



Determination 2019/046

Regarding dangerous building notices issued for a building at 233-237 Queen Street, Auckland

Summary

This determination considers two dangerous building notices that were issued for a six-storey building in central Auckland. The various levels of the building are fitted out for retail, offices, and sleeping accommodation. The determination considers the authority's powers in relation to its decisions to issue dangerous building notices, in particular with regard to restricting entry to part of the building, which meant part of the building could not be used for sleeping accommodation.

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Table 1: The notices referred to in this determination

Notice reference	Date	Description used in this determination
No. 6779	Issued 30 June 2016 Reissued 2 May 2017 Withdrawn on or around 23 June 2017	Notice no. 6779 (This notice was the subject of a previous determination.)
Notices that are the subject of this determination		
NOT 21427373	Issued 20 December 2018 Withdrawn on 30 December 2018	The first dangerous building notice
NOT 21427560	Issued 30 December 2018 Expired 29 January 2019	The second notice
NOT 21430357	Issued 30 January 2019 Expired 18 February 2019	The reissued second notice

1. The matters 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:
- Base Backpackers (NZ) Pty Limited (“the applicant”), who leases two levels in the building. For the purpose of the determination the applicant is represented by an agent (“the applicant’s agent”).
 - The owners of the building (“the owners”), represented by an agent acting for the Body Corporate 318074.
 - Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
 - Fire and Emergency New Zealand (“FENZ”) under section 176(g) of the Act.
- 1.3 In this case FENZ has a dual role: it is both a party under section 176(g) of the Act as an ‘organisation who or that has a right or an obligation under any other Act to give written notice to a territorial authority in respect of matters to which this Act relates’; and, as this determination concerns fire safety, I am also required to consult with FENZ under section 170 of the Act.
- 1.4 This determination arises from the decision of the authority to issue dangerous building notices under section 124 of the Act for a multi-level building. The authority was concerned that the building did not have adequate fire safety systems (active and passive²), and concluded that the building is “dangerous” as that term is defined in section 121(1)(b) of the Act.
- 1.5 After some remedial action was taken by the owners in response to the authority issuing the first dangerous building notice, the authority reached a view that the building remained dangerous only in respect of use of part of the building for sleeping accommodation. The authority issued, and later reissued, a second dangerous building notice restricting entry to part of the building used for sleeping accommodation.
- 1.6 The applicant’s agent accepts that the building was dangerous when the first notice was issued, but is of the view that the building was not dangerous when the authority issued and later reissued the second notice, in particular in relation to the levels leased by the applicant for sleeping accommodation. The applicant’s agent also considers the notices were “defective” as they did not adequately describe the aspects of the building that the authority considered made the building dangerous, and in describing the threshold the authority had applied in reaching its decision that the building was dangerous.
- 1.7 This building has been the subject of a previous Determination³ (“the first determination”), which also considered the authority’s decision to issue a dangerous building notice (no. 6779, issued on 30 June 2016) and that first determination is

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 Active systems include the likes of alarms and sprinkler systems, and passive fire protection consists of fire-rated building elements that limit the spread of smoke and fire.

³ Determination 2017/064 Regarding a dangerous building notice issued for a building at 233-237 Queen Street, Auckland (11 August 2017)

referred to herein. This earlier notice was also issued in relation to fire safety concerns and also restricted use of parts of the building normally used for sleeping accommodation. That notice was reissued on 2 May 2017, and was later withdrawn by the authority (on or around 23 June 2017). The first determination discussed the authority's reliance on notification issued by FENZ (then New Zealand Fire Service) under the Fire Service Act⁴, the restriction on use for sleeping accommodation included in the notice, and the requirements identified in the notice.

1.8 The matters to be determined⁵ in relation to this application are:

Matter 1

The exercise of the authority's powers of decision in issuing the dangerous building notices NOT 21427373 dated 20 December 2018 and NOT 21427560 dated 30 December 2018 (herein after referred to as the first and second notice respectively), and to reissue the second notice NOT 21430357 dated 30 January 2019 ("the reissued second notice") for a further period of 30 days. In making this decision I have considered:

- whether the building was dangerous at the time the authority exercised its decision-making powers
- the powers exercised by the authority when it "withdrew" the first dangerous building notice after an application for determination had been made
- the powers exercised by the authority under section 124(2) of the Act when it issued the notices
- the reasons given for the notices being issued, specifically in relation to the definition of a dangerous building under section 121(1)(b) of the Act
- the statements on the notices that a building consent may be required for some of the remedial work to achieve compliance.

Matter 2

The authority's proposal to exercise its powers under section 124(2)(a) and/or section 124(2)(b) to restrict entry to the building in its entirety as described in its letter of 19 February 2019 (refer paragraph 2.12).

1.9 During the course of this determination, the applicant's agent requested I consider a number of different issues in relation to the exercise of the authority's powers in issuing the dangerous building notice and its subsequent actions in agreeing to a proposal put to it by the owners of the building that in effect continued the restriction on entry for the purpose of sleeping accommodation. I have taken into account the issues raised by the applicant's agent in my considerations insofar as they relate to the matters to be determined as described in paragraph 1.8.

1.10 In making my decision, I have considered the submissions of the parties, including the information available to the authority at the time it reached the conclusion that the building was dangerous and information available to it subsequently, and the other evidence in this matter.

⁴ *Fire Service Act 1975* (repealed on 1 July 2017)

⁵ Under sections 177(1)(b) and 177(3)(f)

- 1.11 The relevant sections of the Act that are discussed in this determination are set out in Appendix A. Unless otherwise stated, all references to sections are to sections of the Act and all references to clauses are to clauses of the Building Code (Building Regulations 1992, Schedule 1).

2. The building and background

Table 2: Key dates and reports

Date	Report title (author)	Paragraph reference
8 November 2018	Passive fire survey and design: survey, specification and design for remedial works (Fire compliance consultants engaged by building owners)	2.2
4 December 2018	Compliance schedule audit (Authority)	2.3
12 December 2018	Fire safety survey (FENZ)	2.4
17 December 2018	The fire consultant's first report (Fire consultant engaged by the authority)	2.5
17 December 2018	Authority issued notice to fix	2.6
20 December 2018	Authority issued first dangerous building notice	2.7
21 December 2018	Application for determination made	2.8
30 December 2018	Authority withdrew first dangerous building notice and issued second notice	2.9
2 January 2019	Ministry issued direction under section 183 ⁶	2.9.5
17 January 2019	The fire consultant's second report (engaged by the authority)	2.10
30 January 2019	Authority reissued second notice	2.11
19 February 2019	Authority entered into agreement with owners	2.12

2.1 The building

- 2.1.1 The building is a circa 1920s six-storey commercial building in central Auckland that houses a variety of businesses, including:

- Basement: untenanted at the time the notices were issued, also houses a transformer room
- Ground Floor: various retail tenants
- Levels 1 & 2: leased by the applicant as a backpacker accommodation at the time the notices were issued, with one level used for sleeping accommodation and the other for amenities.
Level 1 is connected with the adjacent building at 229 Queen Street through an automatic fire door
- Levels 3 & 4: fitted out as offices but currently not tenanted.

I note here that given Levels 3 & 4 were not tenanted at the time the notices were issued, references to the danger posed by the state of the building are in fact only to occupants of Levels 1 & 2, and when the first notice was issued also to the ground floor occupants.

⁶ Under section 183(1), until the chief executive makes a determination on a matter any decision or exercise of a power by the relevant authority that relates to that matter is suspended unless and to the extent that the chief executive directs otherwise.

- 2.1.2 The building has a central atrium that extends from the Ground Floor up to the full height of the building, with bridges allowing access from one side of the atrium to the other (see Figure 1 over page).
- 2.1.3 There are three main escape routes⁷ via ‘vertical safe paths’⁸ or egress stairs serving the upper levels: the “West Stair”, which exits to Elliot Street; the “East Stair”, which exits to Queen Street; and a “Central Stair”, which exits to the Ground Floor at the base of the atrium (see figures 4 and 5) and through an arcade (common corridor) shared with the retail occupancies to Queen Street and Elliot Street. The applicant’s agent states that “based on the original design, Level 2 has two escapes (East and West stairs) while Level 1 has three exits as it includes the Central stair to the [arcade on the Ground floor retail level], then in either direction [to Queen and Elliot Streets]” and “the double doors [on Level 1] to 229 [Queen Street] are not an escape route as both close and one will be against the flow”.

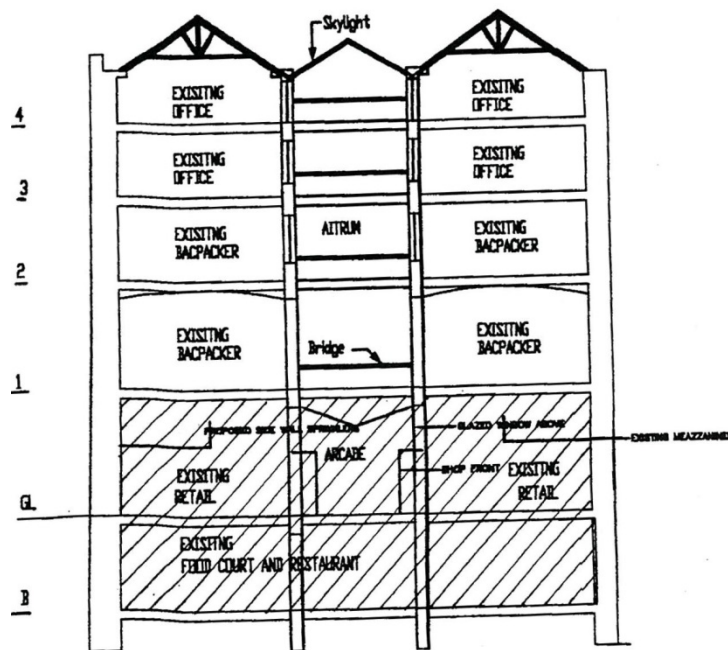


Figure 1: cross section A-A (from 2002 drawings, not to scale)

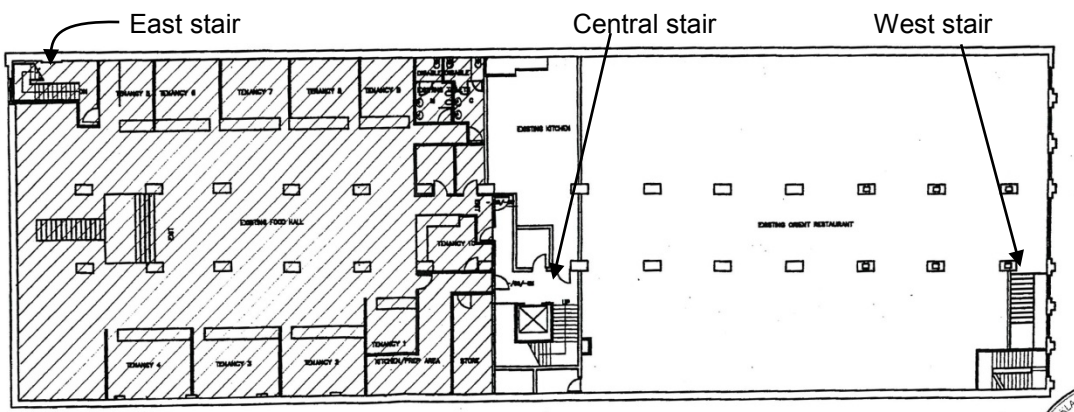


Figure 2: basement floor plan (from 2002 drawings⁹, not to scale)

⁷ Building Code Clause A1 defines Escape route as ‘a continuous unobstructed route from any occupied space in a building to a final exit to enable occupants to reach a safe place, and shall comprise one or more of the following: open paths, protected paths and safe paths’.

⁸ Refer footnote 10

⁹ Drawings from 2002 plans submitted with an application for Building Consent no. AC02/09043: The drawings produced for the purpose of “fire protection upgrade” with hatching to denote the “extent of sprinkler coverage required”. The basement is no longer tenanted as a food hall and the transformer room (refer paragraph 2.10.3) is not indicated on this drawing.

2.2 The passive fire survey and design

2.2.1 The applicant's agent has provided a copy of a "passive fire survey and design" dated 8 November 2018. The stated purpose of the report was a full passive¹⁰ fire survey of the building and passive fire protection specification and design for remedial works "to be consented and completed to comply with 'As near as reasonably practicable' to the NZ building code". It is not clear to me what building work or change of use those remedial works were intended to relate to, nor whether or when the authority was aware of the findings of the report.

2.2.2 Although I have not included a detailed summary of its findings in this determination I note the report highlights a number of concerns relating to fire separations throughout the building (including the transformer room, egress stairs, separation of sleeping occupancy, and separation from adjacent buildings), and that there was exit signage in place for a staircase (the Central Stair) no longer able to be used as a safe path¹¹. The report was detailed in its descriptions of deficiencies and included an appendix listing various building elements, links to relevant photographs, and suggested remedial work required to remedy the deficiencies.

2.3 The compliance schedule audit

2.3.1 On 29 November 2018 the authority carried out an audit of the compliance schedule. The resulting report dated 4 December 2018 recorded the findings of the audit and included various photographs taken during the audit. Under the heading "actions required" the report noted:

The compliance schedule needs to be updated.

There is no [building warrant of fitness] for this building, or evidence of the required inspections and maintenance have been (sic) undertaken.

There are occupants sleeping in this building who could be at SERIOUS life safety risk due to the non-operational specified systems onsite.

Emergency exits are not operating as they should. This is a MAJOR life safety risk.

Specified systems are not currently being maintained correctly. This poses a MAJOR life safety risk.

The building appears to be used for purposes other than it has been lawfully approved for.

2.4 The FENZ report

2.4.1 On 12 December 2018 FENZ carried out a "fire safety survey" of the building. The resulting report on the outcome of that survey was sent to a building management company acting for the owners and was copied to the authority.

2.4.2 In relation to the requirements of the Building Act, the report noted (in summary):

- There was no building warrant of fitness located during the site visit, meaning no evidence was available to confirm maintenance and testing of fire safety systems had been carried out.
- FENZ has no confidence the alarm system and hydrant system will function as per the design.

¹⁰ Passive fire protection is fire-rated building elements that limit the spread of smoke and fire

¹¹ Prior to its amendment on 10 April 2012, Building Code Clause A2 Interpretation defined "safe path" as that part of an *exitway* which is protected from the effects of *fire* by *fire separations*, *external walls* or by distance when exposed to open air. The same definition is used in the current Acceptable Solution C/AS2 for buildings other than Risk Group SH (1st ed 27 June 2019).

- A number of fire separation linings have unprotected penetrations.
 - The emergency lighting system needs checking, servicing and maintaining, and the fire hose reels need to be inspected, tested and maintained.
- 2.4.3 Appended to the report were photographs of various escape routes that were obstructed, heat and smoke detectors and a manual call point, various unsealed penetrations, a fire extinguisher with access to it obstructed, and an “out of test” hose reel.
- 2.4.4 In separate correspondence to the authority on 12 December 2018, FENZ provided advice to the authority that the building was dangerous under section 121(1)(b) of the Act, and described the following matters for the authority’s attention:
- The building does not have a current Building Warrant of Fitness;
 - [FENZ] has no confidence in the adequacy and reliability of the fire safety systems in the building for the early detection and extinguishment of fire;
 - There is no evidence of a maintenance and testing regime for fire safety systems;
 - There is (sic) multiple examples of compromised fire separation throughout the building;
 - Escape routes used for storage; and
 - Our records indicate the building has a [FENZ] approved evacuation scheme. However, the owner has failed to maintain the scheme.

2.5 The fire consultant’s first report

- 2.5.1 The authority engaged a firm (“the fire consultant”) to carry out an assessment of the risk in the building in relation to fire safety in light of the advice received from FENZ. The fire consultant visited the site on 14 December 2018 with an officer of the authority and provided a report dated 17 December 2018 (“the fire consultant’s first report”).
- 2.5.2 The fire consultant observed there were three principle egress stairs (vertical safe paths) serving the upper levels (West, East and Central) and that these serve all levels, but noted that some spaces “will not have access to all stairs due to security restrictions” and that there is access on Level 1 to the adjacent building.
- 2.5.3 Based on a visual inspection of the building, the report recorded a number of key observations, including concerns relating to:
- the effectiveness and coverage of the sprinkler system in the Basement Level and whether the sprinkler system is functional on the Ground Floor
 - whether zones indicated on the fire alarm panel continue to be isolated
 - general lack of maintenance of the fire alarm system
 - no fire separation between the basement and the East stair, which the fire consultant considered a “significant vulnerability”
 - penetrations through walls protecting the exitways and within the service riser shafts throughout the building
 - multiple penetrations through walls in the Basement Level to adjacent buildings
 - a storage room on Level One with a “significant quantity of mattress storage”.

2.5.4 The report noted the key risks to occupants in the building were the uncertainty of both the coverage and reliable operation of the alarm system, openings in the walls between the basement space and the East and Central stairs, and availability of adequate escape routes from all areas.

2.5.5 The key vulnerability was described as follows:

... the consequence of fire starting anywhere in the basement area. The lack of control of smoke spread from the basement into the east and central stairs would significantly impact on the safe use of these stairs by occupants on Levels 1 and 2 who use these stairs to escape from the fire. On the understanding that the fire detection system and fire alerting system is not confirmed to be fully functional, significant delays would occur in warning occupants of the outbreak of fire, especially in unoccupied parts of the building, and the simultaneous threat of that fire on key building escape routes.

Accordingly, we consider that there are fire scenarios where there is a high risk of injury or death should fire occur.

2.5.6 The report went on to state:

If the alarm system can be demonstrated to have full coverage of an automatic fire detection system (heat/smoke detectors or sprinklers) and that the fire alerting system and fire detection systems are fully operational in all areas to instigate an immediate and complete “all out” evacuation, then we would reduce this to a moderate risk provided there is assurance that occupants can use all three fire egress stairs at all levels. However, we also note that an outbreak of fire in the basement is not necessarily the only fire scenario of concern (depending on the nature and extent of fire detection and alerting in the sleeping areas of the building).

...

Additional remedial work is required to fire separate the fire egress stairs at basement level. Finally, a review of the stair enclosure construction ^[12] at all levels should be undertaken to increase the confidence in the level of life safety provided by all stairs.

2.6 The notice to fix

2.6.1 On 17 December 2018 the authority issued notice to fix NOT 21424810 to the body corporate in respect of failure to supply to the authority and to display a current building warrant of fitness (a contravention of section 108 of the Act). The covering letter refers to “previous notices” and stated that the authority considered the owners had been provided with adequate time to resolve the matter of renewing the building warrant of fitness.

2.6.2 The notice set out the remedy required as being a current building warrant of fitness to be supplied to the authority and displayed in the building, and for the owner to call for an inspection by the authority. The notice stated that it must be complied with by 31 January 2019.

2.7 The first dangerous building notice

2.7.1 On 20 December 2018 the authority issued the first dangerous building notice, NOT 21427373.

2.7.2 The notice set out the reasons why the authority considered the building met the test in section 121(1)(b), the requirement for building work to be carried out to reduce or remove the danger (section 124(2)(c)(i)), and that entry to the building was only

¹² I note the Passive fire survey & design report also raised concerns relating to fire separation to stairways.

permitted for the purpose of undertaking building work to achieve compliance with the notice (section 124(2)(d)).

2.7.3 Extracts from the notice have been copied in Appendix B.1.

2.8 The application for determination

2.8.1 The application for determination was received on 21 December 2018. A summary of the submissions made on behalf of the applicant are summarised in paragraph 3 and in more detail in Appendix C.

2.8.2 By email on 23 December 2018, the applicant's agent noted that the application for determination triggered section 183 of the Act. Section 183 provides:

- (1) Until the chief executive makes a determination on a matter, any decision or exercise of a power by any person referred to in section 177 that relates to that matter is suspended unless and to the extent that the chief executive directs otherwise.

2.8.3 It appears, from an extract copied from email correspondence from the applicant's agent to the authority dated 24 December 2018, that the authority met with the applicant onsite on 24 December after earlier meeting with representatives of the owners. The agent then wrote to the authority to request reconsideration of its view with regard to the status of the building and to allow the applicant to reoccupy the kitchen and laundry area on Level 2. The agent referred to remedial works carried out and plans to have the fire safety systems checked and certified¹³ and that in the agent's view the applicant then should be able to reoccupy the sleeping accommodation on Level 1.

2.8.4 The applicant's agent wrote to the authority again on 28 December 2018 on behalf of the applicant, noting that the authority had not responded to the previous email of 24 December. The agent stated it was accepted that:

The first dangerous building notice was reasonably issued in respect to the compromising of basement separations, damage to fire escape route and disruption to alarms on the basement and level 3. The sprinkler system in part of the basement has also been removed.

2.8.5 The letter went on to advise the authority that remedial work had been carried out and systems checked, and that "reports have been provided to [the authority] that the systems are functional". I note for completeness that the "reports" the applicant's agent was referring to in this letter appear to be from a firm that specialises in fire alarms, sprinklers and building warrants of fitness, but I have not seen a copy of the reports referred to.

2.8.6 The letter of 28 December 2018 set out the view of applicant's agent that the building was no longer dangerous, the issues that triggered the dangerous building notice had been addressed, and that restrictions on entry "can no longer apply". The agent also noted that an application for determination had been made, and accordingly the authority's powers in relation to the first dangerous building notice were suspended under section 183 of the Act. The agent also noted that the applicant intended to reoccupy Levels 1 and 2 without delay.

¹³ Form 12A Certificate of compliance with inspection, maintenance, and reporting procedures, Building (Forms) Regulations 2004

2.9 The second dangerous building notice and the direction under section 183

- 2.9.1 On 30 December 2018 the authority wrote to the owners regarding the first dangerous building notice, stating that an inspection had been carried out on 29 December 2018 to confirm that “temporary works had been undertaken to get the specified systems functioning again (excluding the sprinkler system in the basement level)” and that an IQP¹⁴ had provided inspection documentation. The authority noted that
- ...specified systems as installed do not achieve full compliance the with (sic) requirements of the New Zealand Building Code but are believed to provide sufficient coverage to protect the occupants in the event of a fire to exit the building safely.
- 2.9.2 The authority advised that it had decided to withdraw the first notice and issue a replacement (NOT 21427560 dated 30 December 2018, which is referred to in this determination as the second notice) that allowed limited use of the building “until such time as the works to achieve practicable compliance with the New Zealand Building Code are completed.”
- 2.9.3 The description in the second notice of the reasons why the authority considered the building dangerous were limited to issues with fire separations and requirements relating to compliance schedules for the specified systems not having been met. References in the first notice to smoke and heat detectors, sounders and emergency lighting systems, and fire escape routes being used for storage were not included in the second notice. The notice required building work to be carried out by 29 January 2019 to reduce or remove the danger (section 124(2)(c)).
- 2.9.4 In the second notice, permitted entry was limited under section 124(2)(d) of the Act to “normal activities” on Ground Level and Level 3 and specifically excluded sleeping accommodation (refer Appendix B.2). Under section 125(1A) a notice issued under section 124(2)(d) may be issued for a maximum of 30 days – the notice stated that the restriction on entry expired on 29 January 2019.
- 2.9.5 On 2 January 2019 I sent to the parties written notice of a direction under section 183(1) of the Act to the effect that the second dangerous building notice remained in force and continued to have full effect while the determination application was considered.

2.10 The fire consultant’s second report

- 2.10.1 On 9 January 2019, the authority emailed the applicant’s agent advising it had inspected the building after additional work had been carried out and had reached the view that the works “haven’t made the building safe to a point where we could withdraw the [second notice]”.
- 2.10.2 The authority engaged the fire consultant to carry out a further assessment of the building and to provide an opinion on whether the alterations mean the building was no longer dangerous.
- 2.10.3 The fire consultant visited the property on 16 January 2019 and furnished a report on 17 January 2019. This report was then updated on 18 January 2019 to take into account additional information the fire consultant had received regarding two transformers in the basement area. The report did not consider the requirements for

¹⁴ Independently Qualified Person

escape routes and functionality of the alarm system from within the levels occupied by the applicant.

2.10.4 The report noted the changes to the building that had occurred since the fire consultant visited on 14 December 2019, saying:

- The fire alarm system had been reviewed, with new “temporary heat and smoke detection installed throughout the basement and level 3” where previously there was none. The fire consultant saw no evidence of testing or compliance of that new system.
- Construction had occurred to form separation between the Basement and East stair, including reinstatement of an existing stair door, though the fire consultant noted the door does not have all necessary hardware and does not latch and would not achieve the required fire resistance.
- Despite some upgrades to the central stair at Basement level, multiple penetrations are still present.
- A barrier had been installed to prevent rubbish spread from ground to Basement level via the open stair.

2.10.5 With reference to the fire consultant’s first report, the second report noted:

- Although the system may not be compliant (in terms of coverage and its age), on the basis that system coverage is provided throughout the building to alert all occupants this risk is considered to be reduced.
- In relation to new construction between the Basement/East stair to form a separation, smoke spread to the stair is likely to occur in a fire event in the Basement.
- The works to the Central stair are minor only and would not significantly change the level of non-compliance of this stair.
- Advice was received that all secure doors release on fire alarm; given this and that the alarm system has been reviewed, access to all stairs is considered to be available from all areas in a fire event.
- The two existing transformers located in the basement area are considered to have a permanent fire load in the basement.

2.10.6 In its conclusion, with respect to risk to the occupants of Levels 1 and 2, the report concluded:

...the key vulnerability in the buildingis the consequence of fire starting anywhere in the basement area.

The lack of reliable control of smoke spread from the basement into the east and central stairs would significantly impact on the safe use of these stairs by occupants on Levels 1 and 2, who need to use these stairs to escape from the fire. In addition, ductwork into the west stair may render this stair unusable. This is particularly critical for occupants that are asleep and would be unfamiliar with the building, who may have delayed response times.

On this basis, and given the existence of the transformers in the basement, we consider that there remain credible fire scenarios where there is a likelihood of injury or death should a fire occur in the basement for occupants on the sleeping level. Accordingly, we would consider the likelihood of injury or death to occupants on the sleeping levels would remain at a moderate level until a high degree of confidence that fire separations around all three stairs are provided.

2.11 The reissuing of the dangerous building notice

- 2.11.1 On 30 January 2019 the authority reissued the second notice (NOT 21430357)¹⁵. The reissued second notice was the same in almost all respects as the second notice, with the exception that the dates for carrying out the building work and the expiry of the restriction on entry were changed to 18 February 2019.
- 2.11.2 By email on 31 January 2019 the authority advised that the notice had been posted on the building, and because the restriction on entry can only be for a further 30 days (under section 125(1A)(e)) that work required to make the building safe “must be completed legally or the building will be required to again be vacated”. The authority noted that a building consent was currently being processed.

2.12 The agreement reached between owners and authority

- 2.12.1 On 19 February 2019 the authority wrote to the owners of the building advising that the reissued second notice had expired. I note here that the “expiration” of the notice relates to the date the work was required to be carried out by (under section 124(2)(c)(i)) and the date on which the notice expired under section 125(1A)(e) in relation to the restriction on entry (under section 124(2)(d)).
- 2.12.2 The authority stated in this letter that “section 124(2)(a) & (b) still apply” and that if the danger persists the building will be “required to be closed to protect the safety of people intending to use the building”. I note that:
- section 124(2)(a) provides for the authority to “put up a hoarding or fence to prevent people from approaching the building nearer than is safe”; and
 - section 124(2)(b) provides for the authority to “attach in a prominent place on, or adjacent to, the building a notice that warns people not to approach the building”.
- 2.12.3 The authority’s letter stated that the owners had put forward a proposal “to prevent the closure of the building”, and that the conditions relating to restricted access to the building in the second and reissued second notice would remain in place until the building consent to undertake the remedial works is granted and those works are completed. The authority described the restricted access as follows:
- The normal use of the ground floor level and [the amenities level] of the building only, with guards posted at the lift/stair lobbies on these levels to prevent free movement of people to other levels of the building.
- The use of any sleeping accommodation is excluded.
- 2.12.4 The authority’s letter described the scope of works in the building consent as permanently sealing the penetrations in the external walls on the northern and southern sides of the basement area, and “rebuild fire separations around the fire escape routes at the Queen St end of the basement and in the middle of the northern wall of the basement.” The authority stated it agreed with the proposal, subject to the conditions of the reissued second notice remaining in place as noted above, that the occupants of the building were made aware of the restrictions, and the expired notice (i.e. the reissued second notice) remaining posted on the building.

¹⁵ This notice incorrectly referred to it being a reissue of NOT 21430137; the authority has subsequently confirmed the notice number was an error and that the notice was in fact a reissue of NOT 21427560.

2.12.5 The authority concluded by noting:

...any person in breach of these restrictions will be in (sic) committing an offence under section 128A of the Building Act 2004 and may face prosecution in regard to the breach.

For completeness I note that the correct reference would appear to be section 128A(2) in this case¹⁶.

2.12.6 The applicant objected to the continued restriction on use of the building for sleeping accommodation and raised concerns with me about what the applicant considered was in effect the authority exercising its powers under section 124 of the Act through the agreement.

3. The parties' views

3.1 The applicant

3.1.1 A number of submissions have been received from the applicant's agent disputing the authority's decisions to issue the dangerous building notices and in relation to the agreement reached with the authority that continues to affect the applicant's use of part of the building.

3.1.2 The information provided and submissions relevant to the matter to be determined have all been considered and are recorded in Appendix C. The following is a brief summary of key points raised in the submissions:

The status of the building

- Building work had been carried out over months prior to the issuing of the first notice. That building work compromised alarms, fire separation and sprinklers to the basement, ground floor and "perhaps Levels 3 and 4 – but not Level 1 and 2".
- The building was dangerous when it was assessed by FENZ on 12 December 2018, and no further work was carried out between 12 and 20 December 2018.
- The authority has relied on concerns raised in the fire safety survey of 12 December 2018¹⁷; the items identified in that report included "housekeeping concerns that need addressing" but the applicant contends the report did not provide sufficient evidence to support the view that the building is dangerous.
- Given the authority reached the view that the building was not dangerous to occupy under specific conditions (relating to use of the ground floor retail area), the same decision must logically apply to occupants on Levels 1 and 2 as it has the same level of active fire safety protection as the ground floor.
- Fire protection to Levels 1 and 2 are "approved and operational". The use of those levels as sleeping accommodation had previously been approved as a change of use, with compliance measures to protect and warn sleeping occupants. Those measures mitigate the increased risk to that user group. The cause of the danger was not associated with that part of the building.

¹⁶ Section 128A(2) provides a person who fails to comply with section 128(2) commits an offence and is liable on conviction to a fine. Section 128(2) provides no person may use or occupy the building or permit another person to use or occupy the building if the territorial authority has exercised its powers under any of the following sections: 124(2)(a), 124(2)(b), or 124(2)(d).

¹⁷ The applicant noted the survey referred to another report, but the applicant had not seen a copy of that report.

The dangerous building notice(s)

- The first notice was poorly drafted and lacks specific particulars to support the authority's decision that the building is dangerous; the particulars given for why the building is dangerous were too general and it was not clear what needed to be done to reduce or remove the danger.
- References to clauses of the Building Code are not appropriate as non-compliance is not sufficient with regard to the threshold of a dangerous building under section 121 of the Act.
- Lack of a compliance schedule, listed in the notices as one of the reasons the authority considered the building dangerous, is not a valid reason for concluding a building is dangerous.
- The timeframe for building work to be carried out to reduce or remove the danger should have been shorter.
- The reference to requirement for building consent did not take into account that work to make the building safe could have been carried out by the owner under section 41(1)(c), which provides for work to be carried out under urgency without a building consent.
- The purpose of restricting entry under section 125 is for the likes of access to allow for assessment of dangerous buildings and for people to be able to carry out remedial works. That provision is being misused in this case.

The section 121 test

- The need to restrict approach to a building considered dangerous under section 121(1)(b) is unclear.
- The restriction of entry was not appropriate for a building that is not dangerous to enter or approach.

3.2 The authority

3.2.1 On 8 January 2019 the authority provided copies of the reports¹⁸ it took into consideration when reaching the view the building was dangerous, along with a copy of a notice to fix issued in relation to the lack of a current building warrant of fitness. On 9 January 2019 the authority confirmed that despite the remedial work that had been carried out the authority remained of the view the building was dangerous. The authority also provided a copy of an audit report dated 3 December 2018 relating to the specified systems.

3.2.2 In response on 29 January 2019 to a request from the Ministry to clarify the specific matters that were preventing the withdrawal of the dangerous building notice, the authority identified the following:

...the relevant issues fall generically into the following:

1. The vertical and horizontal separations throughout the building have been compromised including a large number of the fire doors and require repairing to an acceptable standard.
2. The fire egress routes in the basement are compromised and require repairing to an acceptable standard.

¹⁸ The FENZ report dated 12 December 2018 and the fire consultant's first report dated 17 December 2018

3. The alarms systems in the building are compromised, particularly in the basement and level 3, and have not been serviced correctly for a considerable length of time.
4. The sprinkler system in the basement has been disconnected and is not operational.

...

The issue of the transformers was brought to [the authority's] attention by [the fire consultant] after [the] second report was issued. Once their existence was confirmed [the fire consultant] altered [the] report, and advised that the transformers are capable of causing a fire in their own right and being oil cooled place a large fire load on the building. In [the fire consultant's] opinion they pose a significant and very real risk to the occupants of the building, particularly the transient sleeping component.

- 3.2.3 On 21 February 2019 the Ministry wrote to the authority in relation to the agreement reached between owners and the authority regarding continuing limitations on use. The Ministry sought confirmation of the powers under the Act the authority was exercising in the conditions set out in that agreement. In a response on 25 February 2019, the authority advised that:

[The authority] believes that [the letter confirming the authority's agreement to the proposal] accompanies the expired notice under section 124.2.(b). However it should be noted that this arrangement is in essence a civil agreement between the owners and [the authority] to prevent [the authority] closing the building totally. This arrangement was brought about by way of a proposal from the owners which [the authority] believes will protect the occupants of the building to the same degree as the restricted access provisions on the [dangerous building notices] under s125.1.(a) of the Act. ...

3.3 The determination drafts and submissions in response

- 3.3.1 A first draft of the determination was issued to the parties for comment on 18 March 2019. The first draft concluded that the authority correctly exercised its powers in deciding to issue the dangerous building notices, but in respect of the agreement entered into with the owners the authority was incorrect in its proposal to exercise its powers under section 124(2)(a) and/or 124(2)(b) restricting access to the whole of the building as opposed to just those parts of the building used for sleeping accommodation.
- 3.3.2 Responses received from the parties are recorded in Appendix C. In summary:
- FENZ proposed some minor non-contentious amendments and commented on its roles under sections 176(g) and 170 of the Act.
 - The authority accepted the findings but sought clarification regarding the reissued second notice being spent and no longer in effect.
 - The applicant's agent sought clarification of part of the decision; requested a direction under section 183; commented on FENZ's role; sought clarification of what attributes or conditions made the use of part of the building dangerous and reiterated the view that the authority was applying an incorrect test.
- 3.3.3 A second draft of the determination was issued to the parties for comment on 21 May 2019.
- 3.3.4 FENZ responded on 5 June 2019, with a minor correction and no further submission on the matters.

- 3.3.5 The authority also responded on 5 June 2019, accepting the draft and minor corrections, but seeking clarification regarding “expiry” of dangerous building notices and the use of the Building Code “as a measure for work to be completed”.
- 3.3.6 The applicant’s agent responded on 7 June 2019, noting that the applicant did not accept the findings in the draft, and the agent made a further submission on the matters (refer Appendix C). In summary: the applicant’s agent maintains the reasons for the authority reaching the view the building is dangerous were not properly stated in the notices and the authority had failed to exercise its powers of decision correctly; reiterated earlier submissions regarding the status of the building and in relation to whether it was dangerous for use as sleeping accommodation; raised concerns regarding the first notice containing the same issues that were identified in the notice that was the subject of the first determination, despite the fact the authority had previously lifted that notice; maintains that the owner has been “coerced” into applying for a building consent rather than carrying out the necessary building work under section 41(1)(c).
- 3.3.7 On 15 June 2019 the agent for the owners advised that the owners’ position on the matter would be forthcoming sometime after the following week. On 18 June 2019 the Ministry emailed the agent to request confirmation of when the Ministry could expect to receive a submission; no response was received to this request, and on 8 July 2019 the agent advised that the owners would not be making a submission.

4. Discussion

4.1 The legislation

- 4.1.1 Section 121(1)(b) of the Act provides the definition for “dangerous building” in relation to a fire event as follows:

121 Meaning of dangerous building

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

...

(b) in the event of fire, injury or death to any persons in the building or to persons on other property is likely.

- 4.1.2 Section 123A(1) of the Act provides:

(1) If a territorial authority is satisfied that only part of a building is dangerous (within the meaning of section 121) or insanitary (within the meaning of section 123),—

(a) the territorial authority may exercise any of its powers or perform any of its functions under this subpart in respect of that part of the building rather than the whole building;

- 4.1.3 Sections 124 to 130 set out the powers of territorial authorities in respect of dangerous, affected, and insanitary buildings. Of relevance in this case is sections 124 and 125, relating to the powers of territorial authorities to issue notices if satisfied that a building is dangerous (refer Appendix A).

- 4.1.4 Section 124(2) provides:

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

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

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

- (c) except in the case of an affected building, issue a notice that complies with section 125(1) requiring work to be carried out on the building to—
 - (i) reduce or remove the danger; ...:
 - (d) issue a notice that complies with section 125(1A) restricting entry to the building for particular purposes or restricting entry to particular persons or groups of persons.
- (3) This section does not limit the powers of a territorial authority.

4.1.5 Section 125 sets out the requirements for notices issued under section 124(2)(c) or 124(2)(d), and who a copy of the notice must be given to:

125 Requirements for notice requiring building work or restricting entry

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

4.2 Matter 1: The authority's decision to issue the dangerous building notices

4.2.1 Was the building dangerous?

- 4.2.1.1 I turn first to the question of whether the building was dangerous (as that term is defined in section 121 of the Act) at the time the authority exercised its decision-making powers to issue the first and second notices.
- 4.2.1.2 At the time the authority made its decision to issue the first dangerous building notice, it had received the advice from FENZ which raised concerns regarding the alarm and hydrant system, fire separations, emergency lighting, fire hose reels and fire extinguishers, and obstructed escape routes, and that FENZ had reached a view that the building met the test under section 121(1)(b) of the Act.
- 4.2.1.3 The authority had also received the fire consultant's first report, which identified key risks relating to the coverage and operation of the alarm system, fire separations (in particular that there was no fire separation between the basement and the East stair and compromised separation to the Central stairs), and availability of adequate escape routes from all areas. The fire consultant had also observed storage of a significant quantity of mattresses on Level 1, which I note would add to the fire load in that firecell.

- 4.2.1.4 In addition to these reports, the authority had previously carried out an audit of the compliance schedule, and issues concerning the compliance schedule relating to fire safety systems had been known to the authority for some time (refer paragraphs 2.3 and 2.6).
- 4.2.1.5 The applicant's agent does not dispute that the building was dangerous at the time the authority issued the first dangerous building notice (refer paragraph 2.8.4), and I agree that the building was dangerous at that time. Accordingly I conclude the authority was correct in making the decision to issue the first dangerous building notice.
- 4.2.1.6 After some remedial works were carried out, the authority withdrew the first notice – I discuss the authority's exercise of its powers in relation to this decision in paragraph 4.2.2. The authority then issued the second notice, which in part had the effect of restricting the use of the building to uses other than sleeping accommodation.
- 4.2.1.7 Based on the content of the second notice and the accompanying correspondence, it appears the authority was satisfied that the work carried out by that time had reduced the danger posed to occupants of the building to the point where the likelihood of injury or death to persons using the Ground Level retail spaces was no longer present (and as levels 3 and 4 were unoccupied there was no likelihood of injury or death to persons using those levels), but the same did not hold true for occupants of the sleeping accommodation. In other words, the authority was satisfied that the building was still dangerous under section 121, but that the likelihood of death or injury was only to occupants using part of the building for the purpose of sleeping accommodation. I discuss the distinction between different groups of users in paragraphs 4.2.1.14 and 4.2.1.15.
- 4.2.1.8 In this case, as in the first determination, the restriction on entry provided for the building to continue to be used for purposes other than sleeping, as the risks posed to those occupant groups (i.e. other than sleeping occupants) was considered by the authority to be lessened to the extent that in the event of fire injury or death was not likely to those other occupant groups.
- 4.2.1.9 I have not been provided with any documentation of the authority's inspection or decision-making process specifically in relation to that restriction or a submission setting out the reasons it reached the view that the danger was at that point limited to only occupants of the sleeping accommodation. However, the fire consultant's second report, provided to the authority on 17 January 2019, supports the view the authority reached on 30 December 2018 and that the authority maintained when it reissued the second notice. I accept the findings of the fire consultant's second report, and taking into account those findings I conclude the building was dangerous under section 121(1)(b) with regard to use of part of the building for sleeping accommodation at the time the authority issued the second notice and later reissued that notice. Accordingly I conclude the authority was correct in its decision to issue and later reissue the second notice in relation to the use of part of the building for sleeping accommodation.
- 4.2.1.10 In regards to my decision under section 188 to confirm, reverse or modify the authority's decision, while the conclusion I have reached would naturally lead me to confirm the authority's decision, I note that the reissued second notice, which cites sections 124(2)(c) and (2)(d), has expired and is no longer in effect.

- 4.2.1.11 The applicant contends that a dangerous building is still a dangerous building even when unoccupied, and if the building meets the definition of a dangerous building under section 121(1)(b) then it must be dangerous for all occupants and not just for particular occupants or activities.
- 4.2.1.12 The applicant is correct that an unoccupied building may be dangerous, but it does not follow that a building that is dangerous for particular occupants or activities will be dangerous for all occupants and activities. Section 123A explicitly contemplates that only part of a building may be dangerous. If only part of a building is dangerous it is clear that the remainder of the building will not be dangerous.
- 4.2.1.13 In relation to section 121(1)(b), a building is dangerous if “in the event of fire, injury or death to any persons in the building or to persons on other property is likely” or “damage to other property is likely”, meaning that both persons within the building, persons on other property, and other property must be considered when assessing a building as dangerous. In the event of fire, a building that is not occupied may pose risk to persons on other property or a risk to other property, and in such a case the test for whether the unoccupied building is dangerous is whether injury or death to those persons on other property is “likely” or damage to other property is “likely”.
- 4.2.1.14 In regards to the danger posed to different occupant groups in a fire event in this building, occupants evacuating from Levels 1 and 2 (and Levels 3 & 4 if those levels were occupied) would evacuate via the stairways (East, West and Central) as vertical safe paths. At the time the authority issued the second notice the fire separations to the stairways had not been remediated and it follows that due to the time spent in the stairway to escape to a safe place there would be a greater likelihood that occupants would be exposed to fire and smoke and therefore there would be a greater likelihood of injury or death to occupants evacuating from upper levels via the stairways than those evacuating from the ground floor directly to Queen Street or Elliot Street. The likelihood of injury or death is further increased for sleeping occupants who must first wake and find a vertical safe path.
- 4.2.1.15 In addition, the fact that one of the levels is used for sleeping accommodation impacts on the risks posed to those occupants in a fire event, as noted in the first determination:
- 4.3.4 Occupant behaviour and their ability to evacuate influence their vulnerability in a fire. Backpackers are a transient occupancy; the majority are unfamiliar with their environment and have limited social cohesion with other residents. In a sleeping situation, pre-movement times for this group of occupants are extended due to the need for occupants to be woken by the alarm, orientate themselves, prepare to evacuate and make their way to an escape route which may not be known to them. Sleeping accommodation is considered more vulnerable when compared to other groups of occupants, such as offices where occupants are awake, alert and practice trial evacuations.
- 4.2.1.16 Taking into account the discussion above, I conclude:
- the building was dangerous as defined in section 121(1)(b) of the Act when the authority issued the first dangerous building notice, accordingly the authority was correct in making the decision to issue the first notice;
 - at the time the authority issued and later reissued the second notice, the building was dangerous in relation to occupation of part of the building for sleeping accommodation because in the event of fire injury or death to persons occupying that part of the building for the purpose of sleeping activities was likely; accordingly in respect of the test under section 121(1)(b)

I conclude the authority was correct in its decision to issue and then reissue the second notice.

4.2.1.17 The applicant's agent has raised the question of the status of the building at the time the authority made its decision in June 2017 to "withdraw" an earlier dangerous building notice (no. 6799 that was the subject of the first determination). The agent is of the opinion that the state of the building at the time the authority made its decision to issue the second notice was in no way different to when that earlier notice was withdrawn, and that this supports the applicant's view that the authority was incorrect in issuing the second notice.

4.2.1.18 I note that the authority's decision to "withdraw" dangerous building notice no. 6779 is not a decision in relation to the first or second notices considered in this determination, and so I have not considered that matter. However, as this was raised as a concern by the applicant's agent I offer the following comment. As noted above, I have reached the conclusion that the building was dangerous at the time the authority made its decision to issue the second notice. If the state of the building when the second notice was issued was in fact no different from when the earlier notice (No. 6779) was "withdrawn", it does not necessarily follow that either one or the other of the authority's decisions must be incorrect, although I can see why the applicant's agent has raised this point as a possible concern. Given the building work that was being undertaken on the building after the first and second dangerous building notices were issued, as well as the various fire safety inspections and reports that were being undertaken, it was to be expected that the authority may have to issue a new dangerous building notice on different grounds or providing for different remedies. In short, it is possible for the authority to make a different decision at a later date when new information is available to it.

4.2.2 The authority's decision to withdraw the first dangerous building notice

4.2.2.1 In the following paragraphs I consider whether the authority correctly exercised its decision-making powers when it withdrew the first dangerous building notice after an application for determination had been made.

4.2.2.2 As noted in paragraph 2.9.2, after some remedial works were carried out the authority withdrew the first notice, despite the fact that an application for determination had been made and any decision or exercise of power by the authority relating to the first notice was suspended unless or until a direction under section 183(2) was made by the Ministry.

4.2.2.3 In this matter I consider the authority incorrectly exercised its powers when it withdrew the first notice, because the authority's powers in respect of that notice were suspended under section 183 of the Act.

4.2.2.4 The authority then went on to issue the second notice, which restricted the use of the building to uses other than sleeping accommodation. I consider the authority's failure to comply with section 183(1) did not affect the validity of that second notice, because nothing in section 183(1) prevents the authority from issuing another notice under section 124 on different terms if the circumstances relating to the building's status as a dangerous building have changed.

4.2.3 The powers exercised under section 124(2) of the Act

4.2.3.1 As described in paragraph 4.1.4, section 124(2) of the Act sets out particular actions the authority may take when a building is dangerous, and it may elect to undertake any or all of those actions. These include, in summary: (a) putting up a hoarding or

- fence to prevent people from approaching the building nearer than is safe; (b) attaching to the building a notice that warns people not to approach the building; (c)(i) issue a notice requiring work to be carried out to reduce or remove the danger; and (d) issue a notice restricting entry to the building for particular purposes, persons or groups of persons.
- 4.2.3.2 The first notice cited section 124(2)(c) requiring work to be carried out to reduce or remove the danger and section 124(2)(d) restricting entry to particular persons or for particular purposes.
- 4.2.3.3 A notice issued under section 124(2)(c)(i) requiring work to be carried out to reduce or remove the danger must comply with section 125(1), which requires the notice to:
- (a) be in writing; and
 - (b) fixed to the building in question; and
 - (c) state the time within which the building work must be carried out, ...; and
 - (d) state whether the owner of the building must obtain a building consent in order to carry out the work required by the notice.
- 4.2.3.4 A notice issued under section 124(2)(d) restricting entry must comply with section 125(1A), which requires the notice:
- (a) must be in writing; and
 - (b) must be fixed to the building in question; and
 - (c) must be given in the form or a copy to the persons listed in subsection (2); and
 - (d) may be issued for a maximum period of 30 days; and
 - (e) may be reissued once only for a further maximum period of 30 days.
- 4.2.3.5 The exercise of powers under these provisions (section 124(2)(c) and (2)(d) and related requirements under section 125(1) and (1A)) are distinct from an authority's powers under section 124(2)(b), which provides for the authority to attach a notice "in a prominent place on, or adjacent to, the building" warning people not to approach the building and which is not time-bound. There was no reference in the first notice or covering letter that the authority was exercising its powers under section 124(2)(a) or 124(2)(b).
- 4.2.3.6 The second notice also cites sections 124(2)(c) and (2)(d) and again there is no reference in the notice or covering letter to sections 124(2)(a) or 124(2)(b). The restriction on entry in the second notice and when it was reissued, permitted entry by persons to the building "to undertake normal functions of the building, on the ground level and level three of the building, excluding sleeping accommodation" subject to conditions relating to preventing free movement of people to other levels of the building.
- 4.2.3.7 As I have concluded that the building was dangerous at the time the authority made its decision to issue the notices, it follows that the authority correctly exercised its powers under section 124(2)(c) in requiring work to be carried out to reduce or remove the danger.
- 4.2.3.8 In regard to section 124(2)(d) and the restriction on entry, I will not repeat the discussion in the first determination regarding the purposes for which territorial authorities typically allow people to enter a dangerous building, such as for carrying out necessary building work to remove the danger, and the types of circumstances where restricting entry would be appropriate (see paragraphs 4.6.3 and 4.6.4 of the first determination).

4.2.3.9 The second notice had the effect of restricting entry under section 124(2)(d) in a manner that permitted use of the building other than for sleeping accommodation. The basis for the authority exercising its powers in this way is that in the event of fire, injury or death of occupants using part of the building for the purpose of sleeping accommodation was likely. As I have concluded that the building was dangerous at the time the authority made its decision to issue the second notice in regards to occupation of part of the building for the purpose of sleeping accommodation, it follows that the authority correctly exercised its powers under section 124(2)(d) to the effect that entry to the building was limited to purposes other than sleeping accommodation.

4.2.4 The reasons given by the authority

4.2.4.1 In the following paragraphs I discuss the reasons given for the notices being issued and in relation to the definition of a dangerous building under section 121(1)(b) of the Act.

4.2.4.2 The applicant's agent contends that the authority incorrectly exercised its powers in respect of the drafting of the notices, in particular (refer to paragraph 3.1.2 for more detail):

- the notices were not clear as to why the building was dangerous – the notices did not identify the specific elements that made the building dangerous which meant that the work required to reduce or remove the danger was not apparent
- the notices cited clauses of the Building Code, and non-compliance with the Building Code is not the correct threshold for a dangerous building notice
- the notices referred to the failure to meet the requirements relating to compliance schedules, which cannot of itself form the basis for the authority's decision to issue a dangerous building notice.

4.2.4.3 With regard to the content of the notices and whether or not it was apparent to the owners what was required to reduce or remove the danger, I note that I have not had any submission from the owners that would either support or contradict the view of the applicant's agent on this matter.

4.2.4.4 In section E of the notices (refer Appendices B.1 and B.2) titled "the building is considered dangerous because:" the authority described features of the building that led to FENZ reaching the view that the building was dangerous. For example:

The fire separations between the various areas of the building have been compromised and will not function as designed ...

The fire separations associated with the riser ducts through the building have been compromised and will not function as designed ...

The smoke detectors, heat detectors, sounders and emergency lighting systems throughout the building have not been correctly maintained and may not function as designed ...

4.2.4.5 I agree with the applicant's agent that in some circumstances these general descriptions may not be adequate for the purpose of identifying to the owner remedial works required to reduce or remove the danger. However, the need for a more detailed description within the dangerous building notice will vary depending on, for example, what is already known to the authority and owners at the time a dangerous building notice is issued and / or what other information is provided to the owners with the dangerous building notice (whether that be in a covering letter, report, or in some other document). I suggest that where more detailed information

is provided in some other documentation, such as the covering letter, report or other document, it would be appropriate for the dangerous building notice to refer to that documentation.

- 4.2.4.6 Based on the documentation provided to me, the information that was available on the state of the building at the time the authority issued the first dangerous building notice is listed below:
- 8 November 2018 Passive fire survey and design
 - 29 November 2018 Authority's audit of compliance schedule
 - 12 December 2018 FENZ fire safety survey – sent to the building management company acting for the owners
 - 17 December 2018 fire consultant's first report
 - 17 December 2018 Notice to fix in relation to building warrant of fitness.
- 4.2.4.7 It is apparent from this that the owners were aware of fire safety issues identified in the passive fire survey on 8 November 2018 and in FENZ's fire safety survey on 12 December 2018. Given that section 8 of the first notice refers to issues identified by FENZ as reasons for the building being dangerous, and that the owners were provided a copy of that report by FENZ, I conclude that the descriptions set out in section "E" of the notice first notice were adequate in this particular set of circumstances.
- 4.2.4.8 At the time the authority issued and later reissued the second notice, the authority had met with the applicant and representatives of the owners on site (24 December 2018) and had received inspection documentation from an IQP (30 December 2018). Again, taking into account the information the owners already had available to them and that which was available after the first notice was issued, and as the description in section "E" of the second notice differed only in that one item was deleted, I conclude that the description set out in the second notice was adequate in the circumstances.
- 4.2.4.9 The applicant's agent has also raised the matter of the authority referring to compliance with the Building Code and the inference that the authority was requiring compliance to a level greater than that required to simply reduce or remove the danger. With regard to the notices, these references include: identified items as being "contrary to" various clauses of the Building Code; the specified systems potentially not functioning "to achieve compliance with the Building Code"; and that consent may be required in relation to "some of the works to achieve compliance". I note this last statement is unclear as to whether it is referring to compliance with the dangerous building notice or compliance with the Building Code.
- 4.2.4.10 In a submission in response to the draft of this determination the authority has also queried whether the notice is correct in its use of specific clauses of the Building Code "as the standard required to make the building safe".
- 4.2.4.11 The issue of referring to clauses of the Building Code in a dangerous building notice was also raised in the first determination, which commented as follows:
- 4.2.8 While it is correct to say that non-compliance with the Building Code does not necessarily mean that a building is dangerous, that does not mean that the references to non-compliant features of the building in the reasons set out in the notice do not support the conclusion that the building is dangerous. Many of the performance requirements of the Building Code relate to life safety in the event of a fire.

4.2.9 There is always a risk that in the event of a fire death or injury to persons will occur, but there must be particular features of a building for this risk to be 'likely' to occur. It is my view that the analysis for a dangerous building notice in relation to fire must first focus on whether the building complies with the Building Code. If this answer is in the negative, then the next analysis will focus on what features of the building that do not comply with the Building Code make it dangerous for the purposes of section 121(1)(b). A building may be non-compliant with the Building Code but additional analysis of the particular configuration and features of the building will need to be undertaken to establish whether or not the non-compliance amounts to 'dangerous' so as to warrant the seriousness of a dangerous building notice.

4.2.4.12 I consider the same reasoning applies in relation to references to specified systems and the associated requirements relating to compliance schedules and building warrants of fitness. While failure to comply with the requirements relating to compliance schedules and building warrants of fitness does not necessarily mean that the building is dangerous, for the same reasons set out in the first determination it does not follow that those requirements and the requirements of the Building Code cannot be referred to in the reasons set out in the notice that support the conclusion the building is dangerous.

4.2.4.13 However, in this instance, in addition to the references in notices, the authority's letter of 30 December 2018 accompanying the second notice referred to the restriction on use remaining in place "until such time as the works to achieve practicable compliance with the New Zealand Building Code are completed".

4.2.4.14 While I have come to the conclusion the authority was correct in its decision to issue the second notice, the authority's requirement of the owner "to achieve practicable compliance with the [Building Code]" is not the correct threshold for considering whether a dangerous building notice should be issued or should remain in force. What was required of the owners was not "practicable compliance" with the Building Code¹⁹ but rather that building work was carried out to reduce or remove the danger. In this respect I conclude the authority incorrectly exercised its powers in relation to the second notice referring to the restriction remaining in place until "practicable compliance with the Building Code" was achieved.

4.2.4.15 I note however that any building work that is carried out in response to the dangerous building notice must itself be compliant with the Building Code (see Appendix A.1, section 17 of the Act). This does not mean that the building work will necessarily bring the building itself into compliance with the Building Code, rather it is the building work being carried out to reduce or remove the danger that is required to comply with the Building Code, and the resulting building, building elements, building systems, amenities or spaces etc. may still not comply with the Building Code even though the danger will have been reduced or removed by that building work.

4.2.5 The requirement to obtain building consent

4.2.5.1 In the following paragraphs I consider the statements on the notices that a building consent may be required for some of the remedial work to achieve compliance.

4.2.5.2 In all three notices, under section "F" titled "Building work required to be carried out" the authority stated that the owner was required to undertake the following building work:

¹⁹ See also paragraphs 4.2.7 to 4.2.9 of the first determination

Immediately undertake all works in remedying the issues set out in section E (box) above

(Note that some of the works to achieve compliance may require to be undertaken under the authority of a Building Consent as required by section 40 of the Building Act 2004)

4.2.5.3 Under certain circumstances the Act provides for building work to be carried out without a building consent being obtained prior. Under section 41(1) a building consent is not required in relation to—

c) any building work in respect of which a building consent cannot practicably be obtained in advance because the building work has to be carried out urgently—

(i) for the purpose of saving or protecting life or health or preventing serious damage to property; or

(ii) in order to ensure that a specified system in a building that is covered by a compliance schedule, or would be covered if a compliance schedule were issued in respect of the building, is maintained in a safe condition or is made safe;

4.2.5.4 In this case, the likelihood of injury or death to persons in the building had been prevented through the restriction on entry, preventing people occupying the building when the first notice was issued and by preventing people from occupying parts of the building for sleeping accommodation when the second notice was issued, with the exception of those entering the building to carry out the necessary works. On that basis I consider that work was not required to be carried out urgently “for the purpose of saving or protecting life or health” of persons in the building in the event of fire.

4.2.5.5 However, given the nature and extent of the issues identified with the active and passive fire safety systems, it could be argued that some, though perhaps not all, of the work had to be carried out urgently “for the purpose of ... preventing serious damage to property” in the event of fire and for the purpose of protecting life or health of persons on other property. I therefore conclude the authority correctly exercised its powers in relation to the statement on the notices to the effect that building consent may be required for “some of the works”; however as noted previously the reference “to achieve compliance” was ambiguous.

4.2.5.6 I note also that section 125(1), which sets out the requirements for dangerous building notices issued under section 124(2)(c)(i), provides the notice must:

(e) state whether the owner of the building must obtain a building consent in order to carry out the work required by the notice.

Clearly the Act contemplates circumstances where a building consent can practicably be obtained for building work that is required to be carried out to reduce or remove the danger.

4.2.5.7 The owners in this case elected to obtain a building consent and an agreement was entered into with the authority as a means to manage the occupation of the building until the consent was processed and granted and the work carried out. The fact the owners elected to pursue this avenue and the effect of the owners’ decision on the applicant’s business are issues that fall outside of the matters that I can determine.

4.3 Matter 2: The agreement and the authority's proposed exercise of its powers

- 4.3.1.1 The applicant's agent has submitted that the conditions incorporated in the agreement are, in effect, the authority exercising its powers under section 124(2)(d) beyond the period provided for in section 125(1A) of the Act.
- 4.3.1.2 Thirty days after the second notice was reissued, the powers under section 124(2)(d) were no longer available to the authority in relation to the restriction on entry to the part of the building occupied as sleeping accommodation. The authority had already issued and reissued a notice under that section and the period of time provided for in section 125(1A) had expired for both notices.
- 4.3.1.3 As noted in paragraph 4.2.5.7 above, the agreement itself is not a matter that can be determined under section 177 of the Act. However, the letter of 19 February 2019 makes a number of statements that concern the authority's exercise of its powers under the Act, and I discuss these in the following paragraphs.
- 4.3.1.4 The Act provides the authority with powers that could have been used in performing its regulatory functions to the same effect as the conditions set out in the agreement; meaning that it could be argued the authority has failed to exercise its powers to restrict entry to the part of the building that is dangerous in its use for sleeping accommodation when it decided instead to enter into the civil agreement to the same effect. Specifically, section 124(2)(a) of the Act provides for the authority to put up a fence or hoarding to prevent people from approaching the building or part of the building that is dangerous, and section 124(2)(b) provides for the authority to attach in a prominent place a notice that warns people not to approach the building or part of the building. There is no limitation in relation to the number of days the fence or hoarding can remain in place, and no limitation in relation to the number of days a notice issued under 124(2)(b) can remain on a building.
- 4.3.1.5 It would appear to be an improper use of the authority's powers under the Act for the authority to use a civil agreement to achieve what it could achieve using the powers in section 124 of the Act. A civil agreement also has the effect of denying the other party the opportunity to seek a determination in respect of the matters covered by the civil agreement.
- 4.3.1.6 In its letter of 19 February 2019, the authority advised the owners that the reissued second notice had expired, but that "section 124(2)(a) & (b) still apply". There is no evidence before me that suggests the authority exercised its powers under section 124(2)(a) by putting up a fence or hoarding, nor that it exercised its powers under section 124(2)(b)²⁰ by fixing a notice to warn people not to approach the building (or part of the building) nearer than was safe. There are no references to either of those subsections in any of the notices issued or the accompanying cover letters, and as noted in paragraph 4.2.3.5, the requirements under section 125(1) and (1A) for notices issued under sections 124(2)(c) and (2)(d) to be fixed to the building are distinct from an authority's powers under section 124(2)(b).
- 4.3.1.7 The expiration of the reissued second notice relates to the date within which the work was required to be carried out to reduce or remove the danger (under section 124(2)(c)(i)) and the date on which the notice expired under section 125(1A)(e) in relation to the restriction on entry (section 124(2)(d)). A notice issued under section 124(2)(c)(i) is no longer in effect once the period in which the work was to have

²⁰ I note this provision is distinct from sections 125(1)(b) and 125(1a)(b), which concern notices issued under sections 124(2)(c) and (2)(d) respectively

been carried out has expired, and a notice issued under section 124(2)(d) is no longer in effect once the period(s) set out in section 125(1A) has expired. In this respect the authority was correct when it stated that the reissued second notice had “expired”.

- 4.3.1.8 In the authority’s view, while the building remains dangerous the notice continues to apply with regard to section 124(2)(c). The authority noted in its submission that under section 126(1) it can apply to the court to carry out works if the necessary works have not been carried out within the time set out in the notice or any further time the authority may allow, and the authority is of the view that the notice issued under section 124(2)(c) “ought to continue to apply in terms of the work required to make the building safe”.
- 4.3.1.9 I agree that a dangerous building remains dangerous until such a time as the necessary work is carried out to reduce or remove the danger. However, a notice issued under section 124(2)(c) is one requiring work to be carried out, and sets out a timeframe in which that is to occur. Once the date set out in a notice issued under section 124(2)(c) has expired, the notice is no longer in effect. If the building remains dangerous at that point the authority must consider the powers available to it under the Act to address that situation. The provision under section 126(1) which includes provision for the authority to allow further time for the work to be carried out, is one power but not the only power available to the authority. The authority also has available to it powers under section 124(2)(a) and (b) – that is it could put up a hoarding or fence to prevent people from approaching the building (or part of the building) nearer than was safe, and / or attach in a prominent place on or adjacent to the building (or part of the building) a notice that warns people not to approach the building or part of the building. I note also that under section 128A of the Act it is an offence to fail to comply with a notice under section 124(2)(c) and the authority has available to it powers related to such an offence.
- 4.3.1.10 The authority’s letter of 19 February 2019 refers to the reissued second notice “remaining posted on the building” as a condition of the agreement. I note here that while the authority could have issued a new notice under section 124(2)(b) and fixed this to the building (or to the relevant part of the building) as discussed above, regardless of whether the reissued second notice remained fixed to the building as it was no longer in effect.
- 4.3.1.11 In the letter of 19 February 2019 the authority also proposed to exercise its powers under the Act under certain circumstances to prevent people from entering the building and advised that a person in breach of the restrictions set out in the letter “will be committing an offence under section 128A ... and may face prosecution in regard to the breach.”
- 4.3.1.12 As there is no evidence that the authority had exercised its powers under section 124(2)(a) or (b), one can only infer therefore that the authority’s reference in its correspondence of 19 February 2019 to these sections (124(2)(a) and (b)), and likewise the references to enforcement action under section 128A(2)²¹, were an indication to the owner that the authority could potentially at some point in the future exercise those powers if it considered the building dangerous and a person used or permitted a person to use or occupy the building.

²¹ For breaching section 128(2), which provides no person may use or occupy the building or permit another person to use or occupy the building if the authority has put up a hoarding or fence (under section 124(2)(a)) or attached a notice warning people not to approach the building (under section 124(2)(b), or issued a notice restricting entry to a building (under section 124(2)(d)). I note here that the notice under section 124(2)(d) was spent.

- 4.3.1.13 The authority's letter of 19 February 2019 also stated "if the danger persists ... the building will be required to be closed", and that the owners had put forward a proposal "to prevent the closure of the building". I take these references to the authority "closing" the building to be a proposal by the authority to exercise its powers under section 124(2)(a) and/or 124(2)(b) to prevent people from approaching or entering any part of the building, i.e. not only preventing people from using part of the building for the purpose of sleeping accommodation.
- 4.3.1.14 It is not apparent on what grounds the authority proposed to exercise its powers under section 124(2) to prevent entry to any or all parts of the building after it had concluded the building was dangerous only in respect of use of part of the building for sleeping accommodation and had otherwise permitted use of the building to continue. There is no information before me that would lead me to the view that the circumstances would differ to the extent that the building would be dangerous for use for all types of occupancy when compared with the building's condition at the time the authority issued (and later reissued) the second notice only restricting use of part of the building for sleeping accommodation. Nor has the authority offered further reasons in submission to this determination for the proposed exercise of its powers in this manner. I therefore conclude the authority incorrectly exercised its powers in its proposal to exercise its powers under sections 124(2)(a) and/or 124(2)(b) to the effect that it would prevent occupancy of whole of the building.

5. The decision

5.1 In accordance with section 188 of the Building Act 2004, I hereby determine:

Matter 1

- the building was dangerous as defined in section 121(1)(b) of the Act when the authority issued dangerous building notice NOT 21427373 (the first notice), accordingly the authority was correct in making the decision to issue that notice;
- at the time the authority issued and later reissued dangerous building notice NOT 21427560 (the second notice), the building was dangerous in relation to occupation of part of the building for sleeping accommodation because in the event of fire, injury or death to persons occupying that part of the building for the purpose of sleeping activities was likely; accordingly the authority was correct in its decision to issue and then reissue the second notice;
- the authority incorrectly exercised its powers of decision in withdrawing the first dangerous building notice NOT 21427373 because the authority's powers relating to that notice were suspended under section 183 at that time;
- the authority correctly exercised its powers under section 124(2)(c) in requiring work to be carried out to reduce or remove the danger and section 124(2)(d) in restricting entry to particular persons or for particular purposes in relation to its decision to issue the first dangerous building notice NOT 21427373 and issuing then reissuing the second dangerous building notice NOT 21427560;
- although the authority was correct in its decision to issue and reissue the second dangerous building notice NOT 21427560, the authority incorrectly exercised its powers in relation to that decision in referring to the restriction remaining in place until "practicable compliance" with the Building Code was achieved;

- the authority correctly exercised its powers in relation to the statement on the notices to the effect that building consent may be required for “some of the works”;

Matter 2

- the authority incorrectly exercised its powers in its proposal to exercise its powers under sections 124(2)(a) or (b) as described in its letter of 19 February 2019 to the effect that it would prevent people from using any or all parts of the building.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 26 September 2019.

Katie Gordon
Manager Determinations

Appendix A: The legislation

A.1 The relevant legislation:

17 All building work must comply with building code

All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.

121 Meaning of dangerous building

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

- (a) ...
- (b) in the event of fire, injury or death to any persons in the building or to persons on other property is likely.

(2) For the purpose of determining whether a building is dangerous in terms of subsection (1)(b), a territorial authority—

- (a) may seek advice from employees, volunteers, and contractors of Fire and Emergency New Zealand who have been notified to the territorial authority by the board of Fire and Emergency New Zealand as being competent to give advice; and
- (b) if the advice is sought, must have due regard to the advice.

123A Application of this subpart to parts of buildings

(1) If a territorial authority is satisfied that only part of a building is dangerous (within the meaning of section 121) or insanitary (within the meaning of section 123),—

- (a) the territorial authority may exercise any of its powers or perform any of its functions under this subpart in respect of that part of the building rather than the whole building; and
- (b) for the purpose of paragraph (a), this subpart applies with any necessary modifications.

(2) To the extent that a power or function of a territorial authority under this subpart relates to affected buildings,—

- (a) the territorial authority may exercise the power or perform the function in respect of all or part of an affected building; and
- (b) for the purpose of paragraph (a), this subpart applies with any necessary modifications.

124 Dangerous, affected, or insanitary buildings: powers of territorial authority

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

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

- (a) put up a hoarding or fence to prevent people from approaching the building nearer than is safe:
- (b) attach in a prominent place on, or adjacent to, the building a notice that warns people not to approach the building:
- (c) except in the case of an affected building, issue a notice that complies with section 125(1) requiring work to be carried out on the building to—
 - (i) reduce or remove the danger; or
 - (ii) prevent the building from remaining insanitary:

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

125 Requirements for notice requiring building work or restricting entry

(1) A notice issued under section 124(2)(c) must—

- (a) be in writing; and
- (b) be fixed to the building in question; and
- (c) be given in the form of a copy to the persons listed in subsection (2); and
- (d) state the time within which the building work must be carried out, which must not be less than a period of 10 days after the notice is given or a period reasonably sufficient to obtain a building consent if one is required, whichever period is longer; and
- (e) state whether the owner of the building must obtain a building consent in order to carry out the work required by the notice.

(1A) A notice issued under section 124(2)(d)—

- (a) must be in writing; and
- (b) must be fixed to the building in question; and
- (c) must be given in the form of a copy to the persons listed in subsection (2); and
- (d) may be issued for a maximum period of 30 days; and
- (e) may be reissued once only for a further maximum period of 30 days.

...

128 Prohibition on using dangerous, affected, or insanitary building

(1) This section applies if a territorial authority has done any of the following:

- (a) put up a hoarding or fence in relation to a building under section 124(2)(a);
- (b) attached a notice warning people not to approach a building under section 124(2)(b);
- (c) issued a notice restricting entry to a building under section 124(2)(d).

(2) In any case to which this section applies, and except as permitted by section 124(2)(d), no person may—

- (a) use or occupy the building; or
- (b) permit another person to use or occupy the building.

128A Offences in relation to dangerous, affected, or insanitary buildings

(1) A person who fails to comply with a notice issued under section 124(2)(c) that is given to that person under section 125(2)—

- (a) commits an offence; and
- (b) is liable to a fine not exceeding \$200,000.

(2) A person who fails to comply with section 128(2)—

- (a) commits an offence; and
- (b) is liable on conviction to a fine not exceeding \$200,000 and, in the case of a continuing offence, to a further fine not exceeding \$20,000 for every day or part of a day during which the offence has continued.

Appendix B: The dangerous building notices

B.1 Extracts from the first dangerous building notice NOT 21427373 dated 20 December 2018:

D) Reason(s) why building is considered dangerous

[The authority] is satisfied that the building identified above (the Building) poses a danger to the safety of people / property in that the building is dangerous in accordance with s121 (b)

(b) in the event of fire, injury or death to any persons in the building or to persons on other property is likely.

E) The building is considered dangerous because:

Alterations to the building and a lack of maintenance have left the building in a state that has been deemed dangerous by [FENZ] in terms of the New Zealand Building Code (the Code), in that:

- The fire separations between the various areas of the building have been compromised and will not function as designed contrary to clause C3 of the Code.
- The fire separations associated with the riser ducts through the building have been compromised and will not function as designed contrary to clause C3 of the Code.
- The smoke detectors, heat detectors, sounders and emergency lighting systems throughout the building have not been correctly maintained and may not function as designed contrary [to] clause C4 of the Code.
- The fire egress routes, including the stairwells, have not been maintained and are being used for storage which may prevent adequate egress in the event of an emergency contrary to clause C4 of the Code.
- The requirements of the Compliance Schedule have not been met contrary to section 105 and section 110 of the Building Act 2004 to prove the Specified Systems associated with the building are functioning to a recognised standard to achieve compliance with the Code.

F) Building work required to be carried out:

In accordance with section 124(2)(c)(i) of the Act, [the authority] requires that you undertake the following building work, which [the authority] reasonably believes is necessary to reduce or remove the danger-

Immediately undertake all works in remedying the issues set out in section E (box) above.

(Note that some of the works to achieve compliance may require to be undertaken under the authority of a Building Consent as required by section 40 of the Building Act 2004)

The requirement to carry out building work under this notice must be complied with by 20 January 2019.

G) Restricted entry:

Under s124(2)(d) entry to the building may be restricted for 30 days:-

Entry will be restricted to all persons except for particular persons or groups of persons as listed below:-

Entry is permitted for the following purposes	To undertake works to achieve compliance with the work required
Entry is permitted for the following particular persons or classes of persons	Contractors undertaking works to achieve compliance work required
Restricted entry expires on	20 January 2019

B.2 Extracts from the second dangerous building notice NOT 21427560 dated 30 December 2018:

D) Reason(s) why building is considered dangerous

[The authority] is satisfied that the building identified above (the Building) poses a danger to the safety of people / property in that the building is dangerous in accordance with s121 (b)

(b) in the event of fire, injury or death to any persons in the building or to persons on other property is likely.

E) The building is considered dangerous because:

Alterations to the building and a lack of maintenance have left the building in a state that has been deemed dangerous by [FENZ] in terms of the New Zealand Building Code (the Code), in that:

- The fire separations between the various areas of the building have been compromised and will not function as designed contrary to clause C3 of the Code.
- The fire separations associated with the riser ducts through the building have been compromised and will not function as designed contrary to clause C3 of the Code.
- The requirements of the Compliance Schedule have not been met contrary to section 105 and section 110 of the Building Act 2004 to prove the Specified Systems associated with the building are functioning to a recognised standard to achieve compliance with the Code.

F) Building work required to be carried out:

In accordance with section 124(2)(c)(i) of the Act, [the authority] requires that you undertake the following building work, which [the authority] reasonably believes is necessary to reduce or remove the danger-

Immediately undertake all works in remedying the issues set out in section E (box) above.

(Note that some of the works to achieve compliance may require to be undertaken under the authority of a Building Consent as required by section 40 of the Building Act 2004)

The requirement to carry out building work under this notice must be complied with by 29 January 2019.

G) Restricted entry:

Under s124(2)(d) entry to the building may be restricted for 30 days:-

Entry will be restricted to all persons except for particular persons or groups of persons as listed below:-

Entry is permitted for the following purposes	To undertake normal functions of the building, on the ground level and level three of the building, excluding sleeping accommodation, subject to guards being stationed in the lift/stairwell to prevent free movement of people to other levels of the building.
Entry is permitted for the following particular persons or classes of persons	Na
Restricted entry expires on	29 January 2019

Appendix C: The submissions received

The application	
21 December 2018 Applicant	Application for determination (incomplete form) Correspondence 14 December 2018 from FENZ: outcome of fire safety survey Submission
22 December 2018 Applicant	Completed application form. Matters in relation to the authority's exercise of its powers of decision to issue dangerous building notice NOT 21427373 described as follows: <ol style="list-style-type: none"> 1. <i>The [notice] is poorly drafted and lacks specific evidence of 'dangerousness'. References to code clauses is inappropriate as non-compliance is not sufficient for the test of dangerous under s121(1)(b)</i> 2. <i>The lack of a compliance schedule ... is not a matter of dangerousness under s121(1)(b).</i> 3. <i>[The authority] have applied a 'restricted entry' provision to this building that is inappropriate to a building that is not dangerous to enter or approach.</i> 4. <i>[The authority] should have applied a shorter period to make the building safe for the occupants and provided a clear pathway to what was required and when.</i> 5. <i>The particulars [set out in section "E" of the notice] ... are too general and non particular such that it is unclear what must be done to make the building not dangerous for fire. The reference to code compliance in 4 [bullet points] is vague and not particular.</i> 6. <i>The requirement for a building consent is inappropriate as the work to make the building safe must be done under s41 (1)(c) as a matter of urgency if the building is dangerous? Permanent work may need a building consent.</i> 7. <i>Having apparently decided subsequently that the building is safe for occupancy under conditions above ... The building must therefore be not dangerous for ground floor public use. The same must apply also who (sic) occupants on level 1 and 2 who enjoy the same level of protections. The applicant has been told that the relaxation only applies to shops in ground floor open to the public."</i>
23 December 2018 Applicant	Confirmation of payment of fee Copy of Determination 2017/064 (the first determination)
24 December 2018 Ministry	Acknowledgement of application, noting the application would be reviewed in January.
31 December 2018 Applicant	Request to expand scope of determination to include the second notice (NOT 21427560 dated 30 December 2018). Copies of: <ul style="list-style-type: none"> - The second notice and covering letter - Code compliance certificate dated 8 October 2002 in relation to building consent AC/02/00221 that concerned a change of use of the second floor from offices to backpacker accommodation, and associated documentation relevant to that building consent - Code compliance certificate dated 17 October 2003 in relation to building consent BLD36020904301 that concerned "fire systems upgrade to suit proposed unit title", and associated documentation relevant to that building consent - "Passive fire survey & design" report, dated 8 November 2018

	<p>Advising the scope of the application is expanded to include the authority's decision to issue the second notice, and that the applicant "is exercising their right to re-enter the building that is no longer dangerous and has adequate means of escape from fire".</p> <p>Raised concern regarding issue of second notice while the first notice was subject to an application for determination (with reference to section 183)</p>
2 January 2019 Applicant	<p>Submitted that the work required has been done and the building is no longer dangerous, and that therefore the restriction on entry is not justifiable. Requested the direction under section 183 be lifted.</p>
2 January 2019 Applicant	<p>Submission (in summary): the issue of the first notice is "accepted as reasonably issued", however the building is not now dangerous and although matters have been addressed the authority has issued a second notice; the issue of the second notice was a breach of section 183; the test for whether the building was dangerous under section 121 was not correctly applied (with reference to the compliance schedule, the authority's view of whether the building was "safe", reliance on the passive fire survey & design report); if the building is safe for use by public in the retail areas then it follows that the rest of the building is also safe; the risks associated with sleeping are mitigated by more onerous heat and smoke detector protection and fire separation; fire separation should only be considered where it is directly related to the means of escape.</p> <p>The submission noted the following works as completed:</p> <ul style="list-style-type: none"> - Basement separations and fire separations reinstated, hydrant and sprinkler systems checked and passed, early warning system and lighting system "are being checked", there is adequate means of escape, IQP reports have been provided confirming systems are functional. - Basement Queen St damaged fire exit – reinstated. - Openings in basement (with reference to riser ducts) – reinstated. - L3 fire separation to plant room – reinstated. - Basement and Level 3 alarms – reinstated (but not sprinklers). - Whether basement requires sprinkler is to be confirmed. - Bedding in corridor of Level 2 – cleared. - Building debris in stairwell between Level 3 and 4 – cleared. <p>Provided copy of email correspondence between the applicant and the authority dated 30 December 2018 (noting the authority had not responded to it), which advised the applicant proposed to re-enter Level 1 from 31 December 2018 and set out the applicant's view of the matter. In summary: none of the reasons provided in the notice relate to the levels leased by the applicant and therefore there is no reason to limit use of those levels; the conversion to sleeping accommodation was approved as a change of use in 2002; a dangerous building notice had been issued in 2016 and was subsequently lifted when remedial work was carried out, and no structural or substantive work has been carried out since; the concerns in the notice are related to fire affecting areas beyond the fire source and not life safety of the occupants; work has been carried out to the warning system and occupants can evacuate safely; failure to meet requirements relating to the compliance schedule cannot of itself form the basis for a dangerous building notice.</p>
The direction under section 183	
2 January 2019 Ministry	<p>Issued a direction under section 183(1) to the effect that the second notice remains in force and continues to have full effect.</p>
2 January 2019 Applicant	<p>Disputed the need for the direction under section 183 as in the applicant's view the building is no longer dangerous and the restriction on entry should not be applied. Note the impact on the applicant's business.</p> <p>(re-sent to the authority on 7 January 2019)</p>
7 January 2019 Ministry	<p>Confirming that the direction under section 183 remains in place but that the applicant's request for it to be revoked would be treated as ongoing.</p>
Initial submissions	

8 January 2019 Authority	Copy of reports the authority had regard to in arriving at its decision to issue the dangerous building notices: - The fire consultant's first fire report - FENZ letter 12 December 2018
8 January 2019 Authority	Completed Part 2 form Copy of NTF 21424810 and covering letter (concerning lack of BWOF)
8 January 2019 Applicant	Acknowledged receipt of reports (listed above 8 January), noting this was the first time the applicant had seen them. Requested the same fire consultant be used to reassess the building now that work had been carried out.
9 January 2019 Authority	Confirming authority's view building still dangerous and offering to have fire consultant reassess the building in light of recent work carried out.
10 January 2019 Ministry	Advising that once the reassessment had been carried out the Ministry would be in a position to review the section 183 direction and would lift the direction if the life safety risk had been adequately mitigated. Requested the applicant provide an evacuation scheme for the two levels occupied by the applicant so that it could be taken into account in that assessment.
10 January 2019 Applicant	Queried use of the phrase "life safety risk" in regards to test under section 121(1)(b).
Ongoing correspondence	
10 January 2019 Applicant	Requesting further information from both FENZ and the authority. Advised the applicant had sought information from FENZ by way of an Official Information Act request (OIA). Provided a copy of the information released: - letter dated 14 December 2018 to building management company - letter dated 12 December 2018 to authority - photographs (taken during FENZ inspection of 12 December 2018 - "Building fire safety report" resulting from 12 December 2018 inspection - Email correspondence between FENZ and the authority between 12 and 13 December 2018
15 January 2019 Authority	Copy of BWOF audit report dated 4 December 2018
25 January 2019 Applicant	Though various sets of requirements have been fulfilled the restriction on use for sleeping accommodation remains. It is unclear what must be done in order for the dangerous building notice to be removed. Requested the Ministry engage a fire engineer to assist in resolving the issues and make recommendations to provide a means to resolve the notice. Provided copies of: - Fire consultant's report of 17 December 2018 - Fire consultant's report of 17 January 2019 - Fire consultant's report of 18 January 2019 - Emails between the authority and the fire consultant on 17 and 18 January 2019 - Email from the authority attaching report dated 18 January 2019
29 January 2019 Ministry	The Ministry to parties: requesting from the applicant a detailed submission about the transformers (location, fire separation) in support of the applicant's view regarding the impact of this on the safety of the building's occupants, and clarification from the authority on the specific issues preventing the withdrawal of the dangerous building notice. [note: requested information was not received from the applicant]
29 January 2019 Authority	Authority's response to request. "Relevant issues fall generically into the following: 1. The vertical and horizontal fire separations throughout the building have

	<p>been compromised including a large number of the fire doors ...</p> <ol style="list-style-type: none"> 2. The fire egress routes in the basement are compromised ... 3. The alarms systems in the building are compromised, particularly in the basement and level 3, and have not been serviced correctly for a considerable length of time. 4. The sprinkler system in the basement has been disconnected and is not operational.” <p>Noted also that the fire consultant advised the authority that the transformers are capable of causing a fire in their own right and being oil cooled place a large fire load on the building. In the fire consultant’s opinion they pose a significant and very real risk to the occupants of the building, particularly the transient sleeping component.</p>
31 January 2019 Applicant	<p>The authority hasn’t adequately specified the matters that make the building dangerous to enable necessary remedial work to be carried out.</p> <p>The references to code clauses infer an incorrect test for issuing a dangerous building notice. In addition, sections 112 and 115²² have been invoked over the years and while this heritage building will likely never be compliant previous approvals mean that compliance was achieved as nearly as is reasonably practicable.</p> <p>It appears the authority’s use of its powers under section 124 are being used to force further upgrades of the building and to address compliance schedule issues that should be dealt with under other sections of the Act.</p> <p>The alarm system, sprinklers, and the basement fire escape have been resolved; the only outstanding matter is in regard to the basement where the transformers pose a high risk – this now has “heat and smoke protection” and the fire load “is within its own fire separation”, and while impacting on fire safety it is not likely to cause injury or death. The transformers have been in their present location for some 50 years and no issues were raised during previous consent approvals; the applicant should be able to rely on the authority’s previous approval (for the change of use).</p> <p>The risks to the sleeping occupants are now the same as for other users of the building.</p> <p>It is not clear why the building work is not being done under urgency in reliance on section 41 as opposed to a building consent, or why the authority has not acted on the owners’ failure to carry out necessary work.</p>
7 February 2019 Applicant	<p>Seeking an update from the Ministry and whether an expert was being appointed “to provide guidance to [the authority] in the exercise of [its] power of decision”.</p>
8 February 2019 Ministry	<p>Requesting further information from the authority in regard to: the particulars in the second notice and in relation to the fire consultant’s reports; confirmation of whether the fire consultant had taken into account the information in the Passive fire survey & design report on the status of the fire separation of the transformer room; seeking clarification on notice numbers.</p> <p>Advising the applicant an expert had not been engaged by the Ministry, and that the Ministry was not aware of the reissued second notice until receipt of the applicant’s email on 31 January 2019.</p>
11 February 2019 Applicant	<p>Expressing disappointment at lack of progress and requesting the fire consultant be engaged to review previous findings and ascertain if the work done to address concerns has been completed and if not what is still required.</p> <p>If the building is still dangerous the notice must state the specific reasons.</p>
12 February 2019 Authority	<p>The authority is of the view that sufficient detail was shown on the [second] notice given that the fire consultant’s reports had been provided to the applicant.</p> <p>The Passive fire survey & design report will be provided to the fire consultant with a view to revising recommendations if that is appropriate.</p> <p>The body corporate has advised that the building consent application includes rebuilding fire separations around the transformer room, which suggests these are</p>

²² Sections 112 and 115 concern upgrades that may be required when a building undergoes an alteration or a change of use.

	<p>in poor condition similar to other areas of concern.</p> <p>Confirmed reference to NOT21430167 on one of the notices was an error.</p>
12 February 2019 Applicant	<p>The dangerous building notice “must stand on its own with the specific matters of dangerous particularised” – the fire consultant’s report was not available until very recently and was not the cause of the notice or relevant to its content.</p> <p>While there are steps being taken to upgrade the fire safety elements of the building, the gap analysis and the ANARP²³ tests are part of a normal consenting process for an existing building where it is undergoing alterations or a change of use. The Passive fire survey & design report and upgrade works are irrelevant. The authority appears to be confusing the compliance/ANARP requirements with the test for a dangerous building which is a different threshold.</p>
13 February 2019 Applicant	<p>Queried the Ministry’s delegations relating to the exercise of the Chief Executive’s powers under the Act. [Note this was treated as a request under the Official Information Act, with an initial response regarding delegations provided by email on 18 February 2019.]</p>
13 February 2019 Applicant	<p>Applicant’s agent raised concerns regarding the authority providing copy of Passive fire survey & design report to the fire consultant.</p>
13 February 2019 Applicant	<p>Applicant objected to use of the Passive fire survey & design report as it was a gap analysis or was for a different purpose (ie. not for the purpose of establishing whether the building is dangerous). Noting the report was by an IQP, not a fire engineer, and raised concerns regarding qualifications of the author, whether there was any peer review, references in the report to NZS3604²⁴.</p> <p>Reiterated points made earlier regarding the test under section 121 and code-compliance.</p> <p>Noted that the repair work to the transformer room could be undertaken from the outside (ie. not requiring involvement of the owner of the transformers) and urgently under section 41(c) to allow the restriction placed on the applicant’s use of the building to be lifted.</p> <p>Raised concerns that the recent building consent application had been refused (as advised by the body corporate).</p>
19 February 2019 Applicant	<p>Authority advised the owners of agreement to the owners’ proposal subject to conditions that in effect continue the restriction on use in the second and reissued notices.</p>
19 February 2019 Applicant	<p>Queried aspects of the authority’s correspondence regarding the agreement.</p>
20 February 2019 Ministry	<p>Advised applicant that questions relating to the correspondence concerning the agreement reached between the owners and authority should be put to the authority in the first instance.</p>
20 February 2019 Applicant	<p>Notes the direction under section 183 means the second notice remains in force, and the restriction on entry persists despite work being carried out and the time under section 125(1A) being spent.</p> <p>Considers the restrictions provided for in the agreement are simply an extension of the dangerous building notice, which is the subject of the determination application, and should therefore be addressed by the Ministry.</p> <p>The authority’s actions and the agreement prejudice the applicant.</p>
21 February 2019 Ministry	<p>The Ministry to the authority: referring to letter of agreement reached between owners and the authority regarding continuing limitations on use, seeking confirmation of the powers under the Act the authority was exercising in the conditions set out in that agreement.</p>
25 February 2019 Authority	<p>Authority advised the arrangement was a civil agreement to prevent the authority closing the building in its entirety. It was presented as a proposal from the owners and the authority considers the proposal would protect occupants of the building to the same degree as the restricted access provisions included in the dangerous</p>

²³ As nearly as is reasonably practicable

²⁴ New Zealand Standard NZS 3604 Timber-framed buildings

	building notices issued under section 125(1A).
26 February 2019 Applicant	Expressed concern with the authority's response and the Ministry's role in facilitating resolution of the matter. Requested the authority answer questions relating to the particulars described in the notices, references to the building no longer being dangerous, and what power under the Act the authority was exercising in relation to the conditions of the agreement.
4 March 2019 Applicant	<p>Correspondence querying what "action or inaction [of the authority] is required" in relation to the current status of the building, and seeking further clarification regarding the expiry of the notices. The authority's proposal to issue a dangerous building notice if Level 1 is reoccupied is a determinable matter under section 177. The authority and the Ministry (through the determination) are using an incorrect threshold of "possible" rather than "likely" in applying section 121.</p> <p>As long as the features that mitigate the risk for sleeping occupancy remain as approved when the change of use was consented, then that activity is on par with other activities in the building, and it should only be singled out if the cause of the danger is present on the floors used for sleeping activities.</p> <p>The standard for the building not being dangerous is different to the standard for the building being compliant with the Building Code.</p> <p>The authority was correct to issue the first notice after inspection on 12 December 2018 – the building at that time met the test under section 121 because "the means of escape was impaired with alarms compromised on Level 3" and "The basement and Queen St fire escape were partly demolished." However, this notice and later notices were "defective" as they did not clearly state the reasons for the building being dangerous. For example the notices refer generally to compromised fire separations in "various areas" or "throughout the building", without further defining those areas. This caused confusion for owners, some of whom were not privy to work occurring in other areas of the building.</p>
11 March 2019 Applicant	<p>Provided a copy of correspondence from the applicant's agent to the authority, dated 28 December 2018, which also included extracts from previous correspondence on 24 December 2018.</p> <p>Requested that the purported exercise of the authority's powers under sections 124 and 129 be included as considerations in this determination.</p>
13 March 2019 Applicant	<p>Advised that building consent for work in the basement, which is to re-do temporary works that were undertaken to make this area safe in order to bring that work "to full compliance", is on hold because a section 37 certificate has been attached that requires heritage approval. The temporary works are functional and adequate.</p> <p>The authority incorrectly exercised its powers in using the dangerous building notice to enforce a level of compliance not required, and is now using the consent process to stop all of the work when it only has the power to stop part of the work under section 37(2)(b), and this situation relates directly to the dangerous building notices already issued.</p> <p>The applicant is being denied the lawful use of their lease and the approved consented use of Level 1. The applicant is powerless to address the issues, which are not within their control.</p>
First draft determination and submissions in response	
18 March 2019 Ministry	<p>First draft of the determination issued to parties for comment. Draft concluded:</p> <ul style="list-style-type: none"> • The authority incorrectly exercised its powers in relation to the withdrawal of the first notice because its powers were suspended under section 183. • The authority correctly exercised its powers of decision to issue and then reissue the second notice under section 124(2)(c) and 124(2)(d). • The authority was incorrect in its proposal to exercise its powers under section 124(2)(a) and/or 124(2)(b) in respect of the whole of the building, as opposed to just those parts of the building used for sleeping accommodation.

18 March 2019 Applicant	Sought clarification of part of the decision. Requested a direction under section 183 to the effect that there aren't grounds for the authority to exercise its powers under sections 124(2)(a) or (b) in relation to the whole of the building.
19 March 2019 FENZ	Accepted the draft, subject to minor non-contentious amendments. Comment on FENZ's role under sections 176(g) and 170.
1 April 2019 Authority	Accepted the findings of the draft. Sought clarification regarding the reissued second notice being spent and no longer in effect. The authority "took that to mean that the section 124(2)(d) component of the notice was spent ...but not the continuing 124(2)(c) component requiring work to be done to reduce or remove the danger".
18 March 2019 Applicant	Sought clarification of the wording in the decision. Requested a direction under section 183(1)
19 March 2019 Applicant	Commented on FENZ roles under section 176(g) and section 170 Further correspondence with FENZ – noting that the applicant was not aware of the fire consultant's report first fire report that had specific and valid reasons for concluding the building was dangerous. Commenting on FENZ role in relation to the report provided to the authority.
22 March 2019 Applicant	Regarding the direction under section 183 and the authority's powers. Reiterated view that the authority was applying an incorrect test. Seeking clarification of what attributes or conditions make the use of part of the building for sleeping accommodation dangerous, and which of these do not apply to other user groups. Requesting the authority be "directed" under section 181(2)(a) of the Act ²⁵ .
4 April 2019 Applicant	Applicant does not accept the findings of the draft determination and stated they "reserve[d] the right to a hearing". The applicant's agent submitted the following (in summary): The draft does not address the matters to be determined, being that the wording in the notices meant it was unclear why the building was dangerous and included references to the Building Code and failure to comply with compliance schedule requirements which are not the correct test to be applied. There is no prescribed form in the Act for a dangerous building notice and no mandatory information on the information required. However, this places greater onus on authorities to clearly communicate the reasons the building is dangerous, as without such clear statements there is no measure for establishing when remedial works have resolved the matter to allow for the notice to be lifted. The draft does not address the issue of whether injury or death is "likely" in a fire event, but simply refers to the first determination. In addition, the transformer room, which is fire separated, has been there for 50 years, and if this is sufficient to make the building dangerous for sleeping occupants then it must also be dangerous for other user groups. Given the wording in section 121 of the Act, a vacant dangerous building is also still a dangerous building; taking that logic further, the building must be dangerous for all users or not dangerous at all. The draft used the wrong test ("reasonable grounds") in considering whether the authority was correct to issue the second notice; the correct test is whether the authority could be "satisfied" and concerns a different level of certainty. The restriction on entry does expire but the dangerous building notice does not; as long as the building remains dangerous the notice must "stand". The authority could make a decision to "lift" the notice, but the notice does not simply "run out".
	The restrictions on entry in section 125 must be to allow evaluation and emergency works – they are not intended to be used in the way they have in this case. Some of the items referred to in FENZ's report are matters of housekeeping and do not make the building dangerous. The report was deficient in that it did not document the damage that would have been able to be observed in the basement

²⁵ Section 181 of the Act provides the chief executive may make a determination on his or her own initiative.

	<p>fire escape route. This damage was not detailed in the dangerous building notice. The authority “purposefully withheld” knowledge of the issues from the building owners.</p> <p>The authority continues to require building consent for work that could be carried out under section 41 without consent, and continues to enforce requirements for compliance to a level over and above that required to make the building not dangerous.</p> <p>The authority has purposefully manipulated and misrepresented their powers, and this cannot be considered a “correct” exercise of the authority’s power of decision.</p> <p>The building is currently in the same condition as at the time that the dangerous building notice that was subject to the first determination was lifted; despite this the authority is insisting on further work to upgrade the fire separations beyond simply repair of existing separations.</p>
The second draft determination and submissions in response	
21 May 2019 Ministry	<p>Second draft determination issued to parties for comment. Draft concluded:</p> <ul style="list-style-type: none"> • the building was dangerous when the authority issued dangerous building notice NOT 21427373, accordingly the authority was correct in making the decision to issue the first notice; • at the time the authority issued and later reissued dangerous building notice NOT 21427560, the building was dangerous in relation to occupation of part of the building for sleeping accommodation because in the event of fire, injury or death to persons occupying that part of the building for the purpose of sleeping activities was likely; accordingly the authority was correct in its decision to issue and then reissue the second notice. • the authority incorrectly exercised its powers of decision in lifting the first dangerous building notice (NOT 21427373) because the authority’s powers relating to that notice were suspended under section 183 at that time • the authority correctly exercised its powers under section 124(2)(c) in requiring work to be carried out to reduce or remove the danger in relation to its decision to issue dangerous building notice NOT 21427373 and issuing, then later reissuing, notice NOT 21427560 • the authority incorrectly exercised its powers in relation to dangerous building notice NOT 21427560 in referring to the restriction remaining in place until “practicable compliance” with the Building Code was achieved, but correctly exercised its powers in relation to other reasons given for issuing the notice • the authority correctly exercised its powers in relation to the statement on the notices to the effect that building consent may be required for “some of the works” • the authority incorrectly exercised its powers in its proposal to exercise its powers under sections 124(2)(a) or (b) as described in its letter of 19 February 2019 to the effect that it would restrict entry to the whole of the building.
5 June 2019 FENZ	Accepted the findings of the second draft of the determination, noting a typographic error to be corrected
5 June 2019 Authority	<p>Accepted the findings of the second draft of the determination, noting typographic errors to be corrected.</p> <p>The authority also sought clarification regarding “expiry” of dangerous building notices and the use of the Building Code “as a measure for work to be completed”. In the authority’s view:</p> <ul style="list-style-type: none"> - in respect of section 124(2)(c), the notice continues to apply while the building remains dangerous (with reference to the authority’s powers under section 126) - whether the notice itself is correct in its use of specific clauses of the Building Code as the standard required to make the building safe.
7 June 2019	Did not accept the second draft of the determination in relation to the matters requested in the application – the notice was not correctly issued in respect of the

Applicant	<p>reasons for it being considered dangerous not being properly stated in the notice, and the applicant was not made aware of those reasons but was greatly impacted by it. The applicant's agent noted:</p> <ul style="list-style-type: none"> - the particulars and where they pertained to were "purposefully generalised" - the notice is being misused to enforce an upgrade - because the particulars were not adequately described the applicant could not require the owners address the issues or undertake the necessary works themselves - the building was dangerous when the first notice was issued, but the authority failed to exercise its power of decision correctly <p>Applicant requested a hearing.</p>
	<p>The applicant's agent also raised the following points:</p> <ul style="list-style-type: none"> - work had been carried out and the building was no longer dangerous when the second notice was issued - the issuance of the second notice was ultra vires, and on that basis the determination cannot conclude that the authority was correct in making that decision - the dangerous building notice issued on 30 June 2016 (no. 6779, which was subject of the first determination) was lifted by the authority on 23 June 2017, yet the reasons given in the first dangerous building notice by the authority for why the building was dangerous are word for word the same as the 2016 notice - it is unclear why the Ministry did not engage an independent expert to carry out an assessment - in reference to the owners' awareness of issues (refer paragraph 4.2.4.7), most of the information described in paragraph 4.2.4.6 was "drip fed" to the owners after January 2019 - it is unclear why the FENZ report did not include the specific matters from the consultant's report that made the building dangerous - maintains that the approval of the change of use for the part of the building occupied as sleeping accommodation and the fire safety measures in place means that the risk for sleeping occupancy is the same as for the other occupancies and therefore the restriction is unreasonable, with reference to section 121(1)(b) prior to its amendment on 13 March 2012 - maintains the owner has been coerced into applying for building consent rather than carrying out the necessary building work under section 41(1)(c).
15 June 2019 Owners	Agent for the owners advised that the owners' position on the matter would be forthcoming sometime after a meeting the following week.
18 June 2019 Ministry	Email to the agent acting for the owners requesting confirmation of when the Ministry could expect a submission.
9 July 2019 Ministry	<p>Letter to the parties advising:</p> <ul style="list-style-type: none"> • the agent acting for the owners had confirmed in a phone conversation that the owner does not intend to make a submission, and • the applicant's request for a hearing had been considered but after consideration of the submissions I considered a hearing was not necessary in this case.