

Determination 2025/043

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

102 Jervois Road, Herne Bay, Auckland

Summary

This determination is about a notice to fix issued for a change of use of a building without prior approval from the authority. The determination considers whether the building's use had changed for the purposes of the Building Act and whether the notice had been issued to a specified person.

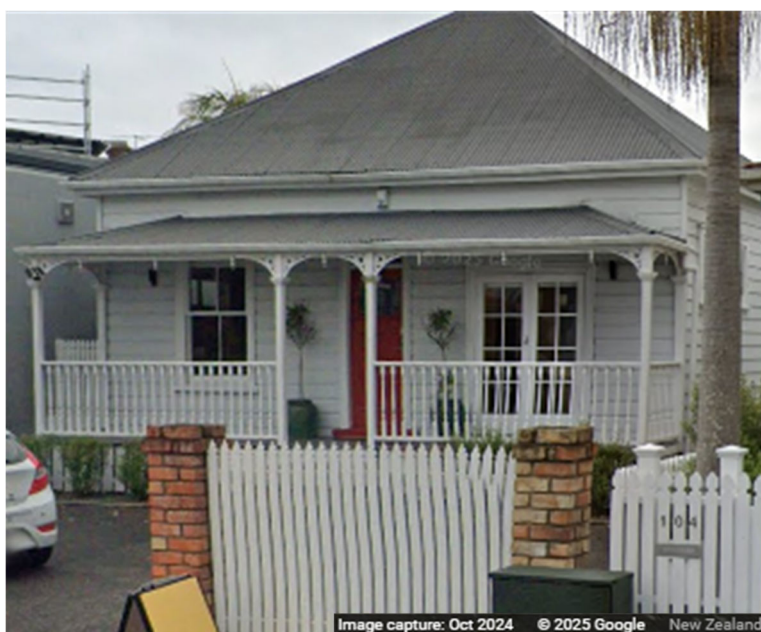


Figure 1: View of 102 Jervois Road from the street¹

¹ Street view image of 102 Jervois Road, retrieved 28 July 2025 from <https://www.google.com/maps>

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, Peta Hird, for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment (“the Ministry”).²
- 1.2. The parties to the determination are:
 - 1.2.1. MLG Limited (“the owner”), that applied for this determination and is the registered owner of the property
 - 1.2.2. LHB Leung (“the director”), the recipient of the notice to fix and the sole director and shareholder of the company that owns the property
 - 1.2.3. Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. The matter to be determined, in terms of section 177(1)(b) and 3(e) of the Act, is the authority’s decision to issue the director with notice to fix NOT 21762048 (“the notice to fix”).
- 1.4. In determining this matter, I must consider whether the building was subject to a change of use for the purposes of the Act and whether the notice was issued to a ‘specified person’ as defined in section 163.

2. The background and building work

- 2.1. The building was originally constructed in 1890s as a single level house and underwent significant renovations and additions in the 1990s.³
- 2.2. I have not been provided with information about the internal configuration of the building at the time the owner took possession in February 2019. However, I have viewed publicly available marketing material that shows the building was a residential dwelling when it was listed for sale in late 2018.⁴ Those materials include a floor plan (“the 2018 floor plan”) and photos which show the building with

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

³ According to records provided by the authority.

⁴ www.hougarden.com/nz/property/auckland/herne-bay/102-jervois-road/zS5m4 (viewed on 28 July 2025).

a living room, a dining room, kitchen, laundry, bathroom, four bedrooms, and an ensuite.



Figure 2: Reproduction of the 2018 floor plan (not to scale)

- 2.3. On or about 28 November 2024, the authority inspected the property. The authority observed a sign outside the property which indicated that the building was operating as an office space. The tenant who was present at that time confirmed to the authority that it was being used as an office space and had recently been the location of a spa and hair salon for a few weeks.
- 2.4. Following the inspection, the authority and owner entered into correspondence about the building and whether it had undergone a change of use. At that time, the owner provided the authority with a floor plan for the building dated 20 January 2024 – see Figure 3. According to this floor plan, the building has four rooms (with no designated purpose), an open plan kitchen and dining area, a bathroom and an ensuite.

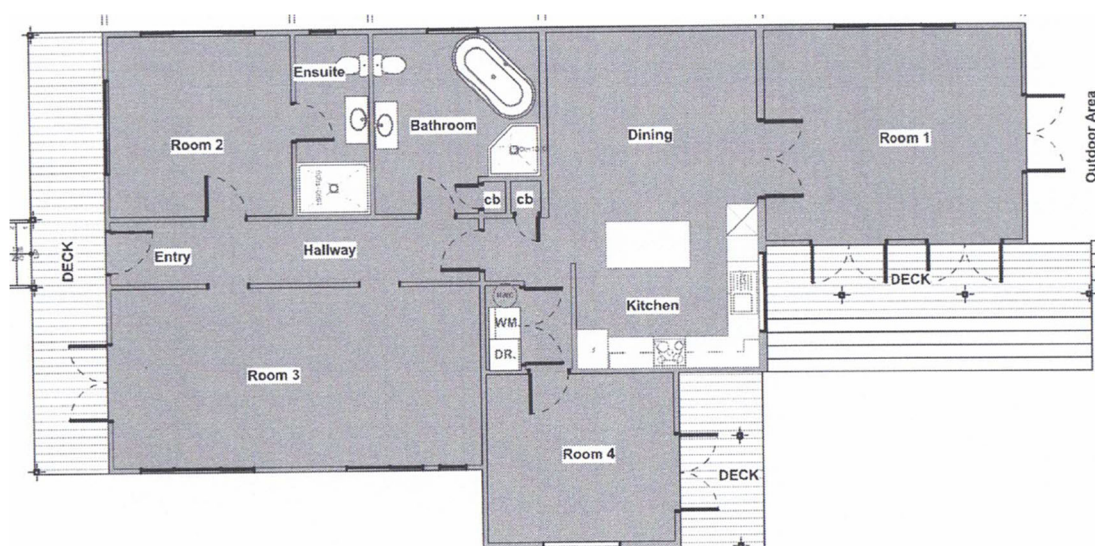


Figure 3: 2024 floor plan

- 2.5. The layout in the 2024 floor plan differs in several ways from that shown in the 2018 floor plan. The bathroom that was next to bedroom 4 has been removed to create a larger room. Part of the kitchen bench and a pillar have been removed to create an open plan layout for the kitchen and dining area. Bedroom 2 has been converted into a new bathroom.
- 2.6. Publicly available evidence indicates the four undesignated rooms in the 2024 floor plan are being used as meeting rooms, office workspaces and for functions and events.⁵
- 2.7. On 11 March 2025, the authority issued the notice to fix to the director. The particulars of contravention or non-compliance set out in the notice were:

[The authority] conducted a site inspection in relation to unauthorised building works.

As a result of this inspection, [the authority] has identified that building work undertaken required you to notify [the authority] with written notice of the change.

Contrary to s.114 of the Building Act 2004, there has been a change of use of the building from Sleeping Single Home (SH) to Working Low at 102 Jervois Road, Herne Bay, Auckland 1011, without the territorial authority ... being given prior written notice of the change.

Contrary to s.115 of the Building Act 2004 the owner must not change the use of the building unless the territorial authority ... is satisfied, on reasonable grounds, that it will comply with the Building Code. Specifically:

You have changed the use of 102 Jervois Road, Herne Bay, Auckland 1011, without receiving written authority from [the authority] that the building complies (as reasonably practicable) with the provisions of the Building Code.

- 2.8. The following remedies were listed on the notice to fix:

(1) Pursue any legal option to achieve compliance with the requirements of the Building Act 2004 and the New Zealand Building Code. This may include applying for a Certificate of Acceptance (COA) in accordance with s.96 of the Act

(2) Reinstate the building to its previously consented use

- 2.9. On 12 March 2025, the owner applied to the Ministry for a determination regarding the notice to fix.

⁵ Photographs and descriptions of the interior of the building sourced from www.sharedspace.co.nz/blog/430-the-village-herne-bay.html (viewed on 28 July 2025).

3. Submissions

The owner

- 3.1. The owner made submissions about the matter and provided correspondence between the owner and the authority.
- 3.2. In relation to whether there was a change of use the owner says:
 - 3.2.1. “[It accepts] that there is a movement from SH to WL” for the purposes of Schedule 2 of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 (“the Change of Use Regulations”)
 - 3.2.2. but “there are no more onerous code requirements applicable to the new use as were required for the old use”⁶
 - 3.2.3. according to their own assessment of what is ‘as nearly as is reasonably practicable’⁷ “there were no significant changes required but for some signage and step edge identification that would not be considered building work”
 - 3.2.4. therefore, “...there was no change of use” for the purposes of sections 114 and 115.
- 3.3. Alternatively, the owner says “[i]f there was a change of use the offence was committed by previous owner”. The owner contends that at the time it purchased the property “[the owner was] under the impression the building was [previously] used for commercial purposes” and that “the approved use [of the property] was commercial in a mixed use planning zone”.
- 3.4. In relation to the alleged contravention of section 114, the owner says it provided notice to the authority by way of a letter dated 12 February 2025.
- 3.5. The letter acknowledged the change in use group from SH to WL but advised an assessment of the fire safety clauses (C1 – C6) had been carried out and provided a fire report. The letter went on to state that “all other code clauses are satisfied” and suggested “it is arguable that a change of use has occurred” and that if there was a change of use the building complies as nearly as is reasonably practicable or at least with only “simple changes as required”.
- 3.6. The owner also contends the notice to fix was “issued to the wrong person and not the specified person under section 163”.

⁶ Elsewhere, the owner says that external fire spread is a more onerous requirement applicable to the new use, but that these requirements “would not be practicable under a ‘as near as reasonably practicable (ANARP)’ approach”.

⁷ See section 115.

The authority

3.7. In its submission, and in correspondence with the director, the authority says:

...the property owner purchased the property where the most recent plans on [the authority's] file were for a dwelling (SH)...

...the owner chose to operate a business from the dwelling and use the building as an office space...

There has been a change of use from sleeping single home to working low. The new use is more onerous...

...this is a breach of section 114 and section 115...

...there may be some very simple actions that the owner could take to comply with the change of use from Sleeping Single Home (SH) to Working Low...

The [notice to fix] has been issued to [the director as they] are a specified person as defined under section 163 of the Act.

4. Discussion

- 4.1. Notices to fix are governed by sections 163 to 168. 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.
- 4.2. A notice to fix is an enforcement notice and may be enforced by a prosecution for failing to comply with the notice. A person commits an offence if they fail to comply with a notice to fix and is liable on conviction to a fine of up to \$200,000.
- 4.3. This determination considers the authority's decision to issue the notice to fix for contravening sections 114 and 115. In deciding this matter, I consider whether there was a change of use and whether the notice had been issued to a specified person.

Whether there was a change of use

- 4.4. The notice to fix issued by the authority alleges the director changed the use of the building without giving notice to the authority (as required under section 114 for a proposed change of use⁸) and the authority confirming that it was satisfied, on reasonable grounds, that the building would comply the extent required under section 115 in its new use.

⁸ Section 114 provides for a building owner to be prosecuted for failing to give their territorial authority written notice of a change of use.

- 4.5. A change of use is determined according to regulations 5 and 6 of the Change of Use Regulations.⁹
- 4.6. To decide this matter, I must consider whether the building or part of the building has changed from one use group to another (the “first criterion”).¹⁰ If I find that it has, I must go on to consider whether the new use gives rise to Building Code requirements which are additional to or more onerous than the requirements under the old use (the “second criterion”). This further criterion requires me to consider the classified use for both the old and new use, as this step is necessary to identify the relevant Building Code requirements.
- 4.7. Both of the criteria above must be satisfied for there to be a change of use for the purposes of the Act.
- 4.8. I now turn to the first criterion, being whether the use group changed for the building (or part of the building). In doing so it is necessary for me to consider whether, at the time the authority issued a notice to fix, the building (or part of the building) was Working Low (WL), when previously it had been Sleeping Single Home (SH).
- 4.9. The SH and WL use groups are set out Schedule 2 of the Change of Use Regulations.
- 4.10. The SH use group is categorised as a use related to sleeping activities. Specifically, in Schedule 2, it is specified as:

Use:

SH (Sleeping Single Home)

Spaces or dwellings:

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.

Examples:

Dwellings or houses separated from each other by distance.

- 4.11. The WL use group is categorised as a use related to working, business or storage activities. Specifically, in Schedule 2, it is specified as:

Use:

WL (Working Low)

Spaces or dwellings:

Spaces used for working, business, or storage—low fire load

⁹ See section 114(1) of the Act.

¹⁰ For a table containing each ‘use group’, see Schedule 2 of the Change of Use Regulations.

Examples:

Places for manufacturing, processing, ..., hairdressing shops, beauty parlours, places for provision of personal or professional services, dental offices, laundries (self-service), medical offices, business or other offices, ...

- 4.12. In late 2018 when the building was marketed by a real estate company it presented as a residential dwelling for a single household.¹¹ The vendor was a company “engaged in the business of residential rental investments”.¹² There is no evidence the building was used for any other purpose at that time (for example, being used as office or retail space).
- 4.13. The owner acknowledged the commercial tenant referred to in correspondence with the authority was their first tenant, but maintains the building was used as an office space prior to purchase. The owner provided information about two other businesses in support of their view. However, the Companies Register confirms the property became the registered office addresses for those businesses at least 17 months *after* the owner purchased the property.¹³ On the evidence available, I consider the building was use group SH when the title for the property transferred to the owner.
- 4.14. When the notice to fix was issued the building was being used mainly as an office space.¹⁴ At least four of the rooms in the building were furnished with tables and chairs for use as meeting rooms and/or office work areas. There is no evidence that any part of the building at that time was being used for sleeping purposes. For these reasons I consider the building’s use when the notice to fix was issued was use group WL.
- 4.15. Therefore, I find that, for the purposes of regulation 6(1) of the Change of Use Regulations, the use group for the building had changed from one use group (SH) to another (WL). I note both parties agree that the use group was WL when the notice to fix was issued.
- 4.16. I now consider whether the second criterion in regulation 5 is met – that the new use results in additional or more onerous Building Code requirements.¹⁵ If this second criterion is met, the requirements on the building owner in sections 114 and 115 are triggered with respect to the building.
- 4.17. In order to determine whether there are additional or more onerous Building Code requirements, first I must ascertain the classified use of the building. This is because

¹¹ See paragraph 2.2 above for a description of the marketing materials. They include a floor plan of the building and photographs of the rooms as at November 2018.

¹² According to a document lodged on the New Zealand Companies Register (viewed 28 July 2025).

¹³ Ibid.

¹⁴ See paragraphs 2.4 to 2.6 above for the layout and the features of the building on or about that time.

¹⁵ Building Code requirements for buildings or parts of buildings vary according to their classified use. See Clause A1 of the Building Code.

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.

Classified use of the building

- 4.18. Clause 3(3) of the Building Regulations 1992 sets out how the classified use is established and states:

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.

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

- 4.20. Section 7 of the Act provides an expansion to the ordinary meaning of "intended use" and this includes "any reasonably foreseeable occasional use".

- 4.21. The Act and Building Code clearly contemplate buildings changing their intended use(s) and classified use(s) over the course of their economic lives.

- 4.22. Based on the records, the layout and its features, the original intended use of the building was a dwelling. There is no evidence that the building had any other intended use other than as a dwelling at the time the title for the property transferred to the owner.

- 4.23. As at the date of the notice to fix, the intended uses of the building were as a space for office work and for functions and events. Principally, the building appears to be used as an office space and this use is of a commercial nature. I have not received any evidence that suggests the use for functions and events is anything other than a reasonably foreseeable occasional use. I consider that by the date of the inspection the intended use had changed to office space.

- 4.24. Therefore, I find the classified use of the building, according to Building Code Clause A1, had changed from 'Detached dwelling' (a subset of the 'Housing' category) to 'Commercial' (which includes offices).

- 4.25. Under the classified use 'Commercial' there are additional or more onerous Building Code requirements when compared with the requirements for the classified use 'Detached Dwelling'. For example, Building Code Clause D1.3.2 did not apply to the building in its use as a dwelling but does apply to the new classified use of 'Commercial'. This is an example of an additional or more onerous Building Code requirement which the building must comply as nearly as reasonably practicable according to section 115(b). I note this is only one example and not a comprehensive review of the additional or more onerous Building Code requirements.

4.26. The owner has submitted that they gave notice to the authority in accordance with section 114. I have considered the contents of the correspondence they refer to, which is dated 12 February 2025, ie before the notice to fix was issued. I note the letter does not propose to change the use of the building but is disputing concerns raised by the authority that the use had changed. And although the letter includes information relating to fire safety, it does not provide other information required for the authority to undertake an assessment under section 115. Therefore, I am of the view that the correspondence referred to by the owner does not constitute notice for the purposes of section 114.

The form and content of the notice

4.27. I now turn to the form and content of the notice to fix.

4.28. Section 164 provides for a 'specified person' to be issued with a notice to fix for a contravention of the Act. Section 163 provides the meaning of 'specified person' – ie, those people who may be issued with a notice to fix.

4.29. An owner is a specified person to whom a notice to fix can be issued. However, the notice to fix was issued only to the director, who is not a 'specified person' for the purposes of section 163 as it is the company that owns the property. I consider this deficiency alone is grounds for reversing the notice.

4.30. Section 165 sets out the requirements for the form and content of a notice to fix. This section requires, among other things, that a notice must be in the prescribed form.¹⁶ The prescribed form provides a space to insert the "particulars of contravention or non-compliance".

4.31. In *Marlborough District Council v Bilsborough* [2020] NZDC 9962, the Court discusses the appropriate approach to wording a notice to fix and, in doing so, refers to earlier decisions in the High Court.¹⁷ Those decisions say that the particulars in a notice must fairly tell the recipient what provision of the Act or the Building Code has been contravened or not complied with.

4.32. Having considered those decisions, including *Bilsborough*, I am of the view that a notice to fix should provide as much detail as necessary so the recipient can identify what gave rise to the contravention or non-compliance to be able to remedy the situation.

4.33. In this instance the particulars in the notice are adequate. I note this could have been expanded to include that the authority considered the new use gave rise to

¹⁶ Form 13 of the Building (Forms) Regulations 2004. Section 165(1)(a) requires that a notice to fix be in the prescribed form.

¹⁷ *Andrew Housing Ltd v Southland District Council* [1996] 1 NZLR 589 (HC); *Seymour v Auckland Council* [2015] NZHC 743.

additional or more onerous building code requirements, ie that both the first and second criterion for a change of use had been met (refer paragraph 4.6).

- 4.34. The remedies refer to a certificate of acceptance. However, a certificate of acceptance concerns building work for which a building consent has not been obtained, which was not the contravention identified in this notice. It would be appropriate in the circumstances to require the owner to confirm their intention relating to the ongoing use of the building, in doing so meeting the requirement in section 114, and to provide information for the purpose of section 115 which would enable the authority to assess the compliance of the building in its new use; or for the owner to revert the use of the building.
- 4.35. Finally, I note that the content of the notice and the accompanying cover letter are at odds. For example, the cover letter refers to building work undertaken that the authority considers was not exempt under Schedule 1 of the Act from the requirement to obtain building consent. However, the notice to fix does not allege a contravention of section 40 for undertaking building work without consent.

5. Conclusion

- 5.1. I conclude that the building had, by the date of the notice to fix, undergone a change of use for the purposes of sections 114 and 115 because:
- 5.1.1. the building's use group, according to the Change of Use Regulations, had changed from SH to WL, and
 - 5.1.2. the building in its new use has at least one more onerous or additional Building Code requirement than the old use group.
- 5.2. 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) and so contravened the Act.
- 5.3. However, the notice to fix was issued to a person who is not a specified person for the purposes of section 163. Due to this deficiency, I consider it appropriate to reverse the notice to fix.

6. Decision

6.1. In accordance with section 188 of the Building Act 2004, I reverse the authority's decision to issue notice to fix NOT 21762048.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 4 September 2025.

Peta Hird

Lead Determinations Specialist