



## Determination 2012/070

### Regarding the issue of a notice to fix for variations to consented building work to a new house at 234 Lake Road, Hauraki



#### 1. The matters to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Ministry of Business, Innovation and Employment (“the Ministry”)<sup>2</sup>, for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to this determination:

- Jayashree Limited the owner, (“the applicants”), represented by a lawyer
- Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

1.3 This determination arises from the decision of the authority to issue a notice to fix for building work carried out to a new house, listing contraventions of the Act in respect of section 40(1) of the Act. The authority’s concerns relate to building work it considers was not covered by the building consent and does not comply with those clauses<sup>3</sup> of the Building Code (First Schedule, Building Regulations 1992) that relate to fire safety (refer paragraph 4.5).

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<sup>1</sup> The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Ministry are all available at [www.dbh.govt.nz](http://www.dbh.govt.nz) or by contacting the Ministry on 0800 242 243.

<sup>2</sup> After the application was made, and before the determination was completed, the Department of Building and Housing was transitioned into the Ministry of Business, Innovation and Employment. The term “the Ministry” is used for both.

<sup>3</sup> In this determination, unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

- 1.4 The matter to be determined<sup>4</sup> is therefore whether the authority correctly exercised its powers in issuing the notice to fix.
- 1.5 In making my decision, I have considered the submissions of the parties, the report of the expert commissioned by the Ministry to advise on this dispute (“the expert”) and the other evidence in this matter.
- 1.6 Relevant clauses of the Building Code and sections of the Act discussed in this determination are set out in Appendix A.

## **2. The building work**

- 2.1 The building work constructed under the consent consists of a two storey house of tradition light timber frame construction on concrete foundations and ground floor slab. The cladding is a combination of masonry veneer and weatherboards fixed over a cavity. The dual pitch upper roof and mono pitch lower roof are clad with asphalt shingles and there are eaves to most of the perimeter.
- 2.2 The building work as approved in the consent included: a garage, two bedrooms, rumpus, home office, laundry, two bathrooms and a separate toilet, and entry on the lower level, and; three bedrooms, one bathroom and one ensuite, kitchen, lounge and dining room on the upper level. The drainage plan indicates one hot water unit located on the lower level at the south east, with the plumbing schematic corresponding with the facilities shown in the plans.

## **3. Background**

- 3.1 On 28 May 2010 applicant purchased the property with an existing house at the rear of the section.
- 3.2 On 1 April 2011 the authority issued building consent (BB 1240735) under the Building Act 2004 for the construction of a new two-storey dwelling at the front of the property which is the subject of this determination. The consent described the building work as ‘New Dwelling – new two storey dwelling, skylight’. The consent conditions noted that resource consent was required and that no building work could commence until that had been obtained.
- 3.3 An application was made for resource consent for the construction of a new dwelling at the front of the property, which was granted on 14 June 2011 for a ‘single residential unit’.
- 3.4 Construction commenced and the authority undertook various inspections.
- 3.5 The authority’s records indicate a notice to fix was issued on 24 January 2012; however I have not seen a copy of that notice.
- 3.6 The building work was completed by 2 February 2012 and the applicant submitted a minor variation to the authority of the same date for its approval. The amendment showed the ground floor only and noted:
- bi-fold doors in front of the garage door
  - three external hot water cylinders
  - stoves and kitchen cabinetry in the garage and rumpus room.

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<sup>4</sup> Under sections 177(1)(b) and 177(2)(f) of the Act

A shower was also added to the laundry area, and a 'laundry' added to the northwest of the garage, but neither was noted as a variation. The authority declined the application.

- 3.7 On 7 February 2012 the authority carried out an inspection at the house and subsequently issued a notice to fix dated 8 February 2012 (which replaced the notice issued on 24 January 2012). The cover letter noted that building work had been carried out without consent which had 'converted the single dwelling into three separate dwellings'; and the notice to fix cited the contravention of the Act as being

Work has been done which contravenes Section 40(1) of the New Zealand Building Act 2004. In that;

- A glazed window frame has been installed in front of the double garage door.
- An electric stove and kitchen cabinetry have been installed in the garage.
- An electric stove and kitchen cabinetry have been installed in the rumpus room.
- Three electric water heaters have been installed servicing hot water to three separate areas of the building.
- Three electricity meters have been installed in one meter box on the exterior wall of the building.

In the covering letter the authority also noted that the three separate dwellings for tenancy had been advertised to the public.

- 3.8 Under the heading of 'further particulars' the notice to fix states:

Do not continue to prepare this dwelling for occupancy until the requirements of this Notice are met.

Do not occupy the dwelling until a Code Compliance Certificate is issued.

- 3.9 On 7 February 2012 the applicant submitted an amendment to the consent for alterations to the layout of the first floor bathroom.
- 3.10 On 11 February 2012 the authority received the application for a code compliance certificate, which included as-built plans showing the variations to the ground floor.
- 3.11 In an email on 14 February 2012 the authority refused the amendments. Those amendments were subsequently submitted by the applicant as an application for a certificate of acceptance made on 15 February 2012, which was an option provided for in the notice to fix. The work for which the certificate of acceptance was sought comprised:
- bi-fold doors in front of the garage door
  - stoves and kitchen cabinetry in the garage and rumpus room
  - three water heaters and three electricity meters.
- 3.12 A final inspection was carried out on 17 February 2012 which failed. The inspection record refers to the items listed on the notice to fix.
- 3.13 On 22 February the authority acknowledged an application for a certificate of acceptance. On 29 February 2012 the authority carried out a further final inspection, which also failed and again referred to the items listed on the notice to fix.
- 3.14 The Ministry received an application for determination on 16 April 2012.

## 4. The submissions and the draft determination

- 4.1 The lawyer made the application for determination on behalf of the applicant and included a submission dated 12 April 2012 which noted that the applicant contends the building work was carried out in accordance with the consent and that the building work complies with the Building Code.
- 4.2 The submission stated that the applicant denies the dwelling has been converted into multiple dwellings. The lawyer also disputed the exercise of powers of the authority in respect of the requirement in the notice to fix that the applicants do not occupy the dwelling until a code compliance certificate is issued.
- 4.3 The application included copies of:
- the notice to fix dated 8 February 2012
  - the application for a certificate of acceptance
  - various producer statements and electrical certificates of compliance
  - revised drawings
  - correspondence from the authority.
- 4.4 The applicant's lawyer made a further submission dated 2 May 2012. The matters raised in the submission are summarised as follows:

### Approved building work

- The ground floor laundry tub and its location is included in the approved plans.
- Wording in the notice regarding the installation of kitchen cabinetry implies kitchen facilities have been established, and this does not accurately reflect the current layout and use.
- The building work detailed in the notice to fix is authorised under the building consent and does not breach the Building Code.

### Exempt building work

- Installation of kitchen cabinets, electric water heaters, and electricity meters do not require consent, and the authority does not impose any restrictions on the number and location of such within a dwelling.
- The installation of a glazed bi-fold door in the front of the double garage door is 'not inconsistent with the approved plans' and is 'essentially a design feature', nor is it work for which consent is required under Schedule 1(ae).
- The authority should have considered an exemption under paragraph k of Schedule 1 as the work met the requirements of paragraph (k)(i) and (ii).

### The notice to fix

- The work listed in the notice as contravening section 40(1) of the Act is work that under the Act is not specifically controlled or restricted under the building consent conditions, but rather is a matter for consideration under the authority's planning regime.
- The notice does not allege any breaches of the Building Code in regards any safety and danger aspects or fire safety requirements.

- The restriction on occupancy is unwarranted and it is not within the authority's powers to restrict occupation of the dwelling where the work complies with the Building Code and the building consent.
- The notice to fix provides for the removal of the 'unlawful' work or for an application for a certificate of acceptance to be made; the applicant chose to apply for a certificate of acceptance and thus has satisfied the notice to fix.
- The removal of the building work is not appropriate as the work complies with the consent and approved plans and is not in breach of the Building Code.

### **Conversion to a multi-unit dwelling**

- The dwelling will remain a single residence, with the intention to allow the dwelling to be occupied by flatmates under a standard rental agreement.
- The fixtures do not establish the dwelling has been converted into three separate dwellings, and regardless it would be a matter under the District Plan and Resource Management Act rather than for enforcement under the Building Act.

The submission also referred to a previous Determination issued by the Ministry that considered the conversion of a garage to an office, and various court cases the lawyer considered relevant.

- 4.5 The authority's submission, dated 6 June 2012, outlined the background to the matter and stated that the building work carried out without consent pertains to dividing the new house into three separate occupancies without fire separations or adequate fire resistance rated materials between the occupancies. The authority was of the opinion that the building work carried out does not comply with the fire safety provisions of the Building Code.
- 4.6 On 11 June 2012 the Department requested copies of relevant documentation from the authority, which were provided on 18 June 2012 and included copies of:
- the building consent and conditions
  - various inspection records and site notices
  - the application for a code compliance certificate
  - copies of three advertisements for separate tenancies at the address, listed by a property manager.
- 4.7 A draft determination was issued to the parties for comment on 27 July 2012.
- 4.8 The authority accepted the draft in a letter dated 16 August 2012, and also sought clarification from the Ministry of the authority's obligations to assess the building under section 124 if it continued to be occupied as a multi-unit dwelling.
- 4.9 The applicant did not accept the draft and requested a hearing on the matter. In a letter dated 17 August 2012 the applicant provided a detailed submission that noted (in summary):
- the intention is for the dwelling to be rented to a group of people who will reside as 'flatmates/subtenants', and advertisements for the three tenancies include the statement that 'it is a part of bigger house'. The 'whole building is interconnected' allowing it to operate as a single household unit

- the use of the dwelling is a resource management issue, and the expert's comments regarding its use fall outside the scope of the determination
- the determination is incorrect in assessing compliance in relation to use as a multi-unit dwelling, and the requirements in respect of fire and noise separation are not relevant as the building is a 'detached single dwelling'
- the applicant disagrees with the determination that the kitchens in both ground floor units are required to comply with the Building Code clauses relating to food preparation and washing. The expert's report stated that the kitchen cabinetry was work that did not require a consent and therefore the removal of these items should not have been included in the notice to fix
- the expert's findings in relation to the bi-fold door is accepted. However, it was not accepted that the installation of the bi-fold door wasn't exempt from the need for consent.

## **5. The hearing and site visit**

- 5.1.1 I arranged a hearing to be held in Auckland on 3 October 2012, which was attended by the applicant and his lawyer and a consultant, and four representatives of the authority. I was accompanied by a Referee engaged by the Chief Executive under section 187(2) of the Act, together with an officer of the Ministry. The attendees visited and inspected the property as part of the hearing process.
- 5.1.2 All the attendees spoke at the hearing and the evidence presented enabled me to amplify or clarify various matters of fact and was of assistance to me in preparing this determination.
- 5.1.3 There was discussion between the parties around the sequencing of resource planning checks, applications for building consents, changes in classified use, and the owner's reliance on duplicating the facilities and layout of an existing building. The authority noted that where changes are made after a building consent has been issued an amendment to the plans is required, and that the amendment may initiate a review in terms of the resource consent.
- 5.1.4 The views put forward at the hearing are summarised below.

## **5.2 The notice to fix**

- 5.2.1 The applicant's lawyer restated points made in submission as regards the matter of use being a matter to be considered under the Resource Management Act and outside that which the determination should consider.
- 5.2.2 The authority acknowledged that the notice to fix was 'less than ideal in some respects' and noted that it was generated to deal with the building work that was outside that approved in the building consent. The authority accepted there were omissions in the notice regarding compliance in respect of fire and acoustic separation for a multi-unit occupancy. The authority considered that the issuing of the notice required the owner apply for an amendment to the consent, and that provisions for fire and acoustic separation would be considered at that time.

## **5.3 Compliance with the Building Code**

- 5.3.1 The parties agreed that if the building is a single dwelling the remedial work to bring the building into compliance with the Building Code is not substantial. However, if

there has been a change of use in terms of the Building Act and its regulations the requirements to bring the building into compliance with the relevant clauses of the Building Code, namely those related to acoustic and fire separations, would be more onerous.

- 5.3.2 The applicant considers the building has been constructed in accordance with the consented plans and noted that it was constructed in the same configuration in regards duplicated food preparation areas and hygiene facilities as the existing dwelling.
- 5.3.3 The applicant's lawyer stated that as a single residence the building has adequate fire safety provisions, but noted that 'it may be appropriate to improve certain fire safety aspects within the building in relation to its communal occupation and use.'

#### **5.4 The use of the building**

- 5.4.1 The applicant stated that the purpose in building the house to the current layout was to support extended family or group living and the intention was not to rent but to sell the house; however it is being let in the meantime.
- 5.4.2 The applicant submitted that the building is a single residence that is occupied by 'tenants that reside there as flatmates and sub-tenants; each has access to all parts of the dwelling and no area or room is closed off to any tenant'; and that this is supported by both the tenancy agreements and the layout of the building. The applicant tabled copies of the three current tenancy agreements, dated March, May, and August 2012. The applicant's view is that the building is still being used in the way that it was approved.
- 5.4.3 The applicant confirmed that the flatmates do not all share the same entrance way, there was not necessarily a familiar relationship between the tenants prior to occupation, and that the tenancy agreements do not identify what is to be shared or what are common facilities. The applicant confirmed that interconnecting doors are not locked or blocked off.
- 5.4.4 The authority submitted that in terms of classified uses, as a single dwelling it would be deemed to be an SH category, but that the current configuration is seen as a change of use to a multi-occupied building and the occupancy has changed to an SA or SR (refer Appendix A.3 and A.4).
- 5.4.5 The authority noted that the consent was for a single residential dwelling, and the building work that has been carried out has created three separate areas including separate meters, heating, hygiene and food preparation areas in each. The authority was of the view that the physical alterations made it able to be used as three separate units, that the use of the building by the tenants in that there are exclusive areas and facilities are not shared demonstrates that the tenants are living as separate household units, and therefore there has been a change of use. The change of use raises issues around fire safety and acoustics.
- 5.4.6 After the hearing the authority forwarded copies of statements of two tenants taken by an officer of the authority, both dated 30 April 2012. The two statements confirmed that the tenants did not share facilities, did not have access to the other units, and that utilities were billed separately to each unit. Kitchen washing facilities for one tenant were by way of a laundry tub next to the washing machine and bathroom.

## **6. The expert's report**

### **6.1 General**

6.1.1 As mentioned in paragraph 1.5, I engaged an independent expert to assist me. The expert is a Registered Architect and a member of the New Zealand Institute of Architects. The expert inspected the building work on 21 June 2012 and provided a report dated 27 June 2012.

6.1.2 In addition to the modifications on the various applications for amendment to the consent, the expert noted the following variations from the consent drawings:

- A hinged door has been installed at the entrance to the 'garage' as opposed to a sliding door.
- Weatherboard has been applied above lower floor joinery up to first floor level.
- The primary uses of some of the lower floor spaces are different to those shown on the drawings; including
  - the room marked as a 'garage' on the drawings is a studio room with living/sleeping and kitchen areas
  - the room marked as a 'rumpus' is a living and kitchen area
  - a room shown as a bathroom is now a kitchen/shower room.
- A 1.8m high fence indicated on the drawings was not constructed and a driveway/parking area was extended to provide three parking bays in the area that is indicated on the consent drawings as an outdoor court and two parking bays.

6.1.3 The expert also noted that the description on all the drawings is as a proposed new dwelling, whereas it has been built and fitted out to enable use as a multi-unit dwelling.

6.1.4 The expert noted that the use of the building could not be reasonably described as being one household unit occupied by 'people living together in one house collectively', because the units were occupied by tenants living separately with exclusive use of

- separate kitchens, bathrooms, living areas and bedrooms
- separately switched and metered electricity supplies
- separate water heaters
- allocated car parking spaces
- independent entrance doors with keyed access, which in the case of the garage and lower floor unit are from a common entrance.

### **6.2 Compliance with the Building Code**

6.2.1 The expert observed construction details that he considered to be typical and commented on the compliance with the Building Code in accordance with the building in its use as a multi-unit dwelling and with a purpose group SR.

- 6.2.2 The expert also commented that the inspection was not a complete review of fire protection issues and that a more detailed review would be necessary to ensure any proposal covers the requirements of Clause C of the Building Code.
- 6.2.3 The expert confirmed that in respect of Clause 3.3.2 Fire separation, the following details were not fire-rated construction:
- The intermediate ceiling/floor.
  - The walls which form the supporting elements of the intermediate floor.
  - Staircase wall.
  - Doors between the staircase and the lower floor and garage units.
  - The roof of the lower floor unit and/or the wall above.
  - The soffits where the upper floor unit projects beyond the lower floor.
- 6.2.4 The expert also noted that a design complying with the Acceptable Solution C/AS1 would include an inter-connected manual fire alarm system in the absence of independent exits or exit to place of safety.
- 6.2.5 The expert confirmed that in respect of Clause G6 Airborne and impact sound the intermediate ceiling/floor and wall between the garage unit and the lower floor unit were not constructed as sound resisting and do not comply with Clauses G6.3.1 or G6.3.2
- 6.2.6 The expert observed that the six panel bi-fold door to the garage unit is installed without a head flashing and no seal at that head, and that the jambs were sealed with a bead of sealant. The installation details are not in accordance with E2/AS1 and as the sole means of weather proofing do not comply with Clause E2 should the room be used as a habitable space as opposed to a garage.
- 6.2.7 The area used as a living space that was designated as a garage in the plans has been insulated with mineral fibre insulation and therefore complies with Clause H1 Energy efficiency.

### **6.3 The notice to fix**

- 6.3.1 The expert considered that the glazed six panel window installed to the garage unit constitutes building work for which building consent was required and does not comply with Clause E2; therefore the expert considered this element was correctly included in the items listed in the notice to fix.
- 6.3.2 The expert noted that the installation of additional electric stoves and kitchen cabinetry are fixtures and not building work requiring consent, and that the Electrical Certificates of Compliance and the plumbing Producer Statement cover the installation of the three electric water heaters, noting however that the Producer Statement does not include a plumber's registration. The electricity meters were also covered by Electrical Certificates of Compliance.
- 6.3.3 The expert also noted that the drawings do not include an electrical layout or specification.
- 6.3.4 The expert was of the opinion that the following items should be included in the notice to fix:

- Inadequate fire separation between the units in separate occupation, and between the units and the means of escape.
- Inadequate noise control between the units in separate occupation.
- Inadequate prevention of spread of fire [between the upper and lower levels].

## 6.4 Submission in response to the expert's report

6.4.1 A copy of the expert's report was provided to the parties on 4 July 2012. The applicant's lawyer responded to the expert's report in a submission dated 20 July 2012. The lawyer submitted that:

- in respect of the alterations generally:
  - The internal layout of the dwelling is within the discretion of the applicants and the occupants. If these fixtures do not accord with the approved building plans then, if necessary, it can be resolved by way of an application for minor variation.
- the installation of the kitchen cabinetry did not constitute building work for which consent was required. The documentation submitted for the water heaters and the electrical meters 'amounted to adequate certification'
- the bi-fold door was exempt from the need for consent, but it is accepted that 'improvements can be made'
- the applicant considers the dwelling is a single residence, therefore matters relating to fire safety and acoustic separation were not relevant, and that
  - The use and occupation of the dwelling is a resource management issue which is acknowledged as being outside the scope of [the expert's report].
  - ... the applicant maintains the position that the matters raised in the Notice to Fix do not represent work undertaken contrary to the consented building plans and drawings.

## 7. Discussion

### 7.1 General

7.1.1 In deciding this matter I have considered:

- the legislative framework and the classified use of the building as-built
- the variations to the consented work
- the compliance of the as-built work
- whether the variations are major, minor, or exempt from the need for a consent
- the issue of the notice to fix.

### 7.2 The legislative framework and the classified use of the as-built work

7.2.1 The following provisions of the Act apply:

- Section 40(1) says that 'a person must not carry out building work except in accordance with a building consent.'
- Section 49(1) says that an authority must grant building consent if the provisions of the Building Code will be met if the work is completed in accordance with the consent documents.

- Section 45(4) says that an amendment to a building consent, for other than minor work, shall be made as if it was an application for consent.
- Section 94(1) says that an authority must issue a code compliance certificate if the completed work complies with the building consent.

7.2.2 Minor variations to building consents are described in Building (Minor variations) Regulations 2009 (“the Regulations”), and in the Ministry’s guidance document ‘Minor variations to building consents’<sup>5</sup>.

7.2.3 The Act prescribes the Building Code’s requirements for buildings based on their classified use. The classified use of a building is determined by a building’s physical configuration and attributes, and/or the plans and specifications for proposed building work, not the particular function that an owner may be using a building for at any particular point in time.

7.2.4 The building work was described in the approved consent as a ‘new dwelling’ (Clause A1: 2.0.2 - Detached Dwelling) and the compliance of the proposed work was assessed and the building consent was issued on that basis. The applicant maintains that the design was for family or group living, and that current tenants live as flatmates and sub-tenants.

7.2.5 The changes to the consented work have altered the building from a detached dwelling to a multi-unit dwelling (Clause A1: 2.0.3 - Multi-unit Dwelling) containing three separate units. I consider this is clear from the features of the building as built, the three separate tenancies in the units (refer paragraphs 4.6, 5.4.2, and 5.4.6), and the use of the separate areas by the tenants with no areas shared other than an access way.

7.2.6 When determining the compliance of the as-built building I must therefore consider the provisions of the Building Code as they apply to a multi-unit dwelling rather than the single dwelling as consented. I note that in some key areas the code requirements for a multi-unit dwelling are more onerous than for a detached dwelling.

### 7.3 The variations to the approved building consent

7.3.1 The building work differs from the building consent in respect of the following items:

#### **Ground floor**

- bi-fold door installed in front of the garage door
- electric stoves and kitchen facilities installed in the garage and rumpus.
- three electric water heaters servicing the three units
- three electricity meters installed in one meter box on the exterior wall of the building
- entry door to the garage unit is a hinged rather than sliding door
- shower and vanity unit installed in the laundry
- the laundry moved to north west of garage

<sup>5</sup> Minor variations to building consents: Guidance on definition, assessment and granting; dated February 2010

- alterations to the functions of rooms described as garage (to living, sleeping and kitchen), rumpus (to living and kitchen), laundry (to kitchen and shower)
- the driveway/parking area extended to provide three parking bays in the area that is indicated on the consent drawings as an outdoor court and two parking bays.

#### **First floor**

- alterations to the layout of the first floor bathroom

### **7.4 The compliance of the as-built work**

- 7.4.1 Taking into account the expert's findings, I am of the view that the building work as a multi-unit dwelling does not comply with Clauses C, F7, and G6 of the Building Code. (I note that the expert has stated that his report is not a full review of the provisions of the Building Code that relate to fire safety.)
- 7.4.2 In addition, what must be considered the food preparation areas ("the kitchens") in both ground floor units are required to comply with Clause G3 'Food preparation and prevention of contamination'. While the kitchens have adequate space for the storage, cooking and preparation of food (Clauses G3.3.1(a), (c), and (d)) I do not consider they have adequate means for 'Means of food rinsing, utensil washing and waste water disposal' under Clauses G3.3.1(b). In response to the applicant's submission (refer paragraph 4.9) I note that all building work must comply with the Building Code irrespective of whether a building consent is required.
- 7.4.3 I accept the expert's findings as to the compliance of the bi-fold door to the 'garage unit' (refer paragraph 6.2.6). I consider that the bi-fold door as installed does not comply with Clause E2.

### **7.5 Are the variations to the consent considered major or minor, or exempt from the need for consent?**

- 7.5.1 The applicant considers the variations to the approved consent as minor and has applied to the authority for an amendment to the consent on this basis. In my view the variations must also be considered against the change of use from a single detached dwelling, to a multi-unit dwelling.
- 7.5.2 I have considered the nature and the extent of variations against the Regulations and the guidance information published by the Ministry. In my view the changes do not fall within what can be considered minor variations. In particular the variations impact on compliance with the Building Code with respect to a number of clauses (refer paragraph 7.4). I note that irrespective of whether the variations are considered major or minor, approval for those changes should have been sought before the work was carried out.
- 7.5.3 I also note that the applicant is of the view that the installation of the bi-fold door to the 'garage unit' is exempt from the need for a building consent under paragraph (ae) of Schedule 1 (refer paragraph 4.4). In my opinion the paragraph (ae) exemption applies only in respect of an alteration to an existing building. Changes to a building during construction do not constitute an alteration to an existing building.

- 7.5.4 If the work was to an existing building then the installation of the bi-fold door could be considered exempt as discussed previously in Determination 2011/041<sup>6</sup>.
- 7.5.5 The applicant is also of the view that the internal alterations should have been the subject of a schedule 1(k) exemption. In my view the provisions of paragraph k required the authority to make a decision in respect of the proposed work before it was undertaken. I also consider that the work comprising the alterations do not meet the requirements of the Building Code.

## **7.6 The notice to fix**

- 7.6.1 Taking into account the above, I consider the authority was correct to issue the notice to fix. This was because the alterations constitute building work for which an amendment to the consent was required but not obtained, and which has resulted in the conversion of a detached dwelling to a multi-unit dwelling. The as-built work does not comply with the consent or with the Building Code.
- 7.6.2 I consider that the notice does not include breaches of the Building Code that it should have identified (refer paragraphs 7.4.1 and 7.4.2), but includes building work that is otherwise self-certifying (energy work under Clause G9 'Electricity'). The notice to fix correctly included the bi-fold door to the 'garage unit' as building work that required consent, but did not address its non-compliance with Clause E2.
- 7.6.3 The notice to fix required the building not be occupied until such time as 'a code compliance certificate is issued.' In this respect I consider the authority incorrectly exercised its powers by including this requirement in the notice to fix. However, the authority's concerns regarding fire safety and the conversion to a multi-unit dwelling are valid and in line with the purposes and principles of the Act.

## **8. What happens next**

- 8.1 The notice to fix should be modified to take account of the findings of this determination; identifying the contravention of the Act as being building work carried out other than in accordance with an approved consent to change the intended use of detached dwelling to a multi-unit dwelling without building consent.
- 8.2 The authority may also wish to consider its powers under section 40 of the Act in respect of building work carried out not in accordance with the building consent; and its powers under section 124 in relation to breaches of the Building Code that relate to life safety (Building Code Clauses C and F7), if it believes the test of what is a dangerous building under section 121 has been met.
- 8.3 Should the owner wish to retain the building work that was carried out without consent, the following will be required:
- the non-compliant building work must be brought into accordance with the Building Code, and an amendment to the building consent will need to be sought and obtained in order to undertake this work
  - the application for an amendment may also include the differences to the consent that can reasonably be considered in conjunction with the proposal to rectify the non compliant building, for example the changes to the internal

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<sup>6</sup> Determination 2011/041: Whether internal alterations to an attached garage is exempt from the need for a building consent under Schedule 1 of the Building Act

layout and function of the rooms, which are the aspects that relate to the intended use of the building

- the application for an amendment will need to exclude those items that were done other than in accordance with the building consent and that are not included in the application for an amendment, for example the changes to the external envelope. A certificate of acceptance should be applied for these items.

## **9. The decision**

9.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority correctly exercised its powers in issuing a notice to fix, because the building work carried out is other than in accordance with the approved building consent. However, the notice to fix is to be modified to take account of the findings of this determination.

9.2 I also determine that the building work does not meet the requirements of Building Code Clauses C, F7, E2, G3, and G6.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 8 November 2012.

John Gardiner  
**Manager Determinations**

## Appendix A

### A.1 Relevant sections of the Act

#### **40 Buildings not to be constructed, altered, demolished, or removed without consent**

- (1) A person must not carry out any building work except in accordance with a building consent.

...

#### **49 Grant of building consent**

- (1) A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.

#### **45 How to apply for building consent**

...

- 4) An application for an amendment to a building consent must,—
- (a) in the case of a minor variation, be made in accordance with section 45A; and
  - (b) in all other cases, be made as if it were an application for a building consent, and this section, and sections 48 to 51 apply with any necessary modifications.

#### **94 Matters for consideration by building consent authority in deciding issue of code compliance certificate**

- (1) A building consent authority must issue a code compliance certificate if it is satisfied, on reasonable grounds,—
- (a) that the building work complies with the building consent; and

...

#### **114 Owner must give notice of change of use, extension of life, or subdivision of buildings**

- (1) In this section and section 115, change the use, in relation to a building, means to change the use of the building in a manner described in the regulations.
- (2) An owner of a building must give written notice to the territorial authority if the owner proposes—
- (a) to change the use of a building; or

...

#### **124 Powers of territorial authorities in respect of dangerous, earthquake-prone, or insanitary buildings**

- (1) If a territorial authority is satisfied that a building is dangerous, earthquake prone, or insanitary, the territorial authority may—
- (c) give written notice requiring work to be carried out on the building, within a time stated in the notice (which must not be less than 10 days after the notice is given under section 125), to—
    - (i) reduce or remove the danger; or
    - (ii) ...

## A.2 Relevant paragraphs of Schedule 1 to the Act:

- (ae) the installation, replacement, or removal in any existing building of a window (including a roof window) or an exterior doorway if—
- (i) compliance with the provisions of the building code relating to structural stability is not reduced; and
  - (ii) in the case of replacement, the window or doorway being replaced satisfied the provisions of the building code for durability:
- (k) any other building work in respect of which the territorial authority (or, as the case requires, the regional authority) considers that a building consent is not necessary for the purposes of this Act because that building work—
- (i) is unlikely to be carried out otherwise than in accordance with the building code; or
  - (ii) if carried out otherwise than in accordance with the building code, is unlikely to endanger people or any building, whether on the same land or on other property:

## A.3 Relevant clauses of the Building Code include:

**Clause A1—Classified Uses 2.0 Housing**

## 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.

## 2.0.3 Multi-unit dwelling

Applies to a building or use which contains more than one separate household or family. Examples: an attached dwelling, flat or multi-unit apartment.

## A.4 Relevant clause of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005

**Schedule 2 – Uses of all or parts of buildings**

Uses related to sleeping activities

Use	Spaces or dwellings	Examples
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, wharehenui
SR (Sleeping Residential)	attached and multi-unit residential dwellings, including household units attached to spaces or dwellings with the same or other uses, such as caretakers' flats, and residential accommodation above a shop	multi-unit dwellings, flats, or apartments
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