



Determination 2015/070

Regarding the refusal to issue a building consent for the change of use from commercial to residential of one level in a multi-level building at 72C France Street South, Eden Terrace, Auckland



Summary

This determination discusses the assessment required under section 115 when there is a change of use to only part of a building, particularly how the phrase “the building, in its new use” in section 115 applies and in respect of Building Code clause B1 Structure. The discussion also considers information provided by way of an Initial Seismic Assessment (ISA) in relation to that assessment, and the separate functions performed by authorities under section 112 and section 115.

1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to the determination are

- L Thomas and C Birch, the owners of Unit E, assigned Accessory Units 22-24 and 32-36, and all the associated common areas (“the applicants”)
- Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

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

- 1.3 I consider the owners of the other units in the building, represented by Body Corporate BC190929, to be persons with an interest in the matter.
- 1.4 This determination arises from the authority's refusal to grant building consent for the fit out of the top level of a commercial building to convert it to a household unit. The authority is of the view that a Detailed Seismic Assessment (DSA)² is required to identify and address any possible critical structural weaknesses in the building.
- 1.5 I therefore take the view that the matter for determination³ is the authority's exercise of its powers of decision in refusing to grant building consent on the basis that further information is required in relation to the building's structure (refer paragraph 3.14).
- 1.6 In this determination, I will refer to the following legislation, the relevant parts of which are set out in Appendix A.
- The *Building Act 2004* with its sections referred to as sections of the Act.
 - *Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005*, referred to as "the Regulations"
 - Building Code Clause B1 – Structure (Schedule 1, Building Regulations 1992).
- 1.7 In making my decision, I have considered the submissions of the parties, and the other evidence in this matter. I have not considered any other aspects of the Act or of the Building Code.

2. The existing building and proposed building work

- 2.1 The construction of the original building was carried out under a building permit issued on 22 November 1971 for an 'office & warehouse'. The building is a reinforced concrete frame structure with pre-cast concrete floor slabs and concrete masonry in-filled perimeter walls between the frames.
- 2.2 The building is a three storeys, with offices on the lower two levels and the upper level shared by Unit E and a roof top parking area. Unit E is a separate fire cell. It is my understanding that the current use (as defined in Schedule 2 of the Regulations) of Unit E is WL (working low).
- 2.3 The proposed building work is associated with a conversion of the existing upper level Unit (E) to an apartment of approximately 300 square metres, and takes up around 40% of the area of the upper level. The proposal is generally a fit out of Unit E and does not include any alterations to the building's structure.

3. The background

- 3.1 The applicants purchased Unit E (72C France Street South) on 5 October 2014, with the intention of converting it to an apartment. The title is freehold and includes eight car parks in the adjacent parking area on the same level.
- 3.2 On 8 December 2014 the applicants lodged a building consent application (no. B/2014/14866) with the authority for 'Refurbishment of top level into Apartment', noting that the change of use was to 'sleeping residential from working low'.

² A Detailed Seismic Assessment is a detailed quantitative appraisal undertaken by earthquake engineers to establish the seismic performance of a building.

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

- 3.3 On 10 December 2014 the authority wrote to an agent who was acting for the applicant, suspending the consent application and requesting further information. In regards to structure, the authority requested:
- b) This consent is to convert the top floor to an apartment and it will be a change of use as per the Building Act. The building must be fully compliant with all the clauses of New Zealand Building Code. The structure must be specifically checked for compliance with the current New Zealand Standards. In particular the seismic strength capacity of the building must be fully assessed and where necessary upgraded to 100% current Code requirements. The construction of stairs and seating of floors must be checked for full compliance in addition to checking lateral strength capacity.
 - c) Please provide a detailed seismic assessment report if the building is not constructed in 1990. If it was constructed in 1990 as stated in the application, evidence for that and a report addressing existing stairs and seating of precast floors (if applicable) is required.
- 3.4 On 11 December 2014 a structural engineer engaged by the applicants (“the structural engineer”) emailed the applicants, stating:
- From the [Initial Seismic Assessment] the building is above 67% NBS IEP⁴ rating therefore ‘low risk’ under the NZSEE guidelines. In changing the use from commercial to residential (structurally favourable for loading requirements) with no structural changes there should normally be no problems.
- 3.5 Following a review of the proposed floor plan, the structural engineer provided a formal letter to the authority dated 23 December 2014 regarding the building consent application. The engineer stated
- The changes shown on the proposed plan can be considered as non-structural and in accordance with AS/NZS 1170⁵, changing the use from commercial office to residential would result in the reduction of floor loading from 3.0kPa to 1.5kPa and reduce the overall design loading requirement of the building.
- Based on the proposed alterations shown on the proposed floor plan, we do not believe the alterations will affect the overall structural performance of the building.
- 3.6 The applicants engaged the services of a firm of consultants to provide a ‘fire and egress report’ for the proposed dwelling. That report, dated 28 January 2015 identified the proposed building work as an alteration and concluded that the dwelling consisted of a change of use and must comply fully with the requirements of section 115 of the Building Act.
- 3.7 On 23 January 2015 the structural engineer emailed the authority in regards the change of use, noting that the engineer’s understanding of the assessment required was not a full DSA but a more detailed approach to the Initial Seismic Assessment with calculations to identify if any key structural weaknesses are present.
- 3.8 On 12 March 2015 the authority wrote to a consultant acting on behalf of the applicant, confirming that the applicable section of the Act is 115(a) and not 115(b) and that the authority had to be satisfied on reasonable grounds that the building in its new use would comply as nearly as reasonably practicable with the Building Code in all respects. Accordingly, in respect of Clause B1, the authority had requested the applicants undertake a structural assessment of the building ‘to determine its structural weaknesses’ in order to make a decision whether structural strengthening is required or not. The authority went on to state that the extent of strengthening requirement would be decided by applying the test ‘as nearly as reasonably

⁴ % of New Building Standard using the Initial Evaluation Procedure (a nationally standardised engineering tool for carrying out an Initial Seismic Assessment)

⁵ Australian/New Zealand Standard AS/NZS 1170 Structural design actions

practicable' under section 115. The authority also noted it would support the applicants in applying for a determination on the matter.

- 3.9 On 1 May 2015 the applicants received a fee proposal for a DSA and a conceptual earthquake strengthening design from the structural engineer.
- 3.10 On 11 May 2015 the applicants received notification from the Body Corporate that permission was refused for access to parts of the building not owned by the applicants to do a DSA on the building.
- 3.11 On 17 June 2015 the authority wrote to the applicants with a request for further information. The authority confirmed that the building 'complies with the [authority's] current Earth Quake Prone policy', but that the strengthening issue had arisen as a result of the proposed change of use.
- 3.12 The structural engineer provided a report dated 18 June 2014, stating that he had prepared an Initial Seismic Assessment (ISA) using the IEP. The report concluded 'the potential earthquake rating for the building is 80% NBS.'
- 3.13 It appears there was a meeting or phone conversation between the applicants and the authority on 7 July 2015, following which the authority again wrote to the applicants to outline what it considered to be the requirements in regards to a structural assessment to support the building consent application. Correspondence continued between the parties without the matter being resolved.
- 3.14 On 5 August 2015, in response to a view put forward by the applicants regarding the lawfully established use, the authority wrote to the applicants noting that the original permit was for commercial use and that the use as detailed on the compliance schedule does not reflect the lawfully established use, and a resource consent application for the establishment of residential accommodation was not acted on and had expired. The authority went on to confirm that
- ...without the information required to confirm that the structural performance of the building is adequate in terms of section 115 of the Building Act we are not able to progress this application further.
- 3.15 The Ministry received an application for a determination on 6 August 2015.

4. The submissions

4.1 The initial submissions

The applicant

- 4.1.1 With the application for determination, the applicants provided a detailed submission setting out the background to the consent application and the authority's requests. The applicants noted the following:
- The conversion is for only part of one floor of the building but the authority was requiring a DSA for the entire building.
 - There is a favourable (i.e. lesser) loading when converting from commercial to residential.
 - The cost of the DSA (\$22,500 + GST) is disproportionate to the estimated cost of the proposed building work. (The estimated cost for the proposed work as stated on the application for building consent is \$80,000.)
 - Access to parts of the building owned by others has been refused by the owners of those parts.

- The building's use as identified in the compliance schedule includes office, residential and retail; so there is no change of use and section 115 does not apply.
- The information provided on the structural strength of the building is sufficient to satisfy the requirements for the consent to be issued.

4.1.2 With its submission, the applicants included copies of:

- correspondence between the applicants, the structural engineer, and the authority (including the authority's requests for information)
- the completed building consent application form
- the letter from the Body Corporate, refusing access
- the authority's practice notes:
 - AC2205 'Change of use to existing buildings' v.5
 - AC2226 'Applying the term as near as is reasonably practicable'
- the compliance schedule (HC/99/00090), describing the 'Current lawful use' as "OFF/RESID/RET"
- the authority's 'Earthquake-prone, dangerous & insanitary buildings policy' (2011-2016)
- Determination 2010/133⁶

4.1.3 On 12 August 2015 I requested further information in relation to the proposed building work. On 12 August 2015 the applicants provided a CD-ROM containing relevant information, and copies of:

- a producer statement design (PS1) for the proposed building work in respect of Clause B1 Structure, along with supporting calculations
- a certificate of design work for the identification of design work that is restricted building work
- the "Fire & egress report" dated 28 January 2015
- plans for the proposed building work.

The authority

4.1.4 On 18 August 2015 I sought clarification from the authority on its current position regarding the application.

4.1.5 The authority's response was received on 27 August 2015. The authority provided a submission setting out its views on the matter (in summary):

- The original 1975 building permit was for a warehouse and office block and the building has continued to be used for the same purpose.
- The current building consent application proposes a change of use to which section 115 of the Act applies.
- The requirement under section 115 is that the authority has to be satisfied on reasonable grounds that the building in its new use will comply as nearly as reasonably practicable with the Building Code (section 115(a)).

⁶ Determination 2010/133: The exercise of the powers of an authority to issue a notice under section 124 of the Act regarding a building considered to be earthquake prone, (*Department of Building and Housing*), 20 December 2010

- The authority is ‘unable to apply the required s115 test (reasonably practicable) to confirm structural performance of the building based on IEP report alone for the “Change of Use” of the building.’
- 4.1.6 The authority also noted it ‘always request(s) a detailed structural assessment for “Change of Use” building consents’
- 4.1.7 The authority provided copies of:
- the building permit application for the original building, dated 21 September 1971
 - selected pages from the subject building consent application B/2014/14866
 - selected pages from the fire & egress report
 - the Ministry’s Guidance document on Initial Seismic Assessments⁷ (“the ISA Guide”)
 - correspondence between the parties.

4.2 The draft determination and submissions in response

- 4.2.1 A draft determination was issued to the parties for comment on 14 September 2015. The draft discussed the functions under sections 112 and 115, and whether the term “the building, in its new use” in section 115 applies to the building as a whole or the part of the building undergoing a change of use.

The authority

- 4.2.2 The authority responded by email on 25 September 2015, noting it did not accept the determination. The authority set out its views as follows:
- The references in section 115 to “building in its new use” are to the whole building, though it may only be necessary in practical terms to look at the part of the building to which there is a proposed change of use.
 - In regards to Clause B1, and in particular in respect of seismic actions, the whole of the building needs assessment, and it is not technically possible to assess only the part of the building to which there is a proposed change of use.
 - The draft appeared to combine the concepts of “reasonable grounds” with what is “reasonably practicable”. The authority requires evidence as to the buildings’ current seismic performance to inform both assessments.
 - The ISA Guide notes an ISA report is not a document to use to support a change of use decision.

- 4.2.3 The authority requested that I clearly state whether the ISA is adequate in light of all the circumstances and if not what information would be adequate.

The applicants

- 4.2.4 In a response received on 28 September 2015, the applicants did not accept the draft determination and made a further submission. The applicants reiterated that they considered the information supplied by the structural engineer was sufficient for the purposes of granting consent, and that the applicants did not get a clear

⁷ Guidance for Territorial Authorities and Property Owners on Initial Seismic Assessments *Ministry of Business, Innovation and Employment* v.1 November 2013

understanding from the authority as to what would be considered ‘reasonably practicable’ in this case in order to satisfy the requirements of section 115.

- 4.2.5 The applicants requested that the Ministry, by way of this determination ‘make a decision to grant the consent application’. In response to this request I note that while a determination can confirm, reverse, or modify a decision made by the authority, the granting and issuing of the consent is still a function undertaken by the authority under sections 49 and 51 and is outside my jurisdiction under section 188. This determination has addressed the central issue in dispute between the parties; it does not assess the building consent application in its entirety in respect of all relevant clauses of the Building Code that would apply. However, given the grounds provided by the authority in its refusal, along with the applicants’ statement that ‘all other aspects of the consent application have been approved in theory’, it is my understanding there are no other impediment to the granting of the building consent.

5. Discussion

5.1 Change of use

- 5.1.1 The applicants have put forward the view that there is no change of use as the building’s ‘current lawful use’ is described in the compliance schedule “OFF/RESID/RET”. I note here that as well as the subject building, the compliance schedule also includes buildings on adjacent Lots 2 and 3 which include residential and retail use.
- 5.1.2 Section 5 of the Regulations defines the term “change the use” specifically for the purposes of sections 114 and 115 of the Act. There is no requirement in the Act for the lawfully established use as described in the compliance schedule to be one of the uses in Schedule 2 of the Regulations, although Schedule 2 can be referred to for guidance.
- 5.1.3 The applicants’ intention to convert Unit E to apartments constitutes a change of use under section 115(a). The dispute between the parties centres on whether the authority must be satisfied, on reasonable grounds, as to the compliance of the building as a whole or only the part of the building undergoing the change of use (Unit E).

5.2 The application of section 115

- 5.2.1 The authority’s approach in this case appears to be that under section 115 a change of use of part of the building (Unit E) requires an assessment of the whole of the building for compliance with the Building Code as nearly as reasonably practicable.
- 5.2.2 I note that this would seem to be in accordance with the approach set out in a previous Determination (2007/91⁸). The issue in that determination involved a change of use of two apartments in a multi-unit apartment building to accessible units. In that determination it was stated:

- 8.1 Referring to section 7 of the 2004 Act, I note that the definition of an “owner” includes owners of buildings. Section 3(2)(a) of the 1991 Act stated that the term “building” included “any part of a building”. While this definition is not included in the current Act, I am prepared to accept that, by implication, the term “building” includes “parts of buildings”. Changing the use of part of a building results in a change of use of the whole building and triggers a

⁸ Determination 2007/91: A dispute in relation to the procedures required for a change of use of a multi-storey apartment building (Department of Building and Housing) 20 August 2007

requirement for the whole building to “comply as nearly as is reasonably practicable” in its new use, or in this case, its new uses (section 115).

- 5.2.3 The statement in Determination 2007/91 regarding the change of use of part of the building resulting in a change of use of the whole of the building was made in the context of a particular determination application, where the practicability of access for people with disabilities was at issue. It was not supported by an analysis or discussion that can be applied in other circumstances when considering the application for section 115. Indeed that determination mostly considered procedural issues. I note also I am not bound by the decisions made in previous determinations – each determination has to be decided on its own facts.
- 5.2.4 It is a change of use under the Regulations (i.e. where 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) that trigger the requirements under section 114 and 115 of the Act. The purpose of sections 114 and 115 is for the owner to notify the authority of such a change of use and the authority to form a view as to compliance in its new use.
- 5.2.5 Section 114(1) of the Act provides:
- ‘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.’
- Regulations 5 and 6 of the Regulations refer to both “the building” and “part of the building” as follows (my emphasis added):
- 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.
- 5.2.6 Section 114(2) sets out the requirement that an owner must give written notice to the territorial authority if the owner proposes ‘(a) to change the use of a building’. Section 114(1) provides that the meaning of the term ‘change the use’ specified in the Regulations applies when that term is used in sections 114 and 115. As noted above, regulations 5 and 6 provide that ‘change the use’ includes changing the use of part of a building, and that different parts of a building can have different uses. If the phrase “the building” in section 114 was taken to mean an entire structure, section 114(2) could be read to mean that the owner is not required to notify the authority if the change is not to the entire building; an approach I consider is illogical.
- 5.2.7 Likewise the obligations of an owner set out in section 115 are that the owner ‘must not change the use of the building ...’ Given the definitions in the Regulations, and the notification required under section 114(2)(a) as note above, section 115 must also apply in respect of a change of use of part of a building.

5.2.8 I am of the view that this also applies in respect of the compliance assessments required under sections 115(a) and 115(b) where the phrase “the building, in its new use,” occurs, and requires the building, or part of the building if the change of use only applies to part of the building, to comply as nearly as is reasonably practicable with the provisions of the Building Code listed in sections 115(a) or (b).

5.2.9 However, the impact of the change of use, in terms of the performance requirements of the Building Code, must be considered in light of each of the relevant clauses of the Building Code. In regards to a proposed change of use of part of a building the relevant provisions of the Building Code may effectively involve an assessment of other parts of the building, and may in some cases include an assessment of the building as a whole.

5.2.10 I offer the following as examples of compliance assessments in respect of a change of use of part of a building (I note here that the examples are not full assessments of all the code clauses that would be relevant in each case, but are provided as discussion on assessments in relation to a change of use to part of the building):

5.2.10.1 *Example: Accessibility* where an existing multi-level building containing private apartments has the third floor converted to retail and office space.

Section 118 applies to the part of the building undergoing a change of use – it does not apply to the remaining private apartments, as these have occupancies/intended uses that do not fall within section 118. The requirements of the Building Code for accessibility will apply to the third floor level, including those related to access routes. Following on from that and given the performance requirements of Clause D1.3.2, the assessment for compliance with the Building Code under section 115(b)(i)(b) will need to include other parts of the building where it forms part of the access route.

5.2.10.2 *Example: External Moisture/Energy Efficiency* where there is a proposed change of use for part of a warehouse facility to be converted to be used as a dwelling. No changes are proposed to the external envelope of the building.

Assuming the warehouse doesn't fall within the limitations on application for E2.2, the performance requirements that applied to the warehouse are the same as would apply for a dwelling – there is nothing additional or more onerous in its use as a dwelling with respect to the requirements of Clause E2. The assessment under section 115(a) is that the authority must be satisfied, on reasonable grounds, that the dwelling will comply with Clause E2 as nearly as reasonably practicable. Accordingly if the external envelope of the warehouse currently complies then the test would be met, but if it did not comply then the assessment must take into account whether it is reasonably practicable to bring it into compliance⁹.

The requirements of Clause H1 for the part of the building being converted to a dwelling are additional to or more onerous than those for the warehouse: H1.2.3(e) only applies to housing and did not apply to the warehouse. The converted area would be unlikely to comply with the requirements of H1 in the proposed new use, and the requirement under section 115(a) is for the dwelling (not the whole of the warehouse) to comply as nearly as reasonably practicable – to achieve compliance it would be highly likely that building work would need to be carried out. However the

⁹ Many previous determinations have established an approach for deciding if a building complies as nearly as is reasonably practicable with the Building Code that follows the approach taken by the High Court. The approach involves weighing the benefits of requiring compliance against the sacrifice of doing so. See for example: 2010/043, 2010/028, 2010/004, 2008/006, 2006/078. Though the examples consider the reasonably practicable test in regards to alterations under section 112, as opposed a change of use under section 115, the approach applies equally to section 115.

scope of this building work would logically only encompass the part of the building concerned with the conversion.

5.2.11 I have applied the assessments as they would be carried out in this case in respect of Clause B1 Structure in paragraph 5.4.

5.3 Section 112 and section 115

5.3.1 In the following paragraphs I discuss the building consent authority and territorial authority functions in regards to compliance assessments under sections 112 and 115.

5.3.2 It appears from the approach taken by the authority in this case, that in circumstances where an application has been received for an alteration to an existing building that is undergoing a change of use, the authority has approached the granting of the consent under section 115 rather than section 112.

5.3.3 The function required of a building consent authority under section 112 is for the purpose of granting a building consent to an applicant for a prescribed amount of building work. The function required of a territorial authority under section 115 is to give the owner written approval that it is satisfied that the building (or part of the building if the change of use is to part of the building) will comply in its new use to the extent set out in that section. Those functions are discrete.

5.3.4 Where a change of use incorporates building work for which consent is required, the authority has two separate functions to perform: give notice under section 115 and grant the building consent for the prescribed building work subject to section 112. The assessment under one may support the assessment under the other – but the functions remain separate and the authority must consider both section 115 and section 112 as discrete requirements.

5.3.5 I therefore consider that:

- A change of use will trigger additional or more onerous obligations under the Building Code, and the authority must make an assessment, under section 115(a) or (b) regardless of whether or not a building consent is required.
- Not all changes of use will involve building work. If no building work is required, section 115 must be complied with, but no assessment would be required under section 112.
- Not all changes of use will involve building work for which building consent is required. If no building consent is required, section 115 must be complied with, but no assessment would be required under section 112.
- In situations where a change of use involves a building consent application, both sections 112 and 115 must be complied with.

5.4 Applying the legislation in this case

5.4.1 In this case the proposed alteration to the building involves building work for which building consent is required and this is associated with a change of use to part of the building.

5.4.2 For the applicants to be given approval to change the use of Unit E, under section 115 the authority must be satisfied, on reasonable grounds, that the part of the building undergoing a change of use will comply in its new use as nearly as is reasonably practicable with the Building Code in all respects.

- 5.4.3 This includes assessing compliance with the performance requirements of Clause B1, and of particular concern to the authority is Clause B1.3.3(f). I consider the following clauses relevant to those concerns:
- B1.3.3 Account shall be taken of all physical conditions likely to affect the stability of *buildings, building elements and sitework*, including:
- (f) earthquake,
- B1.3.4 Due allowance shall be made for:
- (a) the consequences of failure,
- 5.4.4 Accordingly, in its assessment under section 115(a) the authority must consider the likely effect of earthquakes in relation to the building and building elements, including the levels of the building below Unit E effectively acting as the foundation to Unit E. The assessment therefore must take into account the entire existing building and whether the structural strength/serviceability of the levels below Unit E will be sufficient to meet the performance requirements of Clause B1 as a foundation to Unit E. If it currently complies with Clause B1 and the alteration does not alter the level of compliance (section 112) then the test under section 115(a) would be met. If it did not comply, the next step is to consider whether it is reasonably practicable to bring it into compliance (refer paragraph 5.5).
- 5.4.5 The structural evaluation will be a key part of that assessment in regards to the supporting structure, with an ISA/IEP being one possible first step in that process if an ISA is used. The results of the ISA will affect whether or not further information is required.
- 5.4.6 The authority has raised the issue of ISAs in relation to a change of use decision, with reference to the Guide. In section 6 of the Guide, titled “Results and reporting of an Initial Seismic Assessment”, there is an “alert” which states:
- An ISA is only an *initial assessment* based on information available at the time and judgments based on this. Accordingly, an ISA report is **not**:
- a report that should be used to support the sale or purchase of a property
 - a document of confidence in supporting an investment decision
 - a document that might support a change of use decision that might give rise to additional strengthening requirements.
- 5.4.7 The alert regarding the limited use of an ISA noted above refers to change of use decisions ‘that might give rise to additional strengthening requirements’. I agree that where the requirements under Clause B1 for a change of use are additional or more onerous than the existing use, such as when an additional floor is added to a building, there is a greater likelihood that additional strengthening is required and an ISA on its own is unlikely to be sufficient to support a change of use decision.
- 5.4.8 Likewise, where an ISA indicates potential critical structural weaknesses or a %NBS indicating further building work may be required to establish compliance with Clause B1, further information would be necessary in order for an assessment under section 115 of compliance with Clause B1.
- 5.4.9 I note the requirements under Clause B1 for the use as an apartment are not additional or more onerous than the existing use. The structural engineer stated that the change of use from commercial to residential was ‘structurally favourable for loading requirements’, in particular for determining earthquake actions: the IEP identified the effect on structural performance of short columns as “significant”, but no other critical structural weaknesses were identified. The building has been

assessed as having a rating of 80%NBS based on the ISA and the building work does not involve adding any additional live load to the existing building. The ISA in this application is considered sufficient to demonstrate the building's potential earthquake risk.

5.4.10 I make the following observations regarding Clause B1 in respect of the proposed change of use:

- It is likely to be reasonably practicable to achieve full compliance with Clause B1 in the new construction within Unit E, including any existing structural elements that might be required at that level (roof framing, columns, walls, etc.).
- The design floor gravity loading “Q” (in the residential use) at 1.5kPa is within that prescribed for the original intended use (light industrial and/or storage), presuming the intended fitout will not add permanent loading (“G”) in excess of that previous intended use value.
- The design floor seismic load (“E”) in the new use is similarly less than that originally applying within the L3/Unit E area, whilst that within the lower levels of the building providing support to level 3 will be unchanged.
- Based on the ISA and the above gravity load assessment, the structural strength/serviceability of the lateral force system at the levels below Unit E would be considered generally sufficient to provide compliance to the area of the proposed change of use.

5.5 Reasonably practicable

5.5.1 In regards to the matter of whether it would be considered ‘reasonably practicable’ to upgrade the entire building to bring Unit E into compliance with Clause B1.3.3(f), B1.3.3(r) and B1.3.4(a) I note the following.

5.5.2 The reference to compliance “as nearly as is reasonably practicable” recognises that it may be both unreasonable and impracticable to require an existing building to be made to comply to the extent a new building would.

5.5.3 The application of the ‘as nearly as is reasonably practicable’ test has been considered extensively in previous determinations. These determinations have established an approach for deciding if a building complies as nearly as is reasonably practicable with the Building Code that follows the approach taken by the High Court¹⁰. The approach involves weighing the benefits of requiring compliance (such as life safety¹¹) against the sacrifice of doing so (such as disproportionate cost¹²).

5.5.4 The estimated total value of the proposed building work in this case, as noted in the building consent application, is \$80,000. The applicants have received an estimate for a DSA to be carried out at \$22,500, and a separate estimate for assessment of critical structural weaknesses only at \$11,500. Clearly building work associated with structural upgrading of the building itself would be significant and in my view, in addition to the costs for the evaluation, would be disproportionate to the cost of the proposed building work. Given the nature and limited extent of the proposed conversion, and the results of the ISA, I am of the view it would not be reasonably

¹⁰ *Auckland City Council v New Zealand Fire Service*, 19/1095, Gallen J, HC Wellington AP 336/93.

¹¹ See for example Determinations 2010/043, 2008/006 and 2006/078

¹² See for example Determinations 2010/028, 2009/027

practicable to require upgrading of the entire building to fully comply with the structural provisions of the Building Code.

5.5.5 While I have come to the conclusion in this case that it would not be reasonably practicable to require upgrading of the entire building, I note that there are circumstances where I would have formed the opposite view. For example if:

- the IEP identified critical structural weaknesses that would have a severe effect on the structural performance of that part of the building containing the area affected by the change
- the costs of upgrading (whether by a limited scope of upgrading required or for some other reason) were reasonable.

6. The decision

6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority incorrectly exercised its powers of decision in refusing to grant building consent on the grounds provided; accordingly I reverse the authority's decision, thus requiring the authority make a new decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 6 November 2015.

John Gardiner
Manager Determinations and Assurance

Appendix A: The legislation

A.1 Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005

5 Change the use: what it means

For the purposes of sections 114 and 115 of the Act, change the use, in relation to a building, means to change the use (determined in accordance with regulation 6) of all or a part of the building from one use (the old use) to another (the new use) and with the result that the requirements for compliance with the building code in relation to the new use are additional to, or more onerous than, the requirements for compliance with the building code in relation to the old use.

6 Uses of buildings for purposes of regulation 5

(1) For the purposes of regulation 5, every building or part of a building has a use specified in the table in Schedule 2.

(2) A building or part of a building has a use in column 1 of the table if (taking into account the primary group for whom it was constructed, and no other users of the building or part) the building or part is only or mainly a space, or it is a dwelling, of the kind described opposite that use in column 2 of the table.

Schedule 2 Uses of all or parts of buildings

Uses related to sleeping activities		
Use	Spaces or dwellings	Examples
SR (Sleeping Residential)	attached and multi-unit residential dwellings, including household units attached to spaces or dwellings with the same or other uses, such as caretakers' flats, and residential accommodation above a shop	multi-unit dwellings, flats, or apartments
Uses related to working, business, or storage activities		
Use	Spaces or dwellings	Examples
WL (Working Low)	spaces used for working, business, or storage—low fire load ¹	places for manufacturing, processing, or storage of non-combustible materials or materials having a slow heat release rate, cool stores, covered cattle yards, wineries, places for grading, storage, or packing of horticultural products, places for wet meat processing, banks, hairdressing shops, beauty parlours, places for provision of personal or professional services, dental offices, laundries (self-service), medical offices, business or other offices, Police stations (without detention quarters), radio stations, television studios (no audience), places for small tool and appliance rental and service, telephone exchanges, places for dry meat processing
Uses related to intermittent activities		
Use	Spaces or dwellings	Examples
IA (Intermittent Low)	spaces for intermittent occupation or providing intermittently used support functions—low fire load ¹	car parks, garages, carports, enclosed corridors, unstaffed kitchens or laundries, lift shafts, locker rooms, linen rooms, open balconies, stairways (within the open path) ³ , toilets and amenities, and service rooms incorporating machinery or equipment not using solid-fuel, gas, or petroleum products as an energy source

A.2 The relevant sections of the Building Act 2004

112 Alterations to existing buildings

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

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

(i) means of escape from fire; and

(ii) access and facilities for persons with disabilities (if this is a requirement in terms of section 118); and

(b) the building will,—

(i) if it complied with the other provisions of the building code immediately before the building work began, continue to comply with those provisions; or

(ii) if it did not comply with the other provisions of the building code immediately before the building work began, continue to comply at least to the same extent as it did then comply.

(2) ...

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) ...

115 Code compliance requirements: change of use

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

(a) in a case where the change involves the incorporation in the building of 1 or more household units where household units did not exist before, unless the territorial authority gives the owner written notice that the territorial authority is satisfied, on reasonable grounds, that the building, in its new use, will comply, as nearly as is reasonably practicable, with the building code in all respects; and

(b) in any other case, unless the territorial authority gives the owner written notice that the territorial authority is satisfied, on reasonable grounds, that the building, in its new use,—

(i) will comply, as nearly as is reasonably practicable, with every provision of the building code that relates to the following:

(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) will,—

(A) if it complied with the other provisions of the building code immediately before the change of use, continue to comply with those provisions; or

(B) if it did not comply with the other provisions of the building code immediately before the change of use, continue to comply at least to the same extent as it did then comply.