

Determination 2025/021

The authority's decision to issue a notice to fix for a change of use

37A Hayr Road, Three Kings, Auckland

Summary

This determination considers the authority's decision to issue a notice to fix for an unnotified change of use. The determination considers the old and new uses of the building, in order to determine whether the building has undergone a change of use in contravention of sections 114 and 115 of the Building Act. The determination also discusses the particulars and remedies contained in the notice.

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. 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.

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Andrew Eames, Principal Advisor Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.¹
- 1.2. The parties to the determination are:
 - 1.2.1. Jayashree Limited (“the owner”), the owner of the property at the time the notice to fix was issued and a recipient of the notice, represented by its director, M Karmarkar, who applied for this determination.
 - 1.2.2. M Karmarkar (“the owner”), the current owner of the property and a recipient of the notice to fix.²
 - 1.2.3. Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. This determination arises from the authority’s decision to issue notice to fix NOT21722551, dated 7 May 2024 (“the notice”). The authority considers that the building has undergone a change of use without notification to the authority under section 114 of the Act, and the use was changed without the authority providing written notice to the owner under section 115 of the Act. The owner disputes the authority’s decision to issue a notice to fix, stating the authority has not provided “conclusive evidence to support their claim”.
- 1.4. The matter to be determined, under section 177(1)(b) and 3(e) of the Act, is the authority’s decision to issue the notice to fix.³ In deciding this matter, I consider whether there has been a change of use for the purposes of the Act. This

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

² The property was transferred from Jayashree Ltd to M Karmarkar on 19 July 2024. I note that M Karmarkar requested that Jayashree Ltd be removed from the determination. However, as Jayashree Ltd is a party to the determination under section 176, it has not been removed. Because M Karmarkar is also representing Jayashree Ltd in this matter, I refer to both as “the owner”.

³ The authority states that “an identical NTF [notice to fix] was also issued to Madhav Karmarkar”. I note that the notice that is the subject of this determination was issued to both Jayashree Ltd and M Karmarkar.

determination also comments on the particulars regarding section 115 of the Act and the remedies contained in the notice.

- 1.5. I have not considered the compliance of any elements of the building with the Building Code. Further, I have no jurisdiction under any other legislation, and have not considered any Resource Management Act 1991 and/or District Plan matters.

2. The building and background

- 2.1. This determination relates to a nine-bedroom, two storey building (“the building”). The ground storey consists of six bedrooms (12 sleeping spaces) with shared facilities comprising three bathrooms (one of which also contains laundry facilities), two kitchens and a laundry. The upper storey consists of three bedrooms (six sleeping spaces), a lounge, kitchen and two bathrooms (one of which contains laundry facilities). Access between the ground and upper storeys is by an external stairway on the outside of the building.
- 2.2. The house was first constructed in 1951 as a single residential detached dwelling. By the end of 2013, it appears the house existed as two separate household units⁴ – one on the ground storey and one on the upper storey.
- 2.3. On 13 July 2017, the authority issued building consent BCO10175143 (“the 2017 building consent”) to carry out building work to divide the building into three household units, by further splitting the ground floor unit into two household units. The approved building consent floor plans proposed the ground storey to contain two units, each comprising: two bedrooms, a bathroom, kitchen and lounge. The building consent also proposed removing the internal stairs (which allowed internal access between the ground and upper storeys) and specified fire-rated intertenancy walls and ceiling between the units, including an internal fire rated door between the two ground floor units. In respect of the upper floor, the building consent floor plans proposed a second bathroom with laundry facilities.
- 2.4. In 2017 and 2018, decisions by the District Court and High Court concluded the property was being used as a boarding house under the Residential Tenancies Act 1986.⁵
- 2.5. On 15 June 2020, the authority wrote to the owner stating that a code compliance certificate for BCO10175143 had not been applied for, despite the building consent being issued 23 months prior.⁶
- 2.6. On 10 April and 23 April 2024, the authority undertook an inspection. On the 23 April, the authority was also accompanied by Fire and Emergency New Zealand (“FENZ”), who noted a lack of fire separations throughout the building, missing

⁴ As noted in the *Jayashree Ltd v Auckland Council* ENV-2017-AKL-000079 Minute of the Environment Court, issued 27 July 2018, at [4].

⁵ *Karmarkar v Pendem* [2017] NZDC 22771; *Karmarkar v Pendem* [2018] NZHC 693.

⁶ I understand a code compliance certificate has not been issued for the building consent to date.

smoke alarms, a large percentage of the remaining alarms not functioning correctly when tested, and several doors with locks which could prevent escape from the building.

- 2.7. On 7 May 2024, the authority issued the notice to fix to the owner for change of use of the building from SH (Sleeping Single Home) to SA (Sleeping Accommodation), without notification to the authority. The relevant 'particulars of contravention or non-compliance' stated:

During [the authority's] inspection... on 23rd April 2024, [the authority's] officers identified:

- The property was a two-level dwelling that was rented by a single tenant.
- The tenant stated he rents all the other rooms out on a separate basis.
- The [ground storey] consisted of six bedrooms with a total number of 12 sleeping spaces.
- The [upper storey] consisted of three bedrooms with a total number of six sleeping spaces.
- The property was inconsistent to the floor plan held by [the authority].
- There were 18 bed spaces in total, all rooms were rented.
- There were shared facilities consisting of a bathroom, toilet, lounge, and kitchen on each floor,
- The entire property lacked any form of fire safety such as fire alarms and fire exit signage as an example. There was evidence of missing smoked [sic] detectors with only one such detector working at the property.
- There were inappropriate locks on some doors which would impede fire evacuation.
- There was no apparent fire evacuation plan in place.

The main dwelling... is no longer a single-family household unit but is permanent or transient accommodation where six or more people (not including members of the residing family) occupy as tenanted accommodation. Therefore, I consider 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 Sleeping Accommodation, Building Use SA, and Fire risk Group SM.

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.

.....

The [authority] has not given you written notice that the change of use complies with the Building Code, and therefore you have also breached section 115(1) of the Building Act 2004. I am not satisfied that the change of use of the main house

will comply as nearly as reasonably practicable with the Building Code, and but not limited to, the following clauses with the Building Code:

C1 to C6 Protection from Fire.

F6 Visibility escape routes.

F7 Warning Systems.

F8 Signs.

- 2.8. The owner disputed that there had been a change of use, and an application for determination was made in June 2024.
- 2.9. On 19 July 2024, the ownership of the property was transferred from Jayashree Ltd to the current owner, M Karmarkar.
- 2.10. On 15 October 2024, the Environment Court found that “the use of the Property is not as a dwelling but as a boarding house for more than 10 people” and confirmed an Abatement Notice issued by the authority for a contravention of the Resource Management Act 1991.⁷

3. Submissions

The owner

- 3.1. The owner submits (in summary):
 - 3.1.1. The owner has rented the building to a property manager.
 - 3.1.2. All the power, water and WI-FI are paid for by the owner.
 - 3.1.3. The owner has advised the property manager that the fire-rated “intertenancy walls are not fully constructed yet”, and the property manager “must use the entire property with other cotenants on a single flatmates’ agreement and as a single household”.
 - 3.1.4. The property manager states the cotenants are migrants from the same state in India and are living together harmoniously as a single household.
 - 3.1.5. The cotenants have signed a “Flat/house – sharing agreement” and “Emergency Procedures” document.
 - 3.1.6. The property manager has made the cotenants aware of the emergency procedures which “are posted on the doors for a constant reminder”.

⁷ *Karmarkar v Auckland Council* [2024] NZEnvC 253, at [71]. I understand the owner has appealed this decision to the High Court.

- 3.1.7. The tenants do not have individual agreements.
- 3.1.8. The 2017 building consent approved dividing the property into three dwellings (two units on the ground floor and one on the upper floor). Building work on creating intertenancy partitions is underway; however further work has been held up, due to delays related to a District Court case regarding shared costs with neighbours to upgrade the driveway.
- 3.1.9. The authority has failed to provide any conclusive evidence to support their view.

The authority

3.2. The authority submits (in summary):

- 3.2.1. The 2017 building consent authorised three residential units in the building with a total of seven bedrooms (two bedrooms for the two ground floor units and three bedrooms on the upper floor). The fire report provided with the building consent stated a total building occupancy load of 10 persons. No code compliance certificate has been issued.
- 3.2.2. There is previous caselaw concerning whether the property is being rented as a boarding house tenancy under the Residential Tenancies Act 1986, including a Tenancy Tribunal decision, followed by District and High Court appeals in 2017 and 2018.⁸ These proceedings concluded the property is a boarding house tenancy under the Residential Tenancies Act.
- 3.2.3. The notice specifies the 'old use' as SH (Sleeping Single House), but this is inconsistent with the 2017 building consent authorising three separate units. The old use could be characterised as SR (Sleeping Residential) as the building was a multi-unit residential building.
- 3.2.4. There has been a change of use from SR (Sleeping Residential) to SA (Sleeping Accommodation) under the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 ("the change of use regulations"). The building is being used as a boarding house, not a single household unit or multiple household units.
- 3.2.5. With reference to Determination 2023/034,⁹ the building is being used as a boarding house. Relevant factors include: 18 people in residence is a large number for the size of the building, the property manager rents the rooms on a separate basis (there is no agreement between residents to reside together), the layout and features are similar to a hostel (shared communal spaces and door locks), and other jurisdictions have found the building was

⁸ *Karmarkar v Pendem* [2017] NZDC 22771; *Karmarkar v Pendem* [2018] NZHC 693.

⁹ Determination 2023/034 *An authority's decision to issue a notice to fix for a change of use of a building* (15 November 2023).

being operated as a boarding house tenancy. On the whole, the building appears to be operated for commercial purposes, and its use not consistent with the connotations of a single household or multiple households.

- 3.2.6. The building with three separate household units has a classified use Multi-Unit Dwelling. In its use as a boarding house, the building has a classified use Communal Residential – Community Service. There are more onerous or additional Building Code requirements between these two uses, specifically: Clause C3.4 - *Fire affecting areas beyond the fire source*, Clause C5.3 - *Access and safety for firefighting operations*, Clause F6.2 *Visibility in escape routes*, F7 *Warning Systems* and F8.2 *Signs*.
- 3.2.7. A change of use has occurred and notification to the authority was not provided. Therefore, the authority was correct to issue the notice to fix.
- 3.2.8. The issue in this determination is whether there has been a change of use to SA (Sleeping Accommodation) because the building is being used as a boarding house. The Environment Court's decision (issued in October 2024) and findings of fact about the use of the property are relevant to the determination. While the definitions are different in the Building Act context, a relevant matter is whether the property is operated for commercial purposes or as a household.

4. Discussion

- 4.1. This determination considers the authority's decision to issue a notice to fix to the owner for an unnotified change of use of the building, in contravention of sections 114 and 115 of the Act. In deciding this matter, I must consider whether the building has undergone a change of use, and what use group it has changed from and to.

Legislation

- 4.2. The notice to fix provisions are set out in 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 notice to fix alleges contravention of sections 114 and 115 of the Act.

Change of use provisions

- 4.3. Section 114 of the Act provides that an owner of a building must give written notice to the relevant authority if the owner proposes to change the use of a building. Section 115 of the Act provides that an owner must not change the use of the building unless the authority gives the owner written notice that it is satisfied the building, in its new use, will comply with the Building Code to the extent required.

- 4.4. In this case, there is no dispute that written notice has not been provided in accordance with sections 114 and 115.
- 4.5. Whether a change of use has occurred is determined according to regulations 5 and 6 of the change of use regulations.¹⁰ Regulation 5 and 6(1) 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.

- 4.6. The change of use framework is set out in several previous determinations.¹¹ To decide this matter, I must firstly consider whether the building has changed from one use group in Schedule 2 to another (see Table 1). If it has, I must go on to consider whether the classified use has also changed, in order to determine whether there are additional or more onerous Building Code requirements in the new use.

Table 1: Relevant use groups from Schedule 2 of the change of use regulations

Use	Spaces or dwellings	Examples
Uses related to sleeping activities		
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, whareniui
SR (Sleeping Residential)	attached and multi-unit residential dwellings, including household units attached to spaces or dwellings with the same or other uses, such as caretakers' flats, and residential accommodation above a shop	multi-unit dwellings, flats, or apartments
SH (Sleeping Single Home)	detached dwellings where people live as a single household or family, including attached self-contained spaces such as granny flats when occupied by a member	dwellings or houses separated from each other by distance

¹⁰ See section 114(1) of the Act.

¹¹ For example, Determination 2023/034 *An authority's decision to issue a notice to fix for a change of use of a building* (15 November 2023) and Determination 2024/038 *An authority's decisions to issue a notice to fix and a dangerous and insanitary building notice* (9 August 2024).

	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	
--	---	--

The old use

4.7. The notice alleges that the use of the building has changed from SH (Sleeping Single Home) to SA (Sleeping Accommodation). At the time the notice was issued, the authority considered the old use to be 'SH (Sleeping Single Home)'.

4.8. However, the 2017 building consent was granted to approve the building to be converted from two to three residential units.¹² Although it appears that the work to convert the building into three units has not been fully completed, I consider the building contained separate residential units on each floor, rather than a single residential unit.

4.9. The authority has submitted:

21 The [notice] specifies the old use as SH (Sleeping Single Home), which is where 'where people live as a single household or family'. That was certainly the original use of the building when constructed as a detached dwelling.

22 According to [the authority's] records the building has been authorised to be used as three separate but attached units since 2017 by the [building] consent, albeit no [code compliance certificate] has been issued. Prior to 2017 there were two separate units in the building (upper and lower floors). These separate units, are not consistent with the 'single household' element of SH.

23 On reflection, Council submits that the old use could be characterised as SR (Sleeping Residential) under the Regulations because the building was a multi-unit residential building.

4.10. The 'old use' is the previous use which was approved by the authority. The authority, via the 2017 building consent, approved building work to turn two residential units into three. Irrespective of whether the building work was completed, the building was a multi-unit residential building as it had at least two household units, and the 'old use' is SR.

4.11. Likewise, the old classified use is 'Multi-unit dwelling', which applies to "...a building or use which contains more than one separate household or family. Examples: an attached dwelling, flat or multi-unit apartment".

¹² This is clear from documents relating to the 2017 building consent to convert the ground floor unit into two units. The Fire Assessment Report (dated 20/04/2017) was issued to "... address the fire safety requirement for the proposed units' development by converting **the existing two units dwelling into three units...**" [my emphasis]. I also note the Environment Court minute from 2018 confirms the 2 unit property can be converted into 3 units as a permitted activity.

The new use

- 4.12. The owner currently rents the building to a person, who I refer to as “the property manager”.¹³ It appears that the property manager does not live at the property but manages the building.¹⁴ The property manager sublets the rooms, and they showed the authority’s officers around the building during the inspection. At that time, all 9 bedrooms were occupied and it appears there were 17 subletters living in the building.¹⁵ There was very little communal space, and no space where all subletters could socialise or eat together.
- 4.13. Despite the layout of the building, the building is not operated as separate ground floor and first floor units. There is a single “Flat/house - sharing agreement” for the entire building, which the property manager and all subletters have signed. The subletters pay rent to the property manager, who pays the rent for the entire building to the owner. The owner pays power, water and Wi-Fi charges for the entire building. There is a single letterbox for the property.

Is there a single household or multiple households?

- 4.14. The SH use group applies to “detached dwellings where people live as a single household or family” and the SR use group applies to “attached and multi-unit residential dwellings, including household units attached to spaces or dwellings with the same or other uses”. Both use groups require there to be at least one household present.
- 4.15. The owner considers that the current use is SH. This is because they rent the whole property to the property manager and have advised the property manager that they “must use the entire property with the other cotenants on a single flatmates’ agreement and as a single household”. The owner states that property manager has informed them that the subletters are “living together harmoniously as a single household”. The owner has also provided a signed ‘Emergency Procedures’ notice which states “All tenants must stay as a single household and help and warn all other occupants of the building in case of emergency such as fire, earthquake etc”.
- 4.16. In my view, the owner and property managers’ statements and the signed ‘Emergency Procedures’ notice are not adequate evidence that the subletters live as a single household. Nor are the layout and features of the building supportive of the occupants living as a single household. There is no internal connection between each floor (there is only external access between floors), and there are several kitchens, meaning occupants in one part of the building may not necessarily interact with occupants in a different part of the building.

¹³ The owner refers to this person as “the tenant”.

¹⁴ The property manager is not one of the 17 people who have signed the ‘Emergency Procedures’ document. The bank statement provided by the owner also shows that the property manager is paying rent for two properties to the owner.

¹⁵ 17 people have signed the ‘Emergency Procedures’ document, while 16 have signed the ‘Flat/house – sharing agreement’.

4.17. The courts have considered the meaning to be given to the term ‘household’ in the Act. In *Queenstown-Lakes District Council v The Wanaka Gym Limited* (“*Wanaka Gym*”), the judge identified a number of factors they considered relevant in assessing whether a ‘household’ is present.¹⁶ In my view, the following factors from *Wanaka Gym* are relevant.

Table 2: Consideration of factors identified in Wanaka Gym for the term ‘household’

<i>Wanaka Gym</i>	<i>37A Hayr</i>
There is considerable variance in the numbers at any given time	There is likely to be some variance in numbers, as subletters sign a ‘Flat/house - sharing agreement’ with the property manager, and are able to give 14 days’ notice to terminate the agreement.
There are large numbers of people involved in the occupation of the building [at times this varied between 19 and 36]	There are large numbers of people involved in the occupation of the building. At the time the notice was issued, it appears that there were 17 subletters. Eight of the nine bedrooms had 2 subletters per room. There are 18 bed spaces in total. Two lounges (approved via the 2017 building consent) have been converted to bedrooms, and the number of occupants is high for the size of the building. In my view, the high number of occupants contributes to the likelihood that they are not living as a single household.
The relatively short term of the residence [occupants were required to sign lease for a minimum of 3 months]	I have not been provided information on the length of stay of the subletters. Their stay is not fixed for a certain period, but rather they are required to give 14 days’ notice to end their stay, as per the ‘Flat/house - sharing agreement’.
The fact that there is no necessary connection with the others residing in the house	The property manager states that the subletters come from the same state in India. However, there is no evidence that they have a personal connection with each other when they sign up to stay at the property. It is unclear how they are put in contact with the property manager. Further, there is only external access between the ground floor and first floor, so the occupants cannot easily socialise with those on other floors.
There is no agreement of the residents to stay together	The subletters sign the ‘Flat/house - sharing agreement’ with the property manager, rather than taking on the lease of the property as a group. The agreement also states “The flatmate cannot assign the right to live in the flat”. Therefore, there is no agreement of the subletters to stay together.

¹⁶ *Queenstown-Lakes District Council v The Wanaka Gym Limited* DC Christchurch CIV-2003-002-000265, 18 November 2008 at [27].

The whole <i>raison d'être</i> of the building is essentially commercial rather than domestic	The space in the house has been maximised to have a high number of bedrooms. There is minimal communal space in the building, and no space where all subletters can eat or socialise together. The purpose presents as commercial rather than domestic.
---	---

4.18. Considering the factors above, I do not find the operation of the property is consistent with a single household. This is because:

4.18.1. The purpose is commercial rather than domestic. There is minimal communal space in the building because the space has been maximised to have more bedrooms. There is a high number of subletters which reduces the likelihood that they are living as a single household.

4.18.2. There is no necessary connection between the subletters. The subletters do not take on the lease of the property as a group, they cannot “assign the right to live in the flat”, and there is no agreement to stay together. Further, the layout and features of the building create separation between some of the occupants.

4.19. Accordingly, I do not consider the new use group is SH.

4.20. I must also consider whether the new use group is SR (Sleeping Residential), with separate households in each unit. For the reasons described above, I do not consider there are any households present in the building. For the reasons described in paragraph 4.13, the building is not operated as a multi-unit residential dwelling but as a single building. As such, the new use group is not SR.

Is the new use SA (Sleeping Accommodation)?

4.21. The authority considers the current use of the building is SA, which applies to “spaces providing transient accommodation, or where limited assistance or care is provided for people”. Hostels and boarding houses are given as examples of the SA use group.

4.22. I do not have information on the length of stays of the subletters. However, it appears that the subletters are students, and the ‘Flat/house - sharing agreement’ requires 14 days’ notice to terminate the agreement. As such, it does not appear that the arrangement would constitute transient accommodation in most cases. The notice describes the building as “permanent or transient accommodation”, which is an inadequate description.

4.23. Nonetheless, there is evidence of limited assistance or care provided by the property manager and owner to the subletters. The subletters pay weekly rent to the property manager, who pays rent for the entire property to the owner. The property manager also signs the subletters up to the ‘Flat/house - sharing

agreement’ and ‘Emergency Procedures’ document. The owner pays all power, water and Wi-Fi charges.

4.24. I note the owner stated at the Environment Court hearing that “Even I studied in a hostel like that, we had 300 people, 25 of them are good friends...”.¹⁷ In my view, the arrangements are that of a boarding house, which (along with hostels) is given as an example of SA.

4.25. Due to the limited assistance or care provided, I consider the new use group is SA. This is a change from the old use (SR). Accordingly, the building’s use has changed from one use to another as per the uses set out in Schedule 2 of the change of use regulations.

Classified use

4.26. I must now determine whether there are additional or more onerous Building Code requirements under the new use (SA).

4.27. In order to do this, I must determine the classified use, set out in Building Code clause A1 *Classified uses*.

Table 3: Relevant classified uses in clause A1 of the Building Code

<p>2.0 Housing</p> <p>2.0.1 Applies to buildings or use where there is self care and service (internal management). There are three types:</p> <p>2.0.2 Detached dwellings</p> <p>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.</p> <p>2.0.4 Multi-unit dwelling</p> <p>Applies to a building or use which contains more than one separate household or family. Examples: an attached dwelling, flat or multi-unit apartment.</p> <p>...</p>	<p>3.0 Communal residential</p> <p>3.0.1 Applies to buildings or use where assistance or care is extended to the principal users. There are two types:</p> <p>3.0.2 Community service</p> <p>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, motel, nurses’ home, retirement village, time-share accommodation, a work camp, or camping ground.</p> <p>...</p>
---	--

4.28. I do not consider that the classified use is detached dwelling, because it is not “a building or use where a group of people live as a single household or family”, as discussed earlier (paragraphs 4.15-4.19).

¹⁷ *Karmarkar v Auckland Council* [2024] NZEnvC 253, at [62].

- 4.29. Nor do I consider the classified use is ‘multi-unit dwelling’, because it is not being used “as a building or use which contains more than one separate household or family”, for the reasons discussed earlier (paragraph 4.20).
- 4.30. In my view, the classified use is community service, because there is limited assistance or care extended to the principal users, as discussed earlier (paragraph 4.23).
- 4.31. It is clear that under the classified use of ‘community service’ there are additional or more onerous Building Code requirements when compared with the requirements for the classified use ‘multi-unit dwelling’. For example, Building Code clause F8.2 does not apply within household units in multi-unit dwellings, but does apply to buildings under the ‘community service’ classified use.¹⁸
- 4.32. As such, the building has undergone a ‘change of use’ for the purposes of sections 114 and 115. This is because the use group has changed from SR to SA, and the new use group resulted in additional or more onerous Building Code requirements.

Whether there were grounds to issue a notice to fix

- 4.33. The owner did not give written notice of the change of use to the authority, in contravention of section 114(2)(a). Further, in contravention of section 115(b), the owner changed the use of the building without written notice from the authority that the building in its new use, would comply to the extent required. As such, there were grounds to issue a notice to fix under section 164(1)(a).
- 4.34. However, the notice to fix incorrectly identified the previous use as SH, and incorrectly alleged a change of use from SH to SA (rather than SR to SA).

Section 115 particulars

- 4.35. The notice lists several Building Code clauses which the authority considers are not met to the extent required by section 115, but does not refer to specific performance clauses or state why it has reached those decisions.
- 4.36. In my view, it is not necessary for an authority to undertake an assessment of compliance (to the extent required by section 115) if it has not received notification of the change of use from the owner under section 114. However, if the authority has done an assessment under section 115 and considers there are Building Code clauses which are not met to the extent required, it should provide sufficient detail to fairly and fully inform the owner of the reasons.¹⁹ This would include setting out

¹⁸ This relates to the provision of signs identifying escape routes, emergency-related safety features, potential hazards, and accessible routes and facilities for people with disabilities.

¹⁹ Previous determinations have discussed the requirement that owners be “fairly and fully” informed by the particulars in the notice to fix, so that they can address the identified issues. For example, Determination 2024/016 *The issue of a notice to fix for building work associated with a two storey building with sanitary fixtures* (11 April 2024), at [4.12-4.13].

the relevant performance clauses and the reasons why the authority does not consider they are met to the extent required. The authority does not appear to have done so in this case.

The remedies

4.37. The notice states:

To remedy the contravention or non-compliance you must:

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. Notify [the authority] of a Change of Use and obtain a full fire report. This might require obtaining a Resource Consent and will require a Building Consent; or
3. Pursue another option that would achieve compliance with the Building Act 2004.

4.38. In my view, several remedies set out in the notice are inappropriate, for the following reasons:

4.38.1. The reference to the previous use being 'single household residential' is incorrect.

4.38.2. The option to "remove all building works undertaken without a building consent" does not relate to the particulars of contravention (sections 114 and 115), and no building work undertaken without consent has been identified.

4.38.3. Section 165(1)(c)-(g) sets out remedies that may be prescribed in particular situations. There is no basis under section 165 to require a specialist report such as a fire report. Further, a notice to fix issued under the Building Act should not refer to requirements under the Resource Management Act, such as obtaining a resource consent.

4.39. I also note that while section 115 may require building work to be carried out, in some cases, compliance may be achieved by the owner providing information which enables the authority to decide whether the building, in its new use, complies to the extent required. In such a case, or if the building work needed is exempt under s40, a building consent may not be required to bring the building into compliance with the additional or more onerous Building Code requirements of the new use.

5. Conclusion

5.1. A change of use has occurred, from SR to SA. The owner did not provide the authority with written notice of the change of use as required by section 114(2)(a)

or receive prior approval from the authority for the change of use as required by section 115(b). Therefore, there has been a contravention of the Act, and there were grounds to issue a notice to fix under section 164(1)(a).

- 5.2. However, the notice to fix incorrectly identified the previous use as SH, and incorrectly alleged a change of use from SH to SA (rather than SR to SA). I also find that several remedies set out in the notice were inappropriate.

6. Decision

- 6.1. In accordance with section 188 of the Building Act 2004, I determine the building had undergone a change of use, from SR to SA, in contravention of sections 114 and 115. However, the notice to fix incorrectly identified the previous use as SH and several of the remedies were inappropriate and I reverse the notice to fix (NOT21722551).

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 17 April 2025.

Andrew Eames

Principal Advisor Determinations