



Determination 2015/013

Regarding a dispute about which fire Risk Group should be used in establishing compliance of proposed accommodation at a holiday park at 52 Northcote Road, Takapuna

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 and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”) for and on behalf of the Chief Executive of the Ministry.
- 1.2 The parties to the determination are:
 - the applicant, Auckland Council carrying out its duties and functions as a territorial authority or a building consent authority (“the authority”)
 - the owner of the property on which the accommodation is proposed, S & R Family Trust (“the owner”), acting through a legal adviser.
- 1.3 I also forwarded this determination to the New Zealand Fire Service (“the NZFS”) by way of consultation under section 170 of the Act.
- 1.4 This determination arises from a dispute between the parties as to which Acceptable Solution (C/AS1 or C/AS2) applies to the proposed building work for the purposes of achieving compliance with Clause C of the Building Code. The owner is of the view that the proposed building work falls within Risk Group SH², and that therefore C/AS1 applies. The authority’s view is that the proposed building work falls within Risk Group SM and that C/AS2 applies; for this reason the authority has refused to grant building consent No. BH-1248278.
- 1.5 I take the view that the matter to be determined³ is whether the proposed building work complies with Clause C of the Building Code and whether the authority was correct in its refusal to grant the building consent.
- 1.6 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.
- 1.7 The relevant clauses of the Building Code, paragraphs of the Acceptable Solutions, and the commentary to the Acceptable Solutions referred to in this determination are set out in Appendix A. The comments in the Acceptable Solutions provide guidance on, but do not form part of, the application of the solutions.

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 Risk groups are described in Table 1.1 of Acceptable Solutions C/AS1 to C/AS7

³ In terms of sections 177(1)(a), 177(1)(b) and 177(2)(a).

2. The proposed building work

- 2.1 The proposed building work consists of 10 prefabricated dwellings, consisting of four duplexes and two free standing units (“the units”). The units each contain two bedrooms, kitchen, living room, and a combined bathroom/w.c./laundry room.
- 2.2 The duplex units are two story timber framed structures with car parking at ground level; access to the units is by way of external stairs to a deck. The party wall separating the units has a fire resistance rating (FRR) of 30/30/30, it extends out to the dividing wall between the decks and the car parking area underneath, but stops 100mm short of ground level. (Figures 2 and 3 in paragraph 3.3 show the proposed fire rating in more detail). I have received no information in regards to the remaining two free standing units; this determination considers the free standing units only in so far as their use in terms of the type of accommodation intended and does not consider the compliance of the units as they are proposed to be constructed.



Figure 1: Duplex plan (not to scale)

- 2.3 The units are part of a larger motel and holiday park complex containing a range of accommodation, including motel rooms, self-contained ‘tourist flats’, cabins, powered motor home sites and tent sites.
- 2.4 The owner proposes to lease the units by way of a 20 year exclusive license to occupy for use as private dwellings. The owner has provided a copy of a sample ‘license to occupy site in relocatable home park’; however the details in the sample license indicate that it is an example of a license used for other types of accommodation units within the complex and is not specific to the proposed units. I have addressed the issue concerning the proposed licenses to occupy in paragraph 5.4.

3. Background

3.1 The building consent applications

- 3.1.1 The authority initially advised the work was done under one consent (No. 20131907) and that:
- Building Consent 20131907 was not issued and was re-designated BH-1248278, which is on hold pending additional information and the outcome of the determination
- 3.1.2 In response to submissions made by the applicant the authority later advised that building consent No. BC20131907 was for the off-site construction of the re-locatable units, described as ‘Construction of re-locatable 8 x 2 bedroom units’. The units were assessed by the authority as ‘Fire Risk Category SH (single household

units)'; a fire report supporting this consent application, dated 2 April 2012, detailed the location of the units in the holiday park and referred to the 'license to occupy arrangement'.

- 3.1.3 Building consent No. BC20131907 was granted on 21 November 2013 and issued thereafter.
- 3.1.4 According to the applicant the authority then:
 decided at some point to split the application/consent into 2 parts: One for construction off-site and the other for the foundations on site [consent application BH-1248278].
- 3.1.5 Questions were subsequently raised by the authority over the applicable Risk Group (SH or SM) meaning that if the units were found to SM the authority considered 'the approved/consented plans (for construction off-site) effectively became null and void'.
- 3.1.6 The work approved under consented under No. BC20131907 did not proceed.
- 3.1.7 A second application for building consent was recorded by the authority as received on 13 September 2013 and allocated application number BH-1248278. The work is described in the application as:
 To construct off-site and move onto site - 8x2-bedroom units [at] the holiday park. Units to be used for accommodation for the elderly.
- The use was described in the consent as:
 Holiday park / home park (communal residential⁴)
- 3.1.8 Correspondence and information arising from requests for information by the authority use a mix of application numbers BC20131907 and BH-1248278. The authority's records in relation to the applications are unclear, which appears to arise from both consent applications overlapping in terms of the time in which they were being processed.
- 3.1.9 For the purposes of this determination I have considered both the compliance of the building work and the authority's refusal only in terms of the second building consent application No. BH-1248278.

3.2 The fire report

- 3.2.1 The application for consent was supported by a fire report dated 14 May 2013. The fire report described the units as Risk Group SH and said that there was a single means of escape from each unit via the deck and an external stair. The report showed 30/30/30 FRR separation between the duplex units and across the deck (as shown in the figures 2 and 3 below). The report provided two solutions in relation to the fire separation to the carpark, namely:
- (i) 'The fire rating is to extend down to ground [carpark] level but as this is a flood plain area the fire rating will stop at 100mm off the ground level to allow for the flow of water'
 - (ii) 'If a fire rating is NOT constructed between the units at ground level then the underside of the mid floor areas is to be lined to a minimum 30/30/30 FRR ... This [FRR] is to extend a minimum of 1.0m each side of the boundary line between units.'

⁴ "Communal residential" is a classified use defined in the Building Code. Refer to Appendix A.2

- 3.3 The plans submitted for consent applied the second fire safety solution: i.e. the fire separation between the units, fire separation (vertical and horizontal) to the deck, and the 1.0m wide horizontal separation under the units.

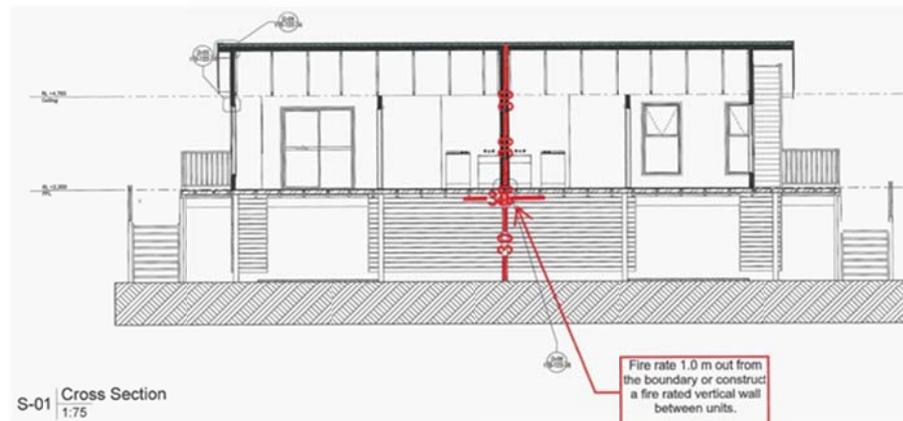


Figure 2: Cross section S-01 from the fire report (not to scale)

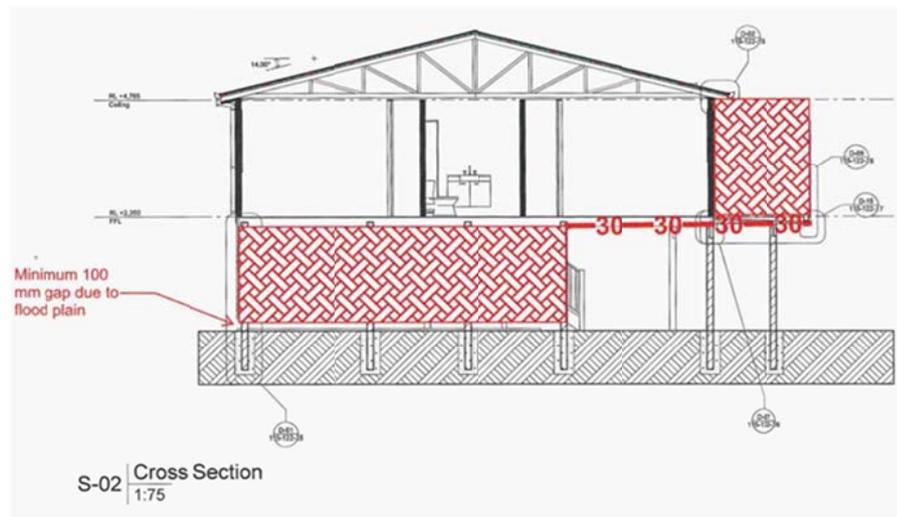


Figure 3: Cross section S-02 from fire report (not to scale)

- 3.4 In December 2013 the authority formed the view that the correct Risk Group for the proposed units was SM, and by email on 21 January 2014 advised the manufacturer that:

The reason is that the accommodation is built on a single lot and there is no exclusive ownership, by the occupier, of the land on which the unit is constructed.

There is no dispute in terms of the units being single households. The terms of residence is by way of a license to occupy (a long term lease of the unit from the owner).

- 3.5 The manufacturer disputes the view taken by the authority and in an email on the same day queried 'how the lack of exclusive ownership has a bearing on the issue at hand'. The manufacturer went on to note that the definition of 'purpose groups' in C/AS1 is in relation to the activity for which the spaces are used rather than ownership, and that the units would be permanently occupied rather than being used for transient accommodation. (I note that the term "purpose groups" was used in the previous edition of the Acceptable Solution – the Approved Document for New Zealand Building Code Clauses C1, C2, C3, C4 effective from 1 June 2001; at that

- time the purpose groups were aligned with the uses set out in Schedule 2 of the Regulations⁵.)
- 3.6 Correspondence continued between the authority and the manufacturer, with the authority noting in an email on 21 January 2014 that ‘[t]he issue stems from the definition of “building” and the fact that the buildings are constructed on a single lot (not fee simple in their own right).’
- 3.7 On 24 March 2014 a legal adviser acting on behalf of the owner wrote to the authority regarding the definition of “building” under section 8(1)(c) of the Act and that the definition of building did not feed into the Risk Group.
- 3.8 The authority responded by email on 2 April 2014, stating that the authority was ‘still not convinced that the individual units can be classified as SH for the purpose of fire design’. The authority referred to the classified use for the purposes of the resource consent being potentially different to the Risk Group for fire design, and that the uses set out in the Regulations do not directly align with the Acceptable Solutions.
- 3.9 In an internal email on 17 June 2014, an officer of the authority set out the view that
- the definitions and acceptable solutions post 2013 don’t allow the use of SH (as the units are occupied as long term leased accommodation), the owner is not the occupier and leases the houses (units) on a long term right to occupy. The definitions don’t include the occupier as “the owner” for the purposes of the Act. Previously the old C/AS1 allowed these types to be considered as SH for the purpose of design, but the new documents don’t have such a relaxation and they are explicit in so much as consent can be granted only by full compliance or using a VM2 design – so discretion (*sic*) has been removed from the BCA
- ... the only result for the Acceptable solution is that the correct risk group is SM. That raises issues for fire resistance and fire separations as well as compliance schedules and access etc...
- 3.10 The authority continued to hold the view that because the occupants don’t own the building, the use under the Regulations is SR (Sleeping residential) and that therefore the relevant Risk Group is SM. The authority proposed a determination be sought on the matter.
- 3.11 On 2 July 2014 the owner’s legal adviser wrote to the authority setting out the view that the matter for the determination to consider was whether the proposed units came within Risk Group SH or SM and accordingly whether or not compliance can be achieved by C/AS1. The letter went on to note that the matter may require analysis of ownership, classified use, Risk Group and purpose group as raised in the application.
- 3.12 The owner’s legal adviser described the proposed development and noted that there would be licenses to occupy entered into by the land owner granting each licensee a 20 year license to occupy for use as a “private dwelling only... not exceeding 2 persons”. The letter set out the owner’s view that the units fell within the Risk Group SH, noting that the units were not above another and had their own independent means of escape. The owner’s legal adviser considered that the authority’s interpretation of the “building” as being the complex as a whole was incorrect, and that if the units were on separate titles, such as unit titles, there would be no question that they would fall within Risk Group SH.

⁵ Schedule 2 of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005; herein referred to as “the Regulations”

- 3.12.1 The authority's records include a 'Recommendation NOT to Grant Building Consent' dated 11 August 2014, which includes a hand written annotation:
- Outstanding information includes Risk Group Classification, Accessibility & Fire Protection requirements remain unresolved.
- 3.13 The application for a determination was received by the Ministry on 12 August 2014.

4. The submissions

- 4.1 The authority did not provide a covering letter or submission with the application; I have taken the correspondence included in the application to represent the authority's view on the matter. The authority provided copies of the following:
- Various correspondence between the parties and internal correspondence between officers of the authority.
 - A 'license to occupy site in relocatable home park' and 'rules for occupancy' for a site (not nominated) on the property.
 - Plans for one of the proposed duplexes, and a site plan showing the location of the 10 units relative to each other.
- 4.2 The authority described the matter to be determined as follows:
- a) Whether the following building work complies with the Building Code:
Construction of residential units occupied under a license to occupy.
 - b) Refuse to issue a building consent for the following building work:
Construction of several residential units to be held by a common owner:
 - 1) What is correct classified use?
 - 2) What is the correct purpose group?
 - 3) What is the correct risk group?
- (I take the authority's reference to 'purpose group' to be referring to the use under the Regulations.)
- 4.3 The owner acknowledged the application and made a brief submission dated 25 August 2014, noting with concern that the building consent application was lodged in August 2013 and that the owner was advised the consent was refused nearly a year later after the application was made for a determination. The owner also referred to the manner in which the matter to be determined had been worded in the application (see also paragraph 3.11).

4.4 The first draft determination and submissions in response

- 4.4.1 A draft determination was issued to the parties and NZFS for comment on 26 September 2014. The draft concluded that the proposed building work was designed to comply with C/AS1 and that paragraph 2.2.10 of C/AS1 applied.
- 4.4.2 The authority's response was received on 22 October 2014. The authority sought further comment on 'the impact upon Risk Group classification on the following':
- 1) What is the purpose (*sic*) group as defined in [the Regulations] applicable to the unit?
 - 2) As the units are to remain in common ownership, although occupied by Licensees, are they regarded as one building?

- 3) Where an SM Risk Group exists (licensed living accommodation) above a VP Risk Group (licensed car-parking) can the requirements of Risk Group SH apply to the whole building.

- 4.4.3 The owner responded on 23 October 2014, making no further submission.
- 4.4.4 The NZFS responded on 3 November 2014, making no comment on the draft determination.
- 4.4.5 In regard to the first two points raised in the authority's response (refer paragraph 4.4.2 above) I note that:
- the use under the Regulations for the single units is SH and for the duplex units the use is SR; the question of which Risk Group the buildings fall under does not turn on the use described in the Regulations
 - the issue of ownership in relation to compliance with Clause C of the Building Code is discussed in paragraphs 5.2.5 to 5.2.7
 - I have discussed the Risk Groups in relation to car parking in paragraph 5.6.

4.5 The second draft determination and submissions in response

- 4.5.1 A second draft determination was issued to the parties on 24 November 2014. The second draft concluded that while the proposed duplex units fall within the provisions of paragraph 2.2.10 of C/AS1, the plans do not show either a fire separation between the two car parking areas or between a shared car parking area and the units above; accordingly the draft found that there was insufficient information in the consent application to establish that the proposed duplex units would comply with Clause C of the Building Code.
- 4.5.2 On 10 November 2014 I sought further information from the owner in regards to fire separation of the car parking spaces. The owner responded on 26 November, noting that two fire safety reports had previously been commissioned. The report (refer paragraph 3.2) dated 14 May 2013, uses the SH Risk Group, but does not mention the accommodation type in terms of the intended length of stay or planned occupancy.
- 4.5.3 On 3 December 2014 I sought confirmation from the authority as to whether the authority had either of the fire safety reports when it made its decision.
- 4.5.4 On 10 December 2014 the authority responded to the second draft determination, requesting guidance on interpreting paragraph C/AS1 1.1.1 (e), and the words 'associated garages or carports' in the context of the diagram in paragraph 5.6.3. The authority stated its interpretation as being that the garages or carports in question 'must be legally dedicated to the sole use of the household units concerned, and cannot be used by others.'
- 4.5.5 On 17 December 2014 in response to the second draft determination the owner provided a submission setting out the background in more detail and provided copies of drawings and some correspondence relevant to the issued consent. The owner submitted the following (in summary):
- It was initially believed that only one consent was required as the prefabricated construction and the site works were both going to be within Auckland. The owner stated that when the approval of the building consent became 'bogged down' the authority advised that the consent would be 'split' between the off-site and on-site construction.

- The only reason given by the authority for refusing the consent had been that the units were to be placed on the same lot and did not have independent means of escape because the occupants would have to cross the land itself (refer paragraph 3.4 and 3.6).
- Some amendment to the licenses to occupy would be made. As the license is not able to be terminated by the licensor, it is not valid to suggest that if there was a new owner or new management the use of the units may change (refer paragraphs 2.4 and 5.4.7 to 5.4.11).
- In response to the authority's submission (refer paragraph 4.5.4 above); it is the owner's intention that the carports below the duplexes are to be used only by the licensees and not any others, and a clause could be included in the license to this effect.

4.5.6 The owner submitted that: there was sufficient evidence provided to establish compliance of the duplex units, and if there was any doubt the authority should have requested further information or clarification; the decision to refuse the consent should not be confirmed in this determination; the determination should record that the reasons provided by the authority were in error.

4.5.7 On 18 December 2014 I sought further information from the authority in regards the building consent(s). The authority provided the information in a series of emails, with the last correspondence received on 13 February 2015. I have included that information in the background set out in paragraph 3.1.

4.6 The third draft determination and submissions in response

4.6.1 A third draft determination was issued to the parties on 18 February 2015. The third draft determination concluded that:

- Acceptable Solution C/AS1 can be used as the stated means of compliance for the proposed duplex units;
- there was insufficient information in the documents provided in the application for building consent to establish that the proposed duplex units would comply with Clause C of the Building Code using C/AS1 in terms of both the occupancy of the units and the fire separation; and accordingly
- the authority's decision to refuse to issue the building consent application No. BH-1248278 was to be confirmed albeit on different grounds to those set out in the authority's refusal.

4.6.2 In a response received on 5 March 2015, the authority accepted the third draft without further comment.

4.6.3 The owner's legal adviser responded on 9 March 2015, accepting the technical aspects of the categorisation of the proposed building work, but submitting that the authority ought not to have refused consent on the grounds stated (the ownership/common land issue), and it should have sought clarification on details required rather than forcing the matter to a determination.

4.6.4 The submission went on to note the following:

- The only reason for refusal given by the authority prior to the determination application was the common ownership of the land, and as such the determination should not confirm the authority's refusal to issue the consent.

- The authority was aware of the ultimate use of the units as part of the holiday park when consent BC 20131907 was issued; when the consent was “split” the authority ought to have treated the consents as a construction in stages and sought clarification or more information rather than refusing the consent outright.
- The consent application BH1248278 is ‘on hold’ pending the issue of the determination – the consent has not been ‘refused’. (I note here that the application received from the authority was in terms of a refusal – see also paragraph 5.7.4)
- Any issues or alleged deficiency in the license to occupy should not now be used to re-designate the Risk Group from SH as approved under BC20131907; however, the license to occupy (refer paragraph 5.4.7) and the fire separation issues (refer paragraph 5.7.2) will be addressed by the owners.

5. Discussion

5.1 General

- 5.1.1 The matter for determination is whether the proposed building work complies with Clause C of the Building Code and accordingly whether or not the authority was correct to refuse to issue the building consent. The Acceptable Solutions for the fire safety clauses have been used to assess compliance, and the matter turns on whether the proposed building work falls within Risk Group SH or SM, and hence whether Acceptable Solution C/AS1 or C/AS2 applies.
- 5.1.2 In determining whether the proposed building work complies with Clause C, I must consider which Risk Group is applicable, and hence which Acceptable Solution can be applied.
- 5.1.3 It is important to note that the Acceptable Solutions provide one way, but not the only way of achieving compliance with the Building Code.

5.2 Relationship between uses in the Regulations, Risk Groups in the Acceptable Solutions, and classified uses in the Act

- 5.2.1 The parties have corresponded regarding the relationship between purpose groups, Risk Groups, classified uses, and the definition of “owner” and “building”. I provide the following as comment on those issues.
- 5.2.2 The uses set out in the Regulations are for the purposes of sections 114 and 115 of the Act which relate to upgrade work that may be required when the uses of buildings are changed. Where an owner intends to change the use of a building, as defined in Schedule 2 of the Regulations, the owner must inform the authority (section 114) and ensure that the building in its new use will comply with the requirements of the Building Code to the extent set out in section 115.
- 5.2.3 Risk Groups are set out in Table 1.1 of C/AS1 to C/AS7 and are for the purposes of the Acceptable Solutions relevant to Clause C. The term “purpose groups” was used in the previous edition of the Acceptable Solution, and those purpose groups were aligned with the uses set out in Schedule 2 of the Regulations. However, in the Acceptable Solutions C/AS1 to C/AS7 effective from 10 April 2012 there is no longer a direct correlation between the Risk Groups and the uses set out the Regulations.

- 5.2.4 Classified uses are for the purposes of the Building Code and are defined in Clause A1. The requirements set out in Clause C of the Building Code refer to “buildings”, with the limits on application of some C clauses referencing particular classified uses; for example, Clause C3.4 does not apply to ‘*detached dwellings, within household units, in multi-unit dwellings, or outbuildings and ancillary buildings*’.
- 5.2.5 The relevant Acceptable Solutions largely refer to occupants rather than to owners. The use of the term owner in the Acceptable Solutions is limited to particular purposes, for example:
- C/AS1 – Commentary on relevant boundary; comment on future flexibility; 5.4(b) regarding carports and adjacent buildings
 - C/AS2 – Commentary on escape routes in adjoining buildings; notional boundaries.
- 5.2.6 In this instance, for example, if each of the units including the carpark was held under separate title the car parking would require fire separation between the two car parking areas, but not between the car parking and the accommodation directly above. However, if the unit’s titles did not include the car parking beneath, fire separation would not be required between the car parking areas, but would be required between the car parking areas and the units above.
- 5.2.7 In respect of the intended use and occupancy of the units in this case, the issue of ownership is relevant in terms establishing whether the units will be occupied as temporary accommodation or as permanent or long term residence, and accordingly which of the Risk Groups the units fall under for the purposes of the Acceptable Solutions. I have discussed this further in paragraph 5.4.

5.3 The Risk Groups and Acceptable Solutions

- 5.3.1 The Acceptable Solutions for Clause C are based around the concept of different buildings, or parts of buildings, belonging to different Risk Groups. Risk Groups are allocated depending on the activities that will occur within the building or part of the building.
- 5.3.2 There are seven Risk Groups, each with a corresponding Acceptable Solution (C/AS1 to C/AS7). All of the Acceptable Solutions have in common Table 1.1, which sets out the seven Risk Groups and their Acceptable Solutions. I have included the relevant parts of Table 1.1 in Appendix A.4.
- 5.3.3 In the current case, the issue is whether the proposed building work falls within Risk Group SH (building sleeping - residential) or SM (building sleeping - non institutional).
- 5.3.4 Paragraph 1.1.1 of the Acceptable Solutions (the solutions all use a common numbering system throughout), describes in greater detail the types of buildings or parts of buildings that fall within the particular Risk Group that the Acceptable Solution refers to.
- 5.3.5 The Ministry has also produced a commentary document on the Acceptable Solutions (*Commentary for Acceptable Solutions C/AS1 to C/AS7*, February 2013) (“the commentary document”), which provides even more detail about the types of activities that would fall within the particular Risk Groups. The commentary document does not form part of the Acceptable Solutions; however, it is recommended in the Acceptable Solutions that the commentary is read in conjunction with them.

- 5.3.6 Appendix A.4 includes the relevant parts of the Acceptable Solutions and the commentary document relating to the scope of C/AS1 and C/AS2 in a single table.

5.4 Applying the appropriate Acceptable Solution

- 5.4.1 The first step in establishing which Acceptable Solution applies is to determine the Risk Group for the activities carried out in the proposed units. There is no dispute between the parties that the activity that the units will be used for is to provide sleeping accommodation. Nor is it disputed that this activity will be consistent throughout the proposed duplex units, and that as a result only one Risk Group will apply.
- 5.4.2 Buildings falling within SH include those that are used as single household units, and multi-unit dwellings where there is no more than one unit above another and where each unit has an independent escape route, and where no building or part of the building falls within a Risk Group other than SH. Boarding houses are also included where they only accommodate five or fewer guests.
- 5.4.3 Household unit is defined in C/AS1⁶ as:
- 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, boarding house, or other specialised accommodation.
- 5.4.4 Buildings that come within the SM include permanent accommodation such as apartments, transient accommodation, and education accommodation. The activities within Risk Group SM are considered to pose a higher risk with respect to protection from fire than those that occur with Risk Group SH. Foremost among the reasons for this is the concept of a household unit. Where all the people within a building or part of a building live as one household, they can be expected to have a greater degree of social cohesion, awareness, and control over their fellow residents' activities, and to more naturally assist them in a fire.
- 5.4.5 Another factor is the permanence, or otherwise, of the accommodation being offered. Permanence is to do not only with how long people stay in a place, but also in how they view it; this affects how familiar residents are likely to be with a building, and its means of escape in the event of a fire. Residents who do not consider their accommodation to be their permanent residence are considered to be more at risk from fire, and hence to require greater protection in terms of fire safety features. Accommodation that is more likely to be used by transient or temporary residents fall within Risk Group SM.
- 5.4.6 Section 16 of the Act states that buildings must comply in their intended use with the functional requirements and performance criteria of the Building Code. Intended use is defined in section 7 as including 'any reasonably foreseeable occasional use not incompatible with the intended use'.
- 5.4.7 In this case the owner has stated the intention that the units will be leased under a license to occupy for periods of 20 years. A license to occupy gives a person a right to occupy a premise but no rights to own the land; it is a contractual right to live in

⁶ There is no material difference between the definition for household unit under C/AS1 and as defined in Clause A2 Interpretation of the Building Code.

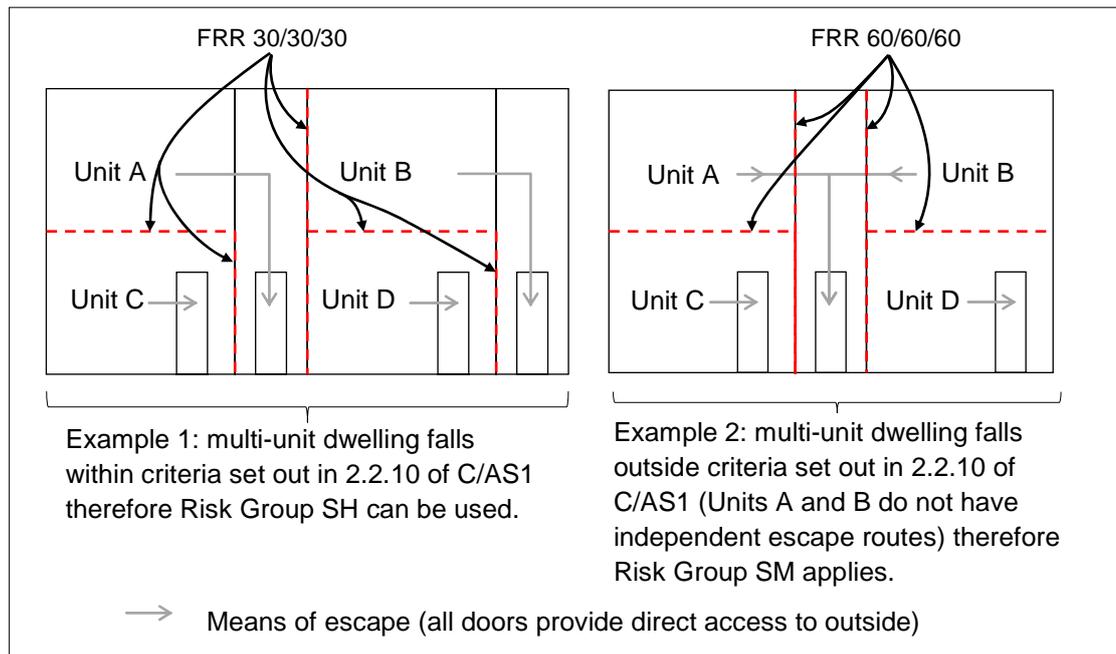
the property. However, the example license to occupy provided by the owner does not appear relevant to the units and I am of the view that there was insufficient information provided in documentation supporting the building consent to establish that the occupancy of the units would be such that the units fall within Risk Group SH. In response to the second draft determination, the owner has accepted that the license to occupy will require modification.

- 5.4.8 In addition, given the design of the units and the fact that they are located within the larger complex under the same ownership and same management, I am of the view that the units are equally suited to be used as a form of temporary accommodation as an extension of the existing temporary accommodation offered on the site.
- 5.4.9 In the second draft determination I stated that '[u]nder the management of a new owner, or the current owner but in different circumstances, the way that the proposed units are used and managed may change.' The owner submitted in response to this that 'as the license is not able to be terminated by the licensor it is not valid to suggest that if there was a new owner or new management the use of units may change.'
- 5.4.10 Whilst I acknowledge the owner's intent in regards to the occupation of the units, I note here that the final form of the license has not been provided to the authority or to me in preparing this determination decision. In addition:
- In regards the reference to 'the current owner but in different circumstances'
 - The provision of a sample license to occupy to support the building consent application is a sample which indicates the intent of the owner. The licenses to occupy for each unit would only come into effect at the time they are signed.
 - The design and location of the units lend themselves to being an extension of the existing temporary accommodation should some units not be able to be leased.
 - Though I have not seen the proposed license agreement in its final form, I expect that it is likely to be able to be terminated by the licensor in some circumstances, such as for a breach of conditions or failure to pay.
- 5.4.11 I note here that the nature of the proposed use (in terms of the temporary versus permanent nature of the occupancy) is relevant in terms of the uses as described in the Regulations, and a change of use would require the owner notify the authority and adhere to the compliance requirements set out in section 115 of the Act.

5.5 Application of paragraph 2.2.10 of C/AS2

- 5.5.1 Paragraph 2.2.10 of C/AS2, allows for Risk Group SH to be used to assess the compliance of multi-unit dwellings provided that there are no more than two levels (one household unit above another), and where each household unit has its own escape route that is independent of all other household units. This situation applies to the proposed units and accordingly C/AS1 can be used as a means of compliance in respect of Clause C.

5.5.2 For clarity I provide the following diagram comparing how paragraph 2.2.10 of C/AS2 can or cannot be applied to a multi-unit dwelling in Risk Group SM.



5.6 Car parking areas and the relevant Risk Group

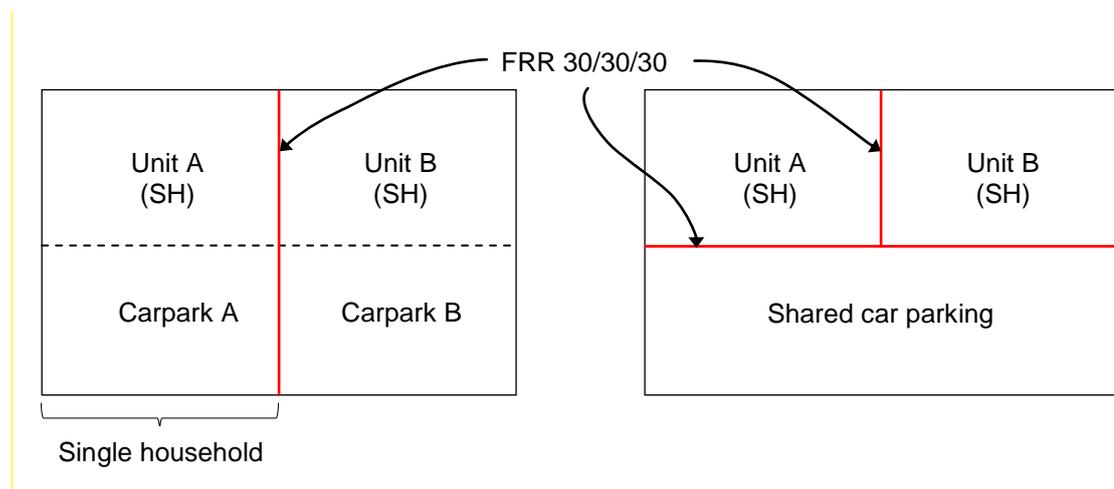
5.6.1 In response to the first draft determination the authority questioned when an SM Risk Group was located above car parking (with a Risk Group VP) whether the whole building can be considered Risk Group SH (refer paragraph 4.4.2). I provide the following comment as it applies in this case:

C/AS1 (including by virtue of paragraph 2.2.10 of C/AS2)

5.6.2 Car parking spaces do not require fire separation from the household if the car park space is solely for the use of the household that it adjoins. The scope of C/AS1, set out in paragraph 1.1.1, includes:

- a) Single household units
- b) Multi-unit dwellings with no more than one unit above another (see Figure 1.1 [of C/AS1]) and where each unit has an escape route independent of all other units, and including associated garages or carports whether or not they are part of the same building
- c) Detached dwellings used as boarding houses for fewer than six people (not including members of the residing family)
- d) Garages that are part of a household unit, and
- e) Garages shared by more than one household unit. The garage shall be fire separated from each adjacent household unit with fire rated construction of 30/30/30.

5.6.3 I have represented 1.1.1(d) and 1.1.1(e) diagrammatically as follows:



Where the car parking is not shared, the car park is only for the use of the unit concerned and any agreement to occupy must include that the use of the car park is exclusive to the unit.

5.6.4 Paragraph 4.1 of C/AS1 states that

Each household unit, including any garage and escape routes in multi-unit dwellings, shall be fire separated from other household units and any escape routes with fire separations having an FRR of no less than 30/30/30

Accordingly, in the case of shared car parking for the duplex units, fire separation would be required between the shared car parking area and the household units, and also between the shared car parking area and any external means of escape from the units.

C/AS2

5.6.5 Paragraph 4.6.10 states that:

Where a vehicle parking garage is provided solely for the use of the occupants of an individual household unit, it is acceptable for that garage to be included within the household unit firecell. However, where garaging is provided for vehicles of occupants of more than one household unit, that space shall be a separate firecell complying with the requirements of Acceptable Solution C/AS7 [Vehicle storage and parking – Risk group VP].

5.6.6 For those circumstances in which C/AS2 applies and the garaging is shared between the occupants of more than one household, the relevant Risk Group for the car parking area is VP and the relevant Acceptable Solution is C/AS7.

5.6.7 However, in establishing at paragraph 2.2.10 of C/AS2 that the requirements of SH apply, the remainder of C/AS2 is not further considered. Accordingly, where building work falls within the circumstances set out in paragraph 2.2.10 of C/AS2 and the requirements of SH apply, C/AS1 paragraph 1.1.1(e) applies in respect of the shared car parking area.

5.7 Conclusion

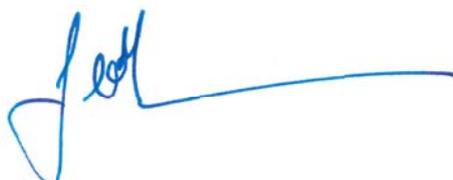
5.7.1 Given that paragraph 2.2.10 of C/AS2 applies to the proposed units, I conclude that C/AS1 can be used as a means of satisfying compliance with Clause C of the Building Code.

- 5.7.2 While I consider the use of the proposed duplex units fall within the provisions of paragraph 2.2.10 of C/AS2, the drawings submitted for consent do not show either adequate fire separation between the car parking areas, or the full fire separation between the units and the carparks (as shown diagrammatically at paragraph 5.6.3) and the carparks and external means of escape. Paragraph 4.1 of the fire report refers to the fire wall between the carparks finishing 100mm above the ground; it is not clear how the fire wall will remain stable in the event of a fire.
- 5.7.3 I conclude therefore that there was insufficient information in the documentation that was provided in the consent application to establish that the proposed duplex units would comply with Clause C of the Building Code. Accordingly the authority's decision to refuse to issue the building consent application No. BH-1248278 is confirmed albeit on different grounds to those set out in the authority's refusal.
- 5.7.4 In regards to the points raised by the owner's legal adviser in response to the third draft (refer paragraph 4.6.4), I note:
- the determination decision, under section 188(1)(a) of the Act, confirming the authority's refusal to issue the consent takes into account all the information that is provided to the determination; a decision to reverse the authority's refusal in this case is not considered appropriate where the information supplied in the building consent application did not establish compliance with the Building Code
 - the authority's application for determination was made in respect of the refusal to issue a building consent (refer paragraph 4.2(b)) – if the refusal was not formally communicated to the owner the matter could still be considered by the determination as a 'proposed or purported exercise' of the authority's power of decision which would affect the wording but not alter the outcome of the decision.

6. The decision

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:
- Acceptable Solution C/AS1 can be used as the stated means of compliance for the proposed duplex units;
 - there was insufficient information in the documents provided in the application for building consent to establish that the proposed duplex units would comply with Clause C of the Building Code using C/AS1 in terms of both the occupancy of the units and the fire separation; and accordingly
 - the authority's decision to refuse to issue the building consent application No. BH-1248278 is confirmed albeit on different grounds to those set out in the authority's refusal.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 9 April 2015.



John Gardiner
Manager Determinations and Assurance

Appendix A

A.1 The relevant sections of the Building Act 2004

7 Interpretation

In this Act, unless the context otherwise requires,—

owner, in relation to land and any buildings on the land,—

(a) means the person who—

(i) is entitled to the rack rent from the land; or

(ii) would be so entitled if the land were let to a tenant at a rack rent; and

(b) includes—

(i) the owner of the fee simple of the land; and

(ii) for the purposes of sections 32, 44, 92, 96, 97, and 176(c), any person who has agreed in writing, whether conditionally or unconditionally, to purchase the land or any leasehold estate or interest in the land, or to take a lease of the land, and who is bound by the agreement because the agreement is still in force

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

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

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

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

...

A.2 The relevant sections of the Building Code

Classified Uses (A1)

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.

2.0.3 Multi-unit dwelling

Applies to a *building* or use which contains more than one separate household or family. Examples: an attached dwelling, flat or multi-unit apartment. (Note the 2.2.10 C/AS1 para re multi-units)

3.0 Communal residential

3.0.1 Applies to buildings or use where assistance or care is extended to the principal users. There are two types:

3.0.2 Community service

Applies to a residential building or use where limited assistance or care is extended to the principal users. Examples: a boarding house, hall of residence, holiday cabin, backcountry hut, hostel, hotel, motel, nurse's home, retirement village, time-share accommodation, a work camp, or camping ground.

3.0.3 Community care

Applies to a residential building or use where a large degree of assistance or care is extended to the principal users. There are two types:

(a) Unrestrained; where the principal users are free to come and go. Examples: a hospital, an old people's home or a health camp.

(b) Restrained; where the principal users are legally or physically constrained in their movements. Examples: a borstal or drug rehabilitation centre, an old people's home where substantial care is extended, a prison or hospital.

A.3 Schedule 2 Uses of all or parts of buildings of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005

Schedule 2 Uses of all or parts of buildings

Uses related to sleeping activities

Use (relevant to this determination)	Spaces or dwellings	Examples
SA (Sleeping Accommodation)	spaces providing transient accommodation, or where limited assistance or care is provided for people	motels, hotels, hostels, boarding houses, clubs (residential), boarding schools, dormitories, halls, wharehousi
SR (Sleeping Residential)	attached and multi-unit residential dwellings, including household units attached to spaces or dwellings with the same or other uses, such as caretakers' flats, and residential accommodation above a shop	multi-unit dwellings, flats, or apartments
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

A.4 The relevant paragraphs of the relevant Acceptable Solutions C/AS1 and C/AS2

Table 1.1 Risk Groups and Acceptable Solutions			
	Acceptable Solution	Risk Group	Applies to
C/AS1	Single household units and small multi-unit dwellings	SH	Houses, townhouses and small <i>multi-unit dwellings</i>
C/AS2	Sleeping (non institutional)	SM	Permanent accommodation eg, apartments Transient accommodation eg, hotels, motels, hostels, backpackers Education accommodation

The comment to Table 1.1 explains that:

Designing a *building* to provide fire safety involves decisions on both the *construction* materials and layout needed to reduce the risk to an acceptable level. The risk is assessed according to: the number and mobility of the occupants (*occupant load* and *Risk Group* of the *building*); the activities undertaken within the *building*; and the nature of the *building* materials and contents. This assessment allows each *building* activity to be categorised in a Risk Group, which is the basis for determining *fire safety* features.



Scope (from Acceptable Solutions)	Description (from the commentary document)	Commentary on the Acceptable Solutions and Risk Groups (from the commentary document)
Risk Group SH - Acceptable Solution C/AS1 applies		
<p>(Page 17)</p> <p>The scope of this Acceptable Solution is restricted to <i>Risk Group SH</i>. This covers <i>buildings</i> where people sleep including multi-unit residential with some restrictions on height. This includes the following:</p> <ul style="list-style-type: none"> a) Single household units b) Multi-unit dwellings with no more than one unit above another (see Figure 1.1) and where each unit has an <i>escape route</i> independent of all other units, and including associated garages or carports whether or not they are part of the same <i>building</i> c) Detached dwellings used as boarding houses for fewer than six people (not including members of the residing family) d)... 	<p>(Page 3)</p> <p>Detached houses and <i>buildings</i> subdivided into multiple dwellings, provided that:</p> <ul style="list-style-type: none"> • People from each dwelling have their own independent <i>escape route</i> to a <i>safe place</i> (ie, their own corridor and <i>stairway</i>), and • The <i>buildings</i> are no more than two units high (there is no limit on the number of units side by side). <p>Not included: <i>buildings</i> with any corridor or <i>stairway</i> serving more than one dwelling, detached boarding houses with facilities for six or more guests (see <i>Risk Group SM</i>).</p>	<p>(Page 4)</p> <p>C/AS1: Risk Group SH <i>Risk Group SH</i> applies to detached houses and to <i>buildings</i> containing a number of separate residential units, provided there is no more than one unit above another. Therefore, the Acceptable Solution covers the <i>fire safety</i> requirements for a row of townhouses and maisonettes as well as two-storey apartment blocks.</p> <p>While each <i>household unit</i> may have more than one floor, it must still have its own independent <i>escape route</i>. If the <i>building</i> provides a shared <i>escape route</i>, then C/AS2 will apply. If a detached house is used as a boarding house, it may have the facilities to accommodate up to five paying guests and still fall within this <i>Risk Group</i>. Boarding houses accommodating six or more paying guests are categorised as <i>Risk Group SM</i>.</p> <p>The <i>fire safety</i> requirements for <i>Risk Group SH</i> are relatively minor and are limited to having maximum <i>travel distances</i>, restricting the use of <i>foamed plastics</i> on walls and ceilings, and protecting <i>other property</i>.</p>
Risk Group SM – Acceptable Solution C/AS2 applies		
<p>(Page 20)</p> <p>The scope of this Acceptable Solution is restricted to <i>Risk Group SM</i>. This covers <i>buildings</i> or parts of <i>buildings</i> where people sleep. This will include the following provided they are no more than 20 storeys high (from ground level):</p> <ul style="list-style-type: none"> a) Apartment <i>buildings</i> and other <i>buildings</i> which consist of more than one household unit b) Accommodation units within other <i>Risk Groups</i> 	<p>(Page 3)</p> <p>All multiple unit accommodation <i>buildings</i> not included in <i>Risk Group SH</i>.</p> <p>Note: there are some minor differences in requirements depending on whether the accommodation is considered permanent (ie, the occupants would be considered to be familiar with the <i>building</i> and its features) or temporary. Apartments and</p>	<p>(Page 4)</p> <p>C/AS2: Risk Group SM <i>Risk Group SM</i> applies to any place where people sleep, except:</p> <ul style="list-style-type: none"> • those <i>household units</i> covered in <i>Risk Group SH</i> (C/AS1), and • where people are cared for or detained (refer to <i>Risk Group SI</i> (C/AS3)). <p>Accommodation types</p>

<p>c) Hotel, motel and serviced apartment buildings</p> <p>d) Backpackers, cabins on holiday parks</p> <p>e) <i>Buildings</i> where more than 5 people pay for accommodation (such as homestay/ bed and breakfast)</p> <p>f) University halls of residence, education accommodation (eg, school boarding hostels), and</p> <p>g) <i>Wharehenui</i> and other community sleeping spaces.</p>	<p>flats are considered permanent accommodation, while hotels, motels, hostels, serviced apartments and similar <i>buildings</i> are considered temporary accommodation.</p> <p>The Acceptable Solution for this <i>Risk Group</i> also specifies particular <i>fire</i> safety requirements for education accommodation, which has been singled out because of its particular nature.</p> <p>This category includes boarding schools (both primary and secondary education) and university halls of residence.</p> <p>Not included: Early childhood education (see <i>Risk Group CA</i>).</p>	<p>Permanent versus temporary accommodation</p> <p>The Acceptable Solution for this <i>Risk Group</i> has different <i>fire</i> safety requirements depending on whether the <i>buildings</i> in this category provide permanent or temporary accommodation.</p> <p>For the purposes of this Acceptable Solution, permanent accommodation is considered to be that where occupants live on a permanent basis such that this accommodation would be regarded as their residential address. Other accommodation within this category is considered to be temporary.</p> <p>When developing this Acceptable Solution, a time limit of 90 days was suggested as determining the difference between permanent and temporary accommodation. However, it was accepted that, in certain cases, people may not live in a fixed place for 90 days but would still consider their residence status as permanent. Equally, temporary accommodation may be used as a more permanent place of residence (for example, serviced apartments might be used on a long-term or semi-permanent basis for working week accommodation), but this activity would still be classified as temporary accommodation.</p> <p>Generally, houses that are used as student accommodation and the like would be regarded as permanent accommodation. However, student hostels provided by universities and other tertiary education institutions would be considered as temporary accommodation despite the fact that a student may reside in the hostel for a full academic year. The reason is that any student may only reside in the hostel for a few weeks or months. Such accommodation is also likely to be used outside the academic year to accommodate visitors for conferences or other events, and these occupants will not be familiar with that particular <i>building</i>.</p> <p>Education accommodation</p> <p>Education accommodation covers primary or secondary schools that have boarding students or that provide sleeping facilities for school-age occupants.</p>
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