



## Determination 2019/050

### Regarding the issue of notices to fix in respect of building work to convert an existing shed and sleep-out to a self-contained unit at 61 Selbourne Street, Grey Lynn, Auckland



#### Summary

This determination considers the issue of notices to fix in regard to building work carried out to convert an existing shed and sleep-out/workshop into a self-contained unit. The determination considers whether the authority was correct to issue the notice to fix, and whether a change of use had occurred.

#### 1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“the Act”) made under due authorisation by me, Katie Gordon, Manager Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The parties to the determination are:
  - the owner of the property, D Kelso (“the applicant”), represented by an agent (“the agent”)
  - Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 This determination arises because of a dispute about the issue of notices to fix in respect of the conversion of an existing sleep-out/workshop to a self-contained unit (“the self-contained unit”).

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

1.4 The matter to be determined<sup>2</sup> is therefore the authority's issue of four notices to fix for the self-contained unit. In making my decision, I have considered:

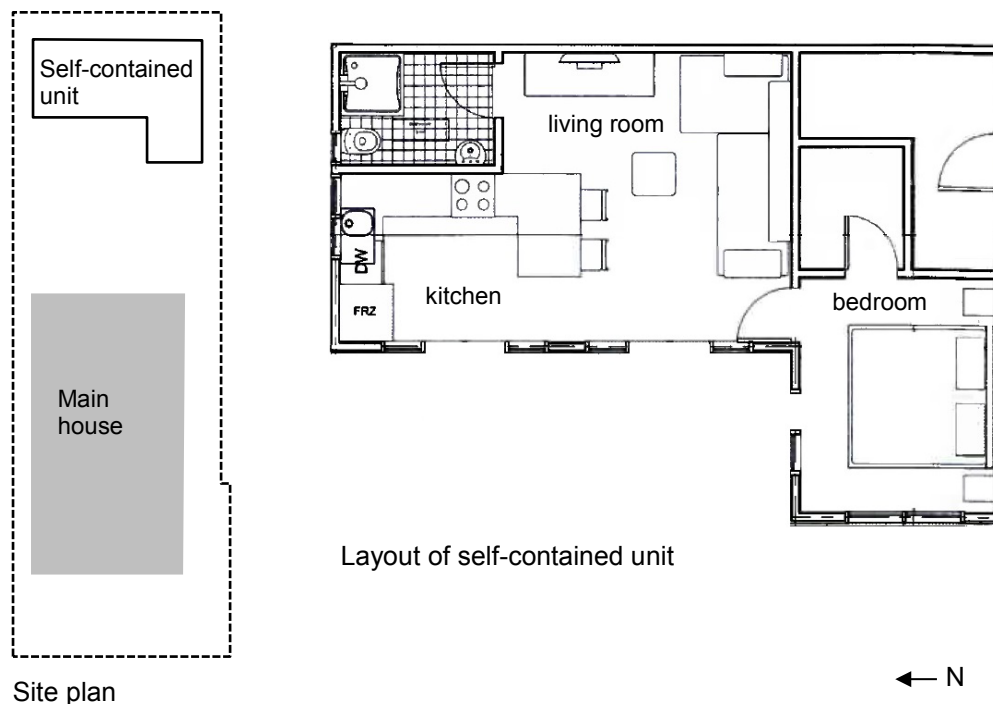
- whether there have been breaches of section<sup>3</sup> 40 as described in the notices to fix
- whether the notices to fix were correctly issued
- whether there has been a change of use in converting the building to a self-contained unit.

1.5 In making my decision, I have considered the submissions of the parties, and the other evidence in this matter.

1.6 The relevant parts of the legislation and regulations are set out in Appendix A.

## 2. The building

2.1 The property is a residential section with a main dwelling to the front of the property and a self-contained unit, which is the subject of this determination, located to the



**Figure 1: Site plan and layout of the self-contained unit (not to scale)**  
rear of the property.

2.2 The self-contained unit is a single storey structure, with an approximate area of 49m<sup>2</sup>. The building has timber weatherboard wall cladding and profiled metal roofing. Inside the self-contained unit there is a bedroom, bathroom, living space, and a kitchen with laundry facilities.

2.3 The kitchen contains a sink, stove, and washing machine. The bathroom contains a shower, toilet, and sink. Gas cylinders and a water heater heat the water for the unit.

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

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

- 2.4 Since June 2017 the self-contained unit has been listed on an online accommodation website<sup>4</sup> as accommodation for the public.
- 2.5 The self-contained unit is presently being used as space for extended family to stay and for the public guests who have booked through the online accommodation website. The public guests do not have access to the main house.

### 3. Background

- 3.1 Drawings dated and approved in 1985 described a 'garden shed' to be constructed behind the main dwelling. At that time the building was noted as a 'shed' and 'garden shed' on the approved drawings.
- 3.2 Information provided with the application for a determination notes a sleep-out and workshop extension was added to the existing shed sometime in 2000.
- 3.3 In early 2017, the building was converted into a self-contained unit. Building work was carried out as part of the conversion, which included the installation of sanitary fixtures.
- 3.4 On 6 July 2017 and 12 July 2017, the authority visited the property as a result of a complaint about building work carried out at the property. However, on both occasions an inspection of the self-contained unit was not carried out<sup>5</sup>. On 26 July 2017, the authority visited the property and carried out an inspection of the building work and established the building contained sanitary facilities.
- 3.5 On 2 August 2017, the authority wrote to the applicant and issued notice to fix number NOT21359396 ("the first notice"). In its letter the authority noted it:

... has identified unconsented building works which have been undertaken at [the property]. ... The building work undertaken is not exempt under schedule 1 of the Act. [The authority] has no consented building records for this work.

- 3.6 The first notice stated:

#### **Particulars of contravention or non-compliance**

Contrary to s40 of the [Act], the following building works have been undertaken at [the property], without first obtaining a building consent:

- Installation and plumbing of additional sanitary fixtures, specifically, toilet, shower, kitchen sink and vanity, in the existing outbuilding titled as a 'garden shed' (eastern boundary). (Contravenes exemption 35 of schedule 1 of the Act – increased the total number of sanitary fixtures).
- Installation of a new instantaneous gas water heater to the garden shed. (Contravenes exemption 36 of schedule 1 of the Act – repair and maintenance of an existing water heater).
- Increasing the footprint at the southern end of the existing garden shed by approximately 7m<sup>2</sup> in floor area. (Contravenes exemption 7 of schedule 1 of the Act – repair or replacement of outbuilding).

#### **To remedy the contravention or non-compliance you must:**

Choose one of the following options to achieve compliance:

1. Pursue any legal options to make the building work comply with the [Act] and the Building Code. This could include a certificate of acceptance ... in accordance with s96 of the Act; or
2. Remove the unauthorised building works.

<sup>4</sup> <https://www.airbnb.co.nz/rooms/18779060?location=Grey%20Lynn%2C%20Auckland&s=ikEd3uhZ> (accessed July 2018).

<sup>5</sup> An inspection did not occur because the applicant was not home.

- 3.7 On 10 October 2017, the authority wrote to the applicant about the expiry of the first notice and issued notice to fix number NOT21368640 (“the second notice”). The second notice had the same particulars and remedies as the first notice.
- 3.8 On 15 December 2017, the authority wrote to the applicant with infringement notice no.61000061696.
- 3.9 On 18 December 2017, the authority wrote to the applicant about the expiry of the second notice and issued notice to fix number NOT21377666 (“the third notice”). The third notice also had the same particulars and remedies as the first notice.
- 3.10 On 25 May 2018, the authority wrote to the applicant about the expiry of the third notice and issued notice to fix number NOT21397449 (“the fourth notice”). The fourth notice had similar particulars and remedies as the previous notices, but included the additional particulars:
- Contrary to Section 114 of the [Act], the owner must give notice, in writing, of change of use of the building, specifically, the existing garden shed at the rear...being converted into a minor household unit where the household unit did not exist before
- Contrary to Section 115 of the [Act], the owner must not change the use of the building unless the territorial authority is satisfied, on reasonable grounds, that it will comply (as [nearly as is] reasonably practicable) with the Building Code...
- 3.11 The remedies to regularise the building work stated on the fourth notice had been amended from the third notice to include the owner “obtaining a Building Consent for the Change of Use”.
- 3.12 An application for determination was received on 29 May 2018.

#### **4. The submissions**

- 4.1 The application for determination included a submission and copies of the first and fourth notices to fix and the related covering letters. The submission set out the background to the application for determination being made, and the reasons the agent believes the authority incorrectly issued the notices to fix and incorrectly refused to accept the notices had been complied with (if they were valid). In summary, the agent submitted:
- The authority was incorrect to include the contravention of section 40 when the building work was complete and the area occupied on the date of inspection. There was no person ‘carrying out’ building work at the time of the inspection and so there was no offence under section 40.
  - The wording in the notices to fix does not relate to section 40 and instead reflects section 44 because the owner has not obtained a building consent. However, there is no offence attached to section 44.
  - The notices to fix were not issued to the correct specified person under section 163(b) because the notice related to “building work being carried out”.
  - The remedies stated in the notices to fix were not specific and did not relate to the particulars. The requirement to remove the work was “an unlawful demand”. Also, a certificate of acceptance is not a mandatory requirement, and the wording suggested it needed to be granted.
  - The notice to fix included allegations of contraventions of Schedule 1 of the Act, which is incorrect because they are not mandatory provisions. The exemptions under Schedule 1 may be used to show a consent was not required.

4.2 On 29 May 2018, the authority acknowledged the application for a determination and provided a copy of the property file. The documents included copies of all four notices to fix (“the notices to fix”) and their cover letters.

4.3 On 8 June 2018, the authority provided additional information that was not on the property file. The documents included:

- an ‘incident checklist’ and records of subsequent correspondence between the authority and the applicant’s previous representative
- photographs of the self-contained unit dated 1 August 2017.

4.4 On 8 June 2018, the agent noted in an email:

... the evidence does not indicate any work in progress on [1 August 2017]. Can [the authority] be asked to indicate the work that is the subject of the allegation under [section] 40 that a person is carrying out building work. Otherwise it seems the evidence is only of existing building and perhaps unapproved work that is not an offence under the [Act]. ...

4.5 On 8 June 2018, the authority re-sent copies of the notices to fix and cover letters, and the infringement notice and cover letter dated 15 December 2017.

#### **4.6 The draft determination and submissions in response**

4.6.1 A first draft of the determination was issued to the parties for comment on 18 December 2018.

4.6.2 The draft determination concluded the authority was correct to issue the fourth notice to fix for the building work. However, the notice to fix incorrectly included references to contraventions of Schedule 1 of the Act and required a building consent for the change of use instead of written notice. The draft determination concluded the self-contained unit did not fall within the classified use ‘Detached dwellings’ and instead fell within the ‘Community Service’ classified use, based on the services offered to the occupants, and its commercial intended use.

4.6.3 On 17 January 2019 the authority accepted the draft determination and did not provide any further comment.

4.6.4 On 21 January 2019 the agent provided a submission in response to the first draft, reiterating previous submissions and noting (in summary):

- the building has not undergone a change of use
- further clarification of who is a ‘specified person’ is required
- the use of the property as public accommodation is occasional and does not reflect the self-contained unit’s intended use
- the examples of ‘Detached dwellings’ need to be considered when assigning the classified use of the building.

4.6.5 A second draft of the determination was issued to the parties for comment on 29 August 2019.

4.6.6 The second draft determination differed from the first draft in concluding the self-contained unit fell within the classified use ‘Detached dwellings’ based on an examination of the supplementary examples of the classified uses.

- 4.6.7 On 12 September 2019 the agent accepted the draft determination and made the following comments (in summary):
- under section 163 the specified person is the person carrying out the building work, and the owner did not carry out the building work
  - a notice to fix should not be issued because the building work has been completed and there is no “continuing offence”
  - there is no requirement for an owner to regularise the building work through applying for a certificate of acceptance.
- 4.6.8 On the same day the authority also accepted the draft determination and made no further comments.

## 5. Discussion

### 5.1 Unconsented building work

- 5.1.1 The notices to fix stated the applicant had contravened section 40 of the Act in respect of the installation and plumbing of additional sanitary fixtures, the installation of a new gas water heater and increasing the footprint of the building by 7m<sup>2</sup>.
- 5.1.2 With respect to the installation and plumbing of sanitary fixtures and the installation of a new gas water heater to the self-contained unit, the owner has confirmed the building work was carried out in early 2017.
- 5.1.3 Section 40 states that building work must not be carried out except in accordance with a building consent. However, section 42A provides that a building consent is not required for building work described in Schedule 1 of the Act.
- 5.1.4 It is the version of Schedule 1 of the Act that was in force at the time the building work was carried out that applies. For the installation of sanitary fixtures and new gas water heater the relevant version is therefore the current<sup>6</sup> Schedule 1.
- 5.1.5 With respect to the installation and plumbing of sanitary fixtures and the installation of a new gas water heater to the self-contained unit, it is my view that this work is not within the ambit of Schedule 1. There are exemptions under Schedule 1 that allow for alterations to existing sanitary plumbing and the repair and maintenance of existing water heaters, but as these sanitary fixtures and gas water heater were new installations, the exemptions under Schedule 1 did not apply. Therefore, these works are correctly described in the notices to fix as building work that required a building consent.
- 5.1.6 With respect to building work to increase the footprint of building, I note the shed was approved in 1985 and the agent has stated the extension to the shed was constructed in 2000. I understand the applicant was the owner when this work was carried out. The Building Act 1991 (the former Act) was in force at this time.

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<sup>6</sup> The current version of Schedule 1 came into force on 28 November 2013.

5.1.7 Section 32 of the former Act stated:

(1) It shall not be lawful to carry out building work except in accordance with a consent to carry out building work ... issued by the territorial authority.

(2) This section shall not apply in respect of –

...

(b) Any building work specified in the Third Schedule to this Act as being work for which a building consent is not required ...

5.1.8 The Third Schedule to the former Act described buildings and building work that were exempt from the requirement to obtain a building consent.

5.1.9 With respect to the building work to increase the footprint of the building, it is my view that this work is not within the ambit of the Third Schedule to the former Act. The building work to extend the shed was not within the discrete list of exempted work under the Third Schedule. Therefore, this building work is correctly described in the notices to fix as building work that required a building consent.

5.1.10 I note this work was carried out when the former Act was in force, however this fact does not restrict an authority from issuing a notice to fix under the current Act.

## 5.2 Who a notice to fix can be issued to and when

5.2.1 In the application for a determination, the agent submitted the notices to fix cannot be issued to the applicant (as the owner) as the applicant did not carry out the building work. The agent has also submitted the contravention of section 40 was misstated as the building work had been completed for three months. The agent argued a notice to fix cannot be issued as no building work was being carried out at the time of inspection and therefore there was no contravention of section 40.

5.2.2 Determination 2016/009<sup>7</sup> discussed who a notice can be issued to, and when it can be issued, and stated:

7.4.3 ... Section 164(1)(a) provides for a notice to fix to be issued if 'a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent)...'

7.4.4 A specified person is defined in section 163 as meaning

(a) the owner of a building; and<sup>[8]</sup>

(b) if the notice to fix relates to building work being carried out,—

(i) the person carrying out the building work; or

(ii) if applicable, any other person supervising the building work.

7.4.5 This means that a notice to fix can be issued to the owner of the building as well as to the person who is physically carrying out or supervising the building work. The issue of a notice to fix is not limited to only the person carrying out or supervising the building work.

7.4.6 The contravention in this case is the failure to comply with the requirement of section 40(1) of the Act; 'A person must not carry out any building work except in accordance with a building consent' and section 40(2) states 'A person commits an offence if the person fails to comply with this section'.

7.4.7 The person who is responsible for obtaining consent is identified in section 14B

<sup>7</sup> Determination 2016/009 Regarding the issue of notices to fix and the refusal to issue a certificate of acceptance in respect of the conversion of a double garage over a boundary (23 March 2016).

<sup>8</sup> Section 163 of the Building Act was replaced on 1 January 2017 by the Building (Pools) Amendment Act 2016. The amendment removed the word 'and' from the definition of section 163.

An owner is responsible for —

- (a) obtaining any necessary consents, approvals, and certificates:
- (b) ensuring that building work carried out by the owner complies with the building consent or, if there is no building consent, with the building code:
- (c) ensuring compliance with any notices to fix.’

And section 44 provides that an owner must, before the building work begins, apply for a building consent.

7.4.8 It follows that the person responsible for obtaining a building consent (the owner) has committed an offence when building work is carried out, albeit on behalf of the owner, without consent being obtained when consent was required.

...

7.4.11 It would be incorrect to interpret the Act to mean that an authority could not issue a notice to fix if the building work was completed prior to the authority becoming aware of the building work being done. Offences are worded in the present tense rather than the past tense, and regulatory offences are less likely to be offences that are detected at the time that they occur. What is required is evidence of the offence and the person who did the work or was responsible for the work being done.

5.2.3 The agent is of the view that when unconsented building work has been completed a notice to fix should not be issued. Determination 2016/009 also stated:

7.4.15 ... Once building work has been completed a notice to fix may be issued if that work was carried out contrary to the Building Code or carried out without a building consent when one was required – there is no particular time limit on when such a notice to fix might be issued although it cannot be issued once a code compliance certificate has been issued for work that is the subject of a building consent.

5.2.4 While the legislation has had a minor amendment since Determination 2016/009 was issued, I maintain this view. I also note that section 165, which sets out the content of a notice to fix, refers in subsection (1)(c) to building work that “is being or has been carried out”.

5.2.5 The agent has submitted the removal of the word ‘and’ from the definition of ‘specified person’ in section 163 by an amendment means that paragraphs (a) and (b) are no longer conjunctive. In the agent’s view, this means that if a notice to fix that relates to building work being carried out, a specified person is the person physically carrying out the building work who is committing the offence. Therefore, the agent is of the view, that if the owner is not the person physically carrying out the building work, the notice to fix cannot be issued to them.

5.2.6 The responsibilities of an owner are set out in section 14B of the Act:

14B Responsibilities of owner

An owner is responsible for—

- (a) obtaining any necessary consents, approvals, and certificates:
- (b) ensuring that building work carried out by the owner complies with the building consent or, if there is no building consent, with the building code:



- 5.2.7 Regardless of the specified person definition, section 14B does not limit the responsibilities of an owner to a specific timeframe or to whether they physically carry out the works. I am of the view that the legislation is clear that an owner is responsible for building work carried out, whether or not the owner is physically carrying out the work.
- 5.2.8 Accordingly, I consider that the notices to fix were correctly issued to the applicant, as the owner, because building work had been carried out without a building consent being obtained as required by section 40, and an owner is responsible for obtaining any necessary consent.

### 5.3 The wording of the notices to fix

- 5.3.1 The notices to fix correctly identify section 40 as the main contravention. However, the notices to fix quantify the grounds of the section 40 contravention by identifying parts of Schedule 1 of the Act. I note for each item of building work carried out, the notices to fix refer to a contravention of an exemption under Schedule 1 of the Act.
- 5.3.2 Schedule 1 of the Act describes items of building work that do not require a building consent. It sets out a description of the building work, and any conditions that must be met, such as who must carry out the building work for the work to be exempt.
- 5.3.3 The applicant has contravened section 40, not Schedule 1 of the Act, by carrying out building work that is not exempt without first obtaining a building consent. Therefore, the notices to fix incorrectly reference a contravention of Schedule 1 of the Act for each item of building work.
- 5.3.4 The prescribed content of a notice to fix is set out in Form 13 of the Building (Forms) Regulations 2004 (refer Appendix A.4). This form includes the requirement for a notice to fix to state how to remedy the particulars of contravention or non-compliance:  
*To remedy the contravention or non-compliance you must: [state any building work that must be carried out and whether a certificate of acceptance must be applied for]*
- 5.3.5 The agent is of the view there is a lack of specific remedies in the notices to fix. The remedies in the fourth notice to fix are stated as:  
Choose from the below options to achieve compliance:
1. Continue to pursue any legal options to make the building works comply with the [Act] and the Building Code. This may require the making of an application for a Certificate of Acceptance...and obtaining a Building Consent for the Change of Use; or
  2. Remove the unauthorised building works and return the building back to the consent plans / use.
- 5.3.6 With the exception of the requirement to obtain a building consent, I am of the view the remedies specified within the notices to fix are appropriate. A certificate of acceptance is the appropriate regulatory mechanism to address building work that has been carried out without building consent first being obtained when consent was required. However, requiring a building consent for the change of use is not appropriate in this situation because the building work has already occurred and no new work is proposed.

5.3.7 Therefore, the applicant was required to get a building consent to extend the building, but did not obtain one, which is a contravention of the Act. The notice to fix was issued to the correct person, correctly contained reference to the contravention of section 40, and the remedy outlined the appropriate regulatory mechanism to regularise the unconsented building work. However, the notice to fix should be amended to remove the references to Schedule 1 of the Building Act and the requirement to obtain a building consent in respect of the change of use. I note the date the owner had to comply with the fourth notice to fix was suspended under section 183 and the authority should take this into account when amending the notice to fix.

## 5.4 Change of use

5.4.1 The authority's letter accompanying the fourth notice (refer to paragraph 3.10) stated the authority had identified a change of use at the property, because the 'garden shed' had been converted to a "minor household unit"<sup>9</sup>. The Ministry also identified that the self-contained unit is being advertised on an online accommodation website.

5.4.2 I will now consider whether there have been any changes of use to the shed. I will first consider the building work in 2000 when the shed was converted into a sleep-out ("the 2000 building work"), and then second the building work in 2017 when it was converted into a self-contained unit and advertised as public accommodation on an online accommodation website ("the 2017 building work").

## 5.5 The 2000 building work

5.5.1 The first change of use occurred when the former Act was in force. Section 46 of the former Act required an owner who changed the use<sup>10</sup>, and where work was required to bring the building into compliance, to notify the authority of the change.

5.5.2 The 2000 conversion from a shed to a sleep-out/workshop was a change of use under the former Act. The building was permitted to be built as a 'shed' in 1985 and when the former Act came into force would have fallen under the classified use<sup>11</sup> category 'Outbuildings'. This category applies to:

...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.

5.5.3 In this case, I do not consider the shed could be said to be a garage due to the lack of car access and the building permit stating in various places the building was a shed.

5.5.4 I consider the building required upgrades to bring it into compliance with the Building Code at the time it was converted because the shed was constructed in a manner not intended for human habitation (an unlined and uninsulated building), but then it was occupied as a sleep-out. However, there is no record of the applicant, who was the owner at the time, notifying the authority of this change of use. Despite the lack of notification and assessment of compliance by the authority, the shed was converted to an unapproved sleep-out with its classified use changing from Outbuildings to Detached dwellings. I note the authority will need to carry out an

<sup>9</sup> I note that the term 'minor household unit' used by the authority is not a term defined in either the Act or the Building Code.

<sup>10</sup> Under Clause A1 – Classified Use of the Building Code.

<sup>11</sup> Classified uses are different categories of buildings described in Clause A1 of the Building Code. The Building Code requirements are determined based on what category the building falls within.

assessment of the building taking into account the unapproved change of use and the subsequent building work, and I leave this to the parties to resolve.

- 5.5.5 Subsequently, I must determine whether another change of use occurred when the sleep-out was converted to a self-contained unit for public accommodation.

## **5.6 The 2017 building work**

- 5.6.1 The current Act has a different test from the former Act for determining whether a change of use has occurred.

- 5.6.2 Under section 114 of the Act, if an owner is planning to change the use of a building (defined in Schedule 2 of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 (“the Change of Use Regulations”)), an owner must provide written notice to the authority. An owner must not change the use of the building unless the authority has given written notice that the building in its new use will comply with the Building Code to the extent required by section 115.

- 5.6.3 Regulation 5 of the Change of Use Regulations provides:

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.

- 5.6.4 Accordingly, the first step to ask whether the building’s use as defined in Schedule 2 of the Change of Use Regulations has changed. If the building’s use has changed under Schedule 2, the second step is to see whether the Building Code requirements in its new use are additional to or more onerous than the requirements in its old use. For the purpose of establishing the performance requirements of the Building Code that apply in the building’s new use, I must consider what is the correct classified use under Clause A1.

- 5.6.5 The application for determination states the building “is intended to be a self-contained space for family and members of the same household”.

- 5.6.6 I note however, that the self-contained unit is also advertised as public accommodation on an online accommodation website, which is an online marketplace where people let out parts of, or whole, properties to guests for a fee. The self-contained unit that is the subject of this determination can be rented by a single group of up to two people at any one time. Since June 2017 the building has been let on at least 23 separate occasions, with at least 19 occasions in 2018 for varying durations.

- 5.6.7 The first step in assessing whether a change of use has occurred is to determine whether the building has changed use under the Change of Use Regulations. The following table sets out the relevant use categories discussed in this determination as defined in Schedule 2 of the Change of Use Regulations:

**Table 1: Use categories defined in Schedule 2 of the Regulations**

Use	Spaces or dwellings	Examples
<b>Uses related to sleeping activities</b>		
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
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
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, wharehousi

### SH (Sleeping Single Home)

- 5.6.8 The building's previous use as a sleep-out fell under 'SH (Sleeping Single Home)'. For the use as a self-contained unit to fall within this use category, the occupants must live as a "single household or family".
- 5.6.9 The building is intended to be used by friends and family, as well as the public. The building as a self-contained unit can only be let by one group of up to two occupants, as stated in the online advertisement. I consider it is expected the occupants will have a relationship similar to a "single household or family" because they are letting a building together. However, for the reasons discussed below, I consider the use of the self-contained unit fits more appropriately in 'SA'.

### SR (Sleeping Residential)

- 5.6.10 It is clear the building does not fall under 'SR (Sleeping Residential)' because the self-contained unit is not attached to the main house.

### SA (Sleeping Accommodation)

- 5.6.11 I am of the view that the use as a self-contained unit in this particular circumstance fits more appropriately within the 'SA (Sleeping Accommodation)' category. To fall within this use, the space must be available for transient accommodation or there must be limited assistance or care provided for people.
- 5.6.12 In this instance, the self-contained unit offers transient accommodation because the building is available to the public for short-stay accommodation as listed on an online accommodation website.

- 5.6.13 Therefore, the use of the self-contained unit falls within SA, despite the fact that friends and family also use the unit, and the use has changed from the previous use of SH as a sleepout under the Change of Use Regulations. In coming to this view, I have considered the intent of the Change of Use Regulations to require upgrades when the use of a building changes to one with increased safety and health risks.
- 5.6.14 The use of a building changing under the Change of Use Regulations does not automatically trigger a change of use under sections 114 and 115. To satisfy these sections the building must change its use under Schedule 2 of the Change of Use Regulations (first step), and its new use must have more onerous or additional requirements than its old use (second step).
- 5.6.15 The Building Code sets out the requirements a building must meet based on its ‘intended use’ (section 16 of the Act). The intended use of a building informs its ‘classified use’. Clause A1 Classified uses of the Building Code classifies buildings under seven categories called classified uses. A building must satisfy the performance requirements set out in the Building Code relevant to its classified use. The intended use informs the classified use, and the classified use informs what mandatory performance requirements of the Building Code apply to a specific building.
- 5.6.16 Therefore, to see whether there are more onerous or additional performance requirements, the building’s classified use (both old and new) under Clause A1 must be established. If the new classified use has more onerous or additional performance requirements when compared to the old classified use, the second step of the change of use test will be satisfied. The classified uses are set out in Appendix A and discussed further below.

## 5.7 Intended use

- 5.7.1 Regulation 3(3) of the Building Regulations 1992<sup>12</sup> states:
- The classified use or uses of a building or part of a building shall be the ones that most closely correspond to the intended use or uses of that building or part of that building.
- 5.7.2 Section 7 of the Act defines “intended use” as including:
- any reasonably foreseeable occasional use that is not incompatible with the intended use
- 5.7.3 The agent has stated the intended use of the building is as a self-contained space for family and members of the same household.
- 5.7.4 A previous determination<sup>13</sup> concluded the term “intended use”, as defined in section 7 of the Act, is not a subjective view based on the owner’s stated use of the building. While the owner’s proposed use is taken into account, the assessment of the intended use also requires an objective assessment of the use to which the building can be put to based on its physical layout and attributes (or the plans and drawings). This objective assessment is to ensure the building’s stated use is in line with the current or proposed operation of the building.
- 5.7.5 In this case, the present use of the building provides accommodation for a mixture of extended family stays and third party occupants who have booked through the online accommodation website.

<sup>12</sup> The Building Code is contained in Schedule 1 of the Building Regulations 1992.

<sup>13</sup> Determination 2011/069 Regarding conditions to a building consent and the use of a building (12 July 2011).

## 5.8 Classified use

- 5.8.1 Sleeping uses are separated into two categories – Housing and Communal Residential. Housing applies to buildings or uses whether there is “self care and service (internal management)”, and Communal Residential applies where “assistance or care is extended to the principal users”.
- 5.8.2 It is not always obvious what classified use a building will fall within. The intended use may not neatly fit into the classified use definitions or the given supplementary examples. In this case, it is not clear whether the use of the self-contained unit as public accommodation will fall within Housing or Communal Residential.

## 5.9 Housing

- 5.9.1 The ‘Housing’ category contains three classified uses where there is “self care and service (internal management)”:

**Table 2: Extract from Clause A1**

Classified use	Examples
<b>2.0 Housing</b>	
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.	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.	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.	within a commune or marae

- 5.9.2 The Housing category consists of three different types of dwelling that relate to use by households or families. Within the Housing category occupants are expected to practice “self care and service” by looking after themselves and each other, as a family would. This concept is reinforced through the Building Code performance requirements that are applicable to ‘Housing’, particularly those related to life safety, which are significantly less onerous when compared with Communal Residential requirements. The expectation is that within a “household” or “family” an individual becoming aware of a fire would naturally alert and assist others within the building to escape. There are also additional amenity requirements for buildings that fall within Housing, which are not required for buildings that fall within Communal Residential.
- 5.9.3 The Housing category places an emphasis on the requirement for a family or a family-like arrangement, through the inclusion of the term “family” within the description of each subcategory. I consider the fact occupants will exercise “self care and service” referred to in Clause 2.0.1 will be reflected in the characteristics of a household or family.

## 5.10 What is a ‘household’?

5.10.1 A ‘household’ is not a defined term in either the Building Act or Building Code. The meaning of the word ‘household’ has been previously considered in the courts.

5.10.2 The District Court in *Queenstown Lakes District Council v The Wanaka Gym Ltd*<sup>14</sup> set out a list of factors it considered when deciding a commercial gym with a residential unit added to the back did not constitute a single household. The High Court in *The Wanaka Gym Limited v Queenstown Lakes District Council*<sup>15</sup> approved those factors set out in the earlier District Court decision:<sup>16</sup>

In determining that the company’s building could not be properly be described as a dwelling for use as a single household, he said:

[27] It seems to me in this case the following factors are relevant:

- (a) There is considerable variance in the numbers at any given time;
- (b) There are large numbers of people involved in the occupation of the building;
- (c) There is a significant degree of restriction as a matter of contract on the freedoms of the occupant which is inconsistent with people being resident in a household;
- (d) The relatively short term of the residence;
- (e) The fact that there is no necessary connection with the others residing in the house;
- (f) There is no agreement of the residents to reside together;
- (g) The whole *raison d’être* of the building essentially is commercial rather than domestic.

5.10.3 The High Court stated:

... the issue of whether a building is used as a dwelling for a single household is a question of fact and degree. The ultimate conclusion is reached through an evaluative process that takes into account all the factual issues that are relevant to the case in question.

5.10.4 Determination 2018/015<sup>17</sup> considered whether the occupants living in a three-storey building that had separate cooking, sanitary, and laundering facilities on each level, and whose numbers varied from 15 to 28, were a single household. The determination assessed the building against the factors used in *Wanaka Gym*, and found the majority of factors to be relevant, which indicated a lack of social cohesion. The occupants could not be described as a “single household” because of the configuration of the house and lack of social cohesion between the occupants.

5.10.5 The meaning of ‘household’ was also considered by the District Court in *Jayashree Limited v Auckland Council*<sup>18</sup>, which was an appeal of Determination 2018/015. The Court stated:

While essentially an issue of fact, the meaning of the word “household” has been considered in several decisions including *Hopper Nominees Limited v Rodney District Council* where Anderson J considered the meaning of the word as it appeared in s 30 of the Rating Powers Act 1988, saying:

Such an intent is most consistent, I think, with the ordinary New Zealanders concept of a ‘household’ namely ‘an organised family, including servants or attendants dwelling in a house’... The word ‘family’ has a wide meaning adequate in modern use

<sup>14</sup> *Queenstown Lakes District Council v The Wanaka Gym Ltd* DC Christchurch CIV 2003 002 0265, 18 November 2008.

<sup>15</sup> *The Wanaka Gym Limited v Queenstown Lakes District Council* [2012] NZHC 2662.

<sup>16</sup> *The Wanaka Gym Limited v Queenstown Lakes District Council* [2012] NZHC 2662 at [29].

<sup>17</sup> Determination 2018/015 Regarding a notice to fix and the refusal to issue a certificate of acceptance for alterations to a house (20 April 2018).

<sup>18</sup> *Jayashree Limited v Auckland Council* [2019] NZDC 2407.

to connote relationships of blood or marriage or other intimate relationships of a domestic nature, including for examples, persons sharing a dwelling-house such as students or friends. The essential connotation of the term is familial domesticity.

...I accept in terms of the meaning given to the word 'household' by Anderson J in *Hopper Nominees Limited* that the configuration of the dwelling-house as well as the means by which the occupants were obtained, namely by advertisements in public media, means that the concept of familial domesticity is missing and that the various occupants do not operate as a single household.

5.10.6 The High Court also referenced the importance of social cohesion:

The very nature of the tenancy arrangements, their varied occupancy and absence of close familial relationships means that inevitably there would be less social cohesion in the event of an emergency such as a fire as would occur in a true organised family household.

5.10.7 The judgment reiterated the factors that can be used (refer paragraph 5.10.2) when assessing whether a building is a single household, noting that the factors are not exhaustive. In my view, the factors can help in considering whether there is social cohesion, and consequently whether the occupants are living as a single household.

5.10.8 Therefore, for a group of occupants to be described as a household (or family) they should display "self care and service" and this will be demonstrated by their familial domesticity, for example the social cohesion present between the occupants.

5.10.9 I note this assessment will need to be made on a case-by-case basis, as there is no one definitive list of characteristics a group of occupants or building must display to be considered a "single household or family". Given the discussion above regarding what is meant by a 'household', I will now consider whether the use of the self-contained unit as public accommodation could be considered to fall within the Housing category.

## 5.11 Does the building fall within the classified use 'Detached dwellings'?

5.11.1 In the following paragraphs I consider whether the building falls within one of the classified uses in the Housing category. In making this analysis I have considered the physical configuration of the building and its intended use as described by the agent.

5.11.2 I note the building is clearly not a group dwelling and does not have the physical configuration and attributes to be used as a multi-unit dwelling, therefore I must consider whether the building has a Detached dwellings classified use.

5.11.3 The Detached dwellings classified use is limited to "where a group of people live as a single household or family". Accordingly, I have considered the present case against the factors taken from *Wanaka Gym* and applied in Determination 2018/015 when considering whether the occupants could be described as single household:

Factor from <i>Wanaka Gym</i>	The subject building
Varying numbers at any given time	Only one group are permitted to stay in the building at any time.
Large numbers of people involved in the occupation of the building	The building can only accommodate up to two people.
Significant degree of restriction (as a matter of contract) on the freedoms of the occupant, which is inconsistent with people being resident in a household	No parties, events, or pets, and smoking only allowed outside the property.



Relatively short term of the residence	Short term stays.
There is no connection with the others residing in the house	Only bookable by one group at any time, and for that reason it is reasonable to assume the occupants will display social cohesion.
No agreement of the residents to stay together	There is agreement of the residents to stay together because the building is only bookable by one group
The whole raison d'être of the building essentially is commercial rather than domestic.	The building appears to be mainly used as public accommodation and to a lesser extent as accommodation for family and friends.

- 5.11.4 The building in this case does not broadly meet all the factors that resulted in the occupants in both Determination 2018/015 and *Wanaka Gym* failing to be described as a “single household”. However, the use of this building includes short term stays, and has a commercial element to the use, which is typically not characteristic of dwellings occupied by a single household or family.
- 5.11.5 Firstly, the fact the occupants in this case will only reside in the building for a short time could exclude the building from falling within Detached dwellings, as some level of permanence would appear to be a key characteristic of a “single household”. Determination 2014/026<sup>19</sup> considered that permanence is not only a matter of how long people stay in a place, but it is also how they view their residence. An occupant who does not consider their accommodation to be permanent is considered more at risk in a fire event and is less likely to be familiar with the escape routes.
- 5.11.6 I will consider the examples of Detached dwellings to understand whether this classified use can include this building where the occupants likely demonstrate “self care and service”, but stay short term, and the building’s use has a commercial element. The following are included as examples of Detached dwellings: “holiday cottage”, “boarding house accommodating fewer than 6 people”, and “hut”. The occupants in these examples would not necessarily be described as a “single household”, or have the social cohesion relied upon in an emergency due to their transient occupancy, lack of connection to each other, and the commercial element of the use. However, based on those examples, the Building Code seems to allow buildings where the occupants could stay short term, provided the number of occupants is low, to fall within Detached dwellings.
- 5.11.7 A “holiday cottage” could describe a self-contained unit that is used for public accommodation. Alternatively, this example could describe a building that is not the primary residence of an owner but instead a second house, such as a weekend bach. While not the permanent residence of the occupants, they are likely to be familiar with the building layout.
- 5.11.8 However, the inclusion of a “boarding house accommodating fewer than 6 people” appears to allow for uses in Detached dwellings that are transient, at least when the occupant numbers are restricted. The occupants in a boarding house could not be described as a “single household”. There is no agreement to reside together, a lack of connection to other occupants, short stays, and the building will have a commercial element to its use.

<sup>19</sup> Determination 2014/026 Regarding which fire risk group should be used in determining the compliance of proposed accommodation (21 May 2014).

- 5.11.9 There is an argument that occupants in a boarding house may have some degree of permanence and develop some form of social cohesion if there are minimum stay periods, or if a boarding tenancy agreement is required. The limited number of occupants also may not significantly affect escape times in the event of a fire. However, the decision in *Jayashree Limited* noted that a collection of unconnected occupants may, over time, learn to cooperate to some extent but this would not translate to the social cohesion of a “true organised family household” in the event of a fire.
- 5.11.10 Therefore, the reliance on social cohesion would seem to be missing in the boarding house example. Instead, the Building Code has accepted a lower fire safety standard and mitigated for the lack of social cohesion within these types of buildings, by restricting the numbers of occupants. Where the occupants are likely to be unknown to each other, as in a boarding house, the limit is less than 6 occupants (not including the residing family). Where the occupants are more likely to know each other and practice “self care and service” the occupancy limit is less explicit, and instead appears to rely on the connection between occupants together with the fact that the building is unlikely to hold large numbers of people.
- 5.11.11 In this case the occupants are likely to demonstrate social cohesion, unlike in some previous determinations<sup>20</sup> where the buildings fell outside the Detached dwellings classified use. Therefore, I consider in this instance the fact there are short stays, and a commercial element does not outweigh the fact the occupants will know each other and have agreed to stay together. This lends itself to “self care and service (internal management)” rather than “assistance or care [being] extended to the principal users” being the common factor in buildings with a Communal Residential use. However, as it is not always obvious which classified use buildings fall into, I have also considered below whether the self-contained unit fits more appropriately into the ‘Communal Residential’ classified use.

## **5.12 Does the building fall within a ‘Communal Residential’ use?**

- 5.12.1 The subcategories within Communal Residential are grouped together based on the degree of ‘assistance or care’ extended to the principal users of the building. The question I will now consider is whether the occupants in this case are the principal users of the building, and if so, whether limited assistance or care is extended to them.
- 5.12.2 Unlike the subcategories within Housing, there is no emphasis placed on the users of the building living as a family (or single household). I also note there is nothing limiting the occupants within the subcategories of Communal Residential from displaying “self care and service” to each other. The supplementary examples cover a range of residential activities that contain different types of occupants. I consider this distinction recognises the occupants are likely to be in an unfamiliar building and the performance requirements reflect the increased risk to life safety.

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<sup>20</sup> Determination 2018/015; Determination 2018/044 Regarding the classified use of a main house which is let out as accommodation (7 September 2018); Determination 2018/045 Regarding the classified use of a building let out as accommodation (11 September 2018).

- 5.12.3 There are two subcategory uses within Communal Residential – Community Service and Community Care.

**Table 3: Extract from Clause A1**

Classified use	Examples
<b>3.0 Communal Residential</b>	
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.	a boarding house, hall of residence, holiday cabin, backcountry hut, hostel, hotel, motel, nurses' 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. (b) Restrained; where the principal users are legally or physically constrained in their movements.	(a) hospital, an old people's home or a health camp. (b) a borstal or drug rehabilitation centre, an old people's home where substantial care is extended, a prison or hospital.

- 5.12.4 I consider it is clear the building does not fall within the Community Care subcategory.
- 5.12.5 Community Service applies to a residential building “where limited assistance or care is extended to the principal users”. A ‘principal user’ is defined in the Building Code as:
- a member of the primary group for which a building was constructed, and therefore explicitly excludes the persons or groups of persons providing care or control of that principal user group
- 5.12.6 In this case, the building is mainly used as public accommodation and therefore these occupants are considered the principal users. I now must consider whether the following services described in the listing on the online accommodation website amount to limited assistance or care, as this is one of the factors that can result in a classified use falling with Community Service:
- luggage drop-off service
  - greeted on arrival and settled in to the accommodation
  - on-site management to help with any queries and itineraries/guides for the city.
- 5.12.7 I note “assistance or care” is not a defined term in the Building Act or Building Code. It is not clear whether assistance or care is referring to assistance arising from Building Code requirements, for example building features that provide assistance in escaping the building, or the ordinary meaning suggesting the level of comfort provided to the occupants. However, it is necessary to consider the nature and degree of the assistance or care.

- 5.12.8 In considering what may constitute “limited” assistance or care, I compare the examples against those in Community Care, which applies to residential buildings where a “large degree” of assistance is provided. It is then apparent Community Care is intended to cover situations where occupants are almost completely dependent on another person (the person offering assistance), whereas occupants in Community Service are largely independent of other people. Taking that into account the threshold for “limited” assistance is not automatically met as soon as any assistance is extended to the principal users. The level of assistance needs to be considered in light of the examples of Detached dwellings and Community Service.
- 5.12.9 The larger degree of independence in Community Service could explain the varying range of what “limited assistance or care” can manifest as within in the examples provided for that classified use. For example, back country huts offer minimal services to occupants, whereas hotels offer a higher level and wider range of assistance.
- 5.12.10 I have considered the nature and degree of assistance or care alongside the examples. The services in this case are primarily for the comfort of the occupant and if removed would not affect how the occupants operated within the building. In the event of an emergency the services would also offer little help.
- 5.12.11 However, if the services offered did meet the threshold of “limited assistance or care”, this alone may not cause the building to fall within Community Service. The examples within Detached dwellings suggest that a building where limited assistance or care is extended to the principal users could still fall within Detached dwellings. For example, ‘boarding house’ is included in both Detached dwellings, with an occupancy limitation, and without an occupancy limitation in Community Service. In both instances, limited assistance or care would be extended to the principal users; the number of occupants is unlikely to alter the fact that this would be offered to some degree.
- 5.12.12 The fact the users of a building may be provided with assistance or care does not necessarily result in the building falling within Community Service where there is a clear single household. Similarly, where there is a lesser degree of assistance of assistance or care but a weak or non-existent single household this may fall within Community Service. In this case, the fact there is a clear single household, and minimal assistance or care offered, leads to me concluding that the building has a classified use of Detached dwellings.
- 5.12.13 I acknowledge also that the building has a commercial element because it is offered as public accommodation, which would seem to align more with the examples in Community Service, such as a hotel. However, a building that offers public accommodation would seem to be allowed for in Detached dwellings, as a number of the examples, e.g. boarding house, holiday cottage, and hut could have a commercial element to them.
- 5.12.14 Therefore, the self-contained unit satisfies the first step, outlined in paragraph 5.6.4, as its use changes under Schedule 2 of the Change of Use Regulations. However, the self-contained unit does not satisfy the second step as the classified use has not changed from Detached dwellings, and subsequently there are no more onerous or additional requirements of the Building Code.

## 5.13 Conclusion

- 5.13.1 I am of the view the self-contained unit used for public accommodation and by friends and family falls under the classified use Detached dwellings.
- 5.13.2 As a result, the applicant was not required to give notice of the intention to change the use (the 2017 building work) under section 114 of the Act from a sleep-out to a self-contained unit because there had not been a change of use using the two step process as outlined in paragraph 5.6.4.
- 5.13.3 In relation to the authority issuing the notices to fix, I conclude:
- the authority was correct to include on the notices to fix a contravention of section 40 in respect of the installation and plumbing of sanitary fixtures and the installation of a new gas water heater, and the building work to extend the self-contained unit
  - the authority was incorrect to include on the notices to fix that Schedule 1 of the Act had been contravened
  - the authority issued the notice to fix to the correct person
  - the authority was correct to include applying for a certificate of acceptance as a remedy in the notice to fix
  - the authority was incorrect to include applying for a building consent in the notice to fix to remedy the change of use.

## 6. What happens next?

- 6.1.1 The authority should amend the fourth notice to fix as outlined in paragraph 5.3.7 and to remove the references to a change of use and re-issue the notice to the applicant.

## 7. The decision

- 7.1 In accordance with section 188 of the Building Act 2004, I hereby determine:
- the authority was correct to issue the notices to fix for the building work
  - the notices to fix incorrectly included references to contraventions of Schedule 1 of the Act
  - the fourth notice to fix incorrectly included a reference to a change of use.
- Accordingly, the wording of the fourth notice to fix should be amended as described in paragraph 6.1.1 of this determination.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 15 October 2019.

Katie Gordon  
**Manager Determinations**

## Appendix A: The legislation and regulations

### A.1 Relevant sections of the Building Act 2004:

#### **14B Responsibilities of owner**

An owner is responsible for—

- (a) obtaining any necessary consents, approvals, and certificates:
- (b) ensuring that building work carried out by the owner complies with the building consent or, if there is no building consent, with the building code:
- (c) ensuring compliance with any notices to fix.

#### ***Building Consents***

#### **40 Buildings not to be constructed, altered, demolished, or removed without consent**

(1) A person must not carry out any building work except in accordance with a building consent.

#### **42A Building work for which building consent is not required under Schedule 1**

(1) Despite section 40, subject to the conditions set out in subsection (2) and whether or not a building consent would otherwise have been required, a building consent is not required for building work in the following categories:

(a) building work described in Part 1 of Schedule 1; or

...

(2) Subsection (1) is subject to the following conditions:

(a) the building work complies with the building code to the extent required by this Act:

(b) after the building work is completed, the building,—

(i) if it complied with the building code immediately before the building work began, continues to comply with the building code; or

(ii) if it did not comply with the building code immediately before the building work began, continues to comply at least to the same extent as it did then comply:

(c) the building work does not breach any other enactment:

...

#### ***Change of use, extension of life, and subdivision of buildings***

114 Owner must give notice of change of use, extension of life, or subdivision of buildings

(1) In this section and section 115, change the use, in relation to a building, means to change the use of the building in a manner described in the regulations.

(2) An owner of a building must give written notice to the territorial authority if the owner proposes—

(a) to change the use of a building; or

...

#### **115 Code compliance requirements: change of use**

An owner of a building must not change the use of the building,—

(a) in a case where the change involves the incorporation in the building of 1 or more household units where household units did not exist before, unless the territorial authority gives the owner written notice that the territorial authority is satisfied, on

reasonable grounds, that the building, in its new use, will comply, as nearly as is reasonably practicable, with the building code in all respects; and

(b) in any other case, unless the territorial authority gives the owner written notice that the territorial authority is satisfied, on reasonable grounds, that the building, in its new use,—

(i) will comply, as nearly as is reasonably practicable, with every provision of the building code that relates to the following:

- (A) means of escape from fire, protection of other property, sanitary facilities, structural performance, and fire-rating performance:
- (B) access and facilities for people with disabilities (if this is a requirement under section 118); and

(ii) will,—

- (A) if it complied with the other provisions of the building code immediately before the change of use, continue to comply with those provisions; or
- (B) if it did not comply with the other provisions of the building code immediately before the change of use, continue to comply at least to the same extent as it did then comply.

### ***Notices to fix***

#### **163 Definitions for this subpart**

...

specified person means—

- (a) the owner of a building;
- (b) if a notice to fix relates to building work being carried out,—
  - (i) the person carrying out the building work; or
  - (ii) if applicable, any other person supervising the building work:
- (c) if a notice to fix relates to a residential pool, a person referred to in section 162C(4).

#### **164 Issue of notice to fix**

(1) This section applies if a responsible authority considers on reasonable grounds that—

(a) a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent); or

...

(2) A responsible authority must issue to the specified person concerned a notice (a notice to fix) requiring the person—

(a) to remedy the contravention of, or to comply with, this Act or the regulations; or

...

A.2 Relevant sections of the Building Act 1991:

**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...

A.3 Relevant regulations of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005:

**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.

**Schedule 2: Uses of all or parts of buildings**

**Uses related to sleeping activities**

Use	Spaces or dwellings	Examples
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, wharehau
SR (Sleeping Residential)	attached and multi-unit residential dwellings, including household units attached to spaces	multi-unit dwellings, flats, or apartments



**Uses related to sleeping activities**

Use	Spaces or dwellings	Examples
SH (Sleeping Single Home)	<p>or dwellings with the same or other uses, such as caretakers' flats, and residential accommodation above a shop</p> <p>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</p>	dwellings or houses separated from each other by distance

## A.4 Relevant form of the Building (Forms) Regulations 2004:

Form 13  
Notice to fix*Sections 164 and 165, Building Act 2004*To: *[name and address of owner]*\*And to: *[name and address of person carrying out or supervising the building work]***The building**

Street address of building:

Legal description of land where building is located:

Building name:

Location of building within site/block number:

Level/unit number:

**Particulars of contravention or non-compliance***[Insert details of failure or error with reference to any relevant building consent]*To remedy the contravention or non-compliance you must: *[state any building work that must be carried out and whether a certificate of acceptance must be applied for]*This notice must be complied with by: *[date or time frame]***Further particulars**\*You must contact the *[state whether the persons to whom the notice is given must contact the territorial authority for the district within which the building is situated, the regional authority for the region within which the building is situated, or both]* on completion of the required building work.\*All building work must cease immediately until the authority that issued this notice is satisfied that you are able and willing to resume operations in compliance with the [Building Act 2004](#) and regulations under that Act.\*The following building work must cease immediately until the authority that issued this notice is satisfied that you are able and willing to resume operations in compliance with the [Building Act 2004](#) and regulations under that Act: *[insert details of building work]*If you do not comply with this notice you commit an offence under [section 168](#) of the Building Act 2004 and may be liable to a fine of up to \$200,000 and a further fine of up to \$20,000 for each day or part of a day that you fail to comply with this notice.

Signature:

Position:

On behalf of: *[name of territorial authority]*

Date:

\*Delete if inapplicable.