



## Determination 2014/042

### Regarding the exercise of an authority's powers of decision in relation to a dangerous and insanitary building at 90 Alexander Street, Greymouth



#### 1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.
- 1.2 This determination arises from the re-issuing by the authority of a notice in respect of a dangerous and insanitary building under section 124(c) and (d) of the Act. The authority has subsequently queried the application of section 125(1A)(e) for situations where a building remains dangerous and/or insanitary at the end of the maximum 30 day period for a notice that has been reissued.
- 1.3 In other words, the issue of concern is what powers are available to the authority to restrict entry to a building after a notice for a dangerous and/or insanitary building has been reissued and the building remains dangerous and/or insanitary at the end of the maximum period of 30 days from when the notice was reissued.
- 1.4 In order to consider this issue, the authority has applied for a determination on the exercise of its powers in issuing a notice under section 124 of the Act for a building at 90 Alexander Street, Greymouth as an example. The authority is of the view that it is powerless to continue to restrict entry at the end of the maximum period of 30 days from when the notice was reissued (refer paragraph 3.2).

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<sup>1</sup> The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at [www.dbh.govt.nz](http://www.dbh.govt.nz) or by contacting the Ministry on 0800 242 243.

1.5 In this determination, I therefore consider the parties to be:

- Grey District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority and who is the applicant, and
- the owner of the subject house, Eastman Developments Ltd (“the owner”)

1.6 The content of the section 124 notice is not in dispute, nor are the reasons why the notice was issued or the extent of damage to the building. I have taken the matter for determination<sup>2</sup> as being the refusal to reissue the section 124(2)(d) notice after the expiry of the relevant 30 day + 30 day time periods specified in section 125(1A)(d) and (e).

## 2. The building and background

2.1 The subject building is located on a sloped section, with a footpath and public highway to the east. The building is a single storey structure, with a partial basement level under the west end of the building that is not enclosed and is used for storage of materials. There is currently no physical impediment, such as a fence or hoarding, to prevent someone entering the property.

2.2 On 17 April 2014, Grey District was subject to the effects of Cyclone Ita which resulted in extensive damage to a number of buildings in the district. On 22 April 2014 officers of the authority carried out a ‘drive-by’ assessment, noting that there was damage to the roofing of the subject house. The owner and the authority subsequently met on 28 April 2014 to discuss their shared concerns as to the condition of the building, with the owner advising the insurance company had already been approached on the matter.

2.3 On 1 May 2014 the authority again visited the site and took some photographs of the exterior. The authority was not able to gain access to the building but noted that it appeared to be unoccupied. The officer of the authority recorded a number of items of concern and concluded that ‘it’s not safe to access the building, or move around the property’. The officer considered the building dangerous in terms of section 121(1)(a), and insanitary in terms of section 123(a) and (b); the officer recommended a dangerous and insanitary notice be issued.

2.4 On 1 May 2014 the authority sought advice from the Ministry regarding the application of section 125(1A). The authority provided as an example the situation of a building the authority owned that was both dangerous and insanitary, but where the period required for public consultation and building works would be approximately 3 months. The authority stated it’s concern that the Act ‘doesn’t state what options the [authority] has after the second 30 day period has elapsed to continue to restrict access to a building that may still be dangerous and/or insanitary’.

2.5 The Ministry responded on 2 May 2014, noting that if the authority wanted to stop people using the building for a longer period of time, the notice would need to be issued under section 124(2)(b) or (c). Section 128 then prevents anyone occupying or using the building until the notice has been complied with. The Ministry’s advice went on to state:

The [authority] should only issue notices under s. 124(2)(d) for “affected” buildings or in circumstances where the danger/insanitary can be remedied quickly. Once a s. 124(2)(d) notice expires (including the additional 30 days) then it is of no further

effect. If the building is still dangerous or insanitary after the notice expires, the [authority] will have to issue a new notice under s. 124(a),(b) or (c).

2.6 On 6 May 2014 the authority issued a notice to the owner that the building was deemed to be:

Dangerous due to unsecured roof finishes and loose materials on the roof, damaged decking (under the verandah) leading to the front door (east elevation of the building), and damaged, incomplete and decaying high level decking and safety barrier to the rear of the building (west elevation); and

Insanitary as it is offensive or likely to be injurious to health because part of the roof is damaged and missing due to storm damage; and the building has insufficient or defective provisions against moisture penetration and is therefore causing dampness in the building;

The notice required the owner complete following

Ensure the building remains unoccupied (except for any works associated with any assessment or repair of the building) until such time as the building is deemed not to be dangerous or insanitary; and

Make safe or secure any loose or unsafe roof finishes by 20 May 2014; and

Demolish the building by 7 July 2014; or

Make arrangements for a competent person (e.g. Structural Engineer) to undertake appropriate invasive investigations as to the structural integrity and durability of the existing subfloor, load-bearing walls, and roof framing structural elements, plus associated internal finishes (e.g. ceilings, wall linings, and floors) 7 July 2014; and

Reduce or remove the danger by replacing and/or repairing the damaged decking (under the verandah) leading to the front door (east elevation of the building), and damaged, incomplete and decaying high level decking and safety barrier to the rear of the building (west elevation) (as per above) 7 July 2014; and

Prevent the building remaining insanitary by replacing and/or repairing the roof to prevent moisture penetration by 7 July 2014.

2.7 On 9 June 2014 the authority reissued the dangerous and insanitary notice.

2.8 By email on 9 June 2014 the authority also applied for a determination 'to clarify the period that [the authority] can impose (if any) in a section 124 notice ... for a dangerous, affected, earthquake-prone, or insanitary building, in respect of restricting entry to that building ... beyond that which is stated in section 125(1A)(d) and (e)'. I sought some clarification regarding a specific building to which the authority had exercised its powers of decision and the application was accepted on 16 June 2014.

### 3. The submissions

3.1 With the application for determination the authority provided copies of the following:

- An internal email describing the authority's assessment of the condition of the building and recommending a dangerous and insanitary notice be issued (refer paragraph 2.3).
- Four photographs of the building, showing damage to the roof and general condition of the exterior.
- An email of 1 May 2014 from the authority to an officer of the Ministry seeking advice on the application of section 125(1A), and the Ministry's response.

- The dangerous and insanitary notices – issued on 6 May 2014 and reissued on 9 June 2014.

3.2 A covering letter to the application for determination, dated 6 June 2014, set out some of the background and the authority’s submission on the matter. I have summarised the authority’s submission as follows:

- The Building Amendment Act 2013 (“the Amendment”) ‘does not state what powers [an authority] has to restrict entry to a building that may still be dangerous and/or insanitary after the two periods of 30 days has expired’.
- The authority acknowledges it ‘may erect a hoarding or fence to prevent people from approaching the building nearer than is safe (section 124(2)(a))... but these could be perceived to be redundant and meaningless if the maximum time frame imposed ... is a combined period of 60 days.’
- It is the authority’s understanding, and concern, that the authority may be powerless to continue to restrict entry to any dangerous and/or insanitary buildings beyond a maximum period of 60 days.
- It is the authority’s view that to “approach” a building (section 124(2)(b)) is not the same as “restricting entry” (section 124(2)(d)). The issue is whether by issuing a notice under section 124(2)(b) is that sufficient to “restrict entry” to the building; and if it is, why have section 124(2)(d) at all?
- It was questionable that the control measures available to prevent people from approaching a building by putting up a hoarding or fence ‘includes or limits the possibility of persons still having the right to gain entry into the same building. This is particularly applicable if the authority decides for reasons of practicality, lack of physical and material resources, and associated costs, that it chooses not to erect a hoarding or fence around a dangerous and/or insanitary building. [An authority] may put up a hoarding or fence, it’s not obliged to.’
- The purpose of the authority’s application for determination ‘is to clarify the period that [an authority] can impose ... a Section 124 notice ... in respect of restricting entry for particular purposes ... beyond that [period] stated in Section 125(1A)...’.

3.3 The authority provided the example of a building that was dangerous and insanitary, but where the owner of the building and the insurer were in dispute. The authority noted that this was not an uncommon situation after the cyclone and that in the meantime the buildings remain unattended to and deteriorate further.

3.4 The authority also acknowledged the additional powers it has under section 126, but considered that it was cost prohibitive and time consuming, and with no guarantee that a District Court would accept the authority’s application.

3.5 In regards to previous correspondence from the Ministry (refer paragraph 2.5), the authority submitted:

- Section 124(2)(d) does not state that it only applies to ‘affected buildings or those that can be “remedied quickly”’. “Remedied quickly” is open to interpretation.
- Issuing a new notice under section 124(a), (b), or (c), ‘could mean [the authority] could have to issue three section 124 notices over the 60 day

period...’. This is ‘time consuming’ and the enforcement costs on the building owner would ‘increase exponentially’.

- 3.6 A draft determination was issued to the parties for comment on 30 June 2014.
- 3.7 The authority provided a submission in response to the draft by letter dated 9 July 2014, noting the authority was in general agreement with the draft determination. The authority sought further clarification on the purpose of a s124(2)(d) notice as opposed to or in addition to the other actions available to the authority under s124.
- 3.8 The authority also submitted that the considerations put forward in paragraph 4.2.1 could be highly subjective and potentially contentious (particularly between an authority, building owner(s), insurer(s) and the general public). The authority requested that the Ministry provide additional and more comprehensive guidance on the application and enforcement of s124.

## **4. Discussion**

### **4.1 General**

- 4.1.1 There is no dispute between the parties as to the status of the building as a dangerous and insanitary building for the purposes of the Act. Following the authority’s assessment of the building, section 124 provides for a number of actions that the authority may carry out, and the authority has discretion as to which action or combination of actions is appropriate in the circumstances. Those actions include
- putting up a fence or hoarding to prevent people approaching the building
  - attaching a notice on or near the building that warns people not to approach it
  - issue a notice requiring building work to be carried out
  - issue a notice restricting entry to the building.
- 4.1.2 In this instance the authority has issued a notice under section 124 identifying the building as both dangerous and insanitary. Though not specifically stated on the notice, having regard to the content I consider that the notice has been issued under paragraphs (2)(c) and (2)(d) of section 124; the notice both describes options available to the owner to reduce or remove the danger and prevent the building remaining insanitary (section 124(2)(c)(i) and (ii)), and requires the owner to ‘ensure the building remains unoccupied ... until such time as the building is deemed not to be dangerous or insanitary’ (section 124(2)(d)).
- 4.1.3 A notice issued under section 124(2) should always specify in the notice the relevant provision of section 124(2) the notice is issued pursuant to. It is not satisfactory to expect an owner to deduce the relevant power in section 124(2) that has been applied, even though that may be reasonably clear from the wording of the notice. For example, to the extent the notice was issued under section 124(2)(d) it is unclear how the notice ‘restricts entry to the building for particular purposes or to particular persons or groups of persons’, or if the notice was issued under section 124(2)(b) whether it was attached in a prominent place on or adjacent to the building warning people not to approach the building.
- 4.1.4 Section 125 sets out the requirements for notices requiring building work or restricting entry, and those requirements are different according to whether the notice was issued under section 124(2)(c) or 124(2)(d). The first three requirements for both notices are the same i.e. section 125 requires the notice be in writing, fixed to

the building, and given to persons listed in section 125(2). (The authority has confirmed that the original notice and the reissued notice were fixed to the building.)

- 4.1.5 The differences in requirements for a notice under section 124(2)(c) or under section 124(2)(d) are as follows:

<b>s125(1) – for notices issued under section 124(2)(c) requiring work be carried out</b>	<b>S125(1A) – for notices issued under section 124(2)(d) restricting entry</b>
(d) state the time within which the building work must be carried out, ...; and	(d) may be issued for a maximum period of 30 days; and
(e) state whether the owner of the building must obtain a building consent in order to carry out the work required by the notice	(e) may be reissued only for a further maximum period of 30 days.

- 4.1.6 The content of the notice complies with the requirements of section 125(1); however doubt has arisen about the application of section 125(1A) if the building remains dangerous or insanitary at the end of the period specified in that subsection.

## **4.2 The application and relationship of sections 124, 125 and 128**

- 4.2.1 Section 124(d) allows an authority to restrict entry to an earthquake-prone, dangerous, affected, or insanitary building for particular purposes or to particular persons or groups of persons, and section 125(1A) sets out the specified period of time that restriction can have effect.
- 4.2.2 A section 124(d) notice has a temporary effect (30 days + 30 days). I consider its use is appropriate in circumstances where the danger posed is temporary, where it is reasonable to allow limited entry to the building, or where the matter giving rise to the notice is able to be remedied within this time.
- 4.2.3 Once a section 124(2)(d) expires it is of no further effect and the authority has no further power to reissue a notice under section 124(2)(d). Irrespective of this, section 128 continues to prohibit the use or occupancy of the building in circumstances where the authority has elected to put up a fence or hoarding (section 124(2)(a)), or required a notice warning people not to approach the building (section 124(b)).
- 4.2.4 In my view a notice issued either under section 124(2)(a) or (b) would have been appropriate in this case. The authority itself has noted various features of the building that suggest it should not be approached, including the loose roofing and the damage to the verandah decking leading to where the section 124 notice is affixed.
- 4.2.5 The authority has stated that to limit the “approach” to a building (section 124(2)(b)) is not the same as “restricting entry” (section 124(2)(d)) and has queried whether issuing a notice under section 124(2)(b) is sufficient to “restrict entry” to a building.
- 4.2.6 It is logical to me that if a person is not able to “approach a building”, whether by a physical barrier or by way of a warning not to do so, then that person’s entry to the building is also restricted. As above, in my view the provision of a section 124(2)(d) notice is intended to allow restricted entry by some persons and not others.
- 4.2.7 The remedies set out in section 124 may be used in combination or singularly by an authority to suit individual circumstances; the circumstances may include:
- whether the danger is present only inside the building, in part of the building, or in the approach to the building
  - the likelihood that people will approach the building given its location, its proximity to a public space, and ease with which the building or property can be accessed

- evidence that the building is being accessed and/or used.
- 4.2.8 There will be situations where a temporary restriction on entry is adequate (refer paragraphs 4.2.1 and 4.2.2 above) as notice under section 124(2)(d) specifically provides for restricted entry into the building. The issue of such a notice would indicate that the “approach to the building” or being in its immediate vicinity poses no danger. It is important to note that the use of one enforcement action under section 124(2) does not prevent the use of one or more other actions under section 124(2) at a later time.
- 4.2.9 The time periods prescribed in section 125(1A) do not limit an authority’s powers in respect of a notice issued under section 124(2)(a) or (b), and a notice issued under section 124(2)(a) or (b) preventing or warning people from approaching a building restricts persons from entering the building. The requirements of section 128 also prohibit the use or occupancy of the building in those circumstances. In my view, section 124(2)(a) or (b) provide effective restrictions on the entry to a building in those situations where a building has remained or is likely to remain dangerous, insanitary, affected or earthquake-prone beyond the periods set out in section 125(1A)(d) and (e).
- 4.2.10 In addition, the authority has powers under section 126 to carry out work ‘if any work required under a notice issued by the territorial authority under section 124(2)(c) is not completed, or not proceeding with reasonable speed...’. This may be appropriate in situations such as the subject house where the authority has concerns regarding loose and unsecured roofing material that the authority considers poses a danger beyond the property’s boundaries if it is again subject to high winds.
- 4.2.11 Given the circumstances of this case it is for the authority to consider the exercise of its powers under section 124(2)(a), (2)(b) and (2)(c) after the expiry of the notice issued under section 124(2)(d). As noted above, I consider the issue of a notice under section 124(2)(a) or (b) may have been a more appropriate first step in this instance.

## **5. The decision**

- 5.1 In accordance with section 188 of the Building Act 2004, I confirm the authority’s refusal to reissue the section 124(2)(d) notice after the expiry of the relevant 30 day + 30 day time periods specified in section 125(1A)(d) and (e).

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 12 September 2014.

John Gardiner  
**Manager Determinations and Assurance**

## Appendix A

### A.1 The relevant sections of the Act:

#### *Definitions of dangerous, affected, earthquake-prone, and insanitary buildings*

##### **121 Meaning of dangerous building**

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

(a) in the ordinary course of events (excluding the occurrence of an earthquake), the building is likely to cause—

(i) injury or death (whether by collapse or otherwise) to any persons in it or to persons on other property; or

(ii) damage to other property; or

...

##### **123 Meaning of insanitary building**

A building is insanitary for the purposes of this Act if the building—

(a) is offensive or likely to be injurious to health because—

(i) of how it is situated or constructed; or

(ii) it is in a state of disrepair; or

(b) has insufficient or defective provisions against moisture penetration so as to cause dampness in the building or in any adjoining building; or

...

#### *Powers of territorial authorities in respect of dangerous, affected, earthquake-prone, or insanitary buildings*

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

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

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

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

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

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

(i) reduce or remove the danger; or

(ii) prevent the building from remaining insanitary:

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

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



**125 Requirements for notice requiring building work or restricting entry**

- (1) A notice issued under section 124(2)(c) must—
- (a) be in writing; and
  - (b) be fixed to the building in question; and
  - (c) be given in the form of a copy to the persons listed in subsection (2); and
  - (d) state the time within which the building work must be carried out, which must not be less than a period of 10 days after the notice is given or a period reasonably sufficient to obtain a building consent if one is required, whichever period is longer; and
  - (e) state whether the owner of the building must obtain a building consent in order to carry out the work required by the notice.
- (1A) A notice issued under section 124(2)(d)—
- (a) must be in writing; and
  - (b) must be fixed to the building in question; and
  - (c) must be given in the form of a copy to the persons listed in subsection (2); and
  - (d) may be issued for a maximum period of 30 days; and
  - (e) may be reissued once only for a further maximum period of 30 days.
- (2) A copy of the notice must be given to—
- (a) the owner of the building; and
  - (b) an occupier of the building; and
- ...
- (3) However, the notice, if fixed on the building, is not invalid because a copy of it has not been given to any or all of the persons referred to in subsection (2).

**126 Territorial authority may carry out work**

- (1) A territorial authority may apply to a District Court for an order authorising the territorial authority to carry out building work if any work required under a notice issued by the territorial authority under section 124(2)(c) is not completed, or not proceeding with reasonable speed, within—
- (a) the time stated in the notice; or
  - (b) any further time that the territorial authority may allow.
- ...

**128 Prohibition on using dangerous, affected, earthquake-prone, or insanitary building**

- (1) This section applies if a territorial authority has done any of the following:
- (a) put up a hoarding or fence in relation to a building under section 124(2)(a);
  - (b) attached a notice warning people not to approach a building under section 124(2)(b);
  - (c) issued a notice restricting entry to a building under section 124(2)(d).
- (2) In any case to which this section applies, and except as permitted by section 124(2)(d), no person may—
- (a) use or occupy the building; or
  - (b) permit another person to use or occupy the building.