.

The Council's public information about clause (k) was minimal. Information which was provided were reduced photocopies of the Department's guidance material. Easily accessible information for the public (i.e. the Council's website) explaining the potential benefits, circumstances where clause (k) may be appropriate to use, or the Council's information expectations for those proposing to apply for this exemption were not available.

## Conclusions

The Council should review its current practices around the use of clause (k) of Schedule 1. Under the Building Act 2004, this is a legitimate and potentially valuable and efficient building control mechanism that is currently not being utilised.

<b>Recommendation 1</b>	
<b>The Department recommended that the Council:</b>	<b>Response from the Council:</b>
reassess its infrequent use of clause (k) of Schedule 1 of the Building Act 2004.	Council advised it has considered the application of Schedule 1(k) and agreed it could be used more frequently. Although it felt there was not much scope for additional exempt work following the December 2010 revisions to Schedule 1, the Council acknowledged that there were a few cases where it could be used (eg, bus shelters).
document its policy around using clause (k) and communicate this (and the potential benefits of using it) to building control staff and external stakeholders.	Council advised it will develop a policy and communicate this to the public via a new handout and the Council's website.
ensure the policy is clearly understood by all building control staff so that they can apply it, have a sound understanding about when it is appropriate to use clause (k), and understand the process they need to follow when seeking to use it (eg, discussing with a team leader or manager first).	Council advised its staff have weekly technical meetings plus a weekly general meeting. The new policy, as all others are, will be discussed at these meetings.

**Note:** The Department's guide to exempt building work (published December 2010) has some important information, including possible criteria for a council to consider when applying clause (k) of Schedule 1. Council should refer to this guidance when developing a policy on this topic. The document is freely available on-line at <http://www.dbh.govt.nz/bc-no-consent>

## 5.2 Project information memorandum processing

### Purpose

To examine how the Council produces and uses project information memoranda as part of its building control operations.

### Background

Sections 31-39 of the Building Act 2004 cover applying for, producing and issuing project information memoranda. These sections specify the minimum information that a project information memorandum must include. Information on special features of the land which are not apparent in the district plan must be included, as well as details of authorisations required by the Council under other Acts, stormwater and wastewater utility systems, and other information likely to be relevant to the proposed building work.

In 2010, the Building Act 2004 was amended to make the application for project information memoranda voluntary under certain situations.<sup>10</sup>

### Findings

The Council's Procedure Manual included a process for receiving and issuing project information memoranda.<sup>11</sup> The Department considered this process to be appropriate. The Council had a specific project information memorandum check-sheet, which covered the required planning, building control and other regulatory functions within the Council.

Between 31.01.10 and 31.07.10, nearly all building consents were issued with project information memoranda. This finding was a little surprising given that project information memoranda had become voluntary in February 2010. Most councils around the country have been issuing considerably fewer project information memoranda with their building consents. The Department expected Invercargill City Council to mirror this national trend.

At the time of the review, it was noted that the Council's public information around the building consenting process did not specifically advise the public that project information memoranda were voluntary in certain instances. Further, the Council's building consent application form (Form 2) did not explicitly clarify that project information memoranda were voluntary in certain situations.

The Department believes the Council's public information should emphasise the following key points about project information memoranda.

- Owners do not have to request or get them, although building consent authorities may in some circumstances be required to obtain them on the owner's behalf.

<sup>10</sup> In November 2009, the Department published guidance about the changes to project information memorandum. Web-link at: [www.dbh.govt.nz/pim-guidance](http://www.dbh.govt.nz/pim-guidance)

<sup>11</sup> Invercargill City Council's *Building Control BCA Functions Procedures Manual* (V 1.12) internal document only – Procedure BC 1.10 refers.

- For some building projects they add value and are well worth getting as they give consent applicants and councils greater assurance that the right things are considered at the preliminary design stage which could impact on the building down the track. They enable councils to make better, risk-based, site-specific decisions when granting building consents. The information they provide includes any special features of the land or building, whether the building is earthquake-prone, any corrosion risk, whether there has historically been any hazardous material on the land (for example, whether it was previously used as a landfill), wind and snow loadings that could impact on structural and bracing design, existing storm or waste water utility systems, whether the building requires an evacuation scheme, and other legislative requirements, etc.
- As an internal policy many councils have generally decided to still collate and consider this information when they process building consents as a matter of good practice and given the requirements of section 31 of the Building Act 2004.

Of those project information memoranda reviewed<sup>12</sup>, the Department found some information provided was inconsistent and disregarded the applicant's request on Form 2 (application for project information memorandum and/or building consent). Examples included:

- a building consent only application that nonetheless supplied a project information memorandum with content relating to wind, seismic, hazard and transport information
- a combined building consent and project information memorandum application which included a project information memorandum with appropriate information in relation to wind, seismic and land designation
- a project information memorandum only application which provided less information than that of the project information memoranda discussed above. Moreover, some inappropriate advisory notes were attached to the project information memorandum. For example, one advisory note stated 'access for fire fighting to comply with NZBC C/AS1 part 8.1'. This particular example is inappropriate because the Building Code is performance-based and an Acceptable Solution is only one means of achieving compliance with the Building Code.

Some mandatory information required by the Building Act 2004 was not always included in the Council's project information memoranda. For example, with regard to buildings intended to be used for, or associated with, one or more of the purposes specified in Schedule 2 of the Building Act 2004, section 35(1)(i) requires a statement that the building must comply with section 118 of the Building Act 2004 (relating to access and facilities for persons with disabilities) and the associated access provisions of the Building Code. This information was omitted from project information memoranda.

The Department noted the Council was taking much of the site-specific information which is normally included in a project information memorandum (regardless of whether a project information memorandum was required and/or requested) and considering this when it processed building consents (for example, wind speed, seismic zones, snow loads and natural hazards). The Department supports this processing approach as it clearly demonstrates the Council is considering and documenting these often important site-specific factors when making building control decisions. As noted above, however, the Council may need to better communicate to building consent applicants that while project information

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<sup>12</sup> None of the reviewed examples were subject to section 31(1)(a) of the Building Act 2004.

memoranda provide fundamental information that may impact upon building design work, they are not always required.

## Conclusion

The Council's project information memorandum system could be strengthened, as per the following recommendations.

<b>Recommendation 2</b>	
<b>The Department recommended that the Council:</b>	<b>Response from the Council:</b>
<b>ensure all relevant site-specific information is included in any project information memorandum produced.</b>	<b>Council advised its procedure will be amended, communicated and reinforced.</b>
<b>ensure its public information about project information memoranda is consistent and clearly explains when they are required and the key value and benefits to building owners when considering project information memorandum information (see discussion above).</b>	<b>Council advised its information has been sourced and public information will be adjusted to better reflect the fact that project information memoranda are optional.</b>
<b>where project information memoranda are issued, include all mandatory information as specified under section 35 of the Building Act 2004.</b>	<b>Council advised its procedure will be amended, communicated and reinforced.</b>
<b>only issue project information memoranda when required and/or requested by the applicant on Form 2.</b>	<b>Council advised, as at 09.09.11, it was seeking in-house comment regarding a proposal to amend the current project information memorandum documentation and workflow as part of its continuous improvement programme.</b>

## **5.3 Considerations on alterations, change the use, and subdivisions**

### **Purpose**

To assess the procedures the Council uses for proposed alterations to an existing building which requires a building consent, or a proposed change of use for a building which may or may not require building consent, or a proposed subdivision of a building.

### **Background**

The following parts of the Building Act 2004 were considered in relation to these terms of reference.

#### ***Alterations***

Section 112(2) of the Building Act 2004 permits a territorial authority to allow the alteration of an existing building without complying with the provisions of the Building Code (as specified by the territorial authority) if it is satisfied that:

- (a) If the building were required to comply with the relevant provisions of the building code, the alteration would not take place; and
- (b) The alteration will result in improvements to:
  - (i) means of escape from fire; or
  - (ii) access and facilities for people with disabilities; and
- (c) The improvements referred to in paragraph (b) outweigh any detriment that is likely to arise as a result of the building not complying with the relevant provisions of the Building Code.

#### ***Change of use***

The Building Act 2004 and the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005, set specific requirements for certain building projects. For the purposes of sections 114 and 115, a 'change of use' means to change the use of all or part of a building from one use (the old use) to another (the new use), with the result that the compliance requirements with the Building Code of the new use are additional to, or more onerous than, the requirements for compliance in relation to the old use.

#### ***Subdivisions***

Section 116A of the Building Act 2004 sets the Building Code compliance requirements for subdivisions of buildings, which is as follows:

A territorial authority must not issue a certificate under section 224(f) of the Resource Management Act 1991 for the purpose of giving effect to a subdivision affecting a building or part of a building unless satisfied, on reasonable grounds, that the building —

- (a) Will comply, as nearly as is reasonably practicable, with every provision of the building code that relates to one or more of the following matters:
  - (i) means of escape from fire;
  - (ii) access and facilities for persons with disabilities (if this is a requirement under section 118);
  - (iii) protection of other property; and
- (b) Will continue to comply with the other provisions of the building code to at least the same extent as it did before the application for a subdivision was made.

## Findings

### **Alterations**

The Council was aware of the requirements of section 112 and referred to it under BC 1.11 of its *Building Control Procedures Manual*. Furthermore, the Council's building consent processing check-sheet made provision for considering means of escape from fire, and access/facilities for people with disabilities and the Department noted examples of this being used.

In the examples of alterations the Department looked at, there was clear documentation for the reasons for its decisions with the decisions themselves being technically sound.

Although most alterations were assessed under section 112(1), which is a building consent authority function, there was at least one example where the Council appropriately used its discretion as a territorial authority to assess a building consent under sub-section 112(2).

### **Change of use**

The Council had documented policy guidelines<sup>13</sup> and procedures for change of use combined with extension of specified intended life and subdivision of buildings.<sup>14</sup>

An error was noted in the Council's training building control procedures manual (V 1.12) procedure BC 1.11, relating to section 116(1) that mentioned 'change the use' rather than 'extend the life'.

The Council advised it was aware of the requirements of sections 114 and 115 of the Building Act 2004. Its manual outlined a procedure for dealing with a notification of change of use and/or building consent applications if they were received.

The Council's commercial consent processing check-sheet (B251-V4-28/01/09 refers) made provision for reviewing a change of use.

One of the case studies examined included a change of use. The Department found the reasons for the Council's decision-making about what is 'as nearly as is reasonably practicable' under section 115, were not adequately recorded. It was suggested the Council should weigh the benefits and sacrifices in the decision-making and record such matters as:

- what should be in the building to satisfy section 115(a) and (b)
- what is currently in the building
- what is proposed to bring this building toward the standard required by the first bullet point
- the expected useful life of the building
- how often people visit the building
- how many people spend time in or in the vicinity of the building
- the reasonable practicality of any proposed upgrades to the building
- upgrade costs in relation to the project value (where a building consent is required).

<sup>13</sup> Invercargill City Council's *Policy and Guidelines In Relation to the Change of Use, Extension of Life and Sub-Division of Buildings* (T504-V1-03/08/07).

<sup>14</sup> Invercargill City Council's *Building Control BCA Functions Procedures Manual* (V 1.12) internal document only – Procedure BC 1.11 refers.

The Council should ensure, when necessary, it considers all aspects of section 115(b)(i)(A). There was an example of a change of use where there was no evidence that structural performance had been considered.

It would be desirable for the Council to provide public information covering changes of use on its website and in hard copy form.

### **Subdivisions**

The Council had documented policy and procedures for subdivision of buildings combined with change of use and extension of specified intended life.<sup>15</sup>

The Council was aware of the requirements of section 116A and its procedures manual outlined a procedure for dealing with subdivision applications if they were received.

The Council advised it had not received any applications which included existing buildings affected by subdivisions.

### **Conclusion**

On the evidence provided, the Department considered the Council's systems around the alterations, change of use, and subdivision provisions of the Building Act 2004 to be generally adequate, but could be improved by actioning the recommendations below.

<b>Recommendation 3</b>	
<b>The Department recommended that the Council:</b>	<b>Response from the Council:</b>
<b>provide greater information for the public around alterations and change of use.</b>	<b>Council advised it has an information sheet on sections 112, 115 and 116 of the Building Act 2004. This handout will be posted on the Council's website and staff will be reminded of its uses and encouraged to attach it to suspension letters for these types of applications.</b>
<b>amend procedure BC 1.11, under the building control procedures manual (V 1.12, page 38) relating to section 116(1) that mentions 'change the use' when it should read 'extend the life'.</b>	<b>Council advised it had amended this procedure.</b>
<b>record reasoning behind the decision-making when considering a change of use.</b>	<b>Council advised that an additional processing check-sheet will be developed for sections 112 and 115 of the Building Act 2004.</b>

<sup>15</sup> Invercargill City Council's *Building Control BCA Functions Procedures Manual* (V 1.12) internal document only – Procedure BC 1.11 refers.

## 5.4 Building consents subject to waivers and modifications of the Building Code

### Purpose

To examine how the Council considers building consent applications subject to waivers and modifications of the Building Code.

### Background

Under sections 67-70 of the Building Act 2004, a building consent authority which is a territorial authority may grant a building consent application subject to a waiver or modification of the Building Code. A waiver or modification may be subject to any conditions the territorial authority considers appropriate. A territorial authority must notify the Chief Executive of the Department if it grants a waiver or modification. A territorial authority cannot grant a waiver or modification to the Building Code that relates to access and facilities for people with disabilities.

### Findings

The Council had a sound policy on waivers and modifications.<sup>16</sup> However, this policy, particularly in dealing with waivers, has historically been rarely used. The Department found no instances of waivers being issued over the review period and was provided with only one that was issued in 2002 which related to the spread of fire across a boundary. The Council did not make the Department aware of any waivers or modifications that were issued in relation to natural hazards.

Council had not been clear on differentiating between waivers and modifications.<sup>17</sup> This had led to some confusion, as there were six modifications issued in the year ending 30.06.10 which were described as 'durability waivers' rather than 'modifications of Building Code sub-clause B2.3.1'. Although the outcomes were appropriate, the Council should ensure the correct terminology is used in their documentation.

A waiver dispenses with the requirement for a particular application for a building consent, or part of an application, to comply with an aspect of the Building Code. For example, waivers should relate to a particular performance requirement of a specific clause of the Building Code (for example, C3.3.2(d)).

A modification alters a performance requirement of the Building Code in a way which enables the functional requirements and objectives of the clause to still be met. A common example is the modification of sub-clause B2.3.1, which relates to the durability of particular building elements and the durability commencement date for those building elements.

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<sup>16</sup> Invercargill City Council's *Policy and Guidelines for Granting Waivers or Modifications to the New Zealand Building Code* (T515-V1-03/08/07).

<sup>17</sup> To download the Department's waiver and modification form refer to the following link:  
<http://www.dbh.govt.nz/building-code-waiver> .

In accordance with Council's policy, notification to the Department should have the following information:

1. *Building consent number*
2. *Building owner name*
3. *Property location*
4. *Building Code clause/s waived or modified*
5. *The basis upon which the decision to grant the waiver or modification was made*
6. *Any conditions attached to the waiver or modification and reason for the conditions.*

In some of the examples examined by the Department this procedure was not strictly followed and some of the above-listed information was not included (Building Code clause/s waived or modified; any conditions attached to the waiver or modification and reason for the conditions).

The Department found two examples of a code compliance certificate being issued against an amendment to a building consent relating to a durability modification. Section 45(5) of the Building Act 2004 requires that an application for amendment must be made as if it is an application for building consent, but this does not call for a separate code compliance certificate (or building consent) to be issued.

## Conclusion

The Council had a system for handling waivers and modifications. The Council should ensure staff fully understand when it is appropriate to apply the waiver and modification provisions of the Building Act 2004.

<b>Recommendation 4</b>	
<b>The Department recommended that the Council:</b>	<b>Response from the Council:</b>
<b>ensure the correct terminology is used in their documentation (i.e. referring to 'modifications of Building Code sub-clause B2.3.1' rather than 'durability waivers').</b>	<b>Council advised correct terminology is now being used in modifications relating to clause B2.3.1. Forms B107 and B91A have been changed to reflect correct wording.</b>
<b>adopt the Department's <i>Notification of Waiver or Modification Form</i> to ensure the details of waiver or modification sought are clearly documented and notified to the Department.</b>	<b>Council advised it has adopted the Department's <i>Notification of Waiver or Modification Form</i> which will help to ensure all necessary information is documented.</b>
<b>ensure awareness and understanding of the waiver and modification process and requirements amongst the wider building control team, including the guidance provided within the Department's <i>Notification of Waiver or Modification Form</i>.</b>	<b>Council advised it has undertaken training of all staff on the waiver and modification process, use of Council's form B107 and the use of the Department's <i>Notification of Waiver or Modification Form</i>.</b>
<b>cease issuing code compliance certificates for each amendment to a building consent.</b>	<b>Council advised it has ceased this practice.</b>

## **5.5 Enforcing building warrants of fitness and amending compliance schedules**

### **Purpose**

To assess the Council's performance in administering their building warrant of fitness system, including the enforcement of this system, and its process for amending compliance schedules, which are not captured by the building consent process.

### **Background**

Sections 100-111 of the Building Act 2004 set out the responsibilities for owners of buildings that have or are required to have a compliance schedule. These sections also specify the responsibilities of building consent authorities and territorial authorities under the compliance schedule and building warrant of fitness systems. All buildings (except single household units that do not have a cable car) containing specified systems, such as fire alarms and lifts, are required to have these systems listed on a compliance schedule. The owner must ensure continued effective operation of the specified systems and confirm ongoing inspection and maintenance by publicly displaying a current building warrant of fitness in their building and providing a copy of the warrant of fitness to the territorial authority.

### **Findings**

#### ***General***

Historically, the Council has had some shortcomings in the specified system, compliance schedule and building warrant of fitness areas. However, to the Council's credit, it had recognised this and the Department acknowledges that a great deal of work had been undertaken by the Council in order to improve its performance in this space. The Department supports the initiatives introduced by the Council, such as:

- forming a project group which included several building control and customer services staff
- establishing clear staff procedures (incorporating computer screen shots) specifically for creating and altering compliance schedules, plus the Form 11 under the Building (Forms) Regulation 2004
- creating individual specified system templates to assist building consent applicants to provide more useful, site-specific information about each specified system in their applications. This will improve the content and quality of information within the new or amended compliance schedule
- requiring applicants to provide floor plans indicating the location of all specified systems
- refusing to accept building consent applications which do not contain the information outlined in the two previous bullet points
- undertaking on-site audits when a submitted Form 12A did not correspond with the records held by Council.

Bearing in mind that this document is a performance review based on a 'snapshot' of information including case studies of building control work which was undertaken sometime ago, some of the following issues may well have been addressed by the Council's continuous improvement programme and its implemented initiatives.

### **Compliance schedule statements**

The Council's internal *Building Control Procedures Manual* identified compliance schedules and compliance schedule statements as separate documents.<sup>18</sup> It was found there was some confusion and uncertainty amongst Council staff as to the fundamental purpose of each document and when they should be issued.<sup>19</sup> For instance, in two recent examples the supposed compliance schedule was titled 'Compliance Schedule Statement' and the Council's attached covering letter made the following erroneous statement:

*After twelve months your Compliance Schedule is to be replaced by a Warrant of Fitness,...*

A compliance schedule is a foundation document for the life of a building which lists specified systems and establishes their inspection, maintenance and reporting requirements.

In contrast, a compliance schedule statement is prescribed in Form 10 under the Building (Forms) Regulation 2004. It is generally issued by the Council with the relevant code compliance certificate and compliance schedule. Compliance schedule statements are a temporary notification of the specified systems in the building, identify where the compliance schedule is kept, and are only valid for the first 12 months after the issue of the compliance schedule. After this time, a compliance schedule statement is replaced by the first building warrant of fitness which is issued by the building owner or their agent on their behalf. Compliance schedule statements (and Form 12As) are not designed to contain detailed information about the specified systems' inspection and maintenance requirements, which the Council was sometimes including on them – this information should be on the compliance schedule.

### **Amending compliance schedules**

The Council's website contained public information about compliance schedules (new or amended) and building warrants of fitness. This information was technically sound.

The Council had separate documented procedures for amending compliance schedules, with or without a completed Form 11. It was noted that the final procedure on the *Altering a Compliance Schedule* document (and repeated in the *Creating a Compliance Schedule* document) stated the following:

*Then once all the inspections are done on the building consent we issue the code compliance certificate or certificate for public use and the Compliance Schedule documents and send them out to the owner/agent.*

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<sup>18</sup> Version V1.12 of the *Building Control Procedures Manual* (internal document only) – BC 1.16 (Compliance Schedule and Inspection Schedule) and CCC 1.10 (Code Compliance Certificate Issued).

<sup>19</sup> For guidance about the various forms and documents involved in the compliance schedule/ building warrant of fitness regime refer to the Department's publication *Compliance Schedule Handbook* which is freely available online at: [www.dbh.govt.nz/building-code-compliance-documents-downloads#handbooks](http://www.dbh.govt.nz/building-code-compliance-documents-downloads#handbooks)

The Department is of the view that the intent of the Building Act 2004 is where there is a building consent, the new or amended compliance schedule is to be issued with the code compliance certificate, and not with the certificate for public use. It was suggested that the Council's documented procedure be amended accordingly.

It is the building consent authority's role to compile a new (or amended) compliance schedule as a result of a building consent application, and therefore, was outside the broad scope of this technical review. Whereas, it is the territorial authority's role to amend compliance schedules when instigated by the owner/agent, or the independent qualified person, or the territorial authority itself. At the time of the review visit (late April 2011), the Council advised it would only amend a compliance schedule if it received a completed Form 11 (application for amendment to compliance schedule) following an on-site Council audit.

The Department examined and assessed several amended compliance schedules. Although it was not always clear in which capacity the Council was acting in (building consent authority/territorial authority), it would seem the majority of the reviewed amended compliance schedules had arisen as a consequence of a building consent application. The general comments and recommendations in relation to the content and format of the amended compliance schedules equally apply to the Council in either capacity, whether it is compiling amended (or new) compliance schedules.

Although the compliance schedule is not a prescribed form under the Building (Forms) Regulations 2004, the compliance schedule (or amended compliance schedule) is, and should be, an important site-specific document as it sets the required inspection, maintenance and reporting of all specified systems in that building for the life of that building. Therefore, it was surprising to find cases where an amended compliance schedule had been merged into the Form 12A template.

The amended compliance schedule and the Form 12A are two distinct documents serving different purposes. The amended compliance schedule, compiled by the Council based on the information provided by the owner (or their agent), is the foundation document setting out the inspection, maintenance and reporting requirements for all specified systems. Whereas, the Form 12A is the independent qualified person certifying that the inspection, maintenance and reporting procedures set in the compliance schedule have been fully complied with for a given 12 month period.

Therefore, it was not appropriate to combine the amended compliance schedule with the Form 12A template. The Council should create two separate documents in order to prevent confusion between parties involved in the building warrant of fitness/compliance schedule process.

There were examples of amended compliance schedules where, in the main, they had been updated to align with the Building Act 2004 and the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005, however, these examples could have been improved by:

- deleting, after consulting and getting approval from the building owner, features/systems which are not considered specified systems as defined in the Regulations referred to previously (for example, fire hose reels, means of escape, accessible toilets)

- including more site-specific information about each specified system (for example, providing type, model and location for automatic back-flow preventers)
- being specific in inspection/maintenance requirements by nominating a given Standard or Compliance Document or other documentation (rather than providing multiple options), and where a Standard is referred to identifying its revision year (for example, NZS 4541:2007 for automatic systems for fire suppression)
- attaching a floor plan showing the location of the specified systems
- attaching detail sheets for each of the specified systems which includes information under the following headings:
  - reference number
  - specified system
  - system description
  - location
  - performance standard
  - inspection procedure and responsibility
  - maintenance procedure and responsibility
  - reporting procedure and responsibility.

### ***Building warrants of fitness***

The Council had a documented procedure for building warrants of fitness (combined with compliance schedule audits), which was considered to be sound.

The Council had developed a database for tracking annual building warrants of fitness which included an indicator to send reminder letters to owners (or their agents) 60 days prior to the expiry date.

It was found that the Council was endeavouring to be proactive and encouraged consistency by providing standard forms for building warrants of fitness and Form 12As. Although the Department saw examples of submitted building warrants of fitness where the specified systems on the compliance schedule were listed, it was noted that this had not been allowed for in the Council's standard building warrant of fitness form. While this is not a mandatory requirement of prescribed Form 12 of the Building (Forms) Regulations 2004, the Department would support the Council doing this. This practice will help provide useful information to other parties (for example, independent qualified persons or the New Zealand Fire Service) who inspect the building.

The Council should be more vigilant and rigorous in its checking of building warrants of fitness and Form 12As. There was at least one example where a submitted building warrant of fitness and the respective 12As, should have been rejected by Council and returned to the owner's agent for the following reasons:

- the building warrant of fitness failed to provide all of the information required by prescribed Form 12 of the Building (Forms) Regulations 2004
- four months of the 12 month period was not accounted for in relation to the inspection, maintenance and reporting of the mechanical ventilation/air conditioning systems
- some specified systems on the amended compliance schedule had no Form 12A (for example, automatic back-flow preventers)

- the Form 12A for the emergency lighting was signed and dated almost two weeks after the issue date of the supplied building warrant of fitness
- in most of the Form 12As, not all the required fields had been populated, i.e. location of building within site/block number, level/unit number, and owner's contact person
- documentation provided by the independent qualified persons did not reflect the significant changes to the compliance schedule which had occurred 10 months into the 12 month building warrant of fitness period.

These and other factors indicated to the Department that further training of Council staff was required to ensure all relevant staff fully understood and could apply the building warrant of fitness and compliance schedule provisions of the Building Act 2004. The other option is for these functions to be handled, or at least peer reviewed, by dedicated staff that have expertise in these areas.

### ***Compliance schedule audits***

The Council advised compliance schedule audits had recommenced in November 2010 and at the time of the review visit (late April 2011) approximately 100 audits had been undertaken. The Council had a policy of requiring up to five percent of buildings with a building warrant of fitness to be randomly audited annually<sup>20</sup> and this was being achieved.

At the time of the review visit, the Council's audits had a focus on buildings where the Form 12As submitted with the building warrant of fitness did not correspond with the Council's records.

The Council maintained a database of buildings with compliance schedules. The database tracks the compliance schedule/ building warrant of fitness number, the building location, the building warrant of fitness status and the last audit inspection date. Council's policy also required all buildings with compliance schedules to be site audited at least once every 10 years (which is at odds with the five percent maximum quoted in the opening paragraph), however, high-risk buildings, such as hospitals or large crowd activity buildings can be audited annually. Although audits are supposedly random, the Council will audit buildings on information received from the public or an outside agency, such as the New Zealand Fire Service. The Department considers the compliance schedule database to be a good building control tool and it was being well utilised.

The Department was advised that following a Council audit inspection, the Council will only amend the compliance schedule if there is a formal application (Form 11) lodged by the owner or agent (acting on behalf of the owner). However, section 107 of the Building Act 2004 permits territorial authorities to amend compliance schedules on their own initiative, without a completed Form 11 and on condition that the territorial authority consults with the owner.

The Department suggests that the Council consider expanding its auditing activity to proactively look at all existing compliance schedules, particularly those originating under the Building Act 1991. This would help ensure compliance schedules only include those systems

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<sup>20</sup> *Policy and Guidelines for the Audit of Building Warrants of Fitness* (internal document only) – T517 – V1 – 03/08/07.

which meet the current definition of a specified system and accurately reflect all those installed specified systems in the building. This would also enable the Council to notify building owners that certain systems are no longer specified systems and, therefore, do not need to be checked by independent qualified persons. This would reduce compliance costs for the building owner and eventually mean less work for the Council. It would also be a good customer service initiative on the Council's part.

The Council had a compliance schedule/ building warrant of fitness check-sheet (Council form B202 – V1 – 11/10/10) to assist with its audits, which also outlined its procedure when any follow-up action was required. The Department found that these were thorough and decision-making was well documented.

### Conclusion

Although Council was endeavouring to improve its systems in regards to processing and enforcing building warrants of fitness and amending compliance schedules, Council should take particular notice of the following recommendations.

<b>Recommendation 5</b>	
<b>The Department recommended that the Council:</b>	<b>Response from the Council:</b>
<b>ensure compliance schedules and compliance schedule statements are treated as two separate documents.</b>	<b>Council advised it had revised these documents.</b>
<b>ensure amended compliance schedules and Form 12As are treated as two separate documents.</b>	<b>Council advised it believed this situation arose from a misunderstanding and these documents have been revised.</b>
<b>ensure building control staff understand the different purposes of each document, (eg, compliance schedules and compliance schedule statements) the information required to be recorded on each, and issue them at the appropriate times (this should be considered as a training priority).</b>	<b>Council advised that its staff have undergone compliance schedule training on two occasions since the Department's visit. Council believe working with the applications and performing audits will strengthen its knowledge base in this area.</b>
<b>amend its documented procedure to ensure new or amended compliance schedules are issued with the code compliance certificate, and not with the certificate for public use.</b>	<b>Council advised it had amended this procedure.</b>

<p>enhance all issued compliance schedules by:</p> <ul style="list-style-type: none"> <li>• deleting/omitting features or systems that are not considered 'specified systems' as defined by the relevant Regulations</li> <li>• including more site-specific information about each specified system</li> <li>• nominating a specific Standard (including its approval year) or Compliance Document or other documentation for inspection/ maintenance requirements</li> <li>• attaching a floor plan showing the location of the specified systems</li> <li>• attaching detail sheets for each of the specified systems.</li> </ul>	<p>Council advised it is currently deleting features or systems that are not considered 'specified systems' when requested with a Form 11 or when building work is undertaken. During every audit, Council suggests, where a feature or system which is no longer considered a specified system is still active, that the owner files a Form 11 to request its removal. Council advised it will consider revising this to a blanket approach.</p> <p>The format of the compliance schedule has recently been updated and expanded to include: site-specific information, applicable standards, specified system plans and maintenance and inspection requirements.</p>
<p>be more vigilant and rigorous in its checking of building warrants of fitness and Form 12As.</p>	<p>Council advised it expects its approach to building warrants of fitness and Form 12As to become more rigorous with training and experience. Council staff have undergone training and are gaining experience. The Council expects that the level of checking will only increase with time.</p>
<p>remind building owners (or their agents) not to issue building warrants of fitness before all applicable Form 12As certifying compliance have been issued collectively.</p>	<p>Council advised this to be an issue that would likely result in an audit. Staff will be retrained not to accept the building warrant of fitness without all the accompanying Form 12As.</p>
<p>remind independent qualified persons that Form 12As must cover the period between compliance schedule anniversaries (i.e. issued on the anniversary date, or before, if all the procedures have been completed).</p>	<p>Council advised the compliance schedule and compliance schedule statement format had recently changed. They now include the expiry date which should help to keep the independent qualified persons on track.</p>
<p>train all relevant staff to understand and apply the building warrant of fitness and compliance schedule provisions of the Building Act 2004.</p>	<p>Council advised that its staff have undergone compliance schedule training on two occasions since the Department's visit. Council believe</p>

	<b>working with the applications and performing audits will strengthen its knowledge base in this area.</b>
<b>align its policy on auditing building warrants of fitness to ensure the yearly percentage of audited buildings matches the target of reviewing all buildings once every 10 years.</b>	<b>Council advised although its policies state five and ten percent in various documents its current rate is over 100 per year (approximately 12 percent) and this will only increase in the future. The policy discrepancy will be revised.</b>
<b>consider expanding its auditing activity to proactively look at all existing compliance schedules, particularly those originating under the Building Act 1991.</b>	<b>Council advised it is planning to expand its auditing activity from early 2012.</b>

**Note:** For further education, it is suggested that a copy of the Department's guidance on building warrants of fitness and compliance schedules (November 2010) is sent by the Council to every independent qualified person in the district and to building owners when they submit their annual building warrant of fitness. It is also recommended that copies be provided to all relevant Council staff, to familiarise themselves with the legislative requirements. This guidance document is freely available on-line at:

[www.building.dbh.govt.nz/building-warrant-of-fitness-guide](http://www.building.dbh.govt.nz/building-warrant-of-fitness-guide)

## 5.6 Issuing regulatory notices and certificates under the Building Act 2004

### Purpose

To examine the Council's procedures for:

- issuing and enforcing notices to fix
- issuing certificates for public use and to ensure that the buildings the certificates relate to are safe for the public to use
- issuing certificates of acceptance and the steps it takes to decide whether it has reasonable grounds to believe building work complies with the Building Code
- issuing infringement notices and any follow-up action.

### Background

The following parts of the Building Act 2004 were considered in relation to this term of reference.

#### ***Notice to fix***

A notice to fix is a statutory notice requiring a person to remedy a breach of the Building Act 2004 or Regulations made under the Building Act 2004. It is similar to a notice to rectify under the previous Building Act of 1991, but can also be issued for all breaches of the Building Act 2004 (not just for building work). Some important points about notices to fix are noted below.

- A building consent authority or a territorial authority (responsible authority) must issue a notice to fix if it believes on reasonable grounds that there has been any contravention of the Building Act 2004 or the Building Regulations. Common examples could include failing to obtain a building consent, not having obtained an appropriate building warrant of fitness, or failing to meet the necessary inspection, maintenance or reporting procedures for a compliance schedule issued by the Council.
- A notice to fix may instruct the owner to apply for a building consent or for an amendment to an existing building consent.
- If a notice to fix relates to building work carried out without a building consent, it can require the owner to apply for a certificate of acceptance.
- If a territorial authority is not satisfied that the requirements of a notice to fix have been complied with (where building work is required), for example, after a follow-up inspection, it must provide written notice of its reasons and issue a further notice to fix to the specified person.

#### ***Certificate for public use***

Under section 363 of the Building Act 2004 a person who owns, occupies, or controls all or part of a building which is intended to be open to, or are being used by the public, must not use or permit the use of any part of the premises that is affected by building work, if:

- a building consent is required, but has not been granted for the work, or

- no code compliance certificate has been issued and no certificate for public use has been granted, or
- the conditions on a certificate for public use have not been complied with.

It is an offence to contravene this section 363 duty.

If the building owner wishes to allow members of the public to use the building where a building consent has been granted, the building owner may apply for a certificate for public use under section 363A of the Building Act 2004.

### ***Certificate of acceptance***

Under section 96 of the Building Act 2004, a territorial authority may, on application, issue a certificate of acceptance in certain circumstances, including for work done without a building consent or where a code compliance certificate cannot be issued. A certificate of acceptance provides verification for a building owner that part of, or all of, the completed building work carried out without a building consent complies with the Building Code in so far as the Council could ascertain depending on what parts of the building work could or could not be checked.

An owner may apply for a certificate of acceptance when any of the following situations occur:

- an owner (or predecessor in title) carried out building work for which a building consent was required but was not obtained (under either the Building Act 1991 or 2004)
- a building consent authority which is not a territorial or regional authority is unable to, or refuses to issue a code compliance certificate in respect of building work for which it granted a building consent
- building work carried out urgently (see section 42 of the Building Act 2004).

The issuing of a certificate of acceptance does not relieve a person from the requirement to obtain a building consent for their building work. The territorial authority still has the ability to issue a notice to fix and to prosecute if building work has been carried out without consent.

### ***Infringement notice***

Sections 370-374 of the Building Act 2004 deal with the proceedings for infringement offences, including the issue and content of infringement notices and the payment of infringement fees.

The infringement offences and fees are set under Schedule 1 of the Building (Infringement Offences, Fees, and Forms) Regulations 2007 and Schedule 2 sets out the prescribed form of infringement notice.

## **Findings**

### ***Notice to fix***

The Council had a documented policy<sup>21</sup> and procedures around issuing notices to fix, which clearly sets out Council's intent to align itself and its functions with the Building Act 2004 and

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<sup>21</sup> *Policy and Guidelines on the Issue of Notices to Fix* (internal document only) – T511 – V1 – 03/08/07.

associated Regulations. The documentation reviewed showed this policy was being followed by Council staff.

The Council's policy included an 'issuing protocol' which contained a four-step process for dealing with contraventions of the Building Act 2004 or Regulations. The first step reflected the Council's approach to resolving less significant breaches by discussion and negotiation rather than through a heavy-handed approach. However, the Department considered the second step, which involved the issue of a written notice identifying the contravention, was not necessary. Any contraventions that cannot be promptly resolved through the first step should be addressed through the issue of a notice to fix as stipulated in section 164 of the Building Act 2004.

The notice to fix/consent ratio was calculated and compared to figures from other councils.<sup>22</sup> This revealed quite a low ratio which could most likely be attributed to the issuing protocol in Council's policy and procedure around notices to fix.

Although not in the Council's notice to fix policy, the Department was informed that Council's practice was to limit the authority to issue notices to fix to the manager of Building Regulation Services. While it was understandable that a degree of control was required over the issue of such forms, it was possible this was quite limiting when it came to ensuring the Council's obligations under section 164 were met. It was recommended that other building control staff, in senior positions, should be given the freedom to issue notices to fix without the approval of the manager.

The Department examined Council's notice to fix forms against the prescribed Form 13 of the Building (Forms) Regulations 2004. The Council forms largely aligned with the prescribed form. However, the Department noted an instance of a notice to fix that omitted two required fields (location of building and level/unit number). While these fields may not have been relevant to the particular contravention, it is a requirement of the Regulations that these fields be present.

The Department also examined the content of the notice to fix forms, specifically the contravention and remedy fields. The notice to fix forms clearly stated the contravention and the way to remedy the contravention. However, they did not specify the part of the Building Act or Regulations which had been contravened. In addition, some notices contained remedies which had no corresponding contraventions. It is important when giving remedial directives in the notice that the remedies can be linked to a specific breach.

### ***Certificate for public use***

The Department noted there was no Council policy or procedure around issuing certificates for public use, although a standard certificate for public use inspection check-sheet was used by Council staff.

It may be useful for the Council to develop a policy to cover matters such as the types of conditions which may be attached to the certificate under section 363A(3)(b) of the Building Act 2004. A common condition is the inclusion of an expiry date. Although an expiry date is not mandatory information in the prescribed Form 16, the Department believes it is good

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<sup>22</sup> 2053 building consents and three notices to fix issued for the 12 month period ending 30.06.10.

practice to include it, as it clearly states to the applicant that the certificate for public use is an interim measure only, and it positively reinforces the need for the applicant to obtain a code compliance certificate.

In general, the Council issued certificates for public use with an expiry date which the Department agrees with, however, the calendar date was not always specified. For example, in two cases the expiry date was listed as finishing upon the issuing of the code compliance certificate.

The certificates for public use examined by the Department were applied for in the appropriate time frame and issued correctly. However, the Council advised the certificates were not being followed up after the expiry date had elapsed. On one occasion there was no documented evidence to suggest any subsequent inspections were undertaken for Council to establish if the building was safe for public use.

Council's certificate for public use application form (Form 15) complied with the Building (Forms) Regulations 2004 although in some cases it was not fully populated by the applicant (i.e. applicant's e-mail address, agent's e-mail address, after hours phone number and agent's relationship to owner). Furthermore, the Department noted that the issued certificate for public use (Form 16) was missing a prescribed field (i.e. applicant's e-mail address).

It was found Council was receiving appropriate verification that critical life safety specified systems were appropriately certified and functioning properly, before issuing certificates for public use.

### ***Certificate of acceptance***

The Council had a documented policy and procedure for issuing certificates of acceptance. This material was appropriate and included the fundamental considerations the Department would expect to be covered. The Council's forms for applying for a certificate of acceptance and its certificate of acceptance standard form complied with prescribed Forms 8 and 9 of the Building (Forms) Regulations 2004 in nearly all aspects. Council's Form 9, however, stated the first point of contact for communications should be directed to the building consent authority rather than the territorial authority. Moreover, in both forms not all of the required fields were populated.

In one example, the 20 day timeframe for processing certificates of acceptance had been exceeded. The Council's records did not indicate whether the application had been suspended as a result of the Council's inspection finding an issue that required remedial action. This may give rise to an incorrect perception that the statutory timeframe had been exceeded because of the Council's slow processing, when in fact this was not the case. The Council should enhance its system to record any suspensions and their reasons.

The same example highlighted insufficient information from applicants to justify the Council issuing a certificate of acceptance. Applicants should provide clear reasons why a certificate should be issued. Unless it is a minor omission, the Council should not accept incomplete applications for processing and should require applicants to re-submit their applications.

Certificates of acceptance are not expected to replicate or have the same status as code compliance certificates, and should be limited in what they include. As noted above, the

Council had an appropriate documented policy and procedure for issuing certificates of acceptance which stated:

*Council should issue a certificate of acceptance only if it is satisfied that to the best of its knowledge and belief and on reasonable grounds, that insofar that it can ascertain, the building work, subject to exclusions, comply with all the provisions of the building code... it must include the generic information as well as the following:*

- *Details of building work covered by the certificate of acceptance*
- *List of exclusions*
- *Details of work inspected.*

Informal discussions with building control staff indicated that, in practice, staff were not consistent in implementing the above policy. For example, although exclusions on certificates of acceptance would typically be expected, none were observed.

It was apparent that Council staff regarded a certificate of acceptance as equivalent to that of a code compliance certificate for a building consent, requiring all building work to comply with the Building Code. For example, an observed inspection sheet for a certificate of acceptance stated that 'This consent can now be issued with a certificate of acceptance'. Council staff had, in some instances, gone to great lengths to assess the work including deconstructive inspections. Instead, Council should be listing specific aspects of compliance, non-compliance or elements of building work that could not be assessed.<sup>23</sup>

### ***Infringement notices***

The Council had adopted a policy around issuing infringement notices but the Council's Building Regulation Services had elected not to implement the policy at the time of the review visit. The manager of Building Regulation Services advised the Department the reason for this was that the Council would prefer education rather than enforcement. Once the recently implemented Council initiatives around improving the quality and accuracy of compliance schedules and building warrants of fitness have bedded in properly, it is intended to introduce infringement notices for offences relating to building warrants of fitness.

Anecdotal evidence from other territorial authorities suggests the issuing of infringement notices have been used increasingly and found to be a valuable building control tool, particularly in relation to building warrant of fitness compliance. The Department believes the Council's Building Regulation Services should seriously consider its use (as well as notices to fix) as part of its day-to-day operations.

### **Conclusion**

The Department reviewed Council's issuing of regulatory notices and certificates and have the following recommendations to strengthen its systems.

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<sup>23</sup> For guidance see the Department's Determination 2010/008.

<b>Recommendation 6</b>	
<b>The Department recommended that the Council:</b>	<b>Response from the Council:</b>
issue a notice to fix in lieu of a written notice (step two of Council's four-step process) when a breach is not promptly resolved through discussion and negotiation.	Council advised it was happy to issue a notice to fix in situations which mirror the examples the Department has given. For minor issues, such as work not complying with a building consent, Council's first response will still be a written site notice. For major instances of non compliance with the building consent, a notice to fix will be issued.
ensure forms for applying for certificates for public use (and the standard certificates that the Council issues) satisfy all of the requirements of prescribed Forms 15 and 16 of the Building (Forms) Regulations 2004.	Council advised its forms have been modified to show all required fields.
ensure certificates of acceptance satisfy the requirements of the prescribed Form 9 of the Building (Forms) Regulations 2004.	Council advised it had changed its Form 9 to reflect the fact that the first point of contact is the territorial authority.
ensure certificate of acceptance application forms as set out in Form 8 of the Building (Forms) Regulations 2004 are fully completed by the applicant.	Council advised that its staff have been reminded of the need for applicants to complete all fields of the certificate of acceptance application form.
ensure all Council staff follow the documented policy and procedures on certificates of acceptance.	Council advised staff training and reinforcement of requirements has been undertaken.
issue certificates for public use with clear expiry dates, track all certificates for public use it issues, and follow-up on expired certificates for public use.	Council advised it is designing a tracking system which will send an email reminder to a nominated Council officer for follow-up to occur.  Clear expiry dates are being put on new certificates for public use.
be less reluctant to use the enforcement tools available to it (eg,	Council advised it has no issue with using the enforcement tools

<p>notices to fix and infringement notices) particularly around issues of public and building user safety</p>	<p>described, but it simply has not found it necessary to do so. Council's approach to date has been one of education rather than enforcement, and this has worked well.</p> <p>If a situation warrants tougher enforcement the Council will issue the necessary infringement notice.</p>
<p>enhance its certificate of acceptance system to:</p> <ul style="list-style-type: none"> <li>• record any suspensions and their reasons</li> <li>• ensure it only accepts complete applications for processing which contain all of the supporting information the Council needs to process it efficiently</li> <li>• ensure any work not covered by the certificate is clearly communicated.</li> </ul>	<p>Council advised it has a procedure for suspending certificates of acceptance, similar to that used for the suspending of building consent applications. It allows the processing officer to ask for more information and stop the clock. This is then documented on the certificate of acceptance application.</p> <p>Vetting staff have been reminded as to the requirement to only accept complete applications.</p> <p>Council will ensure any work not covered by the certificate of acceptance is clearly noted on the issued certificate.</p>

## **5.7 Functions in relation to dangerous, earthquake-prone or insanitary buildings**

### **Purpose**

To examine the Council's procedures in relation to exercising their powers under section 124 of the Building Act 2004.

### **Background**

Section 124 of the Building Act 2004 provides powers to territorial authorities in respect of dangerous, earthquake-prone or insanitary buildings.

### **Findings**

#### ***Dangerous and insanitary buildings***

The Council had separate documented policies and internal procedures for dangerous and insanitary building notifications as adopted by Council on 08.11.05. The policies were available on the Council's website. It was noted that no insanitary building notices had been issued for the year ending 30.06.10.

The Department found that the Council was following its policies and processes and was proactive in monitoring and enforcing the dangerous and insanitary building requirements when necessary. The Council's record keeping, evidence gathering and document control in relation to dangerous building notices was found to be sound. Under section 216 of the Building Act 2004, a territorial authority must keep certain information about buildings for the life of the building. In this instance, the Council records were well-detailed, filed in a logical sequence and proved easy to follow. The Council's use of file notes and photographs was also viewed as good practice.

While the Council initially seeks to encourage voluntary compliance, the Department noted, when necessary, the Council had resorted to court proceedings.<sup>24</sup> The Department believes the Council's enforcement action could be strengthened by more frequent use of notices to fix and implementing its infringement notice policy for offences under the Building Act 2004.

The case study examined by the Department demonstrated that the Council promptly reacted to a dangerous building decisively liaising with all the appropriate stakeholders to mitigate any risk to the public.

#### ***Earthquake-prone buildings***

The Council had a documented policy and internal procedures for managing earthquake-prone buildings. The policy was available on the Council's website.

The Council's policy provided a passive approach to dealing with earthquake-prone buildings. That is, it did not actively seek out potentially earthquake-prone buildings and it generally relied on notifications through building consent applications involving change of use. At the

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<sup>24</sup> Invercargill City Council v AB and SR White (2006).

time of the review visit, Council advised it was reviewing its earthquake-prone building policy and was awaiting the publication of the relevant Department's guidance document that had subsequently been deferred due to the series of Canterbury earthquakes of 2010/11.

The Department recognised that, given the era of building construction in the central business district, this building stock was likely to contain a large number of potential high-risk, earthquake-prone buildings. The Department strongly urges the Council to be more proactive in identifying and reducing the risk the buildings may pose.

As mentioned previously, as at April 2011, Council only identified earthquake-prone buildings through building consents involving change of use. As an aside, with regard to change of use, Council should ensure it considers all aspects of section 115(b)(i)(A), including structural performance. It may also wish to consider expanding its policy on building alterations to include consideration of earthquake-prone buildings as set out in the following Department guidelines.<sup>25</sup>

*Sections 112 and 113 of the Building Act 2004 provide arrangements for handling applications for building consents for alterations to existing buildings. Except in relation to escape from fire and access for people with disabilities, the legislation does not require any further upgrading of the building though it must continue to comply with the other provisions of the Building Code to the same extent as before the alteration. Although the Building Act 2004 does not require an altered building to achieve the current Standard in regard to structural performance, a territorial authority that has adopted a passive approach to the implementation of its earthquake-prone building policy should ensure that applications for these sorts of consent are considered in the context of its earthquake-prone building policy. That is, the application is the trigger for applying the policy requirements.*

*In these circumstances, the policy could require applicants to provide an initial evaluation of the building's performance as part of the application process. If the initial evaluation process indicates that the building is earthquake-prone, the earthquake-prone building policy should require the territorial authority to serve notice under section 124. If the consent application includes significant structural work, it is recommended that the territorial authority require action to improve the building's structural performance at the time of undertaking the alterations.*

## **Conclusion**

The Council's dangerous and insanitary buildings policy was administered and documented well. The Council at the time of the review visit had a passive earthquake-prone building policy which could be improved by the following.

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<sup>25</sup> *Earthquake-Prone Building Provisions of the Building Act 2004* document available at: [www.dbh.govt.nz/bofficials-earthquake-prone-buildings](http://www.dbh.govt.nz/bofficials-earthquake-prone-buildings)

<b>Recommendation 7</b>	
<b>The Department recommended that the Council:</b>	<b>Response from the Council:</b>
<p>re-evaluate its current policy on earthquake-prone buildings and be more proactive in identifying and reducing the risk the buildings may currently pose, particularly in the central business district.</p>	<p>Council advised it was mindful of the Department's original advice on not producing a revised policy and adhered to this advice. The Department have since changed its advice so it is intended that Council's Building Regulation Services will propose a revised policy for Council approval and public consultation. It would be beneficial if the Department did not change its advice without discussing the implications with Council staff.</p> <p>Council staff have been assessing buildings and forwarding information to owners for their response.</p>



## 6. Feedback from the Council

When carrying out technical reviews, the Department gives territorial authorities a reasonable opportunity to make a submission on the report and to provide its feedback.

The Council's feedback has been included throughout this report.

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