



Determination 2012/074

Regarding the authority's exercise of its powers in respect of the change of use provisions of the Building Act for the alteration of part of a house at 6 Vanessa Crescent, Glendowie, Auckland

1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ ("the Act") made under due authorisation by me, John Gardiner, 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:

- H Truong, one of the owners of the house ("the applicant")
- Auckland Council ("the authority"), carrying out its duties as a territorial authority or building consent authority.

1.3 The matter to be determined² is whether the proposed building work to change part of a games room to a second kitchen constitutes a change of use, and therefore whether the authority correctly exercised its powers of decision in respect of the change of use provisions of the Act. The authority was of the view that a change of use would occur, and consequently refused to grant building consent in respect of this work unless fire safety upgrade work was included in the building consent.

1.4 In making my decision, I have considered the submissions of the parties, the report of the expert commissioned by the Ministry to advise on this dispute ("the expert"), and the other evidence in this matter.

1.5 The relevant sections of the legislation are set out Appendix A.

2. The building work

2.1 The proposed building work is an alteration to part of the upper floor of a garage that is attached to the house to form a second kitchen. The area is currently a games room.

¹ The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.dbh.govt.nz or by contacting the Ministry on 0800 242 243.

² Under sections 177(1)(b) and 177(3)(f) of the Act. In this determination, unless otherwise stated, references are to sections of the current Act and references to clauses are references to the Building Code.

- 2.2 The building work includes the installation of a new bench unit supporting a double sink unit that discharges into a grease trap. An aluminium lining is to be installed behind the bench, as is an area of linoleum floor covering adjacent to the bench. The proposed cooking facilities consist of an electric frying pan and an electric steamer both of which would be plugged into a standard 2.3kW electrical socket.
- 2.3 According to the information provided with the building consent application, the kitchen will be used to prepare food for the markets one day a week, by the applicant's wife.

3. Background

- 3.1 The building consent application for the building work was received by the authority on 24 August 2012. The consent application described the building work as '2nd kitchen in the room above the garage (for small scale – 1 person cooking [to] sell to Asian shop'.
- 3.2 On 24 August 2012, the applicant's wife wrote to the authority confirming that she would be the only person working in the kitchen and that she would prepare and cook food for only approximately 7 to 8 hours on one day per week for sale at a market.
- 3.3 On 10 September 2012, the applicant wrote to the authority requesting a waiver under section 67 and providing a fire report relating to the proposed kitchen, which appears to be in response to a request from the authority. The applicant noted that the fire report identifies 'the numerous fire rating' requirements to be upgraded, but requested the authority consider a waiver as the cost of the upgrading would be in excess of \$20,000, the building would remain residential, and the only person preparing food in the second kitchen would be the applicant's wife.
- 3.4 The fire report, dated 7 September 2012, described the building work as a 'change of use' and concluded that the following was required:
- Provide 45/45/45 minutes fire rating to all upper floor and supports
 - Provide 60/60/60 minutes fire rating separating ground floor garage to residence.
 - Provide 60/60/60 minutes fire rating to all walls on the north elevation overlooking roof to residence
 - Provide 4m² of ground floor and upper floor walls on east elevation to 60/60/60 minutes fire rating including stability for after fire conditions.
 - Maintain existing non-emergency non illuminated exit signs to exit door.
 - Provide emergency lighting in egress stair from upper floor to outside.
 - Maintain existing internal walls and ceiling to kitchen areas.
- 3.5 On 19 September 2012, the authority then informed the applicant that the building consent would only be granted if the work detailed in the fire report was carried out. The authority refused to grant a waiver for this work.
- 3.6 The Ministry received an application for a determination regarding the authority's requirement to consider the waiver application under section 67 of the Act on 20 September 2012.

4. The submissions

- 4.1 In a covering letter to the Ministry dated 10 September 2012, the applicant noted that he had applied to the authority for a building consent to change part of an existing games room to a kitchen in order to prepare food for a market.
- 4.2 The applicant stated that he did not want to upgrade the building in accordance with the fire report. It was noted that the whole house was used as a private residence for himself and his family and that no one came to the property for the purpose of buying or delivering goods. The applicant noted that the \$20,000 cost of upgrading far outweighed the income that was earned from the sale of food at the market.
- 4.3 In a further letter to the Ministry dated 20 September 2012, the applicant noted that the actual cooking time during the one day taken to prepare the food was only 1 to 2 hours. The only utensils used would be one cooking pot and one frying pan. The applicant was of the opinion that the requirement to fire-rate the building was unreasonable. It was also noted that:
- the food preparation was solely carried out by the applicant's wife
 - the food did not differ from that cooked for domestic use
 - there was no 'display or advertising'
 - no retail sales were made from the property.
- 4.4 The applicant attached two extracts from the building consent application plans, copies of correspondence with the authority, and the fire report
- 4.5 The authority provided a copy of the building consent application.
- 4.6 A draft determination was issued to the parties for comment on 19 November 2012; both parties accepted the draft without further comment.

5. The expert's report

- 5.1 As described in paragraph 1.4, I engaged the services of an expert who is a registered architect³ and a member of the New Zealand Institute of Architects, to assist me. The expert examined the property on 19 October 2012 and produced a report that was completed on 31 October 2012. Copies of this report were forwarded to the parties on 1 November 2012.
- 5.2 The report described the existing house and the extent of the work involved in the proposed building work. In discussions with the authority, the expert was told that the authority had accepted the fire report and that the authority had a policy not to issue waivers of the Building Code (First Schedule, Building Regulations 1992) for domestic property. The applicant had also informed the expert that the kitchen would be used by the applicant's wife one day per week and that no paid staff would be employed. In addition, no fixed cooking appliances would be installed and the authority had agreed that no electrical extract fan or hood was required.
- 5.3 While the alteration was described on the plans provided with the fire report as a 'commercial kitchen', the expert noted that it lacked the following items normally associated with such a kitchen:

³ Registered Architects are treated under the Registered Architects Act 2005 as if they were licensed in the building work licensing class Design 3 under the Building (Designation of Building Work Licensing Classes) Order 2010.

- a stove, oven, hob or other fixed cooking appliance
 - a gas supply for use in any open flame appliance
 - an electrical circuit of sufficient capacity to enable the operation of commercial kitchen equipment
 - a mechanical extract system to remove the heat generated by appliances
 - paid or other staff from outside the household.
- 5.4 Accordingly, the expert was of the view that the proposed second kitchen was unlikely to be recognised as a commercial kitchen ‘by the catering business community or in the common use of the expression’.
- 5.5 The expert was of the opinion that the alteration did not trigger the change of use requirements because:
- the building regulations recognise that the ‘intended use’ of a building includes ‘any reasonable foreseeable occasional other use’ under Clause A1 of the Building Code. The occasional preparation of food for sale, including such things as baking for school or church summer fairs clearly falls into this category. The intended use, though more regular is similar in character, particularly in the use of normal domestic kitchen appliances by a member of the household
 - one of the elements of the definition of a change of use is 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 The expert also noted that the fire risks associated with the second kitchen would be lower than those of the existing kitchen or a standard domestic kitchen.
- 5.7 As the work in question was an alteration, the expert considered that domestic smoke alarms would be required.
- 5.8 Finally, the expert noted that should staff be employed or fixed commercial cooking equipment be installed in the future, the compliance situation would need to be reviewed.

6. Discussion

6.1 The application of the change of use provisions of the Act

- 6.1.1 Part of an existing games room above a garage is proposed to be converted into the new second kitchen, and according to the applicant is to be used one day a week to prepare food for the markets. It is separate from the original kitchen in the house.
- 6.1.2 There are a range of provisions in the Building Act that expressly set out different requirements that buildings and building work must comply with in particular situations. For example, there are particular requirements in the Building Act where there is building work proposed that alters an existing building (section 112), building work proposed in respect of a building with a specified intended life less than 50 years (section 113), where the use of a building is proposed to be changed (section 115), where a subdivision affecting a building or part of a building is

proposed (section 116A), and where there is building work proposed in respect of certain public buildings (section 118).

- 6.1.3 If an owner is intending to change the use of a building, section 114 of the Building Act requires that the owner must give written notice to the authority. Section 115 requires that an owner of a building must not change the use of the building:
- (b) unless the authority gives the owner written notice that the authority, is satisfied, on reasonable grounds, that the building, in its new use, will-
 - (i) comply, as nearly as is reasonably practicable, with every provision of the building code that relates to either or both of the following matters:
 - (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) continue to comply with the other provisions of the building code to at least the same extent as before the change of use.

- 6.1.4 The Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 (“the Regulations”) define change the use as:

... 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.

- 6.1.5 I note that there are two tests that are required to be met in order for there to be a change of use:
1. The old use of a building (or a part of a building) is different to the new use of a building (or a part of a building) as defined in the Regulations.
 2. The Building Code requirements that apply to the new use are more onerous or additional than for the old use.

- 6.1.6 As to whether the old use of a games room is different to the new use of a second kitchen, the Regulations classify ‘Uses related to sleeping activities’ for a ‘Sleeping Single Home’ (SH) as:

Use	Spaces or dwellings	Examples
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

- 6.1.7 The building currently has a use of SH (Sleeping Single Home). I am of the view that the proposed second kitchen also comes under the use of SH (Sleeping Single Home).

- 6.1.8 I note that while the some of the documentation describes the kitchen as ‘commercial’, it lacks many features that would normally be associated with a commercial catering type operation such as a stove, oven, hob or other fixed cooking appliance, a gas supply for use in an open flame appliance, an electric circuit with the capacity to enable the operation of commercial kitchen equipment, and a mechanical extract system. I note it will be used by an owner of the house running a small

business to make food to sell at the local market one day each week. The business has no employees.⁴

- 6.1.9 It is clear from the provisions of the Regulations that changing part of the house to a second kitchen does not constitute a change of use under the Act. There is nothing in the Act or Regulations that prevents a detached dwelling from having more than one kitchen. The use of the existing building is classified as SH and will in my view remain SH after the proposed building work is completed.
- 6.1.10 I therefore consider that changing part of a house to a second kitchen does not constitute a change of use under the provisions of the Act and therefore section 115 does not apply in this instance.
- 6.1.11 As the old use is not different to the new use, I do not need to consider the second test described in paragraph 6.1.5. However, I agree with the expert that with respect to fire safety, the risks are lower for the second kitchen than an average residential kitchen.

6.2 The application of the alteration provisions of the Act

- 6.2.1 The proposed building work is an alteration to an existing building, and therefore the provisions of section 112 apply. Given the building is a domestic dwelling, provision of domestic smoke detectors as described in the Acceptable Solution F7/AS1 will comply with Clause F7 of the Building Code and meet the requirements of section 112(1)(a)(i).

6.3 Conclusion

- 6.3.1 I am therefore of the view that:
- the proposed change of part of the house to a second kitchen does not constitute a change of use under the provisions of the Act (refer to paragraph 6.1) and the authority incorrectly exercised its powers in this respect
 - the proposed building work is an alteration to an existing building and therefore the building, after the alteration, must comply as nearly as is reasonably practicable with the Building Code provisions relating to means of escape from fire (refer to paragraph 6.2).
- 6.3.2 The applicant applied to the authority for a waiver in respect of the building work that was needed for the second kitchen to comply with the Building Code if it was classified as WL (working low). The authority refused to grant a waiver and this was part of the application for a determination.
- 6.3.3 The view I have taken in respect of the change of use means that it is not necessary for me to consider the authority's refusal to grant a waiver. The building work that was needed for the second kitchen to comply with the Building Code if it was classified as WL (working low) is not needed as the use of the building will remain as SH.

⁴ The Ministry has issued guidance (in respect of the home and business relocations after the Canterbury Earthquakes) that has relevance to this situation 'A guide for Christchurch City Council temporary business and housing restrictions'

7. The Decision

- 7.1 In accordance with section 188 of the Building Act 2004, I determine that the proposed change of part of the house to a second kitchen does not constitute a change of use under the provisions of the Act, and accordingly that the authority incorrectly exercised its powers in requiring the owner to upgrade the building to comply with specific fire safety provisions associated with the intended use in this regard.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 29 November 2012.

John Gardiner
Manager Determinations

Appendix A: the Legislation

A.1 Building Act 2004

The relevant provisions of the Act are:

112 Alterations to existing buildings

- (1) A building consent authority must not grant a building consent for the alteration of an existing building, or part of an existing building, unless the building consent authority is satisfied that, after the alteration, the building will—
 - (a) comply, as nearly as is reasonably practicable, with the provisions of the building code that relate to—
 - (i) means of escape from fire; and
 - (ii) access and facilities for persons with disabilities (if this is a requirement in terms of section 118); and
 - (b) continue to comply with the other provisions of the building code to at least the same extent as before the alteration.

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, will—
 - (i) comply, as nearly as is reasonably practicable, with every provision of the building code that relates to either or both of the following matters:
 - (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) continue to comply with the other provisions of the building code to at least the same extent as before the change of use.

A2 Building (Specified Systems, Change the Use, & Earthquake prone Buildings) Regulations 2005

The relevant provisions of the Regulations include:

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.

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.

Schedule 2: Uses of all or parts of buildings

Uses related to sleeping activities		
Use	Spaces or dwellings	Examples
SH (Sleeping Single Home)	detached dwellings where people live as a single household or family...	dwellings or houses situated from each other by distance
WL (Working Low)	spaces used for working, business, or storage—low fire load	places for manufacturing, processing . . .