Determination 2007/111

Fire safety provisions for two relocated buildings to be used as staff accommodation at Lakefront Drive, Te Anau

Building B

1 The matter to be determined

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

1.2 The applicant is the Southland District Council ("the territorial authority"). The other party is Northmark Investments No. 1 Ltd ("the owner").

1.3 The application arises from a dispute about fire safety provisions for two relocated buildings to be altered in stages before being used as accommodation for hotel staff. I take the view that the matters for determination are:

(a) Whether the buildings will comply as nearly as is reasonably practicable with the provisions of the Building Code that relate to means of escape from fire as required by section 112 of the Act.

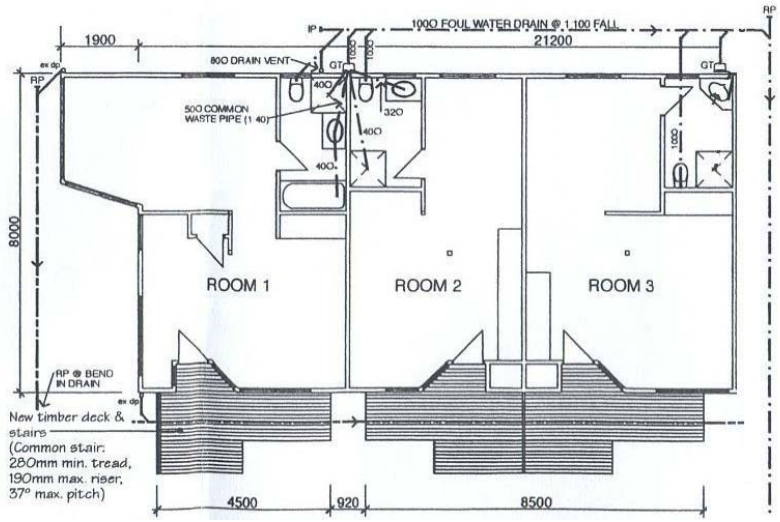
(b) The territorial authority's decision to refuse to grant the stage 2 building consent.

1.4 In making my decision I have not considered any other aspects of the Act or of the Building Code.

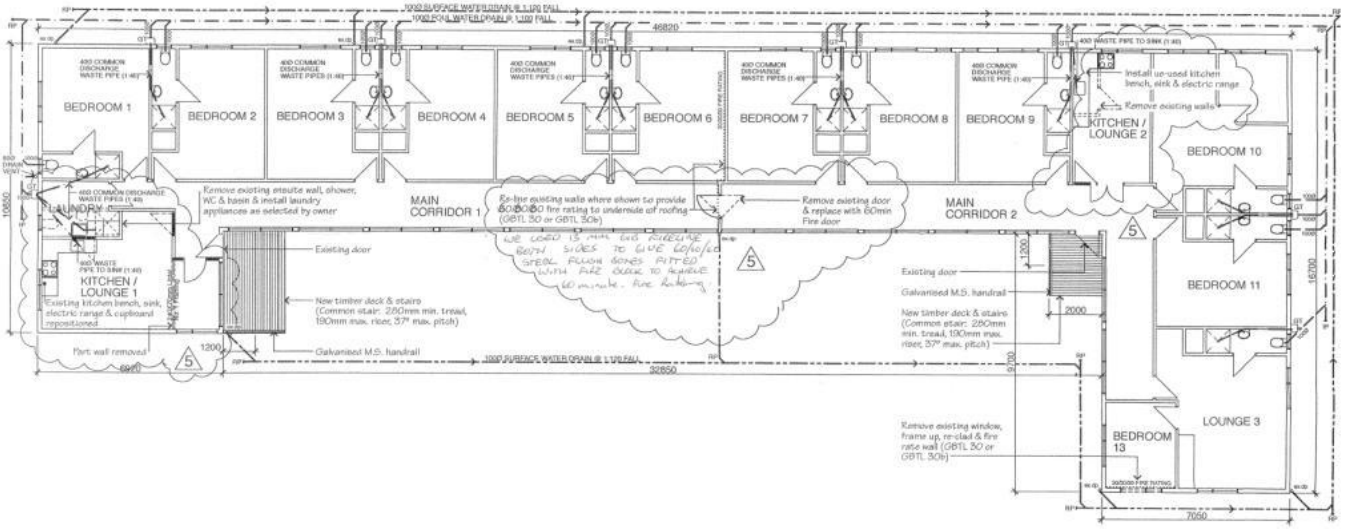
1.5 In this determination, unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

2 The building and the sequence of events

2.1 The buildings



Building A



Building B

Figure 1: Floor plans of Buildings A and B showing the alterations that the owner claims to have been carried out

2.1.1 The two buildings ("Building A" and "Building B") were constructed in approximately 1970 as guest accommodation at a hotel/motel. They have been relocated to the Lakefront Drive site to provide accommodation for staff at another motel/hotel complex already on the site.

2.1.2 The territorial authority initially issued a building consent ("the stage 1 consent") for the relocation, including new foundations, connections to utilities, and so on, but refused to grant the necessary stage 2 consent for alterations to the buildings, particularly upgrading of the buildings' fire safety provisions. For the purposes of this determination, the refusal was based on a comparison between the fire safety provisions of the buildings and those required by the relevant acceptable solution C/AS1, and in particular whether the buildings should be classified as purpose group SR or SA, see 3.3 below.

2.1.3 As I understand the documents:

(a) Building A has a single-storey of conventional light timber frame construction. Internal walls were originally stated to have 10 mm gypsum plasterboard linings said to give a fire separation of 15/15/15. The plasterboard thickness was later measured as 19 mm, which I accept will achieve a fire separation of 30/30/30. It is not clear whether internal walls continue to the underside of the roof. Ceilings are fibrous plaster accepted as achieving a fire separation of 30/30/30. Building A contains three accommodation units, each with space for two or more beds and having its own toilet facilities and opening off an external deck.

(b) Building B was originally the upper storey of a two-storey building but on relocated became a single-storey building. It is of similar construction to Building A except that internal walls are plasterboard over timber tongue-and-groove linings (said to give a fire separation somewhat more than 15/15/15) and that the walls between back-to-back bathrooms have no fire separation rating. Building B contains 11 one-room and 1 two-room accommodation units, each with its own toilet facilities, and two rooms, described as "kitchen/lounges", with cooking facilities.

2.1.4 Each building has a Type 3 automatic fire alarm system with heat detectors and manual call points.

2.1.5 In the application for the stage 2 building consent, what had originally been individual hotel rooms with en-suite toilet facilities were treated as being individual SR firecells, which would require firecell separations of 30/30/30. However, instead of increasing the fire separation ratings between the rooms it was proposed to compensate for the shortfall in fire cell separation by:

(a) Replacing the Type 3 alarm systems with Type 4 systems (automatic fire alarm systems with smoke detectors and manual call points) and

(b) Replacing the internal doors providing access to the units from the corridor with "solid core 15 minute rating doors with smoke seals and closers".

2.1.6 Under section 46, the territorial authority sent a copy of the application to the Fire Service, which advised, amongst other things, that in its opinion the buildings should be classified as SA, for which C/AS1 required a Type 4 alarm system in any case so that the proposal did not include any provision to justify the proposed firecell separation of 15/15/15 instead of 30/30/30.

2.1.7 The territorial authority also considered that SA was appropriate.

2.2 Correspondence between the parties

2.2.1 Correspondence between the parties mainly related to the appropriate purpose group. As to that, the owner's architect said:

> The occupants will be in a flatting situation, they will be hotel shift workers, have the choice of eating in the Hotel staff dining room and due to the shift nature of their work, the occupants will not all be in the flat at once generally. This is no different if the occupants were flatting in a house separate from the site.
>
> SA purpose group relates to a **firecell**, which has spaces providing transient accommodation or where limited assistance is provided. In this case the accommodation is not for transients (like a motel) **nor** is there limited assistance. Any "assistance" in the way of meals for example will occur in another firecell.

2.2.2 The owner proposed to alter the design of Building B as described in 2.1.5 above by enlarging the kitchen lounges and installing a central fire separation to divide the building into two firecells, each containing 6 bedrooms and a kitchen lounge. Those alterations, claimed the owner, meant Building B could be classified as SR and would comply with C/AS1.

2.2.3 The territorial authority described that alteration as splitting Building B

> into two separate households or flats with a 30/30/30 separation between the two. That meant creating a shared kitchen-living area in each unit so that they could be classified as household or flats rather that [*sic*] SA purpose group transient type accommodation.

2.2.4 There was also some discussion of whether bedrooms should be lockable, of the advantages of installing a domestic sprinkler system, and of paragraph 2.2.9 of C/AS1 about "purpose group SA treated as SR", see 3.3 below.

2.3 Building work carried out

2.3.1 The alterations proposed by the owner were carried out, apparently while the discussions between the parties were continuing and despite the fact that no building consent had been issued for the building work concerned. At the time of this determination the buildings have been altered to the extent described in 2.2.2 above and are in use as staff accommodation.

2.3.2 Whether or not the owner has committed an offence and whether or not the territorial authority should use its discretion to mount a prosecution in respect of that offence, if any, are not matters for consideration in this determination, see also 4.3.4 to 4.4.2 below.

2.4 The application for a determination

2.4.1 The territorial authority did not accept the owner's proposal (which had in fact been carried out) and applied for a determination, saying:

> . . . the owner is adamant that he is satisfying the provisions of the Building Code. The proposed shared living areas for the individual household units are adequate [and] he can accommodate 12 in each household unit and that the bedrooms can remain as lockable and still classified as single household or flatting type accommodation.
>
> . . . SA/SR purpose group was a grey area for this type of staff accommodation under the C document acceptable solution . . .
>
> Council wishes to make application for a determination [of the following matters]:
>
> (a) Whether the alternative solution proposed by [the owner] creating limited floor space shared kitchen/living areas for a total of 12 occupants, having lockable doors to individual bedrooms complies with the Building Code for a single household or flatting type situation.
>
> (b)(i) [*sic*] That the decision by Council . . . to refuse the alternative solution on the information provided was correct.

2.4.2 I take the reference to lockable doors to relate to the definition of "suite" in C/AS1, see 3.3 below.

2.4.3 The owner responded by saying that the proper purpose group was SR and:

> The reason I want to maintain locks on bedroom doors is for the health and safety of our staff bearing in mind we have a number of young girls employed . . . . [In many student flats there is] a lock on each bedroom door . . . .
>
> Our staff are not of the transient short-term category as in Motel, Hotel, Hostel, boarding house travellers but are seasonal workers who reside in staff quarters in a flatting environment. Because they not only live with each other but also work together I feel they interact better than people in a lot of other flatting environments. . .
>
> [If the territorial authority felt that the buildings] fell into category SA . . . I could have classified the building as 2 suits with 30-30-30 separation between them allowing for 12 people per suit with the only requirement being an automatic fire alarm . . . or if I limit the numbers to 10 per suite I don't require any fire alarm at all. Refer table 4.1/5 [of C/AS1].

2.5 The first draft determination, the hearing, and the second and third drafts

2.5.1 I prepared a draft determination ("the first draft") which I sent to the parties and to the Fire Service. The first draft was to the effect that each building was more properly described as a "hostel" rather than as a "household unit" and therefore came within purpose group SA. Using C/AS1 as a guideline or benchmark, the buildings did not comply as nearly as is reasonably practicable with the Building Code because the provision of a Type 4 alarm system was required in any case and could not be accepted as justifying a fire separation of 15/15/15 instead of 30/30/30.

2.5.2 The territorial authority and the Fire Service accepted the first draft.

2.5.3 The owner did not accept the first draft, citing the *Compact English Dictionary* definition of "hostel" as "an establishment that provides cheap food and lodging for a specific group of people".

2.5.4 The owner requested hearing, which was held before me on 13 March 2007. I was accompanied by a Referee duly appointed by the Chief Executive. The owner appeared on his own behalf and the territorial authority was represented by two of its officers. Two other staff members of the Department attended. The hearing included a visit to the buildings.

2.5.5 At the hearing, the owner elaborated on the submissions outlined above, and continued to contend that the buildings were household units and accordingly within purpose group SR. The owner said that if, for example, the buildings were to be place on different allotments away from the hotel site then they could be rented out as houses to the same occupants without any requirements for additional fire precautions. The buildings were essentially indistinguishable from buildings in Dunedin, for example, that were let out as student flats.

2.5.6 However, I also understood the owner to say that even if the buildings were SA nevertheless they complied with the provisions of C/AS1 relating to "suites".

2.5.7 After the hearing I prepared a further draft determination ("the second draft") which I sent to the parties and the Fire Service. The second draft addressed the points made at the hearing and concluded that the buildings came within purpose group SA, but also concluded that, because the stage 2 building work had now been completed, albeit without building consent, the "sacrifices" that would now be involved in upgrading the buildings' means of escape from fire were significantly greater than when the territorial authority refused to grant the stage 2 consent. Accordingly, it was no longer reasonably practicable to upgrade the means of escape from fire, although it would have been before the stage 2 work had been done without consent. The second draft therefore decided that the buildings complied as nearly as is reasonably practicable with the relevant provisions of the Building Code but confirmed the territorial authority's decision to refuse the stage 2 building consent.

2.5.8 The territorial authority and the Fire Service did not accept the second draft for reasons that are discussed and taken into account below.

2.5.9 Despite two reminders, the owner did not respond to the second draft nor did he make any comments on the submissions on the second draft received from the Fire Service and the territorial authority.

2.5.10 I then prepared a third draft, which I also sent to the parties and the Fire Service.

2.5.11 The territorial authority made comments which are mentioned in 4.3.3.8 below, and also elaborated on its arguments about kitchen and laundry doors mentioned in 4.3.3.9 below, emphasising "the increased risk to occupants from spread of fire from service areas". I was not persuaded to alter what is said in 4.3.3.9 below.

2.5.12 The owner made extensive comments which essentially said that the owner remained of the opinion that the buildings were flats that complied completely with the Building Code. I was not persuaded to alter the third draft in the light of the owner's comments.

2.5.13 The Fire Service pointed out an editorial error, which has been corrected, and made comments which are mentioned in 4.3.4.8, 5.4, 5.5, and 5.6 below.

3 The Act, the Building Code, and the acceptable solution

3.1 Relevant provision of the Act are:

7 Interpretation

In this Act, unless the context otherwise requires,—

acceptable solution means a solution that must be accepted as complying with the building code

household unit —

(a) means a building or group of buildings, or part of a building or group of buildings, that is—

(i) used, or intended to be used, only or mainly for residential purposes; and

(ii) occupied, or intended to be occupied, exclusively as the home or residence of not more than 1 household; but

(b) does not include a hostel, boardinghouse, or other specialised accommodation.

means of escape from fire, in relation to a building that has a floor area,—

(a) means continuous unobstructed routes of travel from any part of the floor area of that building to a place of safety; and

(b) includes all active and passive protection features required to warn people of fire and to assist in protecting people from the effects of fire in the course of their escape from the fire

94 Matters for consideration by building consent authority in deciding issue of code compliance certificate

(1) A building consent authority must issue a code compliance certificate if it is satisfied, on reasonable grounds,—

(a) that the building work complies with the building consent; and

(b) that,—

(i) in a case where a compliance schedule is required as a result of the building work, the specified systems in the building are capable of performing to the performance standards set out in the building consent; or

(ii) in a case where an amendment to an existing compliance schedule is required as a result of the building work, the specified systems that are being altered in, or added to, the building in the course of the building work are capable of performing to the performance standards set out in the building consent. . . .

96 Territorial authority may issue certificate of acceptance in certain circumstances

(1) A territorial authority may, on application, issue a certificate of acceptance for building work already done—

(a) if—

(i) the work was done by the owner or any predecessor in title of the owner; and

(ii) a building consent was required for the work but not obtained; or . . .

(2) A territorial authority may issue a certificate of acceptance only if it is satisfied, to the best of its knowledge and belief and on reasonable grounds, that, insofar as it could ascertain, the building work complies with the building code.

(3) This section—

(a) does not limit section 40 (which provides that a person must not carry out any building work except in accordance with a building consent); and

(b) accordingly, does not relieve a person from the requirement to obtain a building consent for building work.

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,—

(b) . . .. 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 . . .

(A) means of escape from fire, protection of other property, . . . and fire-rating performance:

177 Application for determination

A party may apply to the chief executive for a determination in relation to 1 or more of the following matters:

(d) the exercise by a territorial authority of its powers under sections 112 and 115 to 116 (which relate to alterations to, or changes in the use of, a building) . . .

3.2 Relevant provisions of the Building Code are:

CLAUSE A1—CLASSIFIED USES

2.0 HOUSING

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. Examples: a holiday cottage, boarding house accommodating fewer than 6 people, dwelling or hut.

CLAUSE A2—INTERPRETATION

In this building code unless the context otherwise requires, words shall have the meanings given under this Clause. . .

Firecell Any space including a group of contiguous spaces on the same or different levels within a building, which is enclosed by any combination of fire separations, external walls, roofs, and floors.

Purpose group The classification of spaces within a building according to the activity for which the spaces are used.

Other relevant provisions have not been included because compliance with a compliance document, in this case C/AS1, must be accepted as establishing compliance with the corresponding provision of the Code, see section 19.

3.3 In this case, the relevant requirements of acceptable solution C/AS1 are:

Definitions

Suite A *firecell* providing residential accommodation for the exclusive use of one *person* or of several people known to one another. It comprises one or more rooms for sleeping and may include spaces used for associated domestic activities such as hygiene and cooking.

COMMENT:

1. Bed numbers are limited to six in *purpose groups* SC and SD or 12 in *purpose group* SA in accordance with C/AS1 Paragraphs 6.6.5 and 6.7.6. Examples may be found in

hotels, motels and residential care facilities, such as old people's homes or in hospices providing temporary family accommodation.

2. It is assumed that the social cohesion of the occupants by virtue of the personal relationship (as family members, friends or associates) would ensure that any individual, becoming aware of *fire*, would naturally assist others within the *firecell* to escape. The term *suite* does not apply to a group of bedrooms where each room is available to different "key-holders". In some cases a *suite* may be a single bedroom.

Table 2.1: Purpose Groups

Sleeping Activities		
Purpose group	**Description of intended use of the building space**	**Some examples**
SA	Spaces providing transient accommodation, or where limited assistance or care is provided for *principal users.*	Motels, hotels, hostels, boarding houses, clubs (residential), boarding schools, dormitories, halls, *wharenui*, community care institutions.
SR	Attached and multi-unit residential dwellings.	*Multi-unit dwellings* or flats, apartments, and includes *household units* attached to the same or other *purpose groups*, such as caretakers' flats, and residential accommodation above a shop.
SH	Detached dwellings where people live as a single household or family.	Dwellings, houses, being household units, or suites in purpose group SA, separated from each other by distance. Detached dwellings may include attached self-contained suites such as granny flats when occupied by a member of the same family, and garages whether detached or part of the same building and are primarily for storage of the occupants' vehicles, tools and garden implements.

2.2.9 Where any part of an SA purpose group consists of self contained suites, each with no more than 12 beds then:

a) Where the suites are attached, have an escape height of no more than 34 m and are used as household units, the requirements of purpose group SR may be applied.

COMMENT:

Treatment as an SR purpose group is permitted only where an SA suite is used as a residential dwelling.

For example, where occupied by the owner or manager of the building. Treatment as SR does not apply to transient occupancy.

b) Where the suites are detached, the requirements of purpose group SH may be applied.

COMMENT:

Under Clause A1 2.0.2 of the NZBC, a boarding house accommodating fewer than six people, may be treated as a detached dwelling.

6.7.6 A sleeping area in purpose group SA may be subdivided into separate suites (such as a motel unit or hotel room with or without en-suite facilities). Each suite shall be a separate firecell and contain no more than 12 beds. Fire separations between adjacent suites on the same floor level shall have a FRR of no less than 30/30/30.

COMMENT:

1. It is implicit that within a suite containing SA purpose group, there is a substantial degree of responsible self regulation by the occupants. Where there are two or more occupants it is expected that the social cohesion of the group would result in a mutual responsibility for warning each other of a fire within a suite.

2. See Paragraph 2.2.9 for situations where SA may be treated as SR or SH.

Table 4.1 of C/AS1, the relevant required fire safety precautions are:

(a) For purpose group SR firecells at ground level: None.

(b) For purpose group SA firecells at ground level:

Fire separation 30/30/30.

Type 4 alarm system (direct connection to the Fire Service not required in this case) and emergency lighting, unless:

ii) the escape routes are for purpose group SA and serve no more than 10 beds, (or 20 beds for trampers huts, see Paragraph 6.20.6), or

iii) exit doors from purpose group SA and SR firecells open directly onto a safe place or an external safe path (see paragraph 3.14).

4 Discussion

4.1 Which purpose group?

4.1.1 General

4.1.1.1 The territorial authority contended that both buildings came within purpose group SA.

4.1.1.2 The owner contended that:

(a) Both buildings came within purpose group SR, being effectively identical to student flats and the like.

(b) Building A was a single SR flat with three bed-sitting rooms having en-suite toilet facilities (and therefore there were no requirements for fire separation between the rooms, fire alarms, or emergency lighting), and that

(c) Building B was two SR flats each with a kitchen-lounge and six bedrooms having en-suite toilet facilities (and therefore 30/30/30 fire separation was required between the flats but there were no requirements for fire alarms or emergency lighting).

The buildings did not provide "transient" accommodation but were occupied by the same staff members throughout the tourist season.

4.1.1.3 In previous discussions, see 2.2 above, the parties appear to have considered that alterations to the layout of the buildings, such as enlarging the kitchen lounges, could change them from purpose group SA to purpose group SR. I do not accept that approach. Alterations to a building do not of themselves make any difference to the activity for which that building is used. It is that activity which determines the purpose group, see clause A1. In this case the buildings are used as residential accommodation for the owner's staff, and that is the defining activity. To take the owner's example (see 2.5.5 above), even if the buildings were on different allotments away from the hotel site they would still be used for the same activity and come within the same purpose group.

4.1.1.4 From table 2.1 of C/AS1 it appears that the distinction between purpose groups SA and SR largely turns on whether the unit concerned can properly be described as a "household unit" as defined in the Act. The examples establish that a motel unit comes within SA and is not a household unit; on the other hand, a caretaker's flat comes within SR and is a household unit. However, a particular building or part of a building will often not come exactly within one of the examples. In such cases, I take the view that the actual use must be compared to the examples, taking account of the definitions, so that the appropriate purpose group is that of the most similar example.

4.1.1.5 I also take the view that when a word or phrase is not specifically defined in C/AS1 then it must be given its ordinary and natural meaning in context.

4.1.1.6 In this case, it seems to me that words and phrases such as "flat", "hostel", "live as a family", for example, are ordinarily and naturally used in generalised meanings. For example, when we talk of "family" we mean the usual run of families (although not necessarily the traditional nuclear family) living together in an atmosphere of trust, harmony, and affection, even though we know that is very far from being the case with some actual families. Similarly, when we talk of a "flat" we mean the residence of a group of people who, if not actually a family, have chosen to live together in a family-like arrangement with a similar atmosphere.

4.1.2 Are the buildings similar to flats?

4.1.2.1 In this case:

(a) The buildings' occupants have not chosen to live together but have become entitled to live in the buildings because they are employed by the owner.

(b) This is not a family-like arrangement based on trust, harmony, and affection (although that characteristic may well develop).

4.1.2.2 There are locks on the bedroom doors for purposes of personal security. Such security considerations are incompatible with the family-like arrangement conveyed by the word "flat". That is not to say that a flat properly so called cannot have locks on bedroom doors, but rather that when we talk about "flats" in general we do not mean to convey a situation in which the occupants feel any need for protection against each other. I recognise that in some actual flats the occupants will not know each other well enough for that to be the case. However, that is not usual in flats whereas it is inevitable in staff accommodation such as the buildings concerned.

4.1.2.3 I therefore do not agree that the units concerned can properly be called "flats" coming within purpose group SR.

4.1.3 Are the buildings similar to hostels?

4.1.3.1 The first draft referred to Determination 2006/92 and said in effect that the buildings were in effect a hostel.

4.1.3.2 The owner disagreed, pointing to the *Compact Oxford English Dictionary* definition of "hostel":

> An establishment which provides cheap food and lodging for a specific group of people.

(I have no information as to the charges, if any, that the occupants of the buildings pay for accommodation and for meals taken in the hotel itself, but that is not an issue in this determination.)

4.1.3.3 In Determination 2006/92 I quoted the *Concise Oxford English Dictionary* definition of "hostel" as:

> a house of residence or lodging for students, nurses, etc

to which can be added the *Shorter Oxford English Dictionary* definitions:

1. A place of sojourn; a lodging [obsolete]
2. An inn, a hotel.
3. A house or residence for students; esp (in recent times) for students connected with a non-residential college.
4. A town mansion. [obsolete]

4.1.3.4 In Determination 2006/92, I considered whether an IHC residential home was to be classified as a household unit and took the view that current New Zealand usage the word "hostel" applied to a building:

> providing managed accommodation for a significant number of people (certainly more than five or six) sharing an occupation (student hostel, nurses hostel) or activity (youth hostel, backpackers hostel) but not sharing personal characteristics such as mental or physical disabilities.

4.1.3.5 In this case, Building A and Building B will provide managed accommodation for some 21 to 32 people sharing the occupation of hotel/motel staff but not necessarily sharing personal characteristics and having no choice as to their fellow occupants. Accordingly, I conclude that both Building A and Building B can properly be referred to as hostels, or at least are more similar to hostels than to any of the other examples in table 2.1 of C/AS1, and therefore come within purpose group SA.

4.2 Suites

4.2.1 I understood the owner to contend that if the units were within purpose group SA (which was denied) then:

(a) Building A contained three suites as defined in C/AS1 (and therefore 30/30/30 fire separation was required between suits and Type 4 fire alarms and emergency lighting were required throughout the building, but there was no requirement for fire separation between the rooms within each suite).

(b) Building B contained two suites as defined in C/AS1 (and therefore 30/30/30 fire separation was required between suits and Type 4 fire alarms and emergency lighting were required throughout the building, but there was no requirement for fire separation between the rooms within each suite).

(The meaning of "suite" was discussed in Determination 1997/07, but that determination concerned a rest home that came within purpose group SC so that different considerations applied and that determination is not relevant to this case.)

4.2.2 As to the "social cohesion of the occupants" referred to in C/AS1 (see 3.3 above), the owner said that arose out of their being work colleagues who lived together. I disagree for the reasons set out in 4.1.2 above.

4.2.3 As to the C/AS1 exclusion of "a group of bedrooms where each bedroom is available to different 'key-holders'", the owner said that in the event of fire staff were required to check on each bedroom in the hotel including the buildings concerned. When asked what a staff member could do if a bedroom in the buildings concerned was locked, the owner offered to ensure that the keys to all bedrooms were identical. I do not accept that approach because:

(a) It depends on the management of the buildings, and as has been said in several previous determinations, management actions cannot be taken in to account because they can be changed with any change of manager (management actions specified in any relevant legislation are already taken into account in C/AS1).

(b) It would be incompatible with the security considerations previously referred to, see 4.1.2 above.

4.2.4 C/AS1 says that examples of "suites" are to be found in hotels and motels. I take the view that in that context, the ordinary and natural meaning of "suite" is a group of interconnected rooms for use by families or groups of friends. As such, a suite is

similar to a household unit or a flat. In particular, the occupants share a suite because they wish to do so. That might not always be the case, but it rarely if ever would be the case in the buildings concerned.

4.2.5 Accordingly, I do not consider that the buildings can properly be said to contain suites.

4.3 Compliance

4.3.1 General

4.3.1.1 The parties approached the matter on the basis that the buildings were to undergo a change of use. For the reasons set out in 4.1 – 4.2 above, I have concluded that both Building A and Building B must be classified as purpose group SA. They were used as hotel/motel guest accommodation before they were relocated so that they were also purpose group SA in their original use. Purpose group SA corresponds exactly to "use SA" as specified in the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005. In terms of those Regulations, therefore, the buildings remain in the same use and there has been no change of use for the purposes of section 115.

4.3.1.2 However, the relocation of the buildings means that they have been altered, and therefore section 112 applies and the buildings must comply as nearly as is reasonably practicable with the provisions of the Building Code for means of escape from fire. I take the view that firecell separations, alarm systems, and emergency lighting all form part of the means of escape from fire as defined in section 7.

4.3.2 Establishing compliance with the Building Code

4.3.2.1 A building that complies with an acceptable solution must be accepted as complying with the corresponding requirements of the Building Code. However, that is not the only means of establishing compliance. A solution that complies with the Building Code but is not an acceptable solution is referred to as an alternative solution. In this case the owner contends that the design is an alternative solution complying with the Building Code but not with the acceptable solution C/AS1.

4.3.2.2 As mentioned in 2.1.5 above, the buildings have in fact been upgraded by replacing the Type 3 alarm systems with Type 4 systems and in by replacing the internal doors in Building B with "solid core 15 minute rating doors with smoke seals and closers". Accordingly:

(a) Building A complies with the relevant provision of C/AS1 because:

(i) Contrary to what was originally stated, fire separation between rooms is now known to be 30/30/30, see 2.1.3(a) above.

(ii) Emergency lighting is not required because the escape routes "serve no more than 10 beds" (Table 4.1 of C/AS1).

(b) In Building B there is no additional fire safety provision to compensate for the facts that:

(i) Fire separations between rooms are 0/0/0 between bathrooms and 15/15/15 elsewhere instead of the required 30/30/30.

(ii) There is no emergency lighting despite the fact that the escape routes serve more than 10 beds.

4.3.2.3 Fire separations are passive protection features that contribute to life safety by preventing a fire in one room from entering the adjoining room for a period of time corresponding to the fire rating of the separation[1].

4.3.2.4 Emergency lighting is an active fire protection feature that contributes to fire safety by assisting people to find their way along an escape route in the absence of the ordinary lighting (whether natural or artificial).

4.3.2.5 In Determination 2005/109 I took the view that in considering whether a building that did not comply with an acceptable solution nevertheless complied with the Building Code I may use the acceptable solution as a guideline or benchmark and take the approach that:

(a) Some acceptable solutions are written conservatively to cover the worst case of a building closely similar to the building concerned. If the building concerned presents a less extreme case, then some provisions of the acceptable solution may be waived or modified (because they are excessive for the building concerned) and the resulting alternative solution will still comply with the Building Code.

(b) Usually, however, when there is non-compliance with one provision of an acceptable solution it will be necessary to add one or more other provisions in order to comply with the Building Code.

4.3.2.6 Building B is not the worst case because of its simple layout and comparatively low numbers of occupants, which means in particular that it is easier for people to find their way along the escape routes than it would be in many of the buildings covered by C/AS1. Nevertheless, I consider that the territorial authority had not been given reasons that would have justified issuing the Stage 2 building consent subject to any waivers or modifications in respect of fire separations or emergency lighting. However, for the purposes of this determination, the question is not whether waivers or modifications were justified then but whether, in terms of section 112, Building B currently complies with the relevant provision of the Building Code "as nearly as is reasonably practicable".

[1] The ratings are based on standard tests so that a building element with a 30/30/30 rating, for example, will actually withstand a real fire for more or less than 30 minutes depending on the characteristics of the fire. However, a 30/30/30 element will withstand any particular fire for longer than would a 15/15/15 element.

4.3.3 Compliance "as nearly as is reasonably practicable"

4.3.3.1 In this case, under section 112, the buildings are not required to be upgraded so as to comply completely with the Building Code but only to comply as nearly as is reasonably practicable with the provisions of the Building Code for means of escape from fire and for access and facilities for people with disabilities (not raised in this determination).

4.3.3.2 In Determination 2006/77 I took the view that there was no substantive difference between the test under the former Building Act 1991 and the Act. That test was considered in *Auckland CC v NZ Fire Service*[2], an appeal against Determination 1993/4, in which the High Court held that:

> [The question as to whether a building complied with a particular requirement of the building code as nearly as is reasonably practicable to the same extent as if it were a new building] must be considered in relation to the purpose of the requirement and the problems involved in complying with it, sometimes referred to as "the sacrifice". A weighing exercise is involved. The weight of the considerations will vary according to the circumstances and it is generally accepted that where considerations of human safety are involved, factors which impinge upon those considerations must be given an appropriate weight.

The test has been applied in numerous determinations.

4.3.3.3 The second draft, applying that approach, said that the benefits were the increased life safety that would be achieved by installing 30/30/30 fire separations and emergency lighting, and that those benefits must be weighed against the sacrifices of the costs and disruption involved in such installation.

4.3.3.5 The second draft said that for Building B as completed, escape from fire involved a travel distance of less than 24 m and room doors are 15/15/15 with smoke seals and automatic closers. Fire separations are generally 15/15/15 but are 0/0/0 between bathrooms. Accordingly:

(a) The benefit of upgrading the current 0/0/0 and 15/15/15 fire separations to 30/30/30 is an increase in life safety for people in one unit when there is a fire in the adjoining unit. Fire spread between bathrooms and then into a bedroom will not threaten life as urgently as will fire spread between bedrooms. The sacrifice is the cost, including the cost of removing and replacing finishes and fittings, particularly in the bathrooms, plus the disruption of having to house staff elsewhere.

The second draft concluded that it was not reasonably practicable to upgrade the fire separations because benefit of improved fire safety would require a sacrifice out of proportion to that benefit.

(b) The benefit of installing emergency lighting is an increase in life safety for people by making it easier for them to use the exit routes when there is a fire in the building. The increase would not be significant because the exit routes involve only a comparatively short travel distance along a level corridor lined

[2] *Auckland CC v NZ Fire Service* [1996] 1 NZLR 330.

with windows to the outside and not requiring the use of stairs. The sacrifice is the on-going costs of installing and maintaining an emergency lighting system.

The second draft concluded that it was not reasonably practicable to install emergency lighting because there would be no significant benefit to balance against the sacrifice.

4.3.3.6 However, said the second draft, in the circumstances as they were when the territorial authority refused to grant the stage 2 building consent:

(a) The benefit of upgrading the fire separations to 30/30/30 would have been the same, but the only sacrifice would have been the cost of installing an additional layer of gypsum plasterboard.

The second draft concluded that it would have been reasonably practicable to upgrade the fire separations because benefit of improved fire safety would have outweighed the sacrifice.

(b) The benefits and sacrifices of installing emergency lighting would have been the same.

The second draft concluded that it was not reasonably practicable to install emergency lighting because there would be no significant benefit to balance against the sacrifice.

4.3.3.7 Responding to the second draft, the territorial authority said

> I don't agree that a compensating factor for having no fire rating between the bathrooms, is that there are two bathroom areas to slow up the spread of fire. If both bathroom doors are open through to the bedrooms at the same time, then there would be minimal effect on slowing up the spread of fire from one to the other for the protection of the occupants. . I certainly don't believe it would equate to 15 minutes which it should to balance with the fire ratings where the bedrooms back on to each other. . . .

4.3.3.8 I accept that the fire separation between bathrooms is less that that between bedrooms, but the point is whether the life safety of people sleeping in a bedroom with the door to the bathroom open would be improved sufficiently to justify the cost of upgrading the fie separation in the bathroom. I consider that it would not. In response to that point in the third draft, the territorial authority also said:

> Council also does not agree with the section 4.4.3.8 comment that the benefit to life safety in upgrading the fire rating between bathrooms is not justifiable given the cost and inconvenience. Council does not accept that cost or possible inconvenience should be a consideration . . . .
> *Auckland CC v NZ Fire Service*. . . The degree of risk is to be balanced against the cost, time, trouble, or other "sacrifice" necessary to eliminate the risk. . . .

That passage was quoted in the *Auckland CC v NZ Fire Service* decision, and the Court said:

> I do not think the Authority was wrong in the approach which it adopted.

Accordingly, I reject the territorial authority's submission on that point.

4.3.3.9 The territorial authority also said that the second draft did not mention the doors to the kitchens and laundries in Building B, which also needed upgrading to comply with C/AS1. That is a legitimate point, but it is one that I cannot recall having been

raised previously by either the territorial authority or the Fire Service. Even without any submissions on the point from the owner, my first impression is that the increase in life safety be replacing those doors would be small. Accordingly, I am not willing to further delay the determination process by addressing the point.

4.3.4 Taking account of work done without building consent

4.3.4.1 On the question of taking account of Building B as completed rather than as it was before the Stage 2 work was undertaken without building consent, the second draft referred to Determination 1993/4, when a similar situation had arisen in that the owner had continued with building work despite the fact that the building consent had been (or was believed to have been) suspended. In that determination, the Building Industry Authority accepted that events since the time of building consent were relevant to the degree of the sacrifice, saying:

> The Authority accepts the submission of counsel for the territorial authority that the assessment of what are reasonable grounds for a decision is to be made objectively in all the circumstances relevant at the time. . . .
>
> The Authority accepts that events since the time of building consent are relevant to the degree of the "sacrifice" . . . .
>
> The provision of a second stair at the time of application for a building consent would have involved basic changes to the design of the building on which the marketing exercise had been based. The Authority accepts that such changes at the time of the building consent would probably have meant that the project was no longer viable. The Authority accepts that at the time of the determination it would not be reasonably practicable to install a second stair. . . .

4.3.4.2 Accordingly, Determination 1993/4 had been to the effect that (taking account of the facts at the time of the determination rather than at the time of issue of the disputed building consent) it was not reasonably practicable to install a second stair but it was reasonably practicable to install a sprinkler system.

4.3.4.3 That approach had been approved by the High Court[3], which said (underlining added):

> It seems to me that the use of the words "reasonably practicable" is designed to allow a commonsense, overall appraisal to take place. That involves a consideration of the situation as it actually exists when the Authority considers it. The significance or weight which is to be given to changes which have occurred since the matter was first placed before the Council or since the building consent was granted is a factor to be taken into account in the overall assessment which the Authority is required to make. <u>An applicant could hardly be permitted to take advantage of his or her own wrong in deliberately proceeding in the face of an argument, to make structural changes. That is merely to accept a risk. On the other hand, where an applicant has in good faith acted in accordance with a consent which has been granted, it would be grossly unjust for the Authority in making an overall assessment, to ignore that.</u> The question is not I think so much one of the time at which an assessment should be made, but rather of the weight which should be given to the various factual matters which are placed before the Authority. . . .

[3] *Ibid*.

I do not think the Authority was wrong in the approach which it adopted.

4.3.4.4 In response to the second draft, the Fire Service quoted those underlined words and pointed out that in Determination 1993/4 the owner had done work in accordance with a building consent, whereas in this case there never was a building consent for the Stage 2 work. The Fire Service accordingly argued that the High Court judgment "stands for the . . . proposition . . . that work undertaken in good faith is relevant to the sacrifice consideration". The judgment had referred to an owner who "acted in good faith in accordance with a consent", but that was not what happened in this case, where the owner had taken the risk of going ahead without consent so that, in the words of the judgment, the owner "could hardly be permitted to take advantage of his or her own wrong".

4.3.4.5 The territorial authority made a similar response to the effect that an owner should not be "rewarded" for doing work without a building consent.

4.3.4.6 Those responses have considerable merit. On the evidence I have seen it appears that the owner knew that the territorial authority (and the Fire Service) both considered that 30/30/30 separation was required, and that was at least one of the reasons why the Stage 2 consent had not been granted. Nevertheless, the owner went ahead without consent and did not install the required separation.

4.3.4.7 However, I do not agree with the Fire Service interpretation of the judgment to the effect that "circumstances as they actually exist" are to be taken into account only when they result from actions undertaken "in good faith . . . in accordance with a consent". Whether or not the work was done in accordance with a building consent may be a factor that must be taken into account, but the Court did not say that it was a conclusive factor. The weight to be given to that factor is a matter for the Chief Executive.

4.3.4.8 Commenting on that approach as taken in the third draft, the Fire Service repeated its view that the judgment was to be read as "an absolute statement [that] only good faith construction is relevant to the consideration". I have reconsidered the matter, taking account of a new internal legal opinion, but maintain my view that the weight to be given to work done otherwise than in accordance with a building consent, whether or not in good faith, is a matter for the Chief Executive.

4.3.4.9 The question, therefore, is whether the fact that the owner should not have gone ahead without building consent should be given sufficient weight to reverse the balance of benefits and sacrifices in "the situation as it actually exists".

4.3.4.10 I take the view that I cannot give significant weight to the fact that the owner completed Building B without a building consent because, although the owner did not deny that it did the Stage 2 work without a building consent:

(a) That is a criminal offence under section 40(3) that was not proved to the standard that would be required by a Court.

(b) The owner's degree of culpability and other relevant matters were never raised.

(c) I am not a Court and cannot make decisions as to criminal liability.

(d) Determinations such as this one are generally concerned with matters of building technology that it is not appropriate to consider in terms of rewards and punishments.

4.4 Conclusions

4.4.1 I conclude that:

(a) The buildings come within purpose group SA.

(b) In the current circumstances the buildings comply as nearly as is reasonably practicable with the relevant provisions of the Building Code.

(c) In the circumstances as they were when the territorial authority refused to grant the stage 2 building consent, the buildings, after the proposed alterations, would not have complied as nearly as is reasonably practicable with the relevant provisions of the Building Code.

4.4.2 Whether my conclusions mean that the owner has unjustly benefited from its illegal actions, and if so whether the owner should be brought to account, are not matters for me to decide. I do not know whether the territorial authority has or intends to prosecute the owner under either section 40 or (if it has issued a notice to fix) section 168. A prosecution is the mechanism set in the Act for dealing, where appropriate, with these sorts of circumstances. In note that the maximum fine set under the Act is $200,000 for an offence of this type.

5 What is to be done?

5.1 Although I have concluded that Buildings A and B comply with section 112, the fact remains the Stage 2 work was not done in accordance with a building consent and therefore that the territorial authority cannot issue a code compliance certificate under section 94.

5.2 The fact that the Stage 2 work was done without consent will be made apparent in the land information memorandum, which may also identify the deficient fire precautions that might need to be addressed in any future alteration or change of use of the buildings.

5.3 The only way the owner can attempt to legitimise Buildings A and B to any extent is by applying for a certificate of acceptance. Section 96(a) contemplates such an application, which must be made in accordance with section 97. If the territorial authority grants the application then the certificate will no doubt also identify the deficient fire precautions. Section 96 provides in effect that that the issuing of a certificate of acceptance does not prevent a prosecution for doing building work without a building consent.

5.4 Commenting on the previous paragraph in the third draft, the Fire Service said:

> . . . a certificate of acceptance can only be issued if the test in s96(3) is met. As the determination finds that the building work does not meet the Building Code then the BCA is unable to issue a certificate of acceptance as the BCA knows that the building work does not meet the Building Code but only complies as nearly as reasonably practicable. Therefore there is no effective remedy.

5.5 That interpretation of section 96 had not been previously raised in respect of this determination. At this stage, I offer no opinion on whether section 96 prevents the territorial authority from issuing any certificate of acceptance or permits it to issue a certificate of acceptance that identifies building work that, as far as the territorial authority could ascertain, does comply with the Building Code and also work that does not comply.

5.6 As to the Fire Service statement that "there is no effective remedy", I note that section 96(3) effectively provides that the fact that a territorial authority has issued a certificate of acceptance in respect of a building does not prevent that territorial authority from mounting a prosecution for doing building work without a building consent (see also 4.3.4.10 above). I also note that it is usually against the owner's interest for a building to have no code compliance certificate and no, or a limited, certificate of acceptance. The owner may also find that he has difficulties in obtaining insurance.

6 Decision

6.1 In accordance with section 188(1) of the Act, I hereby:

(a) Determine that in the current circumstances Building A complies completely and Building B complies as nearly as is reasonably practicable with the provision of the Building Code for means of escape from fire.

(b) Determine that in the circumstances as they were when the territorial authority refused to grant the stage 2 building consent, Building B, after the proposed alterations, would not have complied as nearly as is reasonably practicable with the relevant provisions of the Building Code.

(c) Confirm the territorial authority's decision to refuse to grant the stage 2 building consent.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 17 September 2007.

John Gardiner
Manager Determinations