



Determination 2021/001

Regarding the refusal to grant a building consent for the conversion of part of a building from a carpark to a nightclub at 62 West Quay, Napier

Summary

This determination considers an authority's decision not to grant building consent to a leaseholder for alterations to part of a building, based on the authority's view that the seismic performance of the whole building was required to be upgraded. The determination discusses the requirement in section 115 of the Building Act for a building undergoing a change of use to comply, as nearly as is reasonably practicable, with the provisions of the Building Code relating to structural performance.

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004 ("the Act") made under due authorisation by me, Katie Gordon, National Manager Determinations, Ministry of Business, Innovation and Employment ("the Ministry"), for and on behalf of the Chief Executive of the Ministry.¹
- 1.2 The parties to the determination are:
 - The Thirsty Whale and Bar ("the applicant"), who is the leaseholder of the relevant part of the property. The applicant is represented by an agent ("the agent")
 - the owner of the property, Thames Holdings Limited ("the owner")
 - Napier City Council ("the authority"), carrying out its duties as a territorial authority or building consent authority.
- 1.3 This determination arises from the decision of the authority to refuse to grant a building consent for internal alterations to an existing building that relate to the conversion of a carpark area of the building to a nightclub. The refusal arose because the authority is of the view that the whole building is required to be structurally upgraded, with respect to its seismic performance, under section 115 of the Act.
- 1.4 The matter to be determined² is therefore the authority's exercise of its powers of decision in refusing to grant a building consent on the basis that the seismic performance of the whole building was required to be improved.
- 1.5 I have not considered any other aspects of the Act or of the Building Code, nor have I considered the Building Code compliance of the proposed building work covered by the building consent, other than as outlined in paragraph 1.4. I note that building

¹ The Building Act and Building Code (Schedule 1 of the Building Regulations 1992) are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents and guidance issued by the Ministry, is available at www.building.govt.nz.

² Under section 177(1)(b) and 177(2)(a) of the Act.

work was carried out to fit out the nightclub and that work was carried out without building consent. That work is subject to an application for a certificate of acceptance, and I have not considered that work or the application for a certificate of acceptance in this determination.

- 1.6 In making my decision, I have considered the submissions of the parties, and other relevant information.
- 1.7 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 extracts from the legislation are set out in Appendix A.

2. The building and building work

- 2.1 The building was designed and constructed in 1931 and was originally a wool store comprising a large, open, double height space. The north side of the building is connected to an adjacent building of similar construction.
- 2.2 The building is constructed from a regular grid of structural steel columns supporting structural steel trusses, which form a sawtooth shaped roof. The building is founded on reinforced concrete ground beams. The ground comprises variable density sands and gravels to about 6m in depth, with very dense gravels below.
- 2.3 The building is two storey in part. The second storey comprises an intermediate floor with timber on steel beams. The steel columns of the two storey part of the building are encased in concrete infill, which was used to form the architectural façade on the two street fronting sides.
- 2.4 The building is split into two tenancies. One tenant, a bar, occupies the concrete encased two storey part of the building, and the applicant occupies the remainder of the building.
- 2.5 The applicant's tenancy comprises another bar and a restaurant, with the addition of the new nightclub forming part of the same venue. The nightclub had additional walls and a bar area and stage constructed. The proposed building work includes the construction of a suspended ceiling with insulation, upgrading a fire wall, the installation of emergency systems, improvements to egress routes, and the installation of ventilation.

3. Background

- 3.1 On 23 October 2018, an application was submitted for a certificate of acceptance for the "Addition of walls and new bar in existing internal carparking space to create new bar area" (CA180989).
- 3.2 On 20 November 2018, the authority requested further information in respect of the application for a certificate of acceptance. With respect to structural performance, the authority stated:
- As proposed bar area is considered a change of use please provide a full structural assessment to meet the requirements of [Clauses] B1, B2.
- 3.3 The authority also requested further information about Clauses F7 Warning Systems, F8 Signs, G1 Personal hygiene, G8 Artificial light, G9 Electricity, H1 Energy efficiency, D1 Access routes, C1-C6 Fire, G4 Ventilation and F6 Visibility in escape routes, and referred to sections 118-120.

3.4 A detailed seismic assessment was subsequently prepared, with the report issued on 2 February 2019. The assessment evaluated the building as 36%NBS³. The assessment identified the likely failure of the building being related to the failure of the roof diaphragm to transfer the loads to the bracing elements, and the incompatibility of the solid concrete wall of the building in an otherwise regular structure.

3.5 With respect to options for strengthening the building, the report noted:

Increasing the seismic rating of the building beyond the level that was confirmed in this assessment would require significant structural work to the entire roof structure.

This is because failures that are identified are distributed throughout the structure and all occur at approximately the same level of seismic loading.

Identification of the strengthening scheme is beyond the scope of this report, but such strengthening scheme would likely involve introduction of structural steel bracing (similar to this installed in 2003) in some locations throughout the structure.

The need for even distribution of such bracing would have to be balanced with management of the internal layout of the building, which would be inevitably obstructed by introduction of such bracing.

3.6 On 7 May 2019, the agent wrote to the authority noting:

The Structural engineer has confirmed that the [detailed seismic assessment] has said that the Building Structure is even throughout, there is no one weak point. The Building was partially strengthened 10 years ago when the Building was refurbished into the Thirsty Whale. The [detailed seismic assessment] gives the Building a strength of 36% [NBS] and therefore will no longer be considered earthquake prone. We are spending approximately \$60,000 to complete this fitout work and we consider this minor work. Most of this work is increasing toilet numbers and the partial firewall. There is no ability to easily structurally strengthen the Building and as this is not a substantial alteration, we do not believe we need to. Under section 112 of the Building Act, we will comply with Means of escape from fire and access and facilities and we will complete the following work, which we consider as nearly as reasonably practical (ANARP).

As part of our Building Consent our intention is to upgrade in the area that we are working in

Upgrade the fire alarm

Upgrade the fire wall

Upgrade the ceiling to meet H1

Provide additional toilets

Providing mechanical ventilation to new area (amending existing system).

3.7 On 24 July 2019 a building consent was sought for internal alterations to the building (BC190699). In a letter accompanying the application (dated 16 July 2019), the agent noted:

- the engineer had considered how the building could be strengthened to 66%NBS
- this would be done through the engineer designing a number of portals designed to be evenly placed through the existing building structure, however, the business would need to be shut down for the strengthening work to take place and the existing fitout would need to be pulled apart and reinstated

³ The “% NBS” is the rating given to a building as a whole expressed as a percent of New Building Standard achieved, based on an assessment of the expected seismic performance of an existing building relative to the minimum that would apply under the Building Code to a new building on the same site with respect to life safety.

- upgrading the building could not be justified based on the cost of the structural work required, and the small alteration would not take place if the authority insisted on a structural upgrade to the building.
- 3.8 The building consent application included architectural drawings, a fire report, a ventilation report, compliance schedule details, and the detailed seismic assessment.
- 3.9 On 12 August 2019, the authority requested further information in respect of the building consent application. The authority identified a number of Building Code clauses where further information was required. In respect of section 115, the authority stated:
- It is not considered as nearly as is reasonably practicable to not carry out any structural strengthening to the parking/Dance bar area of the building as strengthening work can be carried out while the existing business continues to operate.
- 3.10 On 16 September 2019, the agent wrote to the authority about the application of section 115 to the building. The agent noted:
- I now hear through our engineer who has met with you last week that you expect the whole building strengthened. Our client has agreed to strengthen the area where the Change of Use is happening at the rear of the Building and we are also installing additional toilets. Our client does not own the building, we have proved through a comprehensive engineering building report that the building is not earthquake prone.
- 3.11 On 17 September 2019, the authority wrote to the agent referring to the provisions of section 115, noting:
- The proposal submitted is considered to be a substantial alteration with the number of people using the building and additional 140m² of bar area, to not increase the current NBS% of 36 percent is deemed to not comply as nearly as is reasonably practicable with the Building Code as per the [Ministry] guidelines. Please note all new building work must be shown to fully comply with the Building Code.
- 3.12 The Ministry received an application for a determination on 13 March 2020.

4. The submissions and draft determination

- 4.1 In the cover letter dated 13 March 2020 accompanying the application for determination, the agent set out the background to the issue, noting:
- The project is to extend the existing bar and restaurant to include a nightclub area in the part of the building currently designated as a carpark. The building was previously a warehouse before becoming a restaurant and bar.
 - During 2003 the building was “structurally assessed and upgraded throughout the whole building”. The authority insists that the whole building needs to be structurally upgraded. The cost to structurally upgrade the building is over \$400,000, not including the shutdown period that would be required to the existing bar and restaurant and the loss of revenue.
 - There are two key issues:
 - (i) if the work is carried out to the rear of the building, whether section 112 or section 115 applies
 - (ii) if section 115 applies, whether this requires consideration of the whole building or just the rear of the building where the alterations are taking place.

4.2 The application included a copy of:

- the detailed seismic assessment of the building issued 2 February 2019
- the fire report dated 21 January 2019
- the building consent structural and architectural drawings
- the request for further information letter from the authority dated 12 August 2019
- the email dated 7 May 2019 from the agent to the authority
- the email dated 16 September 2019 from the agent to the authority.

4.3 On 29 April 2020, the Ministry wrote to the authority requesting information about the basis of its decision.

4.4 On 6 May 2020, the authority provided copies of the building consent application and certificate of acceptance application, and advised:

An existing internal carpark was converted into an additional bar area without the necessary building consent approval

A certificate of acceptance to cover the work was applied for however it was unable to be issued as it was deemed that the work did not comply with the [Building Code]

A building consent was then applied for to get the work to comply with the [Building Code] however it was unable to be issued as it was deemed that the proposed work did not comply with the [Building Act/Code].

4.5 On 19 May 2020, the Ministry sought further information from the authority as to whether the upgrading sought by the authority with respect to Clause B1 Structure applied to the entire building or to that part of the building that has undergone the change of use.

4.6 In a response dated 19 May 2020, the authority stated: “Our requirement is that the building is upgraded to comply as nearly as is reasonably practicable.” The authority further clarified that the building was “the whole building for [as nearly as is reasonably practicable] purposes”.

4.7 The draft determination

4.7.1 A draft of the determination was issued for comment on 2 July 2020.

4.7.2 The applicant sought advice from the Ministry in respect of the “as nearly as is reasonably practicable” analysis on 6 July 2020 and responded to the draft determination on 16 July 2020. The applicant did not expressly indicate acceptance or otherwise of the draft determination, however provided the following comments in relation to the “as nearly as is reasonably practicable” analysis:

- it is not the applicant’s intention to increase the number of occupants in the bar and restaurant, rather to have an additional area where occupants can dance
- the costs to structurally upgrade the building would be substantial. The cost of the proposed changes are modest and it would be disproportionate to require the building to also be structurally upgraded
- the wall being considered under the certificate of acceptance (refer to paragraph 3.1) will be removed, as the cost of the requirement to replace the wall linings to protect against spread of fire compared to removing the wall is out of balance

- the building consent will be amended to reflect the changes, and the cost of the work is expected to be approximately \$50,000
- the applicant intends to upgrade the building for fire egress by improving emergency lighting, the fire alarm, the egress, and installing a fire wall on the boundary. Minor work to the bathrooms will also be carried out.

4.7.3 On 13 July 2020 the authority accepted the draft determination with no further comment. On 13 August 2020 the owner advised the agent that he had no objection to the determination.

5. Discussion

5.1 General

5.1.1 The matter in dispute is whether the authority correctly exercised its power of decision in refusing to grant a building consent for the conversion of a carpark area of the building to a nightclub that is part of the same venue as an existing restaurant and bar. The authority is of the view that the change of use of the carpark area of the building means the whole building is required to be structurally upgraded.

5.1.2 Accordingly, I must consider whether the provisions of section 115 apply to the building as a whole or only to the part of the building that has undergone the change of use.

5.1.3 I note that the building work carried out to fitout the nightclub was carried out without building consent, and that work is subject to an application for a certificate of acceptance. As noted in paragraph 1.5, the compliance of the building work itself and the certificate of acceptance are outside the scope of this determination.

5.2 The application of the change of use Regulations

5.2.1 Under section 114, if an owner is planning to change the use of a building, as defined in Schedule 2 of the Regulations⁴, the owner must provide written notice to the authority. An owner must not change the use of the building unless the authority has given written notice that the building in its new use will comply to the extent required by section 115.

5.2.2 Regulation 5 of the Regulations provides:

For the purposes of sections 114 and 115 of the Act, change the use, in relation to a building, means to change the use (determined in accordance with regulation 6) of all or a part of the building from one use (the old use) to another (the new use) and with the result that the requirements for compliance with the building code in relation to the new use are additional to, or more onerous than, the requirements for compliance with the building code in relation to the old use.

5.2.3 Regulation 6 provides that for the purposes of regulation 5, every building or part of a building has a use specified in Schedule 2 of the Regulations. Accordingly, for the purpose of establishing the use under the Regulations and any resulting change of use, it is the uses defined in Schedule 2 of the Regulations that apply.

5.2.4 The old use of the relevant part of the building as a carpark falls under category IA (Intermittent Low), and the new use as a nightclub falls under category CL (Crowd Large). The obligations under the Building Code relating to the new use are more onerous, therefore the conversion of the carpark area to a nightclub constitutes a change of use under the Regulations.

⁴ The Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005.

5.3 The application of section 115

5.3.1 Section 115 provides that:

An owner of a building must not change the use of the building,—

...

(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.

5.3.2 With respect to the application of section 115, the dispute between the parties centres on whether the authority must be satisfied, on reasonable grounds, as to the compliance as is nearly as is reasonably practicable of the building as a whole or only the part of the building undergoing the change of use. The authority's position in this case is that under section 115 a change of use of part of the building necessitates the structural performance of the whole building to be upgraded to comply with the structural requirements of the Building Code to as nearly as is reasonably practicable.

5.3.3 A similar issue was considered in Determination 2015/070, where an owner proposed to convert a unit on the top level of a multi-storey office building to a residential unit. That determination concluded that the levels of the building below the subject unit effectively acted as the foundation to that unit. The assessment under section 115 therefore had to take into account the entire existing building and whether the structural strength/serviceability of the levels below the subject unit would be sufficient to meet the performance requirements of Clause B1 as a foundation to the subject unit.

5.3.4 Determination 2017/006 also considered a similar issue, where a proposed conversion from commercial to residential units was to the ground floor only. That determination found that it was the ground floor and foundations that supported it, including the underlying basement level that had to be assessed for the purpose of section 115.

5.3.5 With respect to how the requirements of section 115 apply to part of a building, Determination 2015/070 stated:

5.2.6 ... If the phrase "the building" in section 114 was taken to mean an entire structure, section 114(2) could be read to mean that the owner is not required to notify the authority if the change is not to the entire building; an approach I consider is illogical.

5.2.7 Likewise the obligations of an owner set out in section 115 are that the owner 'must not change the use of the building ...' Given the definitions in the

Regulations, and the notification required under section 114(2)(a) as note above, section 115 must also apply in respect of a change of use of part of a building.

- 5.2.8 I am of the view that this also applies in respect of the compliance assessments required under sections 115(a) and 115(b) where the phrase “the building, in its new use,” occurs, and requires the building, or part of the building if the change of use only applies to part of the building, to comply as nearly as is reasonably practicable with the provisions of the Building Code listed in sections 115(a) or (b).
- 5.2.9 However, the impact of the change of use, in terms of the performance requirements of the Building Code, must be considered in light of each of the relevant clauses of the Building Code. In regards to a proposed change of use of part of a building the relevant provisions of the Building Code may effectively involve an assessment of other parts of the building, and may in some cases include an assessment of the building as a whole.
- 5.3.6 I agree with the approach taken in these previous determinations. Therefore in this case, for the applicant to be given approval to change the use of the relevant part of the building, under section 115 the authority must be satisfied, on reasonable grounds, that the part of the building undergoing a change of use will comply in its new use as nearly as is reasonably practicable with the Building Code provisions relating to structural performance.
- 5.3.7 The relevant part of the building is part of a structure that was originally a large, open space, constructed by way of a regular grid of structural steel columns, supporting trusses forming the roof. The assessment under section 115 considering the structural performance of this part must therefore take into account the effect of earthquakes in relation to the whole building and building elements.
- 5.3.8 In this case I note that a detailed seismic assessment has been provided that enables the assessment under section 115 to be made. The detailed seismic assessment shows the building has been assessed as 36%NBS, with the likely failure of the building being related to the failure of the roof diaphragm to transfer the loads to the bracing elements.
- 5.3.9 With respect to the information provided, I note that the authority requested “a full structural assessment”. It is not clear to me what was meant by this, but I note that a detailed seismic assessment will not always be required to support a change of use decision. In some cases a structural evaluation carried out to a lesser degree of detail, such as an initial seismic assessment may be appropriate, including where there is not significant structural work being carried out as part of a conversion, or where the requirements for Clause B1 are not additional or more onerous than the existing use.
- 5.3.10 For the applicant to be given approval to change the use of the relevant part of the building, the authority must also make an assessment of whether it would be considered “reasonably practicable” to improve the seismic performance of the relevant part of the building.
- 5.3.11 The reference to compliance “as nearly as is reasonably practicable” recognises that it may be both unreasonable and impracticable to require an existing building to be made to comply to the extent a new building would.
- 5.3.12 The application of the “as nearly as is reasonably practicable” test has been considered extensively in previous determinations. These determinations have established an approach for deciding if a building complies as nearly as is reasonably practicable with the Building Code that follows the approach taken by the High

- Court⁵. The approach involves weighing the benefits of requiring compliance (such as life safety⁶) against the sacrifice of doing so (such as disproportionate cost⁷).
- 5.3.13 I note that the agent has not provided any analysis of the benefits to the authority, only analysis of the costs, and therefore more information and analysis should be provided by the agent in order for the authority to make a decision.
- 5.3.14 It would appear that the costs of upgrading are disproportionate to the cost of the fitout work, however, the agent should advance those reasons while also discussing the benefits of improving the seismic performance of the building.
- 5.3.15 In terms of the “as nearly as is reasonably practicable” analysis, the detailed seismic assessment identifies the strengthening work that would be required to improve the seismic performance of the building (refer to paragraph 3.5). It notes that increasing the seismic performance would require significant structural work to the entire roof structure, because failures that are identified are distributed throughout the whole structure.
- 5.3.16 I note that the estimated cost to complete the fitout work is \$60,000, and the conversion of the carpark part of the building to a nightclub is limited in scope in terms of its impact to the building. The engineer noted the cost to carry out the work to improve the structural performance of the building is \$400,000. My own observations of the benefits are that there would be improved structural performance of the building that will have potential life safety benefits in a seismic event. However, while the building may be occupied by a greater number of people, they will only be exposed for a limited number of hours per week, and the building will not be more frequently occupied than under the current use.
- 5.3.17 I note that the authority must also consider the application of section 112 in order to grant a building consent as the work is an alteration to an existing building. With respect to structural performance, section 112 applies to the building as a whole and requires the authority to be satisfied that, after the alteration, if the building did not comply with the building code immediately before the building work began, it will “continue to comply at least to the same extent as it did then comply.”

⁵ *Auckland City Council v New Zealand Fire Service* [1996] 1 NZLR 330.

⁶ See for example Determinations 2010/043, 2008/006 and 2006/078.

⁷ See for example Determinations 2010/028, 2009/027.

6. The decision

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority was incorrect to refuse to grant the building consent on the grounds provided. Accordingly, I reverse the authority's decision, thus requiring the authority to make a new decision taking into account the discussion in this determination. This should include a revised "as nearly as is reasonably practicable" analysis provided to the authority by the agent.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 18 February 2021.

Katie Gordon
National Manager, Determinations

Appendix A: The legislation

A.1 The relevant sections of the Building Act 2004

112 Alterations to existing buildings

(1) A building consent authority must not grant a building consent for the alteration of an existing building, or part of an existing building, unless the building consent authority is satisfied that, after the alteration,—

(a) the building will comply, as nearly as is reasonably practicable, with the provisions of the building code that relate to—

- (i) means of escape from fire; and
- (ii) access and facilities for persons with disabilities (if this is a requirement in terms of section 118); and

(b) the building will,—

- (i) if it complied with the other provisions of the building code immediately before the building work began, continue to comply with those provisions; or
- (ii) if it did not comply with the other provisions of the building code immediately before the building work began, continue to comply at least to the same extent as it did then comply.

(2) ...

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) ...

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.2 The relevant regulations of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005

5 Change the use: what it means

For the purposes of sections 114 and 115 of the Act, change the use, in relation to a building, means to change the use (determined in accordance with regulation 6) of all or a part of the building from one use (the old use) to another (the new use) and with the result that the requirements for compliance with the building code in relation to the new use are additional to, or more onerous than, the requirements for compliance with the building code in relation to the old use.

6 Uses of buildings for purposes of regulation 5

(1) For the purposes of regulation 5, every building or part of a building has a use specified in the table in Schedule 2.

(2) A building or part of a building has a use in column 1 of the table if (taking into account the primary group for whom it was constructed, and no other users of the building or part) the building or part is only or mainly a space, or it is a dwelling, of the kind described opposite that use in column 2 of the table.

Schedule 2 Uses of all or parts of buildings

Uses related to crowd activities		
Use	Spaces or dwellings	Examples
CL (Crowd Large)	enclosed spaces (with or without kitchens or cooking facilities) where more than 100 people gather for participating in activities, but also enclosed spaces with kitchens or cooking facilities and where 100 or fewer people gather for participating in activities	cinemas (with qualifying spaces), schools, colleges, and tertiary institutions, libraries, night-clubs, restaurants and eating places with cooking facilities, theatre stages, opera houses, television studios (with audience)
Uses related to intermittent activities		
Use	Spaces or dwellings	Examples
IA (Intermittent Low)	spaces for intermittent occupation or providing intermittently used support functions—low fire load	car parks, garages, carports, enclosed corridors, unstaffed kitchens or laundries, lift shafts, locker rooms, linen rooms, open balconies, stairways (within the open path) ³ , toilets and amenities, and service rooms incorporating machinery or equipment not using solid-fuel, gas, or petroleum products as an energy source