

Determination 2024/047

An authority's decision to issue a notice to fix for a change of use of a house

16 Hinekohu Street, New Lynn, Auckland

Summary

This determination considers an authority's decision to issue a notice to fix. The determination considers whether the house has undergone a change of use, the remedies in the notice, and whether section 167 of the Building Act applies.

In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”), “clauses” are clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992, and “the Regulations” are the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005.

The Act, the Building Code and the Regulations 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 matter 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 (“the Ministry”).¹
- 1.2. The parties to the determination are:
 - 1.2.1. S Singh, the owner of the property and applicant for this determination (“the owner”)
 - 1.2.2. 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 decision to issue a notice to fix. The authority considered the house had undergone a change of use without notification under section 114 of the Act and was not satisfied it complied to the extent required under section 115. The owner disputes the authority’s grounds for issuing the notice to fix, as well as the form and content of the notice.
- 1.4. The matter to be determined, under section 177(1)(b) and 3(e), is the authority’s decision to issue notice to fix NOT21649057, dated 2 December 2022 (“the notice”). In deciding the matter, I will consider whether there has been a change of use for the purposes of the Act.

2. Background

- 2.1. There are three buildings located at the property. The notice was issued in relation to what is variously described as the “main house” or the “main dwelling”, which is a single storey house built in the 1950s. I refer to this building as “the house”. The other two buildings at the property include a structure at the rear of the property which was described in the notice as a “shed” and which I refer to as “the unit”, and a garage at the front of the property.

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

- 2.2. The house originally contained three bedrooms, but has been reconfigured into a five bedroom house with a shared kitchen, bathroom and lounge.² There are also shared laundry facilities.
- 2.3. On 23 November 2022, the authority inspected the property after becoming aware of its “potential use ... as a boarding house”.³ The authority’s inspection report notes that the owner does not live at the property but that a property manager lives next door, and there are “basic house rules” displayed in the house. The property manager informed the authority that some of the occupants stay “a few weeks and some longer”.
- 2.4. At the time of the inspection, the unit was undergoing renovations that appeared to be a conversion from a storage shed to accommodation. The inside of the unit was not inspected. The authority’s inspection report notes that it was assured that no one lived in the unit or garage.⁴
- 2.5. On 2 December 2022, the authority issued the notice to the owner. The notice describes the particulars of contravention or non-compliance as follows:

[The authority’s] records for 16 Hinekohu Street, New Lynn identify the following relevant buildings, applications, and approvals:

- On 10 November 1955 a Building Consent was issued for the construction of a 3-bedroom house, and this was completed in 1956
- On 15 December 1955 a permit was applied for and issued in respect of a new garage and private storage shed on the property to be situated on the front.
- On 4 November 1968 a building permit was issued for a shed on the property to be situated on the rear
- On 22 May 2002 a CCC [code compliance certificate] was issued for the installation of a solid fuel heater
- There are no applications or Building Consents found to authorise a change from 3 bedrooms to 5
- There is no record of a notification of a change of use of the house
- There are no applications or records for a Building Warrant of Fitness or compliance schedule

During [the authority’s] inspection of 16 Hinekohu Street New Lynn on 23 November 2022, [the authority’s] officers identified:

- The house has been converted to a 5 bedroomed house with a lounge room, that we were advised, was also used as a bedroom when required

² The notice states, “The house has been converted to a 5 bedroomed house with a lounge room, that we were advised, was also used as a bedroom when required”. However, it does not appear the authority obtained, and I have not been provided, any information about how often the lounge room is (or was) used as a bedroom.

³ As advised by the authority in its submission dated 7 March 2024.

⁴ I note this was as at the date of the inspection in November 2022. The owner has subsequently advised, in their submission dated 29 January 2024, that the unit is “intended for up to 2 occupants (and less than 6)”. However, the notice does not allege a change of use in relation to the unit.

- The house was described as ‘emergency housing’ by the property manager.
- Currently there are 5 tenants residing in the house in 5 separate lockable rooms.
- There is a shared kitchen, laundry and living areas.
- A separate building at the rear of the property is currently undergoing renovations and we suspect that it is very likely to be used as accommodation once finished. It is claimed that it is a storeroom.
- The garage on the front of the property is in a poor state of repair.
- The owner nor the property manager live on site

The main dwelling 16 Hinekohu Street New Lynn is no longer a single-family household unit but is permanent or transient accommodation 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 [authority] is contrary to section 114 of the Building Act 2004 and the Building (Specified systems, change the use and Earthquake prone buildings) Regulations 2005.

The [authority] has not given you written notice that the change of use complies with the Building Code, and therefore you have also 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 within the Building Code:

C1 to C6 Protection from fire	F6 Visibility escape routes
F7 Warning systems	F8 Signs
G1 Personal Hygiene	G2 Laundering
G3 Food preparation	G4 Ventilation
G5 Interior Environment	

To remedy the contravention or non-compliance you must:

Either:

1. Revert the uses of the main dwelling to a single-family household unit; or
2. Notify the [authority] of the change of use and apply for building consent to ensure the change of use complies with the Building Code and the Building Act 2004; or
3. Pursue another option that would achieve compliance with the Building Act 2004.

- 2.6. On 29 September 2023, the authority issued an infringement notice relating to non-compliance with the notice to fix, and a second infringement notice was issued on 22 November 2023.
- 2.7. On 19 December 2023, the owner’s consultant wrote to the authority responding to the notice. The consultant concluded that the notice was satisfied and should be withdrawn (the consultant has since referred to this correspondence as a “notice of compliance”).

- 2.8. Communication about the issue continued between the parties, but they were unable to resolve their differing views and an application was made for a determination.
- 2.9. In the time since the owner applied for this determination, a separate determination has been issued for another of the owner's properties, which was also alleged to have undergone a change of use.⁵ The owner disputed some of the findings of that determination, and made further submissions for this determination in response.

3. Submissions

The owner

- 3.1. The owner submitted:
 - 3.1.1. The change of use alleged by the authority "is wrong and the change of use regulations have been wrongly applied".
 - 3.1.2. The "dwelling are ... boarding houses with 5 occupants and this limit has been conveyed to [the authority] and undertaking given that each Boardinghouse will be restricted to this number.^[6] The [notice] should have required the occupancy to not exceed 5. (or a family plus 5 boarders)".
 - 3.1.3. Even if "...a movement in schedule 2 table^[7] is decided there are no more onerous requirements as a result of the change because CAS1^[8] states the requirements as the same and there are no more onerous other requirements".
 - 3.1.4. The remedy "to revert to a single family household was already met (as it never departed from this use)". Therefore, the owner considers that the notice has been complied with.
 - 3.1.5. The authority "has failed to properly consider [section] 167 and has not provided adequate reasons for refusal of the [owner's] notice of compliance".^[9]

⁵ Determination 2024/038 *An authority's decisions to issue a notice to fix and a dangerous and insanitary building notice* (9 August 2024).

⁶ The owner's references to "dwelling[s]" and "boarding houses" appear to refer to the house and the unit. As set out in paragraph 2.4, the unit was not inhabited at the time of the authority's inspection. The notice does not allege a change of use in relation to the unit, and as such, I have not discussed it further in this determination.

⁷ Schedule 2 of the Regulations sets out the use groups in a table.

⁸ Acceptable Solution C/AS1 *Protection from fire for buildings with sleeping (residential) and outbuildings (risk group SH)* (Amendment 2, effective 2 November 2023).

⁹ As set out at paragraph 2.7, this 'notice of compliance' is contained in the consultant's correspondence dated 19 December 2023.

3.2. After the issue of Determination 2024/038, the owner also submitted:

It is clear from the example in 2.0.2^[10] that the clause considered a boardinghouse with less than 6 people as a "household" and therefore a "detached dwelling"

It also follows that the reason for this was that it was considered this was because 6 people in a boardinghouse would naturally live as a household which is the experience in this case.

...

3.3. The owner made further arguments in relation to whether there are more onerous Building Code requirements. The owner submits:

- (1) we protest this interpretation as [clause] F8.2 has a limit of application that excludes Boardinghouse with less than 6 occupants as in this case...
- (2) ...The test is "more onerous" this must mean more than just another ... code clause. The provision of signage is hardly an onerous or difficult requirement?
- (3) The classified use informs the code clauses and not the table of uses [in Schedule 2 of the Regulations].

...

It must also be the case that having deemed Boarding-houses with less than 6 occupants to be a detached dwelling there can be no code clauses that apply to this use that don't also apply to a detached dwelling and it is not possible for more onerous clauses to apply.

The authority

3.4. The authority submitted:

The [notice] was issued on the basis of a breach of section 114 and 115 of the [Act]. It was also issued on the basis that the [house] is no longer a single-family household unit but is instead permanent or transient tenanted accommodation. A change of use has accordingly occurred, without notification to the [authority].

3.5. The authority identified the following information from the site inspection as the basis for its view that the use had changed:

5 separate double bedrooms (10 bed spaces) with 5 individual tenants residing in separate lockable bedrooms;

a lounge room that is used as a bedroom when required;

the property [manager] advised that the house was being used as 'emergency housing';

the owner or property manager do not reside at the property; and
shared facilities (bathroom, kitchen and lounge); and

¹⁰ Clause A1 *Classified uses* states, "**2.0.2 Detached dwellings** Applies to a building or use where a group of people live as a single household or family. Examples: a holiday cottage, boarding house accommodating fewer than 6 people, dwelling or hut".

a separate building at the rear of the site was undergoing renovations that were suspected to be a conversion to accommodation for use in the future.

3.6. In the authority's view:

... in respect of the change in classified use... the current use is no longer as a single household or family unit. It is a communal residential community service.

... [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.

... 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.

4. Discussion

- 4.1. Notices to fix are governed by sections 163 to 168. Section 164(1)(a) provides for an authority to issue a notice to fix if it considers, on reasonable grounds, that a specified person is contravening or failing to comply with the Act or its regulations.¹¹ In this case, the notice alleges a change of use has occurred in contravention of sections 114 and 115.
- 4.2. There does not appear to be any dispute between the parties on the following points:
 - 4.2.1. The house was previously classified as SH (Sleeping Single Home) under the Regulations.
 - 4.2.2. At the time the notice was issued, the house was used for emergency housing/short term stays.

Whether there were grounds to issue the notice to fix

Change of use provisions

- 4.3. 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.

¹¹ Section 7 defines 'Regulations' as meaning "regulations in force under this Act".

- 4.4. A change of use is determined according to regulations 5 and 6 of the 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.
- 4.5. To decide this matter, I must consider whether the house has changed from one use group described in Schedule 2 of the Regulations 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 that are additional to 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.

The first criterion

- 4.8. The authority alleges that the use of the house has changed from ‘SH (Sleeping Single Home)’ to ‘SA (Sleeping Accommodation)’.
- 4.9. Table 1 sets out the SA and SH use groups as they appear in Schedule 2 of the Regulations.

Table 1: SA and SH use groups in Schedule 2 of the 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, wharehau
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

4.10. The owner states they do “not dispute that for the purposes of this application these buildings 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 boardinghouse”.

4.11. The use of the house 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 from paragraph 4.20 below where I discuss what constitutes a ‘single household or family’.

4.12. As such, I am satisfied the use group for the house was SA when the authority inspected it on 23 November 2022.

4.13. The parties do not dispute that the house was previously classified under the Regulations as ‘SH (Sleeping Single Home)’.

4.14. Therefore, for the purpose of regulation 5 of the Regulations, the first criterion has been met because the use group has changed from SH to SA.

The second criterion

4.15. I now consider whether the second criterion in regulation 5 of the Regulations is met – that the new use group results in additional or more onerous Building Code requirements.¹² If this second criterion is met the requirements in sections 114 and 115 are triggered.

¹² 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.

- 4.16. The Building Code requirements apply according to a building’s classified use, and not according to its use group in the Regulations. Therefore, in order to determine whether there are additional or more onerous Building Code requirements, I must ascertain the classified use of the house.
- 4.17. Clause A1 sets out the various classified uses a building may have. 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 two classified uses as described in clause A1.

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

<p>2.0 Housing</p> <p>2.0.1 Applies to buildings or use where there is self care and service (internal management). There are three types:</p> <p>2.0.2 Detached dwellings</p> <p>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.</p> <p>...</p>	<p>3.0 Communal residential</p> <p>3.0.1 Applies to buildings or use where assistance or care is extended to the principal users. There are two types:</p> <p>3.0.2 Community service</p> <p>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.</p> <p>...</p>
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Classified use – ‘Detached dwellings’

- 4.18. The owner argues that “If because a boardinghouse 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 [Regulations] has not moved. It is and remains a detached dwelling”. The owner states that they have given an undertaking to the authority that the house will be restricted to five occupants (see paragraph 3.1.2).
- 4.19. 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”.
- 4.20. 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”.
- 4.21. I disagree with the owner’s view (see paragraph 3.2) that the example in clause A1 2.0.2 (ie “boarding house accommodating fewer than 6 people”) means that such a

boarding house is automatically considered to be a detached dwelling. I maintain the view expressed in Determination 2024/038, that whether such a boarding house is considered to be a detached dwelling will turn on whether the occupants live as a single household or family.

4.22. 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.¹³

4.23. 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.

4.24. The owner argues that “6 people in a boardinghouse would naturally live as a household which is the experience in this case”. In my view, it does not automatically follow that because there are less than six occupants, they would “naturally” live as a single household; it would depend on the circumstances. I also note that the owner has not provided any evidence or examples that demonstrate the occupants in this case live as a household.

4.25. I consider that the short-term stays do not indicate a connection between the occupants that would support the conclusion that the occupants live as a ‘single household’. Nor is there any indication the occupants are a family. As such, I conclude that the classified use of the house is not ‘Detached dwelling’.

Classified use – ‘Community service’

4.26. 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.

4.27. Determination 2018/045¹⁴ 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,

¹³ *Queenstown-Lakes District Council v The Wanaka Gym Limited* DC Christchurch CIV-2003-002-000265, 18 November 2008 at [27].

¹⁴ Determination 2018/045 *Classified use of a building let out as accommodation* (11 September 2018).

back country huts offer minimal services to occupants, whereas hotels offer a higher level and wider range of assistance.

- 4.28. 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.¹⁵ It follows that what amounts to ‘limited assistance or care’ depends on the circumstances. I note that even minimal services offered to occupants can be considered ‘limited assistance or care’ (as is the case with back country huts).
- 4.29. In this case, given the use of the house for short term stays and emergency accommodation, and therefore the turnover of occupants, I consider there is involvement by the property manager in managing the occupation.
- 4.30. An example of this involvement is shown in the house rules which the authority photographed at the inspection. The page titled “Homely Rules” included the statement “Any ideas or improvement, faults, breakages or concerns big or small contact management”. I consider that the property manager’s involvement in setting and/or enforcing the house rules, as well as being available to assist occupants with their concerns, constitutes ‘limited assistance or care’.
- 4.31. As such, I conclude that the house falls under the classified use ‘Community Service’.

Building Code requirements

- 4.32. Now that I have established the previous and new classified use of the house, as a second step I must determine whether there are additional or more onerous Building Code requirements in its new use.
- 4.33. The owner argues if “a movement in schedule 2 table is decided there are no more onerous requirements as a result of the change because [Acceptable Solution C/AS1] states the requirements as the same and there are no more onerous other requirements”. I note that Acceptable Solutions are a means by which compliance with the performance clauses can be established, and it is the classified use that determines the Building Code requirements.
- 4.34. Under the classified use ‘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 F8.2¹⁶ did not apply to the house when its use group was SH. At that time, the house had the classified use of ‘Detached dwelling’ and the limits on application for clause F8.2 mean that clause did not apply.

¹⁵ 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 [5.38].

¹⁶ 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.

4.35. The owner made several points in their submission regarding more onerous Building Code requirements and clause F8.2 (see paragraph 3.3). I address those points below:

4.35.1. The limit on application in clause F8.2 applies to detached dwellings, not a “boarding house with less than 6 occupants”. As discussed at paragraph 4.21, I disagree with the owner’s view that a boarding house with fewer than six people is automatically considered to be a detached dwelling. I have already reached the conclusion that the classified use, in this case, is not ‘Detached dwelling’. Therefore, the limit on application does not apply.

4.35.2. The owner’s related argument that “it is not possible for more onerous clauses to apply” is predicated on their view that the classified use remains ‘Detached dwelling’. As set out above, I disagree with this view.

4.35.3. The test in regulation 5 of the Regulations is whether “...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” [my emphasis]. Clause F8.2 is an example of an **additional** Building Code requirement, because it did not apply when the classified use was detached dwelling. The owner’s view that the requirement in clause F8.2 is “hardly onerous or difficult” is not relevant.

4.35.4. I agree with the owner that the classified use of a building informs the Building Code requirements, rather than the use group in Schedule 2 of the Regulations. This is the approach that I have applied. As I have determined that the classified use is now ‘Community service’, the limits on application which relate to ‘Detached dwelling’ no longer apply.

4.36. In conclusion, I consider that the house had, as at the date of the authority’s inspection, undergone a change of use for the purposes of the Act. This is because the use group had changed from SH to SA, and the new use group resulted in additional or more onerous Building Code requirements.

4.37. 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.

Form and content of the notice

4.38. Section 165 sets out the requirements for the form and content of a notice to fix. The prescribed form¹⁷ provides a space to insert the “particulars of contravention or

¹⁷ Form 13 of the Building (Forms) Regulations 2004.

non-compliance”. The courts and previous determinations have discussed the requirement that the recipient of a notice to fix be “fairly and fully informed” by the particulars in a notice, so they can address the identified issues.¹⁸

4.39. In this case, I am of the view that the notice satisfies the requirement to fairly and fully inform the owner of the basis for the notice. Given the notice was issued in respect of a change of use, including a description of the old use and new use would be relevant information. However, I note the notice contains some background information about the property and its history which does not directly relate to the “particulars of contravention or non-compliance” required in a notice to fix. A notice to fix is not the appropriate document in which to include information which is not relevant to the alleged contravention.

Remedies

4.40. The notice sets out three possible remedies; one option is to “Notify the [authority] of the change of use and apply for a building consent to ensure the change of use complies with the Building Code and the [Act]”.

4.41. The Act does not impose an obligation on an owner to apply for a building consent to change the use of a building. The effect of section 115 is that the owner must satisfy the authority that the building (in this case the 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 additional or more onerous Building Code requirements of the new use.¹⁹

4.42. For this reason, the requirement to apply for a building consent was not an appropriate remedy. This determination modifies the remedy to remove reference to that requirement, so that the remedy reads “2. Notify the Auckland Council of the change of use.” It will then be for the owner to provide the relevant information to the authority to enable an assessment to be carried out for the purpose of section 115.

Section 167

4.43. The owner considers that section 167 applies 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

¹⁸ See *Andrew Housing Ltd v Southland District Council* [1996] 1 NZLR 589 (which related to a ‘notice to rectify’, the equivalent of a notice to fix in the predecessor to the Act, the Building Act 1991); *Marlborough District Council v Bilsborough* [2020] NZDC 9962 at [106]-[107]; and Determination 2024/029 *An authority’s decisions to issue a series of notices to fix* (27 May 2024) at [4.2]-[4.3].

¹⁹ For example, installing smoke alarms would not require a building consent.

consider section 167 and has not provided adequate reasons for refusal of the owner's 'notice of compliance'.

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

5. Decision

- 5.1. In accordance with section 188 of the Building Act 2004, I determine there were grounds to issue the notice to fix, as a change of use occurred contrary to sections 114 and 115. However, the notice to fix is modified to remove the requirement to apply for a building consent.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 20 September 2024.

Peta Hird

Lead Determinations Specialist