Determination 2023/034

An authority's decision to issue a notice to fix for a change of use of a building

20 Morrin Street, Ellerslie, Auckland 1051

Summary

This determination considers an authority's decision to issue a notice to fix under section 164 of the Building Act 2004. The determination turns on whether there has been a 'change of use' of a building for the purposes of the Act.

In this determination, unless otherwise stated, references to "sections" are to sections of the Building Act 2004 ("the Act") and references to "clauses" are to clauses in Schedule 1 ("the Building Code") of the Building Regulations 1992.

1. The matter to be determined

1.1. This is a determination made under due authorisation by me, Andrew Eames, Principal Advisor - Building Resolution, Ministry of Business, Innovation and Employment ("the Ministry"), for and on behalf of the Chief Executive of the Ministry.[1]

1.2. The parties to the determination are:

1.2.1. A Zhang and G Yang ("the registered owners") who, as trustees of a family trust, are the owners of 20 Morrin Street ("the property") where the building that is the subject of this determination is located ("the building")

1.2.2. M Brown ("the head resident") who is a family member of the registered owners and resides in the building[2]

1.2.3. Auckland Council ("the authority"), carrying out its duties as a territorial authority or building consent authority.

1.3. The registered owners and the head resident applied for this determination; I refer to the registered owners and the head resident, collectively, as "the applicants".

1.4. This determination arises from the authority's decision to issue the applicants with a notice to fix under section 164 ("the notice to fix") for:

> Changing the use of a building without consent and contrary to [section 114] and the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 [("the Change of Use Regulations")]

1.5. The applicants consider that the authority should not have issued the notice to fix, and that it has effectively been complied with.

1.6. The matter to be determined is the authority's decision to issue the applicants with the notice to fix for contravening sections 114 and 115.[3] This determination will specifically turn on whether there has been a 'change of use' for the purposes of the Act.

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[1] The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

[2] The head resident is considered a party to this determination on the basis that they were issued with the notice to fix. Their status as a party is not disputed by any of the parties. That being so, I give no further consideration as to their status as a 'party' according to section 176.

[3] According to section 177(1)(b) and (3)(e) this matter can be determined by the Chief Executive of the Ministry.

Matters outside this determination

1.7. No consideration is given to the form or content of the notice to fix, except for the alleged contravention of sections 114 and 115.

1.8. Whether or not particular building work required building consent or complies with the Building Code is outside the scope of this determination and no further consideration will be given to those matters.

2. Background

2.1. On 17 October 2019 ("the date of the inspection") the authority and Fire Emergency New Zealand (FENZ) inspected the building. During the inspection the authority raised concerns about the building.

2.2. Subsequently, the authority wrote to the registered owners detailing those concerns, including its view that the building had undergone a change of use under the Act. The authority requested the registered owners take steps to make the building "compliant".

2.3. On the behalf of registered owners, a building consultant ("the consultant") responded to the authority with their view the building had not undergone a change of use.

2.4. On 1 May 2020, the authority issued the notice to fix to the applicants.[4] The relevant part of the notice described the contravention or non-compliance as:

> Changing the use of a building without consent and contrary to S 114 of the Building Act and the [Change of Use Regulations].
>
> During our inspection of 17 October 2019, there was approximately 11 tenants, with their own lockable rooms and a shared common kitchen, laundry and living areas. The building is no longer a single family household unit but is permanent or transient accommodation where 6 or more people (not including members of the residing family) pay for accommodation. There has been a change of use from Classified Use Detached Dwelling, Building Use SH and fire risk group SH to Classified Use Community Service, Building Use SA and Fire risk group SM.

2.5. In the notice to fix, the authority gave the applicants two options to remedy the contravention or non-compliance:

[4] The basis for the head resident being issued with the notice to fix is not clear. However, none of the parties raised concerns about this. That being so, this determination does not consider whether the head resident is a 'specified person' for the purposes of section 164(1) or whether they are an 'owner' for the purposes of sections 114 or 115.

> Revert to the original or intended use of the building, i.e. a single family household unit, or formally notify [the authority] of the building change of use and apply for a Building Consent.

2.6. On 15 May 2020, the head resident sought reasons from the authority for issuing the notice to fix. The head resident maintained that the notice to fix was "effectively complied with" as they consider the building has the classified use of detached dwelling.

2.7. After this, the head resident and the authority exchanged correspondence back and forth reiterating their viewpoints.

2.8. The Ministry received an application for a determination on 29 June 2020.

The building and its use

2.9. On or about the date of the inspection, there were nine people residing at the building including the head resident. The head resident was being paid by each of the others ("the paying residents") for the exclusive use of their own room, the use of shared facilities[5], for shared expenses[6] and any additional charges. Neither of the registered owners were living in the building at that time.

2.10. The head resident provided drawings of the building's layout as of July 2020.[7] Their drawings show a two-storey building with nine bedrooms (three on the ground floor and six upstairs), an open plan kitchen/dining room with a pantry, a lounge, a laundry room, and two bathrooms. Also shown is a covered carport area (which also has a storage room and a workshop). I understand the configuration of the building had previously been altered to increase the number of bedrooms from five to nine.[8]

[5] Including a living room, dining room, kitchen, laundry, storage room, two bathrooms, and a workshop.
[6] Including gas, electricity, water, broadband and a television service.
[7] See Figures 1 and 2 for floor plans of the building as at the date of the inspection. These are derived from the drawings provided by the head resident.
[8] The applicants say this work was exempt under Schedule 1 from the requirement to obtain building consent. This is not considered any further under this determination.

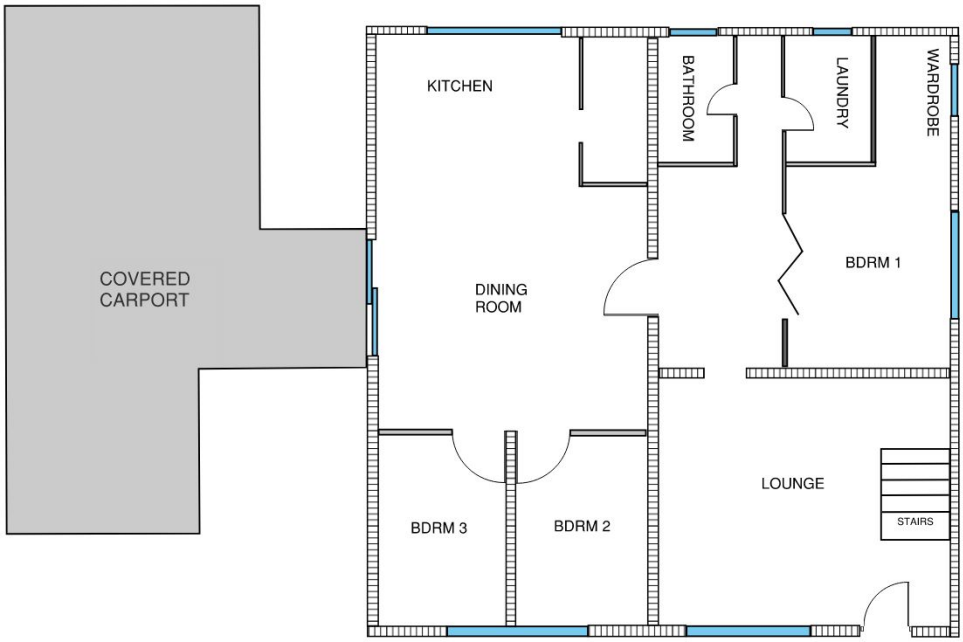

Figure 1: Ground floor layout (not to scale)

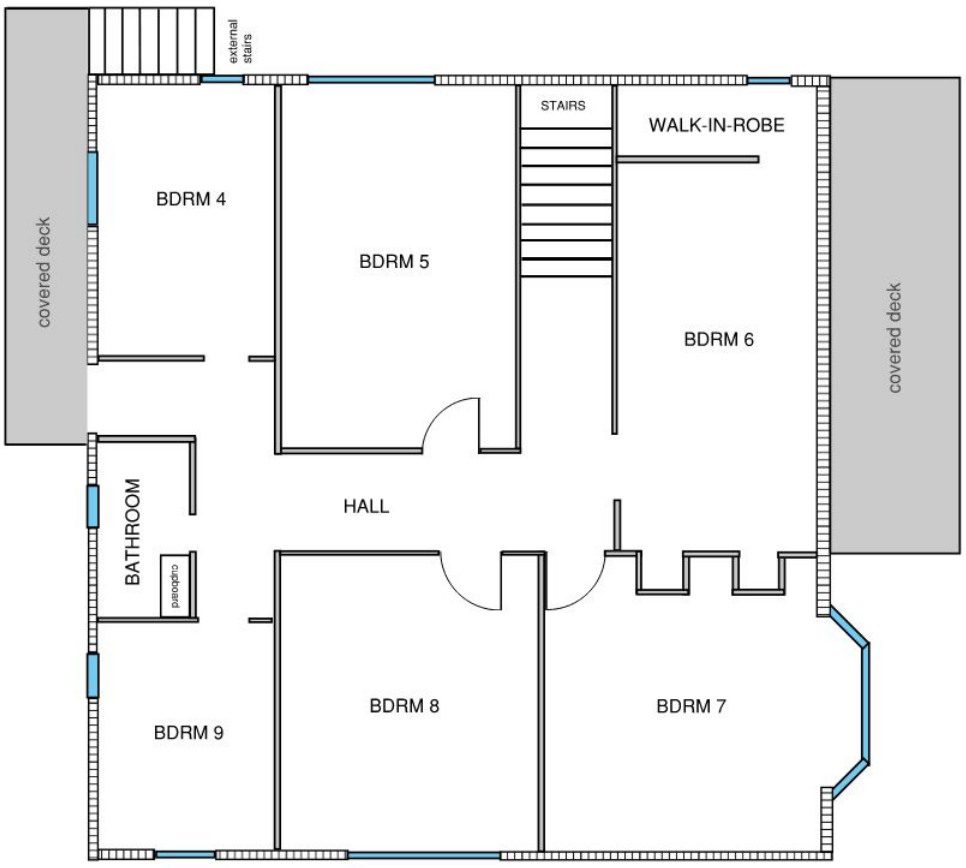

Figure 2: First floor layout (not to scale)

3. Submissions

The applicants

3.1. The applicants consider that the authority should not have issued the notice to fix and, even so, that it has been complied with.

3.2. The applicants submit that:

> There has not been a change of use under s114 [in relation to the building] and no change is intended…
>
> …[the building] is a single household in a detached dwelling…
>
> …[it] has been a detached dwelling for as long as the trust has owned it and since it was originally built in 1900… It is our intent for it to remain a detached dwelling…

3.3. The applicants reference *Queenstown Lakes District Council v Wanaka Gym Ltd*[9] and noted some of the features that the judge took into account when deciding whether a building was being used as a 'single household unit'.

3.4. The applicants also reference *Hopper Nominees v Rodney District Council*[10] and noted its discussion as to 'family' and 'familial domesticity'.

3.5. The applicants reference Determination 2018/044,[11] which concluded that the building in that case was not a single household. The applicants note a broad range of facts in their case which, in their view, differ from those in Determination 2018/044.

3.6. In support of their view that the residents are a single household in a detached dwelling, and that the building does not have the classified use of 'communal residential', the applicants note the following:

> …The owner lives on site…[12]
>
> The owner's intended use [of the building] is as a detached dwelling…
>
> …4, 5, 6 bedroom homes are not unusual – [the building] is 9 bedrooms – is that enough to say "large number of rooms"?...
>
> …many family residences that rent to flatmates [are let room by room]…

[9] *Queenstown-Lakes District Council v The Wanaka Gym Limited* DC Christchurch CIV-2003-002-000265, 18 November 2008 at [26].
[10] *Hopper Nominees Ltd v Rodney District Council* [1996] 1 NZLR 239 at page 6.
[11] Determination 2018/044 *Classified use of a main house, which is let out as accommodation*, (Issued 7 September 2018).
[12] I note that neither of the registered owners live at the property. The head resident is not a registered owner of the property but may be a beneficiary of the trust which owns the property.

…[it is] not a requirement [to lock the bedroom doors]…

…[the residents] frequently leave [their bedroom] doors unlocked…

…[the building] is large and roomy – even spacious – no areas are crowded…

…[the] living room is about 5x6 metres, dining room 6x6, kitchen 3x6 – are these small communal spaces? [The building] is spacious…

…[The residents] take selfcare of the common elements. [They] do their own laundry and the household laundry (tablecloths, dish cloths and dusting rags). [They] clean the laundry room, bathrooms, kitchen, living room and dining room. [They] mow, rake, plant, harvest, weed, trim, paint and repair.

Grocery "deals" are purchased in bulk and shared, meals are frequently shared and there is a regular Friday night dinner that lasts about 4 hours with shared cooking and clean up (the leftovers are divided).

…Transient stays [are] discouraged…[the] current average [stay is] 4 years+…

…[The residents] are pretty "connected"…

…[The residents] have several foreign students stay with [them]. [They] all help them learn English… [They] frequently teach them how to cook, clean, shop, use public transport etc. This is not done as a contracted for paid service – it is done by the [residents] out of friendship. [They] have had students move to New Zealand and stay with [them] 4 years or until they graduate.

[They] still have previous [residents] come back for Friday night dinner and maintaining relationships with current. When a [resident] is leaving – everyone almost always knows when they are going and why.

[The residents have house rules which] mirror those of many family homes – no smoking inside, clean up your own messes, don't disturb other [residents] with too much noise etc…

…when some[one] is playing a stereo too loud or too late – a turn it down request is made and must be complied with (just like a family). If someone leaves a mess – others do their best to figure out who it was and … is "reminded" to clean it up…

… disputes are rare. When they occur the [residents] work things out themselves or [the head resident will] arbitrate – same as a father in a standard family home…

…the degree of service [at the building] is the same as applied in a standard family home…

…the [residents] do pay the [head resident for utilities] but each [resident] is responsible to pay more if their usage is excessive – so they make an effort to save on utilities. Therefore they have individual responsibility for utility usage…

3.7. The applicants say the paying residents at the building are "flatmates", not boarders.

3.8. The applicants say that it is the authority's subjective view that the paying residents are boarders, and that the building is a boarding house. The applicants submit that they are neither and, therefore, there has not been a change of use.

3.9. The applicants reference various definitions of 'boarder' in their submission; all of these describe a 'boarder' as someone who receives or is provided meals as part of a paid stay.[13] They say meals are "frequently shared" between "flatmates" and are not provided to or received by boarders.

3.10. The applicants ask that the authority provide more information as to the "specific activities that make [the building] a boarding house" so they can correct them.[14]

3.11. I understand that applicants submit that any feature found in both detached dwellings and boarding houses should not be used to support the argument that the building is a boarding house.

The authority

3.12. The authority says that the building is shown on their records to be a 5-bedroom, single residential dwelling. When they inspected the building, however, they say they were informed by the head resident that there were 11 bedrooms in the building,[15] but that it was not a boarding house because there were "flatmate agreements" in place.

3.13. With its submission the authority provided the inspection notes which recorded:

> The lounge is of average size with a single TV and some furniture. A tenant confirmed it [was] not used often, it was too small and they had their own TV's in their rooms. I asked if the tenants knew each other well and socialised and was told they sometimes had meals on special occasions, but mostly did not…
>
> Dining table in kitchen, there were only 4 chairs. A tenant advised that the tenants either ate in small groups or in their rooms.

3.14. The authority says that the head resident appears to manage the building on behalf of the registered owners.

[13] Those sources include the Cambridge dictionary, Google, and Merriam Webster.
[14] I note, however, that this matter does not turn on whether the building is a 'boarding house' for the purposes of the Act. Boarding houses are but one example for the use group 'sleeping accommodation', and one example for the classified use 'Community service'.
[15] I understand, however, that nine of these rooms were occupied as bedrooms and the other two were used as an office and a storage room.

3.15. The authority notes that there have not been any building consent applications for the property relating to a change of use and/or to increase the number of rooms.

3.16. The authority says they wrote to the registered owners, following their inspection, asserting their view "…there appeared to have been a change of use of the building from a single household unit (SH) to sleeping accommodation (SA)."

3.17. The authority says that the registered owners' consultant responded contesting that the building was being operated as a boarding house and cited a previous MBIE Determination 2018/044.

3.18. The authority says:

> On reviewing the letter [from the consultant] and determination [2018/044 the authority] advised that their opinion had not changed. Whilst a boarding house is an example of sleeping accommodation and the property gave the appearance of a boarding house, [the registered owners] were requested to address the use of the property as sleeping accommodation and not whether it is or isn't operating as a boarding house.

3.19. The authority says:

> [It] did not accept [the view of the consultant that the building] was being operated as a single household: the [residents] lived in separate lockable rooms with shared communal areas. The detailed flat sharing agreement each occupant signed was also illustrative the property was not being operated as a single household.

3.20. The authority submits:

> The existence of 'flat mate' agreements does not change [the building's] use and in fact seems to reinforce [the authority's] position that it appears a purely commercial operation…
>
> …As [Determination 2018/044] highlighted, the term 'intended use' as defined in Section 7 of the Building Act is not just the subjective view of the owner of the building. While the owner's proposed intent is taken into account, it is an objective assessment of the use to which the building can be put based on its physical design and attributes (or the plans and drawings)…
>
> …[it] maintains the view that the [building] is being operated as sleeping accommodation and gives the appearance of a boarding house.

4. The draft determination

4.1. A draft determination was issued to the parties on 1 August 2023.

4.2. The applicants did not accept the draft determination and provided a further submission. This submission reiterated arguments and statements of fact made in their earlier submissions.

4.3. The authority accepted the draft determination. It made no submission in response to the draft determination, or the further submission provided by the applicants.

5. Discussion

5.1. The matter to be determined is the authority's decision to issue the applicants with the notice to fix for contravening sections 114 and 115. This matter turns on whether there has been a 'change of use' in relation to the building or part of the building for the purposes of the Act.

5.2. A change of use is determined according to regulations 5 and 6 of the Change of Use Regulations.[16]

> **5** [**Change of use**]**: what it means**
>
> For the purposes of sections 114 and 115 of the Act, [change of use], in relation to a building, means to change the use (determined in accordance with regulation 6) of all or a part of the building from one use (the old use) to another (the new use) and with the result that the requirements for compliance with the building code in relation to the new use are additional to, or more onerous than, the requirements for compliance with the building code in relation to the old use.
>
> **6 Uses of buildings for purposes of regulation 5**
>
> (1) For the purposes of regulation 5, every building or part of a building has a use specified in the table in Schedule 2.
>
> (2) A building or part of a building has a use in column 1 of the table if (taking into account the primary group for whom it was constructed, and no other users of the building or part) the building or part is only or mainly a space, or it is a dwelling, of the kind described opposite that use in column 2 of the table.

Two different categorisations are relevant to a change of use

5.3. There are various categorisations of buildings used in the Act and associated regulations. There are two which are relevant to this determination, being:

[16] See section 114(1) of the Act.

- the 'uses' (the "use groups")[17] in Schedule 2 of the Change of Use Regulations
- the 'classified uses' in Clause A1 of the Building Code.

5.4. To decide this matter, I must consider whether the building or part of the building has changed from one use group to another (the "first criterion"). If I find that it has, I must go on to consider whether the new use group gives rise to Building Code requirements which are additional to or more onerous than the requirements under the old use group (the "second criterion"). This further criterion requires me to consider the classified use for both the old and new use group, as this step is necessary to identify the relevant Building Code requirements.

5.5. Both of the criterion above must be satisfied for there to be a change of use for the purposes of the Act.

The change of use provisions

5.6. Under section 114, the owner of a building must provide written notice to the relevant territorial authority if they propose to change the use of a building or part of a building, and provide information about how the building will comply to the extent required under section 115.[18] An owner must not change the use unless the authority has given the owner written notice that the building, or part of the building, in its new use will comply to the extent required by section 115[19].

Whether the use group has changed

5.7. I now turn to the first criterion; that being the question of whether the use group had changed for the building or part of the building. In this case it is necessary for me to consider whether, at the time the authority issued a notice to fix, the building or part of the building was SA, when previously it had been SH.

5.8. Table 1 below sets out the SA and SH use groups as they appear in the table in Schedule 2 of the Change of Use Regulations

[17] I refer to each of these 'uses' individually as a "use group".
[18] Section 114 provides for a building owner to be prosecuted for failing to give their territorial authority written notice of a change of use. By making this a criminal offence, The intent is that building owners to remain alert to changes of use and to give notice to their territorial authority when required by the Act to do so.
[19] A test which is outside the scope of the matter of this determination.

Use	Spaces or dwellings	Examples
Uses relating to sleeping activities		
SA (Sleeping Accommodation)	spaces providing transient accommodation, or where limited assistance or care is provided for people	motels, hotels, hostels, boarding houses, clubs (residential), boarding schools, dormitories, halls, wharenui
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

Table 1: SA and SH use groups

5.9. In my view, section 3(a) provides context for the change of use provisions, particularly their purpose.

5.10. Section 3(a) lists the purposes of the Act in setting performance standards for building. The section 3(a) purposes are as follow:

> **3 Purposes**
>
> …
>
> (a) …to ensure that---
>
> (i) people who use buildings can do so safely and without endangering their health
>
> (ii) buildings have attributes that contribute appropriately to the health, physical independence and wellbeing of the people who use them
>
> (iii) people who use a building can escape from the building if it is on fire; and
>
> (iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development…

5.11. The change of use provisions are intended to ensure a building is appropriate for a new use, should a change of use occur during its economic life (particularly in terms of health and safety, and essential amenities).[20]

5.12. Additionally, the change of use provisions are part of a broader scheme in the Act which triggers assessments that can result in an existing building having to undergo certain upgrades over its economic life.[21]

5.13. As a first step I will consider whether, as at the date of the inspection, the building (or part of the building) was the use group SH or SA. I will then, if necessary, determine whether the building (or part of the building) had previously been a different use group.

Sleeping single home (SH) use group

5.14. The SH use group is described in the Change of Use Regulations as being "detached dwellings where people live as a single household or family".[22]

5.15. Neither the Act nor the Change of Use Regulations provide definitions or expand on the meanings for 'detached dwelling'[23], 'single household'[24] or 'family'.

5.16. I note the Judge's comments in *Queenstown-Lakes District Council v The Wanaka Gym Limited* ("*Wanaka Gym*"):[25]

> As our lives become more complicated and the circumstances under which people choose to live become more and more diverse, it is less and less easy to determine what amounts to a household.

5.17. The Judge in that case cited two earlier cases, both of which considered the meaning to be given to the term 'household', although for the purposes of

[20] Territorial authorities must determine the appropriateness of a building in its new use according to the requirements in section 115.
[21] The levels of performance for existing buildings are generally less rigorous than that required by today's Building Code.
[22] See the table in Schedule 2 of the Change of Use Regulations.
[23] According to Building Code Clause A1, 'Detached dwelling' is a type of classified use which "applies to a building or use where a group of people live as a single household or family".
[24] A similar term, 'household unit', is defined in the Act and Building Code Clause A2.
[25] *Queenstown-Lakes District Council v The Wanaka Gym Limited* DC Christchurch CIV-2003-002-000265, 18 November 2008 at [1].

different statutory regimes.[26] Notably, the Judge included an excerpt from *Hopper Nomines v Rodney District Council*:[27]

> The word 'family' has a wide meaning adequate in modern use to connote relationships of blood or marriage or other intimate relationships of a domestic nature, including, for example, persons sharing a dwelling such as students or friends. The essential connotation of the term is familial domesticity.

5.18. The Judge in *Wanaka Gym* adopted a similar approach and decided that the building in question was not a 'single household unit' but instead a 'group dwelling'. Two subsequent High Court cases adopted the same approach.[28]

5.19. In my view, it is appropriate to compare the features that the judge considered relevant in the *Wanaka Gym* case with features in this determination:

Wanaka Gym	**Morrin Street**
There is considerable variance in the numbers at any given time.	It appears that the building was occupied by the same or similar number of people at any given time.
There are large numbers of people involved in the occupation of the building.	For the size of the building, there were many people in residence.
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.	There was an agreement in place ("the resident agreement") between the head resident and each paying resident which placed restrictions on their freedoms.
The relatively short term of the residence.	Paying residents can leave after a short term but their stays appear to be indefinite or long-term.
There is no necessary connection with the others residing in the house.	Residents may have developed connections over time with each other.
There is no agreement of the residents to reside together.	The head resident agreed to reside with each paying resident by way of the resident agreement; the paying residents do not appear to have been involved in the selection process for each other.

[26] *Hopper Nominees Ltd v Rodney District Council* [1996] 1 NZLR 239; and *Simmons v Pizzey* [1977] 2 All ER 432.
[27] At page 6.
[28] *The Wanaka Gym Ltd v Queenstown Lakes District Council* [2012] NZHC 284; *The Wanaka Gym Ltd v Queenstown Lakes District Council* [2012] NZHC 2662.

Wanaka Gym	**Morrin Street**
The whole raison d'être of the building essentially is commercial rather than domestic.	The building appears to be operated by the applicants for commercial purposes. However, the building was the sole place of residence for its occupants and, to that extent, was being used for domestic purposes.

5.20. The *Wanaka Gym* decision assists with identifying features which may be relevant when assessing whether a 'household' is present. However, in addition to the features discussed in *Wanaka Gym*, there may be further features which are relevant in particular circumstances.

5.21. Long term or indefinite stays are often a feature of a household. By comparison, in *Wanaka Gym* the stays were for a "relatively short term". In this case the resident agreement says, "Instead of a long term lease - Either party may end this agreement by giving 4 weeks' notice to the other." That contemplates paying residents leaving after a relatively short stay. However, the applicants submit that the average length of stay is over four years which is relatively long-term or indefinite. Over that period the residents may have formed connections with each other through the shared use of communal areas in the building.[29]

5.22. There are further features which are indicative or give the appearance of a single household. The head resident describes the residents as being "flat mates". The residents looked after themselves and each other to some extent. They were individually responsible for their own cooking, laundry and cleaning of their bedrooms. Also, they were collectively responsible for keeping the communal areas tidy. The building had a "chores list" which provided for each resident to do at least one household chore each week.

5.23. These features, however, should be balanced against any countervailing features or inconsistencies with the connotations of a household.[30]

5.24. Notably, in both *Wanaka Gym* and this determination, there were restrictions placed on the freedoms of the residents. In this case the residents were required to do a weekly chore or pay an 'opt out' charge. Further, the resident agreement provided for:

- the communal areas to be under video surveillance to "reduce theft."

[29] The head resident gave examples of the interaction between the residents; see paragraph 3.6 above. However, the authority noted in their report that they asked a resident if they knew each other well and socialised and was told they sometimes had meals on special occasions, but mostly did not.
[30] *Hopper Nominees Ltd v Rodney District Council*, obiter dicta at pages 7 and 8.

- a resident to pay the head resident an extra charge where a non-resident stayed with that resident overnight for more than two nights in any month.[31]

- personal property to be kept inside bedrooms except with the permission of head resident and payment of an additional fee.

- oil fin heaters only to be used while "in [their bedroom] and warmly dressed."

- the head resident to have a high degree of control over the paying residents, for example, to "instantly evict" a paying resident for theft, violence etc, to keep a damage deposit and to prevent re-entry to the property (except with the permission of the head resident) upon default of the agreement, to sell a paying resident's possessions to cover costs and return "excess proceeds" them.

5.25. Further – like *Wanaka Gym* – it appears the building in this case was operated by the applicants primarily for commercial purposes. The building had previously been altered to increase the number of bedrooms from five to nine. This may have increased the rental income from the building. In addition to rent, the head resident received non-refundable expenses from each of the paying residents.[32] Also, the head resident received additional payments from paying residents for lost keys, off-street parking and other services or facilities.

5.26. In *Wanaka Gym* both the restrictions on occupants and commercial nature of the operation were considered by the Judge to be inconsistent with people living or being resident in a household. In this particular case, there are further features which are inconsistent with the connotations of a household.

5.27. The layout and features of the building as at the date of the inspection were similar to those of a hostel. There were locks on each of the bedroom doors. Also, a receipt was required where rent was paid by cash, otherwise the head resident would consider that no payment had been made.

5.28. No one feature discussed is determinative by itself whether the residents were living as a single household or family.[33] In these circumstances, a balancing

[31] The resident was required to pay ten dollars for each additional night of their visitor's stay.
[32] Each paying resident paid the head resident thirty dollars per week for expenses such as gas, electricity, water, landline, broadband and a television service. While the agreement provided for the paying residents to make further payments for any shortfall, it did not provide for any refunds where money was left over.
[33] For example, an agreement in writing between the head resident and paying residents does not, by itself, determine whether the residents were living as a single household or family.

exercise is necessary. In my view, the features in this case which are consistent with the connotations of a household are outweighed by those which are inconsistent. Therefore, I find that the building as at the date of the inspection was *not* use group SH.

Sleeping accommodation (SA) use group

5.29. The use group SA includes "spaces providing transient accommodation, or where limited assistance or care is provided for people".[34]

5.30. 'Transient accommodation' is not defined in the Act or the Change the Use Regulations. The Oxford English Dictionary (OED) states 'transient' means "not lasting; temporary; brief; fleeting". The dictionary goes on to say, "…of a hotel, lodging, etc.: designed for short-term or temporary accommodation; (in later use also) used to accommodate people without permanent housing".[35]

5.31. In my view, what is 'transient accommodation' for the purposes of the Change the Use Regulations depends on the circumstances. I consider that the length of stay is a feature but not the only relevant feature.

5.32. I have not received information which establishes that any of the paying residents were using the building as temporary or short-term accommodation. However, there is nothing to prevent a resident from staying for weeks or months rather than years. I note that the residential agreement provides for a paying resident to give four weeks' notice to end their stay. It also provides for the head resident to give four weeks' notice to end a paying resident's stay.

5.33. The applicants say the paying residents are all "longstanding occupants who could be considered permanent"; they also say that their average stay is over 4 years. I note, at the time of the inspection, one of the paying residents placed a note on their bedroom door saying that they had stayed at the building for 6 years.

5.34. Therefore, as at the time of the inspection, I do not consider the building to be 'transient accommodation' for the purposes of the Change of Use Regulations.

5.35. There is, however, another way to determine that the building's use group is SA. A building or part of a building may be SA, "where limited assistance or care is provided for people."

[34] See Schedule 2 of the Change of Use Regulations.
[35] Oxford English Dictionary (online publication), accessed on 31 July 2023.

5.36. The phrase "limited assistance or care" is not defined in the Act or the Change the Use Regulations.

5.37. In my view, the phrase should be interpreted in the context of the other use groups in the Change of Use Regulations, particularly the uses related to sleeping activities.[36]

5.38. I note use group SC (Sleeping Care)[37] covers situations where occupants are almost completely dependent on others; examples given include "hospitals, or care institutions for the aged, children or people with disabilities." By comparison, the use group SA covers situations where occupants do not require as much assistance or care; examples given include "motels, hotels, hostels, boarding houses, clubs (residential), boarding schools, dormitories, halls, wharenui." These examples suggest the nature and degree of 'limited assistance or care' can vary according to type of occupancy. For example, a boarding school would provide a higher degree of assistance or care to its school aged boarders than would a university hall of residence to school leavers, but both would usually be SA by virtue of the provision of limited assistance or care. That being so, what amounts to 'limited assistance or care' depends on the particular circumstances.

5.39. The applicants say that the paying residents are familiar with the building and its features, and would not require any assistance or care in the event of a fire. Whilst the paying residents may not require assistance or care in the event of a fire, I consider that other forms of assistance or care may give rise to 'limited assistance or care'.

5.40. The head resident provided a range of services to the paying residents. These include, for example, enforcing house rules, arranging maintenance and repairs of the building, paying of utilities and other expenses, providing access to bedrooms in the event of lost keys, and dealing with disputes between residents.

5.41. I note that the paying residents exercised a degree of independence at the building,[38] but I consider those activities were not so significant as to be inconsistent with the phrase of 'limited care or assistance'.

[36] The 'use groups' are in Schedule 2 of the Change of Use Regulations.
[37] 'Sleeping Care' which, according to the change of use table, is for those spaces such as hospitals or care institutions where people are provided with special care or treatment.
[38] The applicants say that the residents, who they describe as "flatmates", care for themselves and provide services to the house. They say the "… degree of service is the same as applied in a standard family home." They say each resident, including the head resident, takes care of their own cooking, laundering and the cleaning of their bedroom, and that they are responsible for tidying the communal areas on a weekly basis.

5.42. Therefore, I find, for the purposes of the Change of Use Regulations, that the building is a space where limited assistance or care is provided to people.

5.43. I consider there are no other use groups which are applicable in this particular case.[39]

5.44. I consider that the building in this case was operated primarily for commercial rather than domestic purposes.[40] I am of the view that the layout and features of the building are similar to those of a hostel or a boarding house, particularly the nine lockable bedrooms.[41] I consider the services provided by the head resident are similar to those that would be provided by a 'live-in' hostel manager. Therefore, I find that the use group for the building as at the date of the inspection was SA.

5.45. There appears to be no dispute between the parties that the building was previously used as a single household.[42] That being so, I consider the use group for the building was SH prior to becoming SA. I find, therefore, for the purposes of regulation 5 of the Change of Use Regulations, that the use group for the building had changed from one use group to another.

5.46. I now consider whether the second criterion in regulation 5 of the Change of Use Regulations is met – that the new use group results in additional or more onerous Building Code requirements.[43] If this second criterion is met, requirements in sections 114 and 115 are triggered with respect to the building.

5.47. In order to determine whether there are additional or more onerous Building Code requirements, first I must ascertain the classified use of the building.[44] This is because Building Code requirements apply according to the building's classified use or uses, and not according to its use group in the Change of Use Regulations.[45]

[39] At paragraph 4.30, I find that the use group for the building at the date of the inspection was *not* SH. The facts in this case do not indicate that any other use group applies other than SA.
[40] See paragraph 4.27 above.
[41] I note that the Change of Use Regulations list 'hostels' and 'boarding houses' as an example of use group SA.
[42] The applicants submit that the building is "already in compliance with all applicable regulations for detached buildings"; I note, for the purposes of the Building Code, that a 'detached building' is a building were a group of people live as a single household or family. The authority's records describe the building as a "single residential dwelling".
[43] I note that the Building Code requirements for buildings or parts of buildings vary according to their classified use. As a result, some buildings or parts of buildings are required to meet Building Code requirements that others are not.
[44] For the classified uses, see clause A1 of the Building Code.
[45] See clause 3 of the Building Regulations 1992 together with the 'Limits on application' column for Building Code clauses B1 to H1.

Classified use of the building

5.48. Clause A1 sets out the various classified uses that a building may have.

5.49. Clause 3(3) of the Building Regulations 1992 sets out how the classified use is established and 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.

5.50. A1.0.2 states "[a] building with a given classified use may have one or more intended uses as defined in the Act."

5.51. Section 7 of the Act, provides an expansion to the ordinary meaning of "intended use":

> *intended use*, in relation to a *building*,—
>
> (a) includes any or all of the following:
>
> (i) any reasonably foreseeable occasional use that is not incompatible with the *intended use*: …

5.52. The Act and Building Code clearly contemplate buildings changing their intended use(s) and classified use(s) over the course of their economic lives. In this case, the original intended use of the building appears to be as a family household. However, I consider that by the date of the inspection the intended use had changed to accommodation.

5.53. I note the applicants' submission that the building at the date of the inspection was a "single household in a detached dwelling". However, earlier determinations have noted the term 'intended use' as defined in section 7 of the Act is not a subjective view based on an owner's stated use of the building.[46] While an owner's proposed use is taken into account, the assessment of the intended use requires an objective assessment based on relevant facts as to the use the building has or can be put to.

5.54. In terms of 'reasonably foreseeable occasional use' (which is an exception found within the definition for 'intended use'), I consider that the use of building as

[46] For example, see Determinations 2011/069 and 2018/015.

accommodation was not *occasional*. I am of that view because at the date of the inspection the building had been put to that use for some time.[47]

5.55. Now, as a first step, I will determine whether a change of intended use (from a family household to accommodation) resulted in a change of 'classified use'. If so, as a second step, I will then consider whether, due to the change in the classified use, there are additional or more onerous Building Code requirements for the building.

5.56. The authority considers the building is "permanent or transient accommodation where 6 or more people (not including [the registered owners or their family members]) pay for accommodation" and, therefore, is classified as 'Community service' (which is one of two types of the 'Communal residential' category). The applicants are of the view that the building is a detached dwelling where a group of people live as a single household and, therefore, is classified as 'Detached dwelling' (which is one of three types of 'Housing').

5.57. The 'Communal residential' category applies to buildings or use where assistance or care is extended to 'principal users'.[48] There are two subcategories or types of Community residential which are 'Community service' and 'Community care'.[49]

5.58. The 'Housing' category applies to buildings or use where there is self care and service (internal management).[50] There are three subcategories or types of 'Housing' which are 'Detached dwellings', 'Multi-unit dwelling' and 'Group dwelling'.[51]

5.59. I have considered the classified use categories and types in clause A1 and compared these with the design/layout of the building including its intended use and how the building was being used at the time of the inspection, and I note the following:

5.59.1. The authority says the property is shown on Council records as a "5-bedroom, single residential dwelling"

5.59.2. The applicants say that "Some work was undertaken over the years to repurpose rooms and create spaces and this was lawful work under schedule 1…"

[47] The applicants submit that paying residents stayed in the building for an average of 4 years or more.
[48] Clause A1, 3.0.1.
[49] Ibid, 3.0.2 and 3.0.3.
[50] Ibid, 2.0.1.
[51] Ibid, 2.02, 2.0.3 and 2.0.4

5.59.3. A drawing of the building provided by the applicants shows nine bedrooms, an open plan kitchen/dining room, a living room, a laundry, and two bathrooms; it also shows a carport, workshop area and storage room attached to the building

5.59.4. With changing circumstances, the building had – as of the date of the inspection – nine people living in it, consisting of eight paying residents and the head resident

5.59.5. The applicants say paying residents have stayed for an average of 4 years.

5.60. Based on the features of the building and the conclusions I have already made about limited care and assistance at 5.36 to 5.43 I conclude:

5.60.1. At the time of the inspection, the classified use was 'Community service' which belongs to the 'Communal residential' category

5.60.2. Earlier the classified use of the building had been 'Detached dwelling' which belongs to the 'Housing' category.

5.61. I note that the paying residents looked after themselves and each other to a certain extent, and that those particular activities may be 'self care and service' for the purposes of clause A1, 2.0.1.[52] However, I consider that those activities were not inconsistent with the classified use being 'Community service', especially due to the commercial nature of the relationship between the head resident and the paying residents, as discussed in paragraph 5.28 above.

5.62. Now that I have ascertained the building's old and new classified uses, as a second step I go on to determine whether the change of use gives rise to additional or more onerous Building Code requirements for the building according to its new classified use.

5.63. It is clear under the classified use of 'Community service' that there are additional or more onerous Building Code requirements when compared with the requirements for the classified use of 'Detached dwelling'.

5.64. For example Building Code clause F6.2[53] did not apply to the building when its use group was SH. At that time the building had the classified use of 'Detached dwelling' and, by way of the 'limits on application',[54] clause F6.2 did not apply.

[52] See footnote 37 above.
[53] This relates to safeguarding people from injury in escape routes during the failure of the main lighting.
[54] See the 'Limits on application' column in the Building Code.

However, the change in circumstances that gave rise to the building's use group changing from SH to SA also resulted in the building's classified use changing. The requirements of clause F6.2 apply to the new classified use of 'Community Service'. Therefore, clause F6.2 is an example of an additional or more onerous Building Code requirement to which the owners must comply as nearly as reasonably practicable according to section 115. This is only one example of several.

6. Conclusion

6.1. I conclude that the building had – by the date of the authority's inspection – undergone a 'change of use' for the purposes of sections 114 and 115 because:

6.1.1. the building's use group, according to the Change the Use Regulations, had changed from SH to SA, and

6.1.2. the new use group has more onerous or additional Building Code requirements than the old use group.

6.2. The owners did not provide the authority with written notice of the change of use as required by section 114(2)(a) or receive prior approval from the authority for the change of use as required by section 115(b).

7. Decision

7.1. In accordance with section 188, I determine by 17 October 2019 the building had undergone a change of use contrary to the requirements in section 114 and 115, and I confirm the authority's decision to issue the notice to fix.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 15 November 2023.

Andrew Eames
Principal Advisor, Building Resolution