BUILDING PERFORMANCE

Determination 2024/038

An authority's decisions to issue a notice to fix and a dangerous and insanitary building notice

20 Hinekohu Street, New Lynn, Auckland

Summary

This determination considers an authority's decision to issue a notice to fix and whether there has been a change of use under the Building Act of a house and converted garage. The determination also considers the authority's decision to issue a dangerous and insanitary building notice for the converted garage.

In this determination, unless otherwise stated, references to "sections" are to sections of the Building Act 2004 ("the Act") and references to "clauses" are to clauses in Schedule 1 ("the Building Code") of the Building Regulations 1992.

The Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (eg Acceptable Solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matters to be determined

1.1. This is a determination made under due authorisation by me, Peta Hird, for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment.[1]

1.2. The parties to the determination are:

- S Singh, owner of the property and applicant for this determination ("the owner")
- Auckland Council ("the authority"), carrying out its duties as a territorial authority or building consent authority.

1.3. This determination arises from the authority's decisions to issue:

- notice to fix NOT21665459 ("the notice to fix") on 14 April 2023, for an alleged change of use of a dwelling ("the main house") and converted garage ("the unit") at the owner's property
- a dangerous and insanitary building notice (NOT21665520) on 26 May 2023, for the unit.

The relevant parts of the notices are set out in Appendix A and B respectively.

1.4. The owner considers that the authority should not have issued the notice to fix or the dangerous and insanitary building notice (together "the notices") and is of the view that the notices have been complied with.

1.5. The matters to be determined[2] are:

- the authority's decision to issue a notice to fix for contravening sections 114 and 115. This turns on whether there has been a change of use of the main house and the unit for the purposes of the Act.

[1] The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

[2] In terms of section 177(1)(b), (3)(e) and (3)(f) of the Act

- the authority's decision to issue a dangerous and insanitary building notice for the unit. This turns on whether the unit is dangerous as defined by section 121 and/or insanitary as defined by section 123.

Issues outside this determination

1.6. In making this determination, I have not considered:

- compliance with the Building Code of any building work undertaken at the property
- the authority's processes in carrying out inspections at the property
- infringement notices issued by the authority.

1.7. I have no jurisdiction to consider issues related to the Resource Management Act 1991 and the authority's District Plan requirements.

2. Background

2.1. There are two buildings at the property – the main house built in 1956, and the unit built as a detached garage in 2004. I refer to these together as "the buildings". The main house has five bedrooms, a kitchen, bathroom and lounge. The unit has one main room (which contains kitchen and laundry facilities) and a bathroom.

2.2. On 21 March 2023, the authority and Fire and Emergency New Zealand ("FENZ") inspected the buildings. Both had concerns about the buildings.

2.3. On 14 April 2023, the authority issued the notice to fix for the main house and the unit (the operative parts of this notice are set out in Appendix A). The authority noted that "… no Building or Resource Consents [were] found in [the authority's] records authorising the use of the address as a boarding house".

2.4. On 26 April 2023, the authority again visited the property and issued a dangerous and insanitary building notice for the unit (the operative parts of this notice are set out in Appendix B).

2.5. On 29 September 2023, the authority advised the owner that "… there has been no action taken on your part to satisfy … any of the requirements laid out in [the notice to fix]", and an infringement notice relating to non-compliance with the notice to fix was issued on 3 November 2023.

2.6. On 19 December 2023, the owner's consultant wrote to the authority responding to the notices. The consultant's report concluded that both notices were satisfied and should be withdrawn (the consultant has since referred to this report as a "notice of compliance").

2.7. Communication about the matters continued between the parties, but they have been unable to resolve their differing views and an application was made for a determination.

3. Submissions

Points not in dispute

3.1. There does not appear to be any dispute between the parties on the following points:

- The main house and the unit were previously classified as SH (Sleeping Single Home) under the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 (the "change of use regulations").
- The buildings are currently used for emergency housing/short term stays.

The owner's submission

3.2. Regarding the notice to fix, the owner considers that the change of use alleged by the authority "is wrong and the change of use regulations have been wrongly applied".

3.3. In the owner's view, the authority "has not provided adequate reasons for refusal of the owners notice of compliance".[3]

3.4. The owner believes the notice to fix has been complied with, and that the unit has to be assessed independently of the main house.

3.5. The owner states that the buildings are "boarding houses with 5 occupants and this limit has been conveyed to [the authority] and undertaking given that each Boardinghouse [sic] will be restricted to this number". They consider that "the remedy to revert to a single family household was already met (as it never departed from this use)".

3.6. Regarding the dangerous and insanitary building notice, the owner's view is that:

- the reasons for the authority's decision that it is dangerous relate to compliance rather than an assessment that injury or death is likely with normal use
- the reasons for the insanitary claim are inadequate, with no evidence of likely harm to health.

[3] As set out at paragraph 2.9, this 'notice of compliance' is the consultant's report dated 19 December 2023.

3.7. The owner acknowledges that:

> The unflued gas appliance is the only reason that has any justification [for the dangerous and insanitary building notice] but the intermittent use of the hob is unlikely to be injurious given the natural ventilation present. The DBN [the dangerous and insanitary building notice] should in any event simply required [sic] a rangehood to address this deficiency. (this is now provided).

3.8. On 22 May 2024, the owner confirmed that since the dangerous and insanitary building notice was issued:

> A rangehood has been provided [and] … The gas has … been disconnected. The intention is to replace the hob with an electrical hotplate arrangement in the interim.
>
> … the space [in the unit] is dry and healthy and is self evidently not insanitary at this time. There are adequate sanitary facilities present and hot and cold water.

The authority's submission

3.9. The authority provided information to support their position on the disputed change of use, and on the dangerous and insanitary building provisions.

The change of use

3.10. In their submission, the authority stated that:

> … the change of use on which [the authority] issued the NTF [the notice to fix] was a change from SH to SA[4], with the resultant change in classified use from Housing Detached Dwelling to Communal Residential Community Service.

3.11. The authority considers "the property is a commercial property", and identified the following information from site inspections as the basis for their view that the use had changed:

> 5 separate double bedrooms (10 bed spaces) with 5 individual tenants residing in the main house;
>
> 2 tenants residing in the [unit];
>
> no family members are residing at the property; and
>
> shared facilities (bathroom, kitchen and lounge) in the main house for the occupants of the house and the [unit] to use.

3.12. In the authority's view:

> … the current [classified use of the buildings] is no longer as a single household or family unit. It is a communal residential community service.

[4] SH (Sleeping single home) and SA (Sleeping accommodation) as described in Schedule 2 of the change of use regulations.

> … [the authority] does not accept that a distinction between a boarding house with 5 or a boarding house with more with more than 5 tenants is the difference between a detached dwelling classified use and a community service classified use.
>
> … even if the point above is wrong, the [authority] does not accept that the proposed undertakings [by the owner to restrict the number of occupants of each building to five] will result in a limit of 5 or less occupants.

Position on dangerous and insanitary building provisions

3.13. The authority considers that "…the building is dangerous in accordance with section 121(b) and in the event of fire, injury or death to any persons in the building or to persons on other property is likely".

3.14. The authority gives the following reasons for holding this view:

> There is a non-compliant, uncertified, and unsafe gas installation ...
>
> Non-compliant gas pipe and unflued gas appliance installed in a sleeping area ...
>
> The alterations and gas installations have been done without a building consent or Gas Safety Certificate[5] and no fire safety systems have been installed.

3.15. The authority provided a copy of the Building Fire Safety Report prepared by FENZ following the 21 March 2023 inspection. In summary, the report notes the following issues regarding compliance:

> Escape routes have not been provided with exit signs …
>
> Unauthorised gas appliance installation or alteration [in the unit] …
>
> No smoke alarm [in the unit].

3.16. Regarding the claim that the unit is insanitary under section 123, the authority submits:

> The [unit] does not meet the minimum requirements for a habitable space as specified in the Housing Improvement Regulations 1947
>
> The [unit] is rundown, unclean and has broken windows
>
> It fails to meet the minimum sanitary, minimum size and weatherproof requirements of the Housing Improvement Regulations and Health[y] Homes Regulations.

[5] According to the report on the second site visit on 26 April 2023, the owner provided a copy of a Gas Safety Certificate for the property dated 4 September 2021. However, many of the claims made in the certificate were incorrect, giving reason to believe that gas pressures and other minimum safety requirements had not been correctly completed at the time.

4. Discussion

4.1. The matters to be determined are:

- the authority's decision to issue the notice to fix for a contravention of sections 114 and 115. This turns on whether there has been a change of use of the main house and the unit for the purposes of the Act.

- the authority's decision to issue a dangerous and insanitary building notice for the unit. This turns on whether the unit is dangerous as defined by section 121 and/or insanitary as defined by section 123.

The notice to fix

Change of use provisions

4.2. Under section 114, the owner of a building must provide written notice to the relevant territorial authority if they propose to change the use of a building or part of a building. The owner must not change the use unless notified that the territorial authority is satisfied the building in its new use will comply to the extent required under section 115.

4.3. The parties disagree about whether there has been a change of use of the buildings.

4.4. A change of use is determined according to regulations 5 and 6 of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005[6] (the "change of use regulations"), which state:

> **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.

[6] See section 114(1) of the Act.

4.5. To decide this matter, I must consider whether the buildings have changed from one use group to another ("the first criterion").

4.6. If I find that is the case, I must go on to consider whether the new use group gives rise to Building Code requirements which are additional or more onerous than the requirements under the old use ("the second criterion"). The second criterion requires me to consider the classified use for both the old and new use groups, as this step is necessary to identify the relevant Building Code requirements.

4.7. Both criteria above must be satisfied for there to be a change of use for the purposes of the Act.

4.8. Before I consider the criteria, a preliminary issue arises as to whether the buildings are to be assessed separately or together. The owner submits that "the separate detached dwelling [unit] has to be assessed independently of the main house".

4.9. The notice to fix states that the bathroom, kitchen and lounge in the main house are shared facilities for the occupants of the unit. However, it is not clear what the authority has based this on. No information has been provided to the Ministry by the parties as to whether the communal spaces in the main house are also used by the occupants of the unit. The unit has an ensuite and kitchen facilities, as well as its own laundry facilities.

4.10. While both buildings have the same owner and are managed by the same property manager, the unit can operate separately from the main house. The occupants of the unit are not reliant on any of the facilities in the main house. In these circumstances, it is my view that the buildings should be assessed individually for the purposes of deciding whether there has been a change of use.

The first criterion

4.11. The authority alleges that the use has changed from 'SH (Sleeping Single Home)' to 'SA (Sleeping Accommodation)' for the main house and the unit.

4.12. Table 1 sets out the SA and SH use groups as they appear in Schedule 2 of the change of use regulations.

Table 1: SH and SA use groups in Schedule 2 of the change of use regulations.

Use	Spaces or dwellings	Examples
Uses relating to sleeping activities		
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, wharenui
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

4.13. The owner states they do "not dispute that for the purposes of this application these buildings [the main house and the unit] are boarding houses". The owner also states, "The use is emergency housing with short term stay providing for urgent cases but this is still a community residential use akin to a boarding house".

4.14. The use of the buildings for short term stays is clearly indicative of 'transient accommodation' and so falls under the 'SA (Sleeping Accommodation)' use, rather than occupants living together as a 'single household or family' and the 'SH (Sleeping Single Home)' use. See also paragraph 4.23 below where I discuss what constitutes a 'single household or family'.

4.15. As such, I am satisfied the use group for both the main house and the unit was SA when the authority inspected the buildings on 21 March 2023.

4.16. The parties do not dispute that the buildings were previously classified under the regulations as 'SH (Sleeping Single Home)'.

4.17. Therefore, for the purpose of regulation 5 of the change of use regulations, the first criterion has been met as the use group for the buildings has changed from SH to SA.

The second criterion

4.18. I now consider whether the second criterion in regulation 5 of the change of use regulations is met – that the new use group results in additional or more onerous Building Code requirements.[7] If this second criterion is met the requirements in sections 114 and 115 are triggered.

[7] Building Code requirements for buildings or parts of buildings vary according to their classified use. As a result, some buildings or parts of buildings are required to meet Building Code requirements that others are not.

4.19. The Building Code requirements apply according to a building's classified use, and not according to its use group in the change of use regulations. Therefore, in order to determine whether there are additional or more onerous Building Code requirements, I must ascertain the classified use of the buildings.[8]

4.20. Residential uses are separated into groups – 'Housing' and 'Communal residential'. The authority considers the classified use has changed from 'Detached dwelling' to 'Community service', which are subcategories within these groups. Table 2 sets out these classified uses as described in clause A1 of the Building Code.

Table 2: Relevant classified uses in clause A1 of the Building Code.

2.0 Housing	**3.0 Communal residential**
2.0.1 Applies to buildings or use where there is self care and service (internal management). There are three types:	**3.0.1** Applies to buildings or use where assistance or care is extended to the principal users. There are two types:
2.0.2 Detached dwellings	**3.0.2 Community service**
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. …	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, motel, nurses' home, retirement village, time-share accommodation, a work camp, or camping ground. …

Classified use – 'Detached dwellings'

4.21. The owner argues that "If a boarding house with 5 occupants is deemed under classified use to be a detached dwelling then the [owner] maintains that the use in schedule 2 of the [change of use] regulations has not moved. It is and remains a detached dwelling". The owner states that they have given an undertaking to the authority that "each boarding house" will be restricted to five occupants (see paragraph 3.5).

4.22. The authority "does not accept that a distinction between a boarding house with 5 or a boarding house with more than 5 tenants is the difference between a detached dwelling classified use and a community service classified use. The use as a single household or family unit is a fundamental component which is not present here".

4.23. While the classified use 'Detached dwelling' lists "boarding house accommodating fewer than 6 people" as an example, I agree with the authority that the fundamental consideration is whether the occupants "live as a single household or family".

[8] For classified uses, see clause A1 of the Building Code.

4.24. I considering first the main house. I have not been provided any information to indicate the occupants are a family.

4.25. The courts have considered the meaning to be given to the term 'household'. In *Queenstown-Lakes District Council v The Wanaka Gym Limited* ("*Wanaka Gym*"), the Judge identified a number of factors which may be relevant when assessing whether a 'household' is present.[9]

4.26. I consider the following factors from *Wanaka Gym* are relevant in this case:

- The relatively short term of the occupation.
- There is no necessary connection with the other occupants.
- There is no agreement of the occupants to reside together.

4.27. In this case, the short-term stays do not indicate a connection between the occupants which would support the conclusion that the occupants of the main house live as a 'single household'. As such, I conclude that the classified use of the main house is not 'Detached dwelling'.

4.28. Regarding the unit, as it will be occupied by a single household or family, I consider it falls within the classified use 'Detached dwelling'.

Classified use – 'Community service'

4.29. The classified use 'Community service' "… applies to a residential building or use where limited assistance or care is extended to the principal users". Boarding houses are given as one example.

4.30. Determination 2018/045[10] noted that:

> [6.7.1] Communal residential uses are those where assistance or care is extended to the occupants. Unlike the uses within Housing, there is no emphasis placed upon the requirement for a family (or single household) and the occupants are less likely to know each other before occupying the building.
>
> …
>
> [6.7.10] The larger degree of independence in community service [as opposed to 'Community care'] explains the varying range of what "limited assistance or care" can manifest as within the examples provided for that classified use. For example, back country huts offer minimal services to occupants, whereas hotels offer a higher level and wider range of assistance.

4.31. Similarly, Determination 2023/034 noted that the examples suggest the nature and degree of 'limited assistance or care' can vary according to the type of occupancy.[11]

[9] *Queenstown-Lakes District Council v The Wanaka Gym Limited* DC Christchurch CIV-2003-002-000265, 18 November 2008 at [27].

[10] Determination 2018/045 *Classified use of a building let out as accommodation* (11 September 2018).

It follows that what amounts to 'limited assistance or care' depends on the circumstances.

4.32. In this case, it is not evident that the authority has considered whether "limited assistance or care is extended to the principal users", as no examples of such assistance or care have been provided. Inspection records note that there is a property manager, but I have not been given any information about the assistance or care that they provide to the occupants.

4.33. I note that even minimal services offered to occupants can be considered 'limited assistance or care' (as is the case with back country huts). In this case, given the buildings' use for short term stays and emergency accommodation, and therefore the turnover of occupants, I consider there is a level of involvement by the property manager in managing the occupation of the buildings. In my opinion this constitutes limited assistance or care.

4.34. I conclude that the main house falls under the classified use 'Community Service'. However, despite being managed collectively, because the unit is occupied by a single household, I consider the unit more closely aligns with 'Detached dwelling'.

Building Code requirements

4.35. Now that I have established the previous and new classified use of the main house, as a second step I must determine whether there are additional or more onerous Building Code requirements in its new use.

4.36. The owner states that if "it is deemed that there is a movement in the use tables from SH to SR[12] under schedule 2 of the change of use regulations 2005 then it is still not a "change of use" because the Building Code requirements in the new use are not more onerous than in the old".

4.37. It is clear that under the classified use of 'Community service' there are additional or more onerous Building Code requirements when compared with the requirements for the classified use of 'Detached dwelling'. For example, clause F8.2[13] did not apply to the main house when its use group was SH. At that time, the main house had the classified use of 'Detached dwelling' and the limits on application for clause F8.2 mean that clause did not apply.

4.38. In conclusion, I consider that the main house had, as at the date of the authority's inspection, undergone a 'change of use' for the purposes of section 114 and 115.

---

[11] Determination 2023/034 *An authority's decision to issue a notice to fix for a change of use of a building* (15 November 2023) at paragraph 5.38.

[12] As previously set out, the notice to fix alleges the use has changed from SH to SA (not SH to SR), and I have concluded that the use group has changed from SH to SA.

[13] This relates to the provision of signs identifying escape routes, emergency-related safety features, potential hazards, and accessible routes and facilities for people with disabilities.

This is because the use group had changed from SH to SA, and the new use group resulted in more onerous or additional Building Code requirements.

4.39. The owner did not provide the authority with written notice of the change of use as required by section 114(2)(a) or receive prior approval from the authority for the change of use as required by section 115. Therefore, there was a contravention of the Act, and grounds to issue a notice to fix under section 164.

Remedies

4.40. The notice to fix states:

> To remedy the contravention or non-compliance you must:
> Either
> 1. Revert the uses of the main dwelling and garage to a single-family household unit; or
> 2. Notify the Auckland Council of the change of use and apply for a building consent to ensure the change of use complies with the Building Code and the Building Act 2004; and
> 3. You will require a full fire report and you may require a Resource Consent; or
> 4. Pursue another option that would achieve compliance with the Building Act 2004.

4.41. The effect of section 115 is that the owner must satisfy the authority that the building (in this case the main house), in its new use, will comply with the Building Code to the extent required under that section. This may require building work to be carried out, but it may also be achieved by the owner providing information which enables the authority to make a decision about compliance. In such a case, or if the building work needed is exempt, a building consent may not be required to bring the building in line with the more onerous Building Code requirements of the new use.[14] For this reason, the requirement to apply for a building consent was not an appropriate remedy.

4.42. Further, the authority cannot require a fire report or resource consent in order to comply with a notice to fix.

The application of section 167

4.43. The owner considers that section 167 is applicable because they provided a "formal statement that the notice to fix [was] complied with". This was based on their view that "the remedy to revert to a single family household was already met (as it never departed from this use)". They state that the authority has failed to properly consider section 167 and has not provided adequate reasons for refusal of the owner's notice of compliance.

[14] For example, installing signage or smoke alarms would not require a building consent.

4.44. Section 167 sets out the process regarding the inspection of building work that is required to be completed under a notice to fix. Section 167(1) states:

> If a specified person to whom a notice to fix was issued is required to notify a territorial authority… that the relevant building work has been completed, the territorial authority… must, on receipt of the notice from the specified person concerned, inspect… the building work to which the notice to fix relates.

4.45. In this case, the notice to fix did not require any building work. Accordingly, the owner had not completed any building work required by the notice to fix and subsequently notified the authority that the relevant building work had been completed. As such, section 167 does not apply.

The dangerous and insanitary building notice

4.46. The authority issued a dangerous and insanitary building notice in relation to the unit.

4.47. Section 124 'Dangerous, affected, or insanitary buildings: powers of territorial authority' states:

> (1) This section applies if a territorial authority is satisfied that a building in its district is a dangerous, affected, or insanitary building.
> (2) In a case to which this section applies, the territorial authority may do any or all of the following:
> (a) put up a hoarding or fence to prevent people from approaching the building nearer than is safe:
> (b) attach in a prominent place on, or adjacent to, the building a notice that warns people not to approach the building:
> (c) except in the case of an affected building, issue a notice that complies with section 125(1) requiring work to be carried out on the building to—
> (i) reduce or remove the danger; or
> (ii) prevent the building from remaining insanitary:
> (d) issue a notice that complies with section 125(1A) restricting entry to the building for particular purposes or restricting entry to particular persons or groups of persons.

4.48. The notice alleges that the unit is both dangerous and insanitary. It states:

> [The authority] is satisfied that the [unit] poses a danger to the safety of people / property in that the building is dangerous in accordance with s121(b) and
>
> - In the event of fire, injury, or death to any persons in the building or to persons on other property is likely.
> - AND [the authority] is satisfied that the building is insanitary in terms of s.123(a), (b) and (d) of the Act.

Whether the unit is 'dangerous'

4.49. Section 121 'Meaning of dangerous building' provides:

> (1) A building is dangerous for the purposes of this Act if,—
>
> (a) in the ordinary course of events (excluding the occurrence of an earthquake), the building is likely to cause—
>
> (i) injury or death (whether by collapse or otherwise) to any persons in it or to persons on other property; or
>
> (ii) damage to other property; or
>
> (b) in the event of fire, injury or death to any persons in the building or to persons on other property is likely.
>
> …

4.50. The courts have considered the definition of a dangerous building' in relation to the predecessor of section 121 of the Act, in particular the words "likely" and "likely to cause injury or death".[15]

4.51. The dangerous and insanitary building notice alleges that the unit is dangerous because:

> There is a non-compliant, uncertified, and unsafe gas installation.
>
> Non-compliant gas pipe and unflued gas appliance installed in a sleeping area.
>
> The alterations and gas installations have been done without a building consent or Gas Safety Certificate and no fire safety systems have been installed.

4.52. It does not follow that the unit is dangerous because work has been carried out without building consent. If the authority considers building work has been carried out without consent when one was required, in breach of section 40, then that could form the basis for the issue of a notice to fix. Reasons set out in a dangerous building notice should relate to the legal test in section 121.

4.53. Further details about the gas installation were provided in correspondence between the owner and the authority, as well as in the authority's determination submission. The authority noted:

> (a) The LPG auto changeover valve was delivering inadequate pressure, unable to obtain 2.75kPa at appliance;
>
> (b) No test points installed in appropriate places;
>
> (c) PEX pipe underground section not buried at minimum depth or protected;
>
> (d) PEX pipe run around the building on ground and on sharp gravel;
>
> (e) PEX pipe unsupported and unprotected from physical damage and sunlight;
>
> (f) Gas appliances not operating at correct or adequate pressures;
>
> (g) The gas certificate making false claims of complying with AS/NZS 5601.1[16];
>
> (h) The gas certificate giving incorrect Risk Classification (Low instead of general)[17]; and

[15] *Auckland City Council v Weldon Properties Ltd* [1996] DCR 635 (upheld on appeal in *Weldon Properties Ltd v Auckland City Council* HC Auckland HC26/97, 21 August 1997), and *Rotorua District Council v Rua Developments Ltd* DC Rotorua NP966/97, 3 March 1998.

[16] Australian/New Zealand Standard AS/NZS 5601.1:2013 *Gas installations - Part 1: General installations.*

(i) The natural gas hob converted to LPG, but wrong data plate left on appliance.

4.54. The authority has alleged that the non-compliant gas appliance is dangerous under section 121(1)(b). I note that this provision applies if "**in the event of a fire,** injury or death to any persons in the building or to persons on other property is likely" [my emphasis].

4.55. In this case, the danger was exposure to the products of combustion due to the unflued gas appliance (which also did not operate at the correct pressure), and the risk of the gas pipe being ruptured and causing a gas leak, which can result in a subsequent risk of a fire or explosion. Because these do not relate to the occupants' ability to escape from the building if it is on fire, I consider that section 121(1)(a) is the appropriate test to consider.

4.56. The owner submits:

> The only justification for dangerous might be in respect to gas installation but the inadvertent venting present makes it unlikely that injury or death were likely. The simple provision of a rangehood recommended in AS/NZS 5601 addresses any underlying concern. A combined CO_2 /smoke detector would also be prudent and the smoke alarm is both a healthy homes and Building Code requirements. These provisions are prudent but their absence is not justification for dangerous under the building act s124.

4.57. The owner also states:

> … a dangerous and insanitary building notice must clearly state the matters that are dangerous and not be confused and distracted by matters of code compliance that do not apply to an existing building but only to building work.

4.58. I note that while it is correct that non-compliance with the Building Code does not necessarily mean that a building is dangerous, non-compliant features of the unit may support the conclusion it is dangerous.[18]

4.59. The authority considers the gasfitting work does not comply with clause G11 *Gas as an energy source* and has raised several examples of noncompliance with Australian/New Zealand Standard AS/NZS 5601.1:2013[19]. These include:

- The diameter of the gas pipe (15mm) is too small to provide adequate flow or pressure, and should be at least 20mm.[20]

---

[17] I note that this gas installation would be 'high-risk gasfitting' work as defined in regulation 5A(2)(a) of the Gas (Safety and Measurement) Regulations 2010, because the gasfitting work comprised an addition to an existing installation.

[18] I also note that the Building Safety Fire Report by FENZ (dated 21 March 2023) stated that there is no smoke alarm in the unit. As there has been a change of use, an assessment of Building Code compliance is required under section 115. The owner states that a rangehood and CO/smoke alarm have since been installed (following the issue of the dangerous and insanitary building notice).

[19] Australian/New Zealand Standard AS/NZS 5601.1:2013 *Gas installations - Part 1: General installations* ("AS/NZS 5601").

- The pipe (when buried) is not buried deep enough. The minimum depth of cover required is 300mm.[21]

- The pipe "is not protected or properly supported, and is too close to other services".[22] The authority provided a photograph (see Figure 1), which shows "Gas pipe and water pipe in same trench, too close together and not deep enough. No warning tape".[23]

- There is an unflued gas appliance installed in an area used for sleeping. The standard states "A flueless gas appliance shall not be installed in a … bedroom …".[24]

4.60. The authority's notes from the initial site visit also state "There are obvious signs of a fire external to the building, and we have been informed by FENZ of at least 3 fires associated with that building in the last couple of years".

4.61. At the authority's second site visit, the officer undertook testing to confirm the operating gas pressure. The site visit report states:

> When complete combustion occurs the products of combustion are water vapour and Carbon Dioxide (CO_2). Incomplete combustion will produce Carbon Monoxide (CO) which is toxic in small quantities. In order to obtain complete combustion the fuel gas (LPG) is mixed with air in the correct proportion…
>
> AS/NZS 5601.1 states that the minimum supply pressure to any LPG appliance must be 2.75kPa, which means that the initial supply pressure at source needs to allow for friction losses and needs (normally) to be slightly higher, around 3.00 kPa depending on pipe size and length.
>
> The gas pressures in a residential gas system are very low, and a small difference can make a significant and disproportionate difference to the air/gas ratio, and thus the production of CO.

4.62. The authority noted that two LPG gas bottles with a non-adjustable automatic gas changeover regulator are located at the rear of the main house. Friction losses (due to approximately 26m distance between the point of supply and the gas hob in the unit, as well as the 15mm diameter gas pipe), cause a reduced pressure at the hob.

---

[20] AS/NZS 5601 at [5.2.4] states "The consumer piping shall be of sufficient diameter to ensure adequate gas supply to the gas appliance(s) and shall be determined by calculation using formulae or tables recognised by the Technical Regulator. NOTE: Appendix F provides methods for determining pipe sizing.

[21] Ibid. Table 5.4 Depth of cover for consumer piping.

[22] Ibid. at [5.4.12] "The separation between any underground consumer piping and any service, including other consumer piping, other than an electrical or communication service shall be at least – (a) 100 mm, for consumer piping not exceeding 65 mm nominal size; or (b) 300 mm, for consumer piping exceeding 65 mm nominal size.

[23] Ibid. at [5.4.6] "Marker tape complying with the requirements of AS/NZS 2648.1 shall be laid above plastic consumer piping when installed in an open-cut trench".

[24] Ibid. at [6.2.3].

The authority measured pressure at the hob for several minutes, noting that the pressure fluctuated from 1.2 kPa to 2.0 kPa. The authority states:

> If the use is constant or steady the pressure will stabilise, but can never reach the 2.75kPa required because the main regulator is factory set too low and cannot be increased.
>
> Due to the inappropriate use of a non-adjustable regulator, it is not possible to supply gas at the correct minimum pressure to the gas hob (or any other appliance in the system) and as a result it is not possible to obtain complete combustion in all circumstances. Given there is no permanent ventilation, and the room has in fact been relatively well sealed for insulation purposes, the production of Carbon Monoxide is inevitable, it is only the quantity that may differ.

4.63. In my view, at the time the authority issued the dangerous and insanitary building notice, the gas installation was dangerous due to the risk of exposure to the products of combustion. Gas appliances in sleeping areas need ventilation to avoid the accumulation of products of combustion which can be toxic and are particularly dangerous in areas where occupants sleep. In this case, the gas supply pressure to the appliance was also insufficient to achieve complete combustion in all circumstances, increasing the likelihood of exposure to carbon monoxide. On its own I consider this meets the threshold in section 121 and that the unit was a dangerous building.

4.64. Further, the installation of the gas piping increased the risk of the pipe being ruptured and causing a gas leak, which can result in a subsequent risk of a fire or explosion. Pipework in the ground must have sufficient depth or be covered in such a way to protect the pipe from physical damage. It must also be located where it is not likely to experience mechanical damage or must be physically protected.

4.65. In this case, the pipe is not buried, and nor is it covered (other than with a PVC pipe) (see Figure 1). Burying piping is one way to reduce the force that the pipe may be subject to, and to maintain a sufficient (and consistent) depth at which pipes are less likely to be accidentally struck or damaged.

4.66. In addition, the gas pipe is in close proximity to the water pipe (see Figure 1). Sufficient space between pipes allows for work to occur on one without causing damage to the other. Further, the PVC pipe used as a duct to contain the gas pipe is not clearly marked so that the gas pipe can be identified and protected from physical damage, and may lead to misidentification.

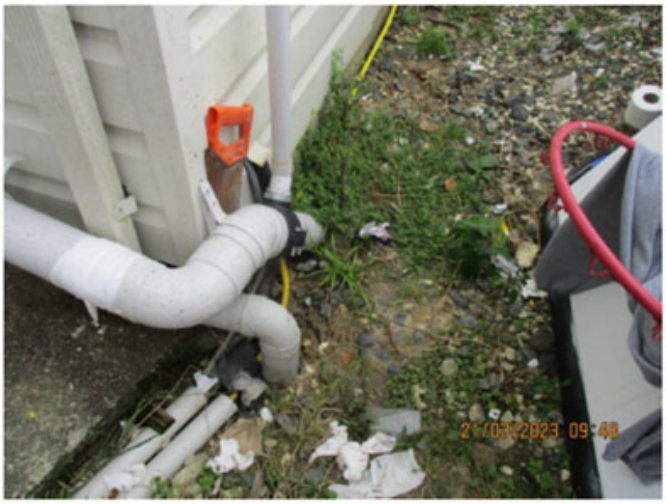

Figure 1: Photograph from the first inspection, captioned "Gas pipe and water pipe in same trench, too close together and not deep enough. No warning tape".

4.67. Between the first and second inspections, the gasfitter who undertook the work made changes to the gas pipe. The authority's notes from the inspection on 26 April 2023 state the gas pipe had been "raised above the ground, covered with conduit and clipped" (see Figure 2). Therefore, it appears that the issues relating to the pipe being located on the ground/sharp gravel, and being unsupported and unprotected from physical damage and sunlight, may have been addressed at the time the dangerous and insanitary building notice was issued. However, the authority's second inspection notes and photographs do not indicate whether these issues had been addressed in the area where the gas pipe transitions into the trench next to the water pipe (see Figure 1).

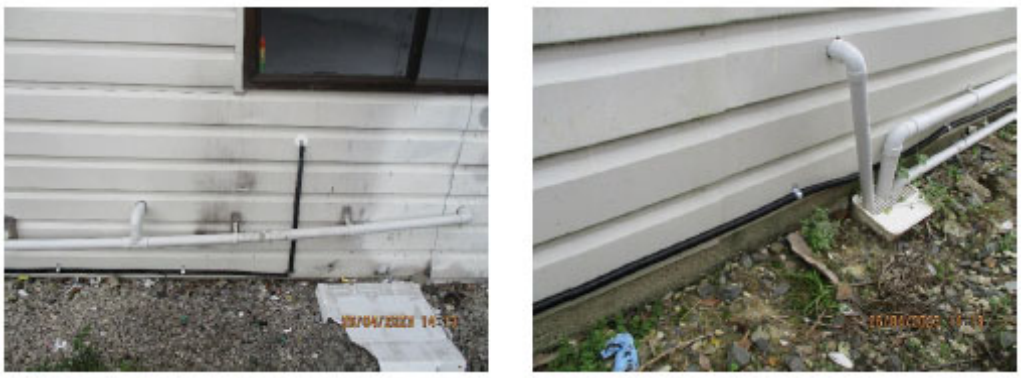

Figure 2. Photographs from the second inspection, captioned "Gas pipe raised above ground, covered with conduit and clipped".

4.68. In my view, due to the risk of exposure to the products of combustion, injury or death was likely in the ordinary course of events. As such, I consider that the test in section 121(1)(a) was met.

Whether the unit is 'insanitary'

4.69. Section 123 'Meaning of insanitary building' states:

> A building is insanitary for the purposes of this Act if the building—
>
> (a) is offensive or likely to be injurious to health because—
>
> (i) of how it is situated or constructed; or
>
> (ii) it is in a state of disrepair; or
>
> (b) has insufficient or defective provisions against moisture penetration so as to cause dampness in the building or in any adjoining building; or
>
> (c) does not have a supply of potable water that is adequate for its intended use; or
>
> (d) does not have sanitary facilities that are adequate for its intended use.

4.70. The dangerous and insanitary building notice alleges that the unit is insanitary under section 123(a), (b) and (d), because:

> The [unit] does not meet the minimum requirements for a habitable space as specified in the Housing Improvement Regulations (1947).[25]
>
> The [unit] is rundown, unclean, and has broken windows. It fails to meet the minimum sanitary and minimum size and weatherproof requirements of the Housing Improvement Regulations and Healthy Home [R]egulations [26] and is thus also Insanitary.

4.71. The authority's report from its initial site visit states:

> The ceiling height throughout the household unit is approximately 2.00m, the minimum head height for any habitable space is 2.4m. (Housing Improvement Regulations)
>
> To meet the requirements for a household unit there must be cooking facilities able to both bake and boil, but the only cooking facilities consist of a gas cooktop (2 burners) and no baking ability. Again this is a breach of the [Housing Improvement] Regulations 1947. …
>
> The unit is not weathertight, with a window and glass from the main door being missing. The resident confirmed that the glass had been missing ever since he rented the room. This qualifies the unit as insanitary as defined in S 123 of the Building Act 2004. …

4.72. The Housing Improvement Regulations 1947 and the Residential Tenancies (Healthy Homes Standards) Regulations 2019 are not administered under the Building Act. As such, the requirements of these regulations cannot be enforced using mechanisms set out in the Building Act such as dangerous and insanitary building notices.

[25] The Housing Improvement Regulations 1947 set minimum requirements for housing. A property must meet all these requirements unless it complied with equivalent Building Code requirements when it was built.

[26] Residential Tenancies (Healthy Homes Standards) Regulations 2019. This sets minimum standards for heating, insulation, ventilation, moisture and drainage, and draught stopping in rental properties.

4.73. I do not consider the lack of an appliance for baking is relevant to whether the building is 'insanitary' under section 123(a) in terms of the building being "offensive or likely to be injurious to health". Further, I do not consider the 2m ceiling height meets the threshold for being injurious to health in terms of how the building has been constructed (section 123(a)(i)).

4.74. A building may be insanitary when it is in a state of disrepair or has insufficient or defective provisions against moisture penetration and so issues concerning weathertightness, such as absence of window panes, are relevant. However, the absence of a window or door pane does not necessarily mean the building is insanitary. Window and door panes may be damaged from time to time and replacement is a matter of maintenance. While the authority's site visit report records the occupant's statement that the glass had been missing since he rented the room, there is no information on how long that was.

4.75. Based on photographs provided, by the time the authority undertook its second site visit and issued the dangerous and insanitary building notice (on 26 April 2023), the missing glass in the window and door appear to have been remedied. No sign of mould or dampness is evident from the photographs.

4.76. I am of the view the unit at the time the dangerous and insanitary notice was issued did not meet the threshold of insanitary under section 123(a) or (b) with regard to insufficient or defective provisions against moisture penetration.

4.77. It is unclear why the authority has alleged that the unit is insanitary under 123(d), ie that the building "does not have sanitary facilities that are adequate for its intended use". The unit has sanitary fixtures and appliances for personal hygiene, laundering and food preparation.

4.78. There is no evidence that the unit was insanitary at the time the dangerous and insanitary building notice was issued.

5. Conclusions

5.1. In relation to the notice to fix, I conclude:

- There was a change of use for the purposes of the Act in respect of the main house, but not the unit.
- There were grounds for issuing the notice to fix in relation to the main house, but not the unit.
- Some of the remedies specified in the notice to fix were not appropriate.

5.2. In relation to the dangerous and insanitary building notice, I conclude:

- The unit was dangerous due to the gas installation.

- The unit was not insanitary.

6. Decision

6.1. In accordance with section 188, as a result of the conclusions I have reached, I reverse both the notice to fix (NOT21665459) and the dangerous and insanitary building notice (NOT21665520).

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 9 August 2024.

Peta Hird
Principal Advisor, Determinations

APPENDIX A

Notice to Fix No: NOT21665459

PARTICULARS OF CONTRAVENTION OR NON-COMPLIANCE
Auckland Council records for 20 Hinekohu Street, New Lynn identify the following relevant buildings, applications and approvals:

- The main house at 20 Hinekohu Street was built circa early 1960's.
- At that time the address was 16 Rickards Place, New Lynn.
- In 2003, the property was subdivided, and 16 Hinekohu Street came into being – RMA20021980
- In 2004 consent BCO30164174 was issued to move the house on the site, to where it currently stands today. This included a new garage and carport.
- In 2005 a Code Compliance certificate (CCC) was issued for an extension to the master bedroom with a walk-in wardrobe.
- On 16/12/2015 a Notice to Fix was issued for illegal use of the property as a boarding house. This was followed by an abatement notice in early 2016 to cease using the property as a boarding house.
- There are no Building or Resource Consent found in Councils records authorising the use of the address as a boarding house.

During an Auckland Council inspection of 20 Hinekohu Street, New Lynn on 22 March 2023, Council officers identified:

- 5 separate bedrooms with 5 individual tenants residing in the main house.
- 2 tenants residing in the garage at the front of the house.
- Shared facilities bathroom, kitchen, lounge in the main house for the occupants of the house and garage.
- No Building Warrant of Fitness

The main dwelling and garage at 20 Hinekohu Street, New Lynn are no longer a single-family household unit but is permanent or transient accommodation where 6 or more people (not including members of the residing family) occupy as tenanted accommodation. Therefore, I consider there has been a change of use from Classified Use Detached Dwelling, Building Use SH and fire risk group SH to Classified Use Community Service, Building Use SA and Fire risk group SM.

Changing the use of a building without notifying the Auckland Council is contrary to section 114 of the Building Act 2004 and the Building (Specified systems, change of use and Earthquake prone buildings) Regulations 2005.

The Council has not given you written notice that the change of use complies with the Building Code, and therefore you have breached section 115(1) of the Building Act 2004. I am not satisfied that the change of use of the main house and

garage will comply as near as reasonably practicable with the Building Code, and in particular the following clauses in the Building Code:

C1 to C6 Protection from fire

V6 Visibility escape routes

F7 Warning systems

F8 Signs

To remedy the contravention or non-compliance you must:

Either

1. Revert the uses of the main dwelling and garage to a single-family household unit; or
2. Notify the Auckland Council of the change of use and apply for a building consent to ensure the change of use complies with the Building Code and the Building Act 2004; and
3. You will require a full fire report and you may require Resource Consent; or
4. Pursue another option that would achieve compliance with the Building Act 2004

APPENDIX B

Dangerous and insanitary building notice. Notice No. NOT21665520

REASON(S) WHY THE BUILDING IS CONSIDERED DANGEROUS and INSANITARY
Auckland Council is satisfied that the building identified above **(the building)** poses a danger to the safety of people / property in that the building is dangerous in accordance with s121 (b) and

- In the event of a fire, injury, or death to any persons in the building or to persons on other property is likely
- **AND** Auckland Council is satisfied that the building is insanitary in terms of s.123 (a), (b), and (d) of the Act

THE BUILDING IS CONSIDERED DANGEROUS and INSANITARY BECAUSE:

- The building has been converted into an independent dwelling, a household unit, where one did not exist before.
- The garage does not meet the minimum requirements for a habitable space as specified in the Housing Improvement Regulations 1947.
- There is a non-compliant, uncertified and unsafe gas installation.
- Non-compliant gas pipe and unflued gas appliance installed in a sleeping area.
- All alterations have been carried out without any Building Consents
- The garage is rundown, unclean, and has broken windows. It fails to meet the minimum sanitary and minimum size and weatherproof requirements of the Housing Improvement Regulations and Healthy Home regulations and is thus also insanitary.
- The alterations and gas installations have been done without a building consent or Gas Safety Certificate and no fire safety systems have been installed.

Building work required to be carried out:

- Only building work to be carried out is to make the site safe and secure the building.
- Revert the garage back to its intended use and cease using it as sleeping accommodation.
- Remove all unsafe, uncertified and non-compliant gas installations from the garage.
- Any building work will require a building consent.