

# Determination 2025/006

## The decision to issue a notice to fix for a change of use of a building

### 233 Great South Road, Manurewa

#### Summary

This determination considers an authority's decision to issue a notice to fix under section 164 of the Building Act 2004. The determination turns on whether there has been a 'change of use' of a building for the purposes of the Act.

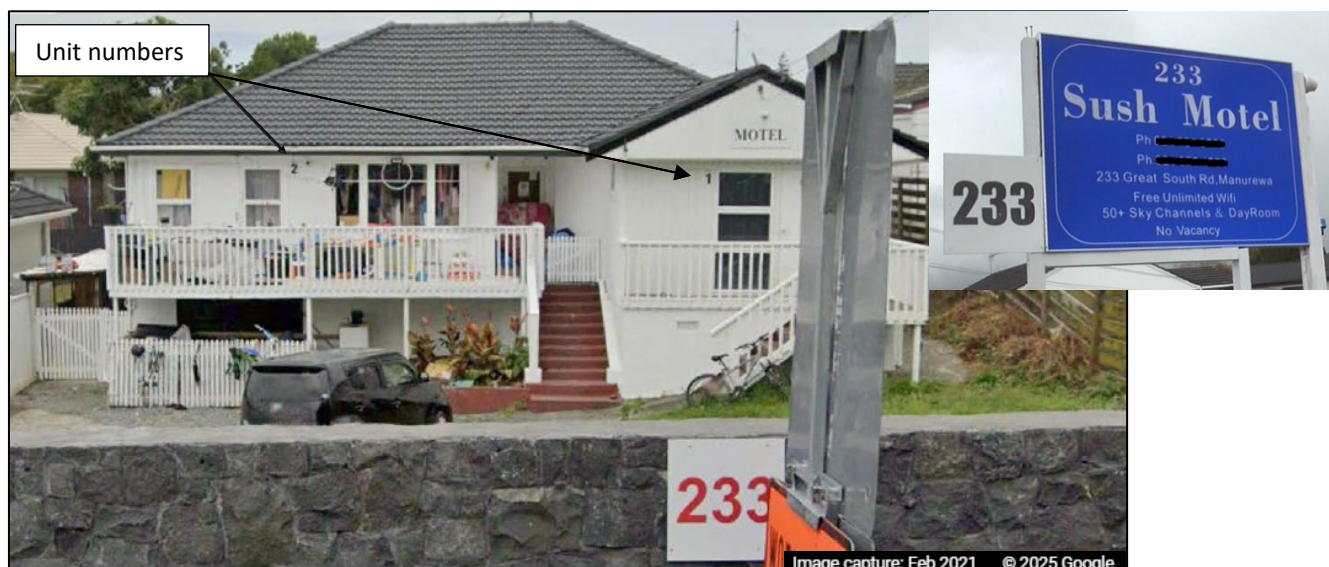


Figure 1: Street view showing access and signage<sup>1</sup>

<sup>1</sup> Image reproduced from Google Street View Feb 2021 (accessed 22 January 2025). Roadside signage from authority's inspection footage, 20 July 2022.

In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”) and references to “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

The Act and the Building Code are available at [www.legislation.govt.nz](http://www.legislation.govt.nz). Information about the legislation, as well as past determinations, compliance documents (eg, Acceptable Solutions) and guidance issued by the Ministry, is available at [www.building.govt.nz](http://www.building.govt.nz).

## 1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Peta Hird, for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment (“the Ministry”).<sup>2</sup>
- 1.2. The parties to the determination are:
  - 1.2.1. the owner of 233 Great South Road, Manurewa (“the property”), S Sachdeva (“the owner”), who applied for this determination
  - 1.2.2. Auckland Council, carrying out its duties as a territorial authority (“the authority”).
- 1.3. This determination arises from a dispute between the parties over the authority’s decision to issue a notice to fix. The authority considered the building at the property had undergone a change of use without notification under section 114 of the Act and was not satisfied the building complied to the extent required under section 115. The owner disputes the authority’s grounds for issuing the notice to fix.
- 1.4. The matter to be determined, in terms of sections 177(1)(b) and 3(e), is the authority’s decision to issue notice to fix NOT21630420 dated 5 August 2022 (“the notice to fix”) to the owner.
- 1.5. In deciding the matter, I will consider whether, for the purposes of the Act, there had been a change of use of the building concerned by 20 July 2022 (being the date of the authority’s inspection).
- 1.6. The notice to fix was also issued in relation to restraining gas bottles. However, this issue was later resolved and so I have not considered the decision to issue the notice in respect of the stated contravention of section 17.

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<sup>2</sup> The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

## 2. The building work and background

- 2.1. The owner's property is in an established residential area in Manurewa, Auckland. When the owner purchased the property in 2019, there were two existing buildings on it: a main dwelling (in this determination referred to as "the building") and a small shed at the rear of the property.
- 2.2. The building was constructed in the 1970s as a partially two-level house. There does not appear to be any dispute between the parties that at the time the owner purchased the property the building was being used as a single residential dwelling.
- 2.3. I have limited information about the lower or ground floor level of the building, but from the photos provided it appears to consist of a single garage and basement area. As the property slopes, only part of the basement area would be tall enough for a person to stand up in.
- 2.4. I have been provided with limited information about the internal configuration of the upper level at the time that the owner purchased the property. However, from publicly available photos it would appear that the dwelling had two living areas and a dining area along its north side, with all three areas linked via an open-plan accessway.<sup>3</sup> There were double doors between the two living areas, but not (it would appear) between the living area and the dining area. The dining area had a window seat, free-standing fireplace and single door leading outside to the rear of the property. The living area to the east had double French doors leading onto a small deck on the east elevation, and there was no external access to the deck.<sup>4</sup> There was another deck to the southeast with access from one of the bedrooms but also with no external access.<sup>5</sup> I do not have any information about the configuration of the remainder of the house at that time.
- 2.5. On 10 July 2020, the owner obtained a resource consent to convert the "existing dwelling" at the property to a motel. This consent was required because the motel would use an existing vehicle crossing off an arterial road and because the motel signage was to be located within the front yard, which was not consistent with the signage bylaw that applied at that time.
- 2.6. Sometime between February 2020 and October 2020 the owner carried out alterations to the interior and exterior of the house. I have ascertained these alterations by comparing publicly available photos<sup>6</sup> with what was recorded by the authority (see paragraphs 2.9 to 2.14). The owner did not apply for a building

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<sup>3</sup> Four photographs of the property sourced from [www.oneroof.co.nz/property/auckland/manurewa/233-great-south-road/oGyjS](http://www.oneroof.co.nz/property/auckland/manurewa/233-great-south-road/oGyjS) (viewed on 10/01/2025).

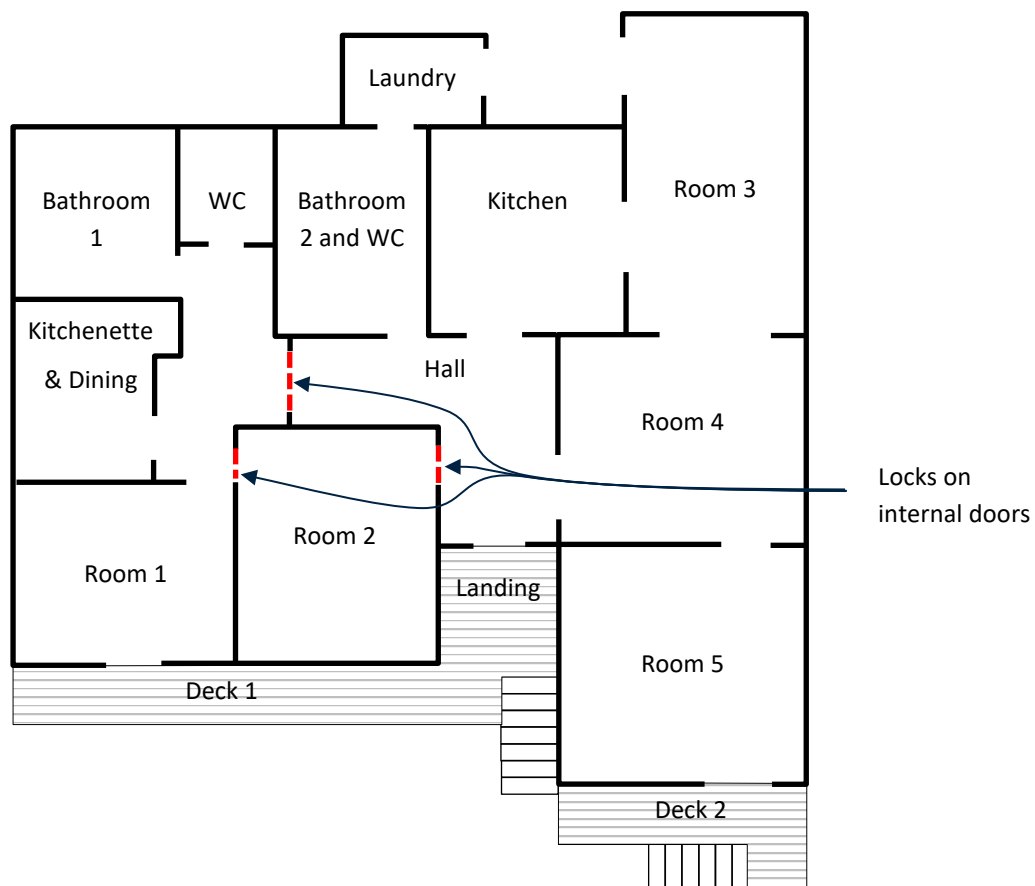
<sup>4</sup> Two photos of the front of the property dated February 2020 and October 2020 sourced from Google Street View [www.google.com/maps/](http://www.google.com/maps/) (viewed on 10/01/2025).

<sup>5</sup> Ibid.

<sup>6</sup> See footnotes 3 and 4 above.

consent for the alterations, nor was there any other form of involvement by the authority at the time.

- 2.7. From around mid-2020 to mid-2022, the building was used as emergency housing for clients of the Ministry of Social Development (Te Manatū Whakahiato Ora).<sup>7</sup>
- 2.8. On 6 July 2022, the authority wrote to the owner informing them that it would inspect the property on 20 July 2022.
- 2.9. On 20 July 2022 (“the date of the inspection”), the authority inspected the property. At that date the building was vacant and mostly empty of furnishings.
- 2.10. The authority took video footage during the inspection. From this, it has been possible to gain a picture of the current configuration of the upper level of the building, as well as how this differs (in some areas) from the configuration when the owner purchased it.
- 2.11. Figure 2 represents the layout of the upper level of the building at the time of the inspection, based on observations from the authority’s video footage.



**Figure 2: Layout of upper floor of the building as at 20 July 2022**

<sup>7</sup> This information was sourced from the website of the Ministry of Social Development on 18 December 2024. See [www.msd.govt.nz/about-msd-and-our-work/publications-resources/official-information-responses/responses-to-official-information-act-requests.html](http://www.msd.govt.nz/about-msd-and-our-work/publications-resources/official-information-responses/responses-to-official-information-act-requests.html)

- 2.12. On the upper level, as at the date of the inspection, there was a kitchen, a separate kitchenette/dining area, two bathrooms (one incorporating a toilet), a separate toilet, and five rooms of which some had beds. External doors provide access to the main entrance/hallway, the laundry, and the rooms numbered 1, 3 and 5.
- 2.13. The hallway provides access to most rooms in the upper level. An internal door in the hallway, just beyond bathroom 2, had a keyed entrance knob and a separate keyed deadlock. Room 2 had two doors providing access to either ends of the hallway. Both doors had locking mechanisms; one a keyless internal slide latch with no emergency release, and the other a keyed deadlock.
- 2.14. The locks on internal doors on the upper level mean it can be used in different configurations, including dividing the upper level into two separate units, each with its own sleeping, toileting, bathing, and food preparation facilities. During the authority's inspection, there as one fridge in the kitchen and another in Room 2, and one washing machine in the laundry and another in bathroom 1.
- 2.15. From the video footage it is also possible to determine some of the alterations that the owner has made to the building. These include:
- French doors or windows were replaced with an entrance door to Room 3
  - The set of two folding doors linking Room 4 and Room 5 were replaced with an extension of the wall and a standard internal door.
  - External access to Room 1 by way of alterations to Deck 1 and the landing and replacement of windows of Room 1 with an entrance door.
  - External access to Room 5 by way of new external steps to Deck 2 and an entrance door which replaced French doors.
  - A 'Motel' sign affixed on the gable end above Room 5, and unit numbers affixed next to entrance doors to Room 1 and Room 5.
- 2.16. I also note that, at some point between February 2020 and October 2020, a sign was erected at the front of the property advertising that the building was a motel.<sup>8</sup> There was a motel sign located in the same position at the date of the inspection.
- 2.17. At the inspection, the owner's representative expressed the view that no building consent had been obtained for the building work, as none was required.
- 2.18. Following the inspection, the authority issued the notice to fix to the owner. The notice to fix described the contravention or non-compliance as:

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<sup>8</sup> Photos of property dated February 2020 and October 2020 sourced from Google Street View ([www.google.com/maps/](http://www.google.com/maps/)) accessed on 10/01/2025.

The main dwelling at [the property] is no longer a single-family household unit but is permanent or transient accommodation where 6 or more people (not including members of the residing family) occupy as tenanted accommodation. This is a change of use requiring more onerous requirements under the New Zealand Building Code, which requires a Building Consent. This will trigger a Compliance Schedule when the [certificate of code compliance] is issued, and an annual [building warrant of fitness].

Changing the use of a building without notifying the [authority] is contrary to section 114 of the Building Act 2004 and the Building (Specified systems, change the use and Earthquake prone buildings) Regulations 2005.

An inspection has established that there has been an unnotified Change of Use made contrary to S114 and S115 of the Building Act 2004.

The Building has changed use from **Classified Use** Detached Dwelling, **Building Use** SH, and **Fire Risk Group** SH to **Classified Use** Community Service, **Building Use** SA and **Fire Risk Group** SM.

The building as it stands does not satisfy the relevant Building Code clauses including but not limited to the following.

C1 to C6 Protection from fire.

F6 Visibility escape routes.

F7 Warning Systems.

F8 Signs.

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2.19. In the notice to fix, the authority gave the owner the following options to remedy the contravention or non-compliance:

Either

1. Immediately revert to the previous use of the building, single household residential, and remove all building works undertaken without a building consent, or
2. Formally notify the [authority] of the Change of Use of the building and apply for a building consent. If granted, when the CCC [code compliance certificate] is issued, this will trigger a Compliance Schedule and the requirement for an annual Building Warrant of Fitness, or
3. Pursue another option that would achieve compliance with the Building Act 2004.

- 2.20. On 14 August 2022, the owner responded to the notice to fix by email, confirming some of the information in the notice, questioning several of the alleged contraventions and set out the steps they had taken following receipt of the notice. In particular, the owner disputed the particulars of contravention or non-compliance and that the classified use and fire risk group of the property had changed, stating that “The building is used for 5 or less people. The statement ... is incorrect as the building classified use and fire risk group remains SH as per [advice given by the authority in relation to] our previous project [at another property].” The owner requested that a revised notice to fix be issued, at which point they would apply for a certificate of acceptance.
- 2.21. The owner and authority then exchanged correspondence setting out their respective views on the matter. However, the parties were unable to reach agreement on whether there had been a change of use of the building.

### 3. Submissions

#### The owner

- 3.1. The owner made a submission with the application for a determination, in which they accepted that the use of the building had changed from SH to SA. The owner submitted that they had provided the authority with notice of the intention to change the building’s use by way of the resource consent application, and that the authority was required to inform them what is needed in order for the building to comply with the Act.
- 3.2. The owner also submits that the building is visitor accommodation or a motel, which is being used for five or fewer people. The owner accepts that there has been a change of use but contends “it complies with section 115 subclause (a)”. The owner’s submission suggests they hold the view that, where there are five or fewer people, section 115(a) applies instead of section 115(b), and no compliance schedule or annual building warrant of fitness is required.<sup>9</sup> The owner also states that a building consent is only required if there is ‘something to build’. Since there were ‘no physical works proposed [for the building] no building consent was applied [for]’.
- 3.3. I understand the owner considers that the notice to fix is ‘invalid’ because:
- they gave notice of their intention to change the use of the building by way of a resource consent application
  - the authority incorrectly stated in the notice that:
    - the house was occupied by six or more people

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<sup>9</sup> The owner’s view appears to be based on advice that the authority provided to a third party regarding a proposal to establish a boarding house at another property.

- a compliance schedule or annual building warrant of fitness is required.
- 3.4. In response to the Ministry's queries and following discussions with the Ministry, the owner also advised that:
- 3.4.1. the only outstanding issues from the notices are 'whether building consent is required and whether the current use for 5 or less people triggers the need for [a] Building Warrant of Fitness [sic]'
  - 3.4.2. there was 'no proposal to change the current internal layout of the house and hence no building consent was proposed'
  - 3.4.3. no-one had stayed in the building since June 2022
  - 3.4.4. they had applied to amend the resource consent granted for the property so that it stated that the building was to be 'a Motel (visitor accommodation) for up to 5 persons'.<sup>10</sup>
- 3.5. The owner concluded that now:
- The proposal is for ONE Visitor Accommodation room for the same family with 5 or less people will be using the site. Hence there will be 100% social cohesion and I don't see any difference between the operations of Boarding House and operations of Motel for this very specific scenario given the occupancy is very – very low.
- 3.6. The owner also provided a floor plan of the building, and the terms and conditions that applied to guests when they were staying. Those terms and conditions are as follows:
- 3.6.1. Smoking is not permitted in any of the units. If you do smoke you will be charged appropriate cleaning and loss of income charges
  - 3.6.2. No visitors are allowed in rooms after 7pm. Any damage to the room or property will be charged, plus a charge for any resultant loss of income if applicable. Where credit card details are held for security any charges will be made to the credit card. Payment for all accommodation must be made in full on arrival (if not already done so).
  - 3.6.3. Check-out time is 10am on the day of departure. Late check-out is by arrangement only.
  - 3.6.4. No refunds within 24 hours of arrival date.

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<sup>10</sup> The authority subsequently advised the owner this was unnecessary and the application for an amendment was withdrawn.



## The authority

- 3.7. The authority submits that it had grounds to issue the notice to fix because “[by operating the building] as transient accommodation it constituted a change of use moving the property from use group SH to use group SA...”.
- 3.8. Further, the authority submits that the building then fell within the category of ‘community service’, in terms of the classified uses in the Building Code, and this gave rise to compliance requirements which are additional or more onerous than the previous classified use ‘detached dwellings’.
- 3.9. The authority referred to previous determinations issued by the Ministry and stated that a ‘range of factors’ identified in those determinations had informed its conclusion that the building now came with the community service classified use. These included the permanence or transience of the residents, the connection with other residents, the social cohesion and whether a group is living as a single household or family.
- 3.10. The authority stated that:
  - 3.10.1. the owner had ‘been at pains to reinforce that [the building] is not a boarding house but is in fact a motel’
  - 3.10.2. the building had a sign advertising it as a motel and had been placed on the emergency housing register as an accommodation provider
  - 3.10.3. the building had three rooms which can be classified as bedrooms, but only two beds, one room having some furniture but no beds
  - 3.10.4. the owner had applied for resource consent to convert the building from a single-family home to a motel providing accommodation for up to 10 persons, and had been on notice as part of that process that ‘an assessment was required under the Building Act 2004
  - 3.10.5. when the authority inspected the property, the bedrooms each had lockable doors and external access
  - 3.10.6. there were rules for guests, with no evidence to suggest that the occupants were family or operated as such
  - 3.10.7. the owner has indicated they wish to resume using the building as a motel for people wanting temporary and holiday style accommodation
  - 3.10.8. motels and boarding houses were ‘not one and the same’ and have very different requirements regarding ‘specified use and fire requirements’

3.10.9. the building 'meets the description in the regulations of providing spaces for transient accommodation' and the 'examples provided in the regulations as being run as a motel'.

3.11. The authority concluded that:

Motels are considered communal residential within the classified use provisions of the [Building Code] and like boarding houses with a similar maximum occupancy, attract increased life safety obligations than if the property were a detached dwelling. The fact that fewer people may reside in a building from time to time does not absolve an owner from the obligation to ensure the relevant safety requirements are met for its maximum permitted occupancy.

The [authority] remains of the view that there has been a change of use at the subject premises and the [authority] as Territorial Authority should have been notified of that pursuant to s114 of the Act.

3.12. With respect to the owner's submissions, the authority stated:

By suggesting they limit the numbers of potential occupants the owner seems to believe that a change of use has not occurred. We disagree. It's the form and function of the building that is relevant, not the stated intention of the owner.

## 4. Discussion

- 4.1. The matter to be determined is the authority's decision to issue the notice to fix to the owner. Notices to fix are governed by sections 163 to 168 of the Act. Section 164(1)(a) provides for an authority to issue a notice to fix if it considers, on reasonable grounds, that a specified person is contravening or failing to comply with the Act or its regulations. In this case, the authority issued the notice to fix in respect of a change of use in contravention of sections 114 and 115.
- 4.2. The change of use provisions in the Act are intended to ensure a building is appropriate for a new use, should a change of use occur during its economic life (particularly in terms of health and safety, and essential amenities).<sup>11</sup> The provisions are part of a broader scheme in the Act which triggers assessments that can result in an existing building having to undergo certain upgrades over its economic life.
- 4.3. Under section 114(2)(a), an owner of a building must provide written notice to the relevant territorial authority if they propose to change the use of a building or part of a building.
- 4.4. Under section 115, an owner must not change the use of a building unless they have been notified that the territorial authority is satisfied the building in its new use will comply to the extent required under that section.

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<sup>11</sup> Refer section 115.

- 4.5. A change of use is determined according to the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 (“the Change of Use Regulations”).<sup>12</sup> The relevant provisions are regulations 5 and 6, which state:

#### **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.

- 4.6. To determine whether there has been a change of use, I must first consider whether the building has changed from one of the use groups described in Schedule 2 to another (“the first criterion”). If it has, I must then consider whether the new use gives rise to Building Code requirements that are additional to or more onerous than the requirements under the old use (“the second criterion”). To assess this second criterion, I must consider the classified use for both the old and new use groups, as this step is necessary to identify the Building Code requirements that apply.
- 4.7. Both criteria above must be satisfied for there to be a change of use for the purposes of the Act.
- 4.8. There are a number of different use groups in Schedule 2 of the Change of Use Regulations. In this instance, the use groups that I consider relevant include SA (Sleeping Accommodation), SH (Sleeping single home), and SR (Sleeping Residential). Table 1 sets out these use groups as they appear in Schedule 2.

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<sup>12</sup> See section 114(1) of the Act.

**Table 1: SA and SH use groups**

Use	Spaces or dwellings	Examples
<b>Uses relating to sleeping activities</b>		
SA (Sleeping Accommodation)	spaces providing transient accommodation, or where limited assistance or care is provided for people	motels, hotels, hostels, boarding houses, clubs (residential), boarding schools, dormitories, halls, wharehau
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

4.9. The use group SA includes “spaces providing transient accommodation, or where limited assistance or care is provided for people”.

4.10. Transient accommodation is not defined in the Act or the Change of Use Regulations. The Oxford English Dictionary (OED) states ‘transient’ means “not lasting; temporary; brief; fleeting”. The dictionary goes on to say, “...of a hotel, lodging, etc.: designed for short-term or temporary accommodation; (in later use also) used to accommodate people without permanent housing”.<sup>13</sup>

4.11. In my view, what is ‘transient accommodation’ for the purposes of the Change of Use Regulations depends on the circumstances. I consider that the length of stay is a factor but not the only relevant factor.

4.12. The phrase ‘limited assistance or care’ is not defined in the Act or the Change of Use Regulations. In my view, the phrase should be interpreted in the context of the other use groups in the Change of Use Regulations, particularly the uses related to sleeping activities. I note use group SC (Sleeping Care) covers situations where occupants are almost completely dependent on others. By comparison, the use group SA covers situations where occupants do not require as much assistance or care. Examples for these uses suggest the nature and degree of ‘limited assistance or care’ can vary according to type of occupancy. For example, a boarding school

<sup>13</sup> Oxford English Dictionary (online publication), accessed on 18 December 2024.

would provide a higher degree of assistance or care to its school aged boarders than would a university hall of residence to school leavers, but both would usually be SA by virtue of the provision of limited assistance or care. That being so, what amounts to 'limited assistance or care' depends on the particular circumstances.

- 4.13. The concept of a 'household unit' underpins both the SH and SR use groups. SH is described as "detached dwellings where people live as a single household or family", and SR is "attached and multi-unit residential dwellings, including household units attached to spaces or dwellings with the same or other uses...".
- 4.14. Whereas SH covers detached dwellings that are separated by distance, SR concerns household units attached to another space (either with a similar use such as apartments, or a different use such as caretaker flats). Each household unit will contain food preparation and sanitary facilities, and each household lives independently of others in the building.
- 4.15. Neither the Act nor the Change of Use Regulations provide definitions or expand on the meanings for 'single household'<sup>14</sup> or 'family'.
- 4.16. I note the Judge's comments in *Queenstown-Lakes District Council v The Wanaka Gym Limited* ("Wanaka Gym"):<sup>15</sup>

As our lives become more complicated and the circumstances under which people choose to live become more and more diverse, it is less and less easy to determine what amounts to a household.

- 4.17. The Judge in that case cited two earlier cases, both of which considered the meaning to be given to the term 'household', although for the purposes of different statutory regimes.<sup>16</sup> Notably, the Judge included an excerpt from *Hopper Nominees v Rodney District Council*:<sup>17</sup>

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.

- 4.18. The Judge in *Wanaka Gym* adopted a similar approach and decided that the building in question was not a 'single household unit' but instead a 'group dwelling'. Two subsequent High Court cases adopted the same approach.<sup>18</sup>

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<sup>14</sup> A similar term, 'household unit', is defined in the Act and Building Code Clause A2.

<sup>15</sup> *Queenstown-Lakes District Council v The Wanaka Gym Limited* DC Christchurch CIV-2003-002-000265, 18 November 2008 at [1].

<sup>16</sup> *Hopper Nominees Ltd v Rodney District Council* [1996] 1 NZLR 239; and *Simmons v Pizzey* [1977] 2 All ER 432.

<sup>17</sup> *Ibid*, at page 6.

<sup>18</sup> *The Wanaka Gym Ltd v Queenstown Lakes District Council* [2012] NZHC 284; *The Wanaka Gym Ltd v Queenstown Lakes District Council* [2012] NZHC 2662.

4.19. The *Wanaka Gym* decision assists with identifying features which may be relevant when assessing whether the occupants form a 'single household or family':

4.19.1. The number of occupants.

4.19.2. The degree of restrictions to the freedoms of the occupants.

4.19.3. Length of residencies.

4.19.4. Familial connections.

4.19.5. Agreement of occupants to reside together.

4.19.6. Commercial or domestic purpose of the building.

4.20. I note these features must be balanced against any countervailing features or inconsistencies with the connotations of a household.<sup>19</sup> In addition to the features discussed in *Wanaka Gym*, there may be other features which are relevant to the particular circumstances in this determination.

4.21. Further, as the building was vacant at the time of the authority's inspection, I am of the view it is appropriate to consider the use of the building in the months prior to that inspection.

### **Whether the use group has changed**

4.22. There appears to be no dispute between the parties that the building was previously used as a single household (for example, at the time the owner purchased the property) and the use group then was SH. That being so, I will consider whether, as at the date of the inspection, the building was still SH or had changed to a different use group.

4.23. Central to this decision is whether the building is occupied by a 'single household or family', or potentially two households or families living in adjacent units. Common features of occupants residing together as a single household or family include long term or indefinite stays, the connection with others (familial domesticity) and agreement to reside together.

4.24. The building was vacant at the time of the inspection. That being so, I have considered the available information about how the building was being used in the period prior to the inspection. Also, I have considered how the building and the wider property presented as at the time of the inspection.

4.25. The building was occupied, from at least September 2020 until the quarter ended June 2022, by Ministry of Social Development clients who received the emergency housing grant. I do not have any information as to the number of those occupants

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<sup>19</sup> *Hopper Nominees Ltd v Rodney District Council*, obiter dicta at pages 7 and 8.

or the length of their stays. As I understand it, the purpose of emergency housing at that time was to provide people who had no other place to stay with temporary accommodation until housing deemed to be adequate for their needs is found.<sup>20</sup> Despite the intent for their stays to be temporary, in some cases they remain in the same accommodation for months or even years.<sup>21</sup> It is possible, therefore, that the stays at the building varied in length with some that can be characterised as 'transient' and others as 'permanent' or 'indefinite'.

- 4.26. I have observed features, present during the inspection, which indicate that MSD clients may have occupied the building either as a whole (ie, by one family) or in two separate units (ie, two units each occupied by separate families). After the owner purchased the property, additional sleeping areas were established (by repurposing existing rooms to use as either living or sleeping spaces) and the building was altered to provide separate access from the outside to two units. At the time the building was inspected there were locks on some internal doors,<sup>22</sup> and by locking the hall door and either of the doors to Bedroom 2, the building could be configured into two separate units. Each unit had sleeping and living areas, and facilities such as a kitchen area, bathroom and toilets.<sup>23</sup>
- 4.27. The use of the building as emergency housing, together with its layout and amenities, are suggestive of more than one use group (being SH, SR and SA). However, the Change of Use Regulations provide for only one use group in relation to a building or part of a building. That being so, I must establish which, of SH, SR and SA, was the *main* use group at the time the building was inspected. In these circumstances, a balancing exercise is necessary taking into account the information available to me.
- 4.28. The use of the building by MSD clients and their families as their sole place of residence, potentially for an indefinite period, is consistent with the use of the building by one or more households. However, the degree of restrictions placed on them by the owner is inconsistent with such a use (eg, the visitor policy, check-out times and associated penalty charges) while being more akin to use as 'transient accommodation'.<sup>24</sup>
- 4.29. There are additional features which I consider are indicative of the building's use for transient accommodation rather than as one or more household units:

4.29.1. The owner has consistently stated that the building was used as a motel, and they had sought and obtained resource consent to operate a motel at

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<sup>20</sup> Special Needs Grants Amendment Programme (No 2) 2020, Clause 14A.2 replaced.

<sup>21</sup> The initial grant covers a maximum stay of seven days, which can be renewed if adequate, longer-term housing cannot be found. Finding adequate, longer-term housing, however, can take an extended period. In those cases, emergency housing stays could be indefinite or for a long period.

<sup>22</sup> A deadlock on the hall door and another on a door to Bedroom 2, and a sliding lock on the inside of a second door to Bedroom 2.

<sup>23</sup> It is unclear whether each unit had its own laundry or whether they shared a laundry.

<sup>24</sup> See paragraph 3.6.

the property. The purpose of a motel, by and large, is to provide temporary accommodation for people while they are away from their normal place of residence.

- 4.29.2. There was motel signage at the front of the property the building had motel signage from at least October 2020, including as at the date of the inspection. Signs on the exterior of the building indicated the presence of two separate units within the building, and as noted above each of those 'units' had its own facilities and an external door providing independent access to and from the building.
- 4.29.3. In the period it was occupied by MSD clients, MSD was not paying emergency housing grants for private rental properties.<sup>25</sup>
- 4.30. In my view, the features in this case which are consistent with the use of the building by one or more households are outweighed by those which are consistent with the use of the building as 'transient accommodation'.
- 4.31. In conclusion, as at the date of the inspection, I consider that:
- 4.31.1. the layout and features of the building align with features typical of transient accommodation (particularly the motel signage and the presence of two separate units each with their own access and facilities)
- 4.31.2. while some features in this case are consistent with the presence of one or two households, those are outweighed by features which are inconsistent with the presence of a 'single household' or two households.
- 4.32. Therefore, I find that the use group for the building as at the date of the inspection was SA, and for the purposes of regulation 5 of the Change of Use Regulations the use group for the building had changed from SH to SA.
- 4.33. Having reached this decision, I must now consider whether the second criterion in regulation 5 of the Change of Use Regulations is met – namely, that the new use results in additional or more onerous Building Code requirements. If this second criterion is met, the requirements in sections 114 and 115 are triggered with respect to the building.

#### **Classified use of the building**

- 4.34. In order to determine whether there are additional or more onerous Building Code requirements, I must ascertain the classified use of the building. This is because Building Code requirements apply according to the building's classified use or uses, and not according to its use group in the Change of Use Regulations.

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<sup>25</sup> Controller and Auditor-General, Inquiry in the Ministry of Social Development's funding of private rental properties for emergency housing, presented to the House of Representatives on December 2021, page 27.



4.35. Clause 3(3) of the Building Regulations 1992 sets out how the classified use of a building or part of a building is established:

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.

4.36. Clause A1 sets out the various classified uses that a building may have. Clause A1.0.2 states “[a] building with a given classified use may have one or more intended uses as defined in the Act.”

4.37. Section 7 of the Act, defines “intended use”:

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: ...

4.38. In this case, the original intended use of the building was a dwelling where a group of people live as a single household or family. However, by the date of the inspection the intended use had changed to accommodation.

4.39. In terms of ‘reasonably foreseeable occasional use’, I consider that the use of the building as accommodation was not occasional because the building had been used as accommodation for a period over one and a half years prior to the inspection

4.40. Two categories of classified use are relevant to consider in this case:

4.40.1. The ‘Communal residential’ category, which applies to buildings or use where assistance or care is extended to ‘principal users’.<sup>26</sup> There are two subcategories or types of the Community residential use, namely ‘Community service’ and ‘Community care’.<sup>27</sup>

4.40.2. The ‘Housing’ category, which applies to buildings or uses where there is self-care and service (internal management).<sup>28</sup> There are three subcategories or types of ‘Housing’ which are ‘Detached dwellings’, ‘Multi-unit dwelling’ and ‘Group dwelling’.<sup>29</sup>

4.41. I have considered the classified uses in these categories and the design and layout of the building, including its intended use and how the building was being used in the months prior to the inspection. Based on the features of the building that I have already discussed with respect to its use group, including its design and layout; and

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<sup>26</sup> Clause A1, 3.0.1.

<sup>27</sup> Ibid, 3.0.2 and 3.0.3.

<sup>28</sup> Ibid, 2.0.1.

<sup>29</sup> Ibid, 2.02, 2.0.3 and 2.0.4.

based on how the building had been used in the period prior to the inspection, I am of the opinion that:

- at the time of the inspection, the classified use of the building was 'Community service'
- the classified use of the building, prior to being used as accommodation, had been 'Detached dwelling'.

4.42. I note that the residents will have looked after themselves and each other to a certain extent, and that those particular activities may be 'self care and service' for the purposes of classified uses under the Housing category. However, I consider that those activities are not determinative on their own, and there are other practices that are indicative of the classified use being 'Community Service'. The owner provided for people to book accommodation at the building, with scheduled departure times, and there were terms and conditions that applied to those staying which indicate a degree of control and oversight by the owner.<sup>30</sup> In my opinion, these features, while very basic, are a form of 'limited assistance or care' for the purposes of Clause 3.0.2.

4.43. I note also that clause A1 provides examples of the types of buildings within each of the classified use categories. One example in the Community service use is motels, which is how the owner has repeatedly described the type of accommodation provided in the building.

4.44. In support of their view that there has not been a change of use, the owner has stated that the building can be occupied by up to five guests. I take this to be a reference to the classified use 'Detached dwelling (clause A1 2.0.2) and the given examples including 'boarding houses accommodating fewer than 6 people'. It is important to note that this differentiation based on numbers of occupants applies only to boardings houses, not motels, and there is no suggestion that the owner's building has or will be run as a boarding house. The level of occupancy of a motel does not affect which classified use it falls within.

4.45. Now that I have ascertained the building's old and new classified uses (Detached dwelling and Community service respectively), I must determine whether the change gives rise to additional or more onerous Building Code requirements for the building according to its new classified use.

4.46. It is clear under the classified use of 'Community service' that there are additional or more onerous Building Code requirements when compared with the requirements for the classified use of 'Detached dwelling'.

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<sup>30</sup> See paragraph 3.6.

- 4.47. For example, Building Code clause F6.2<sup>31</sup> did not apply to the building when its classified use was ‘Detached dwelling’, due to the ‘limits on application’.<sup>32</sup> However, now that the building has changed to the classified use of ‘Community service’, clause F6.2 applies. This is an example of an additional or more onerous Building Code requirement to which the owners must now comply as nearly as reasonably practicable according to section 115. It is only one example of several such additional or more onerous requirements.
- 4.48. I have concluded that the building has undergone a change in use from SH to SA, and that the change in classified use from Detached dwelling to Community service raises additional or more onerous Building Code requirements. This means there has been a change of use of the building in terms of section 115(b) of the Act, and the owner was obliged to notify the authority of this change under section 114(2).
- 4.49. The owner has submitted that by applying for a resource consent they had provided the authority with notice of their intention to change the use of the property. I do not accept that satisfies the requirements of section 114(2). Resource consent matters are dealt with under different legislation, and what was required under section 114(2) was for the owner to alert the authority in writing of their intention to change the use of the building under the Act.
- 4.50. In their correspondence with the authority and submissions the owner has asserted that it is section 115(a) of the Act that is relevant in this case, not 115(b). This is not correct. Section 115(a) applies in situations where one or more new household units are being created within a building where no household units existed before. This is clearly not the case here. Before the owner purchased the property, the building was used as a single dwelling, meaning the entire building was a household unit. Simply increasing the number of household units within the same area where there was originally one household unit does not fall within section 115(a).
- 4.51. It is for the owner of the property, not the authority concerned, to propose how they will achieve compliance to the extent required under section 115(b).

## Form and content of the notice and remedies

- 4.52. Section 165 sets out the requirements for the form and content of a notice to fix. The prescribed form<sup>33</sup> provides a space to insert the “particulars of contravention or non-compliance”. The courts and previous determinations have discussed the requirement that the recipient of a notice to fix be “fairly and fully informed” by the particulars in a notice, so they can address the identified issues.<sup>34</sup>

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<sup>31</sup> This relates to safeguarding people from injury in escape routes during the failure of the main lighting.

<sup>32</sup> See the ‘Limits on application’ column in the Building Code.

<sup>33</sup> Form 13 of the Building (Forms) Regulations 2004.

<sup>34</sup> See *Andrew Housing Ltd v Southland District Council* [1996] 1 NZLR 589 (which related to a ‘notice to rectify’ in the Building Act 1991, the equivalent of a notice to fix in the current Act.); *Marlborough District Council v Bilsborough* [2020] NZDC 9962 at [106]-[107]; and Determination 2024/029 *An authority’s decisions to issue a series of notices to fix* (27 May 2024) at [4.2]-[4.3].

- 4.53. In this case, I am of the view that the notice satisfies the requirement to fairly and fully inform the owner of the basis for the notice in regard to the change of use without notification (section 114) and without confirmation from the authority that it is satisfied the building will comply in its new use (section 115). Given the notice was issued in respect of a change of use, including a description of the old use and new use is relevant information that would also have been helpful to include.
- 4.54. However, in describing the change of use the notice also refers to ‘Risk Groups’ (SH and SM). These are a feature of the Acceptable Solutions for the C Clauses of the Building Code. Acceptable Solutions are one way, but not the only way, of establishing compliance with the Building Code, which may be relevant to an assessment of the compliance of a building in its new use; however, the risk groups are not the means by which a change of use is established for the purpose of the Change of Use Regulations.
- 4.55. The notice also contains background information about the property and its history, such as when it was first constructed, details relating to a resource consent, and observations from the authority’s inspection. These do not directly relate to the “particulars of contravention or non-compliance” required in a notice of fix. A notice to fix is not the appropriate document in which to include information which is not relevant to the alleged contravention.
- 4.56. The notice sets out three possible remedies. One option is to “Formally notify the [authority] of the Change of Use of the building **and apply for a building consent...**” [my emphasis].
- 4.57. The Act does not impose an obligation on an owner to apply for a building consent to change the use of a building. The effect of section 115 is that the owner must satisfy the authority that the building, in its new use, will comply with the Building Code to the extent required under that section. This may require building work to be carried out, but it may also be achieved by the owner providing information which enables the authority to be satisfied about compliance of the building in its new use. In such a case, or if any necessary building work is exempt, a building consent may not be required.<sup>35</sup>
- 4.58. For this reason, the requirement to apply for a building consent was not an appropriate remedy.

## Conclusions

- 4.59. I consider that the building had, as at the date of the authority’s inspection, undergone a change of use for the purposes of the Act.
- 4.60. The owner did not provide the authority with written notice of a proposal to change the use as required by section 114(2)(a) or receive prior approval from the authority

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<sup>35</sup> For example, installing smoke alarms would not require a building consent.

for the change of use as required by section 115. Therefore, there were contraventions of the Act and grounds for the authority to issue a notice to fix under section 164.

4.61. Although the drafting of the notice contained details not relevant to the contravention, in light of my findings regarding the use of the building and that the notice clearly identified the contravention, I am confirming the authority's decision to issue the notice to fix.

## **5. Decision**

5.1. In accordance with section 188 of the Building Act 2004, I confirm the authority's decision to issue the notice to fix.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 5 February 2025.

**Peta Hird**

**Lead Determinations Specialist**