

Determination 2009/98

The change of use of a high-rise apartment building at 18 Turner Street and 17-19 Waverley Street, Auckland City

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, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department.

1.2 The parties to this determination are:

- the owner of the building, Turn and Wave Ltd (“the applicant”) acting through the project managers for the development (“the project managers”)
- the Auckland City Council carrying out its duties and functions as a territorial authority and a building consent authority (“the authority”).

1.3 I take the view that the matter for determination² is whether the authority correctly exercised its powers under section 115³ when it declined to give written notice to the applicant for a change of use for a recently constructed apartment building with a single means of escape from fire.

1.4 The change of use relates to the floors contained within an egress height of between 25 and 34 metres of two towers that constitute an apartment building. The proposed change of use is from a SR (“Sleeping Residential”) to a SA (“Sleeping Accommodation”) purpose group and is in relation to the fire safety of the egress height in question.

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

² Under section 177(d) of the Act.

³ 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.

- 1.5 In making my decision, I have considered the submissions of the parties, the report of an independent expert commissioned by the Department (“the expert”) to advise on this dispute, and the other evidence in this matter.
- 1.6 I also forwarded the determination documentation to the New Zealand Fire Service Commission (“the NZFS Commission”) by way of consultation under section 170.

2 The building

- 2.1 The building in question consists of two apartment towers. One tower is fourteen stories high above ground level and is constructed above three levels of basement carparking. The other tower is thirteen stories high above ground level and is constructed above two levels of basement carparking. The two towers are linked through the lower car parking levels. Both towers consist of apartments upwards from the ground floor level. The purpose group for the accommodation of the building was established as being SR.

3 Background

- 3.1 As set out in paragraph 2.1, the building, in which each tower has a single means of escape, was consented by the authority and built subsequent to the decision in Determination 2006/52. That determination required certain additional requirements to be met before the authority could issue a building consent. According to the project managers, the building was completed in January 2009 and a code compliance certificate has been issued for it by the authority.
- 3.2 The applicants were involved in discussions with the authority regarding a change in use to SA purpose group for the building up to the 34-metre level for both towers. This was to allow the applicants to rent apartments for less than the SR threshold of 90 days. In this respect, I note that the applicant in its submission has suggested that this is a Building Code requirement. However, I note that the 90 day threshold is set out in Table 2.1 of Acceptable Solution C/AS1, which is only one method of ensuring code-compliance.
- 3.3 In a letter to the project managers dated 1 April 2009, the authority noted that:
- the application for the change of use would be treated under section 115
 - any extension “in new use” above 25 metres should be subject to the determination process.
- 3.4 According to the project managers, the authority has agreed that a building consent for a change of use to SA for a single means of escape up to the building height of 25 metres can be applied for under section 115. That application has since been granted (refer paragraph 3.8).
- 3.5 A firm of consultants (“the consultants”) prepared a “Fire Design Amendment” report for the applicant that was dated 1 July 2009. The report described in detail the various aspects of the building and its code-compliance. In essence, the report confirmed that regarding the 25 to 34-metre escape height, using the same risk assessment approach as that set out in Determination 2006/52, the existing design

would continue to provide the same level of life safety as that deemed acceptable in that determination. The report also included the following statement:

The specific fire engineering design was developed on the basis of designing a building suitable for two residential apartment towers and no exclusion was made in the design to specifically identify whether this was for short or long term sleeping risk occupancies.

- 3.6 The application for a determination was received by the Department on 23 July 2009.
- 3.7 Copies of a draft determination were forwarded to the parties and the NZFS on 7 October 2009.
- 3.8 The applicant accepted the draft without comment. The NZFS queried its understanding of an aspect of the expert's report and otherwise had no further comment. The authority accepted the draft and commented:
- references to the egress height should be 25m to 34m, not 35m. (Subsequently amended.)
 - the building consent application for a change of use up to 25m has been granted
 - the test of reasonably practicable under section 115 is not relevant.

4 The submissions

- 4.1 In a letter to the applicant dated 1 April 2009, the authority stated:
- The original building consent was approved specifically for the use of the SR purpose group. The fire designer opted for the risk assessment approach to achieve compliance with the Building Code. The applicant has to go through a determination process through the DBH to achieve this.
- 4.2 The project managers produced a submission dated 2 July 2009 on behalf of the applicants. The submission described the building and set out the background to the dispute.
- 4.3 The project managers forwarded copies of the:
- current floor plans
 - original fire report, dated November 2006, prepared by the consultants for the consent
 - consultants' "Fire Design Amendment" report of 1 July 2009
 - letter from the authority dated 1 April 2009
 - Determination 2006/52.
- 4.4 In a letter dated 6 August 2009, the authority disagreed with the consultants' statement that is set out in paragraph 3.5, stating that the building consent application is for purpose group SR and the fire design amendment report referred to three safety features that are only applicable to SR purpose group. The authority was of the opinion that the building had been subject to an "SA Hotel Accommodation" operation since it was completed. Accordingly, a "reasonably practicable" approach

was not considered to be reasonable in this instance. This was in accordance with the Department's statement set out in paragraph 6.4.4 (c) of Determination 2005/109, which stated:

I take the view that owners cannot change the use of brand new buildings and then be able to claim that they are not required to comply completely with the relevant provisions of the building code.

- 4.5 The authority forwarded copies of the
- building consent application form for the original building
 - information relating to the perceived use of the building.
- 4.6 The project managers wrote to the Department on 17 September 2009, attaching further submissions made by the consultants and a legal advisor.
- 4.7 In a letter to the project managers dated 16 September 2009, the consultants responded to the authority's concern about their statement that is described in paragraph 3.5. The consultants noted that:
- the intention of the statement was to clarify that the fire engineering and Determination 2006/52 did not take long or short-term occupancy of the apartments into account
 - at the time of the original design and application there was no time differentiation between purpose groups SR and SA
 - the analysis of means of an escape from fire was equally applicable to the apartment occupants regardless of whether they were in residence for 1 day or 91 days
 - in their opinion, there was no difference between the occupants' ability to escape from fire if they were short stay occupants or a resident that had just occupied their new apartment on the day of fire occurrence.
- 4.8 The legal advisor to the applicant provided an opinion, dated 17 September 2009, disputing points around the application of section 115, the views held in 2005/109, and that the alleged illegal use of the building is not relevant to the matter.

5 The relevant legislation

- 5.1 The relevant section of the Building Act is:

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.

6 The expert's report

6.1 As stated in paragraph 1.5, I commissioned a fire safety engineer (“the expert”), who is a chartered professional engineer and an expert in fire-safety design, to provide me with a report relating to matter at issue.

6.2 The expert provided me with a report dated 9 September 2009. In summary the report stated:

- The Fire Design Amendment report (See paragraph 3.5) was ‘unconvincing in detail’.
- Despite this, the expert agreed in principal that the Determination 2006/52 analysis result broadly translates into an SA building of an escape height of less than 34 metres.
- The key differentiating fire-safety precautions (“FSP”), such as the higher than required fire ratings, the enhanced sprinkler system, and most importantly, the non-required corridor pressurisation, remained as “enhancements”.
- At an escape height of more than 34 metres, the pressurisation of safe paths becomes a “required” rather than an “enhanced” FSP for SA building. Accordingly, its value is lost, as is any comparability to a “deemed to comply” building.

6.3 The report concluded that the code-compliance of the new use is contingent upon the additional requirements that were set down in paragraph 10.1(b), items (i) to (iv) of Determination 2006/52 having been complied with. This is especially important as regards the corridor pressurisation system, which is central to the compliance debate. Particular attention should be paid to air relief in this respect.

7 Discussion

7.1 I strongly disagree with the statement made by the authority as described in paragraph 4.1. As a building consent authority, the authority should assess any consent application and make its own decision. Should an applicant not accept such a decision, then the applicant can apply to the Department for a determination as regards that matter. The determination process is not one that relieves a building consent authority from carrying out its statutory consent functions and processes.

- 7.2 The expert is of the opinion that, if the requirements set out in Determination 2006/52 have been carried out, the building egress heights between 25 and 34 metres of the two towers of the building would meet the requirements of the SA purpose group.
- 7.3 The requirements referred to were as follows:
- i. A corridor pressurisation system is to be designed, installed, and commissioned to the satisfaction of the territorial authority, with particular attention paid to air relief.
 - ii. Doors are not to be locked from the stairwell side in a manner that would prevent occupants from being able to enter any floor level from the stairwell in fire alarm conditions.
 - iii. In the absence of automatic smoke detectors, tamper-proof manual call points are to be provided in the stairwells to facilitate fire alarm operation and re-entry.
 - iv. Appropriate signage is to be included to the satisfaction of the territorial authority, indicating that the escape route descends past the ground floor entry in each tower to the first basement level.
- 7.4 As I am prepared to accept the expert's opinion in this matter, I find that, on the proviso that the four requirements listed in paragraph 7.3 have or will be carried out prior to any application for a building consent, in terms of section 115 the egress heights of the building between 25 and 34 metres, if used for short-term accommodation, will comply with the Building Code provisions that relate to means of escape from fire, and therefore also comply as nearly as is reasonably practicable as required by section 115.
- 7.5 I observe that it seems likely that the requirements in question were carried out to the authority's satisfaction prior to the issue of that consent as the authority issued a building consent for the building after Determination 2006/52 was issued and has made no submission in this determination in relation to those requirements.
- 7.6 Accordingly, I find that the building meets the Building Code requirements of a SA purpose group in terms of section 115(b). Having reached this decision, I do not consider that I need to address the issues relating to a brand new building. In addition, I emphasise that the decision relates to the circumstances of this building only. A full technical analysis will always be required for similar buildings with a different set of circumstances.
- 7.7 I also accept the argument put forward on behalf of the applicant that the alleged illegal use of the building is not relevant to the matters to be determined and I leave that matter for the authority to resolve with the owners.

8 The decision

- 8.1 In accordance with section 188 of the Act, I determine that, on the basis that the four requirements listed in paragraph 7.3 of this Determination have been carried out, the authority incorrectly exercised its powers under section 115 when it declined to give written notice to the applicant permitting a change of use for a recently constructed apartment building with a single means of escape from fire.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 5 November 2009.

John Gardiner
Manager Determinations