

Determination 2024/071

The authority's decision to issue a compliance schedule for a telecommunications exchange structure

1288 Fergusson Drive, Upper Hutt

Summary

This determination considers the authority's decision to issue a compliance schedule for a telecommunications exchange structure. The determination discusses whether the structure is part of, or related to, a network utility operator system and therefore not considered a 'building' for the purposes of the Act.



Figure 1: Aerial view of telecommunications exchange structure (property boundary in red)

In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”).

The Act is available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (eg Acceptable Solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Peta Hird, for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment (“the Ministry”).¹
- 1.2. The parties to the determination are:
 - 1.2.1. Chorus New Zealand Limited (“the owner”), the owner of the property who applied for this determination.
 - 1.2.2. Upper Hutt City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. This determination arises from the authority’s view that a compliance schedule is required for the structure, a telecommunications exchange (“the exchange”), in accordance with section 100. The owner disagrees and considers that the exchange is not a ‘building’ as defined in the Act because it comes within the exception to the definition of ‘building’ in section 9(ac). Accordingly, the owner considers that the requirement in section 100 does not apply to the exchange.
- 1.4. The matter to be determined, under section 177(1)(b) and (2)(e)², is the authority’s decision to issue a compliance schedule for the exchange.
- 1.5. In deciding this matter, I must consider whether the exchange satisfies the exclusion to the definition of ‘building’ as set out in section 9(ac) of the Act, being part of or related to a Network Utility Operator system (NUO). If the exchange is not a ‘building’ for the purposes of the Act, it does not require a compliance schedule in accordance with section 100.
- 1.6. I have not considered any other aspects of the Act or the Building Code, other than those as outlined in paragraphs 1.4 and 1.5. In particular, I have not considered the contents of the issued compliance schedule.

¹ The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

² Section 102 also provides for a compliance schedule to be issued by a territorial authority in some circumstances.

2. The structure and background

- 2.1. The structure, built in 1974, is single storey and approximately 480m² in area. It was originally constructed as a telephone exchange/switchboard with an office, staff room facilities and toilets as, at the time, it would have been occupied by people manually operating the exchange. The structure is now a telecommunications exchange housing the copper telephone network, fibre network and associated supporting equipment.
- 2.2. On 19 August 2024 the authority wrote to the owner, noting it was aware of an existing fire alarm on site and requesting further information as to whether there are other specified systems³ in the exchange. The authority also stated “the building may also fall outside the scope of an NUO [Network Utility Operator] building and a BWOFF [Building Warrant of Fitness⁴] audit... is required in order to determine if a BWOFF is necessary”.
- 2.3. On 26 August 2024 the owner responded to the authority outlining that the requirement for a compliance schedule under section 100 of the Act does not apply as the exchange is not a ‘building’ for the purpose of the Act. The owner also advised that the exchange:
 - 2.3.1. falls “...within the exception in section 9(ac) of the Act, which provides that a building does not include, among other things, “structures (excluding dams) not intended to be occupied that are part of, or related to, a NUO system”.
 - 2.3.2. houses a telecommunications network and the owner is a network utility operator
 - 2.3.3. is not occupied or intended to be occupied. It is entered only infrequently and for short periods, for maintenance of the network equipment and the systems which support the function, protection, and continuity of the network.
- 2.4. On 5 September 2024 the authority carried out an on-site audit of the exchange. Following this, on 6 September, the authority issued a ‘draft compliance schedule’ for the building, and requested a compliance schedule application form from the owner.

³ See paragraph 4.3 below for the definition of ‘specified system’.

⁴ A building warrant of fitness is a declaration by the building owner issued annually to the authority that all the specified systems in the building have been inspected, maintained and reported in accordance with the compliance schedule for a period of 12 months prior to the issue date. See sections 108 to 111 of the Act.

3. Submissions

The owner

- 3.1. The owner believes that the exchange does not require a compliance schedule as the structure is not a 'building' for the purposes of the Act. The owner submitted (in summary):
 - 3.1.1. The exchange falls within section 9(ac), where a 'building' does not include, "structures (excluding dams) not intended to be occupied that are part of, or related to, a NUO system".
 - 3.1.2. The exchange houses equipment as part of the telecommunications network and the owner operates a telecommunications network, so is the exchange is an NUO.
 - 3.1.3. The exchange is not occupied or intended to be occupied. Access is limited to technicians who visit the site on an intermittent basis for repairs and maintenance only. Access to the site is monitored by a security operations centre on a 24/7 basis, who allow access only to authorised personnel.
 - 3.1.4. In reliance of Determination 2015/042⁵, the exchange satisfies both limbs of the exclusion set out in section 9(ac); it is not occupied and is part of or related to a NUO system.
 - 3.1.5. The common areas originally constructed are no longer usable, and safety systems such as the fire protection systems are for the benefit of exchange equipment, rather than occupants.
 - 3.1.6. As the exchange is not considered a 'building', section 100 for requiring a compliance schedule does not apply, regardless of the nature of the specified systems that may be present.

The authority

- 3.2. The authority considers that a compliance schedule is required for the exchange due to the "size, the existence of internal office and utility spaces, and various specified systems". The authority submitted (in summary):
 - 3.2.1. It was originally constructed as a telephone exchange and was staffed for its operation.
 - 3.2.2. It has a floor area of approximately 480m² consisting of an area occupied by the telephone exchange and several office and utility spaces. While the

⁵ Determination 2015/042 *Regarding whether a compliance schedule is required for a substation containing smoke detectors* (6 July 2015).

authority has been informed that it is currently only accessed for maintenance, the large size and configuration “do not align with the nature of buildings typically classified as NUOs”.

- 3.2.3. The authority cannot grant exemptions from building warrant of fitness requirements.

4. Discussion

Compliance schedule legislation

- 4.1. Sections 100 to 107 covers the requirements for compliance schedules. Of particular relevance, section 100 sets out when a compliance schedule is required which states (*italics* my emphasis):

100 Requirement for compliance schedule

- (1) A *building* not used wholly as a single household unit—
(a) requires a compliance schedule if—
(i) it has a specified system...

- 4.2. Once a compliance schedule is issued for a building, sections 108 to 111 set out the procedure and owners’ responsibilities for an annual building warrant of fitness, ensuring the building’s specified systems are performing to the relevant performance standards, as recorded on the compliance schedule.
- 4.3. A ‘specified system’⁶ is a system or feature that is contained or attached to a building, which contributes to the proper functioning of the building, such as an automatic sprinkler system. Specified systems are described in Schedule 1 of the Building (Specified Systems, Change the Use and Earthquake-Prone Buildings) Regulations 2005.
- 4.4. The requirements of section 100 apply to a ‘building’ therefore in deciding this matter, I must consider whether the exchange is a ‘building’ for the purposes of the Act.

‘Building’ for the purposes of the Act

- 4.5. ‘Building’ for the purposes of the Act is defined in section 8 of the Act as ‘a temporary or permanent movable or immovable structure including a structure intended for occupation by people, animals, machinery, or chattels’. The exchange appears to fit within this broad definition, being a permanent structure that houses machinery.

⁶ As defined in section 7 of the Act.

- 4.6. Section 9 sets out what the term ‘building’ does not include for the purposes of the Act. Of relevance in this case, section 9(ac) provides the following exclusion:

9 Building: what it does not include

In this Act, **building** does not include—

....

- (ac) security fences, oil interception and containment systems, wind turbines, gantries, and similar machinery and other structures (excluding dams) not intended to be occupied that are part of, or related to, a NUO system

- 4.7. To fall within the exclusion set out in section 9(ac), the exchange must be:

- 4.7.1. a structure not intended to be occupied, and
4.7.2. part of, or related to, an NUO system.

Is the exchange part of, or related to, an NUO system?

- 4.8. Section 7 of the Act defines ‘NUO system’ as “a system owned or controlled by a network utility operator”. A network utility operator, among other things, is defined as a person “who operates or proposes to operate a network for the purposes of telecommunication as defined in section 5 of the Telecommunications Act 2001”.

- 4.9. The Telecommunications Act 2001 defines telecommunication as:

the conveyance by electromagnetic means from one device to another of any encrypted or non-encrypted sign, signal, impulse, writing, image, sound, instruction, information, or intelligence of any nature, whether for the information of any person using the device or not.

- 4.10. The exchange is part of a national network of infrastructure for the purposes of telecommunication that the owner owns and maintains the network.

- 4.11. I am satisfied that the owner meets the requirements of a network utility operator as defined in section 7, and that the exchange, being part of a wider telecommunications network, is therefore part of or related to an NUO system.

Is the exchange occupied?

- 4.12. The Act does not define the term ‘occupied’. The term was considered in Determination 2015/042 at paragraphs 5.1.4 – 5.1.5, which found:

- 4.12.1. There are two areas of the Act which discuss the occupation of a building that are useful in the context of this case. Schedule 1, which sets out the types of building work for which building consent is not required, includes clause 4 for unoccupied detached buildings. This demonstrates that buildings only entered on intermittent occasions are considered unoccupied.

- 4.12.2. The other is section 128(2) relating to dangerous and insanitary buildings, where it is noted that a person may not be permitted to 'use or occupy the building'.
- 4.12.3. The term 'use or occupy the building' indicates that those terms are distinct, therefore "using a building does not always constitute occupying a building".
- 4.13. I agree with the approach taken in that determination to the meaning of the term 'occupied', that buildings that are only entered on an intermittent occasion for routine inspection and maintenance of plant or machinery are considered unoccupied.
- 4.14. The owner has submitted that access is monitored and occurs on an intermittent basis for maintenance for short periods of time. While the exchange has a number of rooms, such as those labelled as office, staff facilities and toilets associated with the original purpose, the owner has decommissioned and emptied these rooms.
- 4.15. The way in which the owner uses the exchange is consistent with structures that house machinery which, under normal circumstances, are entered only on intermittent occasions for maintenance of the machinery. The owner does not intend for the exchange to be occupied.
- 4.16. I am of the view that the technicians accessing the exchange, as described by the owner, constitutes 'using' the exchange. As the other spaces are empty and therefore cannot be used for any work not related to the NUO system, I do not consider the exchange to be 'occupied'.
- 4.17. In its submission, the authority raised concerns about the exchange's size, existence of internal office/utility spaces and the configuration being not 'typical' of NUOs. I acknowledge that, as in Determination 2015/042, in some cases a large structure which is accessed more frequently and/or for other purposes could be considered 'occupied'. I accept that at some point in the past the exchange was used and occupied and, in that configuration, ordinarily would have been a 'building' for the purposes of the Act, attracting all of the relevant requirements of the Act.
- 4.18. However, it is clear that is now not the case. Should the exchange be used in a different manner and in a way not directly associated with the NUO system, such as the office space being used for administration work, the exchange may change between not a building to being a building. It is then the owner's responsibility to consider the relevant requirements of the Act that would need to be complied with.
- 4.19. I have found the exchange is part of an NUO system and is not intended to be occupied, and so the exchange satisfies the exclusion set out in section 9(ac). It is not a 'building' for the purposes of the Act, and therefore the requirement under section 100 of the Act does not apply and a compliance schedule is not required.

5. Decision

- 5.1. In accordance with section 188 of the Building Act 2004, I determine the exchange is part of a NUO system as per section 9(ac) of the Act, and therefore is not a building for the purposes of the Act and does not require a compliance schedule under section 100 of the Act. I reverse the authority's decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 19 December 2024.

Peta Hird

Lead Determinations Specialist