

Determination 2007/91

A dispute in relation to the procedures required for a change of use of a multi-storey apartment building at 9-13 Tamariki Avenue, Orewa (“the Nautilus Building”)



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, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department. The applicant is Tamariki Limited, the proprietor of Units 513 and 1010 in the Nautilus Building (“the applicant”) acting through a firm of barristers and solicitors (“the applicant’s legal advisers”). The other party is the Rodney District Council (“the territorial authority”), also acting through a firm of barristers and solicitors (“the territorial authority’s legal advisers”).
- 1.2 This determination arises from the decision of the territorial authority to refuse to issue a written notice under section 115(b) of the Act for the change of use of a multi-storey apartment building.
- 1.3 The application was for a determination of the following matters:

¹ The Building Act 2004 is available from the Department’s website at www.dbh.govt.nz.

The exercise of [sic] the territorial authority of its powers under sections 112 and 115 to 116 of the Building Act 2004, namely that the Rodney District Council should give written notice under section 115 of the Building Act 2004 that the Nautilus will comply in its new use with the Building Code.

- 1.4 The applicant and the territorial authority also addressed the question of whether the applicant, as the unit title holder (“proprietor”) of two of the 152 units in the building, has the status to give notice under section 114 and to be given notice under section 115.
- 1.5 I take the view that I must also consider whether the applicant has the status to apply for a determination under section 176.
- 1.6 I prepared a sequence of draft determinations, copies of which were forwarded to the applicant, the territorial authority, and the Body Corporate. I also requested that the Body Corporate forward copies of the draft determinations to all the individual proprietors for their comment. I note that, following a written request, the applicant’s legal advisers were unable to produce a list of the individual proprietors.
- 1.7 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.
- 1.8 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.

2. The building

- 2.1 The ownership of the building in question is in accordance with the Unit Titles Act 1972. The building has 12 levels as follows:
 - Level 1 contains retail units, car parks, an entrance lobby, and building service areas.
 - Levels 2 and 3 contain car parks, and storage and building service areas.
 - Level 4 is a podium with amenities, a gymnasium and residential units.
 - Levels 5 to 12 contain residential units.
- 2.2 The functional elements of the building are described as:
 - 152 apartments of varying areas and designs, the majority of which are residential. However, some apartments are used as serviced apartments, which can be offered to guests for overnight accommodation. The owners of the serviced apartments have a contractual arrangement with a property management company.
 - A pool, gymnasium, and sauna for the specific recreational use of the building’s occupants and apartment owners.
 - Corridors, stairwells, and lifts for access to all units, amenities, and parking levels by occupants and visitors.
 - A secure entrance lobby and associated administrative offices.
 - Occupant parking, storage and building service areas.
 - Retail units with ground-level frontages.

- 2.3 The applicant's legal advisers point out that there have always been a number of different "uses" for the different functional elements of the building.
- 2.4 I have also been informed that the territorial authority has received requests for a change of use in respect of 34 individual units up to the present time.

3. Background

- 3.1 The territorial authority issued a building consent (ABA23425) to the applicant, then the developer, on 25 February 2003. The use of the building at that stage was classified as purpose group SR ("Sleeping Residential") in terms of the acceptable solution C/AS1. The building was duly erected and a code compliance certificate was issued on 18 June 2004. I assume that once the building had been erected it was subdivided by the deposit of a unit plan. I have not been informed of the designation of the body corporate that was created on the deposit of the unit plan ("the Body Corporate").
- 3.2 Between October 2005 and September 2006, the parties and the applicant's architects ("the architects") engaged in detailed correspondence regarding various issues relating to the code compliance of the building. In summary, these resulted in the:
- establishment of two accessible apartments and provision for accessible parking
 - resolution of fire issues
 - approval by the body corporate of the building work
 - consent by the proprietors of each of the serviced apartments to the change of use required for those apartments.

The applicant and the territorial authority are in agreement that building consents have been issued to the applicant for the above alterations to occur, see 5th bullet point in 4.3.1 below.

- 3.3 On 27 September 2006, the territorial authority wrote to the architects stating that there were two outstanding items to be resolved, namely:
- 1 The approval of or application from all the owners for the change of use of the common area.
 - 2 Resolution as to how the accessible units will remain part of the group of units used for traveller's (*sic*) accommodation.
- 3.4 I have not been informed as to whether the territorial authority has issued a code compliance certificate in respect of all of the alterations.

4. The submissions from the parties

4.1 The applicant's submission

- 4.1.1 The application for a determination, dated 31 October 2006 included submissions from the applicant's legal advisers, which raised the following four questions:

Is there a need for the Council to make further inquiries once it is satisfied that the new use of [the building] will comply with the Building Code?

Has there been a change of use of the common areas?

If a change of use has occurred, does the Council need written notice of that change of use before it can issue a determination under s 115?

If written notice of the change of use is required, must it come from the Body Corporate or every individual unit owner in the Nautilus?

I summarise this submission, using the following headings:

No need for the [territorial authority] to make further inquiries once it is satisfied that the new use of the [building] will comply with the Building Code (Issue 1)

- The territorial authority need not consider whether the change of use has been approved nor is there any consent application.
- All code-compliance concerns have been resolved to the territorial authority's satisfaction.
- As the territorial authority is satisfied that the building in its new use complies with all safety and access problems, it need not make other inquiries or consider other matters in order for it to issue a written notice that the Building Code has been complied with.

No change of use (Issue 2)

- As there has been no operative change of use to the common areas, written notice from the owner of these areas is not required.
- The use of the serviced apartments is now “sleeping accommodation” and the territorial authority acknowledges that it has received notification of this from each serviced apartment owner.
- The use of the common areas has not changed since the construction of the building, despite the introduction of the serviced apartments. This interpretation is in line with the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 (“the Regulations”) and in particular, the definition of SA (Sleeping Accommodation) in Schedule 1, which states “*spaces providing transient accommodation or where limited assistance or care is provided for people*”.
- The relevant schedules recognise that buildings can have multiple uses and multiple spaces. As there has been no change of use of the common areas, there is no need for the territorial authority to require written notice relating to these.

Adequate notice given (Issue 3)

- While the territorial authority has received written notice from the owners of the serviced apartments, it also requested a section 114 written notice from “each and every individual owner of a unit in the building”. I have been notified by some of the individual titleholders that they did not receive a request for such a notice.
- Written notice under section 114 is not a condition precedent to a territorial authority giving notice under section 115 that it is satisfied that a building is code-compliant.

- There is no relevant reference between section 114 and section 115. All that is required for a section 115 notice to be granted is a reasonable satisfaction that the building complies with the Building Code.
- The territorial authority has received written notice of the change of use affecting the serviced apartments and is satisfied that the building in its new use is code-compliant. Accordingly, the territorial authority should issue the section 115 notice.

Any notice required must come from Body Corporate (Issue 4)

- Even if there is a change of use of the common areas and there is a requirement for a written section 115 notice, then such notice should be from the Body Corporate and not from every individual owner of the entire building.
- Under the Unit Titles Act 1972, in buildings such as the Nautilus, the common areas are the responsibility of the Body Corporate.

4.2 The territorial authority's submission

4.2.1 In response to the applicant's submission, the territorial authority's legal advisers wrote to the Department on 4 December 2006. This submission set out the issues raised by the applicant and noted that the territorial authority considered that notice to the owner cannot be given under section 115(b), unless it has first received written notice under section 114 regarding a change of use. Where there has been a change of use of the common areas in a building that is in multiple-ownership, then a notice relating to that change must come from all the owners of the common property or from the Body Corporate. As this has not occurred in this case, the territorial authority cannot issue the relevant notice.

The submission responded to each of the issues raised by the applicant. I summarise these under the same headings used in paragraph 4.1.1.

No need for the [territorial authority] to make further inquiries once it is satisfied that the new use of the [building] will comply with the Building Code (Issue 1)

- The submission set out the salient points and an interpretation of sections 114 and 115. It was concluded that, as well as being satisfied on reasonable grounds that the building in its new use is code compliant, the territorial authority is also required to identify the owner to whom the section 115(b) notice is to be given.

No change of use (Issue 2)

- If, as accepted by the territorial authority, the change of use of specific individual units in the building gives rise to a change of use of the common property, then all the owners of the building, or the Body Corporate, have to give notice of such a change.
- The Regulations, in particular Regulation 5, expressly define what change of use means for the purpose of sections 114 and 115. Based on this definition, "a change of use of a unit in a building will result in a change of use of the entire building, if as a result of that new use, there are additional or more onerous requirements under the Building Code".

- Under Schedule 2 of the Regulations, the current use of the individual units is categorised as SR (Sleeping Residential) and the new use as SA (Sleeping Accommodation). This new use is a change of use because it requires additional code requirements. It was submitted that, as the common areas will become part of a building that offers accommodation to the public, the building will become subject to the requirements of Schedule 2 of the Act in respect of access and facilities for persons with disabilities. Such access imposes requirements for both the individual units and the common property, for which separate building consent applications have been made.
- They submitted this is not a case where “*some of the units in the complex are to be available for use by the public as sleeping accommodation and, therefore, the common areas of the building such as the foyer have to satisfy the fire and accessibility provisions of the Building Code*”.

Adequate notice given (Issue 3)

- As previously discussed, the territorial authority considers that it must receive a valid written notice under section 114 before it can exercise its statutory function under section 115.

Any notice required must come from Body Corporate (Issue 4)

- The territorial authority has notified the applicant that it did not require notification by all the individual unit owners. However, notice must come from the Body Corporate if such individual notification is not forthcoming.
- While section 115 does not mention section 114, both are intended to be read together. Section 114 places a statutory obligation on the “owner of the building” to give that notice, following which, the territorial authority gives that “owner” a section 115 notice.
- The submission discussed the term the “owner” as defined in section 7 of the Act and in the context of section 7 of the Unit Titles Act 1972. It was concluded that a body corporate does not come within the definition of “owner” as set out in section 7. While the territorial authority cannot require a notice of change of use from the Body Corporate, it could accept such a notice on the basis that the Body Corporate was acting as an agent on behalf of the proprietors (the owner). The identification of who is the owner of the building also has ramifications for the territorial authority under other sections of the Act.

Conclusions and background information

- It was noted that the territorial authority had received objections from a number of owners (whom I believe to be the proprietors of individual apartments) to the change of use. The territorial authority also queried whether all the owners of the building should also have been served with copies of the determination application.
- The territorial authority also stated that it did not accept that dispensations have been granted in relation to the number of disabled apartments that are required in the building. In addition, the New Zealand Fire Service had not yet been advised of the change of use. According to the territorial authority, the

Body Corporate had not passed a resolution in respect of the change of use or the building consent for the common areas of the building, as had been requested by the territorial authority.

4.3 The additional response from the applicant

4.3.1 On 19 December 2006, the applicant's legal advisers forwarded a response to the submission made by the territorial authority. I summarise this response as follows:

- The applicant did not accept that notification under section 115 can impact on who is required to give notice of a change of use under section 114. The question of ownership is only relevant in identifying who is to be given notice by the territorial authority. It does not relate to whether or not the territorial authority is required to give notice.
- The Regulations state that "change of use" means the change of use from one category of use to another within the ambit of schedule 2 only. Originally, the apartments were classified as SR and the corridors as IA (Intermittent Low) use. At present, while some of the apartments are now classified as SA, the corridors are still an IA classification. Accordingly, neither the owner of the common area nor the territorial authority has any obligations under section 114 pertaining to the change of use of some of the apartments.
- It is not accepted that, as the use of part of the building had changed, the use of the common areas had also changed. There cannot be the kind of "implied change" of the use of areas that the territorial authority advocates. The use of individual parts of the building can only be determined in accordance with the Regulations and the use of the common areas is unchanged from its original IA classification.
- The territorial authority's suggestion that its obligation under section 115 to notify the owner "*alters who is required to give notice under [section] 114 is illogical*". If the territorial authority is concerned about who should be notified, then it can search the relevant register of titles. The territorial authority appears to accept that, where a change of use of one unit will not change the use of other units or the common areas, it does not require a notification from the owner of the common areas under section 114. However, it would still have to notify all owners under section 115. Section 114 only requires notification from the owner of that part of the building whose use is changing and not from every owner.
- If the territorial authority is satisfied that there is compliance with the Building Code, then it must give notification of the change of use under section 115(b). Compliance with the Building Code is not dependent on the territorial authority being notified by the Body Corporate of an intention to change the use of the common areas. The applicant does not accept that it is relevant for the territorial authority to consider whether the Body Corporate has consented to the change of use. As the Body Corporate applied for building consents, which have been granted in relation to disabled access in common areas, consent to the change of use has been established.

- The applicant was of the opinion that the territorial authority's concerns relating to interpretation of section 114 in the context of prosecutions, "*would lead to unjust and unjustifiable results*" for the Body Corporate.
- The applicant agreed that the Body Corporate is legally capable of notifying a change of use of the common areas on behalf of all unit owners. However, the alternative of requiring notice from every unit title owner would be in most instances practically unachievable.

4.4 The Body Corporate Secretary's submission

- 4.4.1 In a letter to the Department dated 22 January 2007, the Body Corporate Secretary confirmed that on a number of occasions all owners have received correspondence on the issue of the "change of use" to the serviced apartments. The Owners' Committee for the Body Corporate had also discussed this matter and were in support of the change of use. The Committee did not believe that the common areas would be changed by definition. It was also noted that the Committee had been supplied with the submissions from both parties.

5. The legislation

5.1 The following are the sections of the Act that are relevant to this determination:

7 Interpretation

owner, in relation to land and any buildings on the land,-----

- (a) means the person who---
- (i) is entitled to the rack rent² from the land; and
- (ii) would be so entitled if the land were let at a rack rent...

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
 - (b) to extend the life of a building that has a specified intended life; or
 - (c) to subdivide land in a manner that affects a building.
- (3) A person commits an offence if the person fails to comply with subsection.
- (4) A person who commits an offence under this section is liable to a fine not exceeding \$5,000.

115 Code compliance requirements: change of use

An owner of a building must not change the use of the building

- a) in a case where the change involves the incorporation in the building of 1 or more household units where household units did not exist before, unless the territorial authority gives the owner written notice that the territorial authority is satisfied, on reasonable grounds, that the building, in its new use, will comply,

² The rack rent is a rent amounting to the full annual value of the land.

- as nearly as is reasonably practicable, with the building code in all respects; and
- (b) in any other case, unless the territorial authority gives the owner written notice that the territorial authority is satisfied, on reasonable grounds, that the building, in its new use, will
- [(i) comply, as nearly as is reasonably practicable, with every provision of the building code that relates to either or both of the following matters:
 - (A) means of escape from fire, protection of other property, sanitary facilities, structural performance, and fire-rating performance;
 - (B) access and facilities for people with disabilities (if this is a requirement under section 118); and]
 - (ii) continue to comply with the other provisions of the building code to at least the same extent as before the change of use.

176 Interpretation

Meaning of party

In sections 177 to 190, **party**, in relation to a determination means any or all of the following persons affected by the determination

.....

- (c) the owner;

178 Requirements for application for determination

- (2) The applicant must give a copy of the application for a determination to every other party named in, or affected by the application, either before or immediately after the application is given to the chief executive.

5.2 The following provisions of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations are relevant to this determination;

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.

Schedule 2: Uses of all or parts of buildings

Uses related to sleeping activities		
Use	Spaces or dwellings	Examples
SC (Sleeping Care)	spaces in which people are provided with special care or treatment required because of age, or mental or physical limitations	hospitals, or care institutions for the aged, children, or people with disabilities
SD (Sleeping Detention)	spaces in which people are detained or physically restrained	care institutions for the aged or children and with physical restraint or detention, hospitals with physical restraint or with detention quarters, detention quarters in police stations, prisons
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, wharenu i
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
IA (Intermittent Low)	spaces for intermittent occupation or providing intermittently used support functions—low fire load	car parks, garages, carports, enclosed corridors, unstaffed kitchens or laundries, lift shafts, locker rooms, linen rooms, open balconies, stairways (within the open path) ³ , toilets and amenities, and service rooms incorporating machinery or equipment not using solid-fuel, gas, or petroleum products as an energy source

6 The first draft determination

6.1 I prepared a draft determination that I wished to forward to the parties. In order to obtain a list of all the registered unit holders of the property, I had to direct an enquiry to Auckland Legal Services Ltd who forwarded a complete list of all the registered owners on 2 April 2007. I subsequently forwarded copies of the draft determination to the applicant, the territorial authority, and all the other individual unit owners on 7 April 2007.

6.2 Both the applicant and the territorial authority accepted the draft.

³ Open path: That part of an *escape route* (including dead ends) not protected by *fire* or *smoke separations*, and which terminates at a *final exit* or *exitway*.

- 6.3 I also received a total of 51 responses to the draft from other unit titleholders. Out of these, 34 accepted the draft and 17 did not.
- 6.4 Those unit owners who did not accept the draft had varying concerns, some of which were common to various owners. I summarise below the main concerns:
- A belief that misleading initial information had been provided to some owners prior to their purchase of a unit.
 - The lack of information from the Body Corporate as to the change of use.
 - The “anti-social” behaviour exhibited by some of the transient guests.
 - The amenity, security, noise control, and access facilities within the property had deteriorated.
 - The “new use” was illegal and had not been accepted by 100% of the unit holders.
 - The additional fire risks imposed by the change of use.
 - The provision for disabled access was inadequate taking into account the change of use and the initial discussion pertaining to an access ramp.
 - The hotel use was “continuous and extensive” rather than “intermittent”.
- 6.5 The applicant’s legal advisers wrote to the Department on 16 May 2007 on behalf of the applicant, noting that the majority of the other title holders who did not support the draft determination did so for reasons not relevant to the matters considered in the determination. However, there were two other matters raised that could arguably be considered. The first of these related to the fire safety of the building and the second to the claim that any change of use required acceptance by all the owners. The applicant noted that as regards the first matter, the building had been inspected by the territorial authority and had been found to be code-compliant. Nor could the applicant find any support for the second matter in either the Act or any other legislation. The applicant submitted that, as the responses received did not give any relevant reasons to require any changes to the draft, it should now be issued as a final determination.
- 6.6 On 22 May 2007 the territorial authority’s legal advisers wrote to me acknowledging receipt of the responses from other unit holders that I had distributed to the parties. The legal advisers commented that:
- The territorial authority was concerned at the approach expressed in paragraph 9.6 of the draft determination (see paragraph 8.6 in this determination) in which I said that receipt by the territorial authority of a notice under section 114 was not a condition precedent to that territorial authority issuing a notice under section 115. The advisers were concerned that while such an approach might be appropriate when there is a change of use of an entire building, the situation is less clear when there is a change of use of a part or parts of a building. Unless a notice under section 114 was given to the territorial authority by the owner each time a change of use was proposed, the territorial authority would not have an accurate record of the changes of use that had actually occurred, or whether the building complied with the Building Code.

- it is arguable from the draft determination that a territorial authority can issue a section 115 notice without having received a notice under section 114 from the owner, and still prosecute the owner for not having given notice. This “*seems to make a nonsense of the offence provisions*”.
- 6.7 On 23 May 2007 the applicant’s legal advisers wrote to me commenting on the letter dated 22 May 2007 to me from the territorial authority’s legal advisers. The advisers submitted that there was no substance to the two concerns raised.
- 6.8 I considered the submissions and commented as appropriate in the second draft determination, which was forwarded to the parties on 31 May 2007.

7. The second draft determination

7.1 The applicant’s and territorial authority’s responses

- 7.1.1 In a letter to the Department dated 22 June 2007, the applicant’s legal advisors responded to the second draft and stated the current situation regarding the building to be as follows:

“In order for the Nautilus to be code compliant in its new use (as a building that contains units that are both SA and SR) the following works, which accorded with instructions the territorial authority has given to its legal advisors, still need to be carried out:

The establishment of accessible toilets in the recreation area.

The construction of a ramp.

The marking out of accessible car parks.

The Applicant has applied for, and has been granted, the building consents required to carry out the above works.

The works are being carried out.

Once the works are completed the building will be code compliant.”

The legal advisors also suggested changes to paragraphs 3.2, 10.10(a), 10.12, and 11.1 of the second draft determination.

- 7.1.2 The territorial authority’s legal advisors wrote to the Department in response to the second draft determination on 21 June 2007. In summary, the legal advisors submitted that:

- building consents for the accessible units, ramps, accessible toilet in the recreation area, and the marking out of the accessible car park spaces have been applied for, and issued to, the applicant (in relation to the accessible units) and to the Body Corporate
- as the building work to make units 513 and 1010 accessible has been completed, code compliance certificates are in the process of being issued for this work
- the remaining building work as described above will be commenced once the final determination has been issued
- agreement has been reached with the applicant to ensure the on-going availability of the accessible units in the serviced apartment pool

- in relation to paragraphs 10.10 and 10.2 of the second draft, only the individual units in the serviced apartment pool, together with the common areas in association with those units, have to be code-compliant in the new use
- concerning the change of use that has taken place in some of the units, they are code compliant in respect of fire-safety. The building in its current mixed use of SR and SA will not be code-compliant until the ramps, the accessible toilet, and the accessible car parks have been completed.

The legal advisors also suggested amendments to paragraph 10.10, 10.12, and 11.1 of the second draft.

7.2 The other parties' responses

- 7.2.1 The Department has received a total of 60 individual responses to the second draft from the other parties. I summarise the number of these responses as follows:

Acceptances		Non-acceptances	
Individuals	No of Units	Individuals	No of units
35	36	25	27

The totals for non-acceptance include 8 individuals and 10 units that were included in a group response to the first draft and which were referred to in the second group of responses. From the above table it can be seen that, relating to the responses received, the percentage of individual owners accepting the draft is 58% compared with 42% of individual owners rejecting the draft. When comparing the number of units within the alternatives, the percentages are 57% and 43% respectively.

- 7.2.2 The dissenting responses to the second draft determination basically reiterated the concerns set out in paragraph 6.4. In addition, it was also submitted that:
- the determination requires 100% approval of all unit owners, not just the majority
 - rule 2(f) of the Body Corporate rules requires the unanimous approval of all persons entitled to vote at a general meeting of the Body Corporate. As unanimous approval was not obtained for the construction of an exterior ramp, its construction could not proceed
 - the Department has written the determination on the basis of a “narrow legal view”.

- 7.2.3 I have considered the second group of submissions from the applicant, the territorial authority, and the other parties, and have amended the determination where appropriate.

7.3 Additional submissions

- 7.3.1 A group of apartment owners, who have formed an association (“the association”), wrote to the Department on 9 August 2007. The association noted that at a meeting with the territorial authority it had ascertained that this determination only relates to two units, both of which are currently “for sale”. The association could not agree that

“intermittent use” could be appropriate for the “35 to 75 units presently being managed as a HOTEL”. Nor did it accept that the building could remain “functioning without compliance”. They stated that the territorial authority had assured the association that if the determination found that the territorial authority had to accept the change of use for the two units in question, it could not be signed off, as there were other accessibility areas that are non-compliant.

- 7.3.2 The association also set out a list of the 12 accessibility areas that it considered were either lacking or were deficient. It was also noted that some of the serviced units have fire-travel distances longer than the 25 metres required under the Fire Code. Substantial alterations will have to be made to the building before the territorial authority could approve its amended use.
- 7.3.3 The applicant’s legal advisors responded to the association’s submission in a fax to the Department dated 10 August 2007. The legal advisors submitted that the main issues raised by the association were not matters that are relevant to this determination. It was also noted that the work required to be carried out to make the building code-compliant has been agreed between the applicant and the territorial authority. In addition, they stated the fire safety matters had been approved by an independent expert and the territorial authority is satisfied that the relevant fire safety codes have been complied with.
- 7.3.4 A trust that owns three of the units (“the trust”) wrote to the Department on 11 August 2007 in response to the submissions of the association and the applicant. The trust stated that they had lost some of the “quiet enjoyment” of the building, however it was accepted that the determination process was restricted to the consideration of “narrow points of law”. They submitted it could be appropriate for the matter to be heard in the High Court and the Department should be pro-active in this process. The trust considered that the building is non-compliant in its present form.
- 7.3.5 The association faxed a further response to the Department on 12 August 2007, which questioned the applicant’s opinion as to the relevance of the association’s submission. The association considered one of its members to be qualified to comment on accessibility matters.
- 7.3.6 In an email of 13 August 2007, the legal advisors for the territorial authority noted that the territorial authority considered that the letter from the association did not raise any new determinable issues. The territorial authority would further investigate the 12 accessibility matters raised by the association.
- 7.3.7 In a second email of 14 August 2007, the territorial authority’s legal advisors noted that the territorial authority had undertaken an inspection of the building in regard to the accessibility matters. As a result of this inspection, the territorial authority was satisfied that, provided the applicant undertakes the building work including the ramps, accessible toilet and car park marking, the building *will be code compliant for sleeping accommodation for those units* listed in the territorial authority’s letter of 21 June 2007. The territorial authority did not wish to make any other comments regarding the draft determination.

8. Discussion

- 8.1 Referring to section 7 of the 2004 Act, I note that the definition of an “owner” includes owners of buildings. Section 3(2)(a) of the 1991 Act stated that the term “building” included “any part of a building”. While this definition is not included in

the current Act, I am prepared to accept that, by implication, the term “building” includes “parts of buildings”. Changing the use of part of a building results in a change of use of the whole building and triggers a requirement for the whole building to “comply as nearly as is reasonably practicable” in its new use, or in this case, its new uses (section 115).

- 8.2 I am of the opinion that the registered proprietor of an individual unit in the complex is the person entitled to its rack rent. However, in regard to the common property of the complex, I believe that the person entitled to its rack rent is all of the unit owners of the complex as tenants in common in proportion to their respective shares of unit entitlement.
- 8.3 Taking the above considerations into account, I am of the opinion that an individual unit owner within the complex is a party entitled to make an application for a determination as he or she can be defined as an “owner affected by the determination”. This being so, I also determine that an owner of an individual unit has the status under section 114 to notify a change of use.
- 8.4 I turn now to the question of whether the body corporate can have a role in this determination. In accordance with the Unit Titles Act, a body corporate is a separate legal entity with the duties and powers set out in that legislation. However, with one exception that is not relevant to the matters for consideration, I am of the opinion that a body corporate has no rights of ownership in any parts of the units or the common property. Accordingly, while a body corporate can, with appropriate authority from the unit owners, act in relation to the common property, it cannot be an “owner” as defined in section 7.
- 8.5 After careful consideration of the very detailed submissions made on behalf of the parties and the discussion set out in paragraphs 8.1 to 8.4 above, I have reached the conclusion that the applicant has the status as an “owner” to give notice of a change of use under section 114. However, I do not accept that the Body Corporate is also an “owner” in this context.
- 8.6 I am also of the opinion that a notification under section 114 does not equate to a permission to change the use of a building. As set out in section 114(2) an owner proposing to change the use of a “building” (which I have concluded to include “parts of a building”) must give the territorial authority “written notice”. However, I can find nothing in the Act that makes the receipt by a territorial authority of notice under section 114 a condition precedent to the issuing by that territorial authority of a notice under section 115. Accordingly, I take the view that a territorial authority is entitled to give notice under section 115 if the territorial authority:
- knows that a building is undergoing a change of use, and
 - is satisfied on reasonable grounds that, in its new use, the building will comply with the Building Code to the extent required by section 115.

This view does not diminish the importance of an owner giving a notice to the territorial authority under section 114, especially in those cases where there is no other notification (such as an application for building consent) to alert the territorial authority to the proposed change of use. I agree with the territorial authority’s concern (see paragraph 6.6) that the territorial authority will have some difficulty in maintaining accurate records of a building’s uses, or remaining aware of whether the building complied with the Building Code, if owners do not use the section 114 mechanism. Nothing in this determination alters that fact.

The territorial authority has suggested that the view about section 115 expressed above “*could make a nonsense of*” the offence provisions by leaving it open for a territorial authority to prosecute an owner under section 114, despite it having issued a notice under section 115. The matter of when or if a territorial authority should prosecute an owner who has committed an offence under section 114 is not a matter for determination in this case.

- 8.7 After consideration of the Regulations, as the previous use was “IA” and the new use is also “IA”, I have reached the conclusion that there has not been any change of use of the common areas. The territorial authority has also accepted the provisions made in regard to access and fire safety features. Accordingly, I have accepted the arguments made on behalf of the applicant in this matter.
- 8.8 Turning to the provisions of sections 177 to 190, I consider that these provisions anticipate that there may be persons other than the person making an application under section 177 who are affected by a determination. In this case, it would be all the other individual owners of the complex. As provided by section 178(2), a copy of the application for this determination should be forwarded to all the other individual owners as they are parties affected by the application for this determination.
- 8.9 I emphasise that this determination is concerned only with the exercise by the territorial authority of its relevant powers under the Act. Nothing in this determination affects the obligations of the applicant or the other parties under the Unit Titles Act and the Body Corporate rules.
- 8.10 I conclude that, in terms of the issues raised in the application (see 4.1.1 above):
- (a) The parties agree, and therefore I accept, that the building, in its new use, complies with the Building Code to the extent required by section 115, once the alterations that are subject to building consents are completed to the territorial authority’s satisfaction.
 - (b) There has been no change of use of the common areas.
 - (c) If there had been a change of use of the common areas the fact that the territorial authority had not received a notice to that effect under section 114 would not prevent the territorial authority from issuing a notice under section 115.
 - (d) If notice under section 114 was required, it could not be given by the Body Corporate, which is not the “owner” as defined in section 7.
- 8.11 As described in paragraphs 6.4, 7.2.2, 7.3.1, 2, 4 and 6, those unit holders who did not accept the draft determination have raised concerns as to the change of use and consider that the determination has not addressed major issues that are affecting the enjoyment of their properties. In addition, views have been expressed as to the actions of other individual owners and the Body Corporate, and as to the narrow legal approach that has been taken in the preparation of this determination.
- 8.12 While I understand these concerns, I must apply the law as set out under the Act to the matters that are the subject of this determination. That is the process that I have followed in making my decision and, consequently, the matters considered in this determination are restricted to the issues set out in paragraph 4.1.1, which are, in the main, procedural matters. Accordingly, I have not discussed the merit or otherwise of the points raised in paragraphs listed in paragraph 8.11, as I consider that the

determination forum is not an appropriate place to address them. I have been requested to advise how the matters that fall outside the ambit of this determination can be addressed. All I can suggest is that individual owners should obtain their own legal advice as to how to address their concerns.

- 8.13 Some of the unit holders have also expressed concerns as to the compliance of the building in its current use in the context of fire safety and disabled access. Both the applicant and the territorial authority are in agreement that the building is code-compliant at this time with regard to fire safety. Both these parties also agree that the building will comply with disabled access requirements once the alterations are completed. This was further confirmed by the territorial authority in its final submission of 14 August 2007.

9. The decision

- 9.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:
- an owner of an individual unit has the status under section 176 to apply for a determination and under section 114 to notify a change of use
 - the territorial authority's powers under section 115 extend to the issuing of a notice under section 115, whether or not it has received a notice under section 114. Accordingly, I modify the territorial authority's decision not to issue such a notice and direct that once the territorial authority is satisfied on reasonable grounds that the alterations that are subject to building consents are completed to its satisfaction, a notice be issued.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing
on 20 August 2007

John Gardiner
Manager Determinations