



## Determination 2011/033

### Notices to fix issued in respect of the conversion of a storage shed to a sleep-out and alterations to the sleep-out at 39 Onedin Place, Titirangi



#### 1. The matters to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“the current Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department.

1.2 The parties to this determination are:

- Mr M Seymour as one owner of the property (“the applicant”)
- Auckland Council (including in its previous capacity as Waitakere City Council) (“the authority”) carrying out its duties and functions as a territorial authority and a building consent authority.

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<sup>1</sup> The Building Act 2004, Building Code, compliance documents, past determinations and guidance documents issued by the Department are all available at [www.dbh.govt.nz](http://www.dbh.govt.nz) or by contacting the Department on 0800 242 243.

- 1.3 This determination arises from the authority's decisions to issue three notices to fix for 'the conversion of a detached utility building into a self-contained minor dwelling'. The decisions arose because the authority considered that the work was undertaken without building consent when consent was required under section 35 of the Building Act 1991 ("the former Act").
- 1.4 The matter to be determined<sup>2</sup> is therefore whether the authority was correct to issue the notices to fix. In deciding this I must also consider whether the building work complies with the relevant clauses<sup>3</sup> of the Building Code.
- 1.5 I note that the applicant disputes the ownership of the property in that the notices to fix should have been issued to a family trust. Mr & Mrs Seymour are the registered owners of the property. In the absence of any further evidence I consider Mr & Mrs Seymour to be the owners in terms of section 176 of the Act.
- 1.6 In making my decision, I have considered the submissions of the parties, the report of the expert commissioned by the Department to advise on this dispute ("the expert"), and the other evidence in this matter.
- 1.7 Matters outside this determination**
- 1.7.1 In his submissions, the applicant has offered various reasons why the notices to fix should be withdrawn. A determination can only look at the matters prescribed by section 177 of the Act. In this case that is whether the authority was correct to issue the notices to fix and whether the building work complies with the Building Code. Other matters raised by the applicant, relating to the information held by the authority and its obligations to communicate this information to the applicant, are outside my jurisdiction in respect of the matters I can determine under the Act.
- 1.7.2 Correspondence has also passed between the parties about the number of people living in the dwelling, and this was raised by the applicant in his submissions. This is also a matter outside my jurisdiction unless the building's occupancy means it is unsafe or insanitary as defined in the Act and the authority has issued a notice under section 124 of the Act: such a notice has not yet been issued (refer paragraph 7.2).
- 1.8 In the notices to fix, and correspondence between the parties, the sleep-out is frequently referred to as a "self-contained minor dwelling". That term is not used in the Building Code or the Act, and this determination only considers the use of the sleep-out in the terms used in the current Act and the former Act.
- 1.9 In making my decision, I have considered the submissions of the parties, the report of the expert commissioned by the Department to advise on this dispute ("the expert"), and the other evidence in this matter.

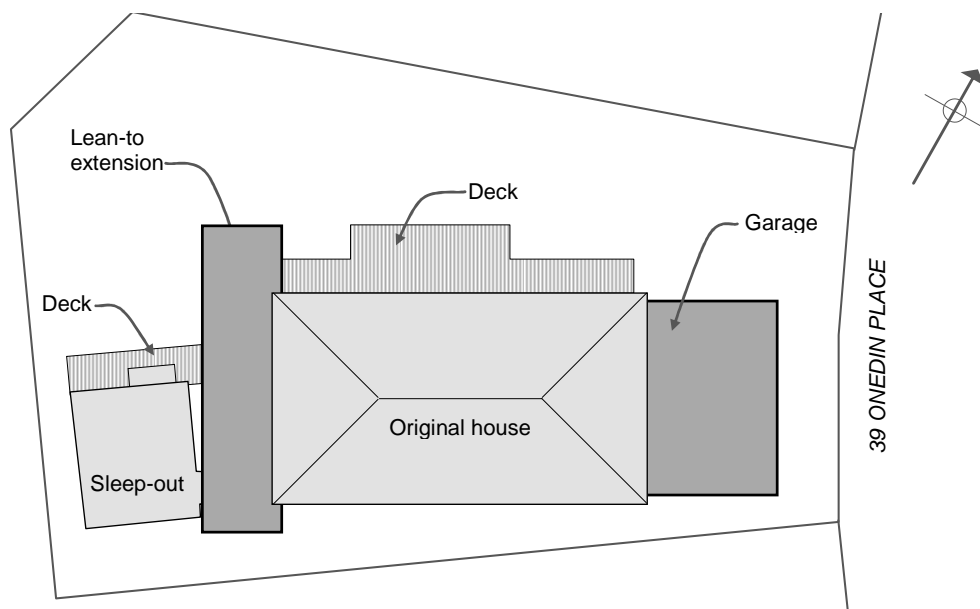
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<sup>2</sup> Under sections 177(1)(b), and 177(3)(e) of the Act.

<sup>3</sup> In this determination, unless otherwise stated, references to sections are to sections of the Building Act 2004 and references to clauses are to clauses of the Building Code.

## 2. The building work

- 2.1 The building work in dispute (“the sleep-out”) is at the rear of an extended dwelling which is situated on a gently sloping residential section. The sleep-out as it was originally constructed was described as a garage or storage shed (referred to herein as the storage shed). A lean-to extension, measuring approximately 3.5 by 10 metres, has been built to the immediate west of the original house between the house and the sleep-out. The lean-to extension contains bedroom facilities. The layout of the original house, the lean-to extension, the garage to the front of the house, and the sleepout is shown in Figure 1.
- 2.2 The sleep-out is a single-story rectangular structure, measuring approximately 4.6m x 5.4m. It has a wooden external entrance door, with a small porch roof over it, leading to a wooden deck. It is clad in profiled metal, with aluminium windows, and a profiled metal roof. The timber framing is likely to be boric treated.



**Figure 1: Site plan (not to scale)**

- 2.3 The sleep-out is located very close to the lean-to extension with a roof bridging the two. Internal access leads from the main dwelling into the kitchen area of the sleep-out. This access is an open passageway, approximately 0.5m in length. There are no doors at either end of the passageway.
- 2.4 Inside, the sleep-out has been divided into three areas: a small kitchen area; a bathroom and laundry area, with a toilet, shower, sink and washing machine; and a sleeping and living area. The internal walls and ceiling are lined and painted, and the timber floor is covered with carpet and vinyl.

### 3. Background

- 3.1 The original dwelling appears to have been built in 1976. On 24 November 1982 the authority issued a building permit (No. 21509) to the previous owner for a storage shed at the rear of the dwelling, being the current sleep-out.
- 3.2 The applicant purchased the property in April 1993. The applicant was advised at this time that there were ‘unauthorised building works’ on the property including ‘the [lean-to extension] connecting the original dwelling to the serviced sleep-out was not permitted’.
- 3.3 In April 1994, the applicant applied for building consent to replace the existing lean-to extension (refer paragraph 2.1) with a proposed extension to the rear of the dwelling and build the garage at the front of the property. The following correspondence and plans in the authority’s files relate to this application:
- A site plan date stamped 26 April 1994 showing the proposed extension extending from the rear of the dwelling nearly all the way to an ‘existing shed’ (the sleep-out). The plan shows an existing sewer drain running beneath the proposed extension. No means of access was shown between the extension and the shed.
  - A letter from structural engineers dated 1 April 1995 (attached to the applicant’s letter of 7 April) states that, ‘The proposed extension will replace an existing lean-to structure which extends from the original house across to a shed’. A plan with the letter shows the ‘existing house’ and ‘existing shed’.
  - A further site plan date stamped 7 April 1995 shows the ‘Proposed rerouting of the branch sewer’. The plan shows the existing sewer being re-routed around the sleep-out. A notation on the plan states, ‘[Install] new 110 upvc sewer outside the perimeter of existing and proposed building with connection for proposed W.C and G.T’. These ‘proposed connections’ are shown connecting to the sleep-out.
- 3.4 In May 1995 the authority issued a building consent (No. 7068) for the proposed extension and the garage to the front of the house. Inspection notes dating from 5 May 1995 to 12 December 1996 have been recorded against this work. The notes make no reference to any work being done on the sleep-out.
- 3.5 I note here that I have been provided with no substantive evidence of when the storage shed was converted to a sleep-out, and that the notices to fix include further work undertaken to install a kitchen and bathroom and associated plumbing and drainage into the sleep-out. The authority is of the opinion the conversion took place between 1994 and 1998, and therefore the work was subject to the provisions of the Building Act 1991.
- 3.6 In 1998 the applicant applied for a further building consent (ABA98004113) for ‘Conversion of existing sleep-out and extension to [minor household unit]’. There is various correspondence and plans in the authority’s files relating to this application including:

- a building consent processing sheet relating to the application which states as condition 4 that ‘This building consent only covers the intertenancy firewall; the conversion of the existing shed into a sleep-out is unauthorised building work’.
  - a floor plan of the ‘proposed connected minor household unit’ shows that it was to incorporate both the ‘existing extension’ and the ‘existing sleep-out’ with an internal access-way joining the two. The floor plan is similar to the layout of the sleep-out, as it is today, although without the washing machine, entrance porch or deck.
- 3.7 On 2 October 1998 the consent application was suspended as the authority required further information. The applicant provided this in a letter dated 30 March 1999. The information related (among other things) to the proposed service areas in the main dwelling and the proposed ‘minor household unit’, and the fire door and firewall between them. The letter stated that: ‘... the proposed work, is only the conversion of an existing wall to an Intertenancy Firewall. The existing buildings and drainage will be retained as existing...’.
- 3.8 On 4 July 2000, the authority wrote to the applicant advising that the application for building consent had been cancelled due to the time that had elapsed since the application was made.
- 3.9 In 2004, the authority commenced legal action for the ‘illegal conversion of the [storage shed]’. The action was abandoned in 2005. The authority states that this is because ‘it was deemed that the Council had not laid information with the courts within 6 months of having knowledge of the breach’.
- 3.10 In 2010, the authority received a complaint from a member of the public about the sleep-out. As a result, the authority inspected the property on 14 June 2010 and issued a notice to fix dated 15 June 2010. This notice to fix (“the first notice to fix”) stated that the particulars of contravention or non-compliance were:
- Conversion of a detached utility building into a self-contained minor dwelling. The conversion work includes the installation of the floor, internal walls, windows, doors, bathroom and kitchen and associated plumbing and drainage. This work was undertaken without building consent when consent was required under section 40 of the Building Act 2004.
- 3.11 The authority carried out a further site inspection on 4 August 2010 and established that no action had been taken. The authority then issued an infringement notice on 4 August 2010 for failing to comply with the first notice to fix.
- 3.12 The authority subsequently issued two further notices to fix. These notices were phrased in identical terms to the first and dated 4 August 2010 (“the second notice to fix”), and 24 September 2010 (“the third notice to fix”).
- 3.13 Substantial correspondence passed between the applicant and the authority related to the notices to fix. This correspondence set out each party’s understanding of the background to the dispute and their current position: this is summarised in paragraphs 3.14 and 3.15.

- 3.14 The applicant wrote to the authority in letters dated 19 June, 25 July, 11 August, 22 August, 5 September, 10 September, 12 October and 16 October 2010. The principal matters raised by the applicant are as follows:

#### **Ownership**

- The property is owned by the Dolphin Family Trust and not the applicant. The notices to fix were issued to the applicant and not the Dolphin Family Trust, therefore the notices were incorrectly addressed.

#### **The sleep-out**

- The sleep-out was constructed by the previous owners ‘under a council supervised building permit, to be used as a sleep-out’.
- There never was at any time a ‘garage’ on the property.
- At the time the property was purchased some of the building work was unauthorised, but the owners had been advised that ‘the sleep-out was permitted’.
- The floors in the sleep-out were installed at the time of its original construction. Much of the rest of the building work, including the internal walls, windows and doors is exempt from the need for a building consent.
- The authority was aware of the plumbing and drainage connected to the sleep-out during the 1980s. The upgrade to this plumbing and drainage was inspected as part of the 1994 consent.
- The sleep-out ‘exceeds the [Building Code] requirements of the day’.
- The 1982 permit documents provided by the authority are incomplete. ‘There is no reference to the floor detail or the finished floor level... There is no plan view in the documents which would have indicated the internal partitions, which were built at the time of the original construction. There is no reference to plumbing or storm water and sewerage disposal. The elevations provided are not for the building detailed on the site plan.’

#### **The 1994 building consent**

- The 1994 building consent was to ‘extend the dwelling at the rear, replace inadequate building plumbing and drainage work, and reconnect the sleep-out to the dwelling’. This work was inspected and approved by authority staff.
- The notation on the 1994 plans describing the sleep-out as an ‘existing shed’ was due to the ‘sarcasm of the draftsman’.
- The authority’s staff inspected the sleep-out as part of the 1994 building consent process.

The applicant was of the view that the sleep-out currently complies with the respective building permits and consents, and that the authority had repeatedly failed to identify any contravention of the Building Act. The applicant requested the authority withdraw the notices to fix.

3.15 The authority wrote to the applicant in letters dated 15 June, 2 July, 4 August, 19 August, 17 September and 28 September 2010. The letters dated 15 June and 4 August enclosed the first and second notices to fix respectively. The principal matters raised by the authority are as follows:

#### **Ownership**

- ‘According to [authority] records and to the copy of the certificate of title ... the Trust is not a listed owner’ and correspondence and the notices to fix had been addressed accordingly.

#### **The sleep-out**

- The previous owner applied for a ‘retrospective building permit in 1981 to legalise what was originally a standard [storage shed] ... which was to function as a storage facility.’
- The storage shed was ‘converted into a self contained unit which included the installation of a floor, internal walls, windows, doors, bathroom, kitchen and associated plumbing and drainage’. No authority records show approval being granted for this work.
- The conversion of the sleep-out into a ‘minor dwelling unit’ was unlawful, because no consent was obtained for it. ‘The works required to effect the conversion, the change of usage and occupation were all considered unlawful.’
- The conversion of the storage shed to a sleep-out occurred sometime between 1994 and 1998.
- ‘no record exists of approval being granted to cover the initial conversion and change of use from non-habitable to habitable status... nor of approval being granted for the subsequent installation of plumbing and drainage...’

#### **The 1994 building consent**

- The site plan for the 1994 building consent application ‘identified the out-building as “existing shed” which is consistent with the earlier application’.

The authority had concerns about overcrowding, and associated health and safety issues and declined to withdraw the notices to fix or the infringement notice.

3.16 The applicant applied for a determination on 11 November 2010.

## **4. Submissions**

4.1 In a letter dated 5 November 2010, accompanying the application for a determination, the applicant offered ‘twelve reasons... why the Notices to Fix should be terminated’. The majority of these reasons concerned the authority’s failure to raise its concerns and state its position during previous dealings with the applicant, and the authority’s failure to correctly process consent applications and respond to correspondence. The remaining reasons repeated points made by the applicant in his correspondence with the authority, namely that:

10. Partitions, windows and doors are currently exempted by Schedule 1 of the NZ Building Act.
11. The work complies with the building code.

12. The owner of the property has committed to do any remedial work correctly identified.

4.2 In an earlier letter to the Department, dated 16 October 2010 and concerning the application for a determination, the applicant had requested a determination cancelling the notices to fix and reinstating the 1998 building consent to convert the sleep-out to a minor household unit. The letter stated that:

The work done in the serviced sleep out was done initially by the previous owner prior to the 1991 Building Act. It was upgraded by us in conjunction with the work done under the 1994 consent.

There had never been a garage on the site. The serviced sleep out was constructed with a timber floor on piles half a metre above the ground. The partitions and plumbing were carried out at the same time, by the previous owner, with [the authority's] awareness.

4.3 The applicant attached a 'synopsis of events' to the letter. This synopsis set out the order of events from the applicant's point of view, and repeated many of the points made by the applicant in his correspondence with the authority (refer paragraph 3.14). In particular the applicant stated that 'no building work requiring a consent has been carried out on the building since the 1994 consent.'

4.4 The applicant also provided copies of:

- correspondence between himself and the authority
- the notices to fix
- the 1982 building permit and associated documents and plans
- the 1995 building consent and associated documents and plans.

4.5 The authority did not acknowledge the application or make a submission in response. On 21 February 2011 I sought further submissions or evidence from the parties regarding the date of conversion of the building to a sleep-out, to which the authority responded on 8 March 2011.

#### **4.6 The draft determination**

4.6.1 A draft determination was issued to the parties for comment on 15 March 2011. The draft concluded that the building work to convert the storage shed to a sleep-out was carried out sometime between 1994 and 1998 and that consent was required for the building work under the former Act. The draft found that the building work did not comply with the Building Code in force at the time of the conversion and that the authority was correct to issue a notice to fix.

4.6.2 The authority accepted the draft determination in an email received by the Department on 25 March 2011. The authority observed that any discussions with the applicant before the property was purchased would not have involved a meeting onsite or any 'cursory inspection', and that such a meeting 'might typically involve discussion and interpretation of [authority's] property and building records' at its offices.



4.6.3 In a letter dated 27 March 2011, the applicant did not accept the draft and provided a submission which reiterated his earlier views, and enclosed letters from family members ‘confirming the existence of the sleep-out in early 1994’ and that it was ‘far from new at that time’. I summarise the relevant points of the applicant’s submission to the draft as follows:

- prior to the applicant’s purchase of the property in 1993, the auxiliary building was used as a bedroom and it included a bathroom and laundry facilities
- the authority was ‘called to the property when the sleep-out was constructed on the boundary’ and again ‘when the toilet discharge was into the public sewer via the access chamber lid opening’ (I have not been provided with the dates these visits occurred or received or any record relating to them)
- the authority ‘sighted the sleep-out when carrying out inspections for the 1994 consent, particularly the plumbing and drainage ... and only related to the sleep-out’. (I note the consent was applied for in 1994 and issued in May 1995.)

The applicant’s submission concluded that the building work was undertaken prior to the former Building Act, and that therefore no regulatory action could be taken unless the building was dangerous or insanitary.

4.6.4 The applicant noted that ‘it is not desirable that the building remain in its current state’ and that ‘all the proposals for developing the site include removal of the sleep-out’.

## **5. The expert’s report**

5.1 As mentioned in paragraph 1.6, I engaged an independent expert to assist me. The expert is a member of the New Zealand Institute of Building Surveyors. The expert was engaged to gather documentation and view the as-built building work.

5.2 The expert inspected the authority’s property file and visited the applicant’s property on 14 January 2011 to inspect the building work. The expert provided a report to the Department on 23 January 2011.

### **5.3 The documentation**

5.3.1 With respect to the documentation the expert found that the original dwelling was built in 1976, with a building permit then issued in 1982 for a storage shed, which is the building that is currently in dispute. The plans for this construction did not ‘include any details for a floor’.

5.3.2 The expert noted that documents relating to the 1995 consent refer to an ‘existing shed’ and that the original site plan for this consent, which was approved on 26 June 1994, shows ‘no existing sewage connections associated with the existing shed’. The expert also noted that the later site plan dated 7 April 1995 shows the sewer diverted around the storage shed, with proposed connection for a WC and GT. These connections were to the storage shed. The building consent was then issued in May 1995, and the expert noted that there is no reference in it to any works associated with the storage shed, other than the reference to the proposed connections in the above plan.

5.3.3 With respect to the 1998 application for a building consent, the expert found two references in the documentation to the sleep-out being converted illegally, although one of these had been crossed out. The expert noted that a floor plan accompanying the consent applications shows the sleep-out in a similar layout to the one that exists today, and that the consent was never issued.

## 5.4 The building work

5.4.1 The expert found that the building work did not comply with the Building Code in several respects (the relevant code clauses shown in brackets)

- Roof, ceiling and floor were all decayed in at least one place. The roof had been repaired in the past, but still leaked (Clauses B2, E2).
- The floor appears to have been added at a later date, as it does not extend under the external walls, and ‘there is no continuous perimeter support for the edge of the particle board’. ‘The floor structure is extremely lightweight and outside the scope of any version of NZS 3604’<sup>4</sup> (Clause B1).
- There is no insulation under the floor (Clause H1).
- The floor outside the shower has completely rotted through (Clauses B1, B2, E3)
- The cladding over-projects past the bottom plate, but ‘possibly not enough to stop water tracking back [onto the framing] in at least some places’. There are several significant unsealed penetrations through the cladding (Clause E2).
- ‘The [exterior] joinery is all hard up under the metal fascia at the top of each wall. There are wide sill flashings under each window, but no obvious jamb flashings.’ (Clause E2)
- Water from the roof is not being discharged into the surface water system. One downpipe has fallen off and the other is discharging onto the ground (Clause E1).
- Wall and floor surfaces adjacent sanitary fixtures are not ‘impervious and easily cleaned’ and some internal linings have deteriorated. Wall and floor surfaces likely to be subject to wall splash have not been sealed to prevent water entering concealed spaces. Openings in claddings and linings mean the spaces are not vermin-proof. (Clause E3, G1, G3)
- The kitchen arguably non-compliant due to its limited size (Clause G3).
- Some of the waste pipes, in particular the one for the washing machine, and the single gully trap do meet Building Code requirements with respect to the disposal of foul water (Clause G13).

5.4.2 The expert concluded that overall the quality of the work was well below the required standard, with lack of maintenance being a significant factor. The expert’s opinion was that ‘considering the overall quality of construction and current condition, bringing this building up to code compliance is unlikely to be a preferred way forward’.

5.5 The expert’s report was referred to the parties for comment on 27 January 2011.

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<sup>4</sup>New Zealand Standard NZS3604: 2011 Timber Framed Buildings.

## **6. Discussion**

### **6.1 General**

6.1.1 There has been some confusion in the correspondence between the parties about exactly what building work is in dispute. However, the parties accept that the storage shed erected under the 1982 building permit (No. 21509), was authorised work. The work to convert the storage shed into a sleep-out and to install bathroom and kitchen facilities is the subject of this determination.

6.1.2 The following considers when the work to the sleep-out was completed and therefore what legislation applies, and the decisions of the authority with respect to the notices to fix.

### **6.2 When was the work undertaken?**

#### **The 1982 building permit**

6.2.1 The applicant has submitted that the documentation for the 1982 permit is incomplete, that the garage structure was never used as a garage, and that the disputed building work to convert the garage structure to a sleep-out was also carried out at this time.

6.2.2 I consider that it is clear that the 1982 permit related only to the erection of the storage shed, and not to the creation of a habitable space within it. The authority's records also indicate the structure was to be used as a storage shed.

6.2.3 I note that in its letter dated 2 July 2010, the authority stated that, '[the previous owner] applied for a retrospective building permit in 1981 to legalise what was originally a ... structure ... which was to function as a storage facility'. I concur with the expert's assessment that the floor was installed some time after the original storage shed was erected. If the 1982 permit application was retrospective, then the installation of a floor within it would have been consistent with the creation of a storage facility, although there is no mention of it in the permit. However, the floor is only one aspect of the disputed building work, and I do not consider that there is any evidence to suggest that the other work was also carried out at this time.

#### **The 1995 building consent**

6.2.4 The applicant has stated that the work to upgrade the plumbing and drainage in the sleep-out was included in the 1995 consent (refer paragraph 3.4) and that the authority inspected the plumbing and drainage work when carrying out inspections for this work. I do not accept this assertion. The authority's records detail 12 inspections of the proposed extension and the garage to the front of the house; none of which record inspection of any plumbing and drainage items to the sleep-out.

6.2.5 The drainage plan for the 1995 consent only shows 'connections for proposed WC and GT'. While this may show that the applicants at some time in the future intended to convert the shed to a self-contained sleep-out or unit, it cannot be taken as approval for the work. The consented plans make no reference to the installation of the toilet, shower and kitchen. (I note that no access way is shown on these plans linking the proposed extension to the sleep-out.)

- 6.2.6 In my opinion, the 1995 consent was limited to the extension to the main dwelling and the garage to the front of the house, and did not authorise any work associated with the sleepout.

### **The 1998 application for building consent**

- 6.2.7 In the 1998 application for building consent (refer paragraph 3.6), the applicant shows the shed as an existing sleep-out, complete with the connection to the dwelling as it now exists. This is the first time the sleep-out has been labelled as such. The authority has identified on the building consent processing sheet, that the conversion of the shed to a sleep-out was unauthorised and not covered by the consent.

### **Conclusion**

- 6.2.8 The applicant has provided evidence, in the form of letters from family members, to support the contention that the storage shed was already in use as a sleepout at the time the property was purchased in 1993. The applicant has also contended that the storage shed was converted to a sleepout at the time it was built in 1982, and that the plumbing and drainage work in the sleepout was undertaken as part of the 1995 building consent. In my view the latter arguments are not supported by the available evidence.
- 6.2.9 On balance I accept the authority's view as evidenced by its records and concur with the opinion of the expert. I conclude that the building work to convert the storage shed to the sleep-out was carried out sometime between 1994 and 1998.

## **6.3 Compliance with the Building Code**

- 6.3.1 The building work is required to comply fully with the Building Code. Although under the current Act, this change would not constitute a change of use, had the building work to convert the storage shed to a sleep-out been consented before it was carried out (under the former Act), the building in its new use would have been required to comply to the level required by section 46 of the former Act (as discussed in Determination 2008/098), as the change from a garage to a sleep-out constituted a change of use under the former Act.

- 6.3.2 Section 46 of the former Act required the building in its new use to comply with the Building Code 'as nearly as is reasonably practicable to the same extent as if it were a new building' with respect to:

- means of escape from fire
- protection of other property
- sanitary facilities
- structural and fire-rating behaviour

In all other respects, the work was to 'continue to comply with the Building Code to at least the same extent as before the change of use'.

- 6.3.3 I accept the expert's assessment that the building work does not comply with the Building Code in force at the time that the work was done.

### **The new building work**

6.3.4 The building work does not comply with the Building Code as was required by section 7 of the former Act as follows:

- The kitchen and laundry
  - The kitchen does not comply with Clause G3 due to its size
  - The laundry does not comply with Clause G4
  - The internal wall and floor surfaces to the kitchen, laundry and bathroom do not comply with Clauses E3, G1, and G3
- Drainage and waste pipes
  - The drainage and waste pipes from the sanitary fixtures, kitchen and laundry do not comply with G13
- Penetrations and openings to claddings
  - Openings in claddings and linings mean the spaces are not vermin-proof. (Clause E3, G1, G3)
  - The new penetrations to the external cladding do not comply with Clause E2
- The windows
  - The configuration of the windows does not comply with Clauses B2 and E2 and the installation of the joinery is unsatisfactory.

### **The building after the change of use**

6.3.5 The building in its new use does not comply as nearly as is reasonably practicable as was required by section 46 of the former Act as follows:

- The floor
  - Although it is unclear when it was constructed, the floor does not comply with Clause B1 and NZS 3604<sup>5</sup> and Clause B2 and should have been upgraded.
  - I also note the floor outside the shower has completely rotted through (Clauses B1, B2, E3).

6.3.6 Of the other matters the expert raised, I also note that although not required to be upgraded under section 46 of the former Act, the surface water provisions in place are not satisfactory. I also note that the roof, ceiling and floor were all decayed in at least one place. The roof had been repaired in the past, but still leaked. I note that the building is not required to be upgraded with respect to its insulation.

6.3.7 The requirements with respect to fire will be determined by the house's intended use which I leave to the applicant to confirm to the satisfaction of the authority (refer also paragraph 6.4.4).

6.3.8 I note that the provision of domestic smoke detectors in the Acceptable Solution for Building Code Clause F7 "Warning Systems", F7/AS1, came into effect in April

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<sup>5</sup> New Zealand Standard NZS3604: 2011 Timber Framed Buildings.

2003. The requirement for smoke detectors was therefore not a requirement of the Building Code at the time the work was completed (being sometime between 1994 and 1998), however, I strongly suggest that smoke detectors are installed in the sleep-out to meet the requirements of F7/AS1.

6.3.9 I also note that the expert concluded that overall the quality of the work was well below the required standard, with lack of maintenance being a significant factor.

#### **6.4 The notices to fix**

6.4.1 The applicant submits that the conversion to a sleep-out was done by the previous owner, with only the plumbing and drainage completed under the 1994 building consent. In my view who undertook the building work does not influence the authority's decision to issue a notice to fix. Under the Act, an authority is required to issue a notice to fix to a 'specified person', which can include the current owner of the building even if the building work concerned was carried out by a previous owner.

6.4.2 I have concluded that the building work was completed between 1994 and 1998 (refer paragraph 6.2.9) which means that the provisions of the former Act apply. This means that the work would have been considered a change of use under section 46 of the former Act, and that a building consent would have been required for the work.

6.4.3 In my view it is clear that the work was not consented under section 35 of the former Act. I have also concluded that the work does not currently comply with the Building Code. A notice to fix, under the current Act, can be issued in respect of work for which a building consent was required but not sought, and in respect of completed work that does not comply with the Building Code. I therefore conclude that the notices to fix were correctly issued.

6.4.4 I note the notices to fix refer to the sleep-out being a 'minor household unit' which is not a term defined in either the Building Act or the Building Code. However, this may indicate the existence of two separate household units in the building comprising the original house, the lean-to extension, and the sleep-out addition. The authority should satisfy itself as to the use of the building and, if two household units exist, what fire provisions are required to achieve compliance in terms of fire separation and means of escape.

6.4.5 In addition the notices to fix also state that a building consent was not obtained under section 40 of the current Act – in my view this reference should be to section 35 of the former Act. The notice to fix should be amended accordingly.

6.4.6 I note that if the work had been completed under the current Act, it would not be considered a change of use (refer Determinations 2009/021 and 2010/107).

#### **6.5 Was the work exempt from the need for Building Consent?**

6.5.1 The applicant has submitted that much of the building work is exempt from the need for a building consent. This assessment is based upon the provisions of the current Act. However, the relevant legislation is that which applied at the time the work was completed was the Third Schedule of the former Act.

6.5.2 The Third Schedule did not provide exemption for alterations or for specific building elements, such as windows or doors. Consequently, no part of the building works would have been exempt from the need for a building consent at the time the work was undertaken. I note that, even if the works were exempt from the need for a building consent, the work is still required to comply with the requirements of the Building Code.

## **6.6 Conclusion**

6.6.1 I conclude that the building work was carried out without a building consent when consent was required, and the building work does not comply with the Building Code. The authority was therefore correct to issue the notices to fix.

## **7. What is to be done?**

7.1 The authority should modify and reissue the notices to fix to take account of the findings of this determination. It is then up to the applicant to decide how best to meet the notice's requirements by either rectifying the matters of non-compliance, or by removing the structure. I note that the applicant has indicated that current development proposals include removing the structure.

7.2 The authority should also satisfy itself that the sleep-out is not dangerous or insanitary as defined in the Act.

## **8. Decision**

8.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the building work does not comply with the Building Code in force at the time that the work was carried out and accordingly I confirm the authority's decision to issue the notices to fix dated 15 June, 4 August, and 24 September 2010.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 13 April 2011.

John Gardiner  
**Manager Determinations**