Christchurch City Council

UNDER	**THE COMMISSIONS OF INQUIRY ACT 1908**
IN THE MATTER OF	**ROYAL COMMISSION OF INQUIRY INTO BUILDING FAILURE CAUSED BY CANTERBURY EARTHQUAKES** **KOMIHANA A TE KARAUNA HEI TIROTIRO I NGĀ WHARE I HORO I NGĀ RŪWHENUA O WAITAHA**

OPENING SUBMISSIONS OF COUNSEL FOR CHRISTCHURCH CITY COUNCIL REGARDING THE CTV BUILDING

DATE OF HEARING: COMMENCING 25 JUNE 2012

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INTRODUCTION

1. These submissions are made on behalf of the Christchurch City Council (the **Council**).

2. At the outset, the Council wishes to express its condolences to the families and friends of those who died and to those who were injured in the collapse of the CTV Building during the earthquake of 22 February 2011.

3. The Council has taken part in most other hearings before the Royal Commission and has made submissions on a number of topics. Most relevantly for this hearing, it has made two submissions relating to post earthquake assessment and management of buildings:

   - Submissions on Building Assessment After Earthquakes.
   - Submissions on the Royal Commission Discussion Paper: Building Management after Earthquakes (GEN.CERC.0004). (Filed with the Commission on 27 July 2012)

4. These two submissions will be considered at a later hearing of the Royal Commission scheduled for September of this year along with the Council's *Report Into Building Safety Evaluation Processes in the Central Business District Following the 4th September 2010 Earthquake* (ENG.CCC.0002F). It is not intended to repeat these submissions, but they include some observations about damage based as opposed to seismic based assessments following earthquakes. This has also been the subject of evidence from Messrs Kehoe and Paret (WIT.KEHOEANDPARET.0001), in the context of the present hearing.

5. The terms of reference of the Royal Commission are set out at page 16 of the opening submissions of Counsel Assisting. The areas where the Council can be particularly of assistance are paragraphs (d), (e) and (f) as follows:

   > *(d) Whether as originally designed and constructed, and as altered and maintained, the CTV Building complied with earthquake-risk and other legal and best-practice requirements that were current, both in 1986 when the CTV Building was designed and constructed and on or before 4 September 2010.*

(e) *Whether prior to 4 September 2010 the CTV Building had been identified as earthquake-prone or had been the subject of any measures to make it less susceptible to earthquake-risk and, if it had, the compliance or standards this had achieved.*

(f) *The nature and effectiveness of any post earthquake assessments of the CTV Building and any remedial work carried out on it after the 4 September and 26 December 2010 events.*

6. The Council has had a number of distinct roles in relation to the CTV Building. These broadly can be divided into:

(a) the issue of building permits for the construction of the CTV Building and the inspection of that building in the course of construction;

(b) the issue of subsequent building consents relating to alterations to the building (involving in one case a change of use);

(c) the Council's role as part of the regional civil defence emergency response after the 4 September 2010 earthquake. After the 22 February 2011 earthquake, a local state of emergency was only briefly in force followed by a national state of emergency on 23 February 2011.

THE STATUTORY FRAMEWORK

7. At the time when the CTV Building was constructed, building construction was regulated by Bylaws made under the Local Government Act 1974. In the case of Christchurch City Council, the relevant bylaw in force in 1986 was Bylaw 105: (1985) Buildings. This bylaw was largely based on the New Zealand Model bylaw NZS 1900.

8. It will be necessary to discuss Bylaw 105 in more detail below, but it listed various standards, standard specifications, and codes of practice in the Second Schedule as means of compliance with the provisions of the bylaw. These included Codes of Practice for the general structure design and design loadings (NZS 4203:1984 - ENG.STA.0018), and for the design of concrete structures (NZS 3101: 1982 -

(ENG.STA.0016). These codes are referred to in opening submissions of Counsel Assisting at paragraphs 23 to 26.

9. A fundamental statutory change to the building control system was introduced by the Building Act 1991 (**1991 Act**) which for most purposes came into force on 1 July 1992. This legislation followed the 1990 report *Reform of Building Controls* by the Building Industry Commission.

10. A single performance based building code for the whole of New Zealand was promulgated by Regulations under the 1991 Act. It was administered by territorial local authorities with central government involvement through the Building Industry Authority (**BIA**). Key features of this statutory regime included:

(a) the replacement of building permits with building consents;

(b) provision for code compliance certificates following completion of building work;

(c) compliance documents issued by the Chief Executive of the BIA and containing acceptable solution and compliance methods;

(d) notices to rectify and stop-work notices;

(e) private building certifiers;

(f) provision for dangerous, earthquake prone and insanitary building notices. (There were provisions of a similar nature previously in the Local Government Act 1974 and the Municipal Corporations Act 1954);

(g) requirements for upgrading some building elements to as nearly as reasonably practical to current Building Code standards in the case of alterations and changes of use. There were previously materially different change of use and alteration of buildings provisions in Bylaw 105 which included reference to an increase in seismic coefficient and seismic forces. (See clauses 3.15 and 3.16 of Bylaw 105- ENG.CCC.0044A.32-34).

(h) express provision for producer statements;

(i) national accreditation of building products and techniques;

(j) requirements for compliance schedules and annual building warrants of fitness to ensure building systems (such as lifts, automatic doors, air conditioning and fire safety systems) continued to function properly.

11. A number of building consents were issued by the Council under the 1991 Act for the CTV building. These included consent for the CTV fitout/internal staircase and the fitout for the Going Places tenancy.

12. The 1991 Act was in turn replaced by the Building Act 2004 (**2004 Act**) which came into force at various dates between 30 November 2004 and 30 November 2005. The 1991 Act had been under review for some time, but the new legislation was accelerated by the leaky building crisis.

13. The 2004 Act was essentially evolutionary but it contains some new provisions which are of relevance to the Commission's wider terms of reference. These include provision for:

(a) earthquake prone building policies to be adopted by territorial local authorities;

(b) changes to the definition of earthquake prone buildings (section 122);

(c) the introduction of a regime providing for licensed building practitioners;

(d) the changing of "notices to rectify" to "notices to fix";

(e) the BIA to be replaced by the Department of Building and Housing (now the Ministry of Business, Innovation and Employment);

(f) implied warranties for residential building work (sections 396 to 399);

(g) certificates of acceptance for approving aspects of work done without a building consent;

(h) accreditation for building consent authorities;

(i) the issue of warnings and bans on building products or techniques; and

(j) removal of specific reference to producer statements.

14. There have been a number of important recent changes to the 2004 Act including those contained in the Building Amendment Act 2012. These changes include:

(a) making explicit reference to the respective responsibilities of owners, owner-builders, designers, builders and building consent authorities under the Act;

(b) provision for different categories of building consent applications (not yet in force);

(c) regulating who may carry out or supervise restricted building consent work; and

(d) code of ethics and competence requirements for licensed building practitioners.

15. In addition, the No 4 Bill is before Parliament. It provides:

(a) more comprehensive consumer protection measures, including mandatory written contracts for residential building work and disclosure of certain information by building contractors;

(b) for the clarification of the exempt building work categories in Schedule 1 of the Act;

(c) a new power for councils to deal with buildings that are at risk because they are near or adjacent to dangerous buildings, which is similar to some of the powers given to the Canterbury Councils by the Canterbury Earthquakes (Building Act) Order 2011.

COMPLIANCE OF CTV BUILDING WITH CODES/STANDARDS IN FORCE IN 1986

16. As foreshadowed in opening submissions of Counsel Assisting, there is considerable conflict in the expert evidence either already given or to be given relating to the extent that the CTV Building complied with Bylaw 105 and relevant Codes of Practice. Most witnesses have concluded that there were areas of non-compliance, but there is no consensus (at least at this stage) as to the extent of that non-compliance.

17. The disparity in views of expert witnesses relate to how the relevant codes of practice should be interpreted generally, and how they should have been applied to the CTV building.

18. It is apparent that NZS 4203:1984 in particular involved a considerable change from the earlier standard (NZS 4203:1976) and it is perhaps not entirely surprising if there were at the time (1986) reasonably held competing views within the structural engineering profession as to how the relatively new codes of practice should be interpreted. These codes of practice had to be interpreted in a workable and practical manner by structural engineers.

19. An important preliminary issue of interpretation has arisen in relation to clause 3.2.1 of NZS 4203:1984:

> "*The building as a whole, and all of its elements that resist seismic forces or movements, or that in case of failure are a risk to life, shall be designed to possess ductility. ...*"

20. This clause is subject to comment in the opening submissions of Counsel Assisting at paragraphs 61 to 64. It has to be accepted that the wording of clause 3.2.1 by itself and in the wider context of both NZS 4203 and NZS 3101 can be subject to competing interpretations.

21. Dr O'Leary will say in his first statement of evidence at paragraphs 21 to 25 that clause 3.2.1 first needs to be put into context by commentary clause C3.2 and should further be considered in the wider context of clauses 3.2.2 and 3.2.3. Next he will say that clause 3.2.3 refers the designer to the appropriate material code which is NZS 3101 and that provides quantitative guidance. He then turns to

clause 3.3.3 of NZS 4203 and notes that its requirements relate to ductile frames and not secondary elements.

22. Another interpretation issue, which is relevant to the beams and columns of the CTV Building, relates to clause 3.5.14 of NZS 3101. Dr O'Leary in his first statement of evidence (at paragraphs 38 to 45) concludes that the beams and columns of the CTV Building were Group 2 secondary elements based on his interpretation of clause 3.5.14.1, and that clause 3.5.14.3 then became applicable. Other witnesses have a different view.

23. A further interpretation issue that has arisen relates to clause 3.4.7.1 of NZS 4203 and as to whether there was a need to use a 3D modal analysis for structures more than 4 storeys in height. This analysis in turn was often carried out using an Extended Three-Dimensional Analysis of Building Systems (**ETABS**). A three dimensional ETABS analysis was in fact carried out for the CTV Building by Mr Harding of Alan Reay Consulting Engineer.

24. Given that there are a number of important matters of interpretation at issue between the experts, it is informative to understand how the engineering profession practicing in Christchurch saw these issues at the time. John O'Loughlin, a senior Christchurch engineer practising at the time, will give evidence as to how Christchurch engineers dealt with these issues on a practical day to day basis. The scope of his evidence is mentioned in more detail below.

Elastic Response Spectra Analysis

25. A related issue that has arisen during the course of the hearing is whether the Elastic Response Spectra Analysis (**ERSA**) referred to in Appendix F of the Hyland Smith Report adequately reproduced an analysis of the kind that would have been undertaken in 1986 based on NZS 4203 and NZS 3101. Dr O'Leary comments on this in his first statement of evidence. The ETABS analysis undertaken by Mr Harding in 1986 is of course not available to the Royal Commission, but it would seem clear that analysis was ultimately reflected in the calculations that were carried out for the CTV building.

26. Most importantly, where an ERSA analysis is given weight as a means of determining whether the CTV building complied with the codes at the time, it is

important that it does as accurately as possible replicate the then provisions of NZS 4203 and NZS 3101.

27. There are a number of other complex interpretation issues that are relevant to code compliance in relation to the CTV Building, and again these are dealt with in the evidence of Dr O'Leary and other witnesses.

28. There is an important issue at stake in the interpretation of the Code relevant to the compliance of the CTV Building. If there is possible criticism of individuals or organisations involved in the design and permitting of the CTV building, it is submitted that the focus should be on whether the approach taken at the time was reasonable having regard to the technology available and technical understanding of engineers in 1986. This is again a focus of the evidence of Dr O'Leary and Mr O'Loughlin to be called for the Council.

BYLAW 105

29. Bylaw 105 came into force on 1 December 1985 and consisted of the Bylaw itself and two schedules (ENG.CCC.CO44A and ENG.CCC.CO44). Bylaw 105 is on the website in two forms. ENG.CCC.CO44 is a reprinted version of Bylaw 105 which incorporates amendments made by Bylaw 105A in 1987. These amendments relate to Part 5 of the Bylaw and are not material for present purposes. The other form of the Bylaw (ENG.CCC.C044A) is a photocopy of the original Bylaw 105.

30. The first schedule of Bylaw 105 contained the substance of the Bylaw (see clause 4) and consisted of 12 Parts. The second schedule listed specifications, standards and appendices that were deemed in the absence of proof to the contrary to be sufficient evidence that the relevant degree of compliance with the Bylaw was satisfied (see clause 5).

31. Of particular relevance to this hearing are the following parts of the first schedule:

(a) Part 1 – Preliminary;
(b) Part 2 – Building Permits;
(c) Part 8 – Concrete;
(d) Part 11 – Structural Design and Design Loadings.

32. Part 1 contains a number of definitions that are of relevance:

(a) "Erection of a Building" – which includes the making of any alteration, repair or addition to any building.

(b) "Inspection" which means an inspection by the Engineer (which is the Council's principal engineer) or other person authorised in that behalf by the Council.

(c) "Structural Design Features Report" meaning a check list completed by the building designer, the purpose of which is to ensure that the structural design requirements of the Bylaw are met.

33. Part 2 deals with Building Permits. The provisions of particular relevance are:

(a) Clause 2.4.2 which provides where a proposed building is subject to specific design, the engineer may require the applicant's engineer to complete and sign additional forms as applicable. The note to the clause indicates that such forms include a Structural Design Features Summary and a Fire Safety Features Summary.

(b) Clause 2.5.4 which provides that where a building is the subject of specific design, the applicant may, and if the engineer so requires the applicant shall, submit a Structural Design Features Summary or a Fire Safety Features Summary or both.

(c) Clause 2.6.2.1 related to provision of structural details except as set out in clause 2.7, and required for buildings wholly or partly subject to structural design under the Bylaw, such stress diagrams, computations and other data as are necessary to show that the design complies with Bylaw requirements.

(d) Clause 2.7.1 stated that all buildings shall be the subject of specific structural design including calculations unless otherwise provided by the Bylaw.

(e) Clause 2.15.1 dealt with the effect of a building permit, and deemed it to operate as a permit to erect on the site shown in the application "*a*

structure as therein described, subject to compliance in every respect with the requirements of this bylaw".

(f) Clause 2.15.2 imposed a duty on the owner, the employer, builder, contractor or person in charge to see that the provisions of the Bylaw were fully complied with in the commencement and execution of the building work.

(g) Clause 2.16.1 provided that after a permit has been issued, no departure shall be made from any of the particulars submitted unless amended particulars clearly describing the intended deviation are supplied to the Council Engineer and written approval is given to the deviation.

(h) Clause 2.19 dealt with inspections generally. While there was an entitlement to inspect at all times (clause 2.19.1), the builder was also required to provide facilities for the inspector to examine the foundation excavation before the placing of any site concrete or any part of the foundation structure. In addition, the builder had to give the inspector not less than 24 hours notice before any structural concrete was placed in the excavation to enable the inspector to inspect all reinforcing steel.

(i) Under clause 2.19.4, the Engineer could require that inspection be made of, or before, other particular operations, and for that purpose to notify the builder in writing or endorse such requirements on the drawings at the time of issue of the permit. The builder was then required to give the inspector specific notice of the operations involved.

34. Part 8, relating to Concrete, had the objective of setting down the design and construction requirements for buildings or parts of buildings constructed of concrete (clause 8.1.1). Provisions of particular interest for present purposes include:

(a) Clause 8.2.1 which requires concrete elements to be designed to resist the loads specified in Part 11 of the Bylaw.

(b) Clause 8.2.5 required the designer to provide calculations to establish that the concrete element has been designed in accordance with the

requirements of the bylaw, or alternatively certify in an approved manner that the design method confirms with a recognised code of practice.

(c) Clause 8.2.6 requires the designer to supervise the construction of key elements, or arrange to have the work supervised by an agent appointed by the designer. "Supervision" is then clarified to mean general supervision only and includes such periodic supervision and inspection as may be necessary to ensure that the structure work is executed generally in accordance with the design as distinct from any special supervision that may be required for a particular situation.

(d) Clause 8.4.1 provides that concrete elements designed in accordance with the requirements of NZS 3101 or a recognised equivalent standard shall be deemed to comply with the requirements of the Bylaw.

(e) Clause 8.4.2 in a similar manner provides that concrete elements erected in accordance with NZS 3109 or a recognised equivalent standard shall be deemed to comply with the Bylaw.

35. Turning to Part 11, clauses 11.1.5 and 11.1.6 relate to general structural design method and cross reference to NZS 4203.

36. Clause 11.2.5 relates specifically to earthquake provisions. Clause 11.2.5.1 relates to symmetry, and clause 11.2.5.2 relates to ductility and has already been referred to by counsel assisting in his opening. Finally clause 11.3 relating to earthquake loads refers specifically to Zone B for Christchurch.

37. Counsel assisting in opening submissions at paragraphs 31 and 32 places some importance on the fact that Bylaw 105 incorporates in clauses 11.2.5.1 and 11.2.5.2, ductility provisions from NZS 3101 and NZS 4203, presumably on the basis that these provisions are entrenched rather than merely being compliance documents referred to in the Second Schedule.

38. It is submitted however that these bylaw provisions cannot be interpreted in isolation, especially given that clause 11.2.5.2(c) refers to "adequate ductility" by cross referencing to the "appropriate material code" which is NZS 3101. A search of Council minutes from 1985 has not revealed any information about the reasons for including clauses 11.2.5.1 and 11.2.5.2 in Bylaw 105.

THE BUILDING PERMIT PROCESS

39. As Mr McCarthy will say in evidence (WIT.MCCARTHY.0001.6, paragraph 21), plans, specifications, and calculations, would have been required to be supplied to the Council in support of the building permit application (BUI.MAD249.0141.8) for the CTV Building. Mr McCarthy, who was not at the Council in 1986, will provide evidence about his understanding of the building permit process.

40. As already mentioned above, there was an alternative procedure (not used in the case of the CTV Building) under clause 8.2.5 of Bylaw 105 relating to concrete structures to provide certification that the design method conformed to the requirements of a recognised code of practice. Clause 2.5.4 of Bylaw 105 also enabled the Engineer to require an applicant to submit a structural design features summary.

41. It seems clear from the Council's file (to the extent that it has been able to be located) that the structural drawings were supplied to the Council after the building permit application (dated 17 July 1986) was made. Mr Leo O'Loughlin (WIT.OLOUGHLIN.0001) will give evidence as to his role in receiving and processing the CTV Building permit application.

42. It was following receipt of the structural drawings on 26 August 1986 (see BUI.MAD249.0141) that Mr Tapper signed a largely hand written letter (BUI.MAD249.0141.14-15) addressed to Dr Reay's firm. The Council now holds only the permitted plans and it is not clear what differences there were in the original set of plans submitted to the Council.

43. It is not possible to be definitive about the complete scope of the response from Dr Reay's firm, as there is no record of a general written response to the letter on the Council's files (or Dr Reay's files), but there are handwritten notations on the letter held by the Council. In addition, there is the document transfer form dated 5 September 1986 from Dr Reay's firm (BUI.MAD249.0141.1).

44. However, it would seem that Mr Tapper personally signed off the structural drawings on 10 September 1986 (BUI.MAD249.0141.8). Dr O'Leary will comment in his first statement of evidence on how a reviewing Council engineer

may have reasonably interpreted the codes. Mr John O'Loughlin will comment in his evidence about:

(a) the expectations of the engineering community in Christchurch in the 1980's as to the nature of the structural review undertaken by the Council's reviewing engineers when considering applications for building permits;

(b) how difficult it would have been for a reviewing engineer to pick up various non-compliances; and

(c) from his perspective and knowledge, some general comments on the role of Council reviewing engineers in the mid 1980's.

45. Whilst evidence has been given relating to the relationship between Mr Bluck and Mr Tapper and their relevant roles, experience, and more particularly their involvement with the permitting of the CTV Building, none of this evidence establishes that (whatever their respective roles were) they did not apply themselves diligently and in good faith to the structural assessment of the CTV Building.

THE INSPECTION PROCESS

46. The inspection process generally and as relating to the CTV Building, is dealt with in the evidence of Mr McCarthy at paragraphs 44 to 59 (WIT.MCCARTHY.0001.12 to 0001.15). His evidence includes an Annexure "A" which provides a timeline of inspection records and related correspondence. There is a five month "gap" in inspection records, which is discussed in Mr McCarthy's evidence and this will be subject of evidence from other witnesses.

47. Mr Leo O'Loughlin will also give evidence on the inspection process.

48. Bylaw 105 clearly contemplated that there should be an element of supervision by structural designers during the course of construction. Reference has already been made to clause 8.2.6 relating to concrete elements.

49. In addition, the building permit conditions for the CTV Building (BUI.MAD249.0141.10) required the engineer responsible for structural design to confirm in writing that the intent of his design has been complied with before the building was occupied. This again suggests that the structural designer would need to have undertaken sufficient supervision of the construction process in order to provide such a certificate. There is of course no actual certificate on the Council's file.

50. Given the complexity of the design and construction of multi-storey commercial buildings, it is not surprising that the Council's building inspectors at the time (and subsequently) would need to rely on the design engineer to carry out an appropriate level of supervision on a site. Mr Jones states in his evidence that it was his impression that the Council relied on design engineers to do supervision and maintenance (WIT.JONES.0001.14 at paragraph 60).

CONSTRUCTION ISSUES

51. The Hyland Smith Report (BUI.MAD249.0189) raises a number of construction issues, as does the Expert Panel Report (BUI.VAR.0056). These issues, which have already been canvassed in some detail in evidence, are the subject of comment by Dr O'Leary in his first statement of evidence.

THE 1991 REMEDIAL WORK – DRAG BARS

52. No building permit was obtained for this work. Mr McCarthy will give evidence that this work would have required a building permit (WIT.MCCARTHY.0001.16-18). The work was carried out some four years after the building was constructed. In the Council's view, the installation of drag bars would amount to an alteration to the building (clause 2.2.1 of 1990 Building Bylaw) (ENG.CCC.0045.24).

53. Even if the installation of the drag bars could be regarded as a continuation of the original building permit process, no consent of the Engineer was obtained as required to a departure from the building permit - see clause 2.16.1 of the 1990 Building Bylaw referred to in Mr McCarthy's evidence.

CHANGES OF USE WITHIN THE CTV BUILDING

54. Prior to the commencement of this hearing, the Council was asked to advise whether the Going Places, Kings Education, CTV, and The Clinic tenancies constituted a change of use under applicable legislation. While the Council provided an initial response, it was indicated that as the issues are of some legal complexity they would be the subject of legal submissions to the Commission.

55. The Council's position in relation to each of the tenancies in the CTV Building in so far as they may have a bearing on change of use issues are summarised in the evidence of Stephen McCarthy.

56. It is noted that there have been some difficulties in determining the use of particular floors of the building over time, due to the floors of the building being described in building consent/permit documentation sometimes with level 1 as the ground floor and sometimes with level 1 in fact being the second floor. Issues arising from this uncertainty are explained below where relevant. These submissions refer to the ground floor as level 1 and subsequent floors as levels 2 – 6. Set out below is a summary of the applicable legislation and its application to the CTV building tenancies.

Building Act 1991

57. Section 46(1) of the 1991 Act (**Annexure A**) provided that it was the duty of an owner of a building to advise the territorial authority in writing if it was proposed to change the use of a building, and the change of use would require alterations to the building in order to bring the building into compliance with the building code. Such notice would normally be given in the context of a building consent application.

58. Section 46(2) of the 1991 Act provided that *"the use of a building shall not be changed"* unless the Council was satisfied on reasonable grounds that in its new use the building would comply with the building code for various matters including means of escape from fire and structural and fire-rating behaviour, as nearly as was reasonably practicable to the same extent as if it were a new building.

59. The 1991 Act did not define the words "use of a building" or "change of use". It was left to territorial authorities to determine whether there had been a change of

use. The general approach set out in the *Brookers Building Law* commentary on section 46 was to determine first whether there had been a change in the "classified use" of a building specified in clause A1 of the building code (**Annexure B**). This was considered to constitute a change of use for the purposes of section 46.

60. If there had been no change in the classified use, the territorial authority would also consider whether there had been a change in the use of the building when applying the ordinary and natural use of those words.

61. It is apparent from section 46(2)(a) of the Building Act 1991 that the structural behaviour of a building would need to be considered if there was a change of use. The territorial authority would need to be satisfied that the building's structural behaviour was at a level at, or would be upgraded, to as nearly as reasonably practicable to, the applicable current structural standard at the time of the change of use.

62. The next issue is however the application of section 46 in the situation where only part of a building is subject to a change of use. "*Building*" was defined in section 3(1) of the 1991 Act as "*any temporary or permanent moveable or immoveable structure*".

63. Section 3(2) stated that:

> *"For the purposes of Part 9 of this Act, a building consent, a code compliance certificate, and a compliance schedule and the term "building" also includes:*
>
> *(a) any part of a building; and*
>
> *(b) any two or more buildings which, on completion of any building work, are intended to be managed as one building with a common use and a common set of ownership arrangements."*

64. Given that section 3(2) does not apply to section 46, it could well follow that a change of use would only arise if there is a change in the use of the building as a whole. This receives some support from section 46(4) which expressly refers to "a building or any part thereof". By way of contrast, *Brookers Building Law* commentary at D3.10 (**Annexure C**) suggests (page D1-19) that:

"(c) *when an identifiable part of a building (such as a storey, a wing, a fire cell or a unit title) is to be altered or undergo a change of use etc, it is the building as a whole, not merely that part, which is required to be upgraded, if at all, under s38 or s46.*"

Building Act 2004

65. Section 114(2)(a) of the 2004 Act provides that an owner of a building must give written notice to a territorial authority if the owner proposes to change the use of a building.

66. Section 115 provides that an owner must not change the use of the building unless the territorial authority gives the owner written notice that it is satisfied, on reasonable grounds, that the building, in its new use, will comply as nearly as is reasonably practicable with every provision of the building code that relates to various matters including means of escape from fire and structural performance.

67. Regulations 5 and 6 and Schedule 2 of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 (**Annexure D**) specify the method that must be used for determining whether there is a change of use for the purposes of sections 114 and 115 of the 2004 Act.

68. Regulation 5 defines change of use, in relation to a building, as meaning changing all or a part of the building from its old use to a new use, and with the result that the requirements for compliance with the building code in relation to the new use are additional to, or more onerous than, the requirements of the old use.

69. Under Regulation 6(1), every building or part of a building has a use specified in the table in Schedule 2. In order to establish the appropriate use category, regulation 6(2) provides that account must be taken of the primary group for whom the building or part was constructed but not any other users of the building or part. A descriptor of the use in column 1 of the table in Schedule 2 of the Regulations is set out in column 2 of the table, while column 3 of the table provides examples of buildings that fall within that use.

70. Additional or more onerous requirements for compliance with the building code between one use and another, will not on their own, mean there is a change of use. The new use must come within a different use "category" from the old use, as specified in the first column of the table in Schedule 2 of the Regulations.

71. For example, the "crowd large" use includes both a restaurant and a library. There would be no change of use from a restaurant to a library for the purposes of the Act, even though there are more onerous Building Code requirements in respect of structural floor loads for a library.

72. A change from a restaurant to a hairdressers would be a change from the "crowd large" to "working low" use categories. However, if there are no additional or more onerous building code requirements to comply with in the hairdresser use compared to the restaurant use, then there will not be a change of use (Regulation 5).

CTV Tenancy

73. Mr McCarthy will say in his evidence (paragraph 85) that a building consent was issued for the CTV fit out on levels 1 and 2 (the ground and first floors) of the building on 11 May 2000. The Council's files indicate that prior to this the whole building had been used as office space for the ANZ bank and A Post Shop.

74. A "Fire Safety Summary" submitted with the application for the CTV fit out stated that there was to be no change of use of the first two levels of the building because the space was still to be used as an office occupancy (BUI.MAD249.0009.10). The report later notes that the occupancy of the ground floor is to be new offices, a studio and store areas and that the second level of the building is to be used as office space (BUI.MAD249.0009.11).

75. The original use of the building for office space and the subsequent use of levels 1 and 2 as offices and a television studio both fell within classified use 5.0.1 – Commercial of Clause A1 Schedule 1 of the Building Regulations 1992 (**Annexure E**). The Regulations stated that this classified use applied to:

> *"...a building or use in which any natural resources, goods, services or money are either developed, sold, exchanged or stored. Examples: an amusement park, auction room, bank, car-park, catering facility, coffee bar, computer centre, fire*

station, funeral parlour, hairdresser, library, office (commercial or government), police station, post office, public laundry, radio station, restaurant, service station, shop, showroom, storage facility, television station or transport terminal".

76. The CTV fit out involved a change from office spaces to "new offices, a studio and store areas". The use of the floors after fit out would not have been significantly different to the use prior to fit out and therefore, would not on this basis be a "change of use" under the ordinary and natural meaning of those words.

Going Places Tenancy

77. Mr McCarthy will state in evidence that the 2001 building consent application ABA10013756 identified "Going Places" as the prospective tenant (WIT.MCCARTHY.0001.21, paragraph 87). The application identified that the building would undergo a change of use as a result of the proposed works and it was treated by the Council on that basis. The building consent issued on 20 June 2001 described the nature of the works as "Language School Fitout" (WIT.MCCARTHY.0001.21, paragraph 88). It is understood from the evidence of John Drew that Going Places occupied level 3 of the building (WIT.DREW.0001.RED.5).

78. The building as a whole (namely all 5 other levels) was primarily used as offices. For the building consent application (ABA10013756), the other 5 levels were assessed in terms of the fire safety compliance document (C/AS1) as WL (working low), and only the one level that was to be fitted out as the language school was assessed as becoming CL (crowd large).

79. In relation to the loading standards in NZS4203:1992 (**Annexure F**), which applied in 2001, it was necessary to ascertain the classification for this building under clause 2.3.1 and Table 2.3.1 (page 17). All buildings came within one of the building category classifications in clause 2.3.1 of NZS4203:1992. Clause 2.3.1 and Table 2.3.1 was in turn relevant to assessing the seismic risk factor for the structure as set out in Table 4.6.2 (page 45).

80. The building and the building work on the building that was described in consent application ABA10013756, would have been within category (IV) "*Buildings not*

included in any other category" and not category (II) "*Buildings which* ***as a whole*** *contain people in crowds".*

81. It seems clear that there would have been increased loading standards for the building compared to a new one built at that same site, but the risk factor itself did not on the basis set out above, increase with the change of use.

82. Counsel Assisting has previously asked whether the Council took any steps to satisfy itself that the building met the increased loading standards for a school, other than to consider when the building had been designed and constructed. There is no contemporaneous record as to how the Council addressed this particular issue apart from the Council structural checklist (BUI.MAD249.0151C.37).

83. As already mentioned, the Council would have been required to be satisfied, on reasonable grounds, that in its new use the building would comply with the provisions of the Building Code, for all of the matters identified in section 46 of the 1991 Act, including structural behaviour, to "*as nearly as is reasonably practicable to the same extent as if it were a new building*".

84. The only applicable case law at the time in relation to the as nearly as is reasonably practicable test in section 46 was *Auckland CC v NZ Fire Service*, partially reported at [1996] 1 NZLR 330.This particular issue was considered at pages 338 to 339 (**Annexure G**). It was stated that the test:

> "... *must be considered in relation to the purpose of the requirement and the problems involved in complying with it, sometimes referred to as "the sacrifice". A weighing exercise is involved. The weight of the considerations will vary according to the circumstances and it is generally accepted that where considerations of human safety are involved, factors which impinge upon those considerations must be given an appropriate weight.*" (page 338, lines 30 to 36).

85. At the time when the Council was processing building consent application ABA10013756 in 2001, there did not appear to be any Building Industry Authority determinations that had considered a change of use situation involving structural issues. Only disabled access and issues relating to means of escape from fire had been the subject of determinations.

86. Section 47 of the 1991 Act provided as follows:

> *"In the exercise of its powers under sections 30 to 46 and 64 to 71 of, and Schedule 3 to, this Act the territorial authority shall have due regard to the following matters:*
>
> *(a) the size of the building;*
>
> *(b) the complexity of the building;*
>
> *(c) the location of the building in relation to other buildings, public places, and natural hazards;*
>
> *(d) the intended life of the building;*
>
> *(e) how often people visit the building;*
>
> *(f) how many people spend time in or in the vicinity of the building;*
>
> *(g) the intended use of the building, including any special traditional and cultural aspects of the intended use;*
>
> *(h) the expected useful life of the building and any prolongation of that life;*
>
> *(i) the reasonable practicality of any work concerned;*
>
> *(j) in the case of an existing building, any special historical or cultural value of that building; and*
>
> *(k) any other matter that the territorial authority considers to be relevant."*

87. In considering what was reasonably practicable in this case, it would have been necessary to weigh up a number of factors, including the upgrading of the whole of the building, compared to the building work proposed under the consent (building work on one level/to part of the building).

88. The date when the building was designed and constructed would also be relevant to the Council's consideration of what was reasonably practicable in relation to this building consent and any upgrading relating to structural behaviour required as a result of the change of use.

89. In the context of this building, there was no structural upgrading work in fact required before the change of use could proceed, but upgrading work in relation to other building code requirements in section 46 was required.

Kings Education Tenancy

90. Mr Drew's evidence is that Kings Education occupied the floor above the Going Places Language School, which was level 4 (WIT.DREW.0001.RED.5.20). The Council has no record of any notification of a change of use of the building or a separate application for a building consent relating to the Kings Education tenancy. The date when the tenancy began is therefore unclear. However, the new tenancy would have been a change of use of level 4 of the building, under the provisions of both the 1991 Act and the 2004 Act.

91. It is unclear what the specific use of level 4 of the building was prior to the Kings Education tenancy. A building consent was issued in 1999 for a fit out of "level 3" of the building for Health Link South Dental (CON 99000309) (BUI.MAD249.0163.7). The application documentation includes a fax from Design Edge (the applicant's consultants) to the Council dated 22 February 1999 (BUI.MAD249.0163.23-4). The fax discusses the proposed use of the building as follows:

> *"The offices and combined surgeries provide a management service for school dental staff. A limited range of dental services is included for routine assessment and treatment, and is a community service type function. No anaesthetic is used in treatment and hours are normal office hours. The maximum number of persons would be 6 for this part of the operation. The training room is used to train school dental staff, and generally 10 people would be in a session. The* [sic] *are four cubicles or open offices for the management team".*

92. If this application in fact related to the third floor, being level 4 of the building, then it seems that, according to the Council's records, this was the use of the floor prior to the Kings Education tenancy. Alternatively, if the dental facilities were on floor 2, level 3 of the building, then according to the Council's records level 4 would have been used as offices before the Kings Education tenancy. It is considered that there would have been a change of use with the Kings Education tenancy, whether the prior use was office space or dental facilities.

93. Under the 1991 Act, the use as office space or dental facilities would have fallen within classified use 5.0.1 – Commercial under Clause A1 of Schedule 1 of the Building Regulations 1992 (**Annexure E**). However, the use of the floor as a language school would have fallen within classified use 4.0.3 – Communal Non-Residential, which applies to:

> *"...a building or use where a large degree of care and service is provided. Examples: an early childhood education and care centre, college, day care institution, centre for handicapped persons, kindergarten, school or university".*

94. As this would have been a change in the classified use under the Regulations, there would, based on the analysis above, have been a change in use for the purposes of section 46 of the 1991 Act.

95. Under the 2004 Act, a dental facility or office use would be classified as WL (working low) under the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005. However, use as a language school would be classified as either CS (crowd small) or CL (crowd large). As this would be a change in the category of use under the Regulations, it would also be considered to be a change of use for the purposes of section 114 of the 2004 Act.

96. While the Kings Education tenancy may have been a change in use of level 4 of the building, as discussed above in relation to the Going Places tenancy, this does not mean that structural upgrading of the building would necessarily have been required had the Council been notified of the change of use.

The Clinic Tenancy

97. As stated in the evidence of Mr McCarthy, the Council has not found any written record notifying it of the occupation of level 5 of the CTV building by The Clinic.

98. The Council's records indicate that before The Clinic occupied level 5 of the CTV building in January 2011, this floor had been used by Empower Rehabilitation as a physiotherapy clinic. This was a change from a physiotherapy use to a medical clinic use. As a result, the new occupation of the floor would not have been a change of use under the 2004 Act.

99. Even if Empower Rehabilitation occupied a different floor, and the floor had instead been previously used as office space, The Clinic tenancy would not have constituted a change of use of level 5 of the building under the 2004 Act.

100. The use of the floor as offices, a physiotherapy clinic and medical clinic, all fall within category WL (working low). The Clinic's occupation would not therefore have resulted in a change of the category of use of the floor under the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 and therefore would not have been a change of use for the purposes of section 114 of the 2004 Act.

THE INTERNAL STAIRCASE

101. The Council issued a building consent for this work on 11 May 2000. The structural engineer involved (Mr Falloon) provided the Council with a producer statement in support of the building consent application and a construction review statement once the work was complete. The Council was entitled to place reliance on these producer statements.

102. Mr Falloon has given evidence describing his involvement in the process (WIT.FALLOON.0001). Mr William Holmes has also provided evidence which reviews the compliance issues associated with the construction of the staircase (WIT.HOLMES.0001).

DEMOLITION OF LES MILLS BUILDING

103. It is clear from the evidence previously given by Mr McCarthy that the building consent issued for the demolition of the Les Mills Building did not contemplate the use of a wrecking ball. There is no evidence that any complaints were received by the Council about the demolition. If complaints had been received, the Council could have been expected to investigate the demolition process.

104. The Building Consent (WIT.MCCARTHY.0001.36) is stated to be issued under section 51 of the 2004 Act. Section 51(1)(a) provides that the building consent must be issued in the prescribed form, which in this case is Form 5 in the Building (Forms) Regulations 2004. Form 5 does not refer to compliance with the Building Code, but section 17 provides:

"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".

105. Mr Dray will give evidence about how the demolition consent application was assessed by him in terms of the effect of demolition on neighbouring buildings.

HOLES CUT IN FLOORS/BEAMS

106. A review has been carried out by the Council in relation to building consent applications from 1990 to 2000. There was no evidence located of any holes in beams being included in the applications. There was reference in two applications to pipe penetrations through the floor - Building Consents 99008556 (BUI.MAD249.0164A.9) and 99000309 (BUI.MAD249.0163.7). The penetrations were of 35-40 mm in diameter, and were for sinks, a shower, and floor waste.

POST SEPTEMBER 4 EARTHQUAKE RESPONSE

107. Evidence has already been given by Mr McCarthy and other witnesses about the Council's involvement as part of the emergency response following the 4 September 2010 earthquake.

108. It is not intended to review this evidence as part of these opening submissions, but there are some matters (many in common to earlier hearings) relating to the post September earthquake response that the Council believes are of wider interest in terms of emergency management for the future:

(a) The vulnerability of paper Council records to damage/destruction and their consequential lack of availability following a major earthquake event. The ultimate solution is the conversion of all building records to an electronic system. This is underway in Christchurch and in the past 3 years the Council has converted 25% of its property records to a secure electronic data management system (EDMS). It is understood that many other Councils have either scanned or are scanning their property records.

(b) The necessity for on-going training of civil defence officials. It has been suggested that a national register of building officials who have experience and training in building evaluation be established and that initially training be directed towards this group, which can be expanded over time. The formal adoption of a national system of assessing buildings after an emergency – a BSE (Building Safety Evaluation System) would enable Councils to focus their training of building officials. The present review of the BSE Guidance Material is not complete and will be influenced by the Royal Commission findings. Formal adoption of the amended BSE system will ensure on-going training.

(c) The need for electronic emergency management information systems so that up to date information about placarding of buildings is available to civil defence officials when co-ordinating rapid assessments of buildings.

(d) Problems around public/landowner understanding of the rapid assessment process and green placards in particular.

(e) Wider issues around building owner follow up when a building has been given a green placard. For instance, should owners of all or some categories of buildings be required to carry out Detailed Engineering Assessments and if so should the scope of those assessments be mandated?

(f) Owners and Insurers sharing engineering information with Councils so that the changing status of buildings can be better understood with on-going aftershocks and the safety of tenants and the public safety on streets and adjacent buildings can be better protected.

POST BOXING DAY RESPONSE

109. Evidence has already been given by Marie Holland as to the issue of a green placard (level 1) following the Boxing Day earthquake.

WITNESSES

110. In addition to the Council witnesses who have already been called, the Council will be calling evidence from the following persons:

(a) Mr Stephen McCarthy (paragraphs 7 to 94);

(b) Mr Leo O'Loughlin;

(c) Dr Arthur O'Leary (3 statements of evidence);

(d) Mr John O'Loughlin (2 statements of evidence); and

(e) Mr William Dray.

111. In addition, the Council will be lodging a memorandum with the Royal Commission providing additional information about the scope of the searches for records relating to the CTV Building.

Dated: 6 August 2012

DJS Laing / K Reid / ND Daines
Counsel for Christchurch City Council

Annexures to opening submissions of Christchurch City Council for Royal Commission hearing in relation to the CTV Building

Annexure	***Description***
A.	Section 46 Building Act 1991
B.	Brookers Building Law commentary – paragraph 46: "*change of use of buildings, etc*"
C.	Brookers Building Law commentary – paragraph D3.10: "*Part of a building and two or more buildings – subs (2)*"
D.	Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005
E.	Clause A1 Schedule 1 of the Building Regulations 1992
F.	NZS 4203:1992 (excerpts from loading standards)
G.	*Auckland CC v NZ Fire Service*, partially reported at [1996] 1 NZLR 330

ANNEXURE A

on every subsequent annual anniversary, the owner of every building in respect of which a compliance schedule has been issued shall supply to the territorial authority a building warrant of fitness, in the prescribed form and containing the prescribed particulars, that states that the requirements contained in the compliance schedule have been fully complied with during the previous 12 months.

(2) A copy of the building warrant of fitness shall be publicly displayed by the owner in a place in the building to which users of the building have ready access.

(3) The owner shall obtain written reports relating to the requirements of the compliance schedule, and—

(a) Those reports shall be kept by the owner together with the compliance schedule for a period of 2 years and be produced for inspection by the territorial authority and by any person or organisation who or which has the right to inspect the building under any Act; and

(b) The location of those reports and the compliance schedule shall be shown on the building warrant of fitness displayed in accordance with subsection (2) of this section.

(4) The territorial authority may issue a notice in the prescribed form at any time if it is satisfied, on reasonable grounds, that the warrant is not correct or that the compliance schedule provisions are not or have not been properly complied with, and that notice shall be deemed to be a notice to rectify in terms of section 42 of this Act.

Change of Use of Buildings

46. Change of use of buildings, etc.—(1) It is the duty of an owner of a building to advise the territorial authority in writing if it is proposed—

(a) To change the use of a building and the change of use will require alterations to the building in order to bring that building into compliance with the building code; or

(b) To extend the life of a building that has a specified intended life in terms of section 39 of this Act.

(2) The use of the building shall not be changed unless the territorial authority is satisfied on reasonable grounds that in its new use the building will—

(a) Comply with the provisions of the building code for means of escape from fire, protection of other property, sanitary facilities, and structural and fire-rating behaviour, and for access and facilities for use

by people with disabilities (where this is a requirement in terms of section 25 of the Disabled Persons Community Welfare Act 1975) as nearly as is reasonably practicable to the same extent as if it were a new building; and

(b) Continue to comply with the other provisions of the building code to at least the same extent as before the change of use.

(3) The life of a building with a specified intended life shall not be extended unless the territorial authority is satisfied on reasonable grounds that in its extended use the building has been altered in compliance with the provisions of section 38 of this Act.

(4) Where a territorial authority is required to consider an application for the issue of a certificate pursuant to section 224 (f) of the Resource Management Act 1991 for the purpose of giving effect to a subdivision which affects a building or any part thereof, the territorial authority shall only issue that certificate if it is satisfied on reasonable grounds that the building will—

(a) Comply with the provisions of the building code for means of escape from fire, protection of other property, and access and facilities for use by people with disabilities (where this is a requirement in terms of section 25 of the Disabled Persons Community Welfare Act 1975) as nearly as is reasonably practicable to the same extent as if it were a new building; and

(b) Continue to comply with the other provisions of the building code to at least the same extent as before the application for a subdivision affecting that building or part thereof was made.

(5) Where the territorial authority is satisfied on reasonable grounds that a change of use or extension of life of a building with a specified intended life has occurred which would require alterations to the building in order to bring that building into compliance with the building code, the territorial authority shall determine whether the owner intends building work to proceed, and if it considers that is not the owner's intention, the territorial authority shall issue a notice in the prescribed form, and that notice shall be deemed to be a notice to rectify in terms of section 42 of this Act.

47. Matters for consideration by territorial authorities in relation to exercise of powers—In the exercise of its

ANNEXURE B

Change of Use of Buildings

46. Change of use of buildings, etc—(1) It is the duty of an owner of a building to advise the territorial authority in writing if it is proposed—

(a) To change the use of a building and the change of use will require alterations to the building in order to bring that building into compliance with the building code; or

(b) To extend the life of a building that has a specified intended life in terms of section 39 of this Act.

(2) The use of the building shall not be changed unless the territorial authority is satisfied on reasonable grounds that in its new use the building will—

(a) Comply with the provisions of the building code for means of escape from fire, protection of other property, sanitary facilities, and structural and fire-rating behaviour, and for access and facilities for use by people with disabilities [(where this is a requirement in terms of section 47A of this Act)] as nearly as is reasonably practicable to the same extent as if it were a new building; and

(b) Continue to comply with the other provisions of the building code to at least the same extent as before the change of use.

(3) The life of a building with a specified intended life shall not be extended unless the territorial authority is satisfied on reasonable grounds that in its extended use the building has been altered in compliance with the provisions of section 38 of this Act.

(4) Where a territorial authority is required to consider an application for the issue of a certificate pursuant to section 224(f) of the Resource Management Act 1991 for the purpose of giving effect to a subdivision which affects a building or any part thereof, the territorial authority shall only issue that certificate if it is satisfied on reasonable grounds that the building will—

(a) Comply with the provisions of the building code for means of escape from fire, protection of other property, and access and facilities for use by people with disabilities [(where this is a requirement in terms of section 47A of this Act)] as nearly as is reasonably practicable to the same extent as if it were a new building; and

(b) Continue to comply with the other provisions of the building code to at least the same extent as before the application for a subdivision affecting that building or part thereof was made.

(5) Where the territorial authority is satisfied on reasonable grounds that a change of use or extension of life of a building with a specified intended life has occurred which would require alterations to the building in order to bring that building into compliance with the building code, the territorial authority shall determine whether the owner intends building work to proceed, and if it considers that is not the owner's intention, the territorial authority shall issue a notice in the prescribed form, and that notice shall be deemed to be a notice to rectify in terms of section 42 of this Act.

D46.01 History

This section corresponds to cl 3.16 New Zealand Standard Model Building Bylaw NZS 1900.

Subsections (2)(a) and (4)(a) were amended, as from 1 November 1997, by substituting in both subsections the words "(where this is a requirement in terms of section 47A of this Act)" for the words "(where this is a requirement in terms of section 25 of the Disabled Persons Community Welfare Act 1975)", by s 2 Health Reforms (Transitional Provisions) Act Commencement Order 1997 (SR 1997/272).

D46.02 Synopsis

This section establishes the procedure to be followed by building owners who want to make changes to the use or specified intended life of a building. Owners who wish to subdivide a building or proposed building under the RMA91 by the grant of a cross-lease or company lease or by the deposit of a unit plan must also follow the procedure in this section.

The owner must notify the territorial authority of a change of use only if the building will not comply with the building code in its new use. Any non-compliance will necessitate notification, despite the fact that the building might require upgrading in respect of the non-compliance concerned. The BA91 does not require upgrading to comply completely with the building code. It needs to comply as nearly as is reasonably practicable with only those provisions listed in s 46(2)(a), and to comply with the other provisions to at least the same extent as before.

D46.03 Cross references

s 2 "alter", "building code", "building work", "means of escape from fire", "owner", "property", "territorial authority"
s 3 "building"
s 7 all building work to comply with building code
s 8 existing buildings not required to be upgraded
s 17(1)(b) matters of doubt or dispute relating to building control
s 32 buildings not to be constructed, altered, or demolished without consent
s 33 application for building consents
s 38 alterations to existing buildings
s 39 buildings having specified intended lives
s 41(2) lapse and cancellation of building consent
s 42 notices to rectify
s 47 matters for consideration by territorial authorities in relation to exercise of powers
s 47A access and facilities for persons with disabilities to and within buildings
s 80(1)(c) offences
Resource Management Act 1991 (1991 No 69) (RS 32)
s 224(f) restrictions upon deposit of survey plan

D46.04 Section 224(f) Resource Management Act 1991

Differences in the wording of s 224(f) Resource Management Act 1991 and s 46(4) BA91 are discussed in D6.08(1).

D46.05 Meaning of "as nearly as is reasonably practicable"

The words "as nearly as is reasonably practicable to the same extent as if it were a new building" in s 46(2)(a) and (4)(a) were considered in *Auckland CC v NZ Fire Service* 19/10/95, Gallen J, HC Wellington AP336/93, partially reported at [1996] 1 NZLR 330, noted [1995] BRM Gazette 189. (Note that the same words are used in a similar context in s 38(a).) In that decision (at pp 338, 339), it was said of the question as to whether a building complied with a particular requirement of the building code "as nearly as is reasonably practicable to the same extent as if it were a new building":

> "It must be considered in relation to the purpose of the requirement and the problems involved in complying with it, sometimes referred to as 'the sacrifice'. A weighing exercise is involved. The weight of the considerations will vary according

to the circumstances and it is generally accepted that where considerations of human safety are involved, factors which impinge upon those considerations must be given an appropriate weight.

. . . . .

"[T]he Authority cannot be criticised for the interpretation which it adopted [in Determination No 93/004] in respect of either ss 46(2)(a) or 46(4)(a)."

The "as nearly as is reasonably practicable" test has been applied in Determinations 93/002, 93/003, 93/004, 94/002, 94/005, 95/002, 95/006, 96/001, 96/005, 97/001, 97/002, 97/009, 99/001, 99/015, 2001/4, 2002/2, 2002/5, and 2002/8.

D46.06 Meaning of "change the use of a building"

The words "use of a building" are not defined in the BA91. Doubts about whether a change of use is proposed, or has occurred, and therefore whether s 46 applies, appear to arise quite frequently.

If there is a change in the "classified use" specified in clause A1 of the building code, then it appears that there is a change of use for the purposes of s 46. However, the fact that there is no change of classified use does not mean that there is not a change of use in the ordinary and natural meaning of those words. For example, a change from a prison to an old people's home, or a change from a factory manufacturing dairy products to a factory manufacturing explosives, would each clearly be a change of use but not a change of classified use.

If a sufficiently detailed description of the intended use of a building appears on such documents as the building consent or the code compliance certificate, then presumably any departure from that intended use is a change of use for the purposes of s 46. However, there will be no such document for a building which was not constructed or altered under the BA91.

It is suggested that the words "change of use" should be given their ordinary and natural meaning while bearing in mind that if the building code requirements for the new use differ from those for the old then there is probably a change of use.

D46.07 Entire building to be upgraded

See D3.10 as to why it is suggested that:

(a) When part of a building undergoes a change of use, the building as a whole is required to be upgraded, if at all, not merely that part of the building.

(b) When one building in a complex of buildings is to undergo a change of use, only that building is required to be upgraded, if at all, not the other buildings in the complex.

D46.08 Fee simple subdivision with no change of use

The relationship between the BA91 and the RMA91 was discussed in *Dept of Survey and Land Information v Hutt CC* EnvC W50/97, noted [1997] BRM Gazette 78, where it was held that a fee simple subdivision with no change of use does not involve any upgrading under s 46 and that upgrading to increase the fire resistance ratings between existing buildings cannot be required as a condition of subdivision consent under the RMA91. The case was distinguished from *Building Industry Authority v Christchurch CC; Christchurch International Airport Ltd v Christchurch CC* 11/12/96, Tipping, Chisholm JJ, HC Christchurch AP78/96; AP190/96, partially reported at [1997] NZRMA 145; (1996) 3 ELRNZ 98, noted [1997] BRM Gazette 33; NZCLD, 5th Series, 1069, because the upgrading condition would control the performance of buildings and the BA91:

"[had] specifically set its mind to the situation of fire ratings as between adjoining buildings . . .

"There has furthermore been no change in *activity* within the structure brought about [by] the activity of subdivision. The advent of such an activity (ie use)

change would immediately bring the Building Act into effect. Therefore the Building Act has legislated for the control of the effects of activities . . . The activity of subdivision creates a *potential* and the Building Act deals with that potential."

Another line of reasoning was followed in *Re Portmain Properties (No 7) Ltd* [1998] NZRMA 56; (1997) 4 ELRNZ 10, noted [1998] BRM Gazette 6. That case concerned the subdivision of land in fee simple by stratum which had the effect of subdividing the ground and first floors of a building into separate titles. It was not a subdivision of the type covered by s 224(f) RMA91 and s 46(4) BA91. It was held that s 108(2) RMA91 did not authorise the imposition of a condition requiring upgrading of the fire ratings of the building:

"because s 224 provides for restrictions on the depositing of survey plans I prefer not to rely on subsection (f) as providing a restriction on the general condition making power in section 108(2) which of course relates to the quite separate process of granting resource consents."

D46.09 Access and facilities for use by people with disabilities

Subsection (2) prohibits any change of use of an existing building unless the territorial authority is satisfied that in its new use the building will comply with the building code's provisions for access and facilities for use by people with disabilities "as nearly as is reasonably practicable". Thus no waiver of the building code is necessary when the building, with or without alteration, does not comply completely. There is no need to waive a requirement which does not apply in any case. See also D38.08.

D46.10 Whether a territorial authority is bound by its previous decisions

In Determination 2002/5, the Authority in effect took the view that a territorial authority, when considering what upgrading is required in association with an alteration, was not bound by its decision in relation to a previous alteration. See D38.09. It is suggested that the same applies in respect of upgrading in association with a change of use.

47. Matters for consideration by territorial authorities in relation to exercise of powers—In the exercise of its powers under sections 30 to 46 and 64 to 71 of, and the Third Schedule to, this Act the territorial authority shall have due regard to the following matters:

(a) The size of the building; and
(b) The complexity of the building; and
(c) The location of the building in relation to other buildings, public places, and natural hazards; and
(d) The intended life of the building; and
(e) How often people visit the building; and
(f) How many people spend time in or in the vicinity of the building; and
(g) The intended use of the building, including any special traditional and cultural aspects of the intended use; and
(h) The expected useful life of the building and any prolongation of that life, and
(i) The reasonable practicality of any work concerned; and
(j) In the case of an existing building, any special historical or cultural value of that building; and
(k) Any other matter that the territorial authority considers to be relevant.

ANNEXURE C

D3.08 **Containers — subs (1)(f)**

Section 2 Dangerous Goods Act 1974 states:

" 'Container' means any barrel, case, cylinder, drum, tank, tin, or other receptacle; and includes every package in or by which goods may be cased, covered, enclosed, contained, or packed:"

D3.09 **Magazines — subs (1)(g)**

Section 2 Explosives Act 1957 states:

" 'Magazine' means any building, chamber, cave, pit, cellar, hulk, floating vessel, or place in which explosives or partly manufactured explosives are stored; but does not include a room or building in an explosives factory in which small quantities of explosives or partly manufactured explosives are stored for use in processes in the factory:"

D3.10 **Part of a building and two or more buildings — subs (2)**

The provision of subs (2)(a) and (b) that the term "building" includes part of a building and, in certain circumstances, also includes a complex of two or more buildings, has raised some doubts. For example, if part of a building in such a complex is to be altered, undergo a change of use, etc, is it that part or the building as a whole or each of the buildings in the complex which are required to be upgraded, if at all, under s 38 or s 46? If one part of a building includes a system listed in s 44(1), is a compliance schedule to be issued in respect of only that part or of the building as a whole?

It is suggested that in circumstances where a provision can be taken to apply to a building as a whole, and also to either or both part of that building and the other buildings in the same complex as that building, then the provision should be applied to whichever is the more reasonable of the part, the whole, or the complex, taking account of the purposes and principles of the BA91 as set out in s 6. On that basis, it is suggested that:

(a) When a complex of buildings is being constructed, it will usually depend on the owner's programme whether it is reasonable to issue a building consent (in stages as appropriate) for each individual building or for the complex as a whole.

(b) When a building in a complex is to be altered or undergoes a change of use etc, it is only that building, not every building in the complex, which is required to be upgraded, if at all, under s 38 or s 46.

(c) When an identifiable part of a building (such as a storey, a wing, a firecell, or a unit title) is to be altered or undergo a change of use etc, it is the building as a whole, not merely that part, which is required to be upgraded, if at all, under s 38 or s 46.

(d) It will not generally be reasonable to issue a compliance schedule for only part of a building unless that part is a firecell which contains the only s 44(1) systems in the building (in which case account will need to be taken of the fact that any features or systems listed in s 44(5) and contained in the rest of the building will not be covered by the compliance schedule for that part).

D3.11 **Structures**

In *Woodward v Astrograss Allweather Surfaces Ltd* 25/11/96, Anderson J, HC Auckland HC112/96, it was held that the word "structure" in s 3 BA91 "must be taken to have its ordinary and natural meaning". The case raised the question of whether a tennis court base slab was a structure, and therefore a building, for building consent purposes. It was held that: "Some slabs may be structures and some may not. The method of construction may be relevant." In the circumstances, it was not necessary to decide whether the particular slab concerned was a structure.

4. Meaning of "allotment"—(1) In this Act, the term "allotment" means any parcel of land that is a continuous area of land and whose boundaries are shown on a survey plan that is—

ANNEXURE D

Reprint
as at 12 January 2006

Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005

(SR 2005/32)

Silvia Cartwright, Governor-General

Order in Council

At Wellington this 21st day of February 2005

Present:
Her Excellency the Governor-General in Council

Pursuant to sections 114(1) and 402(1)(o), (p), and (zc) of the Building Act 2004, Her Excellency the Governor-General, acting on the

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Note
Changes authorised by section 17C of the Acts and Regulations Publication Act 1989 have been made in this reprint.

A general outline of these changes is set out in the notes at the end of this reprint, together with other explanatory material about this reprint.

These regulations are administered by the Department of Building and Housing.

advice and with the consent of the Executive Council and on the recommendation of the Minister for Building Issues, makes the following regulations.

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Regulations

1 Title

These regulations are the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005.

2 Commencement

These regulations come into force on 31 March 2005.

3 Interpretation

(1) In these regulations, **Act** means the Building Act 2004.

(2) Terms or expressions used and not defined in these regulations but defined in the Act have, in these regulations, the same meanings as they have in the Act.

4 Systems or features prescribed as specified systems

The systems or features specified in Schedule 1 are specified systems for the purposes of the Act.

5 Change the use: what it means

For the purposes of sections 114 and 115 of the Act, **change the use**, in relation to a building, means to change the use (determined in accordance with regulation 6) of all or a part of the building from one use (the **old use**) to another (the **new use**) and with the result that the requirements for compliance with the building code in relation to the new use are additional to, or more onerous than, the requirements for compliance with the building code in relation to the old use.

6 Uses of buildings for purposes of regulation 5

(1) For the purposes of regulation 5, every building or part of a building has a use specified in the table in Schedule 2.

(2) A building or part of a building has a use in column 1 of the table if (taking into account the primary group for whom it was constructed, and no other users of the building or part) the building or part is only or mainly a space, or it is a dwelling, of the kind described opposite that use in column 2 of the table.

7 Earthquake-prone buildings: moderate earthquake defined

For the purposes of section 122 (meaning of earthquake-prone building) of the Act, **moderate earthquake** means, in relation to a building, an earthquake that would generate shaking at the site of the building that is of the same duration as, but that is one-third as strong as, the earthquake shaking (determined by normal measures of acceleration, velocity, and displacement) that would be used to design a new building at that site.

Schedule 1

r 4

Specified systems

1 Automatic systems for fire suppression (for example, sprinkler systems).

2 Automatic or manual emergency warning systems for fire or other dangers (other than a warning system for fire that is entirely within a household unit and serves only that unit).

3 Electromagnetic or automatic doors or windows (for example, ones that close on fire alarm activation).

4 Emergency lighting systems.

5 Escape route pressurisation systems.

6 Riser mains for use by fire services.

7 Automatic back-flow preventers connected to a potable water supply.

8 Lifts, escalators, travelators, or other systems for moving people or goods within buildings.

9 Mechanical ventilation or air conditioning systems.

10 Building maintenance units providing access to exterior and interior walls of buildings.

11 Laboratory fume cupboards.

12 Audio loops or other assistive listening systems.

13 Smoke control systems.

14 Emergency power systems for, or signs relating to, a system or feature specified in any of clauses 1 to 13.

15 Any or all of the following systems and features, so long as they form part of a building's means of escape from fire, and so long as those means also contain any or all of the systems or features specified in clauses 1 to 6, 9, and 13:

(a) systems for communicating spoken information intended to facilitate evacuation; and

(b) final exits (as defined by clause A2 of the building code); and

(c) fire separations (as so defined); and

(d) signs for communicating information intended to facilitate evacuation; and

(e) smoke separations (as so defined).

Clause 15: added, on 12 January 2006, by regulation 3 of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Amendment Regulations 2005 (SR 2005/338).

Schedule 2

r 6

Uses of all or parts of buildings

Uses related to crowd activities

Use	*Spaces or dwellings*	*Examples*
CS (Crowd Small)	enclosed spaces (without kitchens or cooking facilities) where 100 or fewer people gather for participating in activities	cinemas (with qualifying spaces), art galleries, auditoria, bowling alleys, churches, clubs (non-residential), community halls, court rooms, dance halls, day-care centres, gymnasia, lecture halls, museums, eating places (excluding kitchens), taverns, enclosed grandstands, indoor swimming pools
CL (Crowd Large)	enclosed spaces (with or without kitchens or cooking facilities) where more than 100 people gather for participating in activities, but also enclosed spaces with kitchens or cooking facilities and where 100 or fewer people gather for participating in activities	cinemas (with qualifying spaces), schools, colleges, and tertiary institutions, libraries, night-clubs, restaurants and eating places with cooking facilities, theatre stages, opera houses, television studios (with audience)
CO (Crowd Open)	spaces (other than those below a grandstand) for viewing open air activities	open grandstands, roofed but unenclosed grandstands, or uncovered fixed seating
CM (Crowd Medium)	spaces for displaying or selling retail goods, wares, or merchandise	exhibition halls, retail shops, supermarkets, or other stores with bulk storage or display

Uses related to sleeping activities

Use	*Spaces or dwellings*	*Examples*
SC (Sleeping Care)	spaces in which people are provided with special care or treatment required because of age, or mental or physical limitations	hospitals, or care institutions for the aged, children, or people with disabilities

Uses related to sleeping activities

Use	*Spaces or dwellings*	*Examples*
SD (Sleeping Detention)	spaces in which people are detained or physically restrained	care institutions for the aged or children and with physical restraint or detention, hospitals with physical restraint or with detention quarters, detention quarters in Police stations, prisons
SA (Sleeping Accommodation)	spaces providing transient accommodation, or where limited assistance or care is provided for people	motels, hotels, hostels, boarding houses, clubs (residential), boarding schools, dormitories, halls, wharenui
SR (Sleeping Residential)	attached and multi-unit residential dwellings, including household units attached to spaces or dwellings with the same or other uses, such as caretakers' flats, and residential accommodation above a shop	multi-unit dwellings, flats, or apartments
SH (Sleeping Single Home)	detached dwellings where people live as a single household or family, including attached self-contained spaces such as granny flats when occupied by a member of the same family, and garages (whether detached or part of the same building) if primarily for storage of the occupants' vehicles, tools, and garden implements	dwellings or houses separated from each other by distance

Uses related to working, business, or storage activities

Use	*Spaces or dwellings*	*Examples*
WL (Working Low)	spaces used for working, business, or storage—low fire load[1]	places for manufacturing, processing, or storage of non-combustible materials or materials having a slow heat release rate, cool stores, covered cattle yards, wineries, places for grading, storage, or packing of horticultural products, places for wet meat processing, banks,

Uses related to working, business, or storage activities

Use	*Spaces or dwellings*	*Examples*
		hairdressing shops, beauty parlours, places for provision of personal or professional services, dental offices, laundries (self-service), medical offices, business or other offices, Police stations (without detention quarters), radio stations, television studios (no audience), places for small tool and appliance rental and service, telephone exchanges, places for dry meat processing
WM (Working Medium)	spaces used for working, business, or storage—medium fire load[1] and slow, medium, or fast fire growth rates	places for manufacturing and processing of combustible materials not listed in the rows relating to WL, WH, or WF, including bulk storage up to 3 m high (excluding foamed plastics)[2]
WH (Working High)	spaces used for working, business, or storage—high fire load[1] and slow, medium, or fast fire growth rates	chemical manufacturing or processing plants, distilleries, feed mills, flour mills, lacquer factories, mattress factories, rubber processing plants, spray painting operations, places for plastics manufacturing, or bulk storage of combustible materials over 3 m high (excluding foamed plastics)[2]
WF (Working Fast)	spaces used for working, business, or storage—medium or high fire load[1] and ultra fast fire growth rates	areas involving significant quantities of highly combustible and flammable or explosive materials which because of their inherent characteristics constitute a special fire hazard, including bulk plants for flammable liquids or gases, bulk storage warehouses for flammable substances, and places for bulk storage of foamed plastics[2]

Uses related to intermittent activities

Use	*Spaces or dwellings*	*Examples*
IA (Intermittent Low)	spaces for intermittent occupation or providing intermittently used support functions—low fire load[1]	car parks, garages, carports, enclosed corridors, unstaffed kitchens or laundries, lift shafts, locker rooms, linen rooms, open balconies, stairways (within the open path)[3], toilets and amenities, and service rooms incorporating machinery or equipment not using solid-fuel, gas, or petroleum products as an energy source
ID (Intermittent Medium)	spaces for intermittent occupation or providing intermittently used support functions—medium fire load[1]	maintenance workshops and service rooms[4] incorporating machinery or equipment using solid-fuel, gas, or petroleum products as an energy source

Definitions of terms in table

[1] **Fire load** has the meaning given to it by clause A2 of the building code.

[2] **Foamed plastics** means combustible foamed plastic polymeric materials of low density (classified as cellular polymers) manufactured by creating a multitude of fine voids distributed more or less uniformly throughout the product (for example, latex foams, polyethylene foams, polyvinyl chloride foams, expanded or extruded polystyrene foams, polyurethane foams, and polychloropene foams).

[3] **Open path** has the meaning given to it by clause A2 of the building code.

[4] **Service rooms** means spaces designed to accommodate any of the following:

(a) boiler or plant equipment:
(b) furnaces, incinerators, or refuse:
(c) caretaking or cleaning equipment:
(d) airconditioning, heating, plumbing, or electrical equipment:
(e) pipes:
(f) lift or escalator machine rooms:
(g) similar equipment, items, features, rooms, or services.

Rebecca Kitteridge,
Acting for Clerk of the Executive Council.

Issued under the authority of the Acts and Regulations Publication Act 1989.
Date of notification in *Gazette*: 24 February 2005.

Contents

1 General
2 Status of reprints
3 How reprints are prepared
4 Changes made under section 17C of the Acts and Regulations Publication Act 1989
5 List of amendments incorporated in this reprint (most recent first)

Notes

1 General

This is a reprint of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005. The reprint incorporates all the amendments to the regulations as at 12 January 2006, as specified in the list of amendments at the end of these notes.

Relevant provisions of any amending enactments that have yet to come into force or that contain relevant transitional or savings provisions are also included, after the principal enactment, in chronological order.

2 Status of reprints

Under section 16D of the Acts and Regulations Publication Act 1989, reprints are presumed to correctly state, as at the date of the reprint, the law enacted by the principal enactment and by the amendments to that enactment. This presumption applies even though editorial changes authorised by section 17C of the Acts and Regulations Publication Act 1989 have been made in the reprint.

This presumption may be rebutted by producing the official volumes of statutes or statutory regulations in which the principal enactment and its amendments are contained.

3 How reprints are prepared

A number of editorial conventions are followed in the preparation of reprints. For example, the enacting words are not included in Acts, and provisions that are repealed or revoked

are omitted. For a detailed list of the editorial conventions, *see* http://www.pco.parliament.govt.nz/legislation/reprints.shtml or Part 8 of the *Tables of Acts and Ordinances and Statutory Regulations, and Deemed Regulations in Force*.

4 Changes made under section 17C of the Acts and Regulations Publication Act 1989

Section 17C of the Acts and Regulations Publication Act 1989 authorises the making of editorial changes in a reprint as set out in sections 17D and 17E of that Act so that, to the extent permitted, the format and style of the reprinted enactment is consistent with current legislative drafting practice. Changes that would alter the effect of the legislation are not permitted.

A new format of legislation was introduced on 1 January 2000. Changes to legislative drafting style have also been made since 1997, and are ongoing. To the extent permitted by section 17C of the Acts and Regulations Publication Act 1989, all legislation reprinted after 1 January 2000 is in the new format for legislation and reflects current drafting practice at the time of the reprint.

In outline, the editorial changes made in reprints under the authority of section 17C of the Acts and Regulations Publication Act 1989 are set out below, and they have been applied, where relevant, in the preparation of this reprint:

- omission of unnecessary referential words (such as "of this section" and "of this Act")
- typeface and type size (Times Roman, generally in 11.5 point)
- layout of provisions, including:
  - indentation
  - position of section headings (eg, the number and heading now appear above the section)
- format of definitions (eg, the defined term now appears in bold type, without quotation marks)
- format of dates (eg, a date formerly expressed as "the 1st day of January 1999" is now expressed as "1 January 1999")

- position of the date of assent (it now appears on the front page of each Act)
- punctuation (eg, colons are not used after definitions)
- Parts numbered with roman numerals are replaced with arabic numerals, and all cross-references are changed accordingly
- case and appearance of letters and words, including:
  - format of headings (eg, headings where each word formerly appeared with an initial capital letter followed by small capital letters are amended so that the heading appears in bold, with only the first word (and any proper nouns) appearing with an initial capital letter)
  - small capital letters in section and subsection references are now capital letters
- schedules are renumbered (eg, Schedule 1 replaces First Schedule), and all cross-references are changed accordingly
- running heads (the information that appears at the top of each page)
- format of two-column schedules of consequential amendments, and schedules of repeals (eg, they are rearranged into alphabetical order, rather than chronological).

5 *List of amendments incorporated in this reprint (most recent first)*

Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Amendment Regulations 2005 (SR 2005/338)

Wellington, New Zealand:
Published under the authority of the New Zealand Government—2009

ANNEXURE E

Clause A1—Classified Uses

1.0 Explanation

1.0.1 For the purposes of this building code *buildings* are classified according to type, under seven categories.

1.0.2 A *building* with a given classified use may have one or more *intended uses* as defined in the Act.

2.0 Housing

2.0.1 Applies to *buildings* or use where there is self care and service (internal management). There are three types:

2.0.2 Detached dwellings

Applies to a *building* or use where a group of people live as a single household or family. Examples: a holiday cottage, boarding house accommodating fewer than 6 people, dwelling or hut.

2.0.3 Multi-unit dwelling

Applies to a *building* or use which contains more than one separate household or family. Examples: an attached dwelling, flat or multi-unit apartment.

2.0.4 Group dwelling

Applies to a *building* or use where groups of people live as one large extended family. Examples: within a commune or marae.

3.0 Communal residential

3.0.1 Applies to *buildings* or use where assistance or care is extended to the *principal users*. There are two types:

3.0.2 Community service

Applies to a residential *building* or use where limited assistance or care is extended to the *principal users*. Examples: a boarding house, hall of residence, holiday cabin, *backcountry hut*, hostel, hotel, motel, nurse's home, retirement village, time-share accommodation, a work camp, or camping ground.

3.0.3 Community care

Applies to a residential *building* or use where a large degree of assistance or care is extended to the *principal users*. There are two types:

(a) **Unrestrained**; where the *principal users* are free to come and go. Examples: a hospital, an old people's home or a health camp.

(b) **Restrained**; where the *principal users* are legally or physically constrained in their movements. Examples: a borstal or drug rehabilitation centre, an old people's home where substantial care is extended, a prison or hospital.

Schedule 1 clause A1 3.0.2: amended, on 31 October 2008, by regulation 4 of the Building (Building Code: Backcountry Huts) Amendment Regulations 2008 (SR 2008/358).

4.0 Communal non-residential

4.0.1 Applies to a *building* or use being a meeting place for people where care and service is provided by people other than the *principal users*. There are two types:

4.0.2 Assembly service

Applies to a *building* or use where limited care and service is provided. Examples: a church, cinema, clubroom, hall, museum, public swimming pool, stadium, theatre, or whare runanga (the assembly house).

4.0.3 Assembly care

Applies to a *building* or use where a large degree of care and service is provided. Examples: an early childhood education and care centre, college, day care institution, centre for handicapped persons, kindergarten, school or university.

Schedule 1 clause A1 4.0.3: amended, on 1 December 2008, by section 60(2) of the Education Amendment Act 2006 (2006 No 19).

5.0 Commercial

5.0.1 Applies to a *building* or use in which any natural resources, goods, services or money are either developed, sold, exchanged or stored. Examples: an amusement park, auction room, bank, car-park, catering facility, coffee bar, computer centre, fire station, funeral parlour, hairdresser, library, office

(commercial or government), Police station, post office, public laundry, radio station, restaurant, service station, shop, showroom, storage facility, television station or transport terminal.

6.0 Industrial

6.0.1 Applies to a *building* or use where people use material and physical effort to:

(a) extract or convert natural resources,

(b) produce goods or energy from natural or converted resources,

(c) repair goods, or

(d) store goods (ensuing from the industrial process).

Examples: an agricultural building, agricultural processing facility, aircraft hanger, factory, power station, sewage treatment works, warehouse or utility.

7.0 Outbuildings

7.0.1 Applies to a *building* or use which may be included within each classified use but are not intended for human habitation, and are accessory to the principal use of associated *buildings*. Examples: a carport, farm *building*, garage, greenhouse, machinery room, private swimming pool, public toilet, or shed.

8.0 Ancillary

8.0.1 Applies to a *building* or use not for human habitation and which may be exempted from some amenity provisions, but which are required to comply with structural and safety-related aspects of the *building code*. Examples: a bridge, derrick, fence, free-standing outdoor fireplace, jetty, mast, path, platform, pylon, retaining wall, tank, tunnel or dam.

Clause A2—Interpretation

In this building code unless the context otherwise requires, words shall have the meanings given under this clause. Meanings given in the Building Act 1991 apply equally to the building code.

ANNEXURE F

2.3 Classification of buildings and parts

2.3.1 *Buildings*

Buildings shall be classified in accordance with table 2.3.1.

Table 2.3.1 – Classification of buildings

Category	Description
I	Buildings dedicated to the preservation of human life or for which the loss of function would have a severe impact on society.
II	Buildings which as a whole contain people in crowds.
III	Publicly owned buildings which house contents of a high value to the community.
IV	Buildings not included in any other category.
V	Buildings of a secondary nature.

2.3.2 *Parts of buildings*

Parts supported by buildings and the connections of the parts shall be classified in accordance with table 2.3.2. Connections shall be assigned the same category as the connected part.

Table 2.3.2 – Classification of parts of buildings

Category	Description
P.I	Parts, the failure of which could cause a life hazard.
P.II	Parts for which continuing function is important.
P.III	Other parts.

2.4 Load combinations

2.4.1 *General*

In the analysis for each limit state, load cases shall include the appropriate set of the following sets of combinations of factored loads and forces, and such additional cases as special circumstances may require. Inclusion of soil loads and hydrostatic water loads into these combinations shall be in accordance with Part 6.

2.4.2 *Serviceability limit state*

2.4.2.1

The building as a whole and all its members shall be designed for the combinations of loads in 2.4.2.2. In these combinations the live load and snow load (or rain or ice load, as the case may be) for the serviceability limit state, Q_s and S_s, shall be derived as follows, where the short term and long term factors, ψ_s and ψ_l, are as given in table 2.4.1.

(a) The live load for the serviceability limit state, Q_s, shall be obtained by multiplying the reduced live load, Q (given in Part 3 as the basic live load, Q_b, multiplied by the area reduction factor, ψ_a), by the short term or long term factor, as follows:

(i) For combinations of dead load and live load only, the short term or long term factor shall be used, as appropriate to the combination considered.

(ii) For combinations of dead load and live load with other loads or forces, the long term factor alone may be used.

(b) The snow load (or rain or ice load, as the case may be) for the serviceability limit state, S_s, shall be obtained by multiplying the load given in Part 6 by the short term or long term factor, as appropriate to the combination considered.

Table 2.4.1 – Short term and long term load factors, ψ_s & ψ_l for the serviceability limit state (see also 3.5.1 and 3.6.1)

Type of load	Short term factor (ψ_s)	Long term factor (ψ_l)
Live load		
Floors, domestic	0.7	0.4
Floors, offices	0.7	0.4
Floors, parking	0.7	0.4
Floors, retail	0.7	0.4
Floors, storage	1.0	0.6
Floors, other	As for storage, unless assessed otherwise	
Roofs	0.7	0.0
Snow load		
All cases	0.5	0.0

2.4.2.2

Combinations of loads for the serviceability limit state shall include the following:

(1) G & Q_s

(2) G & Q_s & E_s

(3) G & Q_s & W_s

(4) G & S_s

2.4.2.3
For all combinations of load listed in 2.4.2.2, likely combinations of internal strain effects shall be considered.

2.4.2.4
For combinations of load listed in 2.4.2.2 not involving earthquake or wind, the most adverse likely distribution of live load or of superimposed dead load shall be considered.

2.4.3 *Ultimate limit state*

2.4.3.1
The building as a whole and all its members shall be designed to support the combinations of factored loads and forces in 2.4.3.3 to 2.4.3.6 inclusive.

2.4.3.2
Where provided for in these combinations, the factored live load, for the ultimate limit state, Q_u, shall be obtained by multiplying the reduced live load, Q (given in Part 3 as the basic live load, Q_b, multiplied by the area reduction factor, ψ_a) by the live load combination factor, ψ_u, given in table 2.4.2.

Where provided for in these combinations, the snow load for the ultimate limit state, S_u, shall be taken equal to S from Part 6.

Table 2.4.2 – Live load combination factor, ψ_u, for the ultimate limit state

Type of live load	Combination factor (ψ_u)
Floors, domestic	0.4
Floors, office	0.4
Floors, parking	0.4
Floors, retail	0.4
Floors, storage	0.6
Floors, other	As for storage, unless assessed otherwise
Roofs	0.0

2.4.3.3
The combinations of factored loads and forces for the ultimate limit state shall include the following:

(1) 1.4G

(2) 1.2G & 1.6Q

(3) 1.2G & Q_u & W_u

(4) 0.9G & W_u

(5) 1.2G & Q_u & 1.2S_u

(6) G & Q_u & E_u

3.4 Live loads

3.4.1 *General*

3.4.1.1
The basic distributed live load and basic concentrated live load, Q_b, for particular occupancies and uses of each space or room shall be as set out in table 3.4.1.

3.4.1.2
The basic uniform and concentrated live loads may be considered separately and design carried out for whichever gives the more adverse effect.

3.4.1.3
Concentrated live loads shall be applied over the actual area of application where known. Where the area of the application is not known, the basic concentrated live load (table 3.4.1) shall be distributed over an area of not greater than 0.3 m x 0.3 m for floors and an area of not greater than 0.1 m diameter for roofs and applied in the position giving the most adverse effect.

3.4.1.4
Except as provided in 2.4.3.5 and 2.4.3.6, it shall be assumed that the prescribed load can be absent from any part or parts of a structure if its absence therefrom will cause a more adverse effect on that or any other part.

3.4.1.5
Where the occupancy of an area of floor or roof is not provided for in table 3.4.1, the live loads shall be determined as appropriate from an analysis of the loads resulting from:

(a) The assembly of persons;

(b) The accumulation of equipment and furnishings, and

(c) The storage of materials.

3.4.1.6
Special loads imposed during construction or maintenance shall also be considered.

Table 3.4.1 – Basic live loads for floors and stairs

Category	Spatial occupancy	Q_b Distr kPa	Q_b Conc kN
1 Domestic			
	1.1 Non-habitable roof spaces	0.5	1.8
	1.2 Balconies	2.0	1.8
	1.3 Other rooms, including service rooms	1.5	1.8
	1.4 Garages	2.5	9.0
2 Residential			
	2.1 Balconies	4.0	1.8
	2.2 Bars and public lounges	3.0	2.7
	2.3 Bedrooms	1.5	1.8
	2.4 Dining rooms	3.0	2.7
	2.5 Corridors, stairs, landings	3.0	4.5
	2.6 Other rooms, except service rooms	3.0	2.7
3 Educational			
	3.1 Class and lecture rooms	3.0	2.7
	3.2 Laboratories	3.0(1)	4.5(1)
	3.3 Library reading areas	3.0	2.7
	3.4 Library stacks:		
	Not exceeding 1.8 m high	4.0	4.5(1)
	For each additional 0.3 m, add	0.5	
4 Institutional			
	4.1 Bedrooms and wards	2.0	1.8
	4.2 Operating theatres	3.0(1)	4.5(1)
	4.3 Utility rooms	3.0	2.7
	4.4 Heavy equipment rooms	3.0(1)	4.5(1)
5 Assembly			
	5.1 Assembly areas, fixed seating	3.0	2.7
	5.2 Assembly areas, moveable seating	5.0(1)	3.6(1)
	5.3 Grandstands, fixed seating(2)	4.0	3.6
	5.4 Grandstands, moveable seating(2)	5.0	4.5
	5.5 Law courts	3.0	3.6
	5.6 Stages	5.0	3.6
6 Office			
	6.1 Banking chambers	4.0	4.5
	6.2 Offices for general use	2.5(1)	2.7(1)
7 Retail			
	7.1 Shop floors	4.0	3.6
8 Industrial			
	8.1 Workrooms without plant	2.5	2.7
	8.2 Workrooms with lightweight plant		
	(no item more than 5 kN)	3.0	3.6
	8.3 Other workrooms	5.0(1)	4.5(1)
	8.4 Broadcasting studios	4.0	3.6
	8.5 Printing plants	12.5(1)	(3)
9 Access, Service			
	9.1 Corridors, Stairways: pedestrian		
	As for floor serviced, but		
	need not be greater than	5.0	4.5
	9.2 Corridors, passageways: vehicle	5.0(1)	9.5(1)
	9.3 Pedestrian bridges	4.0	3.6
	9.4 Plant rooms(4)	5.0(1)	4.5(1)
	9.5 Toilet and locker rooms	2.0	1.8

(1), (2), (3), (4) See notes at end of table

Table 3.4.1 (Continued)

Category	Spatial occupancy	Q_b Distr kPa	Q_b Conc kN
10 Storage			
	10.1 File and store rooms	5.0(1)	4.5(1)
	10.2 Mobile file storage rooms	7.0(1)	
	10.3 Vaults and strongrooms	5.0(1)	4.5(1)
	10.4 Cold storage	(3)	
	10.5 Timber pallets (per pallet)	7.2	
	– lamb carcasses	8.7	
	– mutton carcasses	8.7	
	– cartoned beef	14.1	
	10.6 Fly galleries	4.5 kN/m	
	10.7 Restaurants	3.0	2.7
	10.8 Parking areas and ramps:		
	– vehicles less than 2500 kg tare	2.5	9.0
	– vehicles above 2500 kg tare	5.0(1)	9.0(1)
11 Roofs			
	11.1 No access for pedestrian traffic	0.25 (on plan)	1.0
	11.2 Roof claddings only:		
	– slopes ≤ 30°	1.1	
	– slopes > 30°	0.5	
	11.3 Access for pedestrian traffic:		
	– dwellings	1.5	1.4
	– other	2.0	1.4
	11.4 Construction and demolition sites – Gantry roofs over public ways (refer to Approved Document F5 to the NZBC):		
	– where materials are stacked on, or crane loads are carried over the roof	7.0(1) +impact(5)	0.5(1)
	– where the roof supports a site office	3.5(1) +impact(5)	0.5(1)
12 Agriculture			
	12.1 Cattle pens	4.0	
	12.2 Sheep pens	1.5	
	12.3 Horse pens	5.0	
	12.4 Pig pens	2.0	
	12.5 Chicken coops	2.0	

NOTE – The live load shall be determined on the basis of occupancy of each room or space.

(1) To be calculated but not less than the value given.

(2) Refer to 3.4.3.2 for horizontal live loads.

(3) To be calculated.

(4) This live load is to apply to the floor space surrounding specific items of machinery. Where the weight of machinery is not known a live load of 7.5 kPa shall be used for the entire floor.

(5) Allow for impact of a compact mass equal to that of the concentrated load specified falling from the top of the construction. The contact area of the mass shall be as required by 3.4.1.3.

3.4.2 *Reduced live load*

3.4.2.1
The basic distributed live load, Q_b, may be reduced by multiplying by ψ_a to give the reduced live load, Q. Subject to 3.4.2.2, ψ_a shall be determined as follows;

(a) For storage, service and retail occupancies:

$$1.0 \geq \psi_a = 0.5 + 4.6/\sqrt{A} \quad \text{(Eq. 3.4.1)}$$

(b) For other occupancies:

$$1.0 \geq \psi_a = 0.4 + 2.7/\sqrt{A} \quad \text{(Eq. 3.4.2)}$$

3.4.2.2
ψ_a shall be taken as 1.0 for:

(a) One-way slabs except where it can be demonstrated that the unreduced load on the area under consideration can be supported by the whole of that area in two way action;

(b) Areas where the live load exceeds 5.0 kPa and results from storage;

(c) Assembly areas;

(d) Roofs with no pedestrian access;

(e) Live loads from machinery and equipment for which specific design allowance has been made.

3.4.3 *Additional considerations*

3.4.3.1 *Ceiling framing*
Ceiling joists and immediate supporting members in ceiling spaces with access for maintenance only shall be designed to support a point load, Q = 1 kN at any location. This load need not be applied at the same time as the roof live load.

3.4.3.2 *Stadiums and the like*
In addition to other design requirements of this Standard, grandstands, stadiums, assembly platforms, reviewing stands, and the like shall be designed to resist a horizontal force applied to seats of Q = 350 N per linear metre along the line of the seats and Q = 150 N per linear metre perpendicular to the line of the seats. These loadings need not be applied simultaneously. Platforms without seats shall be designed to resist a minimum horizontal force of Q = 250 N per square metre of plan area (0.25 KPa). The horizontal loadings of this clause need not be added to the required seismic horizontal forces.

(b) For the ultimate limit state, the design spectrum, C(T), shall be appropriate for the aspect of design being undertaken as follows:

(i) For determination of minimum strength requirements in accordance with 4.10.5.1

$C(T)=S_{m1}C_h(T,1)\,S_p\,RZL_u$ ..... (Eq 4.6.8)

(ii) For determination of inelastic effects and capacity actions in accordance with 4.10.5.2.

$C(T)=C_h(T,1)\,RZL_u$ ..... (Eq 4.6.9)

Table 4.6.2 – Risk factor for structure

Category (Refer table 2.3.1)	Risk factor, R
I	1.3
II	1.2
III	1.1
IV	1.0
V	0.6

Table 4.6.3 – Limit state factor

Limit state	Limit state factor
Serviceability	$L_s = 1/6$
Ultimate	$L_u = 1.0$

Table 4.6.4 – Design spectrum scaling factor, S_{m1}

T_1 (seconds)	Structural ductility factor, μ								
	1.0	1.25	2.0	3.0	4.0	5.0	6.0	8.0	10.0
≤0.45	1.0	0.86	0.61	0.44	0.34	0.28	0.24	0.18	0.15
0.50	1.0	0.85	0.58	0.41	0.32	0.26	0.22	0.17	0.13
0.60	1.0	0.82	0.54	0.37	0.28	0.23	0.19	0.14	0.11
≥0.70	1.0	0.80	0.50	0.33	0.25	0.20	0.17	–	–

NOTE –

(1) For intermediate periods and ductility factors interpolate linearly.

(2) For site subsoil category (C) S_{m1} need not be taken greater than the value for T_1=0.6s

ANNEXURE G

Auckland City Council v New Zealand Fire Service

High Court Wellington
12, 13 July; 19 October 1995
Gallen J

Building – Building Industry Authority – Jurisdiction – Building consent issued by council – Consent challenged before Building Industry Authority by New Zealand Fire Service – Whether Building Industry Authority had jurisdiction – Whether acting as Court of law and bound by rules of the Court – Whether statutory tests applied appropriately – Whether entitled to establish and rely on performance standards – Whether rules of natural justice breached – Building Act 1991, ss 12, 16, 17, 19, 46 and 86 – Fire Service Act 1975, ss 17O and 29.

Administrative law – Tribunals and boards – Jurisdiction and functions of Building Industry Authority – Procedures for determination – Whether acting in administrative or judicial capacity – Rules of natural justice – Jurisdiction of Court to make orders – Building Act 1991, ss 17O, 18, 19 and 20 – High Court Rules, R 718A.

This case concerned an appeal and cross-appeal on a determination of the Building Industry Authority (the authority) relating to plans to convert a ten-storey building to apartments. The second respondent, Symphony Group Ltd, the building owner, specifically sought from the appellant council assurance that no alternative would be required to the single stairway which was the only means of egress, nor that a sprinkler system would be needed. The council gave that assurance. On the basis of a report obtained by the council from an independent fire safety consultant, the council proceeded to issue the necessary building consent and work proceeded. However, the New Zealand Fire Service (NZFS) disagreed with the council, and applied to the authority for a determination under the Building Act 1991. The other parties were the council and the building owner. The NZFS argued that a second egress and full sprinkler system were needed. The owner contended that the second stairway was impractical as it would affect light and air easements with an adjoining property, would impose substantial additional costs, and would involve a loss of floor space. The council accepted that on the basis of the fire safety conditions which it had approved, the building complied "as nearly as reasonably practicable" with the requirements of the building code.

The authority heard evidence and in addition obtained a report from independent consultants. That report was not produced at the hearing nor released to the parties. The determination of the authority concluded that to comply with the building code the installation of a sprinkler system was needed instead of the proposed alarm system. No other changes were required to the plans for which building consent had been given.

On appeal to the High Court under s 86 of the Building Act 1991, the council contested the jurisdiction of the NZFS to seek a determination, the conduct of the authority in receiving reports without disclosing them to the other parties, where the onus of proof lay, and whether the authority's own approved performance document indicated an exclusive approach. In a cross-appeal, the NZFS challenged

both the merits of the authority's decision and its approach to the interpretation of ss 17 and 46 of the Building Act.

Held: 1 The NZFS was entitled to be a party to the proceedings and therefore to apply to the authority for a determination under s 17 of the Building Act. The provisions of s 29 of the Fire Service Act could be construed to give rise to an obligation on the NZFS in respect of the Building Act, such as to give it party status under s 16(e) of that Act. Although technically an officer of the organisation rather than the NZFS itself should have been the applicant under s 17, there was no disadvantage from the NZFS having so acted (see p 333 line 34, p 334 line 3).

2 The authority was not entitled to receive and consider the reports of third parties without disclosing those reports to the parties and giving an opportunity to respond. Because the role of the authority should be seen as closer to the decision-making process than to the purely administrative, there was in the circumstances of this case a breach of the principles of natural justice by the authority in its failure to disclose the reports (see p 334 line 8, p 335 line 37, p 335 line 38).

Daganayasi v Minister of Immigration [1980] 2 NZLR 130, 141 (CA) applied.

3 The authority must have evidence to support its conclusion, but it was not helpful to assume that the authority was proceeding in a manner analogous to a judicial proceeding where the rules of a Court of law were decisive on the provision of evidence in the traditional sense of an onus or burden of proof (see p 336 line 1).

Invercargill City Council v Hamlin [1994] 3 NZLR 513 (CA) applied.

4 On the issues under cross-appeal, the authority's approach to the test under s 46 and the interpretation of the phrase "as nearly as is reasonably practicable" had been correct. Its conclusion that the proposal did not comply as nearly as reasonably practicable was one it had been entitled to reach. The test was an objective one. The obligation was not absolute and the words allowed a commonsense overall appraisal. A weighing exercise was required and the question was one of the weight the authority should have given to the facts before it (see p 337 line 41, p 338 line 30, p 339 line 4).

Marshall v Gotham Co Ltd [1954] AC 360; [1954] 1 All ER 937 and *West Bromwich Building Society Ltd v Townsend* [1983] ICR 257 applied.

Auckland Provincial District Local Authorities' Officers IUOW v Onehunga Borough Council (1989) 2 NZELC 96,956 distinguished.

5 Because construction had proceeded before the matter was referred to the authority, there was a question as to the timing of the assessment and whether the degree of sacrifice that would arise was an element to be taken into account by the authority. The issue was not so much one of timing but of the weight to be given to the various factual matters before the authority (see p 339 line 30).

6 Although there had been a breach of the rules of natural justice, the approach of the authority had otherwise been correct. The reports were produced in the hearing before the High Court and it was not argued there that they so affected the evidence before the Building Authority as to vitiate the decision. Therefore, having regard to the circumstances, it was not appropriate to grant further relief (see p 340 line 53, p 341 line 17).

Welgas Holdings Ltd v Commerce Commission [1990] 1 NZLR 484 followed.

Appeal granted on question of disclosure: appeal and cross-appeal otherwise dismissed.

Other cases mentioned in judgment

Auckland City Council v Wotherspoon [1990] 1 NZLR 76.

Countdown Properties (Northlands) Ltd v Dunedin City Council [1994] NZRMA 145.
Environmental Defence Society Inc v Mangonui County Council [1989] 3 NZLR 257 (CA).
Marr (J C) v Arabco Traders Ltd (Ruling no 7) (High Court, Auckland, A 1195/77, 19 December 1986, Tompkins J).
Union Steam Ship Co of New Zealand Ltd v Wenlock [1959] NZLR 173 (CA).

Appeal

This was an appeal against a determination of the Building Industry Authority.

Duncan Laing and *David Kirkpatrick* for the appellant.
Ross Crotty for the first respondent.
Sherwyn Williams for the Building Industry Authority.

Cur adv vult

GALLEN J. This is an appeal brought under the provisions of the Building Act 1991 (the Act) against a determination made by the Building Industry Authority given at Wellington on 5 November 1993. It is the contention for the appellant that the determination was erroneous in point of law on a number of grounds. The first respondent (NZFS) also contends that the determination was erroneous in law and has cross-appealed. The second respondent was not represented before me and took no part in the hearing. The Building Industry Authority (the authority) was however represented and it was appropriate that it should be, bearing in mind that the case raises questions of some importance under a new and rather different regime with regard to the control of building.

[His Honour referred to the background of the proceedings which is concisely summarised in the headnote and proceeded:]

An appeal in respect of the determination is brought under the provisions of s 86 of the Act and can be brought only on questions of law. Those questions of law which the appellant raises are as follows:

(a) Was the NZFS entitled to apply to the authority for a determination pursuant to s 17 of the Act?
(b) Was the authority entitled to receive and consider reports of third parties, without disclosing those reports to the parties and giving the parties a chance to make submissions or call further evidence in relation to them?
(c) Was the authority correct in law in holding that in processing an application for a determination, the authority was not acting as a Court of law?
(d) Was the authority correct in law in holding that no onus of proof lies on an applicant for a determination pursuant to s 17 of the Act?
(e) Did the authority adopt an incorrect test for meeting the requirements of s 46 of the Act?
(f) Was the authority correct in law in applying the standards set out in its approved documents as requirements for fire safety to the exclusion of other possible means of providing for fire safety, to the standard required by the building code?

By the cross-appeal, the NZFS contends that:

(a) The assessment by the authority of the requirements of s 46 of the Building Act were wrong.
(b) That its interpretation of the phrase "nearly as is reasonably practicable" where that appears in s 46 of the Building Act was wrong.
(c) That the assessment by the authority of the time at which the reasonably practicable test fell to be determined, was wrong.

(d) That the authority's assessment as to what measures were reasonably practicable in the particular circumstances, was wrong.
(e) That the authority's conclusion that a second means of egress was not required, was also wrong.

The approach which a Court ought to adopt in considering appeals of this nature, has been considered in other contexts on a number of occasions. In *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 at p 153, a Full Court of the High Court indicated that the Court would interfere with the decision of a Planning Tribunal under the Resource Management Act 1991, only where it considered that:

> "• applied a wrong legal test; or
> • came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come; or
> • took into account matters which it should not have taken into account; or
> • failed to take into account matters which it should have taken into account."

In the same case, the Court accepted comments in *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 where it was stated that the tribunal should be given some latitude in reaching findings of fact within its areas of expertise. Counsel also referred to the decision of Fisher J in *Auckland City Council v Wotherspoon* [1990] 1 NZLR 76.

I agree that the principles as set out in the *Countdown Properties* case, apply equally to appeals contemplated by s 86 of the Building Act and propose to deal with the matter on that basis.

[His Honour then considered the standing of the NZFS and proceeded:]

When the provisions of the Acts Interpretation Act 1924 are taken into account, I think it follows that the responsibilities imposed on the nominated officers, are such that it would be ludicrous if they did not have access to the egress areas of this building and were accordingly unable to take any part in the decision making which had a direct bearing on the responsibilities which the organisation is called upon to assume.

I think therefore, that s 29 [of the Fire Service Act 1975] can be construed in such a way as to give rise to the kind of obligation which would give party status in terms of s 16 of the Act. If it were necessary however, I should also have been prepared to hold that the national commander was an affected person, bearing in mind the provisions of s 17O of the Fire Service Act 1975. Again, I think the obligation to give a fair, large and liberal interpretation to statutory material of this kind, has a bearing and I should be reluctant to reimport that general rigidity which previously applied to questions of locus standi.

That leaves the question quite properly raised by the appellant as to the actual entity entitled to party status under the provisions of s 16. Looking at the rights and obligations imposed by ss 29 and 17O of the Fire Service Act, that should have been the chief fire officer, the deputy chief fire officer, or a person authorised in writing by either of them, or the national commander. The application to the authority in this case was signed by the chief fire commander. Technically then, I think the NZFS which I would accept was an organisation contemplated by the Fire Service Act, is not the correct body to participate under either qualification. The Fire Service as an organisation can act only through its officers. While I accept that the Act contemplates that the particular notice will be given by nominated officers, they are doing so on the part of the organisation from which they derive their authority. It does not seem to me to be stretching the provisions too far to conclude that the national commander was acting as agent for the Fire Service and in any event, I should have thought that if amendment had been sought, it would certainly have been granted and there is no suggestion that anyone has been

disadvantaged by what at best can be described as a technical failure.

I answer the first question posed by the appeal therefore:

> That the chief fire officer, the deputy chief fire officer or a person authorised in writing by either of them, or the national commander, were entitled to apply to the authority for a determination pursuant to s 17 of the Act and in doing so, represented the New Zealand Fire Service.

The second question for consideration relates to the reports which the authority obtained of its own volition and which it did not disclose to the parties or give them an opportunity to make submissions on or call further evidence in relation to. There are now a substantial number of decisions to the effect that the rules of natural justice require decision makers to disclose to parties, material which may be prejudicial to their case unless there is some statutory or other reason which removes that obligation – see *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 at 141. Section 12(3) of the Act requires the authority in the exercise of its functions and powers, to comply with the principles of natural justice. Counsel drew attention to the fact that s 55 of the Act which deals with an inquiry into the conduct or ability of a building certifier, states that the authority is bound by the rules of natural justice and drew attention to the different wording between the use of the words "rules" and "principles". It may be that in certain circumstances the distinction is of significance. I should have thought that "principles" was a wider term than "rules", which may have reference more to the application of the principles, but whether that is so or not, I do not think it affects the outcome of this case.

Counsel for the authority submitted that the requirements of natural justice are not absolute and must be considered in relation to the particular undertaking under consideration. He submitted that those requirements must be considered in the light of the procedure contemplated by the Act itself and in particular, those sections which deal with matters of this kind – that is ss 16-20 inclusive and in particular, the procedural requirements set out in s 19. He submitted that the Act is an administrative Act and that effectively, the authority when dealing with determinations, stands in the shoes of the territorial authority, so that its actions might properly be described as administrative, as distinct from judicial. Accordingly, those principles of natural justice which relate rather to activities which may be categorised as judicial, were contended to have less application. He made these submissions based on the Act itself and on the nature of the activity undertaken by both territorial authorities and the Building Industry Authority, in processing applications for building consent.

In its determination, the authority indicated that it did not see itself acting as a Court of law and that it had approached its decision as if it were a territorial authority considering the owner's application for building consent, but with the advantage of additional evidence and submissions from the parties.

Counsel drew attention to a number of authorities where the obligation has been discussed. Each is in the end an illustration of a decision arising out of the particular circumstances of the specific case. I am prepared to accept that the way in which principles of natural justice impinge upon a particular decision-making activity, will depend upon the nature of that activity and in determining the nature of that activity, some assistance may be derived from comparing it with Court processes. Nevertheless, I do not think this kind of categorisation should be pressed too far. In the end, the fairness which the natural justice principles are designed to achieve, must be considered in relation to what is actually being done. Where the outcome of an application is determined by fixed provisions so that there is in fact no real need for any decision at all, there may be little room for the application of principles which are designed to ensure that a hearing is conducted fairly. At the other extreme, when a determination has to be made between two differing points

of view so that the person entrusted with the decision-making obligation must make a choice between competing arguments, then the principles designed to ensure that the decision is made in a fair manner, must obviously have considerable weight. There are I think a number of reasons why determinations of the kind at present under consideration, ought to be seen as closer to the decision-making process than to the purely administrative.

That part of the Act which gives rise to jurisdiction, is headed "Matters of Doubt or Dispute for Determination by Authority". While the heading itself can have little weight in determining the meaning of the statutory provision, those terms are repeated in s 17. The reference to matters of doubt or dispute, immediately imports questions closer to those which are generally resolved by tribunals than those which are merely acknowledged by functionaries. Secondly, the result is a "determination", terminology which suggests that a choice is being made between more than one possible outcome. The very reference to "parties" is an indication that the process is a decision-making one.

Finally and perhaps most importantly, there is the whole philosophy of the Act itself. This will need to be considered in connection with one of the other questions raised by the appeal but it is sufficient at this stage to say that the system embodied by the Act, departs from the comparative rigidity of the old building law, to one where what is sought is the attainment of objectives by means of performance standards, rather than by an adherence to fixed requirements. Such an approach brings the advantages of flexibility, but it also means that there is room for difference of opinion as to whether or not the objectives are being attained. Such differences have to be resolved. This case provides a very good illustration of that, since the various highly qualified, technical experts who have from time to time been involved in the matter, have seen the proposals in very different lights. I do not see anything in the statute and in particular in the procedural section (s 19) relied on by the authority, which would justify the conclusion the principles of natural justice are so modified in this case that what might be described as a basic principle – the requirement that the parties should know what they face – is to be modified to any extent at all.

The parties to disputes of this kind, need before they can make a considered response, to have available to them all the material upon which the authority is ultimately likely to act. It follows that I think the authority was under an obligation to disclose the reports which it had received, to all those concerned in the determination and that a failure to do so constitutes a breach of the principles of natural justice.

I therefore conclude that in the circumstances of this case, the authority was not entitled to receive and consider reports of third parties without disclosing those reports to the parties and giving the parties a chance to make submissions or call further evidence in relation to them.

The notice of appeal raised a specific question as to whether or not the authority was correct in holding as it did, that in processing an application for a determination, the authority was not acting as a Court of law. In making his helpful submissions, Mr Laing accepted that this question was largely dealt with in the two related questions as to the obligation to disclose material obtained by the authority and the question as to onus of proof. I do not propose to deal with the questions separately and simply add at this point, that the obligation to make material available to the parties, arises from the nature of the proceedings. It is unnecessary to determine for this question, the extent to which they may be seen as comparable to the proceedings in a Court.

[His Honour discussed the relevance of traditional questions of onus or burden of proof, referring to *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA), and proceeded:]

As in the case of the earlier question relating to the obligation of disclosure, I do not think that it is helpful to categorise the proceedings of the authority solely in terms of those which apply to the procedures of a Court of law. The authority has obligations of a general nature, which go beyond the determination of the particular dispute. Like most specialist tribunals, there are aspects of its procedures which can be seen as comparable to those which are adopted by the Courts, but there are others which are not.

I therefore answer the fourth question raised by the appeal by saying:

> That the authority must have evidence to support its conclusion, but it is not helpful in matters of the kind contemplated by the authority to consider the provision of evidence in the traditional sense of an onus or burden of proof.

[His Honour next considered the question of whether or not the authority had erred in law by relying on the approved document as the basis for assessing the requirements of compliance with the code. He concluded that if, as a question of fact, the authority considered the solutions proposed were less satisfactory than the guidelines, the authority would nevertheless have to be satisfied that the objectives of the code itself were met. His Honour observed that the Building Act 1991 was a performance-based Act under which the authority had an obligation to approve documents indicating acceptable solutions to the requirements of the building code; and that the authority had taken into account all the material placed before it, and had used the approved documents not as an exclusive or absolute solution but as no more than guidelines or a benchmark. His Honour proceeded:]

The authority specifically stated that various matters that were mentioned in submissions and in evidence (and it provided as an example the question of access for firefighters), were not discussed by the authority in the decision because "after full consideration of all the circumstances, those matters did not affect the Authority's decision". In the context of this case looking at the decision as a whole, I think it not unreasonable to conclude that the authority took into account all the material which was placed before it.

I am satisfied that the authority as is set out in its decision, saw the approved document as no more than a guideline or benchmark. I do not think therefore that the appellant is right in suggesting that the authority regarded the acceptable document as an exclusive solution.

That brings me to the questions raised by the NZFS on the cross-appeal. The first two raise questions as to the approach adopted by the authority in interpreting the provisions of s 46(2) and s 46(4) of the Act and since they raise substantially the same point, can be dealt with together.

[Section 46(2)(a) requires the territorial authority and subsequently the building authority to be satisfied on reasonable grounds that in its new use the building would:

> (2)(a) Comply with the provisions of the building code for means of escape from fire, protection of other property, sanitary facilities, and structural and fire-rating behaviour, and for access and facilities for use by people with disabilities (where this is a requirement in terms of section 25 of the Disabled Persons Community Welfare Act 1975) as nearly as is reasonably practicable to the same extent as if it were a new building; and
>
> (b) Continue to comply with the other provisions of the building code to at least the same extent as before the change of use – Ed.]

In respect of both subsections, the argument is as to whether or not the proposals comply with the provision of the building code for means of escape from fire as nearly as is reasonably practicable to the same extent as if the proposal were for a new building.

The background to the cross-appeal is a contention put generally by the NZFS

that one means of exit to 42 apartments in a ten-storey building, is unsafe and unacceptable. The submission was made that if the stairway was blocked, there was no way out and further, there could well be a problem if in a comparatively restricted space, people from the building were endeavouring to gain egress while firefighters were moving equipment into position to fight the fire. It is the contention of the NZFS that extension ladders cannot take people out of a building above five stories and in this particular building, no extension ladder could get near three sides of the building to operate at all. It was not prepared to accept that pressurisation of stairwells and sprinkler systems were sufficient to avoid its concerns. It contended that its concerns had not been heard by the authority and it was worried that the decision would be taken as a precedent.

The NZFS started from the position that the building code required the number of exits to be appropriate to the building height, the number of occupants, the fire hazard and the fire safety systems installed in the building and then went on to draw attention to the fact that the approved documents with relation to this, required two or more escape routes and that those documents permitted an internal single exit stair to serve no more than four floor levels, or six floor levels if the building had sprinklers. As a submission on fact, the NZFS indicated that it could accept the ultimate decision made by the authority, that is that one internal single exit stair serve all ten levels of the building, with a type seven fire safety system and a stairwell pressurisation system, but only if there were also provided, some facility to guarantee the integrity of the support system. The significance of this submission was the concern that in the event of a power failure or a failure of the exterior water supply, the safeguards required and imposed by the authority, would no longer be there. It is against that background that the questions raised by the cross-appeal need to be considered.

The matters in contention involve the meaning given by the authority to the words "as nearly as is reasonably practicable to the same extent as if it were a new building" where they appear in s 46(2)(a) and (4)(a). In dealing with this aspect of the matter, the authority set out the conclusion in the following terms:

> "7.1.1 The Authority accepts the submission of counsel for the territorial authority that the assessment of what are reasonable grounds for a decision is to be made objectively in all the circumstances relevant at the time. The degree of risk is to be balanced against the cost, time, trouble, or other 'sacrifice' necessary to eliminate the risk. The Authority was not assisted by any evidence or submissions from the territorial authority as to its reasons for advising the owner, in the territorial authority's letter of 29 January 1993, that an alternative means of egress was not required and the building did not need to be sprinklered."

Counsel agreed that this test was that which conformed to that accepted in *Marshall v Gotham Co Ltd* [1954] AC 360 and *West Bromwich Building Society Ltd v Townsend* [1983] ICR 257. *Marshall's* case dealt with regulations applying to mines. An accident had occurred because there was an unusual geological condition which had not been found in the mines for some 20 years. Lord Reid indicated at p 373 that there might be precautions which it was practicable, but not reasonably practicable to take. He noted that since lives might be at stake, it should not lightly be held that to take a practicable precaution was unreasonable. He noted in that case, that the danger was a very rare one and the trouble and expense involved in the use of precautions while not prohibitive, would have been considerable. They would not have afforded anything like complete protection against the danger and there might well have been a false sense of security. *West Bromwich Building Society v Townsend* involved the question of whether or not a building society was required under the provisions of the Health and Safety at Work Etc Act 1974 (UK) to erect anti-bandit screens. The Judge accepted that the duties created were not

absolute and the fact that a precaution was physically possible, did not mean that it was reasonably practicable.

Mr Crotty submitted that this case was quite distinguishable from *Marshall's* case. He referred to *Union Steam Ship Co of New Zealand Ltd v Wenlock* [1959] NZLR 173, where the Court of Appeal considered the word "practicable" as having the meaning "feasible, able to be accomplished". He also referred to *J C Marr v Arabco Traders Ltd (Ruling no 7)* (High Court, Auckland, A 1195/77, 19 December 1986, Tompkins J) where again the words "reasonably practicable" were equated with "feasible". He relied on comments in *Auckland Provincial District Local Authorities' Officers IUOW v Onehunga Borough Council* (1989) 2 NZELC 96,956 and in particular, the comments at p 96,961 where Judge Castle stated that:

> "Again, the use of the word 'practicable' in our view has to be looked at as something far different from the words 'possible' or 'available' or 'practical', all of which necessarily imply a subjective test. It could be argued perhaps that whatever the legislature meant by the words 'not reasonably practicable' could be construed as 'virtually impossible'. That to us appears to be the broad position under the Act."

That case seems to me to go well beyond the others which are referred to. To equate "not reasonably practicable" with "virtually impossible" is I think to, at least in the circumstances of the Act, remove the significance of the word "reasonably". I agree with the authority that the test is an objective one and generally speaking, I think that the test referred to in *Marshall v Gotham Co Ltd* is relevant, not least because that case too involved an assessment of circumstances where there was serious risk to the safety of persons working in a confined space. I do not think the test in that case is contrary to the decision in *Union Steam Ship Co of New Zealand Ltd v Wenlock*. That case involved whether or not it was reasonably practicable to call a particular witness and was in the end decided on a question of fact.

In the end, what the cases say is that the obligation is not absolute. It must be considered in relation to the purpose of the requirement and the problems involved in complying with it, sometimes referred to as "the sacrifice". A weighing exercise is involved. The weight of the considerations will vary according to the circumstances and it is generally accepted that where considerations of human safety are involved, factors which impinge upon those considerations must be given an appropriate weight. Mr Crotty submitted that the requirements of the building code and the acceptable solutions set out in the approved documents formed the background against which the decisions had to be made as to whether or not the proposals could be regarded as acceptable. He submitted that any deviation from the acceptable documents would have to be minor.

The acceptable solution is not an exclusive one. As the authority itself said, it is a guideline or a benchmark. To that extent, any deviation from it must achieve the same objectives, but whether it does or not is a question of fact. The questions raised by NZFS are questions of fact. The statute contemplates that questions of this kind will be determined by the expert body appointed for that purpose, that is the Building Industry Authority. That authority has accepted that the test was objective and has specifically stated that it adopted the test propounded by the House of Lords in *Marshall v Gotham Co Ltd*. It is in this context that it is important to recall that what is essentially a question of fact, will only become a question of law in the comparatively extreme situation where there is no evidence to support a conclusion, or where the assessment which has been made of the evidence is in some respects at fault from a legal point of view. I do not think that either applies in this case. The authority came to the conclusion that the proposal as originally accepted by the local authority did not comply with the relevant provisions of the New Zealand building code as nearly as reasonably practicable to the same extent

as if it were a new building. It did however, conclude that with the modifications it required, that standard was achieved. I do not think that the approach which it adopted or the tests which it applied, were wrong.

I therefore conclude that the authority cannot be criticised for the interpretation which it adopted in respect of either ss 46(2)(a) or 46(4)(a).

The next question raised by the NZFS is one of timing. Mr Crotty drew attention to the fact that the evidence for the second respondent made it clear that the second respondent had proceeded with the construction proposed, not only on receipt of the building consent, but also subsequently to the filing of the application by the NZFS. He drew attention to the provisions of s 17(4) of the Act which suspends any consent until such time as the determination has been completed. He submitted for the NZFS that the test of what is reasonably practicable for the purposes of s 46, must be determined at the time the building consent is granted. His concern arises from the fact that the authority accepted that events which had occurred since the time of the building consent, were relevant to the degree of sacrifice which was an element to be taken into account as to whether or not the new use of the building proposed would comply as nearly as was reasonably practicable, to the same extent as if it were a new building.

Counsel for the authority drew attention to the fact that s 17(2)(c) allowed the authority to receive any relevant evidence, whether or not it would be admissible in a Court of law. I do not think this helps the authority particularly. Whether or not the evidence is relevant, depends upon the primary decision as to the time when relevance is to be assessed. However, the Act contemplates that work will actually continue pending a determination, since s 17(4) provides for a suspension of the consent, but goes on to indicate using the adversative conjunction "but", that a direction to cease building work for safety reasons, should remain in force pending the determination. It would have been unnecessary to refer to this continuation in those terms if the suspension of the consent automatically prevented any further work taking place.

Counsel contended that in acting, the authority effectively replaces the territorial authority. There are some similarities in the functions of the territorial authority and the building authority, at least to the extent that the ultimate outcome is either the issue or the failure to issue of a consent to build. There are also however, substantial differences so that I do not think it can be said the authority simply replaces the territorial authority. There is no time limit provided for an application to the authority and there is nothing to stop an aggrieved party from making an application, perhaps some months after a building consent has been granted. It seems to me that the use of the words "reasonably practicable" is designed to allow a commonsense, overall appraisal to take place. That involves a consideration of the situation as it actually exists when the authority considers it. The significance or weight which is to be given to changes which have occurred since the matter was first placed before the council or since the building consent was granted, is a factor to be taken into account in the overall assessment which the authority is required to make. An applicant could hardly be permitted to take advantage of his or her own wrong in deliberately proceeding in the face of an argument, to make structural alterations. That is merely to accept a risk. On the other hand, where an applicant has in good faith acted in accordance with a consent which has been granted, it would be grossly unjust for the authority in making an overall assessment, to ignore that. The question is not I think so much one of the time at which the assessment should be made, but rather of the weight which should be given to the various factual matters which are placed before the authority.

The authority's answer to this question was set out as follows:

> "7.1.1 The Authority accepts the submission of counsel for the territorial authority that the assessment of what are reasonable grounds for a decision is to be

made objectively in all the circumstances relevant at the time. The degree of risk is to be balanced against the cost, time, trouble, or other 'sacrifice' necessary to eliminate the risk. The Authority was not assisted by any evidence or submissions from the territorial authority as to its reasons for advising the owner, in the territorial authority's letter of 29 January 1993, that an alternative means of egress was not required and the building did not need to be sprinklered.

7.1.2 The Authority asked counsel for the owner whether he considered that what is reasonably practicable should be decided now or at the time of building consent. He replied that the proper time at which the decision is to be made is the time of the building consent but that the Authority cannot close its eyes to subsequent events, which could 'tip the scales' if discretion were used. Asked whether there could be one decision at the time of building consent and a different decision now, counsel repeated that the proper time was the time of building consent but that there was 'room for subsequent events to move the level of objectivity to the reality of the amount at stake'. The Authority accepts that events since the time of building consent are relevant to the degree of the 'sacrifice' mentioned in the submission of counsel for the territorial authority."

I do not think that the authority was wrong in the approach which it adopted. [His Honour then discussed two questions which related essentially to factual matters and in particular the circumstances of the authority's own expertise and that highly qualified consultants were prepared to come to a conclusion contrary to that for which the NZFS contended. He proceeded:]

Under those circumstances, I do not think it could be said that the authority came to a conclusion on the evidence to which it could not reasonably have come.

The NZFS submits further however, that the council did not comply with its own guidelines for change of use proposals and reinforces this by reference to the fact that those proposals did not comply with the approved documents approved by the authority. The answer to this has to be I think, that as far as the council is concerned, what were adopted were guidelines, not absolute in character and a similar observation applies to the contention that the proposals did not comply with the approved documents. The present scheme of the Act is not to impose absolute requirements, but to provide objectives. The guidelines in the approved documents indicate methods which will be considered acceptable, but they are not exclusive and are not to be seen as replacing the old regulations. If some alternative is acceptable, then that is for the appropriate authority to decide. I do not think that the fourth and fifth grounds of the cross-appeal can succeed.

In summary then, I have reached the conclusion that the appellant and the NZFS were correct in their contention that the authority ought to have disclosed the reports which it had obtained and made them available for comment. In all other respects, I think the appeal and cross-appeal must fail.

It then becomes necessary to decide what the consequence of such a decision is. The appellant is prepared to accept the present situation, although it does not agree that the authority was correct in either the approach it used or the conclusions to which it came. The appellant merely asks effectively for declarations, but does not seek any relief. The NZFS wishes the whole matter to be returned to the authority and reconsidered. The original applicant took no part in the hearing before me and has completed as I understand it, the work for which consents were granted. I am told that the 43 apartments concerned have all been sold and are occupied. The occupants of those premises were not parties to these proceedings and their points of view have not been ascertained.

The conclusion which I have reached is in favour of the authority with the exception of my view that the authority breached the rules of natural justice in not

referring the reports which it obtained to the parties, or giving them an opportunity to comment on them. It is therefore necessary to consider whether that should have any effect on the relief which is granted. Counsel accepted that the powers of the Court in dealing with an appeal of this kind were those set out in R 718A of the High Court Rules. Paragraph (c) is general in terms and empowers the Court to make such further or other orders as the case may require. In *Welgas Holdings Ltd v Commerce Commission* [1990] 1 NZLR 484, the High Court was dealing with an appeal from the Commerce Commission and concluded inter alia, that there was a breach of natural justice or fairness arising out of a failure to make information in the possession of the commission, available to all parties. The Court nevertheless found that the approach of the commission had otherwise been correct. The Court concluded that other than the finding that there had been a breach of natural justice or fairness, it did not consider that the appellants were entitled to any other relief. The case has similarities with this in that respect, although I note that the Court also concluded that part of the decision had been carefully scrutinised in argument based on expert evidence.

The reports which in my view the building authority ought to have made available to all parties, were produced in these proceedings, but they were not analysed in depth. I do not understand counsel to have argued that in some respects those reports could be taken as having so affected the evidence before the building authority as in some sense to have vitiated the decision. With the exception therefore of my conclusion that the reports ought to have been disclosed, I do not consider that the approach of the building authority was wrong and when the matter is looked at overall, the real concern of the New Zealand Fire Service which I accept is genuine, is as to the factual basis of the decision. That is a matter for the authority.

Having regard to the circumstances, I do not think that it is appropriate to grant any further relief and having regard to the circumstances, costs should lie where they fall.

Appeal granted on question of disclosure: appeal and cross-appeal otherwise dismissed.

Solicitors for the appellant: *Simpson Grierson Butler White* (Auckland).
Solicitors for the first respondent: *Chapman Tripp Sheffield Young* (Wellington).
Solicitors for the Building Industry Authority: *Kensington Swan* (Wellington).

Reported by: Briar Gordon, *Barrister*