



Determination 2018/028

Regarding the decision to issue a notice to fix for the means of escape from fire in a building at 345 to 347 Main Street, Palmerston North

Summary

This determination considers whether the authority was correct to issue a notice to fix in respect of locks to doors that are providing the means of escape to a commercial building containing food and retail outlets. The determination considers whether the locked doors provide adequate means of escape from fire when the building has no occupants.

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, Katie Gordon, Manager Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The parties to the determination are:
 - the owner of the property that the notice to fix relates to, Brian Green Properties (1971) Ltd, which is the applicant in the current determination (“the applicant”)
 - Palmerston North City Council, carrying out its duties and functions as a territorial authority or a building consent authority (“the authority”).
- 1.3 I have also provided Fire and Emergency New Zealand (FENZ) with the determination documentation for comment by way of consultation under section 170 of the Act.
- 1.4 This determination arises from the authority’s decision to issue a notice to fix in respect of the applicant’s building on the grounds the building had inadequate means of escape from fire under section 116B² of the Act. Accordingly, the matter to be determined³ is whether the authority correctly exercised its powers of decision in issuing the notice to fix.
- 1.5 The notice to fix also considers matters related to specified systems in the building which are not considered in this determination.
- 1.6 In making my decision, I have considered the application, the submissions of the parties, and the other evidence in this matter. I have not considered any other aspects of the Act or Building Code, beyond those required to decide on the matter to be determined.

¹ The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.building.govt.nz or by contacting the Ministry on 0800 242 243.

² In this determination, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

³ Under sections 177(1)(b) and 177(2)(f) of the Act.

2. The building

- 2.1 The building that this determination relates to is a block of food and retail outlets located in the central business district of Palmerston North. The block was constructed in 1979. It is rectangular in shape and originally contained nine separate shops of a roughly similar size. Each of these original shops also contained a mezzanine floor. There are three separate toilet facilities in the block, which are shared by the shops (as described in paragraph 2.6). The block as a whole, including the tenancies and shared areas, represents one fire cell⁴.
- 2.2 Since its construction, three subsequent building consents have been issued in relation to the building, and some of the original shops have been combined to make larger premises. The building currently contains six different shops of varying sizes (approximate net areas shown):
- shops 1, 2 and 3 (combined into one tenancy) – 217m²
 - shop 4 – 83m²
 - shop 5 – 71m²
 - shop 6 and 7 (combined into one tenancy) – 224m²
 - shop 8 – 76m²
 - shop 9 – 94m².
- 2.3 Each of these tenancies contains an external door on its street frontage leading to the footpath and road beyond. These doors serve as the principal or final exit from the building in the event of a fire, with each door representing the sole means of exit to the outside from each of the tenancies.
- 2.4 The last of the three building consents (No. 5772) was issued on 19 February 2008, and related to work on the mezzanine floors in one of the tenancies. It was a condition of this consent (and one earlier consent I have sighted) that ‘Exit doors on escape route may not be fitted with locking devices that require the use of a key’. This was stated to be in accordance with Clause C of the Building Code (First Schedule, Building Regulations 1992). A code compliance certificate was issued in relation to building consent No. 5772 in 2010.
- 2.5 The authority claims that some point after this code compliance certificate was issued, the locks on the front doors of all the tenancies were changed, so that they could only be opened using a key. However, these key locks were subsequently replaced with locks that could be opened from the inside with ‘thumb turns’, so that at the point that a ‘building warrant of fitness audit inspection’ was carried out in April 2017 (see paragraph 3.2) ‘the final exits [had] been put back to their previously consented and permitted condition’.
- 2.6 The tenancies share toilet facilities, which are located towards the rear of the building. Shops 4 and 5 share one set of toilet facilities, while shops 8 and 9 share a second set. Shop 6 and 7, which has been combined to form one tenancy, has access to both sets of shared toilet facilities, from doors on either side of the shop. (The largest tenancy, consisting of shops 1, 2 and 3 combined, has its own toilet facilities, and does not form part of this determination.) Access to the shared toilet facilities is via a door from each of the tenancies that use them. Each of these internal doors (of

⁴ ‘Firecell’ is defined in C/AS1 as: Any space including a group of contiguous spaces on the same or different levels within a building, which is enclosed by any combination of fire separations, external walls, roofs, and floors

which there are six in total) is currently locked using a key and it is these locks that were part of the reason for the authority issuing the notice to fix which is the subject of this determination.

3. Background

- 3.1 The authority has issued a compliance schedule (No. 25059) in relation to the building. Specified system SS 15/2 in the schedule relates to the ‘Final Exits – Exit doors, egress routes’. The schedule lists the performance standards that the final exits must comply with as being the ‘Fire Safety and Evacuation of Buildings Regulations’, and the Ministry’s Compliance Schedule Handbook.
- 3.2 On 7 April 2016, an independent qualified person (“IQP”) carried out an annual warrant of fitness inspection of the building, under section 108 of the Act. In the inspection report, the IQP identified that the doors leading from the shared toilet facilities to the individual tenancies were fitted with locks that required a key to open them. The final exits were not mentioned in this report. On 27 April 2016, the IQP issued a ‘Form 12...Building Warrant of Fitness’ for the building, confirming that the final exits from the building (item SS 15/2) had been ‘inspected and maintained in accordance with the compliance schedule’.
- 3.3 On 18 May 2016, the authority issued a ‘Site Instruction Notice’ in respect of the building, which stated that:

The following items are not in accordance with the Building Act 2004 for the building warrant of fitness.

1. Some doors in the building have key locks on the doors in the direction of the means of escape. These doors must be able to be opened at any time without a key. Please remove the potential to lock the door with a key and ensure the doors can be opened in the direction of escape at any time.

The notice required that this item should be addressed before 18 June 2016.

- 3.4 On 21 June 2017, the authority issued a notice to fix, under sections 164 and 165 of the Act, in respect of the building. The notice to fix specified the following grounds of non-compliance:

Particulars of contravention or non-compliance

Information required from building owners by the Building Amendment Act 2012, the Building Act 2004 and requested by [the authority] has not been provided for each of the specified systems in the building; including ...Key locks have been installed on doors on a means of escape from fire, in the direction of escape. These are not in accordance with the Building Act 2004 including sections 103, 105, 106, 108, 110 and 116B.

To remedy the contravention or non-compliance you must:

1. ...
2. Remove the potential for locking doors with a key in the direction of escape from fire.

This notice must be complied with by: ...21/7/2017

- 3.5 On 26 June 2017, a second IQP confirmed in an email to the authority that at the time of the April 2016 building warrant of fitness inspection, the final exit doors had all already been fitted with ‘thumb turns. In this email, the IQP also stated that the locks on the doors to the shared toilets were for security purposes, and that these doors ‘do not form part of the egress path’. The IQP reiterated this view in an email to the authority dated 3 July 2017, which stated ‘...we suggest that the inspector

confused doors at the rear of each tenancy leading to toilets as escape paths which they are not’.

- 3.6 The authority booked a reinspection for the property and this was carried out on 20 July 2017 by an officer of the authority. The reinspection confirmed that the tenancies shared toilet facilities, and that ‘All doors to and from those tenancies require keys to open, with a person is able to potentially be locked in this area with no means of escape’. The types of locks used in the various tenancies varied:
- shops 1, 2 and 3 – (not part of this determination)
 - shop 4 – ‘key lock and sliding bolt from tenancy with key lock on opposite side from toilet area’
 - shop 5 – ‘door to shared toilet facilities has handle only operation from the tenancy but requires a key to operate from shared area’
 - shop 6 and 7 – ‘intertenancy shared toilet facilities’ noted on both sides of the restaurant; doors are fitted with ‘top sliding bolt[s], with main deadlock Restaurant users’ side’; door on other side has a key lock
 - shop 8 – ‘rear door to toilet facilities fitted with key lock deadbolt’
 - shop 9 – ‘toilets are shared facilities with [shop 8 and shop 6 and 7] tenancies. All doors to and from those tenancies require keys to open’.
- 3.7 The reinspection report also noted that the officer had talked to some staff members who worked in the tenancies, who stated that they had previously been locked in the shared toilet facilities.
- 3.8 On 5 October 2017, the applicant sent an email to the authority entitled ‘Building Compliance versus Building Security’. The email advised that the previous evening one of the tenancies in the building had been broken into, with the intruder gaining access by ‘forming a small hole adjacent to the door lock, allowing the burglars to reach in and unlock the doors gaining easy access to the unoccupied buildings’. The applicant stated that the authority’s requirement that ‘egress doors can only be locked by snib-type locks...and that doors cannot have key-type locks that prevent occupants exiting’ was creating a ‘problematic issue’ and that this hinged on the definition of ‘occupied’.

The current [authority] interpretation that extends the definition of an “occupied” building to include a time outside business hours has resulted in the situation where the enforced compliant egress from the building is being turned into relatively easy access to the building by unsavoury characters, costing building occupants for losses including theft and building damage.

An alternative interpretation of “occupied” could be that the various Acts and Regulations refer to a building that is “legally occupied”. In such an interpretation, the last legal occupant to leave the building at night would have the ability to secure the premises against “illegal occupants”.

The email went on to point out that roller shutters were allowed across escape routes in the Acceptable Solution (C/AS4⁵), and to assert that this ‘clear intent that escape routes can be mechanically secured when premises are not occupied by the public’ should be extended to ‘a more robust mechanical locking system’.

⁵ C/AS4 Acceptable Solution for Buildings with Public Access and Educational Facilities (Risk Group CA)

- 3.9 The authority replied in a letter dated 1 December 2017, in which it stated that it was not correct that it only allowed egress doors to be locked by snib-type locks, and this was only one way of achieving compliance with the Building Code. However, a ‘key lockable door’ will not comply with the code. The letter then set out the authority’s position that there was no difference ‘between lawful and unlawful occupants’ and that ‘the building code intends that persons are able to easily escape from fire in a building, regardless of whether they have legal entitlement to be in that building or not.’ The letter concluded that the authority could not ‘consider that the safety of a person overrides the ease of maintaining security of a building’, and that the interpretation of occupant in the Building Code was to be taken as ‘those persons who may be within a building from time to time’, whether they were in the building lawfully or not.
- 3.10 The applicant replied to this letter in an email dated 4 December 2017, disputing the authority’s interpretation of the word occupant as also including unlawful occupants, and reiterating the applicant’s position that during the times when a building was not being used by occupants who were legally entitled to be there, it could be ‘securely locked with key-type locks’.
- 3.11 The applicant applied for a determination, and this was received by the Ministry on 18 December 2017.

4. The parties’ submissions

4.1 The applicant’s submissions

- 4.1.1 The applicant made a submission dated 14 December 2017 with its application for a determination. The submission considered the wording and requirements in paragraph 3.15.2 of the Acceptable Solution C/AS4, and set out the applicant’s position that the provisions in the paragraph only applied when the building was occupied. The applicant considered the definitions of “occupied space” and “intended use” as given in Clause A2 of the Building Code and the Definitions section of C/AS4; and the definition of “occupant” as given in section 3 of the Fire Safety and Evacuation of Building Regulations 2006.
- 4.1.2 The applicant set out its view that the inclusion of the word “lawfully” in the latter definition, and the reference in the Building Code and Acceptable Solution to buildings being occupied when a person is present during the building’s intended use, limits the meaning of occupant to people who are lawfully entitled to be in the building.
- 4.1.3 From this interpretation, the applicant asserted that the provision in paragraph 3.15.2 of C/AS4 that locking devices on doors on escape routes shall be ‘designed to be easily operated without a key’ only applies where a person is lawfully in the building.

It is our opinion that keyed locks are permissible on exit doors, and by way of either a Building Management Plan or the inclusion of particular parameters within a building’s Compliance Schedule, keyed locks on exit doors would be mandated to only be secured by the final lawful occupant leaving the building at the conclusion of the intended operating hours.

- 4.1.4 With its application, the applicant enclosed copies of:
- the site instruction notice
 - the notice to fix

- correspondence between the parties.

4.1.5 In an email to the Ministry dated 19 December 2017, the applicant confirmed that although the determination related to one building, its intent in applying for the determination was to obtain a ‘formal response from [the Ministry] that provides clear guidance that can be relied upon throughout the City’.

4.2 The authority’s submissions

4.2.1 The authority made a submission dated 9 January 2018.

4.2.2 In its submission, the authority set out the legislation and standards that it considered applied, and its opinion as to whether the applicant’s building was complying with these provisions. I note that the first three cited documents have since been superseded and no longer apply.

- NZS 1900.5:1963 – this standard was superseded in 1984, and 1988, and subsequently withdrawn without replacement. The authority referred to the requirements for doors on exit-ways within the superseded standard.
- Building Code Clause C2: Means of escape – ceased to have effect from 10 April 2013 and was replaced by the current Clauses C1 to C6. The authority was of the view that the limits on application to superseded Clause C2.3.3(b), which allowed doors on escape routes to be locked, related only to ‘locking a door on the side that is not in the direction of escape’.
- Acceptable Solution CAS/1⁶ – this ceased to have effect from 10 April 2013. The authority highlighted the sections of the superseded CAS/1 relating to locking devices, which it stated are required to be ‘easily operated without a key or security device’.
- Building Code Clause C4: Movement to a place of safety – the authority was of the view that fitting a key lock on a door in the direction of escape would not comply with the performance criteria in Clause C4.
- Acceptable solution C/AS4 – the authority was of the view that paragraph 3.15.2 of the Acceptable Solution ‘clearly will not support the use of key locks in the direction of escape’.
- Fire Safety and Evacuation of Building Regulations 2006 – the authority noted that these regulations were cited in relation to the maintenance, reporting and inspection procedures in the compliance schedule for the applicant’s building. The authority was of the view that a key lock in the direction of escape would constitute an obstacle under clauses 4(a) and (b) of these regulations, and that there was a clear requirement that means of escape must be kept clear of obstacles ‘at all times’.

4.2.3 The other main points made in the authority’s submission can be summarised as follows.

- Security is not a function of the Building Code, or Act, and should never override the safety of the building occupants.

⁶ The Compliance Document for Fire Safety Amendment 9 was used to show compliance with the Building Code Clauses C1-C4 Fire Safety. Clauses C1-C4 also ceased to have effect from 10 April 2013.

- It is not correct that the authority considers snib locks to be the only compliant solution; there are a number of other designs that would enable the applicant to comply with the Building Code.
- Using a key lock on a means of escape reduces safety due to the potential for human error.
- “Lawfully occupied” in the Fire Safety and Evacuation of Building Regulations 2006, refers to the lawful intended use of the building, not the occupants. It is reasonable to consider that any person present in a building at any time is an occupant. The Building Code and Act do not differentiate between lawful occupants who should be kept safe, and other occupants who should not.
- The notice to fix is specific to this building, and to the shared toilet facilities area. The determination ‘should remain specific to this building’ and not take into account other buildings owned by the applicant within the authority’s jurisdiction where there are similar issues: ‘...each building and building owner is treated independently in respect of building compliance matters.’
- ‘[The authority] is concerned about the obstacles barring these doors, the key locks that require a key to open the door at all times and bar locks that cannot be accessed from the direction of escape’.
- The final exits are not an issue on this building, and the authority believes any alteration to these locks to add keys would require a building consent.

4.3 The draft determination and the parties’ further submissions

- 4.3.1 A draft determination was issued to the parties for comment on 5 April 2018.
- 4.3.2 As noted in paragraph 1.3, I also provided FENZ with a copy of the draft determination by way of consultation. FENZ reviewed the draft and agreed with its analysis and conclusions. FENZ further noted that ‘the building has an approved and maintained evacuation scheme as required under the Fire Service Act 1975 and the Fire Safety and Evacuation of Buildings Regulations 2006’.
- 4.3.3 The applicant accepted the draft determination subject to comment on 17 April 2018. These comments clarified that the building was a single fire-cell, with no fire separations between the tenancies or elsewhere in the building.
- 4.3.4 The authority did not accept the draft determination on 19 April 2018 and provided a further submission in a ‘Reply to the Draft Determination’ dated 16 April 2018. The submission reiterated the authority’s position and the points made in its earlier submissions. The main additional points made in the authority’s submission on the draft determination can be summarised as follows:
- The draft determination is contrary to the purposes of the Act, the Building Code and general public policy, as it distinguishes between ‘people who are entitled safety in a building and those who are not’. This cannot be what was intended by the legislature.
 - The draft determination also overlooks the potential for ‘human error’ and that ‘an exit door may be inadvertently locked’.
 - The draft determination ‘has the potential for discrimination of people, by providing for different categories of people for the provision of health and safety in buildings’.

- 4.3.5 The authority also advised that it had approached the New Zealand Human Rights Commission for an opinion on the draft determination. I note that there is no obligation for the Chief Executive to consult with the Commission in relation to a determination under Section 170 of the Act. In an email dated 31 May 2018 the authority stated it had been advised by the Commission that the matter was not within the Commission's authority.
- 4.3.6 With its submission the authority provided copies of:
- An email from the New Zealand Human Rights Commission. The email recorded that an undisclosed email has been received from the authority which the Commission would respond to (refer paragraph 4.3.5 above).
 - An excerpt from the Ministry's Compliance Schedule Handbook (2014).
 - An email from a member of the public confirming that he had been previously been locked in the shared toilet areas off some of the tenancies when frequenting them as a customer; at the time (all dates before 2013) the doors to the shared toilet areas had a 'snib lock' on the tenancy side and keylock on the toilet side.
- 4.3.7 I have taken the parties' submissions into account and amended the determination as I consider appropriate.

5. Discussion

5.1 General

- 5.1.1 The applicant has sought a determination about the authority's decision to issue a notice to fix in respect of key locks on doors that form part of a fire egress route.
- 5.1.2 In particular, the applicant has requested a determination about the authority's interpretation of paragraph 3.15.2 of Acceptable Solution C/AS4, and the correct application of this provision in this case. I have dealt with this request as a preliminary matter in paragraph 5.2 of this determination.

5.2 Preliminary matters

- 5.2.1 *C/AS4: Acceptable Solution for Buildings with Public Access and Educational Facilities (Risk Group CA)* is the Acceptable Solution for Clauses C1 – C6 of the Building Code, in relation to buildings that fall within Risk group CA. This is the risk group that the applicant's building, and shops in general, falls within.
- 5.2.2 Acceptable Solutions are issued by the Ministry and provide one way of complying with the Building Code. If a building or element of a building has been constructed in accordance with a particular acceptable solution, then a building consent authority must accept that it also complies with the related clause or clauses of the Building Code. However, acceptable solutions provide only one means of complying with the code, and their use is not mandatory.
- 5.2.3 What I must consider in the current case is whether the means of escape from the applicant's building complies with Clause C4 of the Building Code, and in particular whether the locks on the doors to the shared toilet facilities prevent compliance, as the authority contends.

- 5.2.4 I note here also as a preliminary matter that, in making an application for a determination, the applicant was seeking broader guidance on how the performance criteria in Clause C4 should be interpreted in other situations where escape routes contain lockable doors.
- 5.2.5 Determinations are decided on the facts of each case, and cannot be considered binding in other situations. In other words, the Building Code is performance-based, and whether or not those performance criteria have been met must be assessed on a case by case basis. However, in making this determination, I have considered the interpretation of the Building Code and the relevant Acceptable Solution, and the principles that I have applied may provide guidance for the parties in similar situations in the future.

5.3 The notice to fix

- 5.3.1 This determination arises from the authority's decision to issue a notice to fix in respect of the locks fitted on the doors leading between the tenancies and the shared toilet facilities. The authority considers these locks to be non-compliant.
- 5.3.2 The section of the Act that is relevant in the current determination is section 116B, which reads:

116B Offence to use building for use for which it is not safe or not sanitary, or if it has inadequate means of escape from fire

(1) No person may—

(a) ...; or

(b) use a building, or knowingly permit another person to use a building, that has inadequate means of escape from fire.

(2) A person who fails to comply with subsection (1) commits an offence.

(3) ...

- 5.3.3 Accordingly, the question that I must determine is whether the applicant's building has 'inadequate means of escape from fire'.

5.4 The Building Code

- 5.4.1 To assess whether the means of escape from fire in the applicant's building are inadequate, I must first look to the clauses of the Building Code that relate to fire safety (Clause C).
- 5.4.2 Clause C1 sets the objectives of the remaining C clauses, which include to:
- (a) safeguard people from an unacceptable risk of injury or illness caused by fire.
- 5.4.3 Clause C4 of the Building Code relates to movement to a place of safety. Clauses C4.1 and C4.2 set the functional requirements that a building must meet in moving people to a place of safety in the event of a fire. The relevant clause in the current case is Clause C4.2 which states:
- C4.2 Buildings must be provided with means of escape to ensure that there is a low probability of occupants of those buildings being unreasonably delayed or impeded from moving to a place of safety and that those occupants will not suffer injury or illness as a result.*
- 5.4.4 Clauses C4.3 to C4.5 then set the specific performance criteria that building must meet in achieving this functional requirement.

5.5 The relevant Acceptable Solution

5.5.1 The Acceptable Solutions that apply to Clause C are organised according to the Risk Group that a building belongs to. The applicant's building comes within Risk Group CA, which incorporates buildings with public access and educational facilities, including shops, restaurants and cafes. Accordingly, the Acceptable Solution that applies is C/AS4.

5.5.2 As stated in paragraph 5.2.2, Acceptable Solutions provide one way, but not the only way of achieving compliance with the Building Code. The provisions that apply in the current case are in paragraph 3.15 of C/AS4 (concerning doors subdividing escape routes), the relevant parts of which are set out below:

3.15 Doors subdividing escape routes

Door closers and latching

3.15.1 Except as permitted by Paragraph 3.15.7...doors on escape routes shall satisfy the following requirements:

a)...

c) If doors are required to be secure, they shall be fitted with panic fastenings complying with Paragraph 3.15.13 and situated in accordance with Paragraph 3.15.12 or fitted with simple fastenings that can be readily operated from the direction approached by people making an escape complying with Paragraph 3.15.14, and

d) They shall not be fitted with any locking devices unless these comply with Paragraph 3.15.2, and...

Locking devices

3.15.2 If the building is occupied, locking devices shall:

a) Be clearly visible, located where such a device would be normally expected and, in the event of fire, designed to be easily operated without a key or other security device, and allow the door to open in the normal manner....

Panic fastenings

3.15.12 Panic fastenings shall be fitted on doors on the means of escape from fire including exitways and final exits in retail areas serving more than 500 occupants or for crowd occupancies of more than 100 people.

For all other areas, simple fastenings shall be fitted on doors on the means of escape from fire. This includes exitways and final exits which are required to be secured against entry when a building or part of a building is occupied...

3.15.13 Panic fastenings are locking devices which shall meet the following requirements:

a)...

Simple fastenings

3.15.14 Doors on *escape routes* (whether or not the doors are *fire doors*) shall be fitted with simple fastenings that can be easily operated from the direction from which people approach when making their escape.

Comment: This generally excludes the use of keyed locks and bolt fastenings. See Paragraph 3.15.2 for security and safety

5.6 The Fire Safety and Evacuation of Buildings Regulations

5.6.1 The other piece of legislation that has featured in the parties' submissions is the Fire Safety and Evacuation of Buildings Regulations 2006 ("the Regulations"). As stated in paragraph 3.1, these Regulations are cited in the compliance schedule for the

building as the performance standard for the building's final exits, exit doors and egress routes.

- 5.6.2 It is important to note that the Regulations relate to how the owner of a building maintains, operates and manages the building's fire exits. Likewise, the Ministry's Compliance Schedule Handbook referred to by the authority in its submissions provides guidance on how certain types of buildings are to be managed, and not on the degree of compliance with the Building Code or Act that they are expected to achieve.
- 5.6.3 Part 1 of the Regulations sets out the "fire safety" requirements for the buildings described in Schedule 1, which includes shops and restaurants. Clause 4 of the Regulations places an obligation on the owners of such buildings to maintain the means of escape from fire within them. The relevant provisions in that clause for the purposes of this determination are as follows.

Means of escape from fire for building

4 Owner of building must maintain means of escape from fire for building

The owner of a building must maintain the means of escape from fire for the building so as to ensure that—

- (a) they are kept clear of obstacles at all times; and
- (b) their exit doors are not locked, barred, or blocked so as to prevent any of the building's occupants from leaving the building; and
- (c)....

5.7 The meaning of "occupant"

- 5.7.1 The authority's position is that the doors leading from shared toilet facilities to the tenancies form part of the fire egress or escape route for the building, and these doors cannot provide an adequate means of escape if a key is required at any time to open them in the direction of escape. The authority considers that having a key lock presents an impediment or obstacle to the means of escape.
- 5.7.2 I consider that the authority is correct in its contention that the doors between the shared toilet facilities and the tenancies form part of the fire escape route or egress path. There was some suggestion, in the parties' earlier correspondence that this was not the case. However, I consider this was more a matter of semantic confusion. Clearly, anyone using the shared toilet facilities would have to use one of these doors to escape in the event of the fire, as there is no other exit from this area to the outside.
- 5.7.3 In their submissions, and prior to this in their correspondence, the parties have taken the view that whether or not the means of escape is adequate turns on the meaning of the term occupant. This approach derives from the various legislation discussed in paragraph 5.4, in which "occupant" is a pivotal term. While the parties have also made submissions on the meaning of "occupied", it has not been necessary for me to consider this in making my decision.
- 5.7.4 For the purposes of this determination, the relevant place where the term occupant appears is in the functional requirement in Clause C4.2 of the Building Code, which requires buildings to be provided with means of escape that ensures there is a low probability of "occupants" being unreasonably delayed or impeded from moving to a place of safety.

- 5.7.5 The authority is of the view that occupant in this context applies to any person who may be in the building at any time, including someone who is unlawfully so. Where a building is being used for its intended use, any person who is in it for any reason is an occupant, and the law does not distinguish between those who are legally entitled to be there and those who are not.
- 5.7.6 The applicant on the other hand, contends that occupants in the legislation is limited to lawful occupants. Outside of those times when a lawful occupant is in a building, for example when the tenancies are closed for the day, the building's doors, including those on escape routes, can be locked with keys.
- 5.7.7 The term "occupant" is not defined in either the Building Code or the Act. In the absence of a definition, I can look at the ordinary and natural meanings of the term in the light of the purposes of the texts in which it appears. The Oxford Dictionary gives a definition "occupant" as:
- occupant**...1 a person who occupies a place at a given time...
- 5.7.8 The other place that "occupant" is defined is in the Regulations, where it is defined as:
- Occupant**, in relation to a building, includes any person lawfully entitled to be in the building (for example a visitor)
- 5.7.9 Looking at these provisions, I am of the opinion that the applicant's view is the correct one, and that an occupant is a person who is lawfully entitled to be in a building. In the current case, this would include the owner or one of their agents, a staff member, a member of the public who is using the services offered by the tenancies or a visitor. It would not, as the authority asserts, extend to a person who has broken into or is otherwise unlawfully in the building.
- 5.7.10 In reaching this conclusion, I have taken the following matters into account.
- The dictionary definition of occupant is limited to a person who is in a place for a specific purpose, be that because they live there or because it is their place of business. An occupant is a person who is in a given place because they have a legitimate reason to be there.
 - The definition of "occupant" in the Regulations is clearly limited to a person who is lawfully entitled to be there. The authority has argued that because this definition uses the word "includes" it is not exhaustive and does not exclude people who are unlawfully present. I consider this a mis-reading of the natural meaning of the clause, which is to limit occupants to those people who are lawfully present in a building.
 - The Building Code prescribes the functional requirements and performance criteria that buildings must comply with in their "intended use". The intended use of a building is defined as "any reasonably foreseeable occasional use that is not incompatible with the intended use". I do not think that unlawfully entering or remaining in a building, after it has been closed for the day, comes within the ambit of "reasonably foreseeable occasional use"; such uses would be clearly incompatible with a building's intended use.
 - The law does not generally accord trespassers the same rights and protections as persons lawfully on land. The same applies here to buildings, and people who unlawfully enter a building cannot expect the law to provide them with the same protections as people who are lawfully using the building.

5.8 Applying the performance criteria to the applicant's building

- 5.8.1 As discussed in paragraph 5.2, the Building Code sets the functional requirements and performance criteria that the applicant's building must achieve with respect to providing adequate means of escape from fire, and the Acceptable Solution provides one way of achieving these.
- 5.8.2 Clause C4.2 of the Code requires that:
- C4.2 *Buildings* must be provided with means of escape to ensure that there is a low probability of occupants of those *buildings* being unreasonably delayed or impeded from moving to a *place of safety* and that those occupants will not suffer injury or illness as a result.
- 5.8.3 The ramification of my decision in paragraph 5.7.9, that occupant is limited to a person who is lawfully entitled to be in a building, is that the functional requirement in Clause C4.2 only applies when such people are present. To put it another way, when a building is open for business (or another intended use), and lawful occupants are in it, then the building must have means of escape that will not delay or impede these occupants from moving to a place of safety in the event of a fire. The functional requirement is contingent on there being occupants in the building. When there are no occupants in the building, it does not apply. Accordingly, when the last lawful occupant leaves a building, they can secure the final exits and other doors that form part of an escape route, as in doing so they will not be delaying or impeding any occupants from moving to a place of safety.
- 5.8.4 In its submission on the draft determination, the authority objected to this interpretation, on the grounds that the Building Code and Act did not differentiate between people who are entitled to be in a building and those who are not and only keep the former safe (i.e those lawfully entitled to be in a building). In the authority's opinion this amounted to discrimination. I do not agree with the authority's interpretation in this regard. The focus is not, as the authority contends, on the lawful nature of people that may use a building; it is on the uses to which the building is put. Section 16 of the Act states that the purpose of the Building Code is to prescribe "functional requirements for buildings and the performance criteria with which buildings must comply in their intended use". Buildings are not required to comply with requirements and criteria unrelated to their intended use. Even a fully compliant building will not serve to keep people safe if they use buildings for purposes or activities that fall outside the uses that are intended to occur within them.
- 5.8.5 Turning now to the particular circumstances of the current case, the authority is concerned that there is potential for people to become locked in the shared toilet facilities area and be unable to escape in the event of a fire. Whether or not this is correct, will depend on the type of lock used.
- 5.8.6 From the information I have been provided with, it would appear that the type of locks used on the doors leading to the shared facilities varies from tenancy to tenancy. These locks can be classified into three types:
- type 1– locks that can be opened using a key from the tenancy side and that remain open until relocked using the key
 - type 2 – locks that can be opened using a key from the tenancy side and that automatically re-lock on closing, requiring a key to reopen them from the shared toilet facility side

- type 3 – locks that can be opened using a handle from the tenancy side and that automatically re-lock on closing, requiring a key to reopen them from the shared toilet facility side.

Some of the doors to the shared toilet facilities also have bolts on the tenancy side.

- 5.8.7 What I must consider is whether the locks achieve the functional requirements and performance criteria in the Building Code. In my opinion, the two-types of locks that automatically re-lock on closing do not (types 2 and 3).
- 5.8.8 Clause C4.2 states that the means of escape in a building must ensure there is a low probability of occupants being unreasonably delayed or impeded as they move to a place of safety. Moving to a place of safety from the shared toilet facilities would involve exiting back through the door linking the facilities to the tenancy, then out through the final exit at the front.
- 5.8.9 In its submission, the authority states that it had already spoken to staff members who had become locked in the shared toilet facility area ‘for some time’. In my opinion, there is a relatively high probability that this will happen from time to time, if the door leading from the toilet facilities to the tenancies requires a key to open from the toilet side.
- 5.8.10 I consider it quite likely that a person using the toilet facilities will:
- (in the case of type 2 locks) leave the key in the lock on the tenancy side either because they do not appreciate that they will need it to re-enter, or because they forget to take it with them, and
 - (in the case of type 3 locks) use the door handle to access the toilet facilities not realising they need a key to re-enter the tenancy if the door is locked.
- 5.8.11 In this situation, they will be prevented from exiting the toilet facilities by the locked door, and the functional requirement in Clause C4.2 will not be fulfilled.
- 5.8.12 I consider the situation is different with respect to the third type of lock (type 1). These locks require a key to open from the tenancy side and will remain open until they are purposefully relocked using the key. In my opinion, these locks do achieve the functional requirement in Clause C4.2 as they present a low probability of delaying or impeding occupants who are using the toilet facilities from exiting the area. While there is a minor possibility that a person on the tenancy side will re-lock the door using the key while another person is using the toilets, I consider this unlikely to happen in practice.
- 5.8.13 The same rationale relates to the bolts that are fitted on some tenancies’ doors to the shared toilet facilities. I consider a bolt is unlikely to be used to secure a tenancy door after someone has accessed the shared toilet facilities, and in any event the shared toilet facilities have multiple doors leading from them.
- 5.8.14 The nature and size of the tenancies means that the occupants will either want the doors to remain open for their customers to use, or will be aware if another person unlocks the door from the tenancy side to use the toilet facilities.
- 5.8.15 To summarise, what is required in all situations is that, while there are occupants present in the tenancies, anyone entering the shared toilet facilities area must be able to exit again without using a key. This does not prevent these doors requiring a key to open them from the tenancy side. However, they must remain open until purposefully relocked. In addition, at the end of the day, there is nothing to prevent

the last person in the tenancy from locking and bolting these doors, provided they are satisfied there is no-one left in the toilet area.

- 5.8.16 I am satisfied that given the small contained nature of the tenancies, there is only a negligible probability that an occupant will remain in the toilets undetected and be impeded from exiting. I appreciate that this may be different in larger or more complex buildings, and that each situation where this issue arises will have to be assessed independently.
- 5.8.17 While it is not part of the matter to be determined, I note that the same reasoning can be applied to the locking of the final exit doors at the front of the tenancies, once the person locking the exit door is satisfied that there is no-one else left in the tenancy.
- 5.8.18 In its submission on the draft determination, the authority did not agree with the above decision on the grounds that the legislation did not intend that compliance should rely on human judgment as this introduced the potential for human error. However, there are numerous instances where achieving compliance with the Building Code depends to varying degrees on human agency or judgement. For example, the clauses in the code related to food hygiene and ventilation require that the people using the systems designed to achieve compliance with Clauses G3 and G4⁷ do so correctly, if compliance is in fact to be achieved. Likewise, the rationale behind the Building Warrant of Fitness regime is to ensure that those aspects of a building that rely on people's actions can be regularly inspected and compliance maintained.

5.9 Conclusions

- 5.9.1 I therefore conclude that, whether or not the doors with locks between the tenancies and the shared toilet facilities comply with Clause C4.2 of the Building Code depends on the nature of the lock used.
- 5.9.2 Locks between the tenancies that require a key to open from the tenancy side will comply provided that they do not automatically relock on closing. The notice to fix should be modified with respect to these locks.
- 5.9.3 Locks that automatically relock on closing, and hence require a key to open from the shared toilet facility side, will not comply with Clause C4.2 of the Building Code. With respect to these locks, the notice to fix was correctly issued.

⁷ Clause G3 Food preparation and prevention of contamination and Clause G4 Ventilation.

6. The decision

- 6.1 In accordance with section 188 of the Building Act 2004, I determine that the authority was correct to issue a notice to fix but only in respect of those locks to the toilet facilities that automatically relock on closing as described herein.
- 6.2 I also determine that the notice to fix is to be modified so that it only applies to those locks to the toilet facilities that automatically relock on closing.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 18 June 2018.

Katie Gordon
Manager Determinations