

Guidance Notes for Territorial Authorities

Section 363 of the Building Act 2004

Introduction

This document is designed to assist territorial authorities to understand their role and responsibilities regarding section 363 of the Building Act 2004 (the Act).

Section 363 creates a new offence concerning the use of buildings intended for public use for which a building consent has not been granted or a code compliance certificate (CCC) issued.

Purpose of section 363

Section 363 (reproduced below) is a public safety measure that gives legislative effect to a key recommendation of the Cave Creek Inquiry. It seeks to ensure that the public is safe when using buildings intended for their use.

The section makes it an offence to permit people to use any part of such a building that is affected by building work for which no building consent has been granted, or for which a consent has been granted but no code compliance certificate (CCC) has been issued.

The legislation has implications for the building control function within territorial authorities as well as for building owners, lessees and users of buildings intended for public use.

363 Offence to permit public use of building for which no building consent or code compliance certificate has been granted

- (1) This section applies to a building that is intended for public use.
- (2) A person commits an offence if the person uses, or permits to be used, any part of a building to which this section applies that is affected by building work—
 - (a) for which a building consent is required, but no building consent has been granted; or
 - (b) for which a building consent has been granted, but no code compliance certificate has been issued.
- (3) A person who commits an offence under this section is liable to a fine not exceeding \$200,000 and, in the case of a continuing offence, to a further fine not exceeding \$20,000 for every day or part of a day during which the offence has continued.
- (4) For the purposes of subsection (1), a building is intended for public use if the building is intended to be open to the public, or is being used by the public, whether for free or on payment of a charge.

Principles for applying Section 363

This section discusses principles that territorial authorities could adopt in formulating policies regarding section 363.

An offence under section 363 can be committed by building owners, lessees and users. However, in practice, the responsibility for complying with the Act will largely fall on owners and lessees – that is those who have commissioned and occupy building work without the necessary consents and certificates.

Each territorial authority should develop its own policy and approach to enforcement. These are likely to vary depending on the category of building and the individual TA's assessment of the safety risk involved.

The purpose of section 363 is to protect public safety. In determining how best to proceed with an issue under section 363, building officials will have to balance working constructively with building owners to achieve solutions with the need to ensure that the public safety objectives of the legislation are met.

Buildings covered by section 363

There are three key tests as to whether a building falls under the provisions of section 363 and, hence, whether there is potential for an offence to be committed.

Is the building intended for public use?

The first test is whether the building is intended for public use.

Section 363(4) defines a building 'intended for public use' as a building intended to be open to the public or one that is used by the public. In general terms this means: buildings with:

- open access – examples of this include restaurants, hospitals, schools, churches and retail shops (note: this is not a complete list and other examples will exist)
- access controlled by payment of a charge – an example of this could be a nightclub where entry from the street is on payment of a cover charge.

It is the Department of Building and Housing's (the Department's) view that buildings with restricted access, for example, where public entry is blocked and entry can only be gained via key pad or other means of coded entry, are unlikely to fall into the category of buildings 'intended for public use'.

However, the Department considers that a building in which the reception area is open to the public and the remainder of the building closed would be categorised as a building 'intended for public use'. In such a case, there would be potential for an offence to be committed, if the second and third tests set out below are met.

Is part of the building affected by building work?

The second test is whether any part of a building is affected by building work.

‘Building work’ is defined in section 7 of the Act as:

7 Interpretation

building work—

- (a) means work—
 - (i) for, or in connection with, the construction, alteration, demolition, or removal of a building; and
 - (ii) on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code; and
- (b) includes—
 - (i) sitework; and
 - (ii) building design

Is a building consent or code compliance certificate required?

The third test is whether the building work required a building consent and no consent has been granted or a building consent has been granted and no code compliance certificate (CCC) has been issued.

If any building work meets the three tests above, an offence under section 363 occurs when the part of the building affected by the building work is occupied.

Categories of affected buildings

Buildings that could be affected by section 363 fall into three categories.

- 1) **Existing buildings** – any existing building containing building work for which a building consent was obtained, but no CCC has been issued, or where a building consent should have been obtained, but was not. (Note this applies only to building work undertaken since July 1992.)
- 2) **Buildings under construction** – this includes all buildings including, for example, a new high-rise shopping centre or apartment block where first-floor retail areas are partially occupied while other floors are being completed.
- 3) **Future buildings** – where construction has not yet started or where consents are pending.

Suggested approach

A possible approach to each category is outlined below. Territorial authorities may find these suggestions useful in formulating their management and enforcement policies on section 363.

For building work lacking code compliance certificates, the suggested approach is based on using existing territorial authority processes.

Existing buildings for which a building consent was obtained, but no CCC has been issued

Territorial authorities could incorporate enforcement of section 363 into the building warrant of fitness regime.

Most public buildings contain systems and features that are managed through the building warrant of fitness regime. There is a direct point of connection between the territorial authority and the building owner when a building warrant of fitness is renewed. Using the building warrant of fitness renewal process to inform owners of the requirements of section 363 and potential issues arising from it is likely to allow a controlled resolution of issues, rather than creating an environment in which a large number of owners are seeking to complete outstanding consents at the same time.

The following is a suggested process that territorial authorities may wish to adopt.

1. Identify outstanding building consents.
2. Identify where those consents relate to buildings intended for public use.
3. Cross check the building warrant of fitness renewal schedule against the list of outstanding building consents.
4. Where there is an outstanding consent, review the compliance schedule to determine if it is correct.
5. Contact the building owner or agent to check if the compliance schedule is correct.
6. Advise the owner of a potential offence under section 363.
7. Inspect the building and discuss with the owner the how best to move forward.
8. Apply the normal CCC issuing process.

Where territorial authorities consider that there is an unacceptable level of risk present, based on the nature of the particular building work and/or what use is being permitted in respect of the building, the Department considers it would be prudent for them to contact the owners, lessees and users of those buildings before working through the building warrant of fitness process.

High-risk cases could include, for example, buildings that accommodate large numbers of people such as:

- hospitals
- childcare centres
- aged and/or care facilities
- places of assembly
- schools.

Although the provisions of section 363 are in force from 30 November 2004, the Department considers that it will not be possible to prosecute an offence under section

363 before 31 March 2005. However, from 30 November, territorial authorities could use existing procedures (see below) to inform owners of the requirements of section 363. This method could also provide territorial authorities with an ordered approach to implementation.

- When undertaking inspections, building officials can advise building owners, agents and lessees of the need to obtain a code compliance certificate.
- Territorial authorities can include a note concerning section 363 in building warrant of fitness reminders.

Existing buildings for which a building consent should have been obtained, but was not

The Department recognises that, in the majority of cases, a territorial authority cannot be expected to have formal knowledge of any un-consented work within its jurisdiction. The absence of a building consent suggests that the owner of the relevant work has not approached the council.

A territorial authority is most likely to learn of un-consented work through public complaints or through the informal observations of building officials. This is by definition a reactive approach and is most likely to apply to work in progress that could be pursued under the provisions of section 40 ‘Buildings not to be constructed, altered, demolished, or removed without consent’.

Actively discovering and investigating work that has been completed without a building consent will be difficult. Some work may come to light through Fire Service inspections. In these circumstances, and depending upon the safety risk, territorial authorities may wish to adopt a more immediate and interventionist approach than that provided by the building warrant of fitness proposals set out above.

Buildings under construction

In some cases the owners of a large building under construction seek to occupy the lower floors of the building while continuing to work on upper floors. Depending on the nature of the work involved, occupation of part of the building could place users at risk; for example, if there were a danger of significant systems malfunctioning.

The Department recognises that this is a particularly complex issue and exact circumstances will be unique to each building. While territorial authorities may be able to apply parts of the suggested ‘existing building’ approach in these cases, a more active approach could be warranted.

It could be appropriate for a territorial authority to investigate the circumstances relating to a building and, if it considered that there was an unreasonable level of risk, to take the action it considered necessary to remove the risk. In some cases, prosecution could be the only solution, but negotiation with owners and occupiers could be a more effective way forward, especially if the level of danger is considered to be low.

Territorial authorities may also wish to consider whether it would be feasible in some circumstances to require owners who wish to occupy a portion of an incomplete building to apply for separate building consents for each stage of the building project.

In the case of buildings under construction that will not be occupied until the completion of the total building work, territorial authorities could follow the normal CCC issuing practices.

Future buildings

Appropriate publicity concerning section 363 provisions could go a considerable way in ensuring that offences do not occur with regard to future buildings. As part of this approach, territorial authorities could include the following advisory note in project information memoranda (PIMs) and land information memoranda (LIMs).

Section 363 of the Building Act 2004 makes it an offence, in respect of any building intended for public use, to use or permit a person to use any part of that building that is affected by building work for which no building consent was obtained, or where a building consent *was* obtained, but no code compliance certificate was issued.

Communications

Information concerning potential offences under section 363 needs to be communicated to owners, lessees and users of affected buildings as it is possible for all three groups to commit an offence under this section.

The Department proposes to publish on its website an information sheet directed towards building users and owners. A copy of it will also be provided to major organisations representing users and owners. The Department will also provide copies of the document to territorial authorities for their use and distribution. It is suggested that territorial authorities could make this pamphlet available to the public:

- at their front office counters
- as an attachment to correspondence and information brochures
- with new building consents
- with their Long Term Council Community Plan (LTCCP) publications
- by distributing copies at all building inspections.

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