



Determination 2016/008

Regarding whether there is a change of use in respect of the conversion of a house to include 13 bedrooms at 68 McParland Street, Upper Hutt

Summary

The building work involved alterations carried out without building consent being obtained to increase the number of bedrooms in a house to 13. The intention was for the rooms to be individually let. The determination considered whether there was a change of use for the purpose of sections 114 and 115, and it also discusses whether the building work required building consent.

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 owner of the house, Raewar Property Holding Trust, acting through a director as the agent (“the applicant”)
 - Upper Hutt City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 This determination arises from a dispute regarding building work to convert an existing four- or six-bedroom house into a 13-bedroom house. The work is being undertaken without building consent having first been obtained. The authority is of the view that the conversion is a change of use under Schedule 2 of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 (“the Regulations”) from use category SH to SA; and that therefore the applicant should notify the authority of the change of use and section 115² of the Act applies.
- 1.4 The authority has submitted that I have no jurisdiction in relation to the application for a determination (refer paragraph 4.3). I acknowledge that the applicant has not applied for a building consent and has not requested written notice from the authority under section 115 of the Act. However, it is clear from correspondence between the parties that there is a dispute over whether the proposed conversion will result in a

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

² 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. The relevant sections of the Act discussed in this determination are shown in Appendix A.

change of use, and accordingly whether sections 114 and 115 apply. I have therefore considered this application for a determination in terms of a proposed exercise of the authority's powers of decision, as is provided for under section 177(1)(b). (Refer also to paragraph 4.4.)

- 1.5 The matter to be determined³ is the authority's proposed exercise of its powers of decision in requiring notification of a change of use under section 114. I consider this matter in paragraph 5.
- 1.6 The applicant has also raised the issue of whether building consent is required for the proposed building work. Whether the applicant has correctly interpreted the building work that can be carried out under Schedule 1 is not a matter that can be determined under section 177 of the Act. I have, however, provided some comment on this issue to assist the applicant (refer paragraph 6).
- 1.7 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.
- 1.8 Relevant sections of the Act and the Regulations are set out in Appendix A.

1.9 Outside this determination

- 1.9.1 I have not considered any other aspects of the Act, nor have I considered whether the building work that has already been undertaken, or is proposed, complies with the Building Code.
- 1.9.2 In the correspondence between the parties, and in the application for a determination, there is reference to the requirements of the Resource Management Act 1991 and the Upper Hutt City Council District Plan. I have no jurisdiction under any other Acts, and this determination is limited to the matter set out in paragraph 1.5.

2. The building and the building work

- 2.1 The existing building, constructed in 1985, is a two-storey house located in a residential area. The plans provided by the applicant indicate the house, as it was originally constructed, consisted of the following:

Ground floor

- Double garage
- Laundry
- Entrance foyer/stairs
- Sewing room
- Bathroom/toilet
- Office
- Rumpus room

Upper level

- Four bedrooms
- Bathroom
- Toilet
- Lounge
- Dining room
- Kitchen
- Stairs/foyer

The lounge, dining and kitchen are largely open plan, with one internal wall partially dividing the lounge from the kitchen.

³ Under sections 177(1)(b), 177(2)(a) and 177(3)(f)

- 2.2 The applicant has referred to the house as consisting of six bedrooms at the time of purchase, with two of the ground floor rooms being used as bedrooms. The applicant intends to carry out alterations, by way of constructing additional internal partition walls, to convert the house to 13 bedrooms, and has provided plans marked up to indicate the following alterations.

Ground floor

- Office and sewing rooms converted to two bedrooms.
- Internal partition walls to divide:
 - rumpus room into two bedrooms
 - double garage into four bedrooms.

Upper level

- Internal partition wall added to convert part of the current lounge area into a bedroom.

(The four existing bedrooms on the upper level remain unaltered.)

- 2.3 The applicant has also referred to plans to install additional windows in the external walls, but has provided no further information on this aspect of the building work.

3. Background

- 3.1 The applicant engaged a building company to carry out the alterations. It appears from correspondence between the parties that the building work came to the attention of the authority in August 2015, at which point the authority sought clarification as to whether there was a proposal to use the building as visitor accommodation (which would require resource consent), or if it was to be residential accommodation.
- 3.2 In its correspondence, the authority also referred to an advertisement to let the rooms, which it later provided a copy of (refer paragraph 4.6).
- 3.3 It is my understanding that building work halted in August 2015.
- 3.4 The parties corresponded throughout August and September 2015. Most of the discussion related to whether resource consent was required and the applicant presenting a number of options for the intended use of the building. I have summarised below the views expressed in the correspondence that provide context to the dispute and that relate to matters considered under the Building Act.

The applicant

- The property was advertised, and purchased by the applicant, as a six-bedroom house.
- There is only one kitchen and there is no intention to install another.
- The applicant is considering three options for the property:
 - a 13-bedroom boarding house
 - a 13-bedroom house to be leased to one organisation for single residential use
 - two separate flats, which would require fire separation from each other.
- While a boarding house is listed as SA – Sleeping accommodation under the Regulations, in this instance the occupation is intended to be long-term and to serve as the occupants’ principal place of residence, with no assistance or care

provided. As such, it is more appropriately classed as SR – Sleeping residential.

- Clarity is required as to whether having the owner living in the property means there is no limit on the number of flatmates that could occupy the property.

The authority

- The floor plans in the authority’s records show that the house is four bedrooms.
- The advertisement refers to ‘6 or more bedrooms’ and targets ‘singles or couples’. This means there will potentially be more than five individuals living at the property, and as such it would be considered a boarding house.
- A change from a residential dwelling to a boarding house constitutes a change of use under the Regulations.
- A change from a house into two flats is also a change of use under the Regulations, from SH – Sleeping single home to SR – Sleeping residential.
- Both changes of use (to two flats or a boarding house) require notification to the authority under section 114, and there are Building Code obligations under section 115 that will need to be satisfied. It is for the applicant to demonstrate how the building will comply in its new use, and it is likely that upgrade works will be required.
- Boarding houses, accommodation and the like have different requirements to a dwelling, in particular in relation to fire safety and accessibility for people with disabilities.
- A building with more than one separate household (e.g. two flats in the one building) requires fire and acoustic separation.
- Discussions held with a consultant fire engineer and the New Zealand Fire Service also indicated that the proposed layout resembles a boarding house, and that it is high-risk in terms of life safety in the event of a fire.

3.5 On 30 October 2015 the Ministry received an application for determination.

4. The submissions

4.1 The applicant provided a covering letter with the application, setting out the applicant’s views on issues relating to the Resource Management Act 1991, and stating that there had been no change of use as the classified use under Clause A1 of the Building Code is a “detached dwelling”. The applicant also noted the following.

- The house, as altered, does not fall within the classified use “community service” or “community care”, as there will be no assistance or care extended to the principal users.
- It also does not fall within the classified use “multi-unit dwelling”, because it does not fit the examples “attached dwelling, flat or multi-unit apartment”.
- It also does not fall within the classified use “group dwelling”, as its use will not be similar to a commune or marae.

- 4.2 The applicant described the building work that is proposed, and has been started, as ‘adding internal partitioning and adding small windows’. The applicant holds the view the building work is exempt under Schedule 1, and referred to the Ministry’s guidance on exempt building work⁴.
- 4.3 The authority acknowledged the application in a letter to the Ministry dated 27 October 2015, and provided a submission that was received on 14 December 2015, which I have summarised as follows.
- The application can only be considered in respect of 177(3)(f). However, the applicant has neither applied for a building consent for alterations, nor approached the authority asking for written notice under section 115. Accordingly, there has been no exercise of a power of decision by the authority and the matter cannot be determined. The authority has provided only advice to the applicant, and has not been in a position to exercise a power of decision.
 - Should the application for a determination be accepted, it is the authority’s view that there is a change of use under the Regulations from SH to SA, and that it is for the applicant to provide information to enable the authority to be satisfied as to whether the building in its new use will meet the criteria set out in section 115(b).
 - The converted building falls within the category “community service” under Clause A1 3.0.2 of the Building Code. The authority takes the term “where limited assistance or care is extended” to include the supply of electricity, cleaning of common areas and supply of other utilities.
 - There is not enough information, based on the plans provided, to establish whether the building work does or does not require a building consent. While the installation of partitions may be exempt, the use of the new rooms as bedrooms may mean that other requirements of the Building Code must be complied with.
 - The plan shows the garage converted into four bedrooms, and it may be necessary for additional windows to be installed, which may have an impact on the structure of the building. If the windows are installed in places where there were previously no windows, this could be, or lead to, restricted building work. If a building consent application was made based on the information provided, a consent would be refused or additional information would be required.
- 4.4 In response to the authority’s submission regarding jurisdiction, and in addition to my comments in paragraph 1.4, I consider it clear from the correspondence that the authority and the applicant hold different views on whether the conversion constitutes a change of use. I acknowledge that the authority has given the applicant advice and has not exercised a power of decision. However, the applicant considers that there is no change of use and no building consent is required. If the applicant were to continue with the alterations, and the authority maintained its view regarding the change of use, the authority could at a later date issue a notice to fix under section 164(1). A determination at this point allows the matter to be addressed as a proposed exercise of powers, before any further building work is undertaken, and may avoid the applicant unwittingly committing an offence under section 114.
- 4.5 A draft determination was sent to the parties for comment on 18 December 2015.

⁴ Building work that does not require a building consent (Third edition 2014).

- 4.6 The authority accepted the draft determination without further comment and provided a copy of an advertisement dated 18 August 2015 for rooms being let individually.
- 4.7 Despite a reminder sent on 15 February 2016, the applicant did not make any further submission in response to the draft determination.

5. Discussion: The change of use

5.1 The legislation

- 5.1.1 Under section 114 of the Act, if an owner is planning to change the use of a building they must provide written notice to the authority.
- 5.1.2 If the change of use involves incorporating one or more household units where household units did not exist before (such as would be the case, for example, if the building was converted into two separate flats), then the owner must satisfy the authority that the building will comply as nearly as is reasonably practicable with the Building Code in all respects.
- 5.1.3 In all other circumstances where a change of use is proposed, the authority must be satisfied on reasonable grounds that the building in its new use will comply, as nearly as reasonably practicable, with every provision of the Building Code that relates to:
- means of escape from fire, protection of other property, sanitary facilities, structural performance, and fire-rating performance; and
 - access and facilities for people with disabilities (if this is a requirement under section 118); and
 - if the building complied with the other provisions of the Building Code immediately before the change of use, continue to comply with those provisions; or
 - if the building did not comply with the other provisions of the Building Code immediately before the change of use, continue to comply at least to the same extent as it did then comply.
- 5.1.4 There are a number of different categorisations of buildings used in, or for the purposes of, the Act, the Regulations and the Building Code. Examples of categorisations include:
- Classified uses, such as Housing, Commercial, Industrial, etc. under Clause A1 of the Building Code – which are for the purpose of applying the performance requirements of the Building Code, and
 - uses of buildings, such as CS (Crowd small), SH (Sleeping single home), WH (Working high) under the Regulations – which are for the purpose of making decisions about work required when buildings undergo a change of use.

5.2 The proposed use

- 5.2.1 The building, when purchased by the applicant, fitted within the use category under the Regulations of SH; this is not disputed by the parties. The applicant proposes to undertake alterations to convert the four or six bedroom house to include 13 bedrooms, with the rooms to be individually let, and holds the view that the use remains SH (refer paragraph 4.1).

- 5.2.2 The authority has likened the building, as it is proposed to be altered, to a boarding house. In its submission, the authority stated its view that as the rooms are to be let on a room-by-room basis, the building will undergo a change of use under the Regulations from SH to SA.

5.3 SH – Sleeping single home

- 5.3.1 The use category SH is further defined in Schedule 2 of the Regulations as:
- 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
- 5.3.2 It is my understanding that the applicant's current proposal is to let the bedrooms individually. That being the case, it cannot be said to be a dwelling 'where people live as a single household or family' and does not fall within the use category SH.

5.4 SR – Sleeping residential

- 5.4.1 I have also considered whether the 13-bedroom building will fall within the use category SR, which is described as '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'. The examples of SR are 'multi-unit dwellings, flats or apartments'.
- 5.4.2 I consider the intended use, as described by the applicant, has some features that are similar to a flat, in that the occupants will have separate bedrooms and will share common facilities such as the kitchen and bathroom areas and communal living spaces. Though it would have a larger number of occupants than may be typical for a flat.
- 5.4.3 In New Zealand, flats are often formed by groups of friends, or students attending universities or other educational institutions. It is typically the flatmates that select who they will share the flat with, and there is usually some level of social cohesion formed due to age, occupation, or a shared sense of belonging. In a group flat each occupant contributes to expenses and chores, and at least one person is a named tenant on a tenancy agreement.
- 5.4.4 The applicant has provided little information on the intended occupation of the 13 bedrooms, but has indicated the rooms are to be let individually as opposed to being let to a group or to a 'head tenant' who will then sublet the remaining rooms. Given the number of rooms, and the apparent intended occupancy type, there will be a lower level of social cohesion formed in this situation than in a flat.
- 5.4.5 Based on the information provided to date, in my view the building cannot correctly be described as a "flat" for the purposes of the Regulations and does not fall within the use category SR.

5.5 SA – Sleeping accommodation

- 5.5.1 The use category SA is defined as 'spaces providing transient accommodation or where limited assistance or care is provided for people'. Examples given include motels, boarding houses, clubs (residential), boarding schools, dormitories, halls and whareniui. The authority is of the view that the correct use category is SA.

- 5.5.2 The term “boarding house” is not defined in the Act so I take the view it must be given its ordinary and natural meaning in the context. The *Oxford English Dictionary* defines “boarding house” as “a private house providing food and lodging for paying guests”.
- 5.5.3 My understanding of the current New Zealand use of the term is that boarding houses:
- (a) typically provide accommodation for members of the public who have a bedroom within a building with shared facilities (for example a group kitchen)
 - (b) usually involve more than six people accommodated in the one building
 - (c) are often transient in nature, in terms of the length of stay
 - (d) have no expected level of social cohesion between the occupants.
- 5.5.4 It is my understanding that the occupants will obtain accommodation directly from the landlord, and there is lesser likelihood of them knowing or getting to know other residents as might be the case in a flatting situation. In my opinion with the number of bedrooms being let and the rooms being let individually, the occupants are more likely to live independently of one another and will be less aware of fellow occupants’ presence and movements. There is no expected level of familiarity between the occupants, and no social cohesion of occupants that would ensure any individual becoming aware of fire would naturally assist others within the building to escape.

5.6 Conclusion

- 5.6.1 Based on the information that has been provided, I am of the view that the conversion of the house to contain 13 bedrooms is a change of use under the Regulations from SH to SA. As a result, under section 114 of the Act, the applicant must give notice of the intention to change the use and must satisfy the provisions of the Building Code in that use under section 115.

6. Discussion: The building consent

- 6.1 The applicant has queried whether building consent is required for alterations to the building. Scant information has been provided on either the building work carried out to date or the proposed building work, other than a plan with rudimentary markings showing additional internal walls and doors. The applicant has also indicated that some new windows will be installed (these are not marked on the plans).
- 6.2 Schedule 1 of the Act sets out building work that can be carried out without building consent first being obtained, including some additions and alterations to existing buildings. Paragraphs 8 and 11 of Schedule 1 provide for building work in connection with windows and internal walls (including doorways) to be carried out within certain conditions (refer Appendix A.3).
- 6.3 Given the lack of information provided by the applicant, it is not possible for me to establish whether the building work will require building consent. I suggest the applicant provide a more detailed set of plans to the authority to establish whether building consent is required. The applicant has an obligation under section 14B of the Act to obtain any consent that is necessary.

6.4 It is also important for the applicant to be aware that even if the building work does fall within Schedule 1 of the Act and is exempt from the need to obtain a building consent, this does not lessen the obligations under section 17 for the building work to comply with the Building Code, nor the requirements under section 42A in respect of the building as a whole after the alterations are complete.

6.5 The authority has also referred in its submission to the possibility of some of the building work being restricted building work, in particular the installation of windows where there were no windows previously. I note that the Ministry's Guide to Restricted Building Work⁵ it states that restricted building work does not include building work that does not require a building consent under Schedule 1. Schedule 1(8) includes:

8 Windows and exterior doorways in existing dwellings and outbuildings

Building work in connection with a window (including a roof window) or an exterior doorway in an existing dwelling that is not more than 2 storeys or in an existing outbuilding that is not more than 2 storeys, except,—

(a) in the case of replacement, if the window or doorway being replaced has failed to satisfy the provisions of the building code for durability, for example, through a failure to comply with the external moisture requirements of the building code; or

(b) if the building work modifies or affects any specified system.

The associated guidance document for building work that does not require a building consent⁶ includes the following example where this exemption could apply:

To gain more sunlight, a home owner decides to install a window in an external fire-rated bedroom wall which contains no other openings. ...

7. What happens next?

7.1 As I have determined that a change of use has occurred from SH to SA, it is now for the applicant to provide sufficient information to the authority for it to be able to satisfied that the building, in its new use, will comply under section 115:

- as nearly as reasonably practicable with the Building Code provisions relating to means of escape from fire, protection of other property, sanitary facilities, structural performance, fire-rating performance and access for people with disabilities
- to at least the same extent as before the change of use occurred with the remaining Building Code provisions.

⁵ Guide to Restricted Building Work, December 2011.

⁶ Building work that does not require a building consent. Third edition 2014.

8. The decision

- 8.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority was correct in its proposed exercise of its powers of decision in requiring notification of a change of use under section 114.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 10 March 2016.

John Gardiner
Manager Determinations and Assurance

Appendix A The legislation

A.1 The relevant provisions of the Building (Specified Systems, Change the Use and Earthquake Prone Buildings) Regulations 2005, include:

Uses related to sleeping activities

Use	Spaces or dwellings	Examples
SC (Sleeping Care)	spaces in which people are provided with special care or treatment required because of age, or mental or physical limitations	hospitals, or care institutions for the aged, children, or people with disabilities
SD (Sleeping Detention)	spaces in which people are detained or physically restrained	care institutions for the aged or children and with physical restraint or detention, hospitals with physical restraint or with detention quarters, detention quarters in police stations, prisons
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, wharehenui
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.2 The relevant provisions of the Building Act 2004 include:

42A Building work for which building consent is not required under Schedule 1

- (1) Despite section 40, subject to the conditions set out in subsection (2) and whether or not a building consent would otherwise have been required, a building consent is not required for building work in the following categories:
 - (a) building work described in Part 1 of Schedule 1; or
 - ...
- (2) Subsection (1) is subject to the following conditions:
 - (a) the building work complies with the building code to the extent required by this Act;
 - (b) after the building work is completed, the building,—

(i) if it complied with the building code immediately before the building work began, continues to comply with the building code; or

(ii) if it did not comply with the building code immediately before the building work began, continues to comply at least to the same extent as it did then comply:

...

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

(b) to extend the life of a building that has a specified intended life; or

(c) to subdivide land in a manner that affects a building.

(3) A person commits an offence if the person fails to comply with subsection (2).

(4) A person who commits an offence under this section is liable on conviction to a fine not exceeding \$5,000.

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,—

(i) will comply, as nearly as is reasonably practicable, with every provision of the building code that relates to the following:

(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) will,—

(A) if it complied with the other provisions of the building code immediately before the change of use, continue to comply with those provisions; or

(B) if it did not comply with the other provisions of the building code immediately before the change of use, continue to comply at least to the same extent as it did then comply

A.3 Schedule 1: Building work for which building consent not required, includes:

Existing buildings: additions and alterations

8 Windows and exterior doorways in existing dwellings and outbuildings

Building work in connection with a window (including a roof window) or an exterior doorway in an existing dwelling that is not more than 2 storeys or in an existing outbuilding that is not more than 2 storeys, except,—

(a) in the case of replacement, if the window or doorway being replaced has failed to satisfy the provisions of the building code for durability, for example, through a failure to comply with the external moisture requirements of the building code; or

(b) if the building work modifies or affects any specified system.

11 Internal walls and doorways in existing building

Building work in connection with an internal wall (including an internal doorway) in any existing building unless the wall is—

(a) load-bearing; or

(b) a bracing element; or

(c) a fire separation wall (also known as a firewall); or

(d) part of a specified system; or

(e) made of units of material (such as brick, burnt clay, concrete, or stone) laid to a bond in and joined together with mortar.