

# Determination 2024/046

The issuing of two notices to fix for the construction of an indoor playground

45A Norman Avenue, Waingawa, Carterton, Wairarapa

## Summary

This determination considers an authority's decisions to issue two notices to fix for a newly constructed indoor playground. The determination considers whether the notices are adequately detailed, and whether there were grounds to issue the notices, including whether the building work was exempt from the requirement to obtain a consent, and whether the playground complies with Building Code Clause B1 *Structure*.

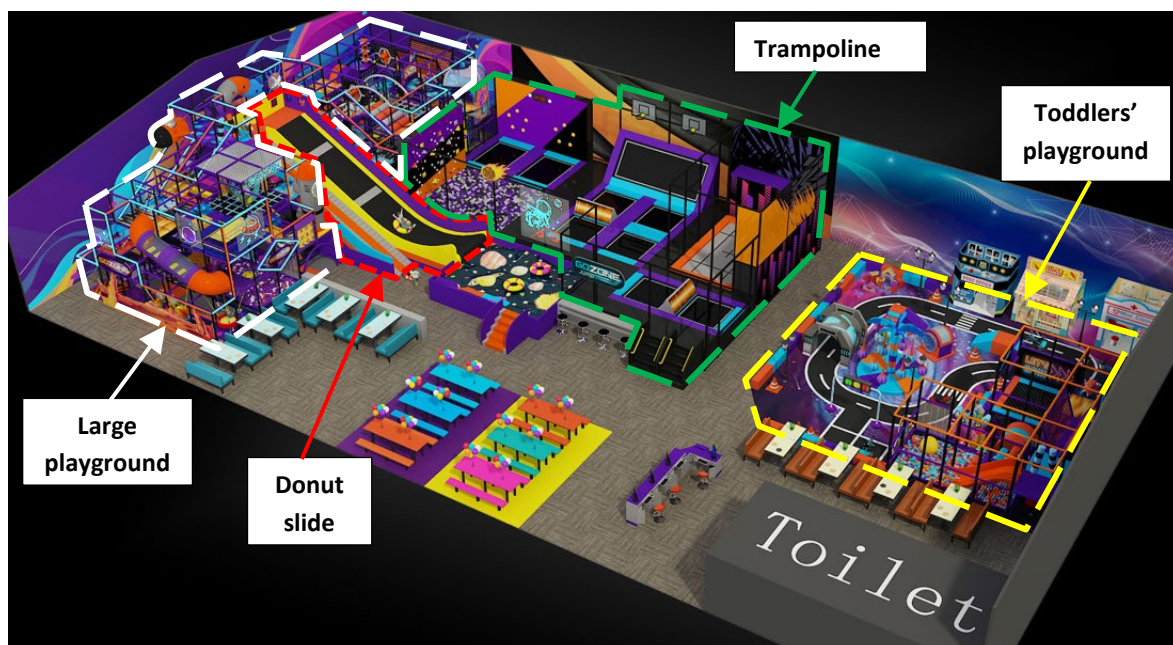


Figure 1: Indoor playground layout

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

The Act and the Building Code are available at [www.legislation.govt.nz](http://www.legislation.govt.nz). Information about the legislation, as well as past determinations, compliance documents (eg, Acceptable Solutions) and guidance issued by the Ministry, is available at [www.building.govt.nz](http://www.building.govt.nz).

## 1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Peta Hird, for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment (“the Ministry”).<sup>1</sup>
- 1.2. The parties to the determination are:
  - 1.2.1. Go-Zone Limited (“the applicant”), the leaseholder of the property at 45A Norman Avenue and owner of the indoor playground, who applied for this determination. The directors, A & J Mitchell, are also parties to this determination as recipients of one of the notices to fix.<sup>2</sup>
  - 1.2.2. LL and CB Properties Limited, the owner of the property and the existing building in which the indoor playground is located (“the owner”).
  - 1.2.3. Carterton District Council (“the authority”) carrying out its duties as a territorial authority or building consent authority.
- 1.3. This determination arises from decisions by the authority to issue two notices to fix regarding a newly constructed indoor playground inside an existing building at 45A Norman Avenue, Waingawa, Carterton.
- 1.4. The parties dispute whether building consent was required, the application of the Building Code to the playground structures, and the compliance of those structures with Clause B1 *Structure*. The authority had also raised issues concerning means of escape from fire and a change of use, but these issues have since been resolved and are not the subject of this determination.
- 1.5. The matters to be determined<sup>3</sup> are the authority’s decisions to issue notices to fix NF0070 and NF0073 (referred to as the first and second notices to fix).

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

<sup>2</sup> The authority has confirmed that the recipient of the first notice to fix did not meet the definition of a specified person under section 163. For that reason, I have not included them as a party to this determination.

<sup>3</sup> Under sections 177(1)(b) and 177(2)(d).

- 1.6. In deciding this matter, I must consider:
  - 1.6.1. whether the notices adequately detail the particulars of contravention or non-compliance
  - 1.6.2. whether, in respect of the first notice to fix, the construction of the large playground and donut slide required a building consent in accordance with section 40(1)<sup>4</sup>
  - 1.6.3. whether, in respect of the second notice to fix, the indoor playground complies with Building Code Clause B1.
- 1.7. In determining this matter, I have not considered the compliance of the indoor playground with any other Building Code clauses, or the existing building or any other elements of building work.

## 2. The building work

- 2.1. The building work is the construction of an indoor playground. The indoor playground is intended to operate as a commercial enterprise open to the public.
- 2.2. The playground equipment was designed and manufactured overseas to several international building standards.<sup>5</sup>
- 2.3. The indoor playground comprises four independent structures (see Figure 1). Each structure is constructed using varying sizes of structural steelwork and fixing clamps, some plywood sheets, and are free standing (ie not fixed to the ground). They also incorporate safety nets and protective soft coverings. The four structures are:<sup>6</sup>
  - 2.3.1. A **large playground** approximately 18.9m long x 7.3m wide, 112.4m<sup>2</sup> in area, and between 1.8m to 5.9m in height over four levels.
  - 2.3.2. A **trampoline** zone approximately 16.5m long, and between 7.5m and 10m wide, and up to 5m in height.
  - 2.3.3. A **donut slide** approximately 11.2m long x 3.6m wide and 4.6m in height (to the uppermost level where a person would stand).

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<sup>4</sup> These were identified by the authority as being subject to the notice to fix and the grounds for issuing the notice in relation to those structures are in dispute (refer paragraph 4.2).

<sup>5</sup> Copies of certificates from the manufacturer refers to compliance with (but not limited to) EN 1176-1:2008 *Playground equipment and surfacing – Part 1: General safety requirements and test methods* and EN 1176-3:2008 *Playground equipment and surfacing – Part 3: Additional specific safety requirements and test methods for slides*.

<sup>6</sup> The plan dimensions, floor areas, and heights have all been approximated from information provided by the manufacturer and other data provided by an engineering consultancy engaged by the authority.

2.3.4. A **toddlers' playground** approximately 7.32m long x 5.6m wide, 25.5m<sup>2</sup> in area, and 2.8m in height.<sup>7</sup>

### 3. Background

- 3.1. The indoor playground was constructed between February and April 2023.
- 3.2. On 2 March 2023 the authority carried out an inspection and on 6 March 2023 issued the first notice to fix to the owner. The notice referred to “a multi-level (floor to roof) steel structure, large slides, and other steel structures”. The particulars of contravention or non-compliance included that no building consent had been applied for or obtained for the building work, in breach of section 40, and the notice required the owner to apply for a certificate of acceptance.
- 3.3. In May 2023, the authority engaged the services of an engineering consultancy “to assess whether the new playground equipment...satisfies the structural loading and design in accordance with the latest [New Zealand] Building Code and propose strengthening for the equipment”.
- 3.4. The engineering consultancy completed a walkover survey of the indoor playground on 18 May 2023 and prepared structural calculations<sup>8</sup> based on information provided by the manufacturer, seismic loads assessed against AS/NZS 1170.5<sup>9</sup>, and other load data from NZS 5828<sup>10</sup>. The engineering consultancy also proposed strengthening the large playground, trampoline, and toddlers' playground using plywood sheets.
- 3.5. On 8 June 2023, the applicant applied for a certificate of acceptance for a “Modular Playground Structure, Trampoline Complex and under 3yrs Playground”, relying on compliance with NZS 5828 to establish compliance.
- 3.6. The engineering consultancy subsequently provided a Producer Statement – Design (PS1) dated 26 June 2023 in respect of the “proposed new playground”. The PS1 stated compliance with clause B1, and Verification Method B1/VM1, and referred to “structural loading verification of a supplied playground checked against NZS 5828”.<sup>11</sup>

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<sup>7</sup> The dimensions only relate to the steel structure, not the whole floor area of the toddlers' playground.

<sup>8</sup> Dated May and June 2023.

<sup>9</sup> Australian / New Zealand Standard AS/NZS 1170.5:2004 *Structural design actions Part 5 Earthquake actions – New Zealand*.

<sup>10</sup> New Zealand Standard NZS 5828:2015 *Playground equipment and surfacing*. The engineering consultancy noted that this standard does not consider ‘earthquake level’, which I take as reference to section 4.2.2 of that standard which states: “NOTE 1 No allowance for accidental loads, i.e. loads produced by...earthquake, need be made for playground equipment”.

<sup>11</sup> I have assumed the PS1 included the proposed strengthening of the playground equipment.

- 3.7. On 12 July 2023, the authority issued the second notice to fix to the applicant and the owner. The particulars of contravention or non-compliance recorded in the notice were as follows (in summary):
- 3.7.1. Not all the requirements of the first notice to fix had been met.
  - 3.7.2. With reference to the reports prepared by the engineering consultancy,<sup>12</sup> the authority had received no records to confirm the deficiencies in the latter report had been resolved.
  - 3.7.3. Referred to some of the remedial work detailed in the engineering consultancy report dated 26 June 2023 ‘may conflict with the requirements of NZS 5828’ and no evidence had been provided to confirm the conflict had been resolved.
  - 3.7.4. The certificate of acceptance had not yet been issued.
  - 3.7.5. There was a breach of clauses B1.3.1 and B1.3.4(a) and (b).
- 3.8. To remedy the contravention or non-compliance the recipients of the notice were to (in summary):
- 3.8.1. complete the work necessary to ensure the structure complies with Clause B1
  - 3.8.2. cease operation of the playground structure until it can be established the structure is not unsafe.
- 3.9. The engineering consultancy provided a technical memorandum dated 17 August 2023, confirming it had accepted modifications to the proposed strengthening using steelwork and bolt connections (instead of the original proposal using plywood sheets). The consultancy subsequently provided a Producer Statement – Construction Review (“PS4”) dated 18 August 2023, in respect of the “proposed new playground” and related to [certificate of acceptance] application CA0095. The PS4 referred to compliance with clause B1 and Verification Method B1/VM1.<sup>13</sup>
- 3.10. On 21 August 2023, the authority issued a certificate of acceptance for the indoor playground.<sup>14</sup>

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<sup>12</sup> Dated 12 June 2023 and 26 June 2023.

<sup>13</sup> For the purposes of this determination, I have assumed the PS4 included the as-built strengthening of the playground equipment.

<sup>14</sup> Certificate of acceptance CA00095 dated 8 June 2023, issued by the authority on 21 August 2023 under section 99 of the Act. The authority’s decision to issue the certificate does not form part of the matters being determined.

## 4. Submissions

### The applicant

#### 4.1. The applicant submits (in summary):

- 4.1.1. They had relied on Schedule 1 for not obtaining a building consent before undertaking the building work, specifically clause 10 'Interior alterations to existing non-residential building', and Schedule 1 clause 42 'Certain public playground equipment'.
- 4.1.2. They had also relied on compliance with section 41(1)(f) because the indoor playground equates to 'modular components'. (I note the manufacturer of the equipment is not a registered Modular Component Manufacturer.<sup>15</sup>)
- 4.1.3. They have relied on compliance with NZS 5828 and other standards as noted in the various certificates provided by the manufacturer.<sup>16</sup> None of the certificates refer to compliance with the New Zealand Building Code.
- 4.1.4. The large playground did not alter the exits from the existing building.
- 4.1.5. The compliance issues the authority was seeking to have addressed only related to the large playground, not the donut slide, the trampoline zone, or the toddlers' playground.
- 4.1.6. The applicant's business is registered as a private company.

### The authority

#### 4.2. The authority submits (in summary):

- 4.2.1. The elements of the indoor playground the parties are in dispute about are:
  - (i) the large playground structure, and
  - (ii) the supporting structure for the donut slide.
- 4.2.2. There is no dispute between the parties regarding the donut slide itself (excluding its supporting structure), the trampoline zone, or the toddlers' playground.<sup>17</sup>
- 4.2.3. An application for a building consent was required for the construction of the large playground structure.

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<sup>15</sup> Sections 41(1)(f)(i) and 272U.

<sup>16</sup> For example, EN 1176-1:2008 and EN 1176-3:2008.

<sup>17</sup> In regard to these elements of the indoor playground the authority referred to Schedule 1, clause 24 'Decks, platforms, bridges, boardwalks, etc'. These elements are not considered in this determination.

- 4.2.4. The issue regarding the means of escape from fire referred to in the first notice to fix has been resolved.
- 4.2.5. Compliance of the indoor playground with clause B1 has now been demonstrated based on the PS1 and PS4, structural calculations, and reports prepared by the engineering consultancy, and the certificate of acceptance has been issued for the building work.

### **The owner**

- 4.3. The owner did not make a submission.

## **5. Discussion**

- 5.1. The matter to be determined is the decisions by the authority to issue two notices to fix for construction of an indoor playground within an existing building.

### **Do the Act and Building Code apply?**

- 5.2. Before considering the notices to fix, I have first turned my mind to whether the construction of the indoor playground is building work regulated under the Act.
- 5.3. Section 8 states a building “means a temporary or permanent movable or immovable structure”, and section 7 interprets ‘building work’ to mean work “for, or in connection with, the construction ... of a building”.
- 5.4. In this case, the indoor playground is constructed as a set of four independent modular structures (plus several other non-structural elements), each of which is intended to support a combination of loads (eg self-weight and imposed gravity loads arising from use). The four playground structures each have a separate form of construction, vary in size and complexity, and each requires its own specific engineering design input, component parts, and fixing arrangements.
- 5.5. I have considered if the indoor playground meets any of the criteria in section 9 that would exclude it from the definition of a building, and I am satisfied the indoor playground is not excluded under that provision.
- 5.6. I note also that clauses 28 and 42 in Schedule 1 of the Act exempt certain playground equipment from the requirement to obtain a building consent, which in itself confirms these types of structures are regulated under the Act.
- 5.7. I am of the view that the four independent structures that make up the indoor playground (ie the large playground structure, the donut slide, the trampoline zone, and the toddlers’ playground) are buildings under section 8, and building work was carried out to construct them.

## Legislation

- 5.8. Section 17 requires “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”.
- 5.9. Section 40(1) provides “a person must not carry out any building work except in accordance with a building consent”, and section 44(1) requires “an owner intending to carry out building work must, before the building work begins, apply for a building consent...”. There are some exceptions from this requirement, as described in sections 41(1)(b), 42A, and Schedule 1 of the Act.
- 5.10. The provisions concerning notices to fix are set out in sections 163 to 168. Section 164(1)(a) provides for an authority to issue a notice to fix if it considers, on reasonable grounds, that a specified person is contravening or failing to comply with the Act or its regulations. This can include carrying out building work without a building consent when one is required.
- 5.11. Section 165 sets out the requirements for the form and content of a notice to fix. The prescribed form provides a space to insert the “particulars of contravention or non-compliance”.<sup>18</sup> The courts and previous determinations have discussed the requirement that the recipient of a notice to fix be “fairly and fully informed” by the particulars in a notice, so they can address the identified issues.<sup>19</sup>

## The first notice to fix

- 5.12. In issuing the first notice to fix, the authority considers the owner has contravened section 40(1) and the installation of the indoor playground has affected the means of escape from fire. Although the notice also refers to issues associated with a proposed change of use of the building, this has subsequently been discounted by the authority, and has not been considered in this determination (refer to paragraph 4.2.4).
- 5.13. Regarding the content of the first notice to fix, I am of the view it does not adequately specify the particulars of contravention or non-compliance as required by the prescribed form. In reaching this view, I consider the first notice to fix:
- 5.13.1. does not adequately describe which structure(s) the notice relates to<sup>20</sup>

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<sup>18</sup> Form 13 of the Building (Forms) Regulations 2004.

<sup>19</sup> See *Andrew Housing Ltd v Southland District Council* [1996] 1 NZLR 589 (which related to a ‘notice to rectify’, the equivalent of a notice to fix in the predecessor to the Act, the Building Act 1991); *Marlborough District Council v Bilsborough* [2020] NZDC 9962 at [106]-[107]; and Determination 2024/029 *An authority’s decisions to issue a series of notices to fix* (27 May 2024) at paragraphs 4.2 and 4.3.

<sup>20</sup> Subsequently clarified in correspondence to the Ministry dated 5 August 2024 (see paragraph 4.2).



- 5.13.2. does not adequately describe how the indoor playground has affected the means of escape from fire
- 5.13.3. does not provide any details regarding compliance with the relevant performance clause(s) of the Building Code (other than a general reference to B1 Structure in the remedies).

### **Was a building consent application required?**

- 5.14. The first notice to fix alleged a contravention of section 40, and so I must consider whether the construction of the indoor playground required a building consent. This determination is limited to the large playground and the donut slide.
- 5.15. In this case, the applicant has relied on several provisions in deciding not to obtain a building consent before undertaking the building work. I have commented on each as follows:
- 5.15.1. **Schedule 1, clause 10.** Subpart (b) of clause 10 does not include building work that modifies or affects any specified system. In this case, the building work involved alterations to install a Type 4 alarm system, emergency lighting, and exit signage. Therefore, the exemption in clause 10 of Schedule 1 does not apply.
- 5.15.2. **Schedule 1, clause 42.** This relates to building work in connection with playground equipment if the work is for a government department, Crown entity, licensed early childhood centre, territorial or regional authority, or other similar public organisation. The applicant is not a public organisation and therefore the exemption in clause 42 of Schedule 1 does not apply.
- 5.15.3. **Section 41(1)(f).** This relates to the manufacture of a modular component that is designed and manufactured by a Modular Component Manufacturer certified to design and manufacture the component. The manufacturer of the playground equipment is not a registered Modular Component Manufacturer,<sup>21</sup> therefore the exemption by under section 41(1)(f) does not apply.
- 5.16. The authority submits that the trampoline zone and toddler's playground are not in dispute, and has referred to Schedule 1, clause 24. This clause exempts "building work in connection with a deck, platform, bridge, boardwalk, or the like from which it is not possible to fall more than 1.5 metres even if it collapses." I note that the trampoline zone includes platforms and climbing walls that appear to exceed 1.5m in height.
- 5.17. I have already determined the four structures that form the indoor playground are buildings and that building work was undertaken to construct them. I have also

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<sup>21</sup> Under section 272Y of the Act.

considered section 41 in its entirety, including any building work described in Schedule 1, and concluded that the building work was not exempt from the requirement to obtain building consent under those provisions.

5.18. As the construction of the indoor playground included building work that required a building consent and consent had not been obtained, the authority had grounds to include a contravention of section 40 in the first notice.

### **The second notice to fix**

5.19. In issuing the second notice to fix, the authority stated that “not all the components of [the first notice to fix] have been complied with” and that there was a breach of clauses B1.3.1 and B1.3.4(a) and (b).

5.20. I am of the view the second notice to fix does not adequately specify the particulars of contravention or non-compliance as required by the prescribed form, such that the recipient would be fairly and fully informed as to what would be required to address the identified issues. In reaching this view, I consider the second notice to fix:

5.20.1. does not adequately describe which items raised in the first notice had not been complied with

5.20.2. does not adequately describe what “discrepancies” in the report<sup>22</sup> prepared by the engineering consultancy were required to be “resolved”

5.20.3. does not adequately describe what aspects of the engineering consultancy’s reports<sup>23</sup> “conflict with the requirements of NZS 5828”

5.20.4. does not adequately describe why the authority considered the building work did not comply with clauses B1.3.1 and B1.3.4(a) and (b).

### **Compliance with clause B1**

5.21. All building work must comply with the Building Code. Regarding the second notice to fix, I need to consider the construction of the indoor playground in terms of its compliance with performance clauses B1 referred to in the second notice to fix.

5.22. The documentation made available by the applicant, as provided by the overseas manufacturer of the playground equipment, does not refer to compliance with the Building Code. However, some of the documentation does refer to European standard EN 1176.

5.23. The applicant has relied on demonstrating compliance by way of NZS 5828, and this standard incorporates several parts of EN 1176. However, I note NZS 5828 is not a

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<sup>22</sup> Dated 26 June 2023.

<sup>23</sup> Dated 12 June 2023 and/or 26 June 2023.

referenced standard in Acceptable Solution B1/AS1<sup>24</sup>, and so compliance by way of that standard is considered as an alternative solution<sup>25</sup>.

- 5.24. Clause B1.3.3 requires physical conditions likely to affect the stability of buildings and building elements to be taken into account, and specifically includes earthquakes (B1.3.3(f)). However, NZS 5828 does not allow 'for accidental loads' such as earthquake actions.
- 5.25. In this case, an engineering consultancy engaged by the authority has assessed compliance of the indoor playground and noted the "overall equipment does not resist lateral loads as per New Zealand standards". Based on the structural calculations prepared by the engineering consultancy I have assumed they were referring to AS/NZS 1170.5 and NZS 5828.
- 5.26. I have assumed the engineering consultancy had concerns with the as-built indoor playground not complying with clause B1. However, it is not clear from their documentation which performance clause(s) of the Building Code were at issue.
- 5.27. Further, it is not clear what importance level the engineering consultancy had considered for the indoor playground, and nor does the report provide a clear description of any likely collapse mechanism (bearing in mind the relatively low seismic mass of the various structures).
- 5.28. Regardless, the engineering consultancy prepared a specific engineering design solution to strengthen some of the playground equipment incorporating some additional bracing; this has now been installed (albeit the original proposal using plywood sheets has been replaced with some structural steel elements).
- 5.29. The design and as-built construction for the strengthening have been supported by a PS1 and PS4 prepared by Chartered Professional Engineers working for the engineering consultancy, and these do refer to compliance with clause B1 using Verification Method B1/VM1.
- 5.30. It appears the PS4 has formed part of the certificate of acceptance application in respect of the as-built indoor playground, and this has subsequently issued by the authority.<sup>26</sup> Therefore, I have assumed the authority was satisfied the building work complies with the Building Code when it granted and issued the certificate of acceptance<sup>27</sup>, as such, I have not considered this further.
- 5.31. Nevertheless, based solely on the documentation prepared by the engineering consultancy, and in the absence of any contrary or other supporting evidence being

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<sup>24</sup> Acceptable Solution B1/AS1 first edition, amendment 20 (effective on 29 November 2021 until 1 November 2023).

<sup>25</sup> As inferred in section 23.

<sup>26</sup> I note, it is not clear what other information may have been provided to the authority as part of the application for the certificate of acceptance.

<sup>27</sup> Section 96(2) and 98(1)(a).

made available to the Ministry, I am of the view the original construction of the indoor playground did not comply with clause B1.3.3(f), and therefore the authority had grounds to issue the second notice to fix.

- 5.32. As the additional building work has been carried out to strengthen the indoor playground and a certificate of acceptance has been issued, I am exercising my discretion not to apply a remedy under section 188(1)(a).

## **6. Conclusion**

- 6.1. The building work to construct the indoor playground was not exempt from the requirement to obtain a building consent and the authority had grounds to issue a notice to fix under section 164.
- 6.2. The building work to construct the original indoor playground did not comply with clause B1.3.3(f) and the authority had grounds to issue a notice to fix.
- 6.3. The form and content of the first and second notices to fix did not adequately specify the particulars of contravention or non-compliance as required by the prescribed form.
- 6.4. As the authority has since issued a certificate of acceptance for the completed building work, I have elected not to exercise any powers under section 188(1)(a) in this determination in respect of the two notices to fix.

## **7. Decision**

- 7.1. In accordance with section 188 of the Building Act 2004, I determine:
- 7.1.1. the authority had grounds to issue notices to fix for contravening section 40(1) and non-compliance with clause B1.3.3(f) in respect of the construction of the four indoor playground structures
- 7.1.2. the form and content of the first and second notices to fix did not adequately specify the particulars of contravention or non-compliance as required by the prescribed form.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 20 September 2024.

**Peta Hird**

**Lead Determinations Specialist**