

Determination 2024/059

**An authority's refusal to withdraw two notices to fix
issued in relation to a change of use**

3 Cloghfin Place, Auckland

Summary

This determination considers an authority's decision to refuse to withdraw two notices to fix, which the owners believe had been satisfied by reverting to the building's original use. The determination turns on whether letting the house for short-term holiday accommodation to single groups constitutes a change of use from SH (Sleeping Single Home) to SA (Sleeping Accommodation).

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 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. K and V Kakkar, the owners of the property who applied for this determination (“the owners”).
 - 1.2.2. Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. This determination considers the authority’s refusal to withdraw two notices to fix, NOT21692694 and NOT21692695 (“the notices”). The authority issued the notices because it considered the owners had changed the use of the house by letting the property as short-term holiday accommodation. The owners subsequently adjusted their operating model which they believe meant they had reverted the use of the building and so satisfied the notices. However, the authority disagreed and refused to withdraw the notices.
- 1.4. The matter to be determined, under section 177(1)(b) and (3)(e), is the authority’s decision to refuse to withdraw the notices to fix. The determination only considers whether the current use, as short-term holiday accommodation for single groups, has satisfied the notices to fix by reverting to the original use.

2. Background

- 2.1. The determination relates to a six-bedroom, two storey house with a double garage, which was built in 2016 (“the house”). The house was constructed as a single residential detached dwelling.
- 2.2. On 24 July 2023, the authority undertook an inspection, where it identified that the house is leased by a company which offers holiday accommodation (“the accommodation company”). At the time the notices were issued, rooms in the

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

house were able to be booked individually, meaning there could be several groups booking individual rooms and occupying the house at the same time.

- 2.3. On 15 September 2023, the authority issued two notices to fix to the owners.² The notices state that the house is one of seven properties used by the accommodation company “as motel style rooms” on a short-term basis. The notices said this constitutes a change of use from SH (Sleeping Single Home) to SA (Sleeping Accommodation), because the house is being let as short-term holiday accommodation.
- 2.4. The relevant particulars of the contravention or non-compliance stated in the notices are as follows:

The main dwelling... is 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 [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 the change of use of the main (sic) will comply as nearly 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. Immediately revert the use of the main dwelling to a single-family household unit; or

² The notices contained the same particulars of contravention or non-compliance, but were issued to the two owners separately.

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. Apply for a Resource Consent, as the number of sleeping spaces exceed 10; or
 4. Pursue another option that would achieve compliance with the Building Act 2004.
- 2.5. On 15 December 2023, the owners wrote to the authority, stating that they had made substantial changes to their operating model in order to comply with the notices. The owners stated, “the business model is now based on full family group bookings for full houses – not individual rooms”. The owners consider they have complied with the notices by “reverting the use back to a single-family household unit”.
- 2.6. On 21 October 2023, the authority responded to the owners, confirming its position that the notices had not been satisfied, because it “disagree[s] with the view that ‘full family or group bookings’ avoids a change of use, particularly given the intention is to operate exclusively as full-time accommodation”.
- 2.7. Following this, the owners applied for a determination as to whether the current operating model, whereby the house is only able to be booked by single groups and rooms are not let individually, means the use has reverted or there is a change of use.

3. Submissions

The owners

- 3.1. The owners submit (in summary):
- 3.1.1. They accept that the property had undergone a change of use when each room was let individually to guests. However, they dispute the authority’s decision “not to accept the current operations with changes made to comply with [the notices] proposed remedy... ‘immediately revert the use of the main dwelling to a single-family household unit’ (i.e. – “entire property is let to group or family short term basis”)”.
 - 3.1.2. Letting the entire property to a single-family group³ does not constitute a change of use under the Building Act. This is because the nature of the bookings constitutes a ‘single household arrangement’ and the occupants do not receive external care. The occupants exhibit complete social

³ Although the owners refer to “single family group” bookings, there is nothing to indicate that other types of single group bookings (eg groups of friends) are not allowed. The accommodation company’s website states “We provide accommodations tailored for travellers, and smaller groups of tourists, families and friends embarking on an adventure together” (<https://www.flatbushaccommodation.co.nz>, accessed 21/10/2024).

cohesion, looking after themselves and each other. The high level of familiarity between the occupants means that any individual becoming aware of fire would alert and assist others to escape. The owners noted that Determination 2018/044⁴ states:

[6.3.11] Therefore, for a group of people living within this building to be considered a “single household” there must be evidence they live like a family with an atmosphere of trust and harmony which would lead to social cohesion.

...

[6.4.12] A high degree of social cohesion is justification for the lower fire protection requirements for household units to satisfy the Acceptable Solutions; relying on occupants warning each other, being aware of the building and its escape routes and quickly evacuating.

- 3.1.3. The use of the house is consistent with the classified use detached dwelling. The house is occupied by a “single-family group”, irrespective of the length of stay. The owners noted that Determination 2014/026 states that permanence is “... not only a matter of how long people stay in a place, but also in how they view it and relate to fellow residents”.⁵
- 3.1.4. The house has smoke alarms, fire extinguishers, exit signage and emergency lighting in place. The check-in staff also “brief the family about the steps to follow in case of a fire before handing over the key”.
- 3.1.5. The authority does not have clear guidelines regarding visitor/short-term accommodation.

The authority

- 3.2. The authority submits (in summary):
 - 3.2.1. While the owners did make changes in response to the notices, the changes amount to new booking processes/procedures only and “do not address the building-performance requirements – specifically aspects of fire protection – of the changed-use... (SH to SA)”.
 - 3.2.2. Full family or group bookings does not mean there is no change of use, as the intention is to operate exclusively as full-time accommodation.
 - 3.2.3. The requirements of use group SA are more onerous than use group SH and the number of guests is not relevant. The property has essentially changed from a large house to a small motel, and “whether the guests are family or groups does not change the requirements”.

⁴ Determination 2018/044 *Classified use of a main house, which is let out as accommodation* (7 September 2018).

⁵ Determination 2014/026 *Regarding which fire risk group should be used in determining compliance of proposed accommodation* (21 May 2014), at [6.3.14].

- 3.2.4. “An assessment, with proposed fire-protection adaptations would support a change of use (CoU) application to authorise operations, and/or inform discussion on alternative means of compliance”.

4. Discussion

- 4.1. The determination considers the authority’s decision to refuse to withdraw the notices to fix. This turns on whether the use has reverted to the original use, meaning the notices have been satisfied. In deciding this I must consider whether letting the house for short-term holiday accommodation to single groups constitutes a change of use from the building’s original use.

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 with the current operating model there has been a change of use of the house or the use has reverted and the notices satisfied.
- 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 2005⁶ (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 house has changed from one use group in Schedule 2 of the change of use 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 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 use⁷ 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 notices to fix allege that the use has changed from SH (Sleeping Single Home) to SA (Sleeping Accommodation) and the authority is of the view that the change in operating model has not reverted the use back to SH. The parties do not dispute that the house was previously classified under the regulations as SH.

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, 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

Use group SH (Sleeping Single Home)

- 4.9. The owners are of the view that the current use group is SH. They state there is a “single household arrangement – occupants do not receive any external care” and “there is complete social cohesion between the occupants – occupants will look after themselves and each other”.
- 4.10. The courts have considered the meaning to be given to the term ‘household’ in the Act. In *Queenstown-Lakes District Council v The Wanaka Gym Limited* (“*Wanaka Gym*”), the Judge identified a number of factors they considered relevant in

⁷ See Building Code Clause A1 – Classified Use

assessing whether a 'household' is present.⁸ I have compared the facts in this case against those considered in *Wanaka Gym* in Table 2.

Table 2: Consideration of factors identified in *Wanaka Gym*

<i>Wanaka Gym</i>	<i>3 Cloghfin Street</i>
There is considerable variance in the numbers at any given time	Numbers would vary but only one group is permitted to stay at any time.
There are large numbers of people involved in the occupation of the building [at times this varied between 19 and 36]	The house has six bedrooms. Information regarding the maximum occupancy has not been provided. It is reasonable to expect that the house may be occupied by a group of up to 12 people.
There is a significant degree of restriction as a matter of contract on the freedoms of the occupant, which is inconsistent with people being resident in a household	There is a degree of restriction placed on the occupants. The accommodation company's website has a list of terms and conditions, which includes restrictions regarding parties and levels of alcohol consumption. ⁹
The relatively short term of the residence [occupants were required to sign lease for a minimum of 3 months]	There are short term stays in all cases as the house is only used for holiday accommodation. The properties let by the accommodation company are advertised at a nightly rate.
The fact that there is no necessary connection with the others residing in the house	The house is only bookable by one group at a time, and therefore it is reasonable to assume the occupants will display a level of social cohesion, although they may not normally reside together.
There is no agreement of the residents to stay together	There is agreement of the occupants to stay together because the house is only able to be booked by one group at a time.
The whole raison d'être of the building is essentially commercial rather than domestic	While leased by the accommodation company and used solely as holiday accommodation, the purpose of the house is commercial rather than domestic.

4.11. The Judge in *Wanaka Gym* also stated:

[26] I think it is important to note that the phrase is a single household. This betokens in my view a combination of considerations including a degree of permanence in the residents, a connection with the other residents other than simple proximity, and an element of living together jointly...

⁸ *Queenstown-Lakes District Council v The Wanaka Gym Limited* DC Christchurch CIV-2003-002-000265, 18 November 2008 at [27].

⁹ [Terms and Conditions \(flatbushaccommodation.co.nz\)](https://www.flatbushaccommodation.co.nz/terms-conditions). Accessed 25/09/24.

4.12. Because the house is only let to one group at a time, it is reasonable to assume that occupants know each other and agree to stay together, and therefore will display a level of connection or social cohesion.

4.13. However, as the house is used solely for holiday accommodation the stays are short-term. The accommodation company's website allows the properties to be booked on a nightly basis.¹⁰ The house is not the primary residence of any of the occupants, and occupants do not view it as such.

4.14. With regard to permanence, Determination 2014/026 said:

In my view permanence is not only a matter of how long people stay in a place, but also in how they view it and relate to fellow residents. Residents who do not consider their accommodation to be their permanent residence are considered to be more at risk from fire, and hence require greater protection.¹¹

4.15. I do not consider that the elements of 'living together jointly' and 'a degree of permanence' are present in this case. Therefore, I do not consider the occupants 'live as a single household or family'.

Use group SA (Sleeping Accommodation)

4.16. The SA use group applies to 'spaces providing transient accommodation, or where limited assistance or care is provided for people'. In this case, the house is used solely for holiday accommodation and is advertised at a nightly rate. As such, it is clearly transient accommodation.

4.17. I am also of the opinion that there is 'limited assistance or care' provided to the occupants. There is a staffed reception (from 3pm to 7pm) and an optional housekeeping and laundry service,¹² and the owners state, "our check in staff brief the family about the steps to follow in case of a fire before handing over the key" and that there is "health and safety training for staff every 6 months". This is a similar level of assistance to a motel, in terms of booking/check in assistance and cleaning after the stay. I note that motels are given as an example of the SA use group. Further, the nature of the use in this instance is purely commercial.

4.18. Due to the house being used for transient accommodation, along with the provision of limited assistance or care, I conclude that the use group in Schedule 2 of the change of use regulations is currently SA.

¹⁰ [Overview \(flatbushaccommodation.co.nz\)](https://www.flatbushaccommodation.co.nz) Accessed 25/09/24.

¹¹ At [6.3.14]

¹² [Overview \(flatbushaccommodation.co.nz\)](https://www.flatbushaccommodation.co.nz) Accessed 25/09/24.

The second criterion

- 4.19. I now consider whether the second criterion in regulation 5 of the change of use regulations is met, ie whether the new use results in additional or more onerous Building Code requirements.¹³ If this second criterion is met, the requirements in sections 114 and 115 are triggered.
- 4.20. The Building Code requirements apply according to a building’s classified use in clause A1, 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 house.
- 4.21. 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 3 sets out these classified uses as described in clause A1 of the Building Code.

Table 3: 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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Detached dwellings

- 4.22. For the same reasons discussed at paragraphs 4.10 to 4.15, I do not consider the house is “a building or use where a group of people live as a single household or family”. Therefore, I do not consider the use group is ‘detached dwelling’.

Community service

- 4.23. The classified use ‘Community service’ applies to a residential building or use where limited care is extended to the principal users”.

¹³ 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.

4.24. Determination 2018/045¹⁴ said:

[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.

4.25. For the same reasons discussed at paragraph 4.17, I consider that there is limited assistance or care provided to the occupants, and the house falls under the classified use 'Community service'.

Building Code requirements

4.26. 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.

4.27. 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 F8.2¹⁵ 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.

4.28. Therefore, despite the change in operating model to only allow for single group bookings, I consider there has nonetheless been a change of use for the purposes of section 114 and 115. This is because the use group has changed from SH to SA, and the new use group has resulted in more onerous or additional Building Code requirements.

4.29. I have not done an assessment of whether the house, in the new use, complies to the extent required by section 115 as that is not within the scope of the matter being determined. However, I offer the following comments for the benefit of the parties.

4.30. Section 115(b)(i) provides that an owner must not change the use of the building unless the authority gives the owner notice that it is satisfied that the building, in its new use, will comply as nearly as is reasonably practicable, with every provision of the Building Code that relates to means of escape from fire, protection of other property, sanitary facilities, structural performance, fire-rating performance, and access and facilities for persons with disabilities (if this is a requirement under section 118).

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

¹⁵ 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.

4.31. In some situations, upgrades which are required to comply with section 115 may not be extensive or onerous. While section 115 may require building work to be carried out, in some cases compliance may be achieved by the owner providing information which enables the authority to decide whether the building in its new use complies in its new use to the extent required. In such a case, or if the building work needed is exempt, a building consent may not be required to bring the building into compliance with the additional or more onerous Building Code requirements of the new use to the extent required under section 115.

Conclusion

4.32. The use of the house, as short-term holiday accommodation for single groups, constitutes a change of use under the regulations from SH to SA.

4.33. Therefore, I conclude that the notices to fix have not been satisfied in terms of reverting the use to SH.

5. Decision

5.1. In accordance with section 188 of the Building Act 2004, I confirm the authority's decision to refuse to withdraw the notices.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 1 November 2024.

Peta Hird

Lead Determinations Specialist