



## **Determination 2019/005**

# **Regarding the authority's decision to issue of a notice to fix for the conversion of a garage to a self-contained unit at 27 Athenic Avenue, Lynfield, Auckland**

### **Summary**

This determination considers whether a detached garage associated with a dwelling has undergone a change of use when it was converted to a self-contained unit. The authority issued a notice to fix in respect of the conversion.

### **1. The matter to be determined**

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“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 building R Nasserri (“the applicant”), represented by an agent (“the agent”)
  - Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 The application for this determination arises from the authority's decision to issue a notice to fix because it was of the view that the conversion of the garage to a self-contained unit constituted a change of use under the Building (Specified Systems, Change of Use, and Earthquake-prone Buildings) Regulations 2005 (“the Regulations”).
- 1.4 The matter to be determined<sup>2</sup> is therefore the authority's exercise of its powers of decision to issue a notice to fix for the change of use.
- 1.5 In making my decision, I have considered the submissions from the parties and the other evidence in this matter.
- 1.6 In this determination, unless otherwise specified, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

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<sup>1</sup> The Building Act, Building Code, Acceptable Solutions, past determinations and guidance documents issued by the Ministry are all available at [www.building.govt.nz](http://www.building.govt.nz) or by contacting the Ministry on 0800 242 243.

<sup>2</sup> Under sections 177(1)(b) and 177(2)(f) of the Act

The relevant provisions of the Building Act 2004 and Building Regulations 2005 are in Appendix A.

## 2. The building, building work and background

2.1 The property is a rear section that contains:

- a three bedroom house, circa 1974, which includes a basement garage.
- a stand-alone self-contained unit at the rear of the property (“the self-contained unit”), which was originally constructed as a double garage (circa 2007). There is no information on the property file about when building consent was granted for this building.

2.2 At its closest point, there appears to be in the order of three metres in distance between the house and self-contained unit.

2.3 The building work consists of the conversion of the garage to a self-contained unit, including the installation of a kitchen and sanitary facilities. Despite requesting the parties provide information about the self-contained unit, I have not been provided with any plans or photographs of it.

2.4 As a result of a complaint about people living in the ‘garage’ (i.e. the self-contained unit), the authority carried out a site meeting and inspection on 9 April 2018.

2.5 On 18 April 2018, the authority issued notice to fix NOT 21392101 to the applicant. The notice to fix was accompanied by a cover letter of the same date, which referred to ‘a change of use to the existing consented double garage being converted into a minor household unit’. The notice to fix stated:

Contrary to section 114 of the [Act], the owner must give notice, in writing, of [a] change of use of the building, specifically, the existing double garage at the rear of [the property] being converted into a minor household unit where the household unit did not exist before.

Contrary to section 115 of the [Act], the owner must not change the use of the building unless the [authority] is satisfied on reasonable grounds, that it will comply (as reasonably practicable) with the Building Code. Specifically, you have changed the use of the building without receiving written authority from [the authority] that the building complies (as [nearly as is] reasonably practicable) with every provision of the Building Code.

2.6 The authority also wrote to the applicant on 18 April 2018 about building work carried out without a building consent first being obtained. The letter stated:

... the [authority] identified that building alteration work had been undertaken on the property without first obtaining a building consent, contrary [to] section 40 of the [Act]. These building works included:

- Installation and plumbing of additional sanitary fixtures – specifically – kitchen sink, shower and toilet in the consented double garage. ...

The building works was not carried out by the current owner, [the authority] will be placing a ‘Property Characteristic’ on the property file noting these unconsented building works.

2.7 On 26 June 2018, the agent wrote to the authority, challenging both the letter regarding the unconsented building work and the issue of the notice to fix.

2.8 On 16 July 2018, the authority wrote to the agent noting that the notice to fix was issued regarding the change of use of the garage, and the garage was consented as a garage and not as a habitable space. The authority also noted that the applicant had

stated that the garage is being tenanted as a self-contained unit and is completely independent of the main house.

2.9 The Ministry received an application for determination on 22 August 2018.

### 3. The initial submissions

3.1 The application for determination included:

- a submission from the agent setting out the background and reasons for disputing the authority's decision
- copies of correspondence between the authority and the agent from the period 27 June 2018 to 17 August 2018
- a copy of the notice to fix (NOT 21392101) dated 18 April 2018 and the cover letter that accompanied the notice of the same date
- a copy of a letter dated 18 April 2018 about the unconsented building work
- copies of correspondence from the period 28 March 2018 to 29 March 2018 between the authority and the agent about the authority's request to inspect the property.

3.2 In the submission accompanying the application, and submissions dated 4, 5, 26 September 2018, and 2, 8, 12 and 16 October 2018, the agent made the following points that relate to the matter to be determined:

- The authority has issued a notice to fix alleging a change of use, despite the applicant's contention that this was not the case. The authority has failed to apply the Regulations correctly.
- The determination "must" be made on the evidence that the authority used to come to its conclusion. That the self-contained unit now exists is not in doubt, what is in dispute is whether this is a change of use in terms of the Regulations.
- With respect to the use:

The intended use is as a single household with the self-contained space in the garage used in this case by a member of the same household (as the main dwelling). This is [sleeping single home] use under the Schedule 2 of the [Regulations]. [Sleeping single home] applies to detached dwellings on the same site (as distinct from [sleeping residential] for attached dwellings). There are no more onerous requirements in any event so no change of use.

The [authority] have alleged [the applicant] is renting out as a minor dwelling. ... This is not the intended use, but in fact the self-contained space could be rented out to a separate household as this is not a change of use under the [Regulations]. This is because as a space within the "detached dwelling" the new use does not move the use from [Sleeping Single Home]. This is because detached dwellings (plural) are nominated in [Sleeping Single Home] use and these are not "attached units" relevant to [Sleeping Residential].

The occupants are permanent residents and no assistance is provided to users so [Sleeping Accommodation] does not apply either.

- The remedies in the notice to fix do not relate to the particulars of contravention.

- Section 114 only requires notice to be provided to the authority if there is a change of use and there is not one in this case. There is no building work that requires a consent in this case.
- 3.3 The authority acknowledged the application on 7 September 2018, and provided the property file on 28 September 2018.
- 3.4 Given the disputed matter and the information provided, on 2 October 2018 the Ministry suggested to the parties an expert be appointed to provide the Ministry with information on the nature of the building and how it is being used. On 2 October 2018 the agent said he disagreed with an expert being appointed by the Ministry; on 8 October 2018 the authority said it agreed.
- 3.5 On 15 October 2018, the authority provided a copy of the notice to fix and cover letter (refer to paragraph 2.5) and stated its position was arrived at due to a complaint, and subsequent phone conversations with the owner who stated her friend is currently living in the garage. The authority also provided a copy of an advertisement to let the self-contained unit dated May 2014.
- 3.6 I note that information was requested by the Ministry from the parties about the self-contained unit but very little information has been provided by the parties. The authority provided the property file, which contains nothing more recent than 2010 (for drainage to a right of way). The property file does not contain any building consent information that relates to the building that is now the self-contained unit, which the authority has referred to as the 'existing consented double garage' (refer paragraph 2.5).

#### **4. The draft determination and the submissions received in response**

- 4.1 A draft determination was issued to the parties for comment on 19 November 2018.
- 4.2 The agent provided a response to the draft determination on 20 November 2018. The agent stated the draft determination was accepted, but requested the draft be amended with respect to the unconsented building work, and should state:
- While a [certificate of acceptance] is the owners prerogative the owner is not obliged to make an application at this time and the unconsented works may remain as unconsented but not unlawful. The offence was with the person that undertook the building work but there is no continuing offence that exists with the presence of the building work as long as it remains not dangerous and not insanitary.
- 4.3 The authority responded to the draft determination on 4 December 2018 and provided an additional submission on 5 December 2018. The authority did not accept the draft determination and commented:
- The authority does not agree with the draft's interpretation that the garage in question is Sleeping Single Home (SH) and remains SH even after it ceases to be used for the purposes specified for a garage in use category SH. This results in the garage being used for human habitation without any assessment in terms of Building Code compliance and there are materially different Building Code requirements for outbuildings and dwellings.
  - There is ambiguity in Schedule 2 of the Regulations because garages fall within two different use categories SH and IA (Intermittent Low).

- Where garages fall within SH, their use in that category is qualified by the requirement that they be used “primarily for storage of the occupants’ vehicles, tools and garden implements”.
- In light of the ambiguous nature of the classification of the garage in question, the use classification that best achieves the purpose of the Act is to be preferred: the garage is SH while used for the purposes specified in the SH use category for garages, but when its use as a garage (as defined in SH) ceases, it reverts to IA. This interpretation achieves the relevant purpose and principles of the Act.
- The change from a garage used for storage to living accommodation constitutes a change of use as envisioned by the Regulations. It is clear from the Regulations that a building does not need to change categories in order to constitute a change of use, as “all or part of a building” may change use.
- The authority is therefore of the view that there was a change of use from SH to IA when the garage ceased to be used primarily for storage of the occupants vehicles, tools, and garden implements, when it was the subject of intended building work to convert the garage to a dwelling.
- Following the change of use from SH to IA it became Importance Level 1 under Clauses A1<sup>3</sup> and A3<sup>4</sup> of the Building Code. After completion of the building work, its use changed from IA to SH becoming Importance Level 2 under Clauses A1 and A3 of the Building Code. This change of classified use triggers more onerous building code requirements.
- A consent should have been applied for. It was not, and a notice to fix is correct, and any certificate of acceptance must provide evidence of compliance with all Building Code clauses (relevant to a household unit).

4.4 The agent made a submission on 11 December 2018 in response to the authority’s submissions. The agent does not agree with the authority’s interpretation as set out in its 4 and 5 December 2018 submissions (refer to paragraph 4.3) and noted:

- Schedule 2 of the Regulations is divided into activities, with categories described as uses under ‘spaces or dwellings’, with examples of these.
- There is a hierarchy apparent in the schedule, with high risk crowd activities at the top of the table and sleeping uses, followed by working and business activities, with intermittent activities at the bottom of the table (and the lowest risk to occupants).
- The key to interpreting the table is to establish the relevant “space or dwelling” with the examples then provided for guidance.
- Spaces for intermittent occupation could not be expected to apply to a detached dwelling, where occupants are always expected to be present. SH and IA are thus exclusive of each other.
- The use IA is consistent with association with working business or storage activities where the space is not occupied. The examples are consistent with a type of working or business use. All the IA examples have a commercial sense

<sup>3</sup> Building Code Clause A1 Classified uses

<sup>4</sup> Building Code Clause A3 Building importance levels

that suggests the intermittent activity was expected to be part of working and business activities.

- The uses are not ambiguous and the confusion is caused by the way the examples are being interpreted, rather than providing the proper emphasis to the wording in the described use. If the authority's rationale was followed, enclosed corridors, kitchens and laundries, linen rooms, open balconies, toilets and amenities, and service rooms in detached dwellings would also have to be treated the same way. This would be even though their use might clearly relate to an occupied building and occupation would not be intermittent.
- The authority is complicating the interpretation of the uses of the table by introducing the classified uses and treating the garage as an outbuilding under Clause A1. Even if this was relevant, it has no bearing on the interpretation of Schedule 2 of the Regulations and change of use, because the schedule stands on its own as the arbiter of change of use.
- The authority's suggestion that the use of the garage reverts to IA when its association changes is incorrect.
- The change of use sections of the Act are permissive in nature and must be upheld as such.
- The draft does not state that a certificate of acceptance is required. Only work undertaken under urgency and section 42 has an obligation in respect to a certificate of acceptance, and even then all that is required is an application.

## 5. Discussion

### 5.1 General

- 5.1.1 The agent has submitted that a change of use has not occurred as the original garage fell under the use category SH and the self-contained unit, which is being used as part of the applicant's household, remains SH.
- 5.1.2 The authority is of the view that the use of the building reverted to IA (Intermittent Low) when it ceased to be used for a garage primarily for storage of the occupants' vehicles, tools, and garden implements, and became the subject of intended building work. The authority is of the view that after completion of the building work to convert it to a self-contained unit, its use changed from IA to SH and this change triggered more onerous Building Code requirements and need to satisfy the provisions of sections 114 and 115 of the Act.
- 5.1.3 The conversion of garages to habitable spaces has been covered in several previous determinations<sup>5</sup>, and I am of the view that the approach taken in those determinations is applicable to this case.
- 5.1.4 Under section 114 of the Act, if an owner is planning to change the use of a building as defined in Schedule 2 of the Regulations, the owner must provide written notice to the authority. An owner must not change the use of the building unless the authority

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<sup>5</sup> See for example: Determination 2018/023 Regarding the refusal to grant an exemption from the requirement to obtain a building consent for alterations (24 May 2018); Determination 2016/009 Regarding the issue of notices to fix and the refusal to issue a certificate of acceptance in respect of the conversion of a double garage over a boundary (23 March 2016); and Determination 2011/016 The refusal of a certificate of acceptance and issue of notices to fix for a sleep-out and bedroom addition (7 March 2011).

has given written notice the building in its new use will comply to the extent required by section 115.

#### 5.1.5 Section 5 of the Regulations provides:

For the purposes of section 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 part of the building from one use (the old use) to another (the new use) and with the result that the requirements for compliance with the building code in relation to the new use are additional to, or more onerous than, the requirements for compliance with the building code in relation to the old use.

#### 5.1.6 Accordingly, I must consider whether the building's use, as defined in Schedule 2 of the Regulations, has changed. To decide this matter, I will form a view on the following:

- the original use of the building, prior to the building work being carried out to convert the garage to a self-contained unit
- whether the use of the building became IA (Intermittent Low), as submitted by the authority, when it ceased to be used as a garage primarily for storage of the occupants vehicles, tools, and garden implements, and became the subject of intended building work
- the use of the building, as a self-contained unit.

## 5.2 The use categories

### 5.2.1 The uses relating to sleeping activities for residential dwellings, as set out in Schedule 2 of the Regulations, are:

Use	Definition	Example
SH (Sleeping Single Home)	detached dwellings where people live as a single household or family, including attached self-contained spaces such as granny flats when occupied by a member of the same family, and garages (whether detached or part of the same building) if primarily for storage of the occupants' vehicles, tools, and garden implements	dwellings or houses separated from each other by distance
SR (Sleeping Residential)	attached and multi-unit residential dwellings, including household units attached to spaces or dwellings with the same or other uses, such as caretakers' flats, and residential accommodation above a shop	multi-unit dwellings, flats, or apartments
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, wharehous

5.2.2 As submitted by the authority, garages are also mentioned in use category IA (Intermittent low):

Use	Definition	Example
IA (Intermittent Low)	spaces for intermittent occupation or providing intermittently used support functions—low fire load	car parks, garages, carports, enclosed corridors, unstaffed kitchens or laundries, lift shafts, locker rooms, linen rooms, open balconies, stairways (within the open path), toilets and amenities, and service rooms incorporating machinery or equipment not using solid-fuel, gas, or petroleum products as an energy source

5.2.3 The dwelling and detached garage had a use of SH prior to the building work being carried out to convert the garage to a self-contained unit, including installation of a kitchen and sanitary facilities.

### 5.3 Whether the use of the building became IA

5.3.1 Clause 5 of the Regulations sets out the circumstances in which a change of use occurs (refer paragraph 5.1.5). With reference to the table in Schedule 2 of the Regulations, Clause 6 of the Regulations states:

- (1) For the purposes of regulation 5, every building or part of a building has a use specified in the table in Schedule 2.
- (2) A building or part of a building has a use in column 1 of the table if (taking into account the primary group for whom it was constructed, and no other users of the building or part) the building or part is only or mainly a space, or it is a dwelling, of the kind described opposite that use in column 2 of the table.

5.3.2 The authority correctly points out that garages are mentioned in the definition of use category SH, and as an example in use category IA. However, there is no ambiguity in this as submitted by the authority. Garages are use category SH when used primarily for storage of the occupants' vehicles, tools, and garden implements. Garages that are not so used are use category IA. I have considered the authority's submission that the use of the building reverted to IA when it ceased to be used for a garage and became the subject of intended building work.

5.3.3 I am of the view that categorising the garage as IA when it became the subject of intended building work is not an appropriate application of the provisions of the Act because there is no mechanism for the use of the garage to 'revert' to IA. The mechanism for changing the use of a building is set out in the change of use provisions of the Act and its Regulations.

5.3.4 As to whether this constitutes a change of use under the Act, I am of the view that there is no scope within the wording of the Regulations to consider the use of a building changing simply by virtue of a building being the subject of intended building work.

5.3.5 I accept there may be situations necessitating a building to be categorised with an interim or temporary use prior to intended building work being carried out, however, I do not agree that ceasing to use the building as a garage for storage and the building becoming the subject of intended building work constitutes a change to IA.

- 5.3.6 In any case, changing the garage from SH to IA would not meet the definition of a change of use as set out in Clause 5 of the Regulations because there are not any additional or more onerous Building Code requirements in relation to a use of IA.
- 5.3.7 The authority's submissions accept that the use of the garage was SH when it was being used primarily for storage of the occupants' vehicles, tools, and garden implements, but the submissions then focus on the alleged change of use from IA to SH when the kitchen and sanitary facilities were added, without adequately explaining how the use of the garage changed from SH to IA.
- 5.3.8 The installation of the kitchen and sanitary facilities did not change the use of the building, and even if for some reason they did, the change from SH to IA would not be a change of use under Clause 5 of the Regulations, because the requirements for compliance with the Building Code in relation to the new use would not be more onerous than the requirements for compliance with the Building Code in relation to the old use.
- 5.3.9 The authority also sought to invoke the purposes and principles of the Act in its submission that the installation of the kitchen and sanitary facilities should result in a change of use of the garage from SH to IA because this would be consistent with the purposes of the Act in section 3 and the principles in section 4(2)(a)(i), (b), (c), (f) and (m). While I accept that it is important to always keep in mind the purposes and principles of the Act, and to have regard to them when appropriate, they cannot be used to override the clear wording of Clauses 5, 6 and Schedule 2 of the Regulations that set out when a change of use occurs.

#### **5.4 The use of the garage as a self-contained unit**

- 5.4.1 The self-contained unit is a detached building. As such the definition of SR (Sleeping Residential) would not apply – it is not a multi-unit dwelling, flat or apartment.
- 5.4.2 The self-contained unit meets the definition of SH under the Regulations as a detached dwelling, and I am therefore of the view that the use of the building under the Regulations has not changed.
- 5.4.3 For completeness, I note that in terms of requirements under the Act and the uses under the Regulations, if the applicant wishes to use the self-contained unit for a separate household from the main dwelling that in itself would not result in the use of the self-contained unit changing from SH.

#### **5.5 The notice to fix**

- 5.5.1 As I have reached the view that there was no change of use under the Regulations, I conclude therefore the authority was incorrect to issue a notice to fix for a change of use.
- 5.5.2 With respect to the authority's statement on the notice to fix:

Contrary to section 114 of the [Act], the owner must give notice, in writing, of change of use of the building, specifically the existing double garage at the rear of [the property] being converted into a minor household unit where the household unit did not exist before.

The authority's use of the term "minor household unit" is not helpful as it is not a term used in the Act or its regulations. I consider when applying the Regulations the authority should refer to the uses specified in Schedule 2 of the Regulations, and use wording that reflects these uses.

- 5.5.3 The authority has raised the issue of unconsented building work in its letter dated 18 April 2018 (refer to paragraph 2.6) accompanying the notice to fix. I provide the following comments to assist the parties.
- 5.5.4 I note that the issue of a certificate of acceptance provides for instances where building work has been carried out without first obtaining a building consent. The purpose of a certificate of acceptance, if requested by an owner, is to provide regulatory sign-off for building work that is considered by the relevant authority to comply with the Building Code.
- 5.5.5 I suggest that if the applicant wishes to regularise the unconsented building work, the applicant may apply to the authority for a certificate of acceptance for this work. This will require the applicant to provide (if available) plans and specifications, and any other information that the authority reasonably requires. It is the applicant who must provide sufficient information to the authority to establish the level of compliance achieved. The authority may also inspect the building work and this information, along with that supplied by the applicant, would assist the authority in forming a view as to compliance with the Building Code.

## **6. The decision**

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority incorrectly exercised its powers of decision in issuing a notice to fix for a change of use and accordingly I reverse the authority's decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 19 February 2019.

Katie Gordon  
**Manager Determinations**

## Appendix: The legislation

### A.1 Relevant provisions of the Building Act 2004

A1.1 The relevant sections of the Act discussed in this determination include:

#### **114 Owner must give notice of change of use, extension of life, or subdivision of buildings**

- (1) In this section and section 115, change the use, in relation to a building means to change the use of the building in a manner described in the regulations.
- (2) An owner of a building must give written notice to the territorial authority if the owner proposes—
  - (a) to change the use of a building; ...

#### **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 provisions of the Building (Specified Systems, Change of Use, and Earthquake-prone Buildings) Regulations 2005

A1.2 The relevant sections of the Regulations discussed in this determination include:

#### **5 Change the use: what it means**

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

## 6 Uses of buildings for purposes of regulation 5

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

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

### Schedule 2 Uses of all or parts of buildings

#### Uses related to sleeping activities

Use	Definition	Example
SH (Sleeping Single Home)	detached dwellings where people live as a single household or family, including attached self-contained spaces such as granny flats when occupied by a member of the same family, and garages (whether detached or part of the same building) if primarily for storage of the occupants' vehicles, tools, and garden implements	dwellings or houses separated from each other by distance
SR (Sleeping Residential)	attached and multi-unit residential dwellings, including household units attached to spaces or dwellings with the same or other uses, such as caretakers' flats, and residential accommodation above a shop	multi-unit dwellings, flats, or apartments
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

#### Uses related to intermittent activities

Use	Definition	Example
IA (Intermittent low)	spaces for intermittent occupation or providing intermittently used support functions—low fire load	car parks, garages, carports, enclosed corridors, unstaffed kitchens or laundries, lift shafts, locker rooms, linen rooms, open balconies, stairways (within the open path) <sup>3</sup> , toilets and amenities, and service rooms incorporating machinery or equipment not using solid-fuel, gas, or petroleum products as an energy source