



Determination 2018/065

Regarding the classified use of buildings used as accommodation under the Recognised Seasonal Employer Scheme, at 605 Williams Street and 105 Alexandra Crescent, Hastings

Summary

This determination considers the classified use of buildings on two properties under Clause A1 of the Building Code when they are used by employers as accommodation for seasonal workers under the New Zealand Recognised Seasonal Employer (RSE) scheme.

1. The matter to be determined

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

1.2 The parties to the determination are:

- the owner of the buildings, J Lowe, who is the applicant in this determination (“the applicant”), acting through his lawyer as his agent (“the applicant’s lawyer”)
- Hastings District Council carrying out its duties and functions as a territorial authority or a building consent authority (“the authority”), acting through its lawyer as its agent (“the authority’s lawyer”).

1.3 This determination arises from the authority’s notification to the applicant that he may be required to apply for a change of use for the subject buildings under section 114 of the Act, because the way that he intended to use the buildings was not consistent with their current classified use.

1.4 Accordingly, the matter to be determined² is whether the intended use of the buildings when used as accommodation under the Recognised Seasonal Employer Scheme as described herein complies with the Building Code³ classified use in Clause A1 2.0 Housing, and Clause A1 2.0.2 Detached dwellings.

1.5 I have provided Immigration New Zealand with the determination documentation as an entity with an interest in this matter. I have also sought and received informal advice from the Labour Inspectorate. Both Immigration New Zealand and the Labour Inspectorate are part of the Ministry.

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

² Under section 177(1)(a) of the Act.

³ In this determination, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

- 1.6 In making my decision, I have considered the application, the submissions of the parties, and the other evidence in this matter. I have not considered any other aspects of the Act or Building Code, beyond those required to decide on the matter to be determined. Relevant sections of the Act, the associated regulations and clauses of the Building Code are provided in Appendix A.

2. The buildings

- 2.1 The subject houses were both originally constructed (by previous owners) as residential dwellings. They are both built on a single level and are located in residential areas in Hastings. Since the applicant has owned them, he has used them as residential rental properties. The houses are either rented directly to tenants in the general residential property market or to employers as accommodation for seasonal workers under the New Zealand Recognised Seasonal Employer (RSE) scheme (see paragraph 3.2).
- 2.2 How the two houses are rented can vary from year to year and within a year. For example, during the off-season, when there is no demand for seasonal accommodation, the applicant advises that he makes the houses available as short-term rentals on the general property market. However, it is the status of the houses when they are being used as accommodation under the RSE scheme that is of interest for the purposes of this determination.
- 2.3 The two houses and sleepout have the following characteristics and occupational capacity.

Property	605 Williams Street	105 Alexandra Crescent
Number of bedrooms	Three, plus detached sleepout	Four
Bedroom sizes and maximum occupancies	<ul style="list-style-type: none"> • Bed 1 – 16.34m² • Bed 2 – 10.85m² • Bed 3 – 9.18m² • Sleepout – 51.29m² 	<ul style="list-style-type: none"> • Bed 1 – 15.6m² • Bed 2 – 17.3m² • Bed 3 – 9.21m² • Bed 4 – 28.80m²
Other rooms	Main house <ul style="list-style-type: none"> • Combined kitchen and dining room • Lounge • Laundry (with shower) • Toilet • Bathroom (with bath, shower, toilet) Sleepout <ul style="list-style-type: none"> • Toilet • Bathroom (with second toilet and shower) 	<ul style="list-style-type: none"> • Kitchen • Dining room • Family room / lounge • Laundry (with shower and toilet) • Bathroom (with bath, shower, toilet)
Sanitary facilities	<ul style="list-style-type: none"> • Four toilets • Three showers • One bath 	<ul style="list-style-type: none"> • Two toilets • Two showers • One bath
Heating	<ul style="list-style-type: none"> • Two gas hot water heaters • House – two heat pumps • Sleepout – one heat pump 	<ul style="list-style-type: none"> • One gas hot water heater • Two heat pumps
Laundry facilities	<ul style="list-style-type: none"> • Two washing machines • One laundry tub 	<ul style="list-style-type: none"> • Two washing machines • Two laundry tubs

Property	605 Williams Street	105 Alexandra Crescent
Use as RSE scheme accommodation	Since 2014	Since 2015
Assessed capacity for RSE scheme workers	<ul style="list-style-type: none"> • 19 – assessed by the Ministry, 2014 • 12 – assessed by the authority, 2017 	<ul style="list-style-type: none"> • 14 – assessed by the Ministry, 2014 • Currently awaiting re-assessment by the authority

- 2.4 The sleepout at Williams Street was originally constructed as a sleepout to the main dwelling, then converted by a previous owner to a classroom. In 2014, the applicant applied to the authority for a change of use for the building to enable it to be used as a sleepout for accommodating RSE workers.
- 2.5 As part of the change of use process, the authority required the applicant to obtain a fire report and this was subsequently supplied (see paragraph 4.1.9). The report discussed the risk group of the sleepout in its new use for the purposes of the C Clauses (the fire safety clauses), and stated that although the appropriate risk group was considered to be SH ‘Buildings with sleeping (residential) and outbuildings’, in the report it had been treated as risk group SM ‘Sleeping (non institutional)’. This approach was taken to enable the sleepout to also be treated as ‘a back packers associated with a dwelling’.
- 2.6 The authority subsequently accepted the change of use, although it is not clear from the correspondence I have seen what the new risk group (for the purpose of the C Clauses) or specified use (for the purpose of the Building (Specified Systems, Change of Use, and Earthquake-prone Buildings) Regulations 2005) for the sleepout was now accepted to be.
- 2.7 The sleepout is a rectangular building, with a total floor area of approximately 50m². It has a separate bathroom and separate toilet located in one corner, which are accessed from outside the building via external doors. The rest of the sleepout is essentially one large room, with a floor area of approximately 46m². The applicant advises that in the past this room has been divided into separate areas using a moveable partition. When used, the partition is less than stud height to allow heat to circulate and has no doors. The sleepout has its own heat pump and hot water heating system. The entire building is treated as a single firecell.

3. The background

- 3.1 The applicant advises that he owns a number of properties throughout the Hawkes Bay, including backpackers hostels and ‘residential dwelling houses’. Some of these houses are rented directly to tenants, while others are rented under the RSE scheme. The applicant believes he is ‘one of the largest private providers of RSE accommodation’ in the Hawkes Bay.
- 3.2 The RSE scheme was established in 2007 and allows employers in the horticulture and viticulture industries to recruit workers from overseas for seasonal work when there are not enough New Zealand workers available. Most of the workers come from specified Pacific countries.
- 3.3 As part of their pastoral care obligations under the RSE scheme, and in order to be able to directly recruit overseas workers, employers must ensure that the workers are provided with suitable accommodation. Immigration New Zealand (a part of the Ministry) administers the scheme and has established worker accommodation

standards⁴ that employers must comply with. These standards are based on the Health and Safety in Employment Regulations 1995 and the Health and Safety at Work Act 2015 and have been developed to be consistent with Workplace New Zealand's worker accommodation fact sheet (which is itself developed under the Health and Safety at Work Act 2015)⁵. The standards are designed to 'assist employers to obtain and maintain their RSE status' and are used for audit purposes. The standards sit alongside any territorial authority requirements relating to worker accommodation, including those under the Act relating to change of use and building consents.

- 3.4 The standards set 'minimum accommodation standards' for RSE worker accommodation and cover such matters as the nature of the building that is proposed to be used as accommodation, the bedrooms and facilities available in it, and the fire protection systems and rubbish disposal arrangements that relate to it. In relation to bedrooms, the standards set minimum dimensions, including floor space, that bedrooms must provide for given numbers of occupants. The standards were last updated in January 2018, with the key changes from the previous standards being an increase in the living space, and the number of toilets and showers required per accommodated worker.
- 3.5 When an employer wishes to recruit workers under the RSE scheme, they make an application to recruit to Immigration New Zealand. As part of this process they must complete a worker accommodation self-audit form, which mirrors the matters set out in the worker accommodation standards. In the form, employers must confirm and comment on how the matters identified in the standards are met in relation to a particular property.
- 3.6 The Labour Inspectorate assesses the self-audit form and any supporting information to ensure that the accommodation is suitable. It will also, if necessary, inspect the accommodation. It then makes a recommendation about the accommodation's suitability to Immigration New Zealand. Immigration New Zealand will take the recommendation into account when deciding whether to approve an employer's application to recruit. The Labour Inspectorate is also responsible for ongoing monitoring of RSE accommodation, including through spot-check audits and when employers apply to renew their RSE status. As part of this process, the Labour Inspectorate advises territorial authorities of any approved RSE accommodation within their areas, so that the authorities can carry out any compliance checks of their own that they wish to conduct.
- 3.7 The applicant has provided houses to be used as accommodation for workers coming into the country under the RSE scheme since 2008. The houses he provides are leased directly to the RSE employer (this is either the grower or to a third-party contractor, who then contracts the workers to the growers). The employer then provides the seasonal workers with the accommodation as part of their remuneration package. The rent for the house is paid directly by the employer to the applicant on a per person rate. This rate also covers utilities such as power, gas, rubbish collection and the like, which are then managed and paid for by the applicant. The houses are provided fully furnished, including bedding and cooking utensils. The cost of the accommodation to the employer (and hence to the worker) is assessed annually by the Ministry to ensure it is reasonable.

⁴ Immigration New Zealand. (2017). *Worker accommodation standards: Recognised seasonal employer*. Wellington: Immigration New Zealand.

⁵ WorkSafe New Zealand. (2016). *Fact sheet: Worker accommodation*. Wellington: WorkSafe New Zealand.

- 3.8 Houses let by the applicant under the RSE scheme are let for a minimum of six months (this is a condition imposed by the applicant) and can be let for up to nine months of the year, depending on the needs of the employer tenant. During the off-season, the applicant leases the houses on the general housing market to people wanting short-term rentals.
- 3.9 The houses leased by the applicant range in size from three-bedroom houses capable of accommodating six people to larger houses capable of accommodating 12 people in a single dwelling.
- 3.10 In his submission, the applicant stated that from 2016/2017, the authority took over responsibility for assessing RSE accommodation in his area and that, in this capacity, the authority inspected his two houses and the sleepout.
- 3.11 However, the applicant's understanding of the situation is not correct. As stated in paragraph 1.5, in preparing this determination I took advice from the Labour Inspectorate within the Ministry. The inspectorate confirmed that responsibility for assessing and recommending RSE accommodation has remained with it. However, from 2016/2017, the inspectorate has been reminding employers that they must also ensure that their accommodation complies with all territorial authority requirements. It would have been in this capacity that the authority inspected the applicant's houses.
- 3.12 The applicant advises that following the authority's inspection, the authority reduced the number of occupants that could live in the two properties that are the subject of this determination. The Labour Inspectorate had previously assessed (in 2014) the maximum occupancy of the house at Williams Street to be 19 people, but the authority reduced this to 12 when it inspected the property in 2017. With respect to the Alexandra Crescent house, the Ministry had previously assessed the maximum occupancy as 14 people. The applicant states that he has been advised by the authority that the maximum occupancy of this house is likely to be 12 people as well.
- 3.13 In its submission of 12 October 2018, the authority clarified that it has 'never adopted an approach to RSE accommodation where by it would only approve a maximum of 12 occupants'. Instead, the authority provides guidance to owners as to the maximum occupancy for dwellings that was 'unlikely to trigger a change of use'. In this context, the authority had advised the applicant that 'the combined occupancy load of the house and sleepout for 605 Williams Street should not exceed 12 people'. The authority does not assess properties for a change of use as a matter of course, but only when an owner applies for one.
- 3.14 On 18 July 2017, some members of the RSE scheme, including the applicant, were advised that RSE accommodation providers would be required to apply for a change of use for their buildings. The specified use of SH or Sleeping Single Home (as established by the Building (Specified Systems, Change of Use, and Earthquake-prone Buildings) Regulations 2005) that had previously been considered appropriate for such accommodation would no longer be accepted for houses with six or more occupants. The applicant recalls that it was the authority that advised him of this new requirement. The authority states that this is not correct, and that it was the Department of Labour⁶ that was directing members to apply for a change of use.
- 3.15 On 1 December 2017, the applicant applied for a determination on the issue in relation to two of his properties to enable the matter to be decided. This initial application sought a determination on whether the applicant's two houses that he

⁶ Both Immigration New Zealand and the Labour Inspectorate were formerly part of the Department of Labour.

intended to use as RSE accommodation were ‘a “single household unit” or “hostel” for the purpose of Section 7 of the Act’.

- 3.16 Section 177 of the Act sets out the matters that I am able to make a determination on, and these are limited to whether particular matters comply with the Building Code (section 177(1)(a)) and an authority’s exercise of its power of decision in relation to particular matters (section 177(1)(b)). The matter for determination being sought by the applicant in his initial application did not come within this scope and the Ministry advised the applicant of this.
- 3.17 On 30 April 2018, the applicant amended the application for a determination on revised grounds (the current application). The Ministry accepted the current application, and requested further information from the applicant on 11 May 2018 and 18 June 2018. The applicant provided the additional information on 16 May, 1 June, and 10 July 2018 respectively.

4. The initial submissions and the draft determination

4.1 The initial submissions

The applicant

- 4.1.1 The applicant made a submission with his application for a determination. The submission describes the applicant’s two houses and the background to the dispute, and provides the following further information about the RSE scheme.

The groups of RSE workers are from the same village in their Pacific Island nation. They have a village leader and they agree to work and live together before they are interviewed and recruited by the employer. They return every year, and live together in the same house for up to nine months of every year, they return often to the same accommodation and bed. Many will leave their possessions at the accommodation for use on their return. They cook for each other and travel to work together each day, they go to church and attend recreational events together. They use transport that they drive themselves...

Once workers have arrived for the season, the tenants rarely change. Arrivals and departures have to be on specific dates and have to meet the agreed visa requirements. The tenants stay for up to 9 months each year.

If a worker chooses not to return to the same RSE employer they will almost always be replaced by another village whanau member. If an employer wishes to recruit more workers they will go to the same village and ask the village leaders for more. This close leadership oversight and close whanau relationships at the critical “glue” that gives the RSE Scheme its unique strength.

- 4.1.2 The applicant submits that these factors show the workers are ‘living as a single household unit’. The applicant says that to decide otherwise would mean that student flats, where large groups of students live together for approximately nine months of the year, would also need to be treated as hostels and not as single household units.
- 4.1.3 The applicant also states that the capacity of his two houses was calculated by the Labour Inspectorate and complies with the Housing Improvement Regulations 1947. When the accommodation assessments were carried out by the Inspectorate, a change of use ‘from single dwelling to hostel accommodation’ was never required. The applicant was under the impression that the authority took over the inspections in 2016/2017 and its ‘initial position was that any rental house accommodating more than five RSE workers needed to be assessed to determine whether a change of use was required’.

- 4.1.4 The applicant goes on to consider section 7 (interpretation) and section 115 (code compliance requirements where there is a change of use) of the Act. He also refers to the decision in the case of *Queenstown-Lakes District Council v The Wanaka Gym Limited*⁷, where the district court considered the relevant factors in deciding whether a building is being used as a ‘single household’ under the Building (Specified Systems, Change of Use, and Earthquake-prone Buildings) Regulations 2005.
- 4.1.5 The applicant makes the following concluding submissions about the RSE scheme and the accommodation provided pursuant to it:
- RSE employers do not make any money from supplying accommodation for their workers; it is part of their responsibilities under the scheme. The costs of the accommodation are assessed each year by the Ministry ‘to ensure they are reasonable’.
 - RSE workers are not transient; they stay for up to nine months of each year.
 - Only a small proportion of RSE houses will increase the number of workers accommodated during the year, which reflects the ‘increased workload from springtime thinning to autumn time harvest activities’. Otherwise, the number of workers accommodated rarely changes.
 - The reasons why a building is not considered a household ‘cannot be due to whether the occupants are residents of New Zealand or not’. Only houses provided under the RSE scheme currently require authority approval, but there are numerous other dwellings housing New Zealand-resident seasonal workers that do not require approval.
 - ‘The number of occupants must be taken into consideration and there must be a tipping point over which the occupancy is such that it cannot be viewed as a single household unit’.
 - RSE workers do not have the ‘same element of choice’ as students or other members of the public as to where they live, as their accommodation is provided by their employer. However, the houses are otherwise ‘occupied in the same manner as student flats and rental properties’. Any ‘extra protection’ extended to RSE workers should also arguably be given to ‘students or New Zealand residents taking short term accommodation for seasonal work’.
 - The applicant’s houses are also rented on the general property market. It is illogical that ‘they would be deemed “hostels” for 7 to 9 months of the year purely because during that time the tenants come from overseas’.
 - Other industries, such as the dairy and farming sectors, provide accommodation for their workers and, like RSE workers, these workers do not get to choose their accommodation. ‘These dwellings are not deemed to be hostels by mere fact that the accommodation comes with the employment package’.
- 4.1.6 With his submission the applicant supplied copies of:
- an earlier application for a determination by the authority⁸
 - floor plans for the two houses.

⁷ *Queenstown-Lakes District Council v The Wanaka Gym Limited* DC CHCH CIV-2003-002-000265 [18 November 2008].

⁸ The application was made in respect to two theoretical buildings used for RSE accommodation. The application was placed on hold pending receipt of detailed information that described the use of the buildings.

- 4.1.7 The applicant made further submissions in response to the Ministry's requests for information (see paragraph 3.17).
- 4.1.8 In a letter dated 14 May 2018, the applicant's lawyer provided copies of the floor plans for the applicant's two houses.
- 4.1.9 In a letter dated 1 June 2018, the applicant's lawyer provided a copy of an undated fire design calculations report, submitted as part of the applicant's proposal to change the use of the current sleepout at 605 Williams Street from a classroom to a sleepout (see paragraph 2.4). A floor plan attached to the report is dated 3 November 2014. The report states:

The proposal is to convert the accessory building (classroom with attached facilities) into a sleepout for use by RSE orchard workers. The present dwelling will remain as a dwelling for the use by the same family of worker (*sic*).

With respect to the risk group that the building would have in its new use, for the purposes of Clause C (protection from fire), the report stated:

Risk group

The risk group is considered as **SH** however for the purpose of this report **SM** category has been adopted so as the sleepout can be considered as a back packers associated with the dwelling.

The report concluded:

The works are a change of use to an existing building; the means of escape are compliant as existing although signage to the escape door is required.

- 4.1.10 In this letter, the applicant also confirmed the maximum and current occupancy of the two houses, and the minimum rental period.
- 605 Williams Street was currently occupied by 10 people 'because that was what their employer needed'.
 - 105 Alexandra Crescent was not currently being used as RSE accommodation.
 - The minimum rental agreement for RSE accommodation was six months. The applicant would not allow the property to be tenanted for RSE workers for a shorter period than this, as it was 'not commercially viable' to do so.
- 4.1.11 In a letter dated 5 July 2018, the applicant's lawyer provided information about the maximum occupancy of each of the bedrooms in the two houses. He advised that these occupancies had been calculated by officers of the Labour Inspectorate.
- Williams Street – past maximum occupancy of four, three and two people, and 10 people in the sleepout, giving a total of 19, 'based on 4.5m² per bed and 7 occupants per shower / toilet'
 - Alexandra Crescent – past maximum occupancy of three, three, two and six people, giving a total of 14, 'based on 4.5m² per bed and 7 occupants per shower / toilet'.
- 4.1.12 The letter also attached correspondence dating from 2014 relating to the applicant's application for a change of use for the building that is now the sleepout. The correspondence shows that the authority accepted the change of use, from a classroom to a sleepout. The applicant subsequently obtained a building consent to make alterations to the building as a sleepout.

- 4.1.13 The letter of 5 July 2018 also attached example tenancy and lease agreements between the applicant and RSE employers, including one relating to the Williams Street house. The agreements set out the respective responsibilities of the parties towards the properties and their occupants. The agreements also all contained a code of conduct or list of house rules that apply to the occupants in the properties. The applicant's lawyer advised in the covering letter that all of the applicant's rental contracts contained similar provisions.
- 4.1.14 The letter clarified that employers have a legal responsibility to accommodate their workers under the RSE scheme, and that although an employee could request a change of accommodation, and the employer would endeavour to meet this, the employer made the ultimate decision as to where the employee would stay.

The authority

- 4.1.15 The authority's lawyer made a submission dated 4 September 2018 to which it attached copies of the legal decisions referred to in the submission. The submission set out the background to the RSE scheme and the authority's involvement with it. It stated that building owners typically approached the authority to enquire how many workers their building could accommodate.
- 4.1.16 The submission outlined the legal provisions that in its opinion applied in this case including: Clause A1 of the Building Code; sections 7 and 115 of the Act; the Building (Specified Systems, Change of Use, and Earthquake-prone Buildings) Regulations 2005; and the district court's decisions in *Queenstown-Lakes District Council v The Wanaka Gym Limited* ("*Queenstown-Lakes*"), in *Wigram Accommodation Ltd v Kelly*⁹ and in *Iniatius Ltd v Davis*¹⁰. In the latter two cases, the court considered what was meant by a hostel in the context of the Residential Tenancies Act 1986. The authority's lawyer also referred to two previous determinations in which my predecessor, the previous determinations manager¹¹, discussed the meaning of the term 'hostel': Determination 2008/111¹², which related to accommodation for seasonal workers on an orchard; and Determination 2006/92¹³, which concerned accommodation for people with disabilities.
- 4.1.17 The authority's lawyer then responded to the matters raised by the applicant in his submission, with the main points being as follows.
- The Williams Street house only has approval for 'one single household unit'. The applicant has been advised that if he wishes to accommodate more than 12 people he must obtain a code compliance certificate for the building work on the sleepout.
 - The building consent for the Alexandra Crescent house only identified three bedrooms, not four. If the house is used to sleep more than 12 people it would be considered 'a hostel or boarding house arrangement', and additional building work, involving a building consent, would be required.
 - The applicant's assertions about the 'make-up and arrangements of his seasonal occupants' (including where they come from and how they are recruited) need to be 'independently verifiable'.

⁹ DC Christchurch MA 153/99, 1 February 2000.

¹⁰ DC Palmerston North CIV-2008-054-256, 28 July 2008.

¹¹ For simplicity's sake, future references to 'I' in this determination, will encompass both myself and any previous determinations managers.

¹² Determination 2008/111: Access and facilities for people with disabilities to a building providing kitchen and ablution facilities at an orchard (2 December 2008)

¹³ Determination 2006/92: Is a compliance schedule required for a new IHC residential home? (19 September 2006)

- ‘2016/17 is the first year that inspections were carried out by councils. The [authority’s] initial position was that any rental house accommodating more than five RSE workers needed to be assessed to determine whether a change of use was required. The [authority] is reviewing this position...’ (The authority’s lawyer has subsequently clarified that the authority carried out an ‘overview’ of the property, involving a desktop review of the property file, and that responsibility for carrying out inspections relating to RSE accommodation has remained with the Labour Inspectorate.)
- Seasonal factors may influence RSE workers’ arrival and departure dates, as well as where they are required to live. RSE workers do not have the same ‘element of choice’ as students.
- The number of occupants is ‘a significant factor’ in determining whether a building is being used as ‘single household unit’.
- The code of conduct that applies to some workers in the current case is quite prescriptive, which you would not expect to find ‘within a hostel or boarding house-type situation’.
- There is nothing to prevent the buildings being deemed hostels when used as RSE accommodation and detached dwellings when rented privately.

4.1.18 The authority’s lawyer also made general submissions relating to the matter, the main points of which can be summarised as follows.

- The authority is not advocating that all seasonal worker accommodation should be treated as a hostel. However, it is ‘struggling to perform its function’ because of the uncertainty around the issue of RSE accommodation. The authority is seeking a determination ruling ‘so that it may adopt a principled and consistent approach’.
- RSE accommodation is different from a student flat, as it is provided by the employer and the workers do not have any choice about where they live.
- Seasonal worker accommodation is inherently commercial.
- RSE workers are vulnerable and ‘deserve to have the safeguards that are provided to other workers living in accommodation intended for commercial use’. A hostel classification will require building owners to make safety improvements and apply for a change of use.
- Many of the factors identified in the *Queenstown-Lakes* case apply in the current case, including: the number of occupants and the variance in these numbers; the short-term nature of the residence; the lack of verifiable connection between the residents; and the commercial nature of the accommodation.
- Many of the factors identified in the *Wigram* and *Iniatius* cases apply in the current case, including that: the accommodation is for a class of people; the kitchens are communal and appliances are provided; the applicant manages, furnishes and provides services at the properties; the RSE employer must regularly inspect the premises; the workers have temporary residential status and share a common purpose of undertaking seasonal work; and house rules and codes of conduct apply to all the workers.

- The Ministry has previously determined¹⁴ that ‘hostel’ is the definition relating to seasonal worker accommodation, and is also ‘associated with a situation where more than five or six people, who share an occupation, live together in “managed accommodation”’¹⁵.

4.1.19 In the interests of completeness, I note here that in an earlier letter dated 17 May 2018 the authority had requested further information from the applicant in relation to the applicant’s submission. The applicant’s lawyer queried the authority’s right to request this information under the determination process. Under section 186(3)(a), the chief executive may require the applicant or another party to provide documents relating to the application. This power does not extend to the parties themselves. However, I have taken the authority’s requests for information into account and they are reflected in the Ministry’s request for further information dated 18 June 2018.

4.2 The draft determination and submissions in response

4.2.1 A draft of this determination was issued to the parties on 19 September 2018. The draft concluded that the intended use of the buildings does not comply with the Building Code classified use in Clause A1 2.0 Housing and Clause A1 2.0.2 Detached dwellings.

4.2.2 The applicant’s lawyer responded to the draft determination in an email dated 12 October 2018. The lawyer queried the wording of the draft in relation to procedural matters that arose during the determination process. I have adjusted the wording to more accurately reflect what occurred.

4.2.3 The authority’s lawyer accepted the draft determination on 12 October 2018, subject to some non-contentious comments made in a submission of the same date. I have taken these comments into account and adjusted the determination as I consider appropriate.

5. Discussion

5.1 The matter for determination

5.1.1 The matter for determination in this case is whether the intended use of the applicant’s two buildings complies with the Building Code classified use in Clause A1 2.0 Housing and 2.0.2 Detached dwellings.

5.1.2 In answering this question, I must consider both the intended use and the classified use of the two buildings, and how these two uses relate to each other.

5.2 The relationship between intended use and classified use

5.2.1 Turning first to the buildings’ intended use, Section 7 of the Act defines intended use as:

intended use, in relation to a building,—

(a) includes any or all of the following:

(i) any reasonably foreseeable occasional use that is not incompatible with the intended use:...

¹⁴ Determination 2008/111: Access and facilities for people with disabilities to a building providing kitchen and ablution facilities at an orchard (2 December 2008)

¹⁵ Determination 2006/92: Is a compliance schedule required for a new IHC residential home? (19 September 2006)

- 5.2.2 In a previous determination¹⁶ I stated the intended use, as defined in section 7 of the Act, is not a subjective view of the owner of the building but an objective assessment of the use to which the building can be put based on its physical design and attributes.
- 5.2.3 The applicant has stated that he intends to use the houses at times as RSE worker accommodation, and at other times as general short-term rental accommodation. As far as I am aware, the authority does not dispute that this is the intended use of the buildings. Where the parties differ is in their interpretation of what this means in terms of the classified use of the buildings.
- 5.2.4 Section 16 of the Act establishes that the purpose of the Building Code is to prescribe the functional requirements and performance criteria that buildings must meet in their “intended use”.
- 5.2.5 Clause 3(3) of the Building Regulations 1992 states how the intended use informs the classified use:
- (3) the classified use or uses of a building or part of a building shall be the ones that most closely correspond to the intended use or uses of that building or part of that building.
- 5.2.6 In addition, Clause 3(2) of the Building Regulations 1992 makes clear that a building may have more than one classified use.
- (2) Except as otherwise provided by the Act, each building shall achieve the performance criteria specified in the building code for the classified use of that building, and, if the building has more than 1 classified use, any part of it used for more than 1 classified use shall achieve the performance criteria for each such classified use.
- 5.2.7 Accordingly, the intended use of a building must be matched to its classified use. Clause A1 of the Building Code sets out the various classified uses that a building, or part of a building, may have. There are 11 classified uses, and the performance criteria that a building must meet under the Building Code will depend on its classified use or uses. If a building has more than one classified use, it will be required to meet the performance criteria for each of these uses.

5.3 Establishing the classified use

- 5.3.1 It is important to establish the correct classified use for the applicant’s houses as this will affect the performance criteria that they must achieve under the Building Code. It will also affect whether or not the applicant is required to apply for a change of use with respect to them.
- 5.3.2 The applicant is of the view that both houses and the sleepout are being used as single households and hence come within the classified use of ‘Detached dwelling’, as set out in Clause A1 –2.0.2. The authority is of the view the houses are more akin to hostels and hence fall within the classified use of ‘Community service’, as set out in Clause A1 – 3.0.2.
- 5.3.3 The 11 classified uses in Clause A1 are split into seven categories – Housing, Communal residential, Communal non-residential, Commercial, Industrial, Outbuildings, and Ancillary. The classified uses are grouped together within these categories, based on the nature of the activities that will occur in buildings with those uses.

¹⁶ Determination 2011/069: Regarding conditions to a building consent and the use of a building (12 July 2011)

- 5.3.4 It is not always obvious which classified use a building will come under, as the activities that occur within the building may not neatly fit into those described or given as examples in Clause A1.
- 5.3.5 However, I consider that the principles on which the classified uses have been grouped into categories are relevant, and can be used to delineate the various use categories for buildings and to interpret the examples given for those categories.
- 5.3.6 Residential uses are separated into two categories – Housing and Communal residential. The Detached dwelling classified use that the applicant favours falls within the Housing category of classified uses. The Community service classified use supported by the authority comes within the Communal residential category.
- 5.3.7 I will now discuss these two categories in turn. I will also consider whether the applicant’s buildings when used as RSE accommodation come within any of the classified uses that fall under these categories.

5.4 Housing category

- 5.4.1 The Housing category contains three types of dwelling where there is “self care and service (internal management)”: Detached dwellings, Multi-unit dwellings and Group dwellings.

Classified use	Examples
2.0 Housing 2.0.1 Applies to buildings or use where there is self care and service (internal management). There are three types:	
2.0.2 Detached dwellings Applies to a building or use where a group of people live as a single household or family.	a holiday cottage, boarding house accommodating fewer than 6 people, dwelling or hut
2.0.3 Multi-unit dwelling Applies to a building or use which contains more than one separate household or family.	an attached dwelling, flat or multi-unit apartment
2.0.4 Group dwelling Applies to a building or use where groups of people live as one large extended family.	within a commune or marae

- 5.4.2 The classified uses grouped under Housing are those that place an emphasis on a family or family-like arrangement. The emphasis on family reflects that the occupants consider the building to be their principal place of residence and suggests a level of social cohesion, comfort and trust that a family would experience.
- 5.4.3 Within these classified uses occupants will mainly look after themselves and each other. This idea is reinforced through the performance requirements that are applicable to ‘Housing’, particularly those related to life safety, which are significantly less onerous when compared with Communal residential requirements.

5.5 Classified use – Detached dwelling

5.5.1 The first classified use within the Housing category that I will consider is that of Detached dwelling, which is defined as:

2.0.2 Detached dwellings

Applies to a *building* or use where a group of people live as a single household or family. Examples: a holiday cottage, boarding house accommodating fewer than 6 people, dwelling or hut.

5.5.2 For a building to fall within the Detached dwelling classified use, the building must house people that live as a ‘single household’ or ‘family’. Neither of these terms is defined in the Building Code or Act, although the term ‘household unit’ is.

5.5.3 Section 7 of the Act defines a household unit as:

- (a) means a building or group of buildings, or part of a building or group of buildings, that is—
 - (i) used, or intended to be used, only or mainly for residential purposes; and
 - (ii) occupied, or intended to be occupied, exclusively as the home or residence of not more than 1 household; but
- (b) does not include a hostel, boarding house, or other specialised accommodation

5.5.4 It must be noted, however, that a household unit is not the same thing as a single household. The term household unit refers to the physical building or buildings that form the residence of the household. The definition is useful, however, in excluding certain types of accommodation, which by their nature cannot be considered to accommodate a household.

5.5.5 One source of useful guidance regarding the characteristics of a ‘single household’ and ‘family’ is in previous judgements and determinations where these terms have been considered.

5.5.6 In the *Queenstown-Lakes* case, the judgement noted that it is often easier to say why something is not a household rather than why it is. However, the court considered the following to be characteristics of a single household, noting it is not an exhaustive list:

- degree of permanence in the residents
- connection with other residents other than simple proximity
- an element of living together jointly.

This case also cited the case of *Hopper Nominees v Rodney District Council*¹⁷ where the court stated:

The word ‘family’ has a wide meaning adequate in modern use to connote relationships of blood or marriage or other intimate relationships of a domestic nature, including, for example, persons sharing a dwelling such as students or friends. The essential connotation of the term is familial domesticity.

5.5.7 Together, these cases extend the concept of a single household unit or family beyond traditional ones of the nuclear or extended family, to arrangements based on how and why the occupants live together.

¹⁷ *Hopper Nominees Ltd v Rodney District Council* [1996] 1 NZLR 239

- 5.5.8 I have also considered these terms and applied the courts' approach in previous determinations. For example, in Determination 2007/111¹⁸, I considered that a 'flat' can lend itself to being considered a single household where there is a level of interaction and community between flatmates. I considered a 'flat' means a residence of a group of people who have chosen to live together in a 'family-like arrangement' with a similar atmosphere of trust, harmony, and affection.
- 5.5.9 Turning now to the current case, in its email of 18 July 2017 (see paragraph 3.14) the authority advised members of the RSE scheme that a change of use was likely to be required for RSE accommodation that housed more than six occupants. In the authority's view, such houses could no longer be considered to fall within the SH or Sleeping Single Home use under the Building (Specified Systems, Change of Use, and Earthquake-prone Buildings) Regulations 2005.
- 5.5.10 However, the number of occupants is just one of the factors that must be considered in establishing the classified use of a particular building. While it is a significant factor in that it influences several of the other factors that must also be taken into account, it is by no means the determining one.
- 5.5.11 In relation to the Detached dwelling classified use, the relevant factors are those that indicate whether or not a group of people is living as a single household or family. In the *Queenstown-Lakes* case, the judge identified the degree of permanence of the residents, their connection with other residents and an element of living together jointly as significant factors. In the current case, there are also other relevant factors. Loosely grouped, these relate to:
- the relationship between the occupants
 - the configuration of the houses and the facilities within them
 - the number and permanency of the occupants
 - the nature of the tenancies
 - the parties' purposes.
- 5.5.12 I will now consider each of these groups of factors in turn (there is inevitably some cross-over between them).

Occupants' relationships

- 5.5.13 The occupants of the applicant's houses will not be a family in the more limited sense of the word. However, they are also not likely to be strangers to each other: there is some element of commonality of background or community between them. While the occupants do not necessarily all belong to the same biological family (although there may be members of the same family living together in the dwellings) they do often all come from the same village in their Pacific country. The applicant states that they are all recruited through their village leader who will replace or provide additional workers as needed. The nature of village life means that the workers are likely to share kinship or community bonds that are family-like in their nature.
- 5.5.14 However, while this situation may be the norm, I consider it is unlikely to always be the case, and that there will also be situations where recruited workers do not come from the same village. The approach of recruiting workers from a single village, through a village leader, is not a mandatory one within the RSE scheme.

¹⁸ Determination 2007/111: Fire safety provisions for two relocated buildings to be used as staff accommodation (17 September 2001)

5.5.15 The applicant has stated that while the RSE workers are resident in New Zealand, they tend to work in the same place as the other people living in their accommodation, eat and travel to and from work together, spend leisure time together and attend church together. Workers also tend to return to the same accommodation with a similar group of co-workers each year, and may even return to the same bed.

5.5.16 I accept that in situations where this occurs, the workers are likely to come to see themselves as a unit or group, based not only on their place of origin and shared work but also on the place that they stay together while they are in New Zealand. Although the membership of the group may change, new members are likely to be welcomed into a pre-established way of living together. However, as stated above, this is not always necessarily the case, and depending on the dynamics of particular groups of workers, may or may not occur.

Houses' configuration and facilities

5.5.17 The applicants' two houses were originally constructed and used as residential dwellings. The sleepout was, I understand, originally constructed as additional sleeping accommodation associated with a dwelling and came within the SH "Buildings with sleeping (residential) and outbuildings" risk group for the purposes of the fire safety clauses of the Building Code. The sleepout was then converted to a classroom and then, in 2014, back to a sleepout.

5.5.18 It would appear that throughout these buildings' lives their internal configuration has remained substantially unchanged (apart from closing in a veranda at the Williams Street house to extend the size of the lounge). Both the Alexandra Crescent and the Williams Street house have separate kitchens, lounges, laundries and sanitary facilities, as might be expected in a normal residential dwelling. In other words, the houses have not been altered to what might be expected for more bunkhouse or dormitory-style accommodation. The sleepout does not have these facilities (other than the sanitary ones), as the expectation is that people sleeping in the sleepout will use the facilities in the main house.

5.5.19 This need for communal living spaces where occupants can cook, eat and otherwise socialise together is a requirement of the RSE Worker Accommodation Standards. The standards clearly envisage that workers who come to New Zealand under the scheme may wish to live together in a group or family-type arrangement once here.

5.5.20 This expectation that there will be a degree of social cohesion between occupants in RSE accommodation, and the applicant's assertion that this is usually how it works in practice, is an important one. There is an emphasis on occupants in buildings that fall within the Housing category to have a high level of social cohesion. This is clear from the inclusion of family or family-like groupings within each subcategory. A high degree of social cohesion is justification for the lower fire protection requirements for household units to satisfy the Acceptable Solutions; relying on occupants warning each other, being aware of the building and its escape routes and quickly evacuating. For this to work, occupants must know each other and be aware of each other's movements.

5.5.21 I consider that it is likely that, as a result of the expectations for worker accommodation set by the RSE scheme and the applicant's description of how the scheme usually works in practice, that there is likely to be a relatively high degree of social cohesion between the occupants within the applicant's houses, and that in this way the occupants are likely to approximate a single household unit in how they live.

Number and permanency of occupants

- 5.5.22 The authority has indicated that any building containing more than six occupants may not be considered be a Sleeping Single Home. Although the authority was referring to the building's classification under different legislation, there is some correlation between the classified uses under the Building Code and the specified uses under the Building (Specified Systems, Change of Use, and Earthquake-prone Buildings) Regulations 2005. The Sleeping Single Home use would in many situations be the same as the Detached dwelling classified use.
- 5.5.23 As stated above, whether or not a building is a Detached dwelling cannot be determined based on its occupancy alone. Indeed, the number of occupants indicated by the authority would represent a relatively small family, both within New Zealand society and within many of the cultures that the RSE workers draw from.
- 5.5.24 However, the number of occupants in a building does affect whether or not they can be considered to be living as a single household unit. The smaller the number of occupants, the more likely that they will know each other well and be aware of each other's movements; in other words, the more likely that there will be a high degree of social cohesion between them. As the number of occupants grows, in the absence of biological family relationships to keep the group cohesive, the involvement and awareness of each other's lives and movements is likely to decrease. If the number continues to rise, there will reach a point where it will become difficult for individual occupants to keep tabs on or assist each other should the need arise.
- 5.5.25 The Building Code makes a similar clear distinction around the risks, and related performance criteria, associated with the number of occupants that different buildings are intended to have. This distinction is reflected in the Acceptable Solutions. Accordingly, boarding houses that provide accommodation for fewer than six people are specifically included within the Detached dwelling classified use. Where there are six or more people, the boarding house falls within the Community service classified use (refer paragraph 5.8.2), which attracts increased life safety obligations and more onerous performance requirements. Again, this distinction reflects the degree of communality and awareness of other residents' movements that smaller boarding houses are likely to have.
- 5.5.26 In the current case, both of the applicant's houses have current maximum occupancies of 12 people. In the past these have been higher at 19 and 14 occupants, and I assume the applicant would wish to reinstate these higher maximum occupancy levels, if possible. Twelve occupants is getting towards the higher end of the scale for a single household unit. However, it would not be particularly unusual in situations where extended family or communal living is the norm. Fourteen and 19 occupants are, of course, higher still. Although, in my opinion 19 occupants is moving towards the cusp of what can realistically be described as a household unit, it cannot be automatically excluded based on its size.
- 5.5.27 There is no hard and fast number at which it can be said that a group is too big to continue to function as a household unit, and hence for a building to be a Detached dwelling. Other factors, such as those already discussed, will need to be taken into account. Also relevant will be the permanency of the residents.

- 5.5.28 I have discussed what is meant by permanency in Determination 2014/026¹⁹, where I stated that permanence is not only a matter of how long people stay in a place, but i also how they view their residence and relate to the other occupants. An occupant who does not consider their accommodation to be permanent is considered more at risk in a fire event and is less likely to be familiar with escape routes.
- 5.5.29 Here the applicant has stated that the RSE workers occupy their accommodation for a minimum of six months and a maximum of nine months each year. Workers often (but not always) will return to the same house and even the same bed. They may chose to leave personal items behind for when they next return to work.
- 5.5.30 The applicant has also stated that, except in relatively uncommon situations related to seasonal tasks, the make-up of the occupants within each RSE accommodation building does not tend to increase or change.
- 5.5.31 In my opinion, both of these factors indicate a relatively high degree of permanency for both the individual occupants and the group of occupants that live in RSE accommodation. Clearly, for some of these workers, their accommodation is viewed as a form of permanent base or home-away-from-home while they are in New Zealand working.
- 5.5.32 Against this is the fact that there is an unavoidable degree of transience in the workers' occupation, as they are only entitled to stay in the country for a set period each year. This restriction means that the occupants will never view the RSE accommodation as their permanent home, or as capable of becoming so. There will always be a temporary nature to it. However, given that workers will stay in New Zealand for at least half of every year, and potentially more, they may, as I have stated above, view it as their permanent home, during the periods they are here.

Nature of the tenancies

- 5.5.33 In Determination 2018/015²⁰, I considered the effect that the nature of the tenancy could have on the classified use of the building.
- 5.5.34 In that case, the building had a large number of occupants (17), with each of them holding individual tenancy agreements with the landlord. I considered this material, as it (along with other factors) indicated that the tenants did not live together as a single household. Other factors that I took into account included the tenants' lack of choice as to who the other tenants were; the locks on all the tenants' bedroom doors; the duplication of facilities on the two floors of the building; and the tenants' view that they were living in a boarding house.
- 5.5.35 In the current case, none of the occupants holds any form of tenancy agreement with the applicant. Instead, the tenancy agreement is between the applicant and the RSE employer or a third-party agent hiring workers on behalf of an RSE employer. The applicant has provided some examples of these tenancy agreements or leases, which set out the respective obligations of the parties.
- 5.5.36 The RSE workers occupying the houses are provided with fully furnished accommodation. They do not have to pay for any of the utilities associated with the tenancy, as this is all provided by the applicant as part of the per-occupant rate he is

¹⁹ Determination 2014/026: Regarding which fire risk group should be used in determining the compliance of proposed accommodation (21 May 2014)

²⁰ Determination 2018/015: Regarding the notice to fix and the refusal to issue a certificate of acceptance for alterations to a house (23 April 2018)

- paid by the employer. The applicant is also responsible for doing the gardening and removing the rubbish.
- 5.5.37 This is a different situation to the one I considered in Determination 2018/015, but is still not a standard tenancy arrangement. From the occupants' point of view, the accommodation is part of the payment that they receive for their work. They do not have any say as to the nature of the house or facilities provided or where it is located. They also do not have any direct control over the other occupants of the house. The applicant states that the occupants will generally all be from the same village, but I do not consider this can be a hard and fast rule. If a particular employer wishes to accommodate workers from two or more villages in one house, then I imagine there is nothing to stop him or her from doing so. The applicant also states that workers can request a change of accommodation, but that the final say as to where they will reside rests with the employer.
- 5.5.38 To me these factors indicate an absence of the choice and self-regulation that you would expect to find in a Detached dwelling. As stated in paragraph 5.4.1, all of the classified uses in the Housing category involve 'self care and service (internal management)'. In the current case, this self care is only partial, with many of the matters of day-to-day living managed by the applicant. In this respect, I consider the situation to be more akin to a boarding house or hostel type situation, where some services will be provided as part of the occupants' board, but others, such as laundry and cooking, may be retained.
- 5.5.39 Another factor that I considered in Determination 2018/015 was inconsistent with a single household was the presence of locks on all of the bedrooms doors. In that case all of the tenants (individuals and couples) had their own bedrooms, which could be locked. That is not the case here. Occupants share bedrooms, with the largest bedroom able to sleep six people, and the sleepout ten people. The occupants are able to access any part of the house freely, in the same way that family or household members might. Under the terms of the RSE Worker Accommodation Standards, however, occupants must be provided with a secure lockable place to keep their valuables.
- 5.5.40 The other factor that I consider material in relation to the nature of the tenancies is the presence of the house rules or code of conduct. These are rules set by the applicant as to how the occupants are to treat his houses and their responsibilities when living in them. The applicant has stated that all of his tenancies include such rules in various forms. In the examples I have been provided with, the house rules cover such things as the need to 'Treat the house as your home with care and respect', keep the house clean, turn off lights when leaving the house, and only use the heating provided.
- 5.5.41 The use of agreements was considered in the *Queenstown-Lakes* case, where the judge stated that:
- ...There is a significant degree of restriction as a matter of contract on the freedoms of the occupant which is inconsistent with people being resident in a household;...
- 5.5.42 In my view the approach taken by the court applies to the circumstances in this case. In particular, I consider that the need to formalise the living arrangement in this way is not typical of a single household or family situation.

5.5.43 The house rules in the current case are not as prescriptive as those considered in the *Queenstown-Lakes* case. However, they still go beyond the types of rules that might be expected in a household situation. They also reinforce the lack of self care that is a feature of the RSE accommodation arrangements. This, together with the other factors discussed above, leads me to conclude that the nature of the tenancies for the applicants' houses does not support the view that the occupants are living as a single household.

RSE parties' purposes

- 5.5.44 The last factor to consider is the RSE parties' purposes in providing and leasing the accommodation. I use the term 'parties' here to mean the individuals and agencies involved in providing, using and regulating RSE accommodation, rather than the parties to the determination.
- 5.5.45 It is clear that the applicant's purpose as owner of the houses is to make them available as worker accommodation under the RSE scheme. This purpose is commercially driven; the applicant is seeking to make a return on his investment in the property. During the off-season, the use changes to short-term rental accommodation for families on the general property market, but for the majority of the year, the applicant's intention is that the houses should accommodate groups of workers associated with the viticulture and horticulture industries.
- 5.5.46 This is similar to the employer's purpose in leasing the properties. The employer has an obligation to provide accommodation for the RSE workers that he or she employs, and he or she is seeking to fulfil this. The accommodation is part of the remuneration package that the workers receive and its cost is regulated by the Ministry to ensure it is fair. As with the applicant, the employer's purpose is commercially driven, as although the employer does not make any profit directly off the accommodation, it enables him/her to access the labour needed to run his/her own business.
- 5.5.47 I also consider it relevant to take into account the government's purpose in enabling the RSE scheme and regulating the accommodation that must be provided under it. This purpose is to provide a certain standard of worker accommodation for particular groups of workers, which is consistent with the purposes of the applicant and the employer.
- 5.5.48 In my opinion, these purposes are important, as in general, the examples of worker- or occupation-based accommodation given in Clause A1 fall under the Community service classified use. So, for example, 'nurses' home', 'work camp' and 'hall of residence' are all listed here. So too is 'hostel' which, although it is capable of being used in other capacities, is also commonly used to describe accommodation provided for groups of workers.
- 5.5.49 In his submissions the applicant has raised the point that the RSE scheme creates a disparity between RSE and other types of worker accommodation, such as farm worker or forestry accommodation, where there is no requirement for territorial authorities to assess the use of the accommodation.
- 5.5.50 This disparity arises from the mechanism within the RSE scheme for the Labour Inspectorate to alert territorial authorities to the presence of worker accommodation in their district. It is designed to ensure that workers brought in from overseas are adequately cared for and have somewhere safe to live. As such, this is a disparity with regard to how these RSE workers are supported, rather than in how the standards in the Building Code are applied to their accommodation. If territorial

authorities become aware of other types of worker accommodation in their district, they may require a similar assessment as to whether the intended use of the accommodation complies with its classified use, and potentially for a change of use to occur.

Conclusion regarding Detached dwelling

- 5.5.51 Taking into account all of the factors discussed above (the occupants' relationship, houses' configuration and facilities, number and permanency of the occupants, nature of the tenancies, and parties' purposes) I am of the view that the applicant's houses do not fall within the classified use of Detached dwelling.

5.6 Classified use – Multi-unit dwelling

- 5.6.1 The next classified use to come within the Housing category is that of Multi-unit dwelling, which is defined as:

Multi-unit dwelling

Applies to a *building* or use which contains more than one separate household or family. Examples: an attached dwelling, flat or multi-unit apartment.

- 5.6.2 The performance requirements in the Building Code for Multi-unit dwellings are similar to those for Detached dwellings, but with more onerous requirements relating to fire and noise separations between household units and protection of other property. This reflects the fact that the households or families live separately within the building, without any necessary connection or interaction between them.
- 5.6.3 As can be seen by the examples given for this classified use, the intention is that it applies to buildings that are physically separated into two or more discrete households. This is clearly not the case with the applicant's houses. Although the sleepout is physically separate from the main dwelling, the majority of the facilities that the occupants of the sleepout will need to use are located in the main dwelling, and the occupants of the sleepout do not live as a separate household to those in the house.
- 5.6.4 Therefore I am of the view that the houses cannot correctly be described as containing multiple units and do not fall within the classified use of Multi-unit dwelling.

5.7 Classified use – Group dwelling

- 5.7.1 The third and final classified use to come within the Housing category is that of Group dwelling, which is defined as:

2.0.4 Group dwelling

Applies to a *building* or use where groups of people live as one large extended family. Examples: within a commune or marae.

- 5.7.2 In my opinion, taking into account some of the factors already discussed in relation to the Detached dwelling classified use, there is some merit in the possibility that the applicant's houses may be being used as Group dwellings. Whether or not this is the case depends on whether the occupants can be considered to be groups of people living as one large extended family.
- 5.7.3 Factors supporting this interpretation include the pre-existing community or village-based bonds that typically exist between the occupants and the nature of their shared living arrangements while in the RSE accommodation. However, as noted earlier,

these family-type bonds and the predisposition to social cohesion that they carry with them are not a prerequisite for groups of workers being recruited or accommodated under the RSE scheme, and will not always be the case.

- 5.7.4 Unlike for the Detached dwelling classified use, the size of the group will not count against this use, as the description of Group dwelling clearly envisages that there will be a large number of people occupying the building. The increased risk that this may cause is addressed through more onerous Building Code requirements relating to protection from fire, access routes, escape routes, signs, lighting and solid waste, than those that apply to Detached dwellings.
- 5.7.5 However, as for Detached dwellings and Multi-unit dwellings, for a building to be considered a Group dwelling it must involve self-care and service (internal management). As already discussed, this is only true to a limited degree in relation to the applicant's houses. There is also the sporadic nature of the occupation, so that the accommodation cannot be viewed as permanent; and the house rules that apply to all the tenancies, giving them more of a commercial accommodation nature.
- 5.7.6 However, I also consider it relevant that the RSE accommodation has strong similarities with the two examples of Group dwellings in Clause A1, namely 'within a commune or marae'. As in these situations, the occupants live together in a communal nature and in pursuit of a common purpose, lifestyle or occupation. The make-up of the group may transcend biological ties, but they share a common purpose in coming together to live in one place, and once in that place live cooperatively. To my view, this distinguishes the current situation from that discussed in Determination 2018/015 where the occupants, although sharing facilities, lived largely independently of each other.
- 5.7.7 In Determination 2011/069²¹ I considered what constitutes a 'group' for the purpose of this classified use (i.e. Group dwelling). In that determination, I concluded that this term should not be interpreted narrowly and that:
- Groups of people could encompass people undertaking similar work together, people of different nationalities who live together in groups, or groups of people in particular relationships.
- 5.7.8 Determination 2011/069 recognised that there were reasons beyond familial relationships for people to live together as one large extended family. This interpretation reflects the shared purpose and necessary cooperation to achieve a certain standard of living (such as in a commune) exhibited in Group dwellings. It is an interpretation that fits neatly with the way that the occupants in the applicant's houses conduct their affairs.
- 5.7.9 In that determination, I concluded that the building in that case came within the Group dwelling classified use. Where that building differed from the applicant's houses was in relation to the degree of assistance provided to the residents. Assistance and care are features of the Communal residential category of classified uses, and for the building in that case these were absent. In the applicant's houses, however, limited assistance is provided to the occupants in the form of furniture, utilities and other services provided as part of their accommodation package.
- 5.7.10 Therefore, I am of the view that the houses do not fall within the classified use of Group dwelling.

²¹ Determination 2011/069: Regarding conditions to a building consent and the use of a building (11 July 2011)

5.8 Communal residential category

- 5.8.1 The Communal residential category of classified uses applies to buildings where assistance or care is extended to the occupants. Unlike the uses within Housing, there is no emphasis placed upon the requirement for a family (or single household), and the examples given tend to relate to buildings where the occupants are less likely to know each other.
- 5.8.2 There are two classified uses within this category – community service and community care. I will look at each of these in turn.

3.0 Communal residential	
3.0.1 Applies to buildings or use where assistance or care is extended to the principal users. There are two types:	
3.0.2 Community service Applies to a residential building or use where limited assistance or care is extended to the principal users.	a boarding house, hall of residence, holiday cabin, backcountry hut, hostel, hotel, motel, nurses’ home, retirement village, time-share accommodation, a work camp, or camping ground.
3.0.3 Community care Applies to a residential building or use where a large degree of assistance or care is extended to the principal users. There are two types: (a) Unrestrained; where the principal users are free to come and go (b) Restrained; where the principal users are legally or physically constrained in their movements.	 (a) hospital, an old people’s home or a health camp (b) a borstal or drug rehabilitation centre, an old people’s home where substantial care is extended, a prison or hospital.

5.9 Classified use – Community service

- 5.9.1 The Community service classified use applies to residential buildings where the occupants receive ‘limited assistance or care’. This term is not defined in the Act, and accordingly must carry its natural meaning in the context in which it is used.
- 5.9.2 To determine what is meant by ‘limited assistance or care’ in this context, I analysed the examples to understand the types of services that might be expected to come within their scope. Within each of the examples, there is a varying degree of what constitutes ‘care or assistance’ provided to the occupants. In some cases, such as a backcountry hut, this could be relatively minor. In other examples, it may include the provision of meals, cleaning, day-to-day upkeep, onsite management etc. What all the examples have in common is that there is some care or assistance, and that this is provided by a third party. In other words, occupants within these examples will not be expected to exercise the same degree of self-care and service as those residing in Detached dwellings, nor will they be reliant on other occupants to provide them with care and assistance to the same degree.
- 5.9.3 In relation to the term ‘limited’ as used in defining this classified use, I have also found it helpful to compare the examples given for Community service with those given for Community care. The latter classified use applies to residential buildings where a ‘large degree’ of assistance is provided. Community care is intended to cover situations where occupants are largely dependent on another person, whereas occupants in Community service are largely independent. The large degree of

independence in Community service explains the varying range of what ‘limited assistance or care’ can cover. For example, back country huts offer minimal services to occupants, whereas hotels offer a wider range of assistance. In both situations the occupants receive varying degrees of care and assistance, but retain their essential autonomy.

- 5.9.4 In the current case, I consider that the occupants are being provided with ‘limited assistance or care’. For example, the occupants have no responsibilities (and also no choice) in relation to entering into a lease or paying the rent for their accommodation (this is the employer’s responsibility), or for most of the basic utilities or upkeep associated with it, including power, gas, water, heating, lawn-mowing and rubbish disposal (this is the applicant’s responsibility). Their accommodation is supplied fully furnished, including bedding and cooking utensils. They need only arrive at their accommodation with their personal belongings at the start of their contract and leave again at the end.
- 5.9.5 Under the example leases I have seen, the employer also has additional responsibilities to provide other assistance to the occupants. For example, the employer must provide training to the occupants in how the ovens, washing machines and other whiteware works, and how to sort rubbish and recycling. He or she must also regularly inspect the buildings for the purposes of maintenance, fire safety, security etc; provide cleaning products for the occupants to use; and provide a list of staff that occupants can contact if they need help.
- 5.9.6 I also consider it relevant that this requirement to provide assistance and care is externally imposed upon the applicant and employer, as opposed to being one that they have taken upon themselves. The nature of the care and assistance to be provided is dictated at a government (Ministry) level, through the RSE scheme and its accommodation standards. Further, the Ministry is involved in regulating the accommodation as a form of worker accommodation, in line with the Health and Safety at Work Act 2015. To my mind, this government intervention is consistent with accommodation provided as part of a commercial enterprise, and less consistent with accommodation that falls within the Housing classified uses.
- 5.9.7 Turning now to the examples given in relation to the Community service classified use, I consider that the way the applicant’s houses are used has similarities with several of them, with the two most direct relevant being ‘boarding house’ and ‘hostel’.
- 5.9.8 The term ‘boarding house’ is not defined in the Act or Building Code. The *Oxford English Dictionary* definition is ‘a private house providing food and lodging for paying guests’. I consider the ordinary and natural meaning of a boarding house as a place that provides accommodation and some level of service higher than, for example, a hostel which has individual occupants. Taking the ordinary and natural meaning of the word, I agree the ‘boarding house’ label is incorrect in this situation. While it could be considered that the occupants in the current case are receiving lodging, the applicant has stated that they take care of all their own cooking and eating arrangements. In addition, in its normal usage, the term boarding house would not be used to describe situations where groups of occupants share a bedroom, especially if they are not necessarily related to each other.
- 5.9.9 The term ‘hostel’ is also not defined by the legislation. Its dictionary definition is given as an ‘establishment which provides inexpensive food and lodging for a specific group of people, such as students, workers, or travellers’. While this definition also incorporates the provision of food, I do not think this is an integral

part of what is meant by the term ‘hostel’ as it is used in New Zealand. Many travellers’ hostels and backpackers’ accommodation, and some student and nurses’ hostels do not cater for occupants but instead provide communal cooking facilities that occupants can use. Unlike the term ‘boarding house’, I consider that ‘hostel’ covers accommodation arrangements where there may be multiple occupants sharing a bedroom. Again, I do not think the way that the applicant’s houses are used fits neatly within the term ‘hostel’; however, I think there are some similarities between what this term is commonly understood to mean, and the nature of the RSE accommodation and how it is run.

- 5.9.10 Several of the other examples given for the Community service classified use, although clearly not fitting the situation here, have important similarities. In particular, as discussed in paragraph 5.5.48, I consider it material that several of these examples; – ‘hall of residence’, ‘nurses’ home’, ‘work camp’ – relate to accommodation provided for occupation or work-based groups.
- 5.9.11 It is important to remember that the examples given in Clause A1 are only meant to illustrate the types of buildings that fall under each of the classified uses, and are not exhaustive. Just because a building does not align neatly within one of the specific examples does not mean that it does not fall within the classified use. What must be considered is whether the building shares sufficient similarities, in terms of characteristics, services, intended use, configuration, occupants, tenure etc, to come within the scope of the classified use.
- 5.9.12 In the current case, I consider that the applicant’s buildings have the following features that align with the Communal residential classified use:
- these buildings accommodate often large groups of occupants
 - the occupants work together, have been bought together as a group, and are being accommodated for the purpose of their work
 - the occupants do not necessarily know the other occupants before they enter the accommodation (although due to the way the scheme is operated in the applicant’s area they often do) and have no say as to who the other occupants are
 - the occupants are provided with care and assistance in their accommodation
 - the accommodation is of a commercial nature, in that it forms part of the occupants’ remuneration for their employment, and the applicant’s purpose in providing the accommodation and the employer’s purpose in leasing it is commercially based
 - the occupants are subject to house rules or a code of conduct while residing in the applicant’s houses, which place restrictions on their behaviour and how they arrange and conduct their affairs, both individually and as a group.
- 5.9.13 The performance requirements in the Building Code that apply to buildings with the Community service classified use also give some indication of the types of buildings that will fall within it. Overall, buildings or uses that fall within Community service have more demanding fire and accessibility performance requirements when compared to uses within the Housing category. The more onerous performance requirements reflect the fact that occupants may be in an unfamiliar sleeping environment, and exposed to higher risks in the event of an emergency than someone who is in a dwelling with members of their family or living in a family-like arrangement.

5.10 Classified use – Community care

- 5.10.1 The remaining classified use relating to residential buildings is Community care. This classified use applies to residential buildings where the occupants receive ‘a large degree of assistance or care’. There are two types: ‘Unrestrained’ where the occupants are free to come and go; and ‘Restrained’ where they are not.
- 5.10.2 The examples given in relation to this use include buildings such as hospitals, old people’s homes and prisons. All of these examples are institutional in their nature, and the large degree of care provided to occupants is associated with the institution’s purpose. I consider it clear that the applicant’s houses do not fall within this classified use.

5.11 Conclusion

- 5.11.1 I note that my conclusions here apply to the facts of this case and are not intended as a definitive statement on what the classified use of buildings used as RSE accommodation will be in all situations. This assessment will need to be made by territorial authorities and others seeking to establish the classified use of RSE accommodation on a case-by-case basis, based on the factors identified in this determination and any other pertinent factors that arise. However, the matters discussed in this determination may provide guidance on the types of matters that will need to be taken into account.
- 5.11.2 In his submissions, the applicant has stressed that typically the groups of people who occupy his houses all come from the same village and have been recruited through their village leaders, and that this existing community bond carries over into how they live once resident in the RSE accommodation. However, while I accept this may commonly be the case, it will not always be so. This approach to recruitment is also not a requirement of the RSE scheme and there is nothing to prevent an employer recruiting, or accommodating, recruited workers in a different fashion.
- 5.11.3 I accept that in situations where the occupants are recruited as the applicant has described, they may well function in a similar way to a large extended family within RSE accommodation. However, where this is not the case, I consider that the group is more likely to function like occupants in a hostel or halls of residence situation. This would especially be the case with larger groups (the applicant has said that in the past the Williams Street house has accommodated up to 19 people) where the level of social cohesion between the occupants could be expected to be less strong, whether or not they knew each beforehand.
- 5.11.4 I also think that the house rules that apply to the occupants significantly limit not only their personal freedoms and how they can use the houses but also their ability to function as a single household unit. In a similar way, the relatively extensive care and assistance provided to the occupants undermines their ability to arrange and take responsibility for their domestic affairs. Both of these factors undermine the occupants’ capacity for self care and service, which is a fundamental aspect of buildings that come within the Housing category of classified uses.
- 5.11.5 In the *Queenstown-Lakes* case the judge concluded that:
- Putting it more as a matter of impression it simply looks more like a hostel or a hotel or hall of residence than it does a house or a home.
- 5.11.6 I think the same can be said here. As a matter of overall impression, I consider that the applicant’s houses are more akin to a nurses’ hostel or a halls of residence or a work camp, than they are to a household or home. I imagine that groups of workers

who start off as strangers, but share hostel-type accommodation over an extended period, come to develop some characteristics and ways of living together as a group that are similar to those found in extended families and household units. However, these buildings remain essentially commercial in their purpose, and the occupants are unlikely to consider the hostel as their permanent home.

- 5.11.7 Accordingly, I am of the view that the occupants in the applicant's houses do not live as a single household in a Detached dwelling, and that instead these houses come within the Community service classified use, as residential buildings where limited assistance or care is extended to the occupants.

6. The decision

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the intended use of the buildings (when used as accommodation under the Recognised Seasonal Employer Scheme) does not comply with the Building Code classified use in Clause A1 2.0 Housing and Clause A1 2.0.2 Detached dwellings.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 19 December 2018.

Katie Gordon
Manager Determinations

Appendix A

A.1 Relevant sections of the Act

7 Interpretation

In this Act, unless the context otherwise requires,—

household unit—

- (a) means a building or group of buildings, or part of a building or group of buildings, that is—
 - (i) used, or intended to be used, only or mainly for residential purposes; and
 - (ii) occupied, or intended to be occupied, exclusively as the home or residence of not more than 1 household; but
- (b) does not include a hostel, boardinghouse, or other specialised accommodation

intended use, in relation to a building,—

- (a) includes any or all of the following:
 - (i) any reasonably foreseeable occasional use that is not incompatible with the intended use:
 - (ii) normal maintenance:
 - (iii) activities undertaken in response to fire or any other reasonably foreseeable emergency; but
- (b) does not include any other maintenance and repairs or rebuilding

16 Building code: purpose

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

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.

A.2 Relevant clauses of the Building Regulations 1992

3 Building code

(1) In accordance with Part 6 of the Act, the building code shall be the building code set out in Schedule 1.

(2) Except as otherwise provided by the Act, each building shall achieve the performance criteria specified in the building code for the classified use of that building, and, if the building has more than 1 classified use, any part of it used for more than 1 classified use shall achieve the performance criteria for each such classified use.

(3) The classified use or uses of a building or part of a building shall be the ones that most closely correspond to the intended use or uses of that building or part of that building.

A.3 Relevant clauses of the Building Code

Clause A1—Classified Uses

1.0 Explanation

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

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

2.0 Housing

2.0.1 Applies to buildings or use where there is self care and service (internal management). There are three types:

2.0.2 Detached dwellings

Applies to a building or use where a group of people live as a single household or family. Examples: a holiday cottage, boarding house accommodating fewer than 6 people, dwelling or hut.

2.0.3 Multi-unit dwelling

Applies to a building or use which contains more than one separate household or family. Examples: an attached dwelling, flat or multi-unit apartment.

2.0.4 Group dwelling

Applies to a building or use where groups of people live as one large extended family. Examples: within a commune or marae.

3.0 Communal residential

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

3.0.2 Community service

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

3.0.3 Community care

Applies to a residential building or use where a large degree of assistance or care is extended to the principal users. There are two types:

(a) **Unrestrained**; where the principal users are free to come and go. Examples: a hospital, an old people's home or a health camp.

(b) **Restrained**; where the principal users are legally or physically constrained in their movements. Examples: a borstal or drug rehabilitation centre, an old people's home where substantial care is extended, a prison or hospital.

A.4 Relevant clauses of the Building (Specified Systems, Change of 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		
<i>Use</i>	<i>Spaces or dwellings</i>	<i>Examples</i>
SC (Sleeping Care)	spaces in which people are provided with special care or treatment required because of age, or mental or physical limitations	hospitals, or care institutions for the aged, children, or people with disabilities
SD (Sleeping Detention)	spaces in which people are detained or physically restrained	care institutions for the aged or children and with physical restraint or detention, hospitals with physical restraint or with detention quarters, detention quarters in Police stations, prisons
SA (Sleeping Accommodation)	spaces providing transient accommodation, or where limited assistance or care is provided for people	motels, hotels, hostels, boarding houses, clubs (residential), boarding schools, dormitories, halls, wharehousi
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	dwellings or houses separated from each other by distance

Uses related to sleeping activities		
<i>Use</i>	<i>Spaces or dwellings</i>	<i>Examples</i>
	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	

...