

# Determination 2025/028

**Regarding two certificates for public use and an application for a third in relation to a building providing accommodation.**

**54 Church Street, Winton**

## **Summary**

This determination addresses three decisions, the first two being certificates for public use issued in 2014 and 2023. The third concerns an application for a certificate for public use refused in 2024. The determination turns on whether the public safety test was met with regard to each of the three decisions. It also discusses the specified systems raised during the process as well as the conditions listed on the 2014 and 2023 certificates.



**Figure 1: Main entrance to the accommodation block.**

The legislation discussed in this determination is contained in Appendix A. In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”) and references to “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

The Act and the Building Code are available at [www.legislation.govt.nz](http://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](http://www.building.govt.nz).

## 1. The matter to be determined

- 1.1. This is a determination made under due authorisation by Andrew Eames, Principal Advisor Determinations, for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment (“the Ministry”).<sup>1</sup>
- 1.2. The parties to the determination are:
  - 1.2.1. the owner of the property, C Kidd, who is the applicant (“the owner”).
  - 1.2.2. Southland District Council carrying out its duties as a territorial authority or building consent authority (“the authority”).
- 1.3. This determination arises from the authority’s decisions regarding applications for certificates of public use (CPUs) for the owner’s building. The applications and decisions were made over several years from 2014 to 2024 and were made against a background of ongoing discussions about the building work required to be completed so that the building could achieve a code compliance certificate.
- 1.4. The matters to be determined, under sections 177(1)(b) and (3)(g), are the authority’s decisions relating to three CPUs:
  - 1.4.1. a CPU dated 3 April 2014 relating to consent BLD/2009/44458/3 (“the 2014 CPU”) – the determination will consider the decision to issue the CPU without an expiry date and with a compliance schedule that included specified systems SS 12: Audio loops or other assistive listening systems and SS 15/3: Fire separations<sup>2</sup>
  - 1.4.2. a CPU (2023/600056/1) dated 23 August 2023 (“the 2023 CPU”) – the determination will consider the decision to issue the certificate subject to the conditions that it would expire after a period of 6 months and that evidence was to be provided that the ducted gas heating system installed

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

<sup>2</sup> Schedule 1 of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 sets out the systems or features of buildings that are considered specified systems for the purposes of the Act. These include fire separations, which in Schedule 1 are denoted as 15(c). However, for consistency, in this determination fire separations will be referred to as specified system 15/3 or SS 15/3.

in the building had been tested and functioned appropriately, including with respect to its connections to other specified systems.

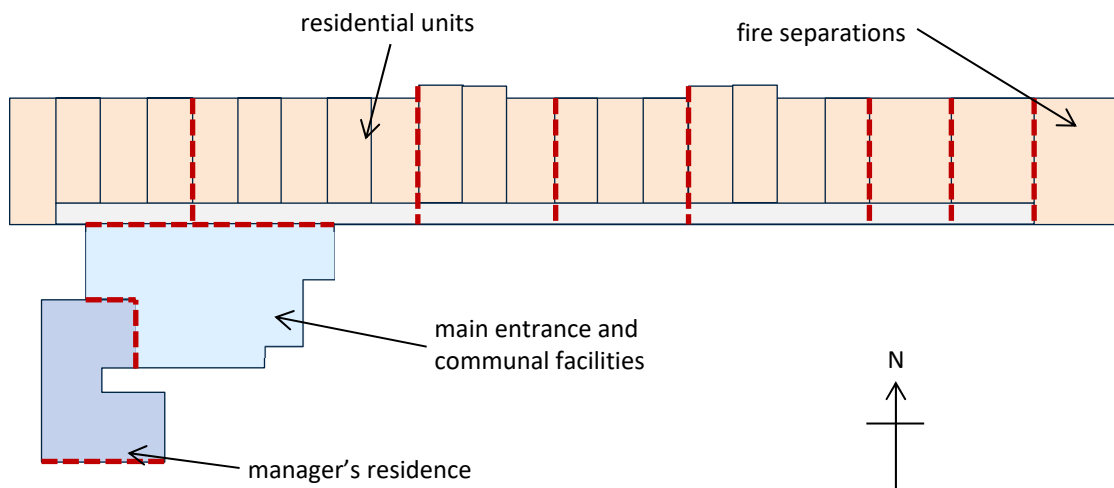
- 1.4.3. an application for a CPU dated 27 February 2024 – the determination will consider the decision to refuse to issue the certificate.
- 1.5. As the matters to be determined concern issues relating to fire safety and fire-engineering practice, I have consulted Fire and Emergency New Zealand (“FENZ”) under section 170(a) of the Act.

### **Issues outside this determination**

- 1.6. This determination will not consider any other matters relating to the building work’s compliance with the Act or Building Code, other than as required to address the matter to be determined. In particular, it will not consider:
- The authority’s decisions to issue any the building consents.
  - The authority’s decisions to issue notices to fix.
  - Whether a change of use has occurred in the building.

## **2. The building work**

- 2.1. The owner’s building is a long L-shaped single-level building. It consists, along its long northern side, of 22 studio sleeping units with en-suite bathrooms, with its shorter southern side comprising a communal kitchen, dining and recreational area. There is also a reception, staff room, laundry, and living quarters for the onsite manager. Onsite accommodation for caregivers is located in a separate building, not subject to this determination.
- 2.2. The owner advises that the building is currently used as long-term accommodation for “people who need some support”, with about 40% of the residents being of retirement age. The owner describes the building as “a low dependency rest home with long term accommodation and supported living”.



**Figure 2: Floor plan diagram showing the layout of the building.**

- 2.3. Construction of the building started in 2009 and was carried out under four building consents, representing four stages of the building work:
- 2.3.1. Building consent BLD/2009/44458/1 was granted by the authority on 18 December 2009 and covered the stage 1 construction of the building's foundations and sanitary drainage.
  - 2.3.2. Building consent BLD/2009/44458/2 was granted on 28 April 2010 and covered the stage 2 construction of additional foundation works and stormwater drainage.
  - 2.3.3. Building consent BLD/2009/44458/3 was granted on 4 February 2011 and covered "Stage 3 – Construct Rest Home", representing the majority of the balance of the building work to construct the building.
  - 2.3.4. Building consent BLD/2009/44458/4 was granted 3 June 2011 and covered stage 4 of the building work, which involved a change of cladding.
- 2.4. I note that while the building consents describe the building work as relating to a "rest home", at some point it was decided that the building would provide long-term accommodation for a broad range of people, not specifically older people.
- 2.5. The approved building consent documents include plans showing the building divided into 10 fire cells.<sup>3</sup> The 22 sleeping units are split across eight of the fire cells; one fire cell contains the communal facilities and front of house areas; and one fire cell contains the living quarters for the onsite manager. The fire cells were to be separated by a proprietary fire-rated wall system, which is shown on the plans as

<sup>3</sup> The term "firecell" is defined in clause A2—Interpretation of the Building Code as: "**firecell** 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*".

extending into the roof space up to the underside of the roofing. The system was specified to achieve a 30/30/30 fire-resistance rating (“FRR”).<sup>4</sup>

- 2.6. The proposed fire safety systems for the building included a fire sprinkler system installed throughout the building, as well as smoke and heat detectors and manual call points.
- 2.7. An undated fire report was provided by a company of engineers, (“the design engineers”) confirming these requirements. The report indicated that:
  - 2.7.1. the building would achieve compliance with the clauses of the Building Code relating to fire safety,<sup>5</sup> by way of C/AS1.<sup>6</sup>
  - 2.7.2. the building would comprise 10 fire cells, with a minimum of 30/30/30 fire separations “between suites of rooms” and “between the group sleeping areas” that would “extend to underside of roofing.”
  - 2.7.3. a Type 7<sup>7</sup> fire warning system (being an automatic fire sprinkler system with smoke detectors and manual call points) was to be installed.
- 2.8. The fire report also included a “fire wall detail” drawing dated 8 March 2010, showing the design and extent of the fire separations between the fire cells.
- 2.9. The consented work also included a ducted gas heating system. The proposed system included heat exchange units located in the roof space of the building, with a communal gas supply located at the building’s eastern end. It also included mechanical vents to be controlled by the fire warning system and dampers in the system air ducts to restrict the spread of fire and smoke.

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<sup>4</sup> A fire resistance rating (FRR) is a measure of how long a building element or system can withstand a fire. FRRs are typically expressed in minutes and comprise three numbers, with each number indicating how long the element or system will maintain its stability, integrity and insulation (in that order) in the event of a fire. An FRR of 30/30/30 therefore indicates that the fire-rated wall system used to separate fire cells in the owner’s building is designed to withstand fire for 30 minutes before its stability, integrity or insulation properties become compromised.

<sup>5</sup> The version of the Building Code that applied at the time included four C clauses relating to different aspects of fire safety: C1—Outbreak of fire, C2—Means of escape, C3—Spread of fire and C4—Structural stability during fire.

<sup>6</sup> The version of the acceptable solution that applied at the time was Acceptable Solution C/AS1 (first edition, amendment 8, effective 30/09/2010).

<sup>7</sup> Table 4.1 of C/AS1 (2010 [amendment 8]), as it applied at the time, set out the different ‘types’ of fire safety precautions that apply when using this as a means of compliance. Fire safety precautions were determined for individual fire cells within buildings, and varied according to the purpose group, occupant load and escape height of the fire cell.

### 3. Background

- 3.1. The background to this determination is long and complex. This section provides a high-level summary of the main events, and aspects of the building work relevant to the matter to be determined.

#### **The construction documentation and earlier notices to fix**

- 3.2. The building consents and their dates of issue are described at paragraph 2.3
- 3.3. The building work commenced in 2009, with various documents being provided as part of the work and the authority carrying out a number of inspections.
- 3.4. On 19 May 2011, the authority issued a “failed inspection notice” (no. 1981) that included “complete fire rating through to fascia line” as a non-compliant item that needed to be resolved.
- 3.5. On 6 October 2011, the authority issued another failed inspection notice (no. 2527) that referred to issues with an absence of smoke control doors and “all penetrations” in the building’s sleeping areas and noted that “currently nothing has been placed to control smoke spread”.
- 3.6. On 11 June 2012, a gas energy work certificate was issued for the installation of 11 “ducted air furnaces” in the building’s roof space. The certificate noted that the flues for the system “forced Draught Flue (Power) ... through roof” and that the system complied with NZS 5261.<sup>8</sup>
- 3.7. On 3 July 2012, the authority issued a notice to fix for breaches of sections 17 and 40(1).<sup>9</sup> The notice listed numerous particulars of non-compliance and contravention, including several contraventions of Building Code clause C3—Spread of fire. The authority reissued this notice to fix eight times, with the eighth update issued on 19 December 2013 (see paragraph 3.14).<sup>10</sup>
- 3.8. On 25 October 2012, a company offering fire alarm installation, inspection and testing services (“the fire alarm system installation company”) issued a “fire alarm

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<sup>8</sup> New Zealand Standard NZS 5261:2003 *Gas installation*.

<sup>9</sup> The authority issued several notices to fix across the course of the building work and subsequent occupation of the building. Two earlier notices were issued prior to the July 2012 notice to fix (in 2010 and 2011) but are not relevant to the matter being determined.

<sup>10</sup> The Ministry made a determination in relation to the fourth iteration of this notice to fix, which had been issued by the authority on 25 January 2013. *Determination 2013/045 Regarding the issue of notices to fix for a rest home at 54 Church Street, Winton* (made 5 August 2013) concluded the authority was correct to issue the notice, subject to a modification. This notice also raised items of non-compliance relating to clause C3, including the fire and smoke separations, and penetrations through those separations by services (eg cabling and ducting), as well as the listening system not being installed.

certificate” for a type 5<sup>11</sup> alarm installed in the owner’s building. The certificate attested that the system had been “installed Under NZS 4512:2003” and “inspected and tested in accordance with NZS 4512:2010”.<sup>12</sup>

- 3.9. On 30 October 2012, a company offering independent qualified person (IQP)<sup>13</sup> services for fire protection compliance (“the fire compliance IQP”) provided a producer statement<sup>14</sup> for the installation of an “emergency warning” system in the building. The system was described as a “manual fire system with local smoke detectors as part of a type 7 sprinkler system” and was certified to have been installed and tested in accordance with NZS 4512:2010 and F7/AS1<sup>15</sup>.
- 3.10. The producer statement stated that the emergency warning system had three “Ancillary Services” related to it, namely interfaced fire doors, mechanical vent shutdown and emergency lighting. The fire compliance IQP also provided producer statements of the same date for the “Emergency Lighting & Exit Signage” and the “Interfaced Doors.”
- 3.11. On 28 November 2012, the fire compliance IQP provided a “Statement of Systems Installed” which referred to the building’s heating system and stated: “The gas heating system has been connected to the fire alarm system, so the power to the heaters will be turned off during a fire activation.”
- 3.12. On 11 September 2013, the design engineers provided a construction review of the fire separation walls between the building’s fire cells. The review stated that the fire separations had been inspected at “all locations” in the building and that:
  - 3.12.1. “Fire stop separation to roof cladding” was provided where required and was continuous.
  - 3.12.2. the unprotected area through the fire separation between units 22 and 23 had been repaired.
  - 3.12.3. fire collars and expanding foam have been used to seal services penetrating the fire separations, and this system “achieves or exceeds the FRR of 30/30/30 specified.”

<sup>11</sup> See footnote 7. Table 4.1 of C/AS1 (2010 [amendment 8]) described a type 5 fire safety precaution system as “Automatic fire alarm system with modified smoke/heat detection and manual call points”.

<sup>12</sup> New Zealand Standard *NZS 4512:2010 Fire detection and alarm systems in buildings* (which superseded NZS 4512:2003).

<sup>13</sup> An IQP is a person accepted by a territorial authority as appropriate to inspect, maintain and report on the specified systems in a building, and certify this for the purpose of issuing annual building warrants of fitness (as defined in section 7 of the Act). The duties of an IQP are as set out in section 108A.

<sup>14</sup> A producer statement is a professional opinion based on specialist judgement and expertise which can be issued by a range of construction professionals.

<sup>15</sup> The version of the acceptable solution that applied at the time was Acceptable Solution F7/AS1 (third edition, amendment 6, effective 1/11/2008).

- 3.12.4. a hold-down system had been provided for the fire covers over the down light penetrations through the ceiling.
- 3.12.5. sprinkler head covers had been adequately fitted and fixed.
- 3.12.6. "Electrical flush boxes have been provided to electrical fittings on one side of all fire separations. A 100mm cavity exists between the two fire cells. A membrane/barrier has been provided within the cavity to act as a smoke separation."
- 3.13. The construction review report incorporated photos of the building work and concluded that: "Following our inspection, it has been determined that adequate systems have been provided to ensure the required fire resistance rating of 30/30/30 has been provided to the fire separations between fire cells."
- 3.14. On 19 December 2013 the authority issued the eighth update of the notice to fix it had first issued on 3 July 2012 (see paragraph 3.8). Among other particulars of non-compliance and contravention, the notice listed the following in relation to the fire safety features of the building:

**Clause C3 - SPREAD OF FIRE**

The fire separations between group sleeping areas and smoke separations to other areas are compromised in some locations by the following:

- The concealed ceiling spaces above group sleeping areas (between fire separations) contain shared heating/venting systems with shared air supply and return air ducts. We have confirmation from the alarm installer that activation of the smoke alarm system shuts down the power supply to the ceiling space gas fired heating units.

That confirmation does not however include confirmation that activating the alarm system closes the motorised dampers in the air supply ducts to the individual rooms and also the dampers to the return air supply ducts retrofitted to units 10 to 19. Confirmation of the alarm system activating all the air supply and return air dampers (including the return air dampers still to be fitted to units 1 to 9) will be necessary from the alarm installer before units 1 to 19 can be occupied.

18/12/13 - This will prevent the units being occupied until resolved.

- The electrical fitting penetrations of fire and smoke separations need to have fire and smoke stopping provision made. A random sample taken of removing electrical fitting face plates showed that fire rated flush boxes have only been fitted to one side of the double skinned fire rated partitions and that no provision has been made to prevent smoke spread by way of electrical fittings in the smoke separations of group sleeping areas.



18/12/13 — It is [the authority's] view that the fire separations will require fire rated flush boxes fitted to all electrical fittings on both sides of the fire rate partition. Also that sealed electrical flush boxes are necessary at the smoke separations of group sleeping areas.

Specialist advice will need to be sourced from your fire designer on the acceptability of the current setup and provided back to [the authority] if you do not agree that fire rated flush boxes are required to both sides of the fire rated partitions or that smoke spread isn't an issue between smoke cells via the electrical fittings. This has not been provided yet and will prevent the units being occupied until resolved.

- 3.15. On 10 March 2014, the design engineer issued a PS4—Construction Review producer statement (“PS4”) for the fire separations. The PS4 states [sic]:

The fire separations between fire cells has been inspected ... at both the roof level and floor level. An electrician ... have been engaged to confirm the adequacy of the seals provided to electrical fittings and flush boxes. Fire stop and fire sealant has been provided at all required locations as per the electricians PS3 declaration. All fixings and penetrations through fire separations have been deemed satisfactory to provide and achieve the required FRR 30/30/30.

- 3.16. On 21 March 2014, the fire compliance IQP issued a producer statement<sup>16</sup> confirming that it had:

installed interfaced fire dampers on the return duct of the heating system, to shut during a fire activation. This system was installed and tested in accordance NZS 4512:2010 and F7/AS1 ...

- 3.17. Subsequent hand-written annotations on the authority's copy of the eighth reissue of the notice to fix (see paragraph 3.14) state:

- 3.17.1. in relation to the motorised dampers in the heating system ducts – this was noted on 2 April 2014 to have been resolved following the provision of a certificate provided by the fire compliance IQP
- 3.17.2. in relation to the electrical fitting penetrations through the fire separations – this was noted on 25 March 2014 as resolved following the provision of a “PS [producer statement] from [the design engineer] at auditing electrician on file [sic].”

- 3.18. It is my understanding that these notes are referring to the documents provided on 21 March 2014 and 10 March 2014, respectively, as outlined in paragraphs 3.16 and 3.15, and to the electrician's PS3 referred to in the 10 March 2014 PS4.

<sup>16</sup> The producer statement was not given a number but appears to have been intended as a PS3—Construction Statement.

## The 2014 certificate for public use

- 3.19. The owner applied for a CPU for the building on 24 March 2014. The application form indicated the completed specified systems had been “installed in accordance with relevant standards and are in proper working order”, but did not indicate which specified systems had been installed.
- 3.20. On 3 April 2014, the authority issued the first CPU for the building – the 2014 CPU – pursuant to section 363A. The CPU did not contain an expiry date and was stated to be for the building’s use during “Stage 3 – Construct Rest Home”, with the part of the building approved for public use being “The entire rest home complex and the managers flat”. The CPU was issued subject to two conditions.
- 3.20.1. The compliance schedule statement was to be “displayed in an area of the building that is visible to the general public”, with processes in place for checking and maintaining the specified systems covered by the statement and reporting back to the authority in 12 months’ time.
- 3.20.2. The CPU stated the only outstanding compliance issues related to the stormwater drainage, and a hearing assistance system installed in the building, which the owner agreed would be replaced with a newer system “once the building is occupied and the residents’ needs are determined”.
- 3.21. On 3 April 2014, the authority also sent the owner a compliance schedule and compliance schedule statement<sup>17</sup> for the 2014 CPU (both numbered CS-717). The compliance schedule statement was stated to be valid for 12 months, with an expiry date of 3 April 2025. The statement and schedule identified eight specified systems, and seven specified systems present in the building, respectively. The following points about the specified systems are relevant to this determination:
- 3.21.1. SS 1 Automatic systems for fire suppression – both documents noted the presence of an SS 1, described in the compliance schedule as an “Automatic sprinkler system throughout the complex”.
- 3.21.2. SS 2 Automatic/manual emergency warning systems – both documents noted the presence of an SS 2, described in the compliance schedule as a “Type 5 Automatic fire alarm system with modified smoke/heat detectors and call points throughout the building”.
- 3.21.3. SS 12 Audio loops or other assistive listening systems – the compliance schedule listed an SS 12, which it described as “Assisted hearing to be

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<sup>17</sup> A compliance schedule statement accompanies a compliance schedule the first time it is issued by the building consent authority. It lists the specified systems covered by the compliance schedule, where the compliance schedule is held, and any other prescribed information. The owner must publicly display the statement for the first 12 months after the compliance schedule is issued, after which the statement is replaced by a copy of the building’s warrant of fitness. Compliance schedule statements are described in sections 104A and 105(e).

installed in dining room, sitting room and TV viewing area prior to final code compliance being issued”. The compliance schedule statement did not include SS 12 as an installed system.

- 3.21.4. SS 15 other fire safety systems or features – both documents noted the presence of SS 15 systems installed in the building, with the compliance statement providing further details.
- SS 15/2 Final exits and SS 15/4 – “Exit signage and final exits as per the attached schedule and plan”.
  - SS 15/3 Fire separations – “Fire separations 30/30/30 between group sleeping areas including fire doors. Refer to layout plan for locations”.
  - SS 15/5 Smoke separations – “Smoke separations include penetrations and door seals and supply/return air duct dampers activation by smoke alarm system”: “heating system shutdown on [fire alarm] activation”.
- 3.22. Attached to the compliance schedule were plans provided by the fire compliance IQP, showing locations of the specified systems detailed in the schedule, including a “fire egress plan” showing the locations of the dampers in the return air ducts for the heating system.
- 3.23. I note, though, that neither document noted the ducted gas heating system installed in the building as being a SS 9 Mechanical ventilation or air conditioning system.

### **The building warrants of fitness**

- 3.24. The fire compliance IQP issued the first building warrant of fitness for the 2014 CPU on 3 April 2015.<sup>18</sup> Attached to the warrant of fitness were two form 12As dated 3 April 2015, certifying that the specified systems within the owner’s building had been inspected, maintained and reported on in accordance with the requirements in the compliance schedule. The first form related to SS 1, SS 2, SS 15/2, SS 15/3, SS 15/4 and SS 15/5, among others. The second form was for SS 12 “Audio Loops – Blue Tooth”.
- 3.25. The fire compliance IQP issued a second annual building warrant of fitness on 3 April 2016, with form 12As attached covering SS 2, SS 3 and SS 15/2–15/5, among others.

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<sup>18</sup> Section 108 of the Act provides that where a compliance schedule has been issued for a building, the owner of the building must provide an annual building warrant of fitness to the relevant authority. The warrant of fitness states that the inspection, maintenance and reporting procedures in the compliance schedule have been complied with for the past 12 months. Certificates to that effect, issued by an IQP, must be attached to the building warrant of fitness in the prescribed form – namely form 12A in Schedule 2 of the Building (Forms) Regulations 2004.

- 3.26. On the same date, the IQP made an application to remove the SS 12 audio loop hearing system from the compliance schedule, with the reason given that, “This is not installed in this building. This building is not being used as a Rest Home but a residential stay home”.<sup>19</sup>
- 3.27. On 12 May 2016, the authority issued an amended compliance schedule without the SS 12 audio loop listed.
- 3.28. On 21 May 2018, the authority received a complaint about the fire alarm system installed in the owner’s building. A subsequent inspection on 16 July 2018 found that the building was being used by members of the public, but that the 2014 CPU was not being complied with, including the “requirement for ongoing inspections and maintenance of the fire alarm system.”
- 3.29. On 25 September 2020, a second company providing IQP services (“the second IQP”) issued a building warrant of fitness for the owner’s building. With respect to SS 15/3, the warrant noted: “The Fire Separations on the Ground Floor were in good order and compliant – the Fire rating of above ceiling separations of cables and pipes are in progress and yet to be completed”, and that as a result no form 12A had been provided for this specified system. A Form 12A was, however, provided for SS 15/5, among other specified systems previously noted.
- 3.30. On 7 October 2020, the authority revoked the 2014 CPU due to concerns about the ongoing maintenance and standard of the specified systems in the building and about the owner’s failure to maintain a current building warrant of fitness for the building.
- 3.31. On 4 April 2021, the second IQP issued a Form 12A that included SS 15/5, but not SS 15/3. Following this, on 7 April 2021, the IQP inspected and noted issues regarding the fire separations in the owner’s building, including that the penetrations where cabling goes through the firewalls either had no, or “incorrect” sealant used, and that the same sealant (a “fire foam”) had been used to seal gaps between the fire-rated walls and was again incorrect. The IQP stated they had sought a second opinion, which had confirmed this was not the correct method, and noted that these issues “need to be attended before this system can be signed off”.
- 3.32. On 30 September 2022, the second IQP applied to have the SS 15/3 fire separations removed from the compliance schedule.
- 3.33. Over the next three years, further documents were issued by the second IQP in relation to the compliance schedule, all of which included SS 15/5, but excluded SS 15/3. These included:
- a building warrant of fitness on 13 April 2022,

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<sup>19</sup> Given that the fire compliance IQP provided a form 12A for the audio loop system in 2015, it is unclear whether a hearing system was installed and then removed or if the form 12A was incorrectly issued.

- a form 12A on 8 August 2022,
- a building warrant of fitness on 3 April 2023,
- two form 12As on 3 April and 9 April 2024, and
- a building warrant of fitness on 22 April 2024.

### **The 2023 certificate for public use**

3.34. The authority issued a second CPU (CPU/2023/600056/1) for the owner's building on 23 August 2023 ("the 2023 CPU").

3.35. The 2023 CPU was stated to supersede all previous CPUs, to apply to the "Entire rest home construction including managers accommodation" and issued for a limited time to enable the completion of outstanding compliance items so a code compliance certificate could be issued.

3.36. The 2023 CPU initially had an expiry date of three months (expiring 23 November 2023). On 10 November 2023 the expiry date was corrected by the authority to six months (expiring 23 February 2024) at the owner's request to reflect "the agreement made with [the owner]".

3.37. The 2023 CPU included conditions. Those relevant to the matter to be determined are the expiry date of 23 February 2023, and the requirement that:

Within 60 days of [issuing] the CPU a report to be provided to the [authority] which shows that the Mechanical ventilation system has been tested, and the all systems are functional including the interconnections between the ventilation system and the fire alarm ... [This report must include] confirmation that both heat supply and air return systems are integrated with emergency warning system and will shut off during an emergency warning system activation.

3.38. The 2023 CPU was accompanied by a draft compliance schedule, also dated 23 August 2023. The draft compliance schedule gave the classified use of the owner's building as "Community service" and the use in terms of Schedule 2 of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 as "Sleeping Accommodation".

3.39. The draft compliance schedule did not include an SS12 assistive listening system. With respect to the other specified systems, those relevant to this determination were described as:

3.39.1. SS 2 Automatic/manual emergency warning systems – described as a "Type 5 Single zone analogue addressable fire alarm system throughout Rest home, carport and managers accommodation". The system was to be interfaced with the fire/smoke doors; emergency lighting system; heating, ventilation and air conditioning (HVAC) system shutdown; and the gas

services shutdown. The system was also described as interconnected with the SS 9 “interfaced fire dampers on the return duct of the heating system” and the “Gas system”, so that the duct and heaters would shut down in the event of a fire.

- 3.39.2. SS 9 Mechanical ventilation or air conditioning systems – described as a “Site Specific Built Mechanical Ventilation System” and stated to be interconnected with the “SS2 emergency warning system for fire”.
- 3.39.3. SS 15/3 Fire separations – described as “Separations between fire cells including fire doors”, with a table detailing the separations’ locations within the building. A comment added in respect of this specified system noted: “Current fire walls have not been constructed as per the consent documents, Certificate for Public Use is in place to allow these works to be undertaken”. In addition, a “fire egress plan” attached to the compliance schedule showed the locations of the fire-rated wall and contained a hand-written annotation that “FRR to extend to fascia lines”.
- 3.39.4. SS 15/5 Smoke separations – described as “Smoke Doors forming a smoke separation between the corridors and units within each fire cell”, with a table detailing the separations’ locations within the building.

### **The 2024 refusal to issue a certificate for public use**

- 3.40. On 27 February 2024, the owner’s agent applied to renew the 2023 CPU. The application was accompanied by a “Checklist for Certificate for Public Use”. In the checklist, the agent stated that:
  - 3.40.1. with respect to the compliance schedule – “The specified systems are being checked in accordance with the compliance schedule requirements”
  - 3.40.2. with respect to ventilation – “The venting is as detailed on the CPU”
  - 3.40.3. with respect to the duration – “we will need 18 months to complete the proposed work”.
- 3.41. The agent provided a “building monthly inspection register” showing inspection dates for seven of the specified systems since the schedule was issued.
- 3.42. The authority refused the application for the 2024 CPU on 8 March 2024. The reasons given for the refusal were:
  - 3.42.1. the condition in the 2023 CPU relating to the mechanical ventilation system had not been met and the authority had not received the required documentation relating to the system’s testing and integration with the emergency warning/fire alarm system

- 3.42.2. “insufficient information” has been supplied to show that that “testing and maintenance has been kept up to date for the specified systems” already installed in the building; the information supplied is “not sufficient to show all the buildings safety systems are in working order”
- 3.42.3. no information had been submitted about the “current condition of the fire walls / separations or any reporting information for SS15/3”. The owner had previously agreed to apply for a building consent to “bring the building into full compliance with the Building Code”. This had not occurred, so a report on this matter by a “suitably qualified person” was now required.
- 3.43. The authority’s refusal letter set out the specified systems that “up to date reporting, inspection and maintenance records” were required for, and advised that as the 2023 CPU had now expired, the owner should not be permitting members of the public to use the building until the authority issued a new CPU.
- 3.44. On 22 March 2024, the authority issued the owner with a further notice to fix (NTF/2024/1041), for a breach of section 363, due to the owner’s building being a “building with a building consent that that has not yet had a Code Compliance Certificate issued, and is operating and accessible to members of the public without a Certificate for Public Use being obtained and current.”
- 3.45. On 22 April 2024, the second IQP again applied to have the SS 15/3 fire separations removed from the compliance schedule.
- 3.46. On 23 May 2024, the authority, in conjunction with FENZ, carried out an inspection of the owner’s building. The purpose was to assess if the building was dangerous under section 121 of the Act because of “the continued use of the building without a current Certificate for Public Use or Code Compliance Certificate in place”. The report and accompanying summary letter from this inspection, both dated 14 June 2024, outlined the following relevant findings.
- 3.46.1. The mechanical extraction systems for the “bathrooms” and “commercial kitchen” were considered to be of a domestic scale. The authority and FENZ were therefore of the view that these systems did not need to be included on the compliance schedule under specified system 9.
- 3.46.2. The heat exchange units were noted to be interconnected, with ducting running between fire cells and penetrating fire-rated separations. The report stated, “The units are not boilers but heat exchangers and from what could be established do not introduce fresh air into the building”. Therefore, the “heating devices do not need to be on a compliance schedule for SS9”. However, the installed heating system should be added to the compliance schedule under SS 2 and SS 15/3.

- 3.46.3. Photos taken of the ceiling space show ventilation ducts for the gas heating system penetrating fire-rated separations at several locations in the building.
- 3.46.4. The “Fire separations within the roof space remain non-compliant” and given the construction method used, any penetrations were likely to “need specialist input”.
- 3.46.5. While some work to correct issues with the fire-rated separations had been carried out, it was noted that there was “still work to be done as per consent non-compliances and previously issued notices to fix”.
- 3.46.6. The fire-rated walls “would achieve the 30/30/30 requirements for structural stability, integrity and insulation” in the event of a fire. However, while this was sufficient “to prevent the building being assessed as immediately dangerous” the walls still were not “compliant to the consent and consented building use”.
- 3.47. The inspection report and summary concluded that while the building did “not meet the definition of immediately dangerous” under section 121 of the Act, “All previous building consent and notice to fix items remain relevant and need to be addressed”. In addition, the owner’s responsibilities under section 363 of the Act remained, and as members of the public were occupying the building and no code compliance certificate had been obtained, a CPU was required.



**Figure 3: Photos from the 2024 inspection of ducting and fire separations in the ceiling space.**



## 4. Submissions

- 4.1. For ease of reference, the parties' submissions are summarised under the CPU they relate to.

### **The owner**

- 4.2. Regarding the 2014 CPU:

- 4.2.1. It was not possible to "renew [the] BWoF annually" as required on the CPU. This is because the compliance schedule listed specified systems (the fire separations) that did not comply with the nominated performance standards. The separations also could not be tested in the way the schedule required. This prevented "the IQP from issuing a form 12A for all specified systems on site, preventing [the owner] from complying with the conditions of the CPU".
- 4.2.2. The accompanying compliance schedule was incorrectly issued because it included specified systems which the authority was aware were "not performing to the requirements of the standard", which is in breach of section 102(1)(b). Specifically, the authority included the fire separations in the schedule, even though it had previously issued a notice to fix relating to them in 2023.
- 4.2.3. The compliance schedule also included specified systems (SS 12 Audio loops or other assistive listening) that had not been installed in the building.
- 4.2.4. The authority was incorrect to issue the compliance schedule because a compliance schedule can only be issued alongside a code compliance certificate. This breaches section 102(2).
- 4.2.5. Despite discussing the issues with the CPU and compliance schedule with the authority, it did not update them, which was a breach of section 107.
- 4.2.6. There is still work requiring to be done to the building to address the matters raised in the 2013 notice to fix. The owner's agent provided a report detailing what these were.

- 4.3. Regarding the 2023 CPU:

- 4.3.1. It was not possible to comply with the condition in the CPU requiring the mechanical ventilation system to be added to the compliance schedule within 60 days, as the ducted gas heating system installed is not the type that needs to be added to a compliance schedule. The owner has received advice from an IQP confirming this and stating the gas heating system does not meet the definition of an SS 9 Mechanical ventilation or air

conditioning system. This is because the system does not introduce any fresh air into the building (it circulates air from inside the building into and out of the heating units but does not draw in air from outside). This means the CPU was impossible to comply with, so it was not renewed.

- 4.3.2. The gas heater units are installed in the roof-space and were installed by a registered self-certifying gasfitter. The owner does not believe the heating units are connected to any other specified system in the building. There is no energy certificate relating to the installation, but the owner considers it complies with AS/NZS 5601. The system is no longer in use, except in the communal dining area. Heating within the units has been converted to electricity.
  - 4.3.3. The owner still does not consider that the gas heating system is required to be on a compliance schedule as SS 9. The authority has been aware of the gas heating system for “some time” and had not previously updated the compliance schedule to incorporate it.
  - 4.3.4. The 6-month timeframe given in the CPU is shorter than agreed to and should not have been imposed. The owner and authority had previously agreed to an 18-month timeframe to allow the owner to complete the building work to a point where a code compliance certificate could be applied for. This is a breach of section 363. Furthermore, it is up to the owner to nominate the timeframe, and this is recognised in section 363A and the authority’s documentation.
  - 4.3.5. When the authority changed the timeframe of the notice from three to six months it did not change the CPU’s issue date. This was a breach of section 363A(3).
- 4.4. Regarding the 2024 refusal to issue a CPU:
- 4.4.1. Baffles have been installed in the ducts of the gas heating system where the ducts pass between individual apartments within each fire cell. No ducts penetrate the fire separations between the fire cells.
  - 4.4.2. The reasons outlined in the authority’s refusal to renew the CPU are excessive and impose a more onerous standard of safety than that outlined in section 363A(2). The owner is only required to show that the building is safe for members of the public to use, but the authority has requested information that goes beyond this and its own “check sheet”.
  - 4.4.3. “The [authority has] issued reports confirming the building is safe to use”, yet still refuses to issue a CPU.

- 4.4.4. The authority should not have refused the applications, as section 363A(5) requires it to put the application on hold when it requests additional information.

### **The authority**

4.5. Regarding the 2014 CPU:

- 4.5.1. While the 2014 CPU did not have a timeframe, it required “ongoing testing and maintenance of specified systems”. The Act does not require that a timeframe be included as a condition on a CPU: an expiry date is a condition that a CPU “may” be issued with under section 363A, but not “must” contain.
- 4.5.2. The CPU was revoked after issues were detected with the specified systems in the building and, although remedial works were undertaken, not all of the systems were “accounted for under Form 12a’s”, meaning the conditions in the CPU had not been met.
- 4.5.3. A territorial authority can issue a compliance schedule at any time, including with the issue of a CPU.
- 4.5.4. The authority relied on the producer statement dated 30 October 2012 for the “emergency warning” system which included “ancillary services [and] mechanical vent shutdown”, and “the fire egress plan issued as part of the consented documents... [which] shows a mechanical ventilation system being controlled by a fire alarm system. The above producer statement gives verification that this ventilation system has been integrated into the emergency warning system”.
- 4.5.5. “The ventilation was not included on the originally issued compliance schedule,” but the authority has added it “to the more recently issued draft compliance schedule when issuing the 2023 CPU.” This was done in agreement with the owner’s agent. It is assumed the “system may have been left off the first compliance schedule due to the install being incomplete at the time the [compliance schedule] was issued”.
- 4.5.6. To “remove a specified system from a building consent that has been issued, a Building Consent Amendment is required to be applied for”.
- 4.5.7. The authority’s current procedure is to include “All specified systems that have been consented ... on a draft compliance schedule that is issued with a Certificate for Public Use, whether installed or not”.
- 4.5.8. The “conditions on the CPU were able to be complied with”.

#### 4.6. Regarding the 2023 CPU:

- 4.6.1. The information supplied for the 2023 CPU was “less than sufficient”. However, the CPU was issued due to “court proceedings and assurance of key steps towards compliance”. The progress towards compliance was not achieved and the CPU expired.
- 4.6.2. “It is reasonable that the revised draft compliance schedule reflect all systems in the building and set the requirement that these be inspected and maintained regularly as required by regulation”.
- 4.6.3. The building was consented as a rest home for use as transient accommodation and requires a ventilation system (SS 9) to be incorporated into a compliance schedule. The authority referred to the Ministry’s *Compliance Schedule Handbook*.
- 4.6.4. The “error [regarding the three-month expiry date] in the document was corrected” pursuant to section 46 of the Legislation Act 2019. The “error was corrected at the [owner’s] agent’s request”. The authority does not consider the CPU has been reissued “as it was not reapplied for”; it was just corrected.
- 4.6.5. The authority’s standard practice is to issue CPUs with a condition that they are valid for 3 months. This incentivises owners to work towards attaining a code compliance certificate. Where a project reasonably requires longer than 3 months to complete, the authority “will extend the period”.
- 4.6.6. There was no “pre-agreement” between the parties to an 18-month expiry date. This date comes from draft court orders that apply to multiple instruments and the time required to resolve them all, not just one CPU.
- 4.6.7. The conditions on this CPU were capable of being complied with. The authority gave the IQP the option of providing other forms of certification in place of a Form 12A if any of the systems in the building were unable to be inspected and tested, or were not yet installed and operational. Instead, the IQP provided a Form 12A that omitted particular specified systems and hence, if displayed, would be “misleading to the public”.
- 4.6.8. The parties agreed at a meeting on 19 June 2023 that the owner would apply for an amendment to the building consent, which was likely to change the use of the building and the specified systems that were shown on the consent as being in the building. The intention was that a new draft compliance system would be issued at that point.

#### 4.7. Regarding the 2024 refusal to issue a CPU:

- 4.7.1. The application for the 2024 CPU had “little to no documentation attached”. The application directed the authority to “previously provided

documentation” and did not supply “newly revised documentation”. The documentation included a building warrant of fitness for the 2023 CPU that was due to expire in just over a month. Updated and additional information was required for the authority to issue a CPU, and because this was lacking the application was refused.

- 4.7.2. The authority “did not receive sufficient information to determine the safety status of the building” and to “be satisfied on reasonable grounds that members of the public could continue to use the premises safely”.
- 4.7.3. The authority “has not issued any report stating that the building is safe to use that is not in the form of a CPU with conditions”. A “building which does not meet the definition of immediately dangerous [as] per section 121 of the Building Act 2004 does not by default meet the definition of safe”.
- 4.7.4. The authority also relied on previous determination 2013/045.<sup>20</sup> The “presence of a ventilation system was not in question, only the complete and compliant installation of the specified fire dampers to prevent fire spread”.
- 4.7.5. During an inspection of the building on 23 May 2024, the authority “observed that the mechanical ventilation system, which was consented and which [the authority] understood previous documentation confirmed had been commissioned, was not present in the building. Based on this new information, [the authority] will request” an application to amend the building consent for “the removal of the consented ventilation system”. An application for an amendment is necessary to remove a specified system from a building consent.
- 4.7.6. The authority’s view is that section 363A requires it to keep working with the owner to bring the building into compliance with the building consents and enable a code compliance certificate to be issued.

## 5. Fire and Emergency New Zealand consultation

- 5.1. I consulted with FENZ as required by section 170(a). The FENZ response stated (in summary):
  - 5.1.1. With respect to the 2014 CPU, if the building was being occupied by the public, then issuing a compliance schedule is appropriate.
  - 5.1.2. With respect to the 2023 CPU, the documentation held by the authority showed the building was to be used as a rest home, and this is reflected in the CPU and compliance schedule, which included an SS 9 smoke control

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<sup>20</sup> See footnote 10.

system. This is consistent with Table 2.2 of C/AS2 which requires a type 9 system to be installed in rest home buildings irrespective of their escape height<sup>21</sup>. “In the absence of a performance-based design addressing the risk of fire and smoke spread between places of safety via the HVAC system, Fire and Emergency considers that the condition for a type 9 system to be appropriate.” If the owner applies to change the use of the building to a motel, the type 9 system will no longer be required under C/AS2.

- 5.1.3. With respect to the refusal of the 2024 CPU, the owner has a “responsibility to ensure that members of the public are adequately protected if they are in a building that does not have a code compliance certificate”. The owner has not satisfied the conditions of the 2023 CPU it was therefore appropriate to refuse the 2024 CPU. FENZ also commented that the decision appeared to be influenced by “challenges in getting specified system SS15/3 (fire separations) signed off”. They noted that construction which “does not achieve the fire rating performance required by the Building Code, ... significantly impacts on the level of safety within the building. This is especially important for this building as it contains sleeping occupants”.

## 6. Discussion

- 6.1. The matters for determination involve the authority’s decisions around issuing three CPUs: the 2014 CPU, the 2023 CPU and the refusal to issue the 2024 CPU. For various reasons, the owner disputes the authority’s decision-making in each case; either because they do not consider a CPU should have been issued, issued with a compliance schedule, issued subject to particular conditions, or refused.

### Certificates for public use

- 6.2. In essence, a CPU is a temporary measure to allow the public to access a building where a building consent has been granted for building work affecting the premises or part of the premises and no code compliance certificate has been issued for the work.
- 6.3. The legislation governing CPUs is set out in sections 362W to 363C of the Act.
- 6.4. Section 362W sets out the types of premises that the duty in section 363 applies to, which include buildings (or parts of buildings) that are open to or being used by members of the public.
- 6.5. Section 363 establishes (among other things) that it is an offence for an owner of the types of premises covered by section 362W to use or permit the use of any part

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<sup>21</sup> I have assumed this in reference to Acceptable solution C/AS2 (first edition, amendment 3, effective 2 November 2023).

of those premises that is affected by building work, in certain situations. Those situations include where a building consent has been granted for the work, but no code compliance certificate or CPU has yet been issued for it; or a CPU has been issued subject to certain conditions and those conditions have not been complied with.

6.6. Section 363A provides that the public may be allowed to use the types of premises covered by section 362W before a code compliance certificate is issued in some circumstances.

6.6.1. Section 363A(1) allows that where a building consent has been granted in relation to such premises, but a code compliance certificate has not yet been issued, the owner of the premises can apply to a territorial authority for a CPU for all or part the premises.

6.6.2. Section 363A(2) provides that an authority can issue a CPU “if, and only if, [it is] satisfied on reasonable grounds that members of the public can use the premises or part (as the case may be) safely”.

6.6.3. Section 363A(3) states that a CPU must be on the prescribed form<sup>22</sup> and may be issued subject to conditions.

6.6.4. Section 363A(5) states that in deciding whether to issue a CPU an authority may request reasonable information in respect of the application.

6.6.5. Section 363A(6) makes it clear that having a CPU issued does not absolve the owner of a building from the requirement to apply for a code compliance certificate once the building work is finished.

6.7. There has been much discussion by the parties, both historically and in their submissions for this determination, about the presence (or absence) of specified systems in the owner’s building and their compliance with the Building Code or building consent.

6.8. However, it is important to note that the test in section 363A(2) is one of safety and this test will depend on a wider range of factors than just the performance of the specified systems the building contains.

6.9. Section 363A(2) requires an authority to be satisfied on reasonable grounds that members of the public can use a building (or part of it) safely, before it can issue a CPU for it. This is a distinct test, specific to the site and building in question, and could involve looking at a wide variety of a given building’s features, as well as potential ways to make those features safe during construction and prior to the issue of a code compliance certificate. It involves weighing the risks associated with any building work that remains outstanding, its impact on the wider building, what

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<sup>22</sup> Namely, Form 16 in Schedule 2 of the Building (Forms) Regulations 2004. Form 15 of these regulations is the prescribed form for making the application.

stage the building work is at and any mitigations in place to manage those risks. It may involve an assessment of how and when members of the public will use the building and in which areas.

- 6.10. The test is broader than the section 17 test of compliance with the Building Code, or the section 102(1)(b) test of specified systems being able to perform (both of which have been raised in the parties' submissions). Although the matters canvassed by these tests may be relevant in the context of a given building and its use, the public safety test does not necessarily depend on the building work being complete or all safety features being already in operation. The progress of the building work and level of Building Code compliance of the building work are just some of the factors the authority must assess in deciding whether or not members of the public can use the building safely and a CPU can be issued.

### **Compliance schedules**

- 6.11. The 2014 and 2023 CPUs refer to compliance schedules issued by the authority and the specified systems installed in the building. These have been subject to discussion by the parties, mainly in relation to whether the compliance schedules issued by the authority are accurate and able to be complied with.
- 6.12. The legislation relating to compliance schedules can be found in sections 100 to 107 of the Act. The provisions of particular relevance include section 100, which stipulates that certain buildings require compliance schedules where they contain one or more specified systems, and section 102 which sets out the circumstances in which a compliance schedule must be issued.

#### **102 When compliance schedule must be issued**

(1) A building consent authority must issue a compliance schedule if—

(a) the compliance schedule, or an amended compliance schedule, is required as a result of building work; and

(b) the building consent authority is satisfied, on reasonable grounds, that the specified systems for the building are capable of performing to the performance standards for those systems.

(2) A compliance schedule that is issued under subsection (1) must be issued with the relevant code compliance certificate or consent completion certificate.

(3) ...

- 6.13. Also of relevance:

- 6.13.1. section 103, which sets out what a compliance schedule should contain, including a description of each of the specified systems that the schedule covers, the performance standards that apply to those systems; and the inspection, maintenance, and reporting procedures to be followed by an



IQP or other person to ensure that the systems are performing to the required standards

- 6.13.2. section 105, which sets out the obligations of a building owner once a compliance schedule has been issued
- 6.13.3. sections 106 and 107, which cover making amendments to compliance schedules, either at the application of the owner or on the authority's own initiative, respectively.
- 6.14. A previous determination discussed the compliance schedule regime, including specified systems and building warrants of fitness in previous determinations.<sup>23</sup> In summary, compliance schedules are issued for certain types of buildings that contain particular safety and essential systems. These systems – known as specified systems – are crucial to the continuing safety and health of the building and those who use it, and are identified on the compliance schedule, along with the performance standards, and the inspection, maintenance and reporting procedures that relate to them.
- 6.15. Once a compliance schedule is issued, the building owner is responsible for ensuring the specified systems in the building are inspected and maintained, and continue to meet their identified performance standards, and that this is duly reported on. This process confirms that the specified systems incorporated into the building's design continue to perform as intended, and that this performance is not compromised over time, to ensure the ongoing compliance of the building.
- 6.16. To discharge these responsibilities, a building owner may engage an IQP (as defined in section 7 of the Act) to verify that the requisite inspection, maintenance and reporting procedures for each specified system in the compliance schedule have been fully complied with. The IQP (or IQPs, where more than one is used) will do this by completing a Form 12A. Once this has been done, the owner must complete and sign a building warrant of fitness for the building, which must then be supplied to the authority (along with the completed Form 12A) and displayed in a public place.
- 6.17. The specified systems that are subject to this regime are listed in Schedule 1 of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005. In addition, the Ministry has issued guidance under section 175 detailing the compliance schedule framework and describing the types of building elements that would meet the definition of a given specified system – namely, the *Compliance Schedule Handbook*,<sup>24</sup> referred to by the authority in its submissions.

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<sup>23</sup> See Determination 2019/040 *Regarding the authority's refusal to amend a compliance schedule to remove a mezzanine floor from the schedule for an early childhood centre* (issued 19 August 2019).

<sup>24</sup> Ministry of Business, Innovation and Employment. (2014). *Compliance schedule handbook*. <https://www.building.govt.nz/assets/Uploads/building-code-compliance/handbooks/compliance-schedule-handbook/Compliance-schedule-handbook-amendment-3.pdf>

- 6.18. The legislation relating to building warrants of fitness can be found in sections 108 to 111. Section 108 sets out the responsibilities of the owner, the purpose of building warrants of fitness and the requirements they must comply with, while section 108A outlines the duties of IQPs.

### **The 2014 certificate for public use**

- 6.19. The owner has submitted the authority should not have issued the 2014 CPU because the condition it contained requiring the owner to renew the building warrant of fitness was not capable of being complied with. This was because the compliance schedule issued with the CPU listed non-compliant fire separations and audio loops that were not installed in the building as specified systems that required reporting on (as SS 15/3 and SS 12, respectively).
- 6.20. However, as set out above, the test in section 363A(2) that the authority was required to apply in deciding whether to issue a CPU is a specific one – the authority must have been satisfied on reasonable grounds that members of the public could use the building safely.
- 6.21. With respect to the 2014 CPU, the authority had already raised concerns regarding the completeness of the fire separations before the CPU was issued, including in its inspection notices and notices to fix (including the notice to fix dated 19 December 2013). Subsequent to this, the design engineer provided a PS4—Construction review stating that the remedial work to the fire separations in the ceiling space and electrical fittings penetrating the fire separations had been inspected and were complete. For the latter, the design engineer referred to a written construction producer statement provided by an electrician.
- 6.22. However, later inspections would find the penetrations in the fire separations were not in fact complete. This included unrated electrical fixings, issues with the type of fire-rated sealant used and how it was used.
- 6.23. For this building, the presence of unrated penetrations through fire separations or products that were not fit for their purpose raise heightened safety risks in terms of fire and smoke spreading more quickly through the residential and communal areas building. As a result, the public may not be able to exit the premises safely, risking injury or death. In addition, there was no evidence that these heightened risks were compensated by way of other safety provisions.
- 6.24. On the balance of evidence, given the inspection records from the authority and third parties, as well as the types of issues raised, I consider these problems with the fire separations were present at the time the 2014 CPU was issued.
- 6.25. I am therefore of the view that, at the time the 2014 CPU was issued, members of the public could not use the building safely, as required under section 363A, and I conclude that the CPU should not have been issued.

- 6.26. Having reached this conclusion, for the sake of clarity I wish to comment on some of the other matters relating to this CPU raised in the parties' submissions.
- 6.27. The 2014 CPU was issued alongside a compliance schedule and contained a condition that the owner was to put in place processes for the "ongoing checking and maintenance" of the features listed in the compliance schedule, and report back on these in 12 months' time. A compliance schedule statement with a 12-month expiry date was also issued, which the owner was to display in the interim.
- 6.28. The owner has submitted that a compliance schedule can only be issued alongside a code compliance certificate and should not have been issued with the CPU.
- 6.29. I do not agree. Section 102 sets out the circumstances in which an authority must issue a compliance schedule. In these circumstances, where the criteria in subsections 102(1) (a) and (b) are met, then subsection provides that compliance schedule must be issued with a code compliance certificate or consent completion certificate. However, the fact that a compliance certificate must be issued in this situation, does not preclude the authority from issuing a compliance schedule at another earlier stage.
- 6.30. The owner has also raised concerns about the inclusion of SS12 in the compliance schedule and the impact this has on the CPU. The owner is of the view that the system should not have been included in the compliance schedule if it had not been installed, and that this made the CPU unable to be complied with.
- 6.31. The owner is correct that the compliance schedule listed SS12: Audio loops or other assisted listening system as a specified system in the building, although the schedule also noted that this would be installed "once the building is occupied and the residents needs are determined". The compliance schedule statement also indicates that an SS 12 had not yet been installed.
- 6.32. The authority has said that its current practice is to include all specified systems that have been consented on a draft compliance schedule, whether or not they have yet been installed. However, in this instance the compliance schedule issued was not in a draft format.
- 6.33. Notwithstanding this, I am of the view that, while the compliance schedule itself is not necessarily best practice in its format, the owner was still able to carry out "ongoing checking and maintenance" of the features listed on the compliance schedule statement, and that this did in fact happen. I note that when the compliance schedule was eventually revoked, this was to do with issues with the fire separations and not the presence or absence of audio loops.
- 6.34. The remaining issue that has arisen with respect to the 2014 CPU is that it did not include an expiry date, upon which a new CPU would need to be applied for.

- 6.35. There is no requirement under the Act or the Building (Forms) Regulations 2004 to include an expiry date as a condition of a CPU. However, I consider that the Act intends the CPU as a temporary mechanism to enable use of certain buildings prior to the issue of a code compliance certificate. In the case of the owner's building, where work was ongoing, and the authority was aware of incomplete building work that potentially affected the building's safety, it would have been appropriate to include conditions requiring renewal of the certificate or similar checks.

### **The 2023 Certificate for public use**

- 6.36. The authority issued the 2023 CPU on 23 August 2023. By this time, evidence had arisen of the unrated penetrations in the fire separations and potential issues with the fire-rated sealant used, as outlined in documentation relating to the 2020, 2022, and 2023 building warrants of fitness.
- 6.37. As discussed in paragraph 6.23, these issues raised risks to the public occupying the building safely. Given the lack of evidence that these safety issues had been satisfactorily resolved or otherwise compensated for at the time the 2023 CPU was applied for, I am of the view that the public safety test under section 363A was not met. Accordingly, I conclude that the 2023 CPU should not have been issued.
- 6.38. The owner has also raised concerns about the conditions included in the 2023 CPU, specifically that the timeframe was updated without amending the issue date of the 2023 CPU, the length of the 6-month timeframe, and the inclusion of conditions regarding the mechanical ventilation system.
- 6.39. Regarding the corrected timeframe, the 2023 CPU was originally issued with a timeframe of 3 months. As outlined in paragraph 3.36 this was later corrected to 6 months to reflect the timeframe that was originally requested and agreed to. I consider that the authority was correcting an error in the 2023 CPU as originally issued, and it was not necessary to update the CPU's date of issue.
- 6.40. Section 363A(3)(b) gives authorities broad leeway to include conditions in CPUs and this includes timeframes. In my opinion, six months was a reasonable timeframe for the authority to set, given the time that had already passed since construction first began, the stage that the building work was at, and the remaining work necessary until a code compliance certificate could be applied for.
- 6.41. I concur with the authority's submission that attaching a shorter timeframe as a condition to a CPU provides an incentive for a building owner to continue working towards attaining a code compliance certificate. As stated above, it is my view that the Act intends CPUs as temporary mechanisms, and maintaining momentum towards a code compliance certificate is desirable. Timeframes also allow for changes in the situation to be managed to ensure the safety of members of the public. I note also that the six-month timeframe imposed by the authority does not preclude the owner applying for further CPUs, should additional time be required.

- 6.42. The 2023 CPU also included a condition requiring the owner to provide further evidence regarding the ducted gas heating systems installed in the individual units in the building (referred to in the CPU as the mechanical ventilation system), in particular regarding the system's integration with the fire alarm and emergency warning system.
- 6.43. This condition is not an appropriate one to include on a CPU. Its inclusion suggests that there were still unresolved safety issues with respect to potentially incomplete specified systems and the resultant risk of spread of fire and smoke. This is an issue that should have been resolved before a decision was made to issue a CPU as it brings into question the safety of members of the public in the building.
- 6.44. The owner has also submitted that the ducted gas heating system should not be listed on the compliance schedule as a SS 9. The outcome of the authority's 23 May 2024 inspection also concluded that the system should not be listed as an SS 9, although it also noted that some aspects of it, such as the interconnection with the fire warning system, should be.
- 6.45. The Ministry's *Compliance Schedule Handbook* notes<sup>25</sup> that not all "ventilation" systems are required to be listed on a compliance schedule, primarily those where their failure will be evident and will not pose a risk to health or life safety.
- 6.46. In making their submission, the owner has relied on the fact that the ducted gas heating system installed in their building does not introduce air from outside the building, and in their view is of the type given in example (I) in the Ministry's handbook of "mechanical ventilation or air conditioning systems not to be incorporated in a compliance schedule".
- 6.47. However, while the ducted gas heating system does not introduce external air as part of its operation, it does include ducts penetrating fire separations. Failure of the ventilation system could have the effect of spreading fire and smoke through the building. I therefore consider that the ducted gas heating system meets the definition of a SS 9, and the system is required to be included on the building's compliance schedule.

### **The 2024 refusal to issue a certificate for public use**

- 6.48. The owner's 2024 application was to renew the 2023 CPU. The authority refused to issue a new CPU on the grounds that no further evidence had been provided regarding the safety issues identified in relation to the earlier CPUs.
- 6.49. On the evidence I have seen I am of the view that the public safety test under section 363A(2) was not met as there was still a risk to members of the public from the potential spread of fire and smoke, as discussed in paragraph 6.23. There were grounds to refuse to issue the CPU.

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<sup>25</sup> At page 38.

6.50. The authority's refusal letter listed several reasons which the owner submits impose a more onerous standard of safety than that outlined in section 363A(2).

6.51. I consider the reasons outlining insufficient information, regarding the known issues with the fire separations and the ongoing testing and maintenance of the specified systems installed in the building, relevant to establishing whether the public safety test under section 363A(2) has been met.

6.52. However, I do not consider the reason requiring the provision of a mechanical ventilation report to be relevant in regard to the safety of members of the public, as the authority had already been provided with evidence regarding the gas heating system being interconnected with the fire warning system and being fitted with dampers to control the spread of fire and smoke.<sup>26</sup>

## 7. Decision

7.1. In accordance with section 188 of the Building Act 2004, I determine:

- with respect to the 2014 CPU, the test under section 363A was not met and the authority's decision to issue the CPU is reversed.
- with respect to the 2023 CPU, the test under section 363A was not met and the authority's decision to issue the CPU is reversed.
- with respect to the 2024 refusal to issue a CPU, the test under section 363A was not met and the authority's decisions to refuse to issue the CPU is confirmed.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 11 June 2025.

**Andrew Eames**

**Principal Advisor Determinations**

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<sup>26</sup> See paragraphs 3.10 and 3.15, regarding the fire compliance IQP's provision of a statement of systems relating to the interconnection of the gas heating and fire warning systems and a producer statement for the installation of dampers in the heating ducts, respectively.