



Determination 2011/069

Regarding conditions to a building consent and the use of a building at 155 Tenby Street, Wanaka

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1. The matters to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Building 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 parties to the determination

- 1.2 The parties are:
- (a) the owner of the building, Wanaka Gym Limited (“the applicant”)
 - (b) Queenstown Lakes District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

The dispute

- 1.3 This determination arises from a dispute about the use of a building and building work that has been undertaken by the applicant.

The matters to be determined

- 1.4 In respect of the matters to be determined, the applicant has requested I determine a large number of issues. I have summarised the issues the applicant has requested be determined as follows (refer also to paragraph 3.5):

Building consent matters and the intended use of the building

- (a) that the authority incorrectly delayed processing various applications for building consents in 2000 and 2003, incorrectly applied requirements relating to the intended use of the building in 1995 and 2000, incorrectly applied visitor accommodation/ SA² requirements in 2000, 2003, 2003 - 2006 and 2008, and refused to issue building consents in breach of court orders and Ombudsman recommendations (refer to paragraph 1.10)
- (b) that the authority was incorrect to impose ‘visitor accommodation’ conditions on the residential building consent issued in 2005 (refer to paragraph 1.6.1)
- (c) that the house is a single household unit and residence, has always been a house and does not provide visitor accommodation, and the use of the building has not changed as pre 2000 resource consent applications show the use was residential and commercial (refer to paragraph 1.7 and 1.10)

The notice to fix issued in 2008

- (d) that the authority shouldn’t have issued the notice to fix in 2008 and that it was not possible to comply with the notice to fix as the authority was withholding information as to what needed to be done to comply with the notice to fix (refer to paragraph 1.11)

The dangerous building notices in 2003 and 2008

- (e) that the authority was negligent in refusing to give information about the canvas sheeting that formed the divisions between rooms and therefore incorrectly issued the 2003 dangerous building notice (refer to paragraph 1.12)

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

² Acceptable Solution C/AS1 Schedule 2 Uses of all or parts of buildings: Uses related to sleeping activities – SA (Sleeping Accommodation)

- (f) that the authority incorrectly issued dangerous building notices in 2003 and 2008 including (refer to paragraph 1.12):
- the circumstances that gave rise to the 2003 and 2008 notices
 - that the authority was negligent in inspections in that it had not had a problem with the ceiling prior to issuing the 2008 dangerous building notice
 - that the authority should not have put an injunction on the building in 2008 because it refused to inspect the work that was done to address the dangerous building notice
 - that an injunction should not have been put on the whole building when only part of the building had a dangerous building notice issued
 - that the authority kept the dangerous building notice on the house when it was no longer occupied

Building Code compliance matters

- (g) whether the building work complies with the Building Code (refer to paragraph 1.6.2)

1.5 I note that the Building Act is particular about the matters for which a party can apply for a determination, and many of the issues the applicant has raised are not matters that I can determine under the Building Act.

1.6 I therefore consider the following are the matters for determination³:

1.6.1 Matter 1: The issue of the building consent in respect of the provisions for fire safety

Whether the authority was correct to issue the building consent with conditions not required for a for a single household unit (refer to paragraph 1.4 (b)).

1.6.2 Matter 2: The Building Code compliance of the building work

Whether the building work (described in paragraph 8.1) complies with the Building Code (refer to paragraph 1.4 (g)).

1.7 Although I do not consider that the use of the building is a matter that is determinable under the Building Act, I have had to consider the use of the building (refer to paragraph 1.4 (c)) in order to inform my decisions about other matters. The use of the building informs the issue of the building consent, in respect of the conditions put on the consent, and the Building Code compliance of the building work.

The matters that can not be determined

1.8 The matters that I have accepted as appropriate for determination are relevant to resolving the current issues in dispute between the applicant and the authority regarding the compliance of the building with the Building Act. However, as I have discussed below, I do not propose to consider the historical issues the applicant has raised that will have no impact on the current compliance of the building and what is required to resolve outstanding building compliance issues.

³ In terms of sections 177(a), 177(b)(i) and 177(b)(iv) of the Building Act (prior to 7 July 2010).

- 1.9 It is not a function of the determination process to apportion blame between the parties as to what has occurred in the past. The primary function of the determination process is to provide an expert view on matters of building compliance. Some of the decisions on which the applicant has sought a determination are more than 21 years old and have been overtaken by subsequent events including a change in the use of the building, further significant building work and various court proceedings involving injunctions and prosecutions. Many of the issues the applicant has sought to have determined overlap with matters that have been extensively considered by the Courts.⁴ It is simply not appropriate for the determination to reopen any of these matters. I understand there is an appeal pending regarding the convictions entered in the District Court on 19 April 2010. If there are still matters the applicant is aggrieved about concerning the notice to fix and the dangerous building notices then those are matters that should be drawn to the attention of the Court at the appropriate time.
- 1.10 ***The building consent matters and the intended use of the building (refer to paragraph 1.4 (a) and (c))***
- 1.10.1 The applicant has asked that I make a determination in respect of the ‘refusal to issue residential building consents at various times 2000-2005, 2008-present’; a request that was subsequently stated by the applicant as ‘... [the authority’s] refusal to issue consents and refusal in breach of court orders’.
- 1.10.2 Under the Building Act, the refusal to issue a building consent means that under section 50 of the Building Act or section 35 of the former Act, the authority formally refuses to grant a building consent for building work and gives reasons for the refusal.
- 1.10.3 As the building consents have either been granted or are suspended and awaiting further information to be provided by the applicant, I do not consider the authority has refused to grant the consents.
- 1.10.4 I understand the applicant’s concerns are in respect of the delays in the issue of the building consents, specifically the applications for building consents made in 2000 and 2003. The applicant stated in the submission dated 14 November 2010 (refer to paragraph 3.4):
- The [authority] should not have evicted my tenants in 2000 and should have processed my building consent within the normal time. This has been stated by the Ombudsman ... You must not let the [authority] away with having failed to process my consent and with the incredible harassment that I suffered subsequently. It is not appropriate for [an authority] to make mistakes, fail to own up to them, and subsequently spend years engaging in harassment and entrapment.
- 1.10.5 In respect of the application for building consent made in 2000, matters relating to the authority’s processing of this building consent were investigated by the Office of the Ombudsmen (refer to paragraph 2.3). The Ombudsman made a recommendation in this matter and it would not be appropriate for this determination to revisit the matters that have already been dealt with by the Ombudsman.

⁴ Including *The Wanaka Gym Limited v Queenstown Lakes District Council* (High Court, Dunedin, Judge Panckhurst, 24 November 2006, CRI 2006412000036); *Queenstown Lakes District Council v Wanaka Gym Limited* (District Court, Christchurch, Judge Neave, 18 November 2008, CIV 2003002000265) ; *Queenstown Lakes District Council v Wanaka Gym Limited* (District Court, Queenstown, Judge Kellar, 11 March 2010 ,CIV 2003002000265); *Queenstown Lakes District Council v Wanaka Gym Limited* (District Court, Queenstown, Judge Holderness, 19 April 2010, CRN 08059500156[etc]); *Queenstown Lakes District Council v Wanaka Gym Limited* (District Court, Queenstown, Judge Holderness, 17 December 2010, CRN 08059500156[etc]).

- 1.10.6 In respect of the application for a building consent made in 2003, before issuing a building consent, the authority is required to be satisfied on reasonable grounds that the building work will comply with the Building Code. The authority may require further reasonable information in respect of the application. The authority requested further information be provided in respect of this building consent application in a letter dated 26 September 2003.
- 1.10.7 Any alleged breach of court orders is not a matter that can be determined.
- 1.10.8 The issues the applicant has raised concerning the intended use of the building occurred more than 10 years ago. Since that time, the applicant gave an undertaking to the Court in 2003 that was then incorporated in an order of the Court regarding the intended use of the building and the matters that would be addressed in the building consent that the applicant had applied for (particularly, that the upgrading in respect of fire protection would be carried out to comply with the SA purpose group). It is also important to keep in mind that the “intended use” of a building as that term is defined in section 7 of the Act is not the subjective view of the owner of the building but an objective assessment of the use to which the building can be put based on its physical design and attributes. There has been significant building work undertaken since 2000 and this work has changed the use of the building. The determination considers the current “intended use” of the building based on the relevant building consent and the current configuration of the building. I do not consider it appropriate for the determination to consider the “intended use” of the building prior to the Court order in 2003 or to consider the basis on which the Court made that order.
- 1.10.9 The applicant has also raised issues concerning the visitor accommodation requirements since 2000. As noted above, the determination considers the conditions on the building consent issued in 2003 and the appropriateness of the subsequent work undertaken further to that building consent, some of which include visitor accommodation requirements. However, as with the matters relating to “intended use”, it is not appropriate for the determination to consider visitor accommodation matters prior to the 2003 Court order.
- 1.11 ***Compliance with the notice to fix (refer to paragraph 1.4 (d))***
- 1.11.1 The applicant’s contention that the notice to fix was impossible to comply with because the authority was withholding information is not a matter that I can determine under the Building Act.
- 1.11.2 I note that the contraventions of the Building Act and the Building Code stated on the notice to fix are matters that have been the subject of a prosecution and in addition I understand that these matters are still before the Courts (refer to paragraph 1.9). In the circumstances, I do not consider it appropriate for the determination to consider these matters further.
- 1.11.3 The applicant has asserted the requirements of the notice to fix could not be addressed and therefore I note the following:
- The notice to fix provisions of the Building Act are broadly worded and empower an authority to issue a notice to fix if the authority ‘considers on reasonable grounds that a specified person is contravening or failing to comply with this Act or regulations.’ The notice must require the person ‘to remedy the contravention of, or comply with’ this Act.

- As the statutory requirements for a notice to fix do not prescribe specific detail that must be included in the notice, an authority has a degree of discretion around what to include in the notice. Therefore, the authority must have reasonable grounds for issuing the notice, and must decide on the appropriate terms to be included in the notice. The authority is required to consider the matters listed in section 165 and the circumstances relating to the building work in deciding what the appropriate terms are for a notice to fix.
- As I have described in many previous determinations, if a notice to fix is required for non compliance with the Building Code, it should be issued requiring the owner to bring the building work into compliance with the Building Code, but not specifying how any defects are to be fixed. It is not for a notice to fix to specify how defects are to be remedied and the building work brought into compliance with the Building Code. That is a matter for the owner to propose and for the authority to accept or reject.
- It is particularly important when authorities are carrying out enforcement action that they do not cross the line and become an adviser to the owner of the building. It is for the owner to take their own advice on what is required to remedy the matters in a statutory notice or to bring a building into compliance with the Building Act. It would not be appropriate for an authority to undertake such a role as an adviser to a building owner.

1.12 ***The dangerous buildings notices and injunction (refer to paragraph 1.4 (e) and 1.4 (f))***

- 1.12.1 The injunction was issued by the Courts and the terms of the injunction is not a matter that can be considered by a determination. I also note that the matters surrounding the dangerous building notices have also been the subject of a prosecution and in addition I understand that these matters are still before the Courts (refer to paragraph 1.9).
- 1.12.2 The alleged negligence and withholding information by the authority is not a matter that I can determine under the Building Act.

Issues surrounding the use of the building

- 1.13 It is clear that the underlying dispute between the parties is the use of the building. I discuss the use of the building in paragraph 5.13 to 5.17, however, at this point I observe that the applicant appears to be of the view that the use of the building in terms of the Building Act is established by a variety of matters, including Resource Management Act issues such as the zoning of the building and any District Plan rules, and the treatment of the building by the local Council for rates. I therefore note the following about the use of the building in terms of the Building Code:

- Buildings, under the Building Code, are classified according to type under seven categories as classified uses. These classified uses are defined in Clause A1 of the Building Code. The Building Code prescribes functional requirements for buildings and performance criteria with which buildings must comply in their intended use. The Building Code's functional requirements and performance criteria are driven by the classified use categories.
- The type of rates paid for a property, resource consents held, and the District Plan zoning of a property have little relevance to the use of a building in terms of the Building Act.

- The three month period for short term and long term accommodation referred to by the applicant is a District Plan requirement and also has little relevance to the use of the building with respect to determining compliance with the Building Code.
- Residential accommodation and visitor accommodation are not terms used in the Building Act or Building Code, and nor are they classified uses or terms used in the Building Regulations.

The process of the determination

- 1.14 In making my decisions, I have considered the submissions of the parties and other evidence in this matter.
- 1.15 I note that the history of this dispute also involves Resource Management Act issues. While I have considered the history of this case, I have no jurisdiction under other enactments and this determination considers only building matters relating to the Building Act and its regulations.
- 1.16 In this determination, I have referred to the following legislation, the relevant parts of which are included in full in the Appendix:
- The Building Act (refer to paragraph 1.1)
 - The Building Act 1991 (“the former Act”).

2. The background

- 2.1 The building was originally a joinery factory that was subsequently converted into a gymnasium, with living quarters at the rear of the building. The building has a simple rectangular form incorporating a suspended timber floor, and is timber framed with a large timber structure supporting the roof.
- 2.2 The activity for which the building was used, and the legality of the use under the Resource Management Act, has been in dispute between the parties since the mid 1990s.
- 2.3 The applicant applied to the authority for a building consent in 2000 to alter the building. The authority requested further information about the proposed building work and further plans were subsequently provided. The building consent was not issued. The processing of this building consent was subject to an investigation by the Office of the Ombudsmen as described in paragraph 1.10.5.
- 2.4 In August 2003, the authority issued a notice under section 65 of the former Act as it deemed the building to be dangerous. It appears that at this time, the original building had been divided up into small bedrooms with some rough timber frames lined with plastic tarpaulin to create partitions. 24 beds were set out in the original building. The authority was of the view that it had not approved this use, and it considered that there were issues with the building being used in this way regarding the egress from the building and the fire separations between the bedrooms.
- 2.5 The authority sought an interim injunction from the Court that was heard and granted on 4 September 2003. The order stated ‘An interim injunction is granted restraining the [applicant] from using or permitting to use [the building] for a use for which the building is not safe or has adequate means of escape from fire.’ The interim injunction was subsequently varied by the Court (on application by the applicant) to state ‘That as [the authority’s] concerns are such that for the prevention of loss of

- life, the premises should not be used at all until all safety issues have been addressed to the satisfaction of [the authority].’
- 2.6 The applicant then re-applied for a building consent (number 031148) (“the building consent”) on 8 September 2003, proposing to split the building into a lounge and 12 bedrooms. A project information memorandum for the proposed building work was issued on 17 September 2003, stating the intended use was ‘communal residential’ and noted that for the building to be used for this activity, the applicant would be required to obtain a resource consent.
- 2.7 On 24 September 2003, the Court held a hearing for a permanent injunction. The applicant’s undertaking was issued as an order of the Court and included requirements for the fire safety provisions of the building to be upgraded to the standard that meets a purpose group SA rating, and requirements for each party around the processing of the building consent, and stated ‘Upon consent being granted, the [applicant] will forthwith carry out alterations to the standard required by the Building Code. Upon completion... the question of the use to which the building is then put may be reviewed by the Court.’
- 2.8 On 26 September 2003, the authority wrote to the applicant requesting further information about the proposed building work and raised issues about the information provided, demonstration of Building Code compliance, the proposed occupancy of the building, and a fire safety report detailing how the fire safety provisions of the building would meet the requirements of the Building Code.
- 2.9 The applicant provided further information to the authority on 3 December 2003, including a fire safety report dated 26 November 2003. It is unclear the extent of the information received, and whether all of the questions raised by the authority were addressed. The building consent was subsequently issued on 21 July 2005 and stated an intended use of ‘Change of use to residential’. The building consent was granted under the Building Act, although the application for building consent was under the former Act.
- 2.10 An inspection relating to the installation of windows was carried out in April 2006 by the authority.
- 2.11 The authority issued an abatement notice under the Resource Management Act on 30 May 2006 for contravention of the District Plan rules.
- 2.12 The authority inspected the building work on 10 June 2008, recording a number of items that had either been undertaken without building consent or had not been completed in accordance with the building consent, a number of items that did not comply with the Building Code, and that the building was being used for a use of accommodation, which the authority did not consider safe. A notice under section 124 of the Building Act dated 25 June 2008 was subsequently issued to the applicant. Following the issue of the section 124 notice, there was a significant amount of correspondence between the parties, with the parties disputing the issues and building work required to be done to the building.
- 2.13 On 18 July 2008 the authority issued a notice to fix (“the notice to fix”) to the applicant stating contraventions of section 128 and section 40 of the Building Act and a number of contraventions of the Building Code.
- 2.14 Following an application by the authority, the Court issued an injunction on 8 August 2008 preventing the building being used for residential activities including

sleeping. It appears the applicant applied unsuccessfully to the Court to have the injunction rescinded.

- 2.15 The authority laid charges against the applicant under the Building Act relating to breaches of the notice to fix and the dangerous building notice. A hearing was held in Court in late 2009.
- 2.16 The Department received an application for a determination dated 9 February 2010; however the application fee was not received until 19 February 2010.
- 2.17 In an application to the authority dated 10 December 2009, that was received by the authority on 11 February 2009, the applicant applied to amend the building consent to create a firecell to the foyer area of the original building. The authority requested further information from the applicant, and the application to amend the building consent has not yet been granted by the authority.
- 2.18 On 11 March 2010, the Court varied the injunction order dated 8 August 2008. The variation to the injunction was to allow the applicant to occupy the building as a single household unit.
- 2.19 On 19 April 2010, the Court found all the charges described in paragraph 2.15 had been proved against the applicant. I am advised that an appeal has been lodged, but is yet to be heard, against the conviction and sentencing.

3. The submissions

- 3.1 Over the course of the determination, I received many submissions by the parties including submissions about the determination, and a large amount of background information about previous events. The submissions from the parties are summarised in paragraphs 3.3 to 3.7.
- 3.2 I also held a hearing in Wanaka on 2 November 2010 at the request of the applicant. In attendance at the hearing were the applicant, a representative of the authority and its legal adviser, and representatives of the Department. Further information was presented to me at and subsequent to the hearing by both parties, including submissions about the determination and a large amount of background information. Both the parties spoke at the hearing and the evidence presented enabled me to amplify or clarify various matters of fact, and clarify the background to the dispute. I also conducted a site visit, which allowed me to observe the building and inspect the issues of Building Code compliance in dispute between the parties.
- 3.3 Due to the number of submissions and counter submissions received during the course of this determination, I have recorded the submissions received from each of the parties and summarised the material that has been presented to me, including the information presented to me at the hearing.
- 3.4 The following submissions were received from the applicant:

Date	Submission
19 February 2010	Application for determination
1 March 2010	Email
16 July 2010	Email
19 July 2010	Email
21 August 2010	Email

4 September 2010	Email
6 September 2010	Email
8 September 2010	Email
6 October 2010	Email
28 October 2010	Email
1 November 2010	Email
12 November 2010	Email
14 November 2010	Email
13 December 2010	Bundle of documents
20 December 2010	Email
22 December 2010	Email
3 January 2011	Email
10 January 2011	Email
27 May 2011	Email
31 May 2011	Email

3.5 The applicant submitted the following (in summary):

- The building has been used for residential accommodation continually since 1993, and while part of the building was used as a gymnasium from 1993 to 2000, from then onwards, the building has been used only as residential accommodation for long term tenants and is operating as a single household unit; the relevant criteria for a single household unit (as opposed to visitor accommodation) are met, as the tenants all eat together, and were close (i.e. they continued to live together as a group after they left the house).
- The authority should not have been able to require the building to meet the fire safety standards of an SA purpose group, as the building is a residence and the authority should be required to issue residential building consents for this building in the future.
- None of the issues raised in the notice to fix should have been able to be raised by the authority, and the only reason it was able to issue the notice to fix was because the authority had forced the building consent to include provision for an upgrade to meet the fire safety standards of an SA purpose group.
- The determination must cover all the matters requested for determination, including in general what a single household unit is (refer to summary of matters requested for determination in paragraph 1.4).
- The change of use from commercial to residential occurred in 1992 as we commenced to live there then and this was consolidated in 1995 when the plans detailed a mixed commercial and residential building consent.
- Definitions of a single household unit have been extensively discussed in two previous determinations, and both cases were considered in the light of whether they were other than household units i.e. whether they were visitor accommodation or a boarding house; and the house does not meet the criteria for any other category than a single household unit.

- The authority refused to process the building consent, not because the information wasn't complete, but because it required information that was necessary for a visitor accommodation building consent.
- There has never been any evidence produced the house is not a single household unit.
- The wording and substance of the draft determination is not what was asked to be determined; a determination requesting the status of the house at different points of time is required, including for each point of time; the use of the building, whether the house was a detached dwelling, and whether the authority was right to insist on SA building consent application.
- The house is not in any way similar to the examples for a group dwelling as we are a single group of people. The analysis implies that the Department believes the use of the house is similar to purpose group SH in all but the occupant load.
- There should be a choice as to whether the house is a detached dwelling or not and it is not for the Department to force the house to be a particular type of building.

3.6 The following submissions were received from the authority:

Date	Submission
21 April 2010	Email
13 May 2010	Bundle of documents
28 May 2010	Email
23 August 2010	Email
6 September 2010	Email
14 September 2010	Email
6 October 2010	Email
29 October 2010	Email and bundle of documents
1 November 2010	Email
15 November 2010	Bundle of documents
24 December 2010	Email
25 January 2011	Email
18 March 2011	Email
31 May 2011	Emails

3.7 The authority submitted (in summary):

- The applicant does not appear to understand the specific matters which can be determined under the Building Act, and has raised several areas as concerns that are clearly not applicable for determination under the Building Act.
- There is no 'magic number' of occupants for a single household unit in the Building Act.
- An application for the building consent was made in 2000, and subsequent drawings and revisions were made after that. The reason for the time delays in the issue of the building consent was through the failure of the applicant to

provide correct building design information to allow the completion of the processing of the application.

- The undertaking was not agreed to between the parties, it was opposed by the authority. It was an undertaking made to the court by the applicant, which was made an order by the court. This order of the court required the applicant to make a building consent application, and for the authority to process that application, which was precisely what happened. The granting of the consent was delayed because the applicant did not provide the further information requested.
- A fire safety report showing intended compliance with the SA performance requirements was submitted by the applicant initially to the court injunction process (refer to paragraphs 2.5 and 2.7). This report provided a means for the applicant to show the court the actions that the applicant intended to take. This report was volunteered to the court, and was included as a part of the application for building consent.
- The building consent was issued only for a single household residential use, albeit with fire design to a higher level than required for such a single household.
- The draft determination and the injunction proceedings and court proceedings have all verified that the use to which the building was being used was not as a single household unit.
- The authority disagrees with the much of the content of the applicant's submissions.
- Several assessments have been made over recent years of how the applicant has chosen to operate the property, and it has been found that it has not been as a single household unit, and the appropriate regulatory steps to achieve safety and compliance have therefore been taken.

3.8 Draft determinations were issued to the parties for comment on 20 August 2010 (the first draft determination) and 6 October 2010 (the second draft determination). Both parties provided submissions in response to both draft determinations, which I have included in paragraphs 3.5 and 3.7.

3.9 A third draft determination was issued to the parties on 2 March 2011. The applicant did not accept the third draft determination and the authority accepted the third draft determination, subject to a number of minor amendments.

4. Framework for considering the regulatory decisions of the authority and the Building Code compliance of the building

4.1 Of the matters that are determinable under the Building Act, the applicant has requested a determination considering the issue of the building consent and the code compliance of the building. As described in paragraph 1.6, the matters to be determined are:

- whether the authority was correct to issue the building consent with conditions not required for a single household unit
- whether the building work complies with the Building Code.

4.2 This determination therefore turns on the building work that was proposed and the issue of the building consent.

4.3 In order to inform these matters, I must first consider:

- How does the Building Act apply to this situation (refer to paragraph 5)? Specifically:
 - What are the provisions of the Building Act applying to building work?
 - What are the provisions of the Building Act applying to building consents?
 - What are the provisions of the Building Act applying to existing buildings?
- How does the Building Code apply to this situation (refer to paragraph 6)? Specifically:
 - What is the classified use of the building in terms of Clause A1?

4.4 I have set out some of these matters in this determination in greater detail than would otherwise have been the case as there seems to have been some confusion among the parties and their advisers about the appropriate classified uses for determining compliance with the Building Code and the relationship between these classified uses and the purpose groups in the fire safety compliance document, C/AS1.

5. The application of the Building Act – building work, building consents and existing buildings

General

5.1 Of the matters that are determinable under the Building Act, the applicant has requested a determination considering the issue of the building consent and the code compliance of the building. In order to inform these matters, I must consider the provisions of the Building Act that apply.

5.2 The applicant has contended that the authority was incorrect to ‘impose visitor accommodation conditions’ on the ‘residential’ building consent issued in 2005. I have therefore considered, as a matter to be determined, whether the issue of the building consent, with provisions relating to fire safety not required for a single household unit, was correct.

5.3 The starting point for considering the requirements building work must comply with are the requirements in sections 16, 17 and 18 of the Building Act. These provisions specify the purpose of the Building Code, which is to prescribe the functional requirements for buildings and the performance criteria buildings must comply with in their intended use (section 16), that all building work must comply with the Building Code (section 17), and that building work is not required to achieve performance criteria in excess of those prescribed in the Building Code (section 18).

5.4 There are a range of further provisions in the Building Act that expressly set out different requirements that building work must comply with in particular situations and sections 17 and 18 must be read subject to these provisions.⁵ For example, there are particular requirements in the Building Act regarding the standard for building

⁵ Section 17 only applies “to the extent required by this Act” and section 18(2) states section 18 is subject to “any express provision to the contrary in any Act”.

work that alters an existing building (section 112), building work in respect of a building with a specified intended life less than 50 years (section 113), building work that involves a change of use (section 115), building work that includes a subdivision that affects a building (section 116A), and building work in respect of certain public buildings (section 118).

- 5.5 In respect of buildings for which an owner is intending to change the use of the building, section 114 of the Building Act requires that an owner of a building must give written notice to the territorial authority if the owner proposes to change the use of a building. Section 115 requires that an owner of a building must not change the use of the building:
- (b) 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.

The application of the change of use provisions

- 5.6 The application for the building consent was for alterations to part of the gymnasium section of the building, to create a lounge and 12 bedrooms by the construction of internal walls (based on the plans provided to the authority). This was building work that required a building consent and section 49 required the authority to be satisfied that the provisions of the Building Code would be met if the building work was properly completed in accordance with the plans and specifications that accompanied the application. The Building Act required that the building work must comply fully with the Building Code.
- 5.7 As to the other provisions of the Building Act that applied (refer to paragraph 5.4), the applicant disputes that the use of the building has changed. The applicant appears to be of the view that a change of use has not occurred because there was a 'mixed residential and commercial consent' in 1997. In an affidavit dated 23 September 2003, the applicant states:

23. My house is not visitor accommodation and the [authority] has been aware of this since I informed the [authority] that I intended to use the house as a residence three years ago. As the underlying zoning is a residential one, all I needed to do is to inform the [authority] in writing that I intended the property to revert to being a residence, and this was duly done.

and in a submission dated 6 October 2010:

The change of use from commercial to residential occurred in 1993 – as we commenced to live there then – and this was consolidated in 1995 when we put in our plans detailing mixed commercial/residential building consent...

The use of the building did not change at all. It has been residential since 1993 and solely residential since 2000. Fire separations were not required between the bedrooms as our use was purely residential.

- 5.8 I note that the Building Act has specific requirements when an owner proposes to change the use of a building, and to “change the use” is a term that is specifically defined in The Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 (refer to paragraph 5.10).
- 5.9 As to whether the use of the building changed, I note:
- different parts of a building can have different uses
 - while part of the building was residential from approximately 1993, part of the building was a gymnasium until 2000, and this was the approved use of this part of the building
 - the gymnasium part of the building was the part that was altered by the building work to provide bedrooms
 - the last approved use of this part of the building, before the building work, was a gymnasium.
- 5.10 The Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 define change the use as:
- ... 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.
- 5.11 The Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 categorise uses of buildings as uses related to:
- crowd activities
 - sleeping activities
 - working, business, or storage activities
 - intermittent activities.
- 5.12 Therefore, in terms of the change of use regulations:
- the old use was a use related to crowd activities (a gymnasium)
 - the new use was a use related to sleeping activities
- and therefore, this change constituted a change of use under the Building Act (at the time the building consent was issued in 2005).

Conclusion

- 5.13 In terms of the view I have reached about the change of use of the building in paragraphs 5.6 to 5.12, I have considered the evidence provided to me by the parties about the change of use of the building.
- 5.14 It is clear that a change of use occurred (refer to paragraph 5.9), however the timing of the change of use from the approved use is unclear. However:
- the building work proposed by the building consent altered the gymnasium part of the building to provide bedrooms
 - it is this building work proposed by the building consent that triggered the change of use requirements

- the building consent was issued and carried out under the Building Act (although it was applied for under the former Act).
- 5.15 Given the consented building work altered the gymnasium part of the building to provide bedrooms, and the building consent was issued under the Building Act in July 2005, I have considered the change of use in terms of this Act. The Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 came into force on 31 March 2005.
- 5.16 I conclude that the change from a use related to crowd activities to a use related to sleeping activities constituted a change of use under the Building Act.
- 5.17 I observe that this change triggered a requirement for the applicant to meet the requirements of section 114 and 115 of the Building Act. While it appears the applicant notified the authority of the applicant's intention to change the use of part of the building, the upgrade requirements of section 115 also require:
- the building in its new use to comply as nearly as reasonably practicable with every Building Code provision that relates to means of escape from fire, protection of other property, sanitary facilities, structural performance, fire rating performance, and access and facilities for people with disabilities
 - the building in its new use to comply with the other provisions of the Building Code to at least the same extent as before the change of use.
- 5.18 The authority should have responded to the applicant definitively stating these requirements.

6. The application of the Building Code – classified use

General

- 6.1 Further to paragraph 5.1, in order to make a determination about the issue of the building consent and the code compliance of the building, I must consider the classified use of the building in terms of the Building Code. This is because questions regarding code compliance of particular buildings and building consents are dependent on a building's classified use.
- 6.2 The applicant has stated that the Department can not '... decide that my house is visitor accommodation requiring a visitor accommodation building consent when I am currently not using it as anything but a house, and when I do not have a resource consent to use it as anything but a house.' The applicant is also of the view that the 'tenancy agreements specify very clearly that the house is a single household unit, that we are operating as such, and that my lawyer has seen my contracts.' However, as discussed below, the classified use of a building is determined largely by a building's physical configuration and attributes, and/or the plans and specifications for proposed building work, not only the particular function that an owner may be using a building for at any particular point in time.

Clause A1 of the Building Code

- 6.3 The Building Code sets out the functional requirements and performance criteria that buildings must meet in their "intended use" (section 16 of the Act). The "intended use" of a building must be matched to its classified use. Clause A1 of the Building Code, classifies buildings under seven categories called classified uses. Therefore, the performance criteria that a building must meet, depends on its classified use.

6.4 The use categories that relate to residential buildings, which people live in are:

Type	Description
2.0 Housing	Applies to building 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.
3.0 Communal residential	Applies to building or use where assistance or care is extended to the principal users. There are two types:
3.0.2 Community service	Applies to a residential building or use where limited assistance or care is extended to the principal users. Examples: a boarding house, hall of residence, holiday cabin, [back country hut], hostel, hotel, motel, nurses' home, retirement village, time-share accommodation, a work camp, or camping ground.
3.0.3 Community care	Applies to a residential building or use where a large degree of assistance or care is extended to the principal users. ...

The evidence about the classified use

6.5 I have considered the classified use categories of residential type buildings that people live in, and compared this with the design of the building including its intended use and the evidence provided by the applicant about the intended use of the building and how the building was being used, and I note the following:

- the plans and specifications provided as a part of the building consent application in 2003 shows the main sleeping area is designed to sleep up to 20 people and consists of 12 bedrooms, many of which are twin bedrooms
- the application for a building consent states the intended use of the house as residential
- with changing circumstances over the period of 1993 to 2008, the house had between 0 and 19 tenants living at the house, with each tenant required to live in the building for a three months minimum stay
- evidence provided by the applicant includes:
 - A statement from the applicant dated 16 July 2005, which states:
 - 2. I have a very large building that needs quite a few people to make its way. Six people only pays the mortgage and does not allow me to make any money at all from the property. ...
 - A memorandum of counsel for [the applicant] dated 16 August 2008 confirms on 8 August 2008 there were 19 tenants living in the building
 - A statement from the applicant dated 14 November 2010, which states:
 - From 1993-1997 or so we had mostly four tenants. In 1997 for one single season we had around eight tenants, as was our right with the resource consent we had at the time ... In 2000 we had four tenants ... 2000-2002 we did not have any tenants at all ... In 2003 after we informed the [authority] we would divide the building up ... [we] did not have more than

17 people altogether, and not more than 13 tenants. Between 2003 and 2005 we had few tenants ... Between 2005 and 2006 we still have relatively few tenants ... In 2007 – [2008] very slowly we began at last to be able to have a normal situation and for the very first time actually fill our rooms with tenants. In 2008 we had 13 tenants, the first time since 2003 that we had had a large number of tenants. The others were wwoofers, of which we had an unusually large number ... The sleeping cell of the house is only allowed to sleep 20 tenants as per the fire report on my 2005 consent and we have never exceeded this number.

- A statement from the applicant dated 6 October 2010, which states:

In actual fact, the average numbers of tenants during the off season are 2-3, the average numbers during the summer are 6-7, and it is only during the winter that we have had larger numbers. The highest number of tenants we have ever had is 19 and as that is in 12 bedrooms that is certainly not excessive.
- A statement from the applicant's fire engineer dated 10 November 2000, which states:

[The applicant] is keen to resolve the immediate issue that relates to the [notice] and the occupation of the building ...

[The applicant] also advises that the dwelling have been leased to a group of persons who are living in the rear section (as a group).

6.6 Based on the design of the building and the evidence provided by the applicant about the intended use of the building, and how the building was being used through the time period of the building consent applications and issue of the building consent, I have come to the conclusion that the classified use of the building in terms of Clause A1 of the Building Code is closest to a group dwelling, in the broader category of Housing, as it is '... a building or use where groups of people live as one large extended family' (refer to paragraph 6.4).

6.7 In concluding the classified use of the building is a group dwelling use, by having considered the design of the building and the evidence provided by the applicant about the intended use of the building, how the building is being used, and how the building was being used through the time period of the building consent applications and issue of the building consent I also note I am of the view that:

- the classified use category for this building is not community service, as assistance or care is not extended to the users of the house
- the classified use category for this building is not detached dwelling, as the classified use description of detached dwelling is

... a building or use where a group of people live as a single household or family.

and examples given are:

a holiday cottage, boarding house accommodating fewer than 6 people, dwelling or hut.

And I do not consider the building is used in a way that is comparable to this definition that contains an express limit of 6 persons who may be accommodated in a detached dwelling. This number is significantly lower than the 20 persons the building has been designed to accommodate.

- 6.8 The applicant submitted that the tenants are not “groups” of people as they live as one large family. However, I do not think the term “groups” should be interpreted narrowly as requiring evidence of distinct “groups” of people. Groups of people could encompass people undertaking similar work together, people of different nationalities who live together in groups, or groups of people in particular relationships. The classified uses in the building code are necessarily broad as there are only three categories relating to residential housing where there is no care provided. The other two categories concerning detached dwellings and multi-unit dwellings both relate to a “single household or family” or “separate households or families”. The reference in the group category to people living “as one large extended family” better fits the use of this building than these other two categories.

Conclusion

- 6.9 I am satisfied, based on the design of the building for the building consent application and the evidence presented by the applicant, that the classified use of the building is a group dwelling use.

Matter 1: The issue of the building consent in respect of the provisions for fire safety

7. Discussion

The Building Code requirements for the building work and the existing building

- 7.1 I have considered the Building Code requirements at the time the building consent was issued.
- 7.2 In terms of the issue of the building consent, it is the requirements for fire safety to this building that are principally in dispute between the parties, and in particular, the requirements for fire rating performance and means of escape from fire.
- 7.3 The Building Act, and the former Act, provides for an authority to request further information in respect of building consent applications. Section 34(2) of the former Act states:
- A territorial authority may, within the prescribed period, require further reasonable information in respect of the application and, for the purposes of this Act, the prescribed period shall be deemed to have been suspended until the further information is received by the territorial authority.
- 7.4 The authority, in processing the building consent application, requested further information from the applicant about the building work and change of use in a letter dated 26 September 2003. The authority requested:
- [item 7] A comprehensive fire report for the entire building is required. This needs to show compliance with the New Zealand Building Code.'
- 7.5 As the alterations to the building constituted a change of use, the building work was required to comply fully with the Building Code, and the building in its new use was required to comply as nearly as reasonably practicable with every Building Code provision that related to means of escape from fire and fire rating performance.

- 7.6 The classified uses have different features that in turn determine the fire safety requirements of the Building Code, in respect of Clauses C2 Means of escape and C3 Spread of fire. For a group dwelling use, the requirements are more onerous, and there are additional requirements than for a detached dwelling use.
- 7.7 As described in paragraph 7.5, the building was required to comply with the performance requirements of Clauses C2 and C3 and the building in its new use, had to comply as nearly as is reasonably practicable with these requirements.
- 7.8 Clauses C3.3.2 and C3.3.4 provide for the provision of fire separations between certain spaces within buildings and the sealing and subdividing of concealed spaces where necessary. These are additional requirements to those required for a detached dwelling use.
- 7.9 It is clear that the Building Code has more onerous and additional requirements for a group dwelling use than for a detached dwelling use. It is also clear that the alterations, which were a change of use to the building, triggered requirements for fire safety be upgraded.
- 7.10 Therefore, I consider that the issue of the building consent, with provisions relating to fire safety that were more onerous than those required for a detached dwelling use or single household unit was correct.
- 7.11 Of course, as noted in the applicant's submissions, the building consent would have made no reference to a "group dwelling use" as the consent that had been applied for was for a "residential" use and further fire safety requirements had been added pursuant to the Court order following the applicant's undertaking to the Court that the building would be upgraded to the standard of purpose group SA.
- 7.12 However, it is my view that for the purposes of complying with the Building Code, that undertaking was in excess of what was required by the Building Code. A group dwelling requires a lower level of fire safety features than the purpose group SA in C/AS1 the applicant undertook to comply with and which equates with the classified use of community service. This point is discussed in further detail below.

Commentary about the application of the C Clauses of the Building Code and C/AS1

- 7.13 I understand that the building work with respect to the provisions for fire safety has been largely completed in accordance with the applicant's fire safety report dated 26 November 2003 and therefore the building consent. However, given the extensive background to this case, I have provided a commentary about the application of the C Clauses of the Building Code and the acceptable solution C/AS1 to assist the parties.
- 7.14 I note the applicant's fire safety report states:
- [The applicant] has elected to upgrade the [dwelling to a standard required of Visitor Accommodation notwithstanding, the intent to continue with residential occupation.
- We advise that we have carried out an analysis based on drawings supplied and site inspections the fire report is based on the Building Code Approved Documents C/AS1 and that subject to compliance with the attached documents ... the building will meet the requirements for fire safety as prescribed in C/AS1.
- 7.15 The fire safety report provided by the applicant as a part of the building consent documentation applies the C/AS1 requirements for an SA purpose group. The fire safety report cites C/AS1 as a means of compliance with the Building Code, although

I note that the term Visitor Accommodation used in the fire safety report is neither a purpose group in terms of C/AS1 nor a classified use in terms of the Building Code.

- 7.16 In assessing the fire safety provisions for any building using C/AS1, the first requirement is to determine the purpose group within C/AS1 and then to match this up with the most appropriate classified use in the Building Code. Unfortunately, the solutions in C/AS1 do not line up exactly with the classified uses contained in the Building Code. Thus, there is no C/AS1 solution that matches the Building Code requirements for a building with the classified use of a group dwelling.
- 7.17 C/AS1 uses the following purpose groups for intended uses relating to sleeping activities (refer to C/AS1 Table 2.1 appended):
- SC – spaces in which principal users because of age, mental or physical limitations require special care or treatment.
 - SD – spaces in which principal users are restrained or liberties are restricted.
 - SA – spaces provided for the use of people who will be transient and reside for a temporary period, typically not more than 90 days, or where limited assistance or care is provided for the principal users.
 - SR – attached and multi unit residential dwellings.
 - SH – detached dwellings where people live as a single household or family.
- 7.18 Adequate fire safety provisions for purpose groups are based on a risk assessment using C/AS1 (refer to C/AS1 subparagraph 2.1.2) that is assessed according to:
- The number and mobility of the occupants (occupant load).
 - The activities undertaken within the building.
 - The nature of the building materials and contents.
- This assessment allows each building or part of a building to be categorised in a purpose group, which is the basis for establishing the fire safety precautions required.
- 7.19 It is for an owner to come to a decision as to their preferred solution to satisfy the relevant Building Code requirements for fire safety. An owner may prefer to employ a C/AS1 solution for reasons of design, materials and familiarity, or may propose an alternative solution (that could include some C/AS1 components) to satisfy the fire safety requirements of the Building Code.
- 7.20 I have considered the perceived risk of the building as described in subparagraph 2.1.1 of C/AS1 (refer to paragraph 7.18), and compared this to the perceived risk of purpose groups SH and SA.
- 7.21 In terms of the perceived risk for a group dwelling, the maximum number of persons who could use the subject building, based on the buildings physical configuration and attributes, is higher than predicted by purpose group SH, although the nature of the activities undertaken within the building are similar to purpose group SH. The maximum number of persons who could use the building aligns better with purpose group SA.
- 7.22 There are also Building Code Clauses relating to fire safety that apply to a building with a classified use of group dwelling that do not apply to a building with a classified use of detached dwelling i.e. the Building Code has both more onerous and

additional fire safety requirements for a group dwelling use than for a detached dwelling use (refer to paragraph 7.8 and 7.9). Therefore the C/AS1 solution for SH would not satisfy the Building Code requirements for this building.

- 7.23 The fire safety report provided by the applicant as a part of the building consent documentation utilises the C/AS1 solution for SA purpose group and this purpose group corresponds to the classified use of community service. The Building Code has more onerous fire safety requirements for a community service use than for a group dwelling use.
- 7.24 Although the perceived risk is higher for a community service use than for a group dwelling, and the requirements of the C Clauses of the Building Code are more onerous, I note that this solution is an appropriate proxy for this building, given there is no C/AS1 solution for a group dwelling. An owner may prefer to employ a C/AS1 solution with additional fire safety requirements for reasons of design, materials, familiarity, and knowledge that the solution is prescribed and must be accepted by a Building Consent Authority as complying with the Building Code. The other approach is to propose an alternative solution (that could include some C/AS1 components) to satisfy the fire safety requirements of the Building Code; but this has the potential disadvantages that the solution must be justified by the designer as establishing compliance with the Building Code and isn't accompanied by any certainty that it will be accepted by a Building Consent Authority as complying with the Building Code.
- 7.25 The applicant chose not to opt for a solution that more closely met the Building Code requirements for a building with the classified use of a group dwelling, but that may have required more complex design work in order to support the particular proposed solution.
- 7.26 The applicant now wishes to modify the consented fire safety provisions to the building to meet the applicant's objectives in terms of the use and usability of the building. This will require advice from a suitably qualified fire engineer to inform an alternative solution.

Fire safety solutions for a group dwelling

- 7.27 The solutions of the applicant's fire safety report provide for a higher level of fire safety compliance than strictly required by the Building Code's requirements for a building with the classified use of a group dwelling.
- 7.28 The acceptable solution C/AS1 provides one means of complying with the C Clauses of the Building Code, and a building built to this method is automatically deemed to comply with the Building Code. However, though it is one way it is not the only way of satisfying the requirements of the Building Code for fire safety in buildings. The applicant could have opted for a solution that more closely met the Building Code requirements for a building with the classified use of a group dwelling.
- 7.29 I note this may have required more design work in order to support the particular proposed solution but may have also better met the applicant's own intended use requirements for the building.
- 7.30 The applicant wishes to modify the consented fire safety provisions to the building. This will require advice from a suitably qualified fire engineer to inform an alternative solution.

- 7.31 I acknowledge that one of the significant issues for the applicant is in respect of the partition walls between the bedrooms that do not extend to ceiling height. The current configuration of these partition walls is in accordance with the applicant's fire safety report.
- 7.32 In my view, it will be possible for the applicant, with the advice of a suitably qualified fire engineer, to design an alternative solution that provides for the walls to extend to the ceiling, thus meeting some of the applicant's other objectives such as privacy to the bedrooms. However, the design will need to incorporate features and/or other measures that compensate for this and that contribute to fire safety in the building e.g. the number and reliability of fire alarms.
- 7.33 The Building Code, by being a performance-based code enables innovative and non-generic solutions that differ from those described in the Acceptable Solution. A suitably qualified fire engineer may be able to design a solution for the fire safety of the building that demonstrates Building Code compliance, while meeting the objectives of the applicant in terms of the use and usability of the building. Any proposed alternative solution must be supported by quantitative or qualitative evidence to show that the performance criteria of the relevant Building Code clauses will be met.

Matter 2: The Building Code compliance of the building work

8. Discussion

The items in dispute

- 8.1 Based on the information presented to me by the parties at the hearing, I understand the following items of building work are in dispute between the parties in respect of their Building Code compliance:
- the configuration of the ceiling
 - the configuration of the windows.
- 8.2 The hearing included a site visit (refer to paragraph 3.2), which allowed me the opportunity to inspect the building, with particular respect to these items of building work, and form a view about the Building Code compliance of the items.
- 8.3 The building work is an alteration to an existing building, undertaken by the applicant to improve the building. The extent of the Building Code obligations for the new building work is dependent on the scope of the building work being carried out. The Building Act requires that:
- any new building work must comply fully with the Building Code subject to any waiver or modification granted by the authority
 - after the alteration, the altered building, as a whole must:
 - comply as nearly as is reasonably practicable with the provisions of the Building Code that relate to means of escape from fire and access and facilities for people with disabilities
 - continue to comply with the other provisions of the Building Code to at least the same extent as before the alteration.

- 8.4 In terms of the process for applying for building consents (including amendments to building consents), I observe that sections 45(1)(b) and (c) of the Building Act require that the application for a building consent must include documentation that adequately describes the proposed work in accordance with the Building Act and its regulations.
- 8.5 A building owner is required to clearly show how the proposed building work will comply with the Building Code. Information must contain sufficient detail to give the building consent authority 'reasonable grounds' on which to make its decision. I note this applies to both applications for building consents, and amendments to building consents, including both minor and major changes.
- 8.6 The documentation and descriptions of the materials and methods that have been used are not easy to follow, and there is a lack of clarity about the scope and detail of the intended and completed work. There is a lack of basic information such as construction and finishing details and product information and this appears to have led to uncertainty and confusion regarding what was intended, how it was to be built and finished, and how Building Code compliance would be achieved.
- 8.7 However, I have considered the Building Code compliance of the ceiling and windows and formed a view, based on the information provided to me and my observations of the building work on site.

The ceiling

- 8.8 The ceiling configuration is foil faced flame retardant underlay to most areas of the ceiling, covering wool insulation held in place by wire mesh, and a further layer of foil faced, flame retardant underlay below the roofing material. The underlay and insulation is new building work, and the roofing material was part of the existing building.
- 8.9 Building Code Clause E2.3.5 requires:
Concealed spaces and cavities in buildings must be constructed in a way that prevents external moisture being accumulated or transferred and causing condensation, fungal growth, or the degradation of building elements.
- 8.10 Whilst the roofing material was part of the existing building, the new insulation and underlay must meet the requirement of Clause E2.3.5. The current configuration does not achieve this requirement. With the current configuration of the ceiling, water vapour would travel through the wool and condense on the cold foil that lies directly under the roofing. Although not the only means of compliance, E2/AS1 requires all profiled metal roofing to have an underlay installed. The underlay is required to be a paper-based underlay, with requirements for vapour, transmission, water resistance, and water absorption.
- 8.11 The applicant has proposed having the roofing material removed and a layer of building paper or roofing underlay installed. A further option the applicant may wish to consider is completing the bottom layer of foil faced underlay to form a complete vapour barrier to the underside of insulation, in order to prevent water vapour from entering the ceiling cavity.

The windows

- 8.12 The windows to the building were replaced in 2006 with double glazed PVC windows. On site, I observed the windows installed within larger existing openings in the exterior concrete block walls. Infill framing was treated to H3.2. The sections

of infill and the block walls were covered with 40mm polystyrene, which was finished with modified plaster.

8.13 Clause E2.3.2 requires:

Roofs and exterior walls must prevent the penetration of water that could cause undue dampness, damage to building elements, or both.

8.14 I note that no documentation has been provided to me about the detailing and construction of the windows. However, in terms of the Building Code compliance of the windows, it is my view that the construction meets the requirements of Clause E2. In this respect I note:

- H3.2 treated timber was used to construct the infill window frame
- the windows are self flashed
- the windows are installed into concrete block walls which already have head jamb and sill blocks
- if any water does enter the structure around the perimeter of the windows the consequences of failure to the building elements are not considered significant.

Conclusion

8.15 I am of the view that:

- the windows comply with Clause E2 of the Building Code
- the ceiling does not comply with Clause E2 of the Building Code.

8.16 On site I observed that building work had been carried out to the light well area of the building, although the work appeared to be incomplete. I observed that sheets of fibre-cement cladding were installed directly into the ground and I note that this does not meet the requirements of the Building Code.

8.17 I note that the notice to fix is now over two years old. If the authority considers a notice to fix necessary, it is appropriate that the notice to fix be updated to reflect the current situation. As I have described in many previous determinations, any notice to fix should be issued requiring the owner to bring the building work into compliance with the Building Code, but not specifying how any defects are to be fixed. It is not for a notice to fix to specify how defects are to be remedied and the building work brought into compliance with the Building Code. That is a matter for the owner to propose and for the authority to accept or reject.

8.18 The applicant should then, in consultation with a suitably qualified person, propose to the authority how the building work is to be brought into compliance with the Building Code, and carry out the work once approved by the authority. If the applicant wants to apply for a code compliance certificate, the applicant will need to apply to amend the building consent to reflect and record the variations to the building consent, and if there is building work not covered by the building consent as amended, the applicant should apply for a certificate of acceptance.

9. Decision

9.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:

- the authority's decision to issue the building consent with conditions included in respect of the provisions for fire safety is confirmed
- in respect of the matters of Building Code compliance in dispute between the parties, the configuration of the ceiling does not comply with Clause E2 of the Building Code.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 12 July 2011.

John Gardiner
Manager Determinations

Appendix A

10.1 The relevant provisions of the Building Act are:

16 Building code: purpose

The building code prescribes functional requirements for buildings and the performance criteria with which buildings must comply in their intended use.

17 All building work must comply with building code

All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.

18 Building work not required to achieve performance criteria additional to or more restrictive than building code

- (1) A person who carries out any building work is not required by this Act to—
 - (a) achieve performance criteria that are additional to, or more restrictive than, the performance criteria prescribed in the building code in relation to that building work; or
 - (b) take any action in respect of that building work if it complies with the building code.
- (2) Subsection (1) is subject to any express provision to the contrary in any Act.

44 When to apply for building consent

- (1) An owner intending to carry out building work must, before the building work begins, apply for a building consent to a building consent authority that is authorised, within the scope of its accreditation, to grant a building consent for the proposed building work.
- (2) An owner may make a series of applications for building consents for stages of the proposed building work.

45 How to apply for building consent

- (1) An application for a building consent must—
 - (a) be in the prescribed form; and
 - (b) be accompanied by plans and specifications that are—
 - (i) required by regulations made under section 402; or
 - (ii) if the regulations do not so require, required by a building consent authority; and
 - (c) contain or be accompanied by any other information that the building consent authority reasonably requires; and
 - (d) be accompanied by the charge fixed by the building consent authority; and

...
- (5) An application for an amendment to a building consent must be made as if it were an application for a building consent, and this section applies with any necessary modifications.

48 Processing application for building consent

- (1) A building consent authority must, within 20 working days after receiving an application for a building consent that complies with section 45,—
 - (a) grant the application; or
 - (b) refuse the application.
 - (2) A building consent authority may, within the period specified in subsection (1), require further reasonable information in respect of the application, and, if it does so, the period is suspended until it receives that information.
- ...

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 conducted in accordance with the plans and specifications that accompanied the application.

...

50 Refusal of application for building consent

If a building consent authority refuses to grant an application for a building consent, the building consent authority must give the applicant written notice of—

- (a) the refusal; and
- (b) the reasons for the refusal.

112 Alterations to existing buildings

- (1) A building consent authority must not grant a building consent for the alteration of an existing building, or part of an existing building, unless the building consent authority is satisfied that, after the alteration, the building will—
- (a) comply, as nearly as is reasonably practicable ... , with the provisions of the building code that relate to—
 - (i) means of escape from fire; and
 - (ii) access and facilities for persons with disabilities (if this is a requirement in terms of section 118); and
 - (b) continue to comply with the other provisions of the building code to at least the same extent as before the alteration.
- (2) Despite subsection (1), a territorial authority may, by written notice to the owner of a building, allow the alteration of an existing building, or part of an existing building, without the building complying with provisions of the building code specified by the territorial authority if the territorial authority is satisfied that,—
- (a) if the building were required to comply with the relevant provisions of the building code, the alteration would not take place; and
 - (b) the alteration will result in improvements to attributes of the building that relate to—
 - (i) means of escape from fire; and
 - (ii) access and facilities for persons with disabilities (if this is a requirement in terms of section 118); and
 - (c) the improvements referred to in paragraph (b) outweigh any detriment that is likely to arise as a result of the building not complying with the relevant provisions of the building code.

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 (2).

115 Code compliance requirements: change of use

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

- (b) 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, as nearly as is reasonably practicable, with the building code in all respects; and

- (c) 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.

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 authority may-
 - (a) put up a hoarding or fence to prevent people from approaching the building nearer than is safe:
 - (b) attach in a prominent place on, or adjacent to, the building a notice that warns people not to approach the building:
 - (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) prevent the building from remaining insanitary.

...

164 Issue of notice to fix

- (1) This section applies if a responsible authority considers on reasonable grounds that-
 - (a) a specified person is contravening or failing to comply with this Act or the regulations (for examples, the requirement to obtain a building consent); or
 - (b) a building warrant of fitness or dam warrant of fitness is not correct; or
 - (c) the inspection, maintenance, or reporting procedures stated in a compliance schedule are not being, or have not been, properly complied with.
- (2) A responsible authority must issue to the specified person concerned a notice (a notice to fix) requiring the person-
 - (a) to remedy the contravention of, or to comply with, this Act or the regulations; or
 - (b) to correct the warrant of fitness; or
 - (c) to properly comply with the inspection, maintenance, or reporting procedures stated in the compliance schedule.

...

165 Form and content of notice to fix

- (1) The following provisions apply to a notice to fix
 - (a) it must be in the prescribed form:
 - (b) it must state a reasonable time frame with which it must be complied with:
 - (c) if it relates to building work that is being or has been carried out without a building consent, it may require the making of an application for a certificate of acceptance for the work:
 - (d) if it requires building work to be carried out, it may require the making of an application for a building consent, or for an amendment to an existing building consent, for the work:
 - (e) if it requires building work to be carried out, it must require the territorial authority, the regional authority, or both to be contacted when the work is completed:

- (f) if it relates to building work, it may direct that the site be made safe immediately and that all or any building work cease immediately (except any building work necessary to make the site safe) until the responsible authority is satisfied that the person carrying out the work is able and willing to resume operations in compliance with this Act and the regulations.

...

177 Application for determination

A party may apply to the chief executive for a determination in relation to 1 or more of the following matters:

- (a) whether particular matters comply with the building code:
- (b) a building consent authority's decision to—
 - (i) issue, or refuse to issue, a building consent, code compliance certificate, or compliance schedule; or
 - (iii) refuse to allow, under section 52(b), an extension of the period during which building work must be commenced before a building consent lapses; or
 - (iv) issue a notice to fix; or
 - (v) refuse to allow, under section 93(2)(b)(ii), an extension of the period during which the building consent authority must decide whether or not to issue a code compliance certificate; or
 - (vi) amend a building consent, notice to fix, or code compliance certificate; or
 - (vii) impose a condition on a notice to fix or compliance schedule or to amend that condition:
- (c) a territorial authority's decision to—
 - (i) grant or refuse a waiver or modification of the building code under section 67; or
 - (ii) issue, or refuse to issue, a certificate of acceptance under section 96; or
 - (iia) grant or refuse an exemption from building consent requirements under paragraph (k) of Schedule 1; or
 - (iii) amend a compliance schedule under section 106 or section 107; or
 - (iiia) issue or refuse to issue a certificate for public use under section 363(A); or
 - (iv) issue, amend, or impose a condition on a notice to fix:
- (d) the exercise by a territorial authority of its powers under sections 112 and 115 to 116 (which relate to alterations to, or changes in the use of, a building) and the issue by a territorial authority of a certificate under section 224(f) of the Resource Management Act 1991:
- (e) the exercise by a territorial authority of its powers under section 124 or section 129 (which relate to dangerous, earthquake-prone, and insanitary buildings) or the failure to exercise those powers.

10.2 The relevant provisions of the former Act are:

34 Processing building consents—

- (1) The territorial authority shall grant or refuse an application for a building consent within the prescribed period.
- (2) A territorial authority may, within the prescribed period, require further reasonable information in respect of the application and, for the purposes of this Act, the prescribed period shall be deemed to have been suspended until the further information is received by the territorial authority.
- (3) After considering an application for building consent, the territorial authority shall grant the consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work was properly completed in accordance with the plans and specifications submitted with the application.
- (4) The territorial authority may grant a building consent subject to—
 - (a) Such waivers or modifications of the building code, or any document for use in establishing compliance with the building code, subject to such conditions as the territorial authority considers appropriate; and

(b) Such conditions as the territorial authority is authorised to impose under this Act or the regulations in force under this Act.

(5) In formulating any conditions under subsection (4) of this section, the territorial authority shall have due regard to the provisions of the building code and the matters set out in section 47 of this Act.

...

35 Issue of building consent–

(1) The territorial authority shall issue each building consent to the applicant in the prescribed form on the payment of any charge fixed by the territorial authority in relation to the consent ...

(1A) The territorial authority may attach to a building consent issued under subsection (1) of this section a certificate, in the prescribed form, to the effect that an authorisation under the Resource Management Act 1991, which, in the opinion of the territorial authority, will materially affect the building work to which the building consent relates has not yet been obtained, and that until that authorisation has been so obtained–

(a) No building work may proceed; or

(b) Building work may only proceed to the extent specified in the certificate.

(2) If the territorial authority refuses to grant a building consent it shall notify the applicant, in writing, specifying the reasons.

(3) The issue of a building consent shall not of itself–

(a) Relieve the owner of the building or proposed building, to which the building consent relates, of any duty or responsibility under any other Act relating to or affecting the building or proposed building; or

(b) Permit the construction, alteration, or demolition or removal of the building or proposed building if that construction, alteration, demolition, or removal would be in breach of any other Act.

64 Buildings which are deemed to be dangerous or insanitary–

(1) A building shall be deemed to be dangerous for the purposes of this Act if it is–

(a) A building which, in the ordinary course of events (excluding earthquakes), is likely to cause injury or death (whether by collapse or otherwise) to any persons in it or to persons on other property or damage to any other property; or

(b) A building which, by reason of fire hazard and occupancy of the building, would be likely to give rise to an almost certain loss of life in a fire.

(2) For the purposes of subsection (1)(b) of this section, a building shall be deemed to be dangerous by reason of fire hazard and occupancy [if a sufficient fire hazard exists, or] if there is a change of fire hazard or a change of occupancy sufficient to ensure that–

(a) In the case of a building with a high or abnormal fire hazard which was previously not used for human occupation, the building is now being used for human occupation; or

(b) In the case of a building which has an occupancy which involves one or more household units, other type of accommodation or residential purpose, the fire hazard is high or abnormal or has been increased to an unacceptable level; or

(c) In the case of a building used for the storage or processing of hazardous substances, the fire hazard is sufficient to endanger–

(i) Persons who work in the building or on property adjoining that land or building; or

(ii) Persons who are property adjoining that land or building; or

(e) In the case of a building in which the safety of people is directly dependent on the ongoing functioning of specified life safety features or systems, there is a failure of those features or systems being properly maintained.

(3) For the purposes of determining whether any building is of any of the categories described in subsection (2) of this section, the territorial authority may seek advice from such members of the New Zealand Fire Service as the Fire Service National Commander deems competent to give such advice, and, where such advice is sought, the territorial authority shall have due regard to that advice.

...

10.3 The relevant provisions of Schedule 1 of the Building Regulations (the Building Code) are:

Clause A1 – Classified Uses

2.0 Explanation

1.0.1 For the purposes of this building code buildings are classified according to type, under seven categories.

1.0.2 A building with a given classified use may have one or more intended uses as defined in the Act.

3.0 Housing

2.0.1 Applies to building 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.

4.0 Communal residential

3.0.1 Applies to building or use where assistance or care is extended to the principal users. There are two types:

3.0.2 Community service

Applies to a residential building or use where limited assistance or care is extended to the principal users. Examples: a boarding house, hall of residence, holiday cabin, [back country hut], hostel, hotel, motel, nurses' home, retirement village, time-share accommodation, a work camp, or camping ground.

3.0.3 Community care

Applies to a residential building or use where a large degree of assistance or care is extended to the principal users. ...

Clause C2 – Means of Escape

C2.3.1 The number of open paths available to each person escaping to an exitway or final exit shall be appropriate to:

- (a) The travel distance
- (b) The number of occupants
- (c) The fire hazard, and
- (d) The fire safety systems installed in the firecell.

C2.3.2 The number of exitways or final exits available to each person shall be appropriate to:

- (a) The open path travel distance,
- (b) The building height
- (c) The number of occupants,
- (d) The fire hazard, and
- (e) The fire safety systems installed in the building.

C2.3.3 Escape routes shall be:

- (a) Of adequate size for the number of occupants,
- (b) Free of obstruction in the direction of escape,
[[Limits on application] Performance C2.3.3(b) must not prevent a door that forms part of an *escape route* from being locked if the person who locks it is satisfied that no one is in that part of the *building* served by the *escape route* and that no one is likely to enter that part of the *building*, except in an emergency, without unlocking that door.]
- (c) Of length appropriate to the mobility of the people using them,
- (d) Resistant to the spread of fire as require by Clause C3 **Spread of Fire**,
- (e) Easy to find as required by Clause F8 **Signs**,

- (f) [Provided with systems for visibility during failure of the main lighting, as required by Clause F6 “Visibility in escape routes”, and
- (g) Easy and safe to use as required by Clause D1.3.3 Access Routes.

Clause C3 – Spread of fire

C3.3.1 Interior surface finishes on walls, floors, ceilings and suspended building elements, shall resist the spread of fire and limit the generation of toxic gases, smoke and heat, to a degree appropriate to:

- (a) The travel distance,
- (b) The number of occupants,
- (c) The fire hazard, and
- (d) The active fire safety systems installed in the building.

C3.3.2 Fire separations shall be provided within buildings to avoid the spread of fire and smoke to:

- (a) Other firecells,
- (b) Spaces intended for sleeping, and
- (c) Household units within the same building or adjacent buildings.

[[Limits on application] Performance C3.3.2 shall not apply to Detached Dwellings, or within household units of Multi-unit Dwellings.]

C3.3.3 Fire separations shall:

- (a) Where openings occur, be provided with fire resisting closures to maintain the integrity of the fire separations for an adequate time, and
- (b) Where penetrations occur, maintain the fire resistance rating of the fire separation.

C3.3.4 Concealed spaces and cavities within buildings shall be sealed and subdivided where necessary to inhibit the unseen spread of fire and smoke.

[[Limits on application] Performance C3.3.4 shall not apply to Detached Dwellings.]

C3.3.5 External walls and roofs shall have resistance to the spread of fire, appropriate to the fire load within the building and to the proximity of other household units and other property.

C3.3.6 Automatic fire suppression systems shall be installed where people would otherwise be:

- (a) Unlikely to reach a safe place in adequate time because of the number of storeys in the building
- (b) Required to remain within the building without proceeding directly to a final exit, or where the evacuation is excessive,
- (c) Unlikely to reach a safe place due to confinement under institutional care because of mental or physical disability, illness or legal detention, and the evacuation time is excessive, or
- (d) At high risk due to the fire load and fire hazard within the building.

C3.3.7 Air conditioning and mechanical ventilation systems shall be constructed to avoid circulation of smoke and fire between firecells.

C3.3.8 Where an automatic smoke control system is installed, it shall be constructed to:

- (a) Avoid the spread of fire and smoke between firecells, and
- (b) Protect escape routes from smoke until the occupants have reached a safe place.

C3.3.9 The fire safety systems installed shall facilitate the specific needs of fire service personnel to:

- (a) Carry out rescue operations, and
- (b) Control the spread of fire.

C3.3.10 Environmental protection systems shall ensure a low probability of hazardous substances being released to:

- (a) Soils, vegetation, or natural waters
- (b) The atmosphere, and
- (c) Sewers or public drains.

[[Limits on application] Performance C3.3.10 applies only to buildings where significant quantities of hazardous substances are stored or processed.]

Clause E2 – External Moisture

E2.3.2 Roofs and exterior walls must prevent the penetration of water that could cause undue dampness, damage to building elements, or both.

E2.3.5 Concealed spaces and cavities in buildings must be constructed in a way that prevents external moisture being accumulated or transferred and causing condensation, fungal growth, or the degradation of building elements.

E2.3.6 Excess moisture present at the completion of construction must be capable of being dissipated without permanent damage to building elements.

10.4 The relevant provisions of the Building (Specified Systems, Change the Use and Earthquake Prone Buildings) Regulations 2005 are:

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.

10.5 The relevant section of the Acceptable Solution C/AS1 is:

Part 2: Occupant Numbers and Purpose Groups

2.1 General

2.1.1 Designing a *building* to provide *adequate fire safety*, involves decisions on both the *construction materials* and layout needed to reduce the perceived risk to an acceptable level.

2.1.2 The risk is assessed according to:

- a) The number and mobility of the occupants (*occupant load*).
- b) The activities undertaken within the *building*.
- c) The nature of the *building materials* and contents.

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, wharehau multi-unit dwellings, flats, or apartments
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	
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