

# Determination 2025/001

**The purported decision to refuse to issue a building consent for reasons relating to the building's use and means of escape from fire**

**34 Jellicoe Street, Martinborough, South Wairarapa**

## Summary

This determination considers an authority's purported decision to refuse to issue a building consent for alterations and an addition to an existing building.

The matter turns on whether the proposed building work would have resulted in a change of use for the building and whether the building would have complied as nearly as reasonably practicable with clause C4.3 of the Building Code relating to means of escape from fire.



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](http://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](http://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”).<sup>1</sup>
- 1.2. The parties to the determination are:
  - 1.2.1. Jellicoe Enterprises Limited, the owner of the property (“the owner”) represented by one of the directors who applied for this determination.
  - 1.2.2. South Wairarapa District Council, carrying out its duties as a territorial authority or building consent authority (“the authority”).
- 1.3. As required under section 170(a) of the Act, I have consulted with Fire and Emergency New Zealand (FENZ) in making this determination.
- 1.4. The determination arises from the authority’s purported decision to refuse to issue a building consent for proposed building work involving internal alterations and a new extension to an existing building at 34 Jellicoe Street, Martinborough.
- 1.5. The authority believed the building work would result in a change of use<sup>2</sup> for the building and the current route as a means of escape from fire for the residential occupants would be made worse. The owner disputes both issues.
- 1.6. The matter to be determined, under section 177(1)(b) and (2)(a), is the authority’s purported decision to refuse to issue the building consent, reference number 210554.<sup>3</sup>
- 1.7. In deciding this matter, I must consider whether the proposed building work would have resulted in a change of use, and whether the building would have complied as nearly as reasonably practicable with Clause C4.3 of the Building Code.

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

<sup>2</sup> For the purposes of sections 114 and 115, and as per Regulation 5 of the Building (Specified Systems, Change of Use, and Earthquake-prone Buildings) Regulations 2005.

<sup>3</sup> The owner subsequently withdrew the building consent application in August 2024 after applying for the determination but wished to continue with this determination. I have taken the authority’s request for information dated 14 March 2022, after the fire report was provided, to mean the authority considered the proposed building work did not meet the test under section 49(1) for it to grant a building consent.

- 1.8. In relation to the means of escape from fire, compliance to the extent required under section 112 requires consideration of other relevant provisions of the Building Code, not just to clause C4.3 (for example clauses C3.4, C4, C6, D1, F6, F7 and F8). However, in this case, the issue in dispute was limited to the use of an escape route alongside the external wall of the building to the street. The parties have not raised concerns with other Building Code provisions, so I have not considered those other clauses.

## **2. The building work and background**

- 2.1. The existing building (“the building”) was constructed in the 1930s. It is a single-storey timber framed structure with lightweight wall and roof claddings. It occupies the southwest side of 34 Jellicoe Street and is in a high wind zone near the main street in a small town.
- 2.2. An adjacent building (“the cinema”) crosses the boundary from 30 Jellicoe Street and partly occupies the southeast side of 34 Jellicoe Street. A fire report submitted to the authority indicates the distance between the building and the cinema is approximately 3m. Photographs show this area includes a concrete path immediately adjacent the building and vegetation alongside the cinema wall.
- 2.3. The building is currently divided into two interconnected parts:
- A two-bedroom unit with separate kitchen, bathroom and living room.
  - A commercial space and two storage spaces. One of the storage spaces has been demolished.
- 2.4. The commercial space is currently occupied as an office. Prior to that it was operating as a shop.
- 2.5. The commercial and residential parts of the building currently share bathroom facilities and are connected via several internal doors. Entry to the commercial space is via an external door facing the street, and this serves as the fire exit.
- 2.6. The residential unit is accessed via an external door on the side adjacent to the cinema. The route from the residential unit to the street sees occupants exiting the single external door from the living room, then moving along the existing concrete path immediately adjacent to the commercial part of the building where they pass two vertical sliding sash windows in the external wall of the building.
- 2.7. There is currently no fire alarm system in the building. The existing fire separation walls between the commercial and residential parts are incomplete in that they do not continue through the roof space.

## The proposed building work

- 2.8. On 17 December 2021 the owner applied for a building consent. The proposed building work was a combined renovation-and-extension of the commercial part of the building and changes to the shared internal walls between the building's commercial and residential spaces.
- 2.9. The completed building consent application form indicated that the building had more than one use, there would be no change in the building's use because the "current lawful established use and proposed use were commercial, the building would be used for something other than a single household unit.
- 2.10. The application did not confirm the proposed means of compliance with Building Code clauses C1-C6 *Protection from fire*.
- 2.11. The building work proposed in the application included replacing all existing internal doors between the commercial space and the residential unit with solid fire-rated walls and linings, apart from the door between the existing office and residential living room. The latter door was to be "either replaced with a solid core 60 minute FRR hinged door, or wall infilled with 60 minute FRR wall construction – to be confirmed by owner during construction".
- 2.12. Some internal walls between the commercial and residential parts of the building were to be fitted with 16mm fire-rated wall linings. Remaining internal wall linings between the commercial and residential parts of the building were not altered. The existing ceiling in the commercial area was to be upgraded to achieve a fire resistance rating of 60 minutes throughout.

## The fire report and the purported refusal

- 2.13. On 2 February 2022, the authority sent the owner the first request for information (RFI) and a change of use application form for what the authority considered was a change of use from SH to SR/WL resulting from the proposed work.
- 2.14. The owner then submitted a fire engineering report dated 3 March 2022 ("the fire report"). The fire report stated compliance was by way of the Acceptable Solution C/AS2<sup>4</sup> and provided the following proposed summary of works:
- 2.14.1. A new interconnected smoke detection system throughout the building for building-wide alarm, in accordance with NZS 4514<sup>5</sup>.
- 2.14.2. Exit signage within the office.

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<sup>4</sup> C/AS2 Acceptable Solution for Buildings other than Risk Group SH For New Zealand Building Code Clauses C1-C6 Protection from Fire (First edition 2019, effective from 27 June 2019).

<sup>5</sup> New Zealand Standard NZS 4514 Interconnected smoke alarms for houses.

- 2.14.3. An external escape path from the residential unit, separated at least 2m from the external wall of the office.
  - 2.14.4. Swing doors with generous opening arcs for ease of use.
  - 2.14.5. Locking devices that are easy to use in an emergency.
  - 2.14.6. Escape routes compliant with Building Code clause D1.
- 2.15. The fire report also noted the following:
- 2.15.1. Residential occupants were provided with a single egress route which discharged to the outside directly, then past the office to the street.
  - 2.15.2. A new interconnected fire alarm system was proposed, and on activation would have sounded a building-wide alarm and would provide earlier notification to all occupants in the building.
  - 2.15.3. Evacuation would have been significantly faster and safer compared to the current situation because of the proposed alarm system upgrades, new fire rated elements and fire stopping.
  - 2.15.4. The proposed works represented a significant improvement in life safety in the event of fire, and the existing walls were proposed to be retained and comply with the Building Code on an 'as nearly as reasonably practicable' basis.
- 2.16. On 14 March 2022 the authority issued a second RFI requesting an upgrade to a type 4/5 fire system and a change of use application for the commercial part of the building.
- 2.17. In letters to the authority dated 11 April 2022 and 3 May 2023, the owner disputed that the proposed work would result in a change of use and maintained their view that the proposed building work complied to the extent required by the Act. The owner also suggested there were two alternative routes for the occupants of the residential part of the building in the event they could not use the proposed route.<sup>6</sup>
- 2.18. On about 20 April 2022, the owner engaged a second fire engineer to peer review the fire report. No written report was produced from this review.
- 2.19. In an email to the owner dated 28 April 2022, the authority confirmed the change of use requirement needed to be addressed and stated:

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<sup>6</sup> The suggested alternatives were not included in the plans and specifications accompanying the application for the building consent, so I have not considered these further in assessing compliance of the proposed building work.

... the minimum requirements to be addressed by the [owner's] fire engineer are: Alarm system, means of egress and the separation of the building to form 2 firecells.

The removal of the vegetation between the 2 buildings would assist in this ...

2.20. On 26 May 2022, the owner summarised discussions held with the authority, noting "[T]here was some debate around the change of use requirement and which building regulations were more onerous between the existing shop use (CM) and the proposed office use (WL)." The owner requested clarification as to which of the RFI issues remained unresolved "having taken into account the solutions already proposed in my letter of 13 April 2022".

2.21. On 29 May 2022, the authority advised the owner of the reasons they believed there was a change of use:

The original use prior to 1991 is a home business set up (not unusual), in 1991 the Act would have recognised it as SH. This is further reinforced by the documents included in the 1985 building permit ...

In the recent fire design, it recognises that the risk group is WB and SM, which translated into use is WL (office) and SR (sleeping residential).

The first trigger has been met for a Change of Use.

The second trigger has been met because the change for a home occupation to a residential/commercial split use requires at least D Clauses be included. Therefore, under the [Building] Code (not AS) there is a technical change of use.

2.22. The authority and the owner continued to discuss the matter, including the potential alternative escape routes suggested by the owner, but were unable to reach resolution and the owner subsequently applied for a determination.

### **3. Submissions**

#### **The owner**

3.1. The owner's view is that the proposed building work did not constitute a change of use, and that adequate provision was made for means of escape from fire from the residential part of the building. The owner submitted (in summary):

3.1.1. All issues including upgrading the proposed alarm system to type 4/5 were addressed, except for the authority's change of use request and an agreement over means of escape from fire for residential occupants.

3.1.2. The proposed building work would not change the building's use because the building has been in mixed commercial-residential use for over twenty years. The commercial space is currently used as an office and was a mechanical workshop/office in the 1980s.

- 3.1.3. The fire regulations for mixed use CM and SR are exactly the same as for mixed use WL and SR.
- 3.1.4. The authority “refused to accept the application ... on the basis that the entire building would currently be classified as SH and not mixed use as previously assumed in [the RFIs]”. SH is not a valid definition for the building as it has always been mixed commercial-residential use.
- 3.1.5. Regarding egress from the residential unit in the event of a fire, the most straightforward route was rejected “because it does not meet the 2m clearance requirements where it passe[s] the office area”. However, the proposed “Type 4/5 early detection alarm system” meant residents would not be put at risk by using this route and improves the fire safety for the building’s occupants because there is currently no fire alarm system.
- 3.1.6. The proposed alternative egress route behind the cinema was rejected because the authority believed it crossed another title, but the building and part of the cinema are on the same title. It would not be possible to sell one building without a boundary adjustment, and there are no plans to segregate the buildings onto individual titles.
- 3.1.7. The authority’s approach did not allow for the ‘as nearly as is reasonably practicable’ test.
- 3.1.8. The means of compliance is by way of Acceptable Solution C/AS2, as described in the fire report.

### **The authority**

- 3.2. The authority’s view is that the proposed building work would have resulted in a change of use and the residential unit would not have complied with means of escape from fire provisions. The authority’s submitted (in summary):
  - 3.2.1. The building was originally residential with a home business, which is SH in the regulations. More recently the building has accommodated an architectural office although no application for this use was received by the authority.
  - 3.2.2. The proposed work would have changed the building’s use from the original single use (SH) to a mixed-use (SR and WL/WM) commercial operation employing non-family members for salary.
  - 3.2.3. Compliance requirements for the new mixed-use building are more onerous and involve splitting the building into WL/SR firecells.
  - 3.2.4. A change of use would have been triggered even if the building’s commercial use was previously a shop (CM) and changed to an office (WM), as the latter has more onerous compliance requirements.

- 3.2.5. The fire report fell well short of demonstrating compliance to the authority's satisfaction in the selection of the appropriate Act section, failing to recognise the change of use, alarm system requirements, existing fire separation and the need to protect sleeping occupants, and the means of egress provisions.
- 3.2.6. The proposed work would have worsened the means of escape from fire for residential occupants. The first route option alongside the new southwest extension was too narrow and the second option passed unprotected windows and was also too narrow for compliance with C/AS2. A third route option crossed other property without rights of way or other instruments allowing this to occur.
- 3.2.7. The proposed work did include a fire alarm system, but the fire report argued for a reduction in the alarm system based on cost (not full compliance) without supporting evidence. The fire report also argued that full fire separation between commercial and sleeping risk groups was not required, which the authority disputes.

## **FENZ**

- 3.3. FENZ provided comment, but noted that because information on the historical use was not clear FENZ did not have a strong view about whether there would have been a change of use.
- 3.4. Regarding compliance with clause C4.3, FENZ considers the 2m separation as shown in the fire report would meet the requirements of a safe path in C/AS2 but there was no evidence in the architectural drawings that the path would be relocated as per the fire report. FENZ is of the view the existing path alongside the building does not comply.

## **4. Discussion**

- 4.1. The matter to be determined is the authority's purported refusal to issue building consent 210554.
- 4.2. In deciding this matter, I must consider whether the building would have undergone a change of use as a result of the proposed building work, and whether the escape route for the residential occupants would have complied as nearly as reasonably practicable with clause C4.3 of the Building Code.

### **Change of use**

- 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.

- 4.4. A change of use is determined according to regulations 5 and 6 of the Building (Specified Systems, Change of Use, and Earthquake-prone Buildings) Regulations 2005 (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 that use in column 2 of the table.
- 4.5. In summary, establishing whether there is a change of use requires first considering whether it has changed from one use group in Schedule 2 of the change of use regulations to another (“the first criterion”), and then 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”). Both criteria must be satisfied for there to be a change of use for the purposes of the Act. The second criterion requires consideration of the classified use<sup>7</sup> for both the old and new use, as this step is necessary to identify the relevant Building Code requirements.
- 4.6. The authority’s view that the proposed building work would have resulted in a change of use is based on the building being a “residential building with a home business” and that the building’s existing use when the application for building consent was made is SH (Sleeping single home).
- 4.7. I do not agree that the building’s existing use is SH. The information provided by the parties includes a 1985 application for a building permit to carry out alterations to the building, which occurred before the Act came into force. The alterations significantly expanded the commercial part of the building; what had been a shop in one room of a building that was otherwise occupied as a residence was expanded to incorporate an area that was previously a bedroom, a second bedroom was converted to a workshop and a third bedroom to a storage/office area.

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<sup>7</sup> See Building Code Clause A1 – Classified Use

- 4.8. The application for the building permit clearly indicated the building was going to be a mixture of residential and commercial use. The nature of the business at the time the alterations were carried out was a “lawnmower, chainsaw and cycle business for retail selling purpose and engine repairs”, and the portion of the building that was occupied by the business after the alterations was significantly larger than the original shop had previously been.
- 4.9. Based on the submissions of the owner, I understand this part of the building remained in use for commercial purposes and has more recently been used as an office.
- 4.10. I have received no information that would suggest this part of the building reverted back to residential use after the 1985 permitted alterations were carried out.
- 4.11. I conclude that the existing use of the building was not SH. It follows that there were not grounds for the authority’s purported refusal based on the premise the building would undergo a change of use from SH to another use.
- 4.12. Because the owner has chosen to withdraw the building consent application, I have elected not to exercise any powers under section 188(1)(a) in respect of the purported exercise of a power of decision by the authority.

### Compliance with clause C4.3

- 4.13. Regarding the route proposed in the building consent application for the residential occupants to move to a place of safety, the relevant Building Code clause in dispute is C4.3:

**C4.3** The evacuation time<sup>[8]</sup> must allow occupants of a building to move to a place of safety<sup>[9]</sup> in the event of a fire so that occupants are not exposed to any of the following:

- (a) fractional effective dose of carbon monoxide greater than 0.3:
- (b) a fractional effective dose of thermal effects greater than 0.3:
- (c) conditions where, due to smoke obscuration, visibility is less than 10m except in rooms of less than 100m<sup>2</sup> where visibility may fall to 5m.

- 4.14. The parties have not provided any information regarding exposure to carbon monoxide, thermal effects, or obscured visibility to the levels set out in clause 4.3(a), (b), or (c).

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<sup>8</sup> Evacuation time means the time between the ignition of a fire affecting a building and the time when all occupants of the building have reached a place of safety (Clause A2 – Interpretation).

<sup>9</sup> Place of safety means either— (a) a *safe place*; or (b) a place that is inside a building ...

Safe place means a place of safety in the vicinity of a building, from which people may safely disperse after escaping the effects of a fire. It may be a place such as a street, open space, public space or an adjacent building (Clause A2 – Interpretation).

4.15. Because the proposed building work involved alterations to an existing building, with regard to the escape route for the residential part of the building (which was not altered) I must consider whether it would have complied with clause C4.3 to the extent required under section 112:

**112 Alterations to existing buildings**

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

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

(i) means of escape from fire; ...

4.16. Considering means of escape from fire for the purposes of section 112 is not limited to just the route that occupants would follow to get to a safe place. Other relevant considerations include (but are not limited to) the means of alerting people to the occurrence of a fire<sup>10</sup> at the earliest opportunity so they are afforded an opportunity to escape the effects of a fire, and the means by which people are directed to and along the designated escape route<sup>11</sup>.

4.17. The fire report confirms there is an existing one-way fire separation along the external wall of the building immediately adjacent to the concrete path. However, I have received no information indicating whether the two existing vertical sliding sash windows in the that wall are fire rated.

4.18. There were improvements to fire safety features in the proposed building work. These included a new fire alarm system for the building. Although there is conflicting information regarding the type of alarm proposed,<sup>12</sup> the installation of a new fire alarm system would alert occupants of the building to the occurrence of a fire in either part of the building, affording them the ability to exit at the earliest opportunity.

4.19. Further, the proposed work included improvements to internal fire separation between the office and the residential unit and to surface finishes. This would have assisted in limiting the spread of fire and smoke between the two parts of the building.

4.20. I note also that the residential part of the building would have a low occupant load, the horizontal travel distance for the escape path remained unchanged and the route is entirely across level ground, and occupants of the residential unit would be

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<sup>10</sup> Clause F7 *Warning systems*.

<sup>11</sup> Clauses F6 *Visibility in Escape Routes* and F8 *Signs*.

<sup>12</sup> The fire report refers to a new interconnected smoke detection system in accordance with New Zealand Standard NZS 4514:2021 *Interconnected smoke alarms for houses*, but the owner refers to the installation of a Type-4 alarm system (automatic fire alarm system activated by smoke detectors and manual call points).

familiar with the escape route because it also serves as the main entryway to that part of the building.

- 4.21. I conclude that after completion of the alterations as proposed in the building consent application, the escape route for the residential unit alongside the northeast side of the building would have complied as nearly as is reasonably practicable with the clause C4.3.

## **5. Decision**

- 5.1. In accordance with section 188(1)(b), I determine:

- 5.1.1. there were not grounds for the authority's purported refusal based on the premise the building would undergo a change of use from SH to another use, and
- 5.1.2. the proposed escape route for the residential unit complied as nearly as is reasonably practicable with clause C4.3 of the Building Code.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 10 January 2025.

**Peta Hird**

**Lead Determinations Specialist**