MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HIKINA WHAKATUTUKI

Determination 2016/009

Regarding the issue of notices to fix and the refusal to issue a certificate of acceptance in respect of the conversion of a double garage over a boundary at 1338 Dominion Road, Mt Roskill, Auckland

Summary

This determination involves building work that was carried out without consent to a double garage built across the boundary of two properties to install an ensuite, kitchen unit and bedrooms in each. The determination discusses the use under the Regulations before and after the building work and whether there was a change of use, the grounds for refusing to issue a certificate of acceptance, and the issuing of multiple notices to fix.

1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004[1] ("the Act") made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment ("the Ministry"), for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to the determination are:

- the owners of the property, E and L Latu, ML Trustees 3688 Limited, and Liumeitupou Family Trust, ("the applicants"). The applicants are acting through an agent ("the agent").
- Auckland Council ("the authority"), carrying out its duties as a territorial authority or building consent authority.

1.3 This determination arises from the decisions of the authority to issue notices to fix for building work carried out without building consent being obtained and for a change of use under the *Building (Specified Systems, Change the Use, and*

[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.

Earthquake-prone Buildings) Regulations 2005 ("the Regulations"), as well as the authority's decision to refuse to issue a certificate of acceptance.

1.4 The matters to be determined[2] are therefore the authority's exercise of its powers of decision in issuing the notices to fix and refusing to issue the certificate of acceptance. In making my decisions I have considered:

- whether there has been a change of use
- whether there have been breaches of section 40 as described in the notices to fix
- the reasons given for the refusal to issue the certificate of acceptance.

1.5 Matters outside this determination

1.5.1 In the covering letter to the application for determination the agent has referred to the authority's actions in issuing infringement notices. Infringement notices issued under section 372 and the authority's exercise of its powers of decision under sections 371 to 374 are not matters that can be the subject of a determination under section 177 of the Act. Although the authority's actions are recorded in the background to provide context to the order of events, I do not consider the infringement notices further in this determination.

1.5.2 The applicants have stated in the hearing that they were advised by their builder that they did not require a building consent and so the building work was carried out without building consent first being obtained. In the application for the certificates of acceptance, the applicants stated that the reason why the building consent was not obtained was because it had to be carried out urgently under section 41(1)(c). This determination does not consider whether the applicant was correct to rely on that section of the Act in the circumstances.

1.6 In making my decision I have considered the submissions of the parties, and the other evidence in this matter.

1.7 In this determination, I refer to the following legislation, the relevant parts of which are set out in Appendix A:

- 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 (First Schedule, Building Regulations 1992).

2. The building work

2.1 The subject building is a double garage that is located across the boundary of two Lots (set out on the plan in Figure 1 over page as "Garage 1" and "Garage 2"). The two Lots contain existing dwellings, described on the plans as "Flat 1" and "Flat 2". The land was subdivided in 1989 and the garage was originally constructed in 1989-1990 with each flat having a half share of the double garage. The applicants purchased the property in 2002, and both lots are owned by the applicants.

2.2 In 2013 building work was carried out to the double garage without consent being obtained.

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

2.3 The building work consisted of:

- removal of the original roller doors to the garages and the installation of aluminium ranch-slider doors in their place
- installation of a new ensuite consisting of shower, vanity, and toilet, with associated plumbing and drainage connections, vinyl flooring, new ceiling, and an internal partition wall
- installation of a kitchen bench with sink
- fire-rated water resistant lining to ensuite walls and a fire sprinkler to the bedroom area of each unit
- insulation installed to external walls and ceiling
- new plasterboard lining to external walls in bedrooms and bracing/noise reduction board to garage partition wall.

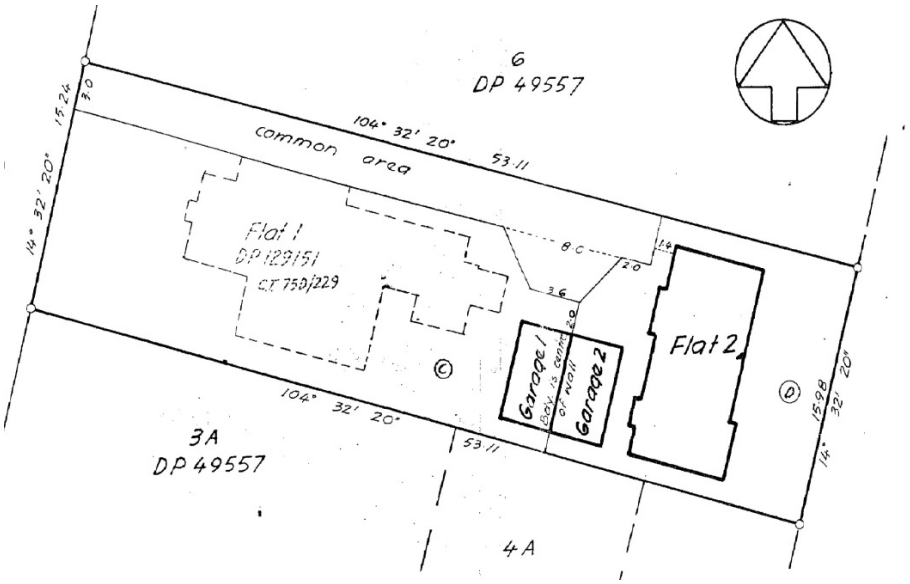


Figure 1: Site plan (from plans dated 1989) (Not to scale)

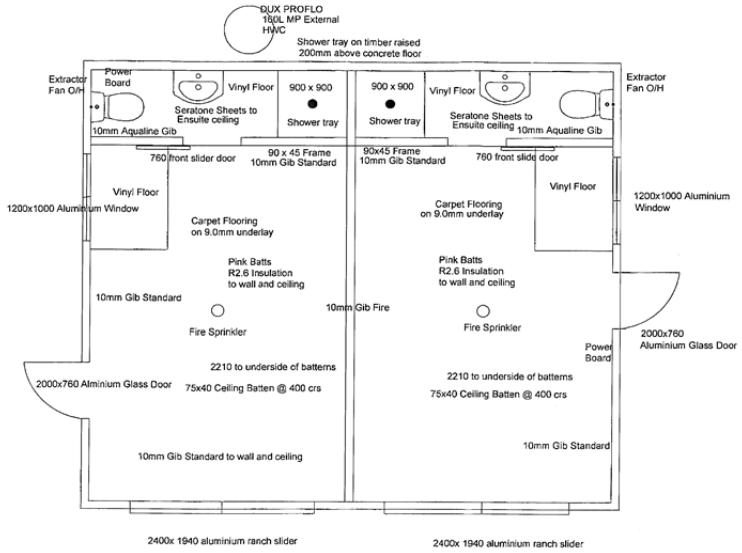


Figure 2: Floor plan of the converted garages (Not to scale)
Note: orientation different to that shown in the Site plan.

3. Background

3.1 The building work was carried out in February and March of 2013. It appears from the authority's records that the authority first became aware of the building work as a result of receiving a complaint on 11 December 2013. The authority carried out site visits on 12 December 2013 and 28 January 2014 at which time the work had already been completed.

3.2 In a letter dated 28 January 2014, the authority noted it had carried out a site visit and observed that building work had been carried out without consent to convert the garage into 'two separate self contained units' and this was not building work that was exempt under Schedule 1. The letter required the applicants take appropriate action by 25 February 2014.

3.3 On 25 February 2014 the authority contacted one of the applicants to discuss the situation, and the applicant confirmed that a builder's report had been obtained but the applicant was awaiting a plumber's report before filing an application for a certificate of acceptance.

3.4 The applications for certificates of acceptance

3.4.1 On 31 March 2014 the applicant applied for two certificates of acceptance for the building work carried out to each half of the garage; the building work was described as 'garage conversion into sleepout with complete ensuite', the box asking "will the building work result in a change of use" was ticked 'yes' and the new use was described as 'sleepout'.

3.4.2 The applications noted that the building work was carried out in February and March 2013 without consent because consent could not practicably be obtained due to the urgency of the work, with the applicant noting on one application that 'family member was living in garage long term diagnosed and treated for cancer 2012' and on the second form that 'previously living in garage for a number of years due to health issue needed to undertake work urgently'.

3.4.3 The application included the following supporting documentation:

- A floor layout dated 20 March 2014, setting out the conversion of the double garage to two sleepouts. (I note here that the drawing includes extractor fans to both ensuites; however it is not evident in the photographs provided and the authority has included this in its list of reasons for refusal – see paragraph 3.5.5, item 7).
- A statement from a licensed building practitioner ("LBP") that the construction was 'of sound workmanship and appropriate material. (I note that the document was undated, did not clearly describe the building work to which the LBP was referring, but was copied to the applicants and referred to "existing garage doors").
- A letter dated 20 March 2014 from a registered plumber[3] ("the plumber") recording the plumbing and wastewater systems that had been installed. The letter concluded:

> Require to install vents to both toilets waste. Other than this requirement I am happy that the plumbing and drainage has been installed in a sound manner and comply with the plumbing and drainage code. The sanitaryware installed and plumbing material used are of high quality.

[3] The plumber is a certifying drainlayer & plumber and licensed gasfitter

- A letter dated 24 February 2014 from a builder ("the builder") engaged by the applicants to 'undertake a review of the construction methodology used' to convert the garages to two units. The builder set out a description of the existing garage and provided a list of the work carried out. (I have included that information in paragraph 2.3.)
- Photographs of:
  - the roller door entrances to the double garage (pre-alteration)
  - the shower and hand basin and the toilet
  - internal space showing what appears to be a kitchen sink, and door to the ensuite.

3.5 The refusal and first notice to fix

3.5.1 In a letter dated 22 April 2014, the authority advised that it had reviewed the application for a certificate of acceptance and found that 'the works undertaken on your property are of an unacceptable nature'. The application was declined for the following reasons (I have numbered these for later reference):

1. No inspections have been under taken buy *(sic)* [the authority]
2. Plans that have been submitted, lack detail of the following; fire wall and connections or system that has been used, solid block and returns, connections, drawings are not well detailed.
3. Producer statements are not available for work carried out.
4. [The authority] in this insists *(sic)* can not satisfy its self *(sic)* that the building work carried out complies with the Building Code.

(It was not clear from the records available whether the authority carried out an inspection of the building work to assess compliance with the Building Code. Subsequent to the hearing the authority submitted that its assessment was based on the documentation and photographs (refer paragraph 6.3.3).

3.5.2 The authority's records indicate that the applicant advised the authority in June 2014 that assistance of a third party was being sought to deal with the issues raised in the letter of refusal, and the applicants intended to resubmit the applications. It appears that the applicants did not address the authority's concerns regarding compliance of the building work or adequacy of information, and the applications were not resubmitted.

3.5.3 On 2 and 9 July 2014 an officer of the authority advised the applicant that without a new application for a certificate of acceptance being submitted the authority would issue a notice to fix.

3.5.4 In a letter dated 11 July 2014 the authority enclosed notice to fix no. 4842 ("the first notice to fix") for the installation of plumbing work without consent and the change of use. The notice was in respect of 'Flat 1 … Garage 1'. The particulars of contravention or non-compliance were described as follows:

> The following works have been undertaken on the building without building consent, such consent was required under Sec 40 of the Building Act: -
>
> - Illegal plumbing work done, kitchen, toilet, shower, hand wash basin in each unit.
>
> The following change has been undertaken at the residence without a notice of change of use. Such change of use is required under Section 114 of the [Act].:- …
>
> - Double garage has been changed into two separate self-contained living units.

> Section 115 of the [Act] says … an owner of a building must not change the use of the building, if the building does not comply with the building code, for example, escape from fire, access for people with disabilities.

The date given for the notice to be complied with was 8 October 2014.

3.5.5 In a letter dated 27 November 2014 the authority advised the applicants that it was refusing to issue the certificate of acceptance. The authority set out the following as its reasons for refusal (I have numbered these for later reference):

1. No inspections have been undertaken be *(sic)* [the authority].
2. Plans submitted are inadequate and lack information on work carried out under the building scope of works provided by [the builder].
3. No third party report from a suitable qualified person has been included in your application.
4. No specified fire system, has been provided for the separation of garage into two habitable living spaces, evidence of firewall to underside of roof cladding has not been provided. C1.
5. No evidence of existing concrete slab been sealed against moisture egress *(sic)*. E3
6. No evidence of R values of insulation used. H1
7. No evidence of venting installed for [ensuites]. G13
8. Relief gully not installed. G13
9. No evidence external cladding complies with E2 (garage has been cladded *(sic)* for habitable space)
10. Minimum threshold for slab has not been achieved. E1
11. Electrical certificate not supplied any evidence of flush boxes not *(sic)* in firewall.

3.6 The second notice to fix

3.6.1 The authority's records, dated 4 December 2014 note the following:

> The current NTF [4842] will not be enforced as they did submit a COA application that was rejected, a new NTF will be issued.

3.6.2 On 4 December 2014 the authority wrote to the applicants noting that applicants had complied with the first notice to fix by submitting an application for certificates of acceptance, but that the authority had refused to issue the certificates (the letter of refusal was enclosed). The authority went on to state:

> Your only option now is to remove the illegal building work and to reinstate the garage to its original use.

3.6.3 The authority enclosed with the letter the notice to fix No. 5147 ("the second notice to fix") for building work carried out without consent and an unapproved change of use. The notice was in respect of 'Flat 1 … Garage 1'. The particulars of contravention or non-compliance were described as follows:

> Contrary to s.40 of the Building Act, the following building works have been undertaken without first obtaining a building consent
>
> - Illegal plumbing work done, kitchen, toilet, shower, hand wash basin. Double garage has been converted into a *(sic)* two separate residential units.
>
> The following change has been undertaken at the residence without a notice of change of use. Such change of use is required under Section 114 of the [Act].:- …
>
> - Double garage has been changed into two separate self-contained living units.

> Section 115 of the [Act] says … an owner of a building must not change the use of the building, if the building does not comply with the building code, for example, escape from fire, access for people with disabilities.

3.6.4 The date given for the notice to be complied with was 4 March 2015.

3.7 The third notice to fix

3.7.1 On 26 March 2015 the authority carried out a site visit, confirming that the unconsented building works were still in place and that the units were in use. I have seen photographs taken during that site visit in support of the issuing of infringement notice B80 which include:

- a smoke detector installed on the ceiling of one unit
- the toilet area of one unit, including the toilet as installed, a vanity unit with hand basin installed, and what appears to be a portable baby's bath tub
- the shower installed in one unit
- a fire sprinkler head in one unit, open hatch to the ceiling space
- the ranch-slider
- external hot water system and plumbing.

3.7.2 On 27 March 2015 the authority wrote to the applicant enclosing an infringement notice (B81) for failing to comply with the second notice to fix.

3.7.3 On 30 March 2015 the authority issued notice to fix No. 5382 ("the third notice") for building work carried out without consent. The particulars of contravention or non-compliance were described as follows:

> Contrary to s.40 of the Building Act, the following building works have been undertaken without first obtaining a building consent
>
> - Plumbed and installed two sets of toilets, [ensuite] sinks and showers within a double garage which has been converted into two separate residential units.
>
> To remedy the contravention or non-compliance you must:
>
> Remove the unauthorised building works.

3.7.4 The date given for the notice to be complied with was 27 April 2015.

3.8 The fourth notice to fix

3.8.1 It appears that the authority carried out another site visit on 29 April 2015, confirming that the unconsented building works were still in place and that the units were in use. I have seen photographs taken during that site visit in support of the issuing of infringement which show:

- a hand basin with the tap operating
- the toilet area installed in one unit (annotation records the toilet was operational)
- the shower installed in one unit (annotation records the shower was operational)
- external plumbing.

3.8.2 On 30 April 2015 the authority carried out a site visit, confirming that the unconsented building works were still in place and that the units were in use.

3.8.3 On 5 May 2015 the authority issued notice to fix No. 5395 ("the fourth notice"), with the particulars of contravention and the remedy identical to that in the third notice. The date given for the notice to be complied with was 30 June 2015.

3.9 The infringement notices

3.10 On 3 August 2015 the authority issued infringement notices numbered, B98, B99, and B100 to the applicants for failure to comply with a notice to fix. I note here that the infringement notices do not refer to which notice to fix they were being issued for.

3.11 The fifth notice to fix

3.11.1 The authority carried out further site visits on 3 and 27 July 2015, confirming that the unconsented building works were still in place and that the units were in use. Photographs dated 27 July 2015 show:

- the hand basin to one unit with the tap operating. The hand basin is sealed at the wall but it appears that paint on the wall at this junction is peeling away
- the shower installed to one unit (annotation records the toilet was operational)
- external plumbing
- two external gas cylinders.

3.11.2 On 11 August 2015 the authority issued notice to fix no. 5719 ("the fifth notice"), again for 'Flat 1 … Garage 1', with the particulars of contravention and the remedy as follows:

> Contrary to s.40 of the Building Act, the following building works have been undertaken without first obtaining a building consent
>
> - Illegal plumbing work done, kitchen, toilet, shower, hand wash basin.
> - Double garage has been converted into two separate residential units.
>
> The following change has been undertaken at the residence without a notice of change of use. Such change of use is required under Section 114 of [the Act]:-
>
> Owner must give notice of change of use, extension of life, or subdivision of buildings.
>
> - Double garage has been changed into two separate self-contained living units.
>
> Section 115 of the [Act] says the following:-
>
> Code compliance requirements: Change of use.
>
> - An owner of a building must not change the use of the building, if the building does not comply with the building code, for example, escape from fire, access for people with disabilities.
>
> To remedy the contravention or non-compliance you must:
>
> Remove the unauthorised building works; or pursue other legal option and make the building work comply with the …Building Code and [the Act].

3.11.3 The date given for the notice to be complied with was 22 September 2015.

3.12 An application for determination was received by the Ministry on 14 August 2015, and the fee was paid on 21 August 2015.

3.13 In the covering letter to the application for determination, the agent noted that the authority had filed charges with the court. It is my understanding that the charges have since been withdrawn. I note here that under section 182 no proceedings can

commence in a District Court or High Court on a matter that is subject to a determination application until the determination is made.

4. The submissions

4.1 The applicants

4.1.1 In a letter dated 13 August 2015, the agent for the applicants set out the following (in summary):

Section 40

- There was no building work 'being carried out at that time or being carried out by the owners. There was no continuing offence as building work was not being carried out by a person.'
- The building work carried out without consent is likely limited to only the sanitary fixtures (if the total number on the property had increased) – under Schedule 1 the remaining building work can be carried out as exempt from requiring building consent.
- The applicants had satisfied the obligations set out in the first notice to fix by applying for a certificate of acceptance; further notices should not have been issued for the same issue.
- It is not an offence to have unapproved work, but an owner may choose to apply for a certificate of acceptance (as in this case). This is consistent with sections 3, 165(1)(c), and 96.

Change of use

- The double garage was subdivided in 1989 and was a single garage for each property.
- There is no change of use under the Regulations – the two units are still part of the SH (sleeping single home), and remain SH as long as the units are used by family members as granny flats, which is the presently the case.
- The notices to fix (referring to the first and second notices to fix) wrongly state a change of use could not occur if the building does not comply with the Building Code.

Compliance

- The fire separation was already provided and approved.
- A specified fire system is not required. A fire separation already exists and fire requirements were unchanged in terms of means of escape requirements under section 112. (I note that while the 1989 plans for the garage show a lined wall dividing the garage in two, this wall is shown as 2300mm high and not to the under of the roof.)

Other

- Form 13 should be followed: the first notice to fix did not include in the remedies the option to apply for a certificate of acceptance, and the second notice only allowed a single remedy, being removal of the building work.
- When a notice to fix has been issued and complied with the authority cannot then issue a further notice to fix for the same matter, and under section 378

may even be time-barred from doing this because more than six months has passed.

- The agent requested guidance be provided regarding:
  - the issuing of multiple notices to fix for the same matter that appear as extensions of time with the same particulars
  - whether a trustee is an owner for the purposes of a notice to fix.

Certificates of acceptance

- The exempt building work should have been identified and excluded from the requirement for a certificate of acceptance.
- Regarding the refusal:
  - If plans were lacking detail, this detail should have been requested.
  - Third party reports and Producer Statements are not required, and the authority should have inspected the work to the extent it was able.
  - The authority is not required to be satisfied that the building work complies with the Building Code but only satisfied to the extent set out in section 96(2).
  - Eight items in the refusal letters 'were not matters that required upgrading and were not matters that required a certificate of acceptance.' (refer items 4 to 11 in paragraph 3.5.5)

4.2 The authority

4.2.1 On 17 September 2015 I requested a copy of the property file from the authority, along with any further information relevant to the authority's decisions to issue the notices to fix and refuse to issue the certificate of acceptance.

4.2.2 A CD of the property file was received from the authority on 8 October 2015.

4.2.3 On 15 October 2015 the authority forwarded copies of various infringement notices and photographs dated 26 March 2015 (refer paragraph 3.7.1).

5. The first draft determination and submissions in response

5.1 A draft determination was issued to the parties for comment on 30 October 2015. The draft concluded that the garage had undergone a change of use from SH to SR, the plumbing and drainage work was building work that required building consent be obtained, and the authority was correct to refuse to issue the certificate of acceptance but not for all of the reasons stated.

5.2 On 11 November 2015, the authority made a submission in response to the draft noting that it considered the following omission required addressing:

> …building work which might otherwise be exempt under Schedule 1, will not be exempt pursuant to section 42A(2)(c) of the Act, if it has been undertaken in furtherance of a breach of the Resource Management Act 1991.

5.3 In a response received from the agent on 11 November 2015, the applicants did not accept the draft determination and requested that a hearing be held on the matter. The submission noted that the application was in respect of one only of the properties and that the property was subdivided in 1989, with the boundary meaning there was a single garage on each Lot.

5.4 The agent attached copies of a previous determination[4], extracts regarding the issue of notices to fix from the authority's practice note[5], and a high court judgement[6] . The agent reiterated points made previously and submitted the following (in summary):

- At the time the notices to fix were issued there was no work being carried out and no person committing an offence.
- There was no change of use.
- An analysis of what work was exempt under Schedule 1 should be made; if the scope of the certificate of acceptance is correctly defined there would be no reason to decline the certificate.
- The notices to fix were inadequate in that they did not accurately describe the particulars of contravention, and required removal of the building work.

5.5 I have amended the determination as I consider appropriate taking into account the submissions received.

6. The hearing, second draft and further submissions

6.1 On 21 December 2015 I held a hearing in Auckland. The hearing was attended by an officer of the authority, one of the applicants and the agent. I was accompanied by a Referee engaged by the Chief Executive under section 187(2) of the Act, together with two officers of the Ministry and a legal adviser.

6.2 Those present visited the subject property as part of the hearing process. All the attendees spoke at the hearing to clarify various matters of law and fact and were of assistance to me in preparing this determination. The discussions held at the hearing are summarised below.

The building and building work

6.2.1 It was confirmed by the applicant that the garage was subdivided in 1989, and the fire rated wall was installed during construction; this was accepted at face value by the authority at the hearing. It was also confirmed by the applicant that the sanitary fixtures installed in the ensuites as part of the subject building work are additional to those in the dwellings.

6.2.2 The applicant reiterated that the building work was done without consent on the advice from the builder that consent was not required; and that the applicant was and always had wanted to regularise the building work but was unsure of what was required.

The use and change of use

6.2.3 There was discussion on the use category under the Regulations prior to the building work and whether it had in fact been SR at that point. Matters of ownership and management, and the relationship between uses under the Regulations and Classified Uses in the Building Code were discussed. Whether part of a building that is

[4] Determination 2009/21: Whether proposed building work for conversion of a garage to a sleep-out complies with the Building Code to the extent required by the Building Act *(Department of Building and Housing)* 20 March 2009
[5] AC2401 (v.1) October 2011
[6] Andrew Housing Ltd vs Southland District Council, 23 November 1995, Tipping J (52/95)

constructed over a boundary can be considered a separate building in its own right for the purpose of the Act was also discussed[7].

The certificate of acceptance application and refusal

6.2.4 The applicant stated that no inspections for compliance had been carried out, and that the authority's focus appeared to be removal of the building work. The applicants have subsequently removed the kitchen bench unit; the authority commented that the removal of the kitchen unit may mean that there had been a further change of use.

6.2.5 The authority confirmed a further submission would be provided once details were checked regarding whether an inspection for the purpose of ascertaining compliance with the Building Code was carried out. The officer noted that the authority would usually issue a notice to fix when a certificate of acceptance was refused and that this provides for an entry on the LIM to alert any future purchasers.

6.2.6 The agent put forward the view that it is an owner's discretion whether or not to apply for a certificate of acceptance.

The notice to fix

6.2.7 The agent considers that an offence under section 40 is with the person that is carrying out the building work and applies only at the time the building work is physically being undertaken; and no enforcement is available if the work is completed.

6.2.8 The wording and content of the notices were also discussed. The authority noted that it now issues notices to fix that include reference to the owner being able to apply for a certificate of acceptance rather than removal of the building work being the only remedy. A discussion was held regarding Schedule 1 and whether there was a requirement for authorities to identify the building work carried out in breach of section 40 when some work may be exempt.

6.2.9 The authority's policies regarding the issue of notices to fix and enforcement were raised, and the limitation on enforcement provided in section 378 of the Act referred to.

6.2.10 The agent put forward the view that the determination should reverse the issue of the notices on the following grounds:

- The owners were incorrectly identified.
- The building work had been completed, so there was no contravention of section 40 in that there was no longer a person "carrying out" the building work.
- The notices were issued more than six months after the authority became aware of the building work.
- There is no evidence of a failure to comply with the Building Code.
- The authority has no power to insist the applicants remove the building work.

Compliance with the Building Code

6.2.11 It was noted that even if the building work was exempt under Schedule 1, it must still be compliant with the Building Code. Various obligations under the Building Code were discussed, including:

[7] See also Determination 2015/074: Regarding the installation of a lift without building consent, and a request to remove the compliance schedule, for a multi-unit residential building, *Ministry of Business, Innovation and Employment*, 30 November 2015.

- Maintaining the fire separation where work has been carried out to the inter-tenancy wall (for example ensuring dampness from the ensuite does not affect the performance of the fire separation).
- Plumbing and drainage relating to the ensuite and kitchen unit.
- Food preparation areas.
- Ventilation.

6.3 Post-hearing submissions

6.3.1 In response to a request made at the hearing, on 22 December 2015 the agent forwarded a photograph of the kitchen bench that had been installed in Garage 2 (on the adjacent property) which was the same as that which had been removed from the subject property.

6.3.2 The agent made a submission on 22 December 2015 as follows (in summary):

- The hearing raised the issue of whether the garages were in fact SR prior to the building work being carried out as a result of the 1989 subdivision. The agent accepts that this is the case and reiterates that there has been no change of use under the Regulations as a result of the building work carried out.
- The notices to fix wrongly state the contravention of section 40, the continuing contravention is of the requirement in section 44 that the owner obtain a consent but there is no offence associated with section 44.
- Having complied with the first notice to fix by applying for a certificate of acceptance there was no continuing offence and the other notices should not have been issued.
- Section 378 provides guidance on what are fair and reasonable timeframes for issuing a notice to fix for unapproved building work.
- Guidance is required on the issuing of multiple notices to fix for the same issue, and in this case also the issuing of infringement notices for multiple notices to fix.

6.3.3 The authority provided further information by email on 23 December 2015, noting that the assessment which resulted in the refusal to issue the certificate of acceptance (refer paragraph 3.5.1) was made based on documents and photographs. The authority is of the view that it had 'sufficient information to produce a working list of items to be considered and/or resolved'.

6.3.4 The agent responded to that submission on the same day, requesting the determination provide guidance on assessments of applications for certificates of acceptance and requesting the authority reconsider its refusal given 'the self-evident good condition and present performance (observed by hearing attendees)' and the determination direct the authority to issue the certificate of acceptance.

6.4 The second draft determination and subsequent submissions

6.4.1 A second draft determination was issued to the parties for comment on 1 February 2016. The draft concluded that:

- there had been no change of use; at the time the subdivision was carried out the garage fell within use category SR, and it remained SR after the building work was carried out

- the plumbing and installation of sanitary fixtures was building work that required building consent be obtained
- the authority was correct to refuse to issue the certificate of acceptance but not for all of the reasons provided by the authority.

6.4.2 The draft determination also found the notices to fix contained many inaccuracies, were wrongly issued in a number of respects, and reversed the authority's decision to issue the four outstanding notices to fix.

The applicants' submission

6.4.3 On 12 February 2016 the agent made a submission in response to the second draft determination. The agent requested the determination be amended to clarify that no work was being carried out when the authority undertook its site visit on 12 December 2013 (refer paragraph 3.1). I have amended the determination in this respect.

6.4.4 The agent also requested that I clarify the effect of the applicants' compliance with the first notice to fix, specifically whether compliance with the first notice should have 'been an end to the matter' – meaning that the authority should not, or did not have the power, to pursue the matter once the applicants had applied for a certificate of acceptance. The agent also referred to section 167, noting that they authority can only issue another notice to fix for the same matter when section 167(4)(b) applies.

6.4.5 In regards to the remaining four notices to fix the agent disputed the analysis set out in the second draft and reiterated his views that:

- there was no contravention of section 40; there was no 'continuing offence' as building work was not actively being carried out but had already been completed; the possession of unconsented building work is not an offence
- the contravention is of section 44, however there is no offence associated with contravention of that section; sections 40 and 44 are discrete
- it would be contradictory if the Act considered the possession of building work completed without consent an offence when at the same time the Act allows for its approval by way of a certificate of acceptance
- multiple notices to fix should not have been issued for the same matter
- under section 378 the notices to fix were out of time, referring to *Andrew Housing Ltd vs Southland District Council*[8]
- with the exception of section 41(1)(c), applying for a certificate of acceptance is at the owner's discretion; a notice to fix cannot 'require' an owner apply for a certificate of acceptance
- the authority's action in regard to the certificate of acceptance 'cannot be correct if the reasons were not valid'
- declining a certificate of acceptance is not grounds for issuing a notice to fix.

6.4.6 The agent does not accept that a notice to fix should clearly identify breaches of other enactments (refer paragraph 7.2.9), and does not accept that separate parts of a single structure could not be considered separate buildings in their own right (refer

[8] Andrew Housing Ltd vs Southland District Council, 23 November 1995, Tipping J (52/95)

paragraph 6.2.3). The agent also considers the authority should not be invited to consider issuing a notice to fix at a later date (refer paragraph 7.6.5).

6.4.7 In regard to the infringement notices, the agent advised that the authority had only suspended, not withdrawn, the notices and that the courts were actively pursuing at least one of the applicants.

6.4.8 In response to the authority's submission (see below) the agent made a further submission on 29 February 2016 (in summary):

- Regardless of whether the correct use category is SH or SR under the Regulations, there was no change of use.
- It is wrong to say that building work exempt under Schedule 1 is no longer exempt if, say, the Resource Management Act 1991 ("RMA") is breached. The requirement that the work does not breach any other enactment is a condition only and is the equivalent of section 51(2) which applies in respect of consented work.
- The agent disagrees with the statement that where there was a breach of any other enactment this should be identified in any notice to fix issued (refer paragraph 7.2.9). The RMA has its own powers of enforcement and it is not the place of the Act to enforce the RMA in this manner.

The authority's submission

6.4.9 In a submission on 24 February 2015 the authority noted it did not accept the draft determination in regards to the analysis of the use category. The authority submitted that SH does not preclude garages being attached to another building on a different Lot in a terrace type arrangement when the garage is used primarily for the storage of the occupants' vehicles for example, and there is no reason why it should.

6.4.10 The authority also noted the reference to the condition in section 42A(2)(c) regarding other enactments and holds the view that any determination findings in respect of exempt work should be qualified.

6.5 Taking into account the submissions received, I amended the determination as I considered appropriate.

7. Discussion

7.1 The refusal to issue a certificate of acceptance

7.1.1 Section 40 states that building work must not be carried out except in accordance with a building consent, and section 96(1)(a) provides for the issue of a certificate of acceptance where an owner has carried out building work without obtaining a building consent when building consent is required. In such a situation, a territorial authority may, on application, issue a certificate of acceptance but 'only if it is satisfied, to the best of its knowledge and belief and on reasonable grounds, that, insofar as it could ascertain, the building work complies with the building code' (section 96(2)).

7.1.2 In this case much of the building work carried out was exempt under Schedule 1; accordingly the scope of the application for a certificate of acceptance is limited. The agent has requested that I clarify for the parties the work that was exempt under Schedule 1, and I make the following observations in this respect (references to

clauses of Schedule 1 are to those that were current at the time the building work was carried out):

Table 1 – Schedule 1 exemptions

Description of building work	Relevant clause of Schedule 1 current at the time the work was carried out
Removal of the original roller doors to the garages and the installation of aluminium ranch-slider doors in their place.	Exempt under (ae) subject to (i) regarding structural stability.
Installation of a new ensuite consisting of shower, vanity, and toilet. Associated plumbing and drainage connections, and exhaust fans.	Not exempt. Associated penetrations and weatherproofing, fireproofing, or sealing of penetrations would be exempt under (jh) if the penetrations are no greater than 30 centimetres in diameter.
Vinyl flooring to bathroom and kitchen sink area, new ceiling. New plasterboard lining to external walls in bedrooms.	See paragraph 7.1.3.
Installation of an internal partition wall dividing bedroom and ensuite.	Exempt under (ca).
Bracing/noise reduction board to garage partition wall. Fire-rated water resistant lining to ensuite walls.	Exempt under (ca) subject to (ii) that the fire rated wall has not been detrimentally affected.
Installation of a kitchen bench with sink.	Not exempt.
Fire sprinkler to the bedroom area of each unit.	Not exempt – connections to mains would have required consent, or if connected to new sanitary plumbing system would have formed part of that consent.
Insulation installed to external walls and ceiling.	Not exempt - installation in external walls is excluded from exemption (jg)(i).

7.1.3 I note here that Schedule 1 that was current at the time the building work was carried out did not provide for building work in connection with internal linings or finishes, but that this was included in the amendment to Schedule 1 that came into effect on 28 November 2013 – meaning that if the same building work were to be carried out today it would not require building consent. It is my view that in such circumstances authorities should exercise their discretion when considering a notice to fix in relation to a breach of section 40.

7.1.4 When an application for a certificate of acceptance is made the authority is required to consider all the available evidence, such as plans and specifications, producer statements, the builder's records, the owner's records, any expert reports, and the authority's own experience and knowledge of the builders and designers involved in the work in order to ascertain whether the building work complies with the Building Code.

7.1.5 The person making an application for a certificate of acceptance is required to provide (if available) plans and specifications, and any other information that the authority reasonably requires. It is the applicants who must provide sufficient information to the authority to establish the level of compliance achieved. The authority may also inspect the building work and this information, along with that

supplied by the owner, would assist the authority in forming a view as to compliance with the Building Code.

7.1.6 The authority reviewed the information provided in the application for the certificates of acceptance and that information was found by the authority to be inadequate. I note however, while the authority undertook a number of site visits that confirmed that building work had been carried out without building consent being obtained, it did not carry out an inspection of the building work in order to inform its decision as to the compliance of the building work with the Building Code.

7.1.7 I make the following observations in respect of the reasons provided by the authority for its refusal in the letters dated 22 April and 27 November 2014:

Table 2 – reasons for refusal

Reasons given	My comment
1. & 5. No inspections have been undertaken by the authority.	An application for certificate of acceptance is almost always in respect of work an authority has not inspected. Subsequent inspections by the authority can be carried out as part of the assessment process. See previous determinations[9] regarding evidence base for certificates of acceptance.
2. Plans that have been submitted, lack detail of the following; fire wall and connections or system that has been used, solid block and returns, connections, drawings are not well detailed. 6. Plans submitted are inadequate and lack information on work carried out under the building scope of works provided by the builder.	A single A3 plan has been provided for both units. The plan shows a floor layout for the units with rudimentary notes identifying the new work and/or building features. The plan does not identify the existing building work and does not clearly differentiate the work for which the application is being made as against work that is exempt. There are no general notes about the construction, and the plan contains no construction, or installation details. The kitchen bench (which has since been removed) is not shown.
3. Producer statements are not available for work carried out.	Although the authority would have been entitled to accept producer statements if they were offered, there is no basis in the Act for an authority to demand a producer statement as a condition for establishing compliance.
4. The authority cannot satisfy its self that the building work carried out complies with the Building Code.	The authority did not carry out an inspection of the building work for compliance with the Building Code; there are no records of an inspection that addresses compliance.
7. No third party report from a suitable qualified person has been included in your application.	It is unclear what information the authority is seeking in such a 'third party report'.
8. No specified fire system, has been provided for the separation of garage into two habitable living spaces, evidence of firewall to underside of roof cladding has not been provided. C1.	C1 is not a performance requirement. Assessment of fire safety clauses should take into account that a sprinkler system is installed.

[9] See for example 2011/043 The refusal to issue a certificate of acceptance for a retaining wall to a driveway at 570 Wyuna Bay Road, Coromandel *(Department of Building and Housing)* 13 May 2011

9. No evidence of existing concrete slab been sealed against moisture egress *(sic)*. E2	As an alteration to an existing building, no building work was carried out to the slab – assessment can only be to the extent required by 42A. The 1989 plans for the garage show a damp proof course membrane under the slab.
10. No evidence of R values of insulation used. H1	As an alteration to an existing building envelope assessment can only be to the extent required by 42A.
11. No evidence of venting installed for [ensuites]. G4	G4.3.3(b) and (c) applies in respect of removal of moisture and odour from the ensuites.
12. Relief gully not installed. G13	This function is only required if the gully trap is providing protection for the property from the authority's sewer main.
13. No evidence external cladding complies with E2 (garage has been cladded (sic) for habitable space).	Only applies if cladding was installed as part of the building work carried out in the conversion. Applies where new joinery has been installed in respect of an alteration to cladding junctions.
14. Minimum threshold for slab has not been achieved. E2	As an alteration to an existing building, no building work was carried out to the slab – the assessment can only be to the extent required by s42A.
15. Electrical certificate not supplied any evidence of flush boxes not in firewall.	It is unclear what is required here. An electrical certificate could be provided as evidence of compliance.

7.1.8 As noted in paragraph 7.1.2, the items that were not exempt under Schedule 1 and were required to be subject to an application for a certificate of acceptance are fairly limited. While I hold the view that the drawings provided were inadequate and the information insufficient in terms of establishing compliance with the relevant clauses of the Building Code, the authority's refusal did not adequately address the reasons for which the application should have been refused and contained items (such as the concrete slab) that were outside the scope of the building work.

7.1.9 In forming a view as to compliance of the building work with the Building Code for the purposes of a decision to issue or refuse to issue a certificate of acceptance, it is appropriate that authorities carry out an inspection before such a decision is made; the inspection should be appropriately recorded, and this inspection can then be referred to if the application is refused. Grounds for refusing to issue a certificate of acceptance would be that there was non-compliant building work or that the exclusions are of such an extent that the certificate would be severely limited in nature and of little or no value.

7.1.10 Those elements of the building work that were exempt under Schedule 1 from the requirement to obtain building consent must still comply with the Building Code. The relevant code obligations were discussed at the hearing, and I make the following observations:

- Where a garage is converted to a granny flat or sleep-out there is a change in the Classified Use as set out in Clause A1 of the Building Code – from an "outbuilding" to a "detached dwelling" and there are compliance obligations that will apply to the new building work in its new Classified Use. For example, the installation of an ensuite would be required to meet the relevant performance requirements of Clauses E3, G4, G12, and F2.

- As the building work was an alteration to the existing building section 42A(2)(b) applies. For example, in this case there is a requirement that the building work must not reduce the performance of the existing fire rated wall between the two properties.

7.1.11 For the benefit of both parties I note that the issues involved in establishing compliance for the purposes of obtaining a certificate of acceptance are not insurmountable, and while it is for the applicants to provide adequate information in support of the application, many of the items are able to be assessed by the authority undertaking an inspection.

7.1.12 The building work was observed during the site visit as part of the hearing. While it is for the authority to carry out a full inspection, I note the following were evident during the site visit:

- There are penetrations to the cladding as a result of the new work (E2).
- No surround to the gulley traps (both properties) preventing ingress of surface water (G13).
- The drains to the building did not appear to be vented (G13).
- There were electrical boxes on the fire wall that should be verified (C3).

I also note that there was damage apparent to some areas of the cladding, and I am of the opinion that this is an item of maintenance.

7.1.13 Section 99(2) and Form 9 both provide for a certificate of acceptance to attach a list of the building work an authority has been able to inspect for the purpose of limiting the liability of the authority to that work it has been able to inspect.

7.1.14 A certificate of acceptance can exclude those clauses or building elements which the authority cannot ascertain complies with the Building Code. The fact that compliance may not be able to be determined in respect of certain Building Code clauses does not of itself mean that the work concerned is non-compliant.

7.1.15 Any exclusion should only relate to the building work for which compliance cannot be determined and should not include building work that is not compliant; a certificate of acceptance cannot be issued if the building work does not comply with the Building Code.

7.1.16 The agent has requested the determination direct the authority to issue a certificate of acceptance. The determination can only confirm, reverse, or modify the decision made by the authority, and in this case I have concluded that there were grounds for the authority to refuse to issue the certificate of acceptance and accordingly I have confirmed that decision. To assist the parties I have provided additional comment on steps that can be taken to bring the outstanding issues to resolution (refer paragraph 7.6.5).

7.2 Unconsented building work

7.2.1 The notices to fix stated that the applicants had contravened section 40 in respect of plumbing work and the installation of sanitary fixtures without building consent.

7.2.2 The building work was carried out in February and March of 2013. It is the version of Schedule 1 that was in force at that time that applies. While much of the building work carried out would fall within Schedule 1 as exempt from the requirement to obtain building consent (refer Table 1 and Appendix A.2), the plumbing and

drainage work and the installation of sanitary fixtures are correctly described in the notices as building work that required consent.

7.2.3 However, I also am of the view that the reference to the conversion in the fifth notice was too general and could be misinterpreted as meaning all of the building work carried out in converting the garage.

7.2.4 In conclusion, I consider the authority was correct in including a contravention of section 40 in respect of the plumbing work and installation of sanitary fixtures in the notices to fix that were issued, as this was building work carried out without building consent when consent was required.

7.2.5 I note here that regardless of whether the building work was exempt under Schedule 1 or required building consent, the applicants are not relieved from complying with other legislation, such as the *Resource Management Act.* Section 42A(2)(c) provides that exempt building work is subject to the condition that it does not breach any other enactment. Whether or not there is a contravention of the *Resource Management Act* falls outside the matters that I can determine.

7.2.6 The authority has understood this to mean that building work cannot be exempt under Schedule 1 when carried out in breach of any other enactment.

7.2.7 I am not persuaded that the effect of not complying with the condition in section 42A(2)(c), that building work does not breach any other enactment, results in exempt building work losing its exempt status. Section 42A(2) lists a number of "conditions" for exempt building work. Some of those conditions are clearly intended to apply only after the building work is completed. For example, section 42A(2)(b) establishes requirements for exempt building work "after the building work is completed". Obviously, the effect of failing to comply with this condition cannot have any impact on the exempt status of the building work that has already been carried out.

7.2.8 The condition in section 42A(2)(c) is similar to section 51(2), the effect of which acknowledges that building work under a building consent may breach another enactment and the owner must still comply with the other enactment, but there are no specific consequences under the Building Act in respect of that non-compliance with another enactment. It would be suprising if Parliament intended there to be far more serious consequences for exempt building work that breaches another enactment than for building work under a building consent that breaches another enactment.

7.2.9 The condition in section 42A(2)(c) is still an important condition on exempt building work and able to be enforced by the issue of a notice to fix – requiring the owner to comply with the condition in s 42A(2)(c) that the building work comply with the other enactment.

7.2.10 If the authority's approach to section 42A(2)(c) were adopted it would also lead to the somewhat undesirable and confusing situation where an owner may carry out exempt building work in good faith and only discover after the event that the building work contravenes some other enactment. The owner is then at risk of prosecution under section 40 for a serious offence. If Parliament had intended exempt building work to lose that status if the building work contravened some other enactment it would more likely have expressed the condition as an exclusion from all of the exempt building work listed in Schedule 1 – so that no building work that contravened another enactment could be exempt building work.

7.2.11 Alternatively, Parliament could have explicitly addressed how exempt building work would be affected by other enactments as it has done in section 37 of the Act, which provides that if an authority considers a resource consent has not been obtained and the resource consent will or may materially affect the proposed building work, the authority is required to issue a certificate attached to the project information memorandum specifying the extent to which the building work may proceed, if any.

7.3 Change of use

7.3.1 The notices to fix included a contravention of the Act in respect of a change of use under the Regulations. The uses set out in the Regulations are for the purposes of sections 114 and 115 of the Act which relate to upgrade work that may be required when the uses of buildings are changed. Where an owner intends to change the use of a building, as defined in Schedule 2 of the Regulations, the owner must inform the authority (section 114) and ensure that the building in its new use will comply with the requirements of the Building Code to the extent set out in section 115.

7.3.2 The double garage was subdivided in 1989. As a result of the subdivision the double garage was constructed across the boundary of two Lots (both owned by the applicants at this time); this determination does not address the authority's exercise of its powers of decision in respect of the subdivision.

7.3.3 One of the issues discussed at the hearing and raised in the submissions in relation to the construction of the garage was that the fire wall was installed at the time the garage was constructed. Having observed the building work I accept that to be the case.

7.3.4 The two use categories under the Regulations discussed in the submissions and at the hearing are SH and SR. Schedule 2 of the Regulations defines these as follows:

Table 3 – Uses under the Regulations

Use	Spaces or dwellings	Examples
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
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

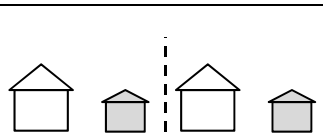
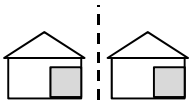
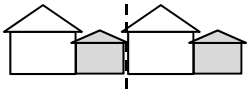
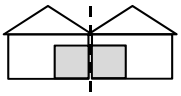
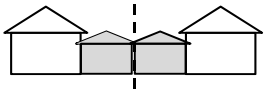
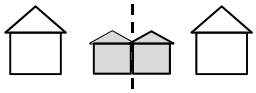
7.3.5 I am of the view that at the time of its construction, the double garage over the boundary of the two Lots could not be described as falling within the use SH. While Garage 1 is detached from Flat 1, and Garage 2 is detached from Flat 2, the two garages are part of one structure that sits on two separate properties.

7.3.6 The spaces and examples that fall within SH include a garage that is either detached from the associated dwelling or forms part of a detached dwelling. I am of the view that SH does not include a garage that is attached to another building on another

property or that forms part of a larger structure over the boundary to another property.

7.3.7 The authority disputes this view, and has referred to garages used for the storage of occupants' vehicles and the like when the garage is attached to another building on a different Lot in a terrace-type arrangement; the authority maintains that the use would remain SH.

7.3.8 While a garage that either forms part of the dwelling or is detached from the dwelling is included in the use SH, I am of the view that use SH does not include a garage that is attached to another building on an adjacent property or that is part of a larger structure over the boundary of two properties[10]. I have set out below a schematic diagram that provides a number of examples of dwellings and garages and the use category in which they would fall:

Use & Examples	Garages shown shaded, Property boundaries shown dashed
SH (Sleeping Single Home) dwellings or houses separated from each other by distance	 
SR (Sleeping Residential) multi-unit dwellings, flats, or apartments	   

7.3.9 Central to the difference between the uses SH and SR under the Regulations are that the dwellings in SH 'are separated from each other by distance' and that the dwellings are occupied by people as a single household or family; both criteria being relevant to safety from the effects of fire for the occupants and those of other property.

7.3.10 In the schematic diagram above, the garages shown in the use category SH would remain SH if they were converted to a self-contained space, as long as they are occupied by members of the same household or family. If they were occupied by others, the example on the left would remain SH as two separate dwellings that are separated by distance and the example on the right would change to SR. In the examples shown as SR, none of the garages are separated by distance and I consider therefore that they do not fall within use category SH.

7.3.11 I conclude that the double garage at the time of the subdivision in 1989 fell within the use category SR. That being the case, the building work has had no effect on the use under the Regulations. The applicants were not required to give notice under section 114 and there has been no contravention of section 115. I conclude that the authority incorrectly exercised its powers in issuing notices to fix for a change of use.

[10] I note that for the purpose of compliance by way of the Acceptable Solutions C/AS1 and C/AS2, the Risk Group that could apply to the examples shown in the table above may well be SH (subject to the parameters set out in paragraph 2.2.10 of C/AS2). However, the Risk Group should not be confused with the use category under Schedule 2 of the Regulations.

7.4 Additional comment

7.4.1 In response to additional points raised by the agent in the application (refer paragraph 4.1.1) as well as at the hearing and in the subsequent submissions, I make the following comment:

Notices to fix for contraventions of section 40

7.4.2 Section 40 provides:

> 40 Buildings not to be constructed, altered, demolished, or removed without consent
>
> (1) A person must not carry out any building work except in accordance with a building consent.
>
> (2) A person commits an offence if the person fails to comply with this section.
>
> (3) A person who commits an offence under this section is liable on conviction to a fine not exceeding $200,000 and, in the case of a continuing offence, to a further fine not exceeding $10,000 for every day or part of a day during which the offence has continued.

7.4.3 The agent has put forward the view that reference to "a person" in section 40 is limited to the person who is actually carrying out the physical building work, and that the term "contravening or failing to comply" in section 164 limits the issue of a notice to fix to only those circumstances where the building work is underway and not when the building work has been completed.

7.4.4 I disagree with the agent's interpretation of those sections of the Act. Section 164(1)(a) provides for a notice to fix to be issued if 'a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent)…'

7.4.5 A specified person is defined in section 163 as meaning

> (a) the owner of a building; and
>
> (b) if the notice to fix relates to building work being carried out,—
>
> (i) the person carrying out the building work; or
>
> (ii) if applicable, any other person supervising the building work.

This means that a notice to fix can be issued to the owner of the building as well as to the person who is physically carrying out or supervising the building work. The issue of a notice to fix is not limited to *only* the person carrying out or supervising the building work.

7.4.6 The contravention in this case is the failure to comply with the requirement of section 40(1) of the Act; 'A person must not carry out any building work except in accordance with a building consent' and section 40(2) states 'A person commits an offence if the person fails to comply with this section'.

7.4.7 The person who is responsible for obtaining consent is identified in section 14B

> An owner is responsible for —
>
> (a) obtaining any necessary consents, approvals, and certificates:
>
> (b) ensuring that building work carried out by the owner complies with the building consent or, if there is no building consent, with the building code:
>
> (c) ensuring compliance with any notices to fix.'

And section 44 provides that an owner must, before the building work begins, apply for a building consent.

7.4.8 It follows that the person responsible for obtaining a building consent (the owner) has committed an offence when building work is carried out, albeit on behalf of the owner, without consent being obtained when consent was required.

7.4.9 The agent has also referred to the term "continuing offence" and put forward the view that there is no offence when the work stops, i.e. once the building work has been completed there is no person "carrying out" the building work.

7.4.10 I note the term "continuing offence" is a particular criminal law term that is applied to specific offences (for example an offence of discharging pollutants would be a "continuing offence" while the pollutants were being discharged). In this case there is no "continuing offence" – the notices to fix are not in respect of a continuing offence, the offence was the contravention of section 40.

7.4.11 It would be incorrect to interpret the Act to mean that an authority could not issue a notice to fix if the building work was completed prior to the authority becoming aware of the building work being done. Offences are worded in the present tense rather than the past tense, and regulatory offences are less likely to be offences that are detected at the time that they occur. What is required is evidence of the offence and the person who did the work or was responsible for the work being done.

7.4.12 The agent has also stated that the application for a certificate of acceptance is at the applicants' discretion. While in some circumstances an owner could choose not to apply for a certificate of acceptance for work carried out without a building consent when one was required, this is clearly not the case where an owner has carried out building work without a consent in reliance on section 41(1)(c) of the Act or where the requirement to apply for a certificate of acceptance has been included in a notice to fix (refer section 165(1)(c) of the Act).

7.4.13 At the hearing the applicant referred to the removal of the kitchen sink and bench as being of particular concern with the authority, and the authority referred to the kitchen in respect of the use under the Regulations. It appears that there may be some confusion caused regarding District Plan issues being addressed in conjunction with issues under the Building Act. For clarity I note that in respect of the Building Act and its Regulations, the installation of the kitchen is not the sole factor in establishing the use under the Regulations. A detached self-contained unit may well be a separate "residential unit" for the purposes of the Resource Management Act (and whether or not it is, is outside my jurisdiction), but a detached self-contained space that includes kitchen and bathroom facilities, if used by members of the same household, remains SH under the Regulations, or in this case SR as it is attached to another on the property boundary.

Section 378

7.4.14 The agent has set his view in submissions to this determination, and in other previous determinations, that section 378 limits the authority's power to issue notices to fix if the building work was carried out more than 6 months prior, and that action can only then be taken under sections 121 to 124.

7.4.15 I maintain the views expressed in previous determinations[11] that a notice to fix can be issued more than 6 months after the completion of building work, and note:

- The application of section 378 is not a matter for determination under section 177 – the proper place for determining any disputes over the application of section 378 is the court where the charges are filed.
- Once building work has been completed a notice to fix may be issued if that work was carried out contrary to the Building Code or carried out without a building consent when one was required – there is no particular time limit on when such a notice to fix might be issued although it cannot be issued once a code compliance certificate has been issued for work that is the subject of a building consent.

7.5 Wording and content of the notices to fix, and the issuing of notices to fix and multiple notices

7.5.1 The notices to fix referred to a change of use having occurred, but did not record the existing and new use under Schedule 2 of the Regulations. I am of the view that where an authority considers a change of use has occurred the old and new use as defined in the Regulations should be identified for the purpose of correspondence with the owner and in any notices to fix issued. I have concluded that in this case there was no change of use under the Regulations (refer paragraph 7.3.11).

7.5.2 In some of the notices to fix the remedy was stated as being that the applicants must remove the building work, with the fifth notice including that the applicants could 'pursue other legal option and make the building work comply with the …Building Code and [the Act]'. The issue of the demolition of unapproved building work has been considered in a number of previous determinations[12], and I continue to hold the view expressed in those determinations.

7.5.3 Demolition of building work which is neither dangerous nor insanitary is a drastic step which should only be taken for compelling reasons. I accept that building work that required building consent was carried out without consent first being obtained, and the compliance of the building work has yet to be confirmed. However I do not consider that the breaches of the Act in this case constitute a compelling reason for the building work to be removed or demolished. I acknowledge that at the hearing the authority confirmed that since the issue of these notices it has changed the wording regarding remedies in notices to fix it now issues.

7.5.4 At the hearing, the enforcement process and the authority's policies regarding refusals of certificates of acceptance and the subsequent issuing of notices to fix were discussed, with the authority noting that it would generally issue a notice as the next step after refusing a certificate of acceptance. The authority commented that the issue of a notice to fix provided for an entry on the LIM.

7.5.5 In a previous determination I have considered the timing of the issue of a notice to fix in relation to a refusal to issue a code compliance certificate, and I am of the view that the same approach can be taken when considering a notice to fix after refusing a certificate of acceptance.

- The issue of a notice to fix should not necessarily be seen as an expected sequential step in the regulatory process following the refusal.

[11] See for example Determination 2014/051 The issue of a notice to fix for the construction of a deck without building consent at 12 Hobson Terrace, Onetangi, Waiheke Island *(Ministry of Business, Innovation and Employment)* 20 October 2014
[12] See Determinations 1999/006, 2000/1, 2009/115, and 2010/008 for example.

- When refusing the certificate of acceptance the authority must provide notice with the reasons for the refusal under section 99A. The provision of those reasons allows for the owner to take the appropriate steps to address the deficiencies, whether by bringing building work into compliance with the Building Code (which may require building consent), by providing further information in order that the scope of the application is clear and compliance with the Building Code can be established, or some combination of those.
- Providing the reasons for the refusal makes the owner aware of the work or further action that is required, and can set out a timeframe in which this is to be done. The owner is able to undertake the necessary action and resubmit the application. If no action is taken and the application not resubmitted, the authority can then consider whether it would be appropriate to issue a notice to fix.
- I acknowledge that whether a notice to fix should be issued at the same time as a refusal to issue a certificate of acceptance must be considered on a case-by-case basis. There will be some circumstances in which it would be appropriate for the authority to issue a notice to fix at the same time.
- The refusal to issue the certificate of acceptance also provides for an entry on the LIM and is another means of alerting potential purchasers.

7.5.6 The agent also expressed concern regarding the issuance of multiple notices to fix for the same breach. I agree with the concerns expressed by the agent. It seems very hard for the authority to justify the issue of five notices to fix.

7.5.7 A notice to fix is most commonly issued in respect of building work that does not comply with the Building Code or building work carried out without a building consent when a building consent was required. The remedies required by a notice to fix would typically require the owner to undertake building work to bring building work into compliance with the Building Code (and may require the owner to apply for a building consent in order to carry out such remedial building work), and require the owner to apply for a certificate of acceptance in respect of building work carried out without a building consent.

7.5.8 A failure to comply with a notice to fix is a serious offence with a maximum fine not exceeding $200,000. A notice to fix under s 165(1)(b) must contain a date within which it must be complied with. It is good practice for a notice to fix to clearly identify whether it is a new notice to fix about a new matter or whether the notice to fix supersedes an existing notice to fix about the same matter (but may have a new date within which it must be complied with). A notice to fix should be issued where other measures, such as advice or a written letter from the authority, have failed to produce compliance. A notice to fix will generally be inappropriate where an owner has indicated a willingness to comply. The authority's objective for enforcement action must surely be to make it easy to comply for those owners who want to comply, and to assist those owners trying to comply but not succeeding.

7.5.9 This determination has found the notices to fix issued by the authority contained many inaccuracies; they were wrongly issued in regards of a contravention of section 40 in respect some of the building work carried out without a building consent when a building consent was not in fact required, wrongly issued for building work that already complied with the Building Code to the extent required by the Act, and required the owner to advise the authority of a change of use when no change of use had occurred.

7.5.10 The authority refused the certificate of acceptance without inspecting the building work and considering whether it complied with the Building Code. Given the willingness of the owner to comply, as evidenced by the owner's application for a certificate of acceptance, it is hard to see how the authority can justify the issue of five notices to fix and three infringement notices. I note the authority's own protocol for issuing a notice to fix states "every attempt shall be made to resolve the matter by way of negotiation with the [owner]".

7.5.11 One option available to the applicants in response to the first notice to fix was to apply for a certificate of acceptance, and after receiving the application the authority confirmed the first notice to fix had been satisfied. The agent has requested I clarify whether compliance with the first notice should have meant the end of the matter i.e. that no further notices should have been issued. The agent also referred to section 167(4)(b).

7.5.12 I note that section 167 is in respect of building work that is carried out subsequent to the issue of a notice to fix and provides for the authority to issue a new notice to fix if it considers that the original notice to fix has not been complied with. I am of the view that this section would only apply to the circumstances in this case if the first notice to fix had required building work to be carried out either to bring the building work into compliance or to remove the building work. In this instance however the applicant chose to apply for the certificate of acceptance and work was not carried out in response to the first notice to fix.

7.5.13 I am of the view that section 167 does not limit the authority's powers to issue a new notice to fix. While the remedy set out in the first notice to fix may have been complied with, because an application was made for a certificate of acceptance, I am of the view that this does not necessarily preclude an authority from exercising its powers under section 164 and issuing a further notice to fix; whether it is appropriate to exercise that power will depend on the circumstances. For example, where an authority refuses to issue a certificate of acceptance on the grounds that building work is not compliant and the owner takes no further action to address the non-compliance, an authority may issue a further notice to fix.

7.5.14 I have already discussed the authority's actions in this case with regard to the issuing of the five notices to fix and the infringement notices (above); however I also note that the second notice to fix was issued a short time after the refusal to issue the certificate of acceptance and the applicants had had little opportunity to address the issues raised in the refusal.

7.6 Conclusion and what happens next

7.6.1 In relation to the authority's exercise of its powers of decision in issuing the notices to fix, I conclude:

- The authority was correct to refuse to issue the certificate of acceptance, although some of the reasons for refusal were not valid.
- The authority was correct in including on the notices to fix a contravention of section 40 in respect of the plumbing work and installation of sanitary fixtures.
- The authority was incorrect to include on the notices to fix that there was a change of use under the Regulations.
- The authority was incorrect to require removal of the building work as the only remedy on some of the notices to fix.

7.6.2 When making a determination, under section 188 I must confirm, reverse, or modify the decision made by the authority. Modification of the notices to fix to remove references to a change of use and to provide for the application of a certificate of acceptance as a remedy is one means of determining this matter. However, although the authority was correct to issue the notice to fix for the breach of section 40 it is my opinion that the parties are able to resolve the outstanding matters without recourse to enforcement by way of the notices to fix remaining in force.

7.6.3 I note that the authority's "Code of practice for building inspections"[13] sets out a protocol for issuing a notice to fix which includes the following:

> Generally the following protocol shall be followed leading up to issuing a notice to fix and following up of the notice to fix:-
>
> • other than urgent or dangerous or insanitary situations, every attempt shall be made to resolve the matter by way of negotiation with the specified person(s)
>
> ...

7.6.4 The applicant stated at the hearing he maintained an intention to regularise the building work, but that refusal to issue the certificate of acceptance and the subsequent actions of the authority left the applicants unclear what was required.

7.6.5 I suggest the parties take the following steps in order to conclude this matter:

- The authority to notify the applicant of a reasonable timeframe in which it considers the matters can be addressed by way of bringing the building work into compliance and resubmitting a certificate of acceptance before a notice to fix would be considered.
- The authority make available to the applicants information on how to apply for a certificate of acceptance, and what information will be required. (In making these suggestions I note also that compliance with other Acts may need to be addressed and that this should be communicated to the applicants as it may impact on the applicants' choices with respect to regularising the building work under the Act.)
- The applicants seek the advice of a competent person to identify and address any areas of the building work that do not comply with the Building Code. The applicants address any areas of non-compliance, and prepare documentation in support of the application for a certificate of acceptance to be resubmitted to the authority.
- The authority to carry out an inspection of the building work with regard to compliance with the Building Code to inform its decision on the application for a certificate of acceptance. The inspection should take into account that the building work is alteration to an existing building and that the existing building is assessed under section 42A(2). If there is any non-compliance with the Building Code the authority can issue a site notice, clearly setting out the building elements that do not comply.

[13] AC2401 (v.2)

8. The decision

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

- the authority was correct to refuse to issue the certificate of acceptance, although not for all of the reasons stated in its refusal, and I confirm the authority's decision
- the outstanding notices to fix, no's 5147, 5382, 5395, and 5719, were incorrectly issued in respect of a change of use, and I reverse the authority's decision to issue those notices to fix.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 23 March 2016.

John Gardiner
Manager Determinations and Assurance

Appendix A

A.1 Relevant sections of the Building Act 2004:

14B Responsibilities of owner

An owner is responsible for—

(a) obtaining any necessary consents, approvals, and certificates:

(b) ensuring that building work carried out by the owner complies with the building consent or, if there is no building consent, with the building code:

(c) ensuring compliance with any notices to fix.

Building Consents

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

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

42A Building work for which building consent is not required under Schedule 1

(1) Despite section 40, subject to the conditions set out in subsection (2) and whether or not a building consent would otherwise have been required, a building consent is not required for building work in the following categories:

(a) building work described in Part 1 of Schedule 1; or

…

(2) Subsection (1) is subject to the following conditions:

(a) the building work complies with the building code to the extent required by this Act:

(b) after the building work is completed, the building,—

(i) if it complied with the building code immediately before the building work began, continues to comply with the building code; or

(ii) if it did not comply with the building code immediately before the building work began, continues to comply at least to the same extent as it did then comply:

(c) the building work does not breach any other enactment:

…

Change of use, extension of life, and subdivision of buildings

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

…

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.

Notices to fix

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 example, the requirement to obtain a building consent); or

…

(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

…

A.1.2 Relevant clauses of Schedule 1 current at the time the building work was carried out

(ae) the installation, replacement, or removal in any existing building of a window (including a roof window) or an exterior doorway if—

(i) compliance with the provisions of the building code relating to structural stability is not reduced; …

(ca) the construction, alteration, or removal of an internal wall (including the construction, alteration, or removal of an internal doorway) in any existing building if—

(i) compliance with the provisions of the building code relating to structural stability is not reduced; and

(ii) the means of escape from fire provided within the building are not detrimentally affected; …

(jg) the installation of thermal insulation in an existing building other than in—

(i) an external wall of the building; or

(ii) an internal wall of the building that is a fire separation wall (also known as a firewall):

(jh) the making of a penetration no greater than 30 centimetres in diameter to enable the passage of pipes, cables, ducts, wires, hoses, and the like through any existing building and any associated building work, such as weatherproofing, fireproofing, or sealing the penetration:

A.2 Relevant clauses of 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
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