



Determination 2016/029

Regarding the issue of a notice to fix for three cabins at an ashram constructed without building consent at 1334 Oruru Road, Peria, Kaitaia

Summary

This determination considers three cabins constructed for the use of sleeping accommodation at an ashram and whether the building work was exempt from the requirement to obtain building consent under Schedule 1. The determination discusses the definition of the term “dwelling” as it relates to Schedule 1(3)(d).

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The parties to the determination are:
 - the owner of the property at 1334 Oruru Road, Tushita Charitable Trust (“the applicant”), acting through a representative of the Trust
 - Far North District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 This determination arises from the construction of three small cabins on the applicant’s property without building consent, and the authority’s subsequent decision to issue a notice to fix for a breach of section 40² of the Act. The applicant believes that the building work was exempt under Schedule 1 of the Act.
- 1.4 The matter to be determined³ is therefore the authority’s exercise of its powers of decision in issuing a notice to fix for the building work. In determining this matter, I must consider whether the building work comes within the category of building work in Schedule 1(3) of the Act that is exempt from the requirement to obtain building consent.
- 1.5 In making my decision, I have considered the submissions of the parties and the other evidence in this matter. I have not considered any other aspects of the building work or compliance with the Building Code.

¹ The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.building.govt.nz or by contacting the Ministry on 0800 242 243.

² 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.

³ Under sections 177(1)(b) and 177(2)(f) of the Act

2. The background

2.1 The applicant's property is in a rural area, inland from Doubtless Bay in the Far North. The applicant is a charitable trust, and manages its property as an ashram or place of retreat.

2.2 The buildings

2.2.1 The property contains several existing buildings that the applicant states were built around 1995, including a main building that the applicant has submitted was a dwelling at the time the cabins were constructed. The applicant advises that the main building 'provides the showers, toilet and dining facilities' for the people accommodated in the cabins. I understand that at the time the cabins were constructed, the main building contained sanitary facilities, cooking facilities and two bedrooms.

2.2.2 In December 2013, the applicant constructed three small cabins on its property. The cabins were constructed without the applicant applying for or the authority granting a building consent, as the applicant was of the view that the building work was exempt under Schedule 1(3) of the Act. It is these cabins which are the subject of this determination.

2.2.3 The cabins are of identical construction. Each measures 2.7m x 3.6m (9.72sqm), and stands 2.4m high. The cabins are timber framed, with timber foundations, plywood cladding on the walls, corrugated iron cladding on the roof and a single layer plywood floor. The cabins have aluminium joinery (windows and a door), and a small wooden deck out the front, which is covered by an extension of the roof to form a veranda.

2.2.4 The applicant advises that the three cabins are used, from time to time, as sleeping accommodation for volunteers working for the Trust. I have not seen any floor or other plans for the cabins, but as far as I am aware they do not contain any sanitary or cooking facilities.

2.2.5 The cabins are located away from the main building, and are connected by a concrete path. I have not been provided with any measurements for the distance between the main building and the cabins, but from the photos it appears to be several metres.

2.2.6 In January 2014, after the cabins had been constructed, the authority granted building consent no. BC 2014-365 for additional building work, including alterations to the main building. This subsequent building work is not considered in this determination, except in so far as it relates to the cabins. I have not seen a copy of this consent, but the applicant advises it was to erect four large sleeping dormitories, plus new shower and toilet facilities, and to extend the dining area of the main building. The consented work was designed to provide accommodation for up to 30 people who would be attending retreats and other events at the property.

2.2.7 The applicant advises that, sometime after the cabins were constructed, the two bedrooms in the dwelling were converted for use as an office and a study. This conversion occurred 'because of fire regulations relating to the consented work in the existing dwelling'.

2.3 The notices to fix

2.3.1 On 23 July 2015, the authority issued a notice to fix (BC-2016-84/0) for the building work (“the first notice to fix”). The particulars of contravention or non-compliance given in the notice were that:

Non consented building works have been carried out and non compliance of the conditions of the approved Building Consent, BC-2014-365/0 which is a breach of Section 40 and Section 17 of the New Zealand Building Act 2004.

1. Three non-consented buildings that are being used as accommodation
2. Non consented conversion of an existing three bay farm shed to private/public meeting hall in association with the commercial activities on the site.
3. Non consented construction of a shed/shelter for farm implements.
4. Permanent location of shed storage/workshop.
5. Conditions of Building Consent BC 2014-365 have not been complied with, being warning systems.

2.3.2 The remedy in the first notice to fix required that the applicant cease public occupation of the accommodation buildings, meeting hall and common services building (which I assume to be the main building) until compliance had been achieved, and also an application be made for a certificate of acceptance. The applicant was required to provide: a fire report to support an amendment to the building consent; a building report to support the application for a certificate of acceptance; and items were required to be added to the compliance schedule and identified on the building warrant of fitness. The first notice to fix had an expiry date of 21 August 2015.

2.3.3 I understand that the applicant replied to this first notice to fix, indicating an intention to ‘address the compliance aspects’ in the notice. I have not seen a copy of this reply.

2.3.4 On 27 October 2015, the authority issued a code compliance certificate for the building work completed pursuant to building consent BC-2014-365, including the dormitories, ablutions block and alterations to the main dwelling.

2.3.5 On 24 November 2015, the authority granted an extension of time for the first notice to fix to be complied with to 23 February 2016.

2.3.6 On 31 January 2016, the applicant applied for a determination about the authority’s decision to issue the first notice to fix in relation to the three cabins (item 1).

2.3.7 On 4 April 2016, the authority issued a revised notice to fix (“the second notice to fix”). A letter accompanying the notice acknowledged that some of the matters in the first notice to fix had been addressed. The second notice to fix repeated the content of the first notice, with some addition content under “further particulars” noting ‘multiple non consented buildings located on-site and non consented changes to buildings uses.’ The notice gave a date of 2 May 2016 for compliance.

3. The submissions

3.1 The applicant made a submission with its application for a determination that:

...[The applicant] holds the opinion that the part of the Notice to Fix applying to the three cabins is not relevant as they are under 10 square metres and have access to the Dwelling.

The cabins were already at the property when [the applicant] applied for Building Consent for ablution blocks, larger cabins and an extension to the main house. This further work did not commence until approximately two months after obtaining the Building Consent dated 21 January 2014 and received a Code of Compliance since.

[The applicant] also disagrees with the [authority's] interpretation that there is no longer a Dwelling since the building of ablution blocks, larger cabins and an extension of the main house.

It therefore seeks a Determination in regards to the definition of "Dwelling" and how it relates to this situation.

3.2 The applicant provided the following documentation with its application:

- photos of the buildings on its property, including the cabins, ablution blocks and main building
- a photos of one of the three cabins under construction
- a copy of the first notice to fix
- a copy of the second notice to fix
- copies of correspondence between the parties relating to the notices to fix
- a site plan for its property.

3.3 On 10 April 2016, the applicant confirmed that the matter to be determined related to the three cabins only, which had been constructed before the changes were made to the main building.

3.4 The authority did not make a submission in response to the application. On 9 March 2016 I requested the authority provide a submission setting out the background to the regulatory action that had been taken, as it was unclear from the application. The authority did not provide the information requested, but by email on 8 April 2016 sent a copy of the second notice to fix.

3.5 A draft of this determination was issued to the parties on 27 April 2016.

3.6 The authority and the applicant both accepted the draft without further comment in responses received on 15 June and 12 July 2016 respectively.

4. Discussion

4.1 I note that at the time the determination was applied for the first notice to fix was in force. However, this notice has subsequently been superseded by the second notice to fix issued on 4 April 2016. In this discussion, when referring to "the notice to fix", I will be referring to the second notice to fix issued 4 April 2016. Given that the second notice to fix raises the same issues as the first in relation to the three small cabins, I do not consider it has a material impact on the matter to be determined.

- 4.2 Section 41 of the Act specifies that a building consent is not required in certain situations, including under section 41(1)(b) for any building work described in Schedule 1 of the Act. Under section 42A(2)(a) this is subject to the condition that the building work must still comply with the Building Code to the extent required by the Act.
- 4.3 Schedule 1(3) of the Act includes “Single-storey detached building not exceeding 10 Square metres in floor area” as exempt building work. Sub-clauses 3(1) and 3(2) describe and set conditions on the types of single-storey detached buildings that come within this exemption. Sub-clause 3(1)(d) specifies that a single-storey detached building of under 10 square metres in floor area will only be classed as exempt if it:
- (d) does not include sleeping accommodation, unless the building is used in connection with a dwelling and does not contain any cooking facilities.
- 4.4 From the applicant’s submissions, I understand that the three cabins are used as sleeping accommodation for volunteers working for the Trust. They do not contain any cooking or sanitary facilities; people staying in the cabins use the facilities in the main building. There also does not appear to be any dispute between the parties about the size of the cabins or their compliance with the Building Code. Accordingly, the question of whether a building consent was required for their construction hinges on whether, at the time of construction, they met the test of being ‘used in connection with a dwelling’.
- 4.5 The term “dwelling” is not defined in the Act. It does, however, appear in Clause A1 – Classified Uses of the Building Code, in relation to the classified use of “Housing”. Clause A1(2) reads:
- 2.0 Housing**
- 2.0.1 Applies to *buildings* or use where there is self care and service (internal management). There are three types:
- 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.
- 2.0.4 Group dwelling**
- Applies to a *building* or use where groups of people live as one large extended family. Examples: within a commune or marae.
- 4.6 Different types of dwelling are recognised in this definition, but what all of them have in common is that they are lived in by households or families. It is important to note that it is not the facilities that the building contains that determine whether it is a dwelling or not; it is the use to which it is put and the nature of the group or groups of people who occupy it. Just because a building contains a kitchen, bathroom and bedrooms will not, in itself, make it a dwelling. It must be lived in by a household or a family (or in the case of multi-unit dwellings, households or families).

- 4.7 Household unit is defined in both the Building Act and the Building Code. The definitions are essentially the same. The definition in Clause A2 of the Building Code reads:

household unit means any *building* or group of *buildings*, or part of any *building* or group of *buildings*, used or intended to be used solely or principally for residential purposes and occupied or intended to be occupied exclusively as the home or residence of not more than one household; but does not include a hostel or boardinghouse or other specialised accommodation

- 4.8 Family is not defined in the Act or the Building Code and should be given its natural or ordinary meaning.
- 4.9 The *Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005* (“the Change of Use Regulations”) also use the term “dwelling”. These regulations (among other things) attribute specific uses to buildings, or parts of buildings, for the purposes of sections 114 and 115 of the Act (which relate to changing the use of buildings or parts of buildings).
- 4.10 Schedule 2 of the Change of Use Regulations sets out the various uses that buildings may be classified as for the purpose of the regulations. The classifications SR and SH, which fall within ‘Uses relating to sleeping accommodation’, relate to uses of buildings as “dwellings”.

Use	Spaces or dwellings	Examples
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

- 4.11 Again, what is notable about these classifications is their reference, in relation to the use of the term dwellings, to household units, households and families. The definitions of terms used in the regulations are the same as for the Building Act 2004, so reference to a household unit incorporates the concept of the building, or part of the building, being occupied or intended to be occupied as a home or residence for a household.
- 4.12 In contrast, classified use SA (Sleeping Accommodation) under the Change of Use Regulations is the use given to certain types of transient accommodation, such as hotels and hostels, but does not incorporate dwellings.

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, wharehous

- 4.13 In my opinion, the main building cannot be considered to be a dwelling within the meaning set out in the regulations to the Act. While the building contains some of the facilities that you might expect to find within a dwelling, it is not lived in by a household or family. People staying at the applicant's property and using the main building, whether for a retreat or other service provided by the Trust, do not do so with the intention of forming a household or family. Likewise, the volunteers who stay in the three cabins from time to time do not do so with the intention of forming a household or family. It may be that there is a managing family that lives on the applicant's property, and I have not been provided with any information about this, but it is apparent they do not live in the main building.
- 4.14 In regards to the use of the main building at the time the cabins were constructed, I acknowledge that there were two bedrooms in the main building prior to alterations being carried out; however it is my understanding that the ashram has been in operation at the property since 2007, prior to construction of the cabins. I am of the view that the use of the main building in providing facilities and accommodation to guests and volunteers to the ashram was not a "dwelling" at the time the cabins were constructed.
- 4.15 I have considered the issue of whether a particular building is intended as accommodation for a household unit in previous determinations, notably Determination 2014/026⁴, where I considered whether the people residing in small bedsit type units within a building formed a household unit for the purposes of Clause C – Fire Safety of the Building Code. In that determination, factors that I considered important in deciding whether or not a household unit existed included the degree of social cohesion between the people using the building and the permanent, or otherwise, nature of their residence. I consider that both of these factors apply equally in the current case.
- 4.16 In my opinion, people attending courses at the applicant's property may or may not cohere and form a group during their stay. Regardless, it will be on the understanding that they are forming a temporary arrangement. The same applies to the volunteers: they will stay at the property for the duration of their placement, and may or may not form relationships with their fellow workers and guests. The intention is not to create a permanent household or family grouping based at the applicant's property.

4.17 Conclusion

- 4.17.1 In my opinion, the main building on the applicant's property is not a "dwelling" for the purpose of the Act, whether or not the other buildings on the property are taken into account, because it is not used or intended to be used as a place where a household or family live.
- 4.17.2 As a consequence, I am of the view that the three cabins constructed on the applicant's property do not come within the exemption Schedule 1(3) of the Act. The cabins provide sleeping accommodation but are not associated with a dwelling. Accordingly, I conclude that the construction of the cabins was building work that required building consent and the authority correctly issued its powers of decision in issuing a notice to fix in respect of the three cabins (item 1 on the notice to fix).

⁴ *Determination 2014/026 Regarding which fire risk group should be used in determining the compliance of proposed accommodation at 64A Rosella Road, Mangere East, Auckland, Ministry of Business, Innovation and Employment (21 May 2014)*

5. The decision

- 5.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority correctly exercised its powers of decision to issue a notice to fix for the three cabins constructed without building consent when consent was required.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 19 July 2016.

John Gardiner
Manager Determinations and Assurance