

Determination 2025/046

Regarding an authority's decision to issue a dangerous building notice

140 Belvedere Road, Carterton

Summary

This determination relates to the authority's decision to issue a dangerous building notice under section 124 arising from the use of the building and its fire safety features. The determination considers the features of the building in relation to the dangerous building test under section 121(1)(b) and, as the historical decision to record a change of use is in dispute, the evidence the authority had in recording a change of use in 2011.



Figure 1: Photo of the building dated December 2024, taken from Google 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, Rebecca Mackie, for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment (“the Ministry”).¹
- 1.2. The parties to the determination are:
 - 1.2.1. Belvedere House Ltd, the owner of the building and recipient of the dangerous building notice, who applied for the determination, represented by its directors, P and S Davy, who live in the building and are referred to as “the owners” hereafter.
 - 1.2.2. Carterton District Council, carrying out its duties as a territorial and building consent authority (“the authority”).
- 1.3. This determination arises from the authority’s decision to issue a dangerous building notice under section 124 of the Act, in respect of the owners’ building. The authority issued the notice following an inspection of the building, which it carried out with Fire and Emergency New Zealand (FENZ) in October 2024. The authority decided to carry out the inspection after becoming aware that the building was being used for ‘transient accommodation’ or ‘fee paying tenants’ and raised concerns about the building’s ‘life safety features’ in relation to the use. In the authority’s view, this use constituted a change of use from the “approved use” of the building it had recorded on its property files from 2011, and was concerned that there was no compliance schedule for the building governing the functioning or maintenance of specified systems. The owners dispute that any change of use has occurred and that the building is dangerous.
- 1.4. The matter to be determined, under section 177(1)(b) and (3)(f), is the authority’s decision to issue a dangerous building notice under section 124 on 10 October 2024 (“the dangerous building notice”) in respect of the owners’ building. In determining this matter, I must consider:
 - 1.4.1. whether the building was dangerous in the event of a fire, as defined by section 121(1)(b), at the time the dangerous building notice was issued, and

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

- 1.4.2. as the use of the building relates to the decision to issue the dangerous building notice, the basis authority had for considering that a change of use of the building had occurred, in terms of section 114 and 115, at the time that it recorded a change of use on the building's property file on 18 July 2011.
- 1.5. I have also consulted with FENZ on this matter, as required under section 170(a) of the Act.
- 1.6. This determination is limited to the matters set out in 1.4 and will not consider any other matters.

2. The background

- 2.1. The owners' property is a large (2,498sqm) flat section in an area of Carterton that is zoned commercial. The owners purchased the property in 2010.
- 2.2. The property includes a large two-storey historic building, which was constructed in around 1899 for use as a hotel, with a public house (pub) and restaurant / dining room on the ground floor, and accommodation (including guest accommodation and an owner's or manager's private apartment) on the first floor.
- 2.3. The building is constructed of timber framing, with timber weatherboard cladding and a metal sheet roof. The ground and first floors have timber joists with timber flooring laid on top of them. At present, only some of the ground-floor ceilings are lined, with a variety of ceiling materials used. In some areas, there are no ceiling linings so the underneath of the first-floor joists and flooring are exposed.
- 2.4. A compliance schedule² (detailing the building's life safety systems, known as 'specified systems', along with the inspection, maintenance and reporting requirements for those systems) was first issued in respect of the building in May 2001³.
- 2.5. The public house stopped operating in February 2005, although the first floor of the building continued to be used for bed and breakfast accommodation, with 14 bedrooms available for this purpose.
- 2.6. In 2006, the authority assessed the building as being a potentially earthquake-prone building under the relevant (at the time) provisions of the Act, and as part of that process encouraged the then owner to obtain an independent assessment of the building in order to avoid the building being added to the earthquake-prone building register.

² Compliance schedule requirements are set out in sections 100 to 107. In conjunction there are annual building warrant of fitness requirements (an annual renewal process confirming the building's specified systems have been maintained and inspected), there are set out in sections 108 to 111.

³ I have not been provided details of what specified systems were included in the schedule.

- 2.7. In late 2008 the building was damaged in a fire. Shortly after, on 2 February 2009, the authority cancelled the building's compliance schedule.
- 2.8. On 1 July 2009, the previous owners of the building applied for a building consent for 'Reinstatement of fire damaged building', with the application giving the intended use of the building as 'storage'. The authority issued the building consent (BC090177) on 15 July 2009. The project information memorandum attached to the consent also gave the intended use of the building as 'storage', as did the consented plans which carried an annotation that the first floor was to be used for "Controlled light storage only" and was "One complete fire cell". The authority issued a code compliance certificate in respect of the works covered by building consent BC090177 on 2 March 2010.
- 2.9. In 2010, the current owners purchased the property and initially lived in a self-contained apartment on the first floor. I understand members of their extended family may also lived in the building at this point.
- 2.10. On 1 June 2011, the owners applied for a building consent to install a freestanding wood burner on the first floor of the building. The authority issued a building consent (BC110116) for the work on 8 June 2011. The authority's processing sheets associated with the consent describe the 'building category' as 'residential' category 1 ('RES 1'), but do not otherwise indicate the building's use at the time. The authority issued a code compliance certificate in respect of the consent on 13 June 2011.
- 2.11. On 18 July 2011, the authority removed the building from the earthquake-prone building register, with its records stating: 'Change of use to habitable dwelling only by new owners in 2010 means building can be removed from earthquake-prone building register. Any future work to convert to retail/commercial premises will require an engineer's report for [earthquake-prone building].'
- 2.12. The owners applied for a building consent on 4 June 2015 (BC150141) for 'internal alterations & recladding of back exterior wall'. The application was withdrawn on 20 October 2016. A hand-written note on the application form explained that the building would be used to house members of the owners' family, as well as 'possibly up to 5 boarders'.
- 2.13. Between 2010 and 2022, the owners carried out various building work on the building, including rewiring it, reinstating bedrooms, bathrooms and kitchens, relining the walls and ceilings, and upgrading fittings. It is unknown the full extent of these works and whether they required building consent or came within the Schedule 1 exemptions.
- 2.14. In November 2023, the owners contacted the authority querying the level of rates they were paying on the building. The authority's records state that the building use changed to residential use in 2011, which should have triggered a corresponding change in the rates. This hadn't occurred, and as a result the owners had been

paying commercial rates for the past 12 years. The owners were provided with a refund for the excess rates, with the file noting that the building was 'still zoned commercial from a planning perspective' and that if it was used for a commercial venture in the future, the owners would have to apply for a change of use.

- 2.15. From February 2024, the owners used the 'left wing' of the upper floor as bed and breakfast accommodation for approximately two months. They then organised with WINZ (Work and Income New Zealand) and Ka Puta Ka Ora Emerge Aotearoa to rent out upper-floor rooms to tenants.
- 2.16. In September 2024, the owners shifted from the first floor to an apartment on the ground floor, which they had gradually been creating over the preceding two years. The work to create this apartment is still underway.
- 2.17. In late 2024, the authority became aware that the building was being used for accommodation. On 13 September 2024, it wrote to the owners requesting a site visit by itself and FENZ in order to assess the building's life safety systems and for the purposes of establishing if the building is dangerous as defined by the Act. The authority was concerned that the building did not have a current compliance schedule and wished to verify that any specified systems were being maintained.
- 2.18. On 9 October 2024, the authority and FENZ undertook a site inspection of the property. The authority noted in its report that at the time of the inspection, the building was being occupied by the owner and five tenants. The tenants occupied the first floor, and had individual tenancy agreements, typically for one year, and locks on their individual units or bedroom doors. Some of the tenancies were self-contained units, while others were individual bedrooms with shared communal facilities, including a lounge, kitchen and bathrooms. The ground floor of the building was predominantly being used to store household items, and also contained the owners' apartment. The report also noted that the approved use of the building was as a 'house', but the actual use was 'SA (transient accommodation)'. Throughout the report also notes:
 - ...there are no effective features to stop the spread of smoke or fire around the building...
 - ... If a fire was to start it would grow very quickly and spread quickly...
 - ...meaning that the means of escape would be quickly overcome.
 - The building does have smoke detectors which are interconnected however there is not full coverage
 - ... A smouldering fire would also be problematic as given the lack of smoke separations smoke would easily travel around the building.
- 2.19. Following the inspection, FENZ sent the authority a letter of the same date stating that "the building in it's [sic] current state is likely to result in the loss of life or serious injury should a fire occur". This opinion was based on the following observations made during the site visit of 9 October 2024, which, in FENZ's opinion, meant that, in the event of fire, injury or death to persons in the building or to

persons on other property is likely (in other words, the threshold for a dangerous building under section 121(1)(b) had been met):

- A lack of a suitable warning system to alert the occupants to presence and danger from fire.
- No discernable [sic] fire separations within the structure resulting in the ability for fire and smoke to rapidly spread throughout the building should a fire occur.
- The removal of safety features such as external escape ladders thereby allowing only one exit path available to the upstairs occupants.
- Insecure handrails on the internal stair.
- A lack of any emergency lighting within the exit paths.
- A large amount of combustible materials stored within some ground floor rooms which would give rise to the rapid spread of fire compromising the ability of upstairs occupants to safely exit the building.
- Openings into the escape path which were not fire rated, thereby compromising the integrity of the escape path.

2.20. On 10 October 2024, the authority issued the owner with a dangerous building notice under section 124(2)(c)(i). The notice stated that the authority “considers that the building has insufficient life safety features to protect residents, and in the event of fire, injury or death to any persons in the building or to persons on other property is likely”. In particular, the authority noted that:

2.20.1. the building is one large firecell with no obvious fire separations,

2.20.2. the smoke detection system installed is insufficient to raise an alarm should a fire occur in a space that does not have a smoke/heat detector installed,

2.20.3. there is no emergency lighting associated with the stairs; should a fire occur that causes the power supply to fail, this may mean the tenants are unable to adequately see the escape route,

2.20.4. there is a large fire load given the amount and type of materials stored on the site in particular on the ground floor.

2.21. In addition to the above, the notice stated that during the site visit the authority also observed:

2.21.1. the main stairs from the lower to first level are not protected from the effects of fire or smoke,

2.21.2. that some final exits have been removed by cladding and lining being installed over original door spaces and parts of the external walkways for the fire escape being removed.

2.22. The dangerous building notice cited a compliance date of 5 November 2024, requiring work to be carried out by that time, to ‘remove’ the danger in order that the authority could be satisfied that the building was no longer dangerous. The authority recommended the following work be undertaken:

- 2.22.1. Remove all material from the ground floor that is not specifically for the day-to-day use of residents, or for construction purposes.
- 2.22.2. Extend the smoke detection system into all spaces within the building including those spaces that are vacant or under construction, heat detectors may be installed in the kitchens to avoid false alarms. This must include replacement of the upstairs detector that has been removed from one of the bedrooms.
- 2.23. The owners applied for a determination on the 26 October 2024 and this was accepted by the Ministry on 3 December 2024.
- 2.24. On 28 November 2024, the authority issued a notice to fix (NF2024/01) in respect of the owners' building. The notice listed numerous particulars of contravention or non-compliance, including, among other things, matters covered by the dangerous building notice.

3. Submissions

The owner

- 3.1. The owners made submissions in support of the application for determination and in response to the Ministry's requests for information, which are summarised as follows:
 - 3.1.1. The owners have lived onsite since purchasing the property in 2010. The majority of this time was spent occupying a self-contained room on the first floor before moving to a ground floor apartment in September 2024.
 - 3.1.2. The owner's intent for the property was always to have a small number of tenants to supplement their retirement income and progressively finish renovating the ground floor with the income generated.
 - 3.1.3. The building has always been used as accommodation and not as a private home. It previously had 14 bedrooms on the first floor but the owners have reduced these to 7. There will only ever be a maximum of seven (or eight) persons upstairs in a 320m² area. Tenants are permanent so are aware of escape routes.
 - 3.1.4. There are 'multiple ways to escape' from the first floor. The main stairway is the primary route leading to front and back ground-floor doors, but there are also walkways on three sides of the building with ladders leading to the ground. All walkways are now intact and all first floor windows open.
 - 3.1.5. The building has never been used as a storage facility. This was an intention of a previous owner which was not actioned.

- 3.1.6. When the owners purchased the property, the authority issued a building consent for the building as residential and not commercial. There were no firecell blocks, no smoke alarm and all fire doors had been removed.
- 3.1.7. The owners have never intended to change the use of the building, and there has been no consultation, correspondence or documentation with or from the authority about a change of use.
- 3.1.8. The owners were also never advised of the change of use to a 'habitable dwelling', as recorded in the authority's file note of 18 July 2011. The owners have always intended to use the building for accommodation and have continued renovating the entire building so it can be used for this purpose. They would not have done this if they knew the use had been changed.
- 3.1.9. Twenty Wi-Fi linked smoke detectors have been installed throughout the two floors of the building which would sound simultaneously in the event of a fire.
- 3.1.10. There has never been emergency lighting installed in the building. There is a large skylight above the stairs and all tenants have torches beside their beds and emergency evacuation instructions on their room doors. Windows and doors have exit signs and the stairs have handrails.
- 3.1.11. The owners have a strict no flame policy in the building and all tenants have evacuation instructions on their doors.
- 3.1.12. The large amount of household items stored onsite was temporary, as a relative had passed away and the owners had recently moved downstairs leaving numerous possessions in boxes. These have since been removed.
- 3.1.13. The authority has issued the dangerous building notice because it considers a change of use has occurred, but the owners do not consider that any change of use has taken place. There was no consultation or correspondence from the authority that indicated that a change of use had been recorded or that such requirements under the Act had been implemented.

The authority

- 3.2. The authority made submissions in response to the application for determination and to the Ministry's requests for information, which are summarised as follows:
 - 3.2.1. The authority's view is that the building is being used as an accommodation building and that a change of use has occurred.
 - 3.2.2. The authority considers that the building's use has now changed from sleeping single home (SH) to sleeping accommodation (SA), as defined by

Schedule 2 of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 (“the change of use regulations”).

- 3.2.3. The compliance schedule for the building was cancelled by the previous owner in 2009, following a significant fire in the building.
- 3.2.4. The original use of the building was changed in 2011 which gave the building an approved use as a SH. The authority’s records show this is the current approved use.
- 3.2.5. The application for building consent made by the owners in June 2015, and withdrawn in October 2016, stated that the property ‘will be used as a residential building’.
- 3.2.6. The authority’s records show that the owners engaged with the rates team in late 2023 and a rates review was undertaken. The SH use was confirmed and as result a rates refund was applied as the owners had been paying commercial rate fees on the building. This change was at the owner’s request and in the authority’s view constituted a notification to it (in its capacity as a territorial authority) that the use of the building had changed.
- 3.2.7. The authority’s view is that the building is currently being used as SA and that this use, at the time the dangerous building notice was issued, was not disputed by the owners. There are fee-paying tenants subject to ‘rental type agreement[s]’ who have paid bonds and have locks fitted on their room doors.
- 3.2.8. The authority is concerned that there is no current compliance schedule for the building and so it cannot be assured that any specified systems relating to life safety are being maintained.

4. Fire and Emergency New Zealand’s opinion

- 4.1. As stated in paragraph 1.5 I consulted with FENZ under section 170(a) about the fire safety and fire engineering of the building.
- 4.2. FENZ reviewed the site photographs provided in the parties’ submissions, and confirmed the opinion expressed in its letter of 9 October 2024, namely that the building in its current state is likely to result in the loss of life or serious injury, either to people in the building or people on other property, should a fire occur.

5. Discussion

- 5.1. The matter to be determined is the authority’s decision to issue a dangerous building notice in respect of the owners’ building under section 124. As the parties dispute the use of the building (which gave rise to the issuing of the notice), I will

consider the use of the building and the basis on which the authority recorded a change of use for the building (under section 115) in 2011.

- 5.2. While I will consider each of these matters in turn, I note the building's use is relevant to both.

The dangerous building notice

- 5.3. The authority issued the dangerous building notice in respect of the owners' building on 10 October 2024, requiring work to be carried out on the building to reduce or remove the danger in respect of section 124(2)(c)(i). The authority "considers that the building has insufficient life safety features to protect residents, and in the event of fire, injury or death to any persons in the building or to persons on other property is likely", suggesting the authority considers the building is dangerous 'in the event of fire' as per section 121(1)(b).
- 5.4. The authority's decision was informed by the official use of the building recorded on its files, its site inspection carried out 9 October 2024, and the fire safety advice it received from FENZ following the site inspection.

The legislation

- 5.5. The provisions of the Act relating to dangerous building notices can be found in subpart 6, with the relevant sections in this case being sections 121, 124 and 125.
- 5.6. Section 121 sets out the meaning of a 'dangerous building'.

121 Meaning of dangerous building

(1) A building is **dangerous** for the purposes of this Act if,—

(a) ...

(b) in the event of fire, injury or death to any persons in the building or to persons on other property is likely.

(2) For the purpose of determining whether a building is dangerous in terms of subsection (1)(b), a territorial authority—

(a) may seek advice from employees, volunteers, and contractors of Fire and Emergency New Zealand who have been notified to the territorial authority by the board of Fire and Emergency New Zealand as being competent to give advice; and

(b) if the advice is sought, must have due regard to the advice.

- 5.7. Under section 121(1)(b), a building is dangerous for the purposes of the Act if 'in the event of fire, injury or death to any persons in the building or to persons on other property is likely' ("the section 121(1)(b) test").
- 5.8. Section 121(2)(a) allows for an authority to seek advice from FENZ in determining if a building is dangerous, which the authority did when it carried out the site inspection with FENZ on 9 October 2024. FENZ subsequently issued a written

opinion, which the authority has relied on in issuing the dangerous building notice, as provided for in section 121(2)(b).

- 5.9. Section 124 provides that if a territorial authority is satisfied that a building is dangerous (as set out in section 121) it may, among other things, issue a notice “that complies with section 125(1) requiring work to be carried out on the building to... reduce or remove the danger” as per section 124(2)(c)(i). A notice issued under section 124 is not a prescribed form under the Building (Forms) Regulations 2004. Instead, section 125 specifies the requirements for such a notice, in particular section 125(1) sets out the requirements of a notice issued under section 124(2)(c)(i) that requires building work to be carried out.

The section 121(1)(b) test

- 5.10. Previous determinations have discussed⁴ a building can be dangerous in terms of section 121(1)(b) for any reason relating to fire, and this may include likely fire hazards and sources and the building’s occupancy, among other matters.
- 5.11. There is always a risk that in the event of a fire a person may be injured or die. However, for the risk of this to be ‘likely’, as set out in section 121(1)(b), there must be particular features of the building that create or contribute to this likelihood.
- 5.12. When analysing if a particular building is dangerous, I consider it is appropriate, as an evaluation tool, to first consider whether the building complies with the Building Code, as many of the performance requirements of the Code relate to life safety in the event of fire. If the answer is no, then the next consideration will be whether the non-compliant features of the building contribute to and satisfy the test of a building dangerous in terms of section 121(1)(b).
- 5.13. It is important to note that although a building may not comply with particular aspects of the Building Code, this does not automatically mean that the building is dangerous. Additional analysis of the particular configuration and features of the building needs to be carried out to establish if the non-compliance amounts to ‘dangerous’ so as to warrant the seriousness of issuing a dangerous building notice.
- 5.14. The particular features of the building to analyse for Building Code compliance may include (but are not limited to) the:
- Outbreak and spread of fire (such as nature, number and location of any ignition sources)
 - means to escape the building
 - warning systems to alert occupants of fire and initiate evacuation
 - building’s use
 - occupancy.

⁴ Determination 2015/014 *Regarding the issue of a dangerous building notice for a house* (issued 13 April 2015) at paragraph 8.2.4.

As these relate to Building Code Clause concerned with the prevention of fire occurring, the spread of fire and movement to a place of safety.

- 5.15. There are two further points to note with respect to the test in section 121(1)(b). The first, is that the phrase ‘in the event of fire’ should be taken to refer to a credible fire scenario. This need not be the worst credible fire scenario (as might be used if testing for Building Code compliance), but nor should it be a trivial fire scenario. The analysis should be aligned to a fire scenario that might be considered usual or typical for the building’s type and occupancy.
- 5.16. The second point to note is the meaning of the term ‘likely’. This meaning was considered in Determination 2006/119⁵ in the context of the dangerous building test under section 64 of the former Building Act 1991. The relevant paragraph of that determination states:

The word “likely” in the context of section 64 of the Building Act 1991 (“the former Act”), now section 121, has been interpreted as follows:

“likely” does not mean “probable”, as that puts the test too high. On the other hand, a mere possibility is not enough. What is required is “a reasonable consequence or [something which] could well happen”. *Auckland CC v Weldon Properties Ltd* 7/8/96, Judge Boshier, DC Auckland NP2627/95, [1996] DCR 635.

- 5.17. I consider that this decision continues to represent good law in respect of the meaning of ‘likely’ in section 121, which should therefore be read as meaning something that could well happen.

The ‘classified use’ of the building at the time the dangerous building notice was issued, to establish the Building Code requirements

- 5.18. In order to carry out the first stage of the analysis for the section 121(1)(b) test – namely to assess whether the owners’ building complied with the Building Code – it is necessary to establish the ‘classified use’ of the building. This is because the “each building shall achieve the performance criteria specified in the building code for the classified use of that building”⁶.
- 5.19. The various classified uses that buildings can have are set out in Clause A1 of the Building Code. A building with a given classified use may have one or more intended uses, as that term is defined by the Act.⁷ A building’s intended use includes any reasonably foreseeable occasional use that is not incompatible with the intended use.⁸ Clause 3(3) of the Building Regulations 1992 states how the intended use informs the classified use:

⁵ Determination 2006/119 *Dangerous building notices for houses* (issued 7 December 2006 by the Department of Building and Housing), at [5.2.1].

⁶ Refer to Building Regulations 1992, section 3(2).

⁷ Clause A1.0.2 of the Building Code.

⁸ Section 7 of the Act.

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

- 5.20. Looking at the intended use of the owners' building, at the time of the site inspection and the issue of the dangerous building notice, the building was occupied by the owners and five tenants. The owners occupied a flat on the ground floor, while the tenants occupied rooms with communal facilities or self-contained apartments on the first floor. The tenants all had individual residential tenancy agreements, typically for one-year, and locks on their room or apartment doors. Some of the tenants shared communal facilities such as kitchen and laundry areas.
- 5.21. At the time the notice was issued, the building had three kitchens and two laundry areas on the ground floor and two kitchens and a laundry on the first floor. There were seven independent bedrooms/apartments on the first floor. The owners state that their intention is to have up to a maximum of seven or eight tenants living on the first floor, in order to generate retirement income and enable them to continue to renovate the building. They state this has always been their intention, although it appears that they did not begin to accept tenants until early 2024.
- 5.22. Turning now to the classified uses in clause A1, there are two categories of classified use that residential uses may fall within – 'housing' and 'communal residential'.
- 5.23. Within the 'housing' category there are the following classified uses:

2.0 Housing

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

2.0.2 Detached dwellings

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

2.0.3 Multi-unit dwelling

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

2.0.4 Group dwelling

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

- 5.24. Within the 'communal residential' category, there are two types of classified use, with the use that is potentially relevant to the owners' building being community service.

3.0.2 Community service

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

- 5.25. In their correspondence, the parties have discussed the possible intended use of the owners' building as a boarding house. However, I note that a boarding house is given in Clause A1 as an example of both the 'detached dwelling' and the 'communal residential community service' classified uses, so this is not in itself a definitive indication of which use the owners' building falls within.
- 5.26. Instead, it is important to look at the features of the building and how the residents of the building live and their relationships with each other. Within the 'housing' category of classified uses, the occupants will mainly look after themselves and each other.⁹ This idea is reinforced through the performance requirements that apply to housing uses, particularly those related to life safety, which are significantly less onerous than those that apply to 'communal residential' uses.
- 5.27. For a building to fall within the 'Detached dwellings' use it must house people that live as a single household or family, with a boarding house accommodating fewer than 6 people given as a possible example.
- 5.28. A 'household' is not defined in the Building Code. However, a 'household unit' is defined in section 7 of the Act, which can inform the interpretation of household.

Household unit—

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

- 5.29. The definition of 'household' has also been considered by previous judgements and determinations that can provide guidance on the characteristics of a 'single household' and 'family'.¹⁰ For example, in the High Court case of *Queenstown-Lakes District Council v Wanaka Gym Ltd*,¹¹ the judge considered the following characteristics of a single household, noting it is not an exhaustive list:

- degree of permanence in the residents
- connection with other residents other than simple proximity

⁹ See clause A1.2.0.1.

¹⁰ See for example, *Hopper Nominees Ltd v Rodney District Council* [1996] 1 NZLR 239; and Determination 2007/111 Fire safety provisions for two relocated buildings to be used as staff accommodation (17 September 2007).

¹¹ *Queenstown-Lakes District Council v Wanaka Gym Ltd*. CIV-2003-002-265 (21 May 2014).

- an element of living together jointly.

5.30. It is clear from the features of the building, for example several kitchens, that the building does not support the jointly living together as one exclusive household across the building.

5.31. ‘Communal residential’ uses, on the other hand, are those where assistance or care is extended to the occupants.¹² Unlike the uses within the ‘housing’ category, there is no emphasis placed upon the requirement for a family (or single household) and the occupants are less likely to know each other before occupying the building. The ‘communal residential’ category covers residential activities where occupants generally receive more care and support than the housing category, and where the building contains a disparate group of occupants.

5.32. In my view, based on the evidence provided, at the time the dangerous building notice was issued, the owners’ building was being used as a boarding house, with the owners living onsite as a separate household unit on the ground floor and permanent tenants occupying the first floor, with varying degrees of self-contained areas (‘apartment’)¹³ or in rooms with communal facilities. The fact that the tenants had separate residential tenancy agreements, and individual rooms / apartments with locks on their doors indicates they were not living as a single household unit. This is supported by the presence of several kitchens. There was no evidence that the tenants knew or had any type of relationship with each other, beyond the use of shared facilities. Instead, it appears the intention is they live independently of each other, with the owners providing limited assistance or care, in the form of maintaining the building and providing communal facilities on their behalf.

5.33. Accordingly, I am of the opinion that the classified use of the owners’ building is ‘communal residential’ (specifically ‘community service’) and my analysis of the Building Code compliance of the building, for the purpose of the section 121(1)(b) test, will be carried out on this basis.

Building Code compliance

5.34. As stated above, in respect of section 121(1)(b) test for whether a building is dangerous, it is appropriate to first consider whether the building complies with the Building Code.

5.35. The dangerous building notice issued by the authority raised several matters relating to protection from fire, prevention of the spread of fire and means of escape. The relevant provisions can be found in the C—Protection from fire clauses of the Building Code (Clauses C1 to C6), which relate to different aspects of fire

¹² See clause A1.3.0.1.

¹³ I consider ‘2.0.3 Multi-unit dwelling’ is not a relevant classified use as the building does not have sufficient separation of discrete separate household units.

safety, with the main clauses of relevance being clause C3—Fire affecting areas beyond the source and C4—Movement to a place of safety.

- 5.36. The focus is on identifying particular deficiencies in the building – areas of non-compliance that could potentially make the building dangerous in the event of a fire. The most direct way to do this is to compare the as-built building, at the time the dangerous building notice was issued, with the relevant Acceptable Solution as a means of establishing compliance with the relevant Building Code Clauses. Although acceptable Solutions are not the only means of establishing compliance¹⁴, identifying areas where a building deviates from an Acceptable Solution highlights those areas so their compliance can be examined further.
- 5.37. There are three Acceptable Solutions and two Verification Methods that relate to clauses C1-6 —Protection from fire. Which of these will apply to a particular building depends on which ‘risk group’ the building falls within, which is in turn based on how the building is used or intended to be used. The various fire safety risk groups are described in Table 1.1 in the Acceptable Solutions, and there are three that relate to places where people stay or reside.¹⁵
- 5.38. The owners intend to use their building as a boarding house, and I have found that it has a classified use of ‘communal residential, community service’. At the time of the dangerous building notice, there were five tenants living in the building, but there are seven individual rooms / apartments on the first floor and the owners have indicated they are interested in potentially having more tenants in the future (up to seven or eight).
- 5.39. Accordingly, I consider that the building falls within risk group SM—Sleeping non-institutional. This risk group applies to buildings used as boarding houses where six or more people pay for accommodation (among other uses). Although risk group SH also applies to boarding houses (those where fewer than six people pay for accommodation), I consider the layout of the building, number of tenants and lack of ‘living as a single household unit’ means risk group SH is not appropriate, rather SM is the more appropriate risk group to apply.
- 5.40. The Acceptable Solution for the SM risk group is C/AS2 (“the acceptable solution”). Looking at the matters raised by the authority in the dangerous building notice, it is clear that there are several areas where the owners’ building does not conform with the Acceptable Solution and hence potentially also does not comply with the Building Code.
- 5.41. One of the first matters raised in the notice is that the building is one large firecell with no obvious fire separations. Paragraph 4.6 of C/AS2 contains specific requirements for firecells within sleeping areas in SM risk group buildings.

¹⁴ Refer to section 19 of the Act for how compliance with the Building Code is established.

¹⁵ I note that the risk groups for the purpose of the C clauses and their Acceptable Solutions, are not the same as the classified uses defined in clause A1 or the use groups defined in the change of use regulations, although there are similarities between each set of uses.

Paragraph 4.6.9 requires that each ‘suite’ within the building (ie, each tenant’s bedroom / accommodation room or apartment¹⁶) shall be a separate firecell with fire separations that comply with the standards set in the Acceptable Solution. In addition, paragraph 4.6.8 provides that areas with “communal service functions”, such as shared kitchens and living areas,¹⁷ shall be separated from suites by compliant fire separations; and that paragraph 4.6.12 states that each “household unit” shall be a single firecell separated from every other firecell by compliant fire separations.

- 5.42. I consider that the building being one large firecell, with no obvious fire separations anywhere within it, does not satisfy the requirements of C/AS2 for risk group SM. The building contains both multiple suites that the tenants live in on the first floor and the owners’ household unit on the ground floor and the Acceptable Solution requires compliant fire separations between them.
- 5.43. In the dangerous building notice, the authority also identified that “the smoke detection system installed is insufficient to raise an alarm should a fire occur in a space that does not have a smoke/heat detector installed” and that not all spaces have smoke detectors (or heat detectors in kitchens, if appropriate).
- 5.44. The owner has provided evidence that that building is currently fitted with several Wi-Fi connected smoke detectors. This constitutes a Type 1 domestic alarm system (the various fire safety system types are defined in Appendix A of C/AS2).
- 5.45. Table 2.2 of the Acceptable Solution specifies the types of fire safety systems required for the various risk groups. For buildings in risk group SM that have a permanent “occupant type”¹⁸, the minimum fire safety system required is a Type 1 smoke detection, and Type 2 manual fire alarm system which conforms with NZS 4512 and has manual call points throughout the building. Each suite and household unit requires its own Type 1 smoke alarm.
- 5.46. However, table 2.2 note 1a specifies that a Type 2 system for risk group SM is not required where “the escape routes serve no more than 10 beds¹⁹, or where the exit doors from sleeping area firecells open directly into a safe place or external safe path”.

¹⁶ A suite is defined in C/AS2 as “A firecell providing residential accommodation for the exclusive use of one person or of several people known to one another. It comprises one or more rooms for sleeping and may include spaces used for associated domestic activities such as hygiene and cooking. A suite may include transient or educational accommodation.”

¹⁷ Defined in C/AS2 as “Spaces that provide day to day service function to support the sleeping areas and are higher fire risk than direct support functions. These are generally enclosed spaces which include but are not limited to offices, waiting rooms, lounges, stores, dining rooms, laundries and kitchens.”

¹⁸ I consider ‘permanent’ given the tenancy agreements, suggesting that the building is the home of those occupants, rather than transient accommodation.

¹⁹ Noting that “beds” do not necessarily equate to the number of rooms or tenancy agreements. However, the acceptable solution states ‘occupant load is derived by bed spaces’.

- 5.47. The owners have stated their intention is to have a maximum of seven or eight tenants. It is unclear if such tenancy agreements would be for individuals or couples. The exact number of escape routes for the building has also not been confirmed given that some areas of the upper floor include routes that utilise external walkways and ladders, that are in various state of repair or may not be accessible (refer to paragraph 5.49). If tenants and the owner's household unit are required to use the same escape route, then it is possible that this route could potentially exceed "10 beds".
- 5.48. Accordingly, from the information provided, it is unclear if the Type 1 system currently installed in the owners' building would satisfy the requirements of C/AS2 for risk group SM or whether a full Type 2 system is also required. A full compliance assessment is recommended with a complete understanding of the occupant numbers (by bed spaces). Despite this, it is clear the type 1 smoke detection does not provide coverage of all areas, and in that respect does not comply.
- 5.49. Other points raised in the dangerous building notice relate to the escape routes and final exits within and from the building. The authority has noted that the main stairs are not protected from the effects of smoke or fire, some of the exits to external walkways have been removed (by being covered over by cladding and lining) and that parts of the upper floor external walkways for the fire escape have been removed.
- 5.50. From the floor plans and layout I have been provided with, it is unclear the exact number of escape routes and final exits in the owner's building. Table 3.2 in C/AS2 states that for buildings in risk group SM (with either no fire safety system or a Type 2 fire alarm system) the maximum total open path²⁰ length is 50m and the maximum dead end open path²¹ distance is 20m. Without further information relating to escape routes and final exits, I am unable to comment further as to whether the owners' building complies. However, in my view, the lack of firecells and fire separations in the building make it unlikely that compliance will be achieved.
- 5.51. Using C/AS2 as an evaluation tool, I conclude that the building's compliance with the Building Code has not been established in its use as a boarding house providing permanent accommodation at the time the notice was issued.
- 5.52. As noted above, Acceptable Solutions provide just one means of establishing compliance with the Code, and the fact that a building or building work does not comply with an Acceptable Solution does not automatically mean that it also does not comply with the Code. However, in situations where compliance is not established via an Acceptable Solution, then I would expect to see evidence of other features, systems or approaches that ensure the building complies with the Building

²⁰ That part of an escape route (including dead ends) within a firecell where occupants may be exposed to fire or smoke while making their escape.

²¹ That part of an open path where escape is possible in only one direction.

Code by other means. I have seen no such evidence in relation to the owners' building. The building falls short in conforming with the Acceptable Solution, but there is no evidence of any compensatory features, systems or approaches which means this shortfall is not material and is otherwise addressed.

- 5.53. Accordingly, I conclude that with respect to clause C3 and C4 of the Building Code, the owner's building either does not comply or compliance has not been established.
- 5.54. For the sake of completeness, I note that the authority raised a couple of other matters in the dangerous building notice that warrant discussion but do not come within the scope of C/AS2.
- 5.55. The first is the authority's contention that there is no emergency lighting associated with the main stairs in the owners' building, and that should a fire occur and the power supply to fail this may mean the tenants cannot adequately see the escape route.
- 5.56. C/AS2 does not include requirements for emergency lighting. However, clause C4.1(a) establishes a functional requirement that "buildings must be provided with visibility in escape routes complying with clause F6". Clause F6.2 states that "specified features in escape routes must be made reasonably visible by lighting systems, other systems, or both, during failure of the main lighting", with clause F6.3.1 establishing an associated performance requirement that "Specified features in escape routes must, when the systems for visibility are at their design level, be reasonably visible." Specified features are defined in clause A2 and include stairs.
- 5.57. As such, the lack of any type of emergency lighting or visibility system on the main staircase of the owner's building means that the building does not comply with clause C4 in its intended and classified use as a boarding house.
- 5.58. The second point raised by the authority in the dangerous building notice relates to the large amount of household items being stored on the ground floor of the building at the time of its inspection, and the "high fire load" this created. However, I do not consider it necessary to assess this point further as I judge it to be a situational and time-specific feature, and the owners advise the items have now been cleared.

Whether the building was dangerous - Application of the section 121(1)(b) test

- 5.59. Having established that the owners' building did not comply with the Building Code, in respect of the fire safety requirements, at the time the dangerous building notice was issued, the second step in the analysis is assessing whether there are any particular features of the building (or lack of features) associated with the Building Code non-compliance that in combination result in the building being dangerous for the purposes of section 121(1)(b).

- 5.60. As stated in paragraph 5.14, there are some types of features that are especially relevant to consider, although this list is not exhaustive, and in no particular order.

Nature, number and location of ignition sources

- 5.61. The floor plans provided indicate there are potentially 10 sources of fire within the building, including two kitchens and two laundry areas on the ground floor, and two kitchens, a single laundry, a wood burner (in the family room) and a pellet fire (in the lounge) on the first floor.
- 5.62. The existence of kitchens and laundries does not make the building inherently dangerous under s121(1)(b). However, the number of such facilities, when combined with the independent living arrangements of the owners' household and the tenants, mean the risk of fire is significantly higher than for a typical single residential household unit.

Means of escape

- 5.63. The number and availability of the escape routes and the protection of the escape paths from the effects of fire are all relevant factors in analysing whether the building is dangerous.
- 5.64. As outlined in paragraph 5.50, I have not seen any evidence as to the number of escape routes and their protection from the effects of fire (being heat, smoke or toxic products). However, the authority has recorded that there are no fire separations or fire-rated walls in the building, including around the single stairway between floors, and that the building is one large firecell. The authority has also recorded that some final exits have been blocked up and parts of the first floor external walkways for fire escape have been removed. In addition, satellite imagery available online²² shows that around the time the dangerous building notice was issued the external fire escape walkway on front of the building was in a state of considerable disrepair creating a potential fall hazard for escaping occupants using this route.
- 5.65. In my opinion, these features or lack of features – in particular, the lack of fire separations around escape routes (single stairway) and the fact that some exits have been compromised – are likely to contribute to the risk of injury or death in the event of a fire and make the building dangerous in terms of section 121(1)(b).

Warning systems

- 5.66. From evidence provided, there is Wi-Fi connected Type 1 smoke alarm system installed in the owners' building, which lacks adequate detectors in several areas.
- 5.67. While a Type 1 system will offer early warning of a fire (and under C/AS2 is required in each household unit and suite, in addition to potentially a Type 2 system for the

²² Google maps street view dated December 2024.

building as a whole), its efficacy depends on the 'coverage' of the system. If areas where fire could occur do not have, in this case, smoke detectors, then an outbreak of fire in those areas won't be automatically detected until the fire/smoke reaches an area that does have smoke detectors. This will delay warning occupants to initiate escape, and the fire to grow and present a more significant hazard once occupants initiate escape. I consider this particularly an issue in this case as the areas that do not have smoke detection are areas on the ground floor that are in close proximity to the single stairs escape route. Delayed warning arising from the lack of smoke detection 'coverage' in these areas will likely result in a larger fire/more smoke impacting the single stair escape route. This, combined with the lack of fire separations protecting the escape route from the effects of a likely larger fire with more smoke at the ground floor, would contribute to the risk of injury or death to persons using the single stairs to escape in the event of a fire, making the building dangerous in terms of section 121(1)(b).

The use of the building

- 5.68. As discussed in paragraph 5.32, I consider that the owners' building was being used as a boarding house at the time the dangerous building notice was issued, with the owners living as a household unit on the ground floor and the tenants living independently on the first floor. The owners have confirmed this use, stating they consider the building to be private accommodation and not a private home.
- 5.69. As such, there is assumed to be little or no social cohesion between tenants and owners. The size of the building, the number of facilities, the individual tenancies and the locks on the individual room and apartment doors, and the fact that the tenants are not necessarily known to each other before they take up their tenancies and are under no obligation to develop relationships with each other once they do, all support this assessment of how the building is run.
- 5.70. The significance of this in terms of section 121(1)(b) is that it reduces the degree of assistance that the building's occupants can be expected to extend to each other in the event of a fire. With occupants living independently in separate spaces, they will have no necessary awareness of the other tenants' whereabouts or activities, and may have limited ability to alert them in the event of a fire. In my view, this increases the risk of injury or death occurring in the event of a fire and contributes to making the building dangerous in terms of section 121(1)(b), particularly combined with the deficiencies in the smoke detection warning system and lack of fire separations.
- 5.71. I have also taken into account the 'sleeping' activity of the building and the delay that can occur in initiating escape when occupants are asleep.

Occupancy

- 5.72. At the time the dangerous building notice was issued, the owners were living as a household unit on the ground floor with only five tenants on the upper floor. There

are, however, seven bedrooms on the upper floor and the owners have expressed an interest in increasing the number tenants in future up to seven or eight.

- 5.73. In my view, at the time of the notice, the building did not have an occupancy level that contributed to it being dangerous. The nature of the occupancy, in terms of how the occupants use the building, did have an impact, as already discussed in paragraph 5.70 and 5.71.

Conclusion on the section 121(1)(b) test and whether the building is dangerous

- 5.74. Under section 121(1)(b), a building is considered dangerous if in the event of a fire, the injury or death to any persons in the building is likely. As discussed, there are two strands to the analysis required under this test: firstly, that the building does not comply with the Building Code, and secondly that particular features of the building associated with this non-compliance are such that they are likely to contribute to the risk of injury or death.
- 5.75. In the case of the owners' building, I have determined that there are multiple areas of non-compliance with clauses C3 and C4, and numerous features of the building associated with this non-compliance. These include the absence of any fire separations between individual units, between units and communal areas, around areas where potential fire sources are located, and to protect safe paths and escape routes; the inadequacy of the fire alarm system coverage installed for the intended use of the building; the closing up of final exits from the building; the state of repair of the fire escape walkways on the outside of the building; and the use of the building as a boarding house, with tenants living independently with no expectation of a relationship of care and assistance between them and the sleeping use.
- 5.76. It does not mean Building Code non-compliance results in a dangerous building. Further, it is not necessary that there be one feature within a building that makes it definitely dangerous. In my view, it is the particular combination of the lack of smoke detection in some areas (particularly the ground floor), the lack of fire rated construction at the ground floor protecting the single stair escape path and the fact that some exits have been compromised, are building features that contribute to the likelihood of injury or death occurring should a fire breakout in the building, in combination with the nature or use of the occupancy of the building. In my view this likelihood has been established in this case.
- 5.77. I therefore conclude that the owners' building was dangerous in terms of section 121(1)(b) at the time that the authority issued the dangerous building notice, and the authority therefore had grounds to issue the notice.

The form and content of the authority's dangerous building notice

- 5.78. Having found that the authority had grounds for concluding that the owners' building was dangerous and for issuing a dangerous building notice under section 124, I will now consider the form and content of that notice.

- 5.79. What is required under section 124(2)(c)(i) of the Act is for the notice to require work to be carried out to reduce or remove the danger. In other words, it is the reduction or removal of the danger that is the required outcome from the issue of such a notice.
- 5.80. Section 125 specifies the requirements for a notice issued under section 124(2)(c)(i), in particular, section 125(1) requires the notice to state whether the owner of the building must obtain a building consent in order to carry out the work required by the notice (subsection (e)), and to state the time within which the building work must be carried out (subsection (d)). Section 125(2) prescribes who the notice should be given to. Section 128A(1) provides a person who fails to comply with a notice issued under section 124(2)(c) commits an offence and is liable to a fine.
- 5.81. The authority's notice was issued under section 124(2)(c)(i) requiring work to be carried out to reduce or remove the danger. The authority recommended that the following work be undertaken to remedy the issues identified in the notice:
- Remove all material from the ground floor that is not specifically for the day-to-day use of residents, or for construction purposes.
 - Extend the smoke detection system into all spaces within the building including those spaces that are vacant or under construction, heat detectors may be installed in the kitchens to avoid false alarms. This must include replacement of the upstairs detector that has been removed from one of the bedrooms.
- 5.82. In setting out in the notice the above work to be carried out, the authority must consider this is all of the work required to reduce or remove the danger so that the building is no longer dangerous, as this is the intended outcome from the issue of the notice.
- 5.83. As stated above, the authority's notice identified key features of the building that it considered are likely to cause injury or death in the event of a fire. However, the notice only recommends two areas of work to be carried out to fully reduce or remove the danger. In respect of this part of the notice:
- 5.83.1. I am not satisfied that the two recommended areas of work that are stated in the notice would be sufficient to reduce or remove the dangerous nature of the building.
- 5.83.2. I consider the building is dangerous in respect of other building features - being the lack of fire rated protection of the stair escape path at the ground floor where the first floor occupants escape through the owners ground floor apartment and close to areas not covered by smoke detectors, especially given the adequacy of the other escape paths – and should have also considered works to be carried out to those areas that also make the building dangerous, so to reduce or remove the dangerous as is the intended outcome of such a notice.

- 5.83.3. A dangerous building notice must be clear in its description of what has rendered the building dangerous and consequently what requires addressing to reduce or remove the danger, because it is an offence not to comply with the notice. In this respect I do not consider the notice has set out all of the work required to reduce or remove the danger in respect of section 124(2)(c)(i). If the authority does not consider works are required to the other items set out in the notice, it is not clear how or why those items contribute to rendering the building dangerous. If it is a matter of a combination of features resulting in the dangerous building but only requires one specific work to be carried out to reduce or remove the danger in respect of the combination of features, that could be made clear in the notice.
- 5.84. The authority has submitted that it is unable to require specific work as part of this notice and has therefore made 'recommendations' on work to be carried out. Previous determinations²³ have considered what is required of a notice. The seriousness of issuing a dangerous building notice has significant implications for the owner and the occupant. This seriousness obliges the authority to have a comprehensive understanding of the danger, and the building work required to reduce or remove the danger, before it issues a dangerous building notice. The description of required building work in a dangerous building notice should be focussed on the necessary outcome for the identified dangers that exist in the building. The generalised description of building work to reduce or remove each identified danger, with a focus on the outcome required, can be made clear without being prescriptive or limiting or providing an exhaustive list of options. It is open to the authority to recommend comprehensive specific work as one option for the owners to consider, alongside a second option enabling the owners to provide an alternative plan to reduce or remove the danger.
- 5.85. Section 125(1)(d) also requires a notice issued under section 124(2)(c) to:
- state the time within which the building work must be carried out, which must not be less than a period of 10 days after the notice is given or a period reasonably sufficient to obtain a building consent if one is required, whichever period is longer.
- 5.86. Section 125(1)(e) requires a notice issued under s124(2)(c) to:
- state whether the owner of the building must obtain a building consent in order to carry out the work required by the notice.
- 5.87. The authority's notice specifies that "this work should be carried out as soon as practicable, but within no later than 15 working days from the date of this notice". The notice does not confirm if a building consent is required to undertake these works.

²³ Determination 2020/027 *Regarding the issue of a dangerous building notice requiring repair work to be carried out to the building* (issued 5 October 2020) at paragraph 5.3.4 onwards.

- 5.88. The particular reference to heat detectors being installed, given the use of the building, is considered a specified system (or part of),²⁴ which would require a building consent for building work to install or alter them. As such, 15 working days would not be a reasonably sufficient period within which to gather sufficient information, apply and obtain a building consent and then carry out the work. This is also relevant to the matter of fire rated construction required to protect the stair escape path at the ground floor.
- 5.89. For these reasons, I consider that, while the building is considered a dangerous building under s121(1)(b), the authority's notice itself does not fully achieve the requirements of section 124(2)(c)(i), section 125(1)(d) and section 125(1)(e).

Dangerous building notice conclusion

- 5.90. A determination under section 177(1)(b) is in respect of an authority's exercise of its powers of decision. Section 188(1) provides that a determination can confirm, reverse, or modify that decision, or determine the matter to which it relates.
- 5.91. The District Court, in *Estate Properties Ltd v Hastings District Council* stated "The Chief Executive's choice of remedy under s 188(1) is an exercise of discretion"²⁵ and that it was open to the Chief Executive to not apply one of the positive steps required by section 188(1)(a).²⁶ Further, the court took the view that declining to reverse a decision did not have the effect of confirming the decision.²⁷
- 5.92. In this case I have concluded:
- 5.92.1. that the owners' building was dangerous in terms of section 121(1)(b) at the time that the authority issued the dangerous building notice, and the authority therefore had grounds to issue the notice,
 - 5.92.2. however, the notice itself has some inadequacies of the form and content of the notice in respect of sections 124(2)(c)(i), 125(1)(d) and 125(1)(e) and I consider the listed works to be carried out will not reduce or remove the danger without the addition of works to the fire rated construction required to protect the stair escape path at the ground floor.
- 5.93. While I agree the building was dangerous at the time, despite the seriousness of a dangerous building notice I consider it is not appropriate to confirm the decision to issue the notice due to the inadequacies of the form and content of the notice

²⁴ Under Schedule 1 of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005.

²⁵ *Estate Properties Ltd v Hastings District Council* [2021] NZDC 17000 for discussion on section 188(1)(a) at [21].

²⁶ The court dismissed an appeal against a decision of the Chief Executive that a code compliance certificate had been wrongly issued but declining to reverse the certificate (refer to Determination 2020/034 "Regarding the compliance of fire safety precautions in a motel at 2 Arataki Road, Havelock North", dated 16 December 2020). See [2021] NZDC 17000 at [30].

²⁷ [2021] NZDC 17000 at [29].

Further, the notice is now expired and is no longer in effect, and it not necessary to modify the notice. I also consider it not appropriate to reverse the notice as I agree the building was dangerous at the time and therefore grounds to issue the notice. I have therefore elected not to exercise a remedy in respect of section 188(1)(a) in this determination.

The change of use

5.94. I now consider the authority's decision to record a change of use of the building under section 115 in 2011. Under section 114, an owner of a building must give written notice to a territorial authority if the owner proposes to change the use of a building. Failure to give such notice is an offence.

5.95. Section 115 sets out the new or additional code compliance requirements that apply where an owner proposes to change a building's use; and the requirement for an authority to give written notice that it is satisfied that the building, in its new use will comply with those Building Code requirements.

5.96. What is meant by "change the use" in the context of sections 114 and 115 is described in the change the use regulations.²⁸ Regulation 5 makes it clear that for there to be a change of use of a building for the purposes of sections 114 and 115 there must be both:

- a change of use of all or a part of the building from one use (the old use) to another (the new use), as determined by regulation 6
- additional or more onerous building code compliance requirements attaching to the building's new use, compared to the old one.

5.97. The various uses that a building may have are set out in schedule 2 of the regulations. The two uses that are relevant here are SA—Sleeping accommodation and SH—Sleeping single home, which are defined in schedule 2 as follows:

Use	Spaces or dwellings	Examples
SA (Sleeping Accommodation)	spaces providing transient accommodation, or where limited assistance or care is provided for people	motels, hotels, hostels, boarding houses, clubs (residential), boarding schools, dormitories, halls, wharehous
SH (Sleeping Single Home)	detached dwellings where people live as a single household or family, including attached self-contained spaces such as	dwellings or houses separated from each other by distance

²⁸ See regulation 5 and 6, and schedule 2 of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005.

	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	
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- 5.98. The authority has submitted that, according to its records, the original use of the building was changed from SA to SH in 2011. In late 2024, the authority became aware that the building was being used for transient accommodation or 'fee paying tenants' and that as a result the building's use had changed back from SH to SA. This prompted the authority to undertake its site inspection in conjunction with FENZ relating to the fire safety features required for that use.
- 5.99. The owners have challenged that a change of use has taken place. They state the building's past and future use was always intended to be accommodation (SA), with 14 bedrooms originally on the upper floor now reduced to 7.²⁹
- 5.100. Reviewing the evidence before me, it would appear that from its construction until early 2005, the building was used as a pub with accommodation. Although the pub ceased operating in 2005, the first floor continued to be used to provide bed and breakfast accommodation. After the October 2008 fire, the previous owner discontinued their accommodation activities.
- 5.101. The authority's property database records that the building's compliance schedule (CS0040) was cancelled in February 2009. No evidence has been provided that the previous owner applied (under section 106) for this to happen.
- 5.102. However, section 107 allows a territorial authority to amend a compliance schedule on its own initiative in certain circumstances. Where an authority 'cancels' a compliance schedule pursuant to section 107, then it must advise the owner of its intention to do so,³⁰ and provide written notice of the amendment to the owner.³¹ I have seen no evidence that these provisions were followed, or that the authority advised the previous owner of its intention to cancel the compliance schedule or of the actual cancellation.
- 5.103. The previous owners then applied for a building consent to partially rectify the fire damage to the building, which the authority issued on 15 July 2009 (BC090177). In the application, the owner stated that the building's use at that time was "storage"

²⁹ It is noted that the owners' initial submissions referenced the building falling under the clause A1 classified use 2.0.4 group dwelling, which applies to a building or use where groups of people live as one large extended family, and that their extended family at one point did occupy the building in that manner. However, in subsequent submissions the owners is clear that the tenants occupy the building on individual tenancies and are not part of the same household as the owners.

³⁰ Section 107(3)(a)

³¹ Section 107(4)(a).

and that there were no specified systems in the building. The authority's processing check sheet for the application recorded "no change of use @ this stage".

5.104. The current owners purchased the property in 2010 with the intention of using the first floor for bed and breakfast accommodation. They applied for a building consent to install a solid fuel heater (BC110116), which the authority issued on 8 June 2011. The authority's processing check sheet for the application lists the building's category as residential 1 (RES1), which is a reference to the authority's internal processes for handling building consents, rather than describing the use of the building.³²

5.105. The owners have submitted that when they purchased the building it had no firecells or smoke alarms and all the fire doors had been removed, and that the authority issued a building consent for it as a residence and not as a commercial property. I assume this is a reference to the authority's check sheet for BC110116. However, this form related specifically to a building consent for a solid fuel heating appliance and did not include any section relating to the building's current or proposed use.

5.106. The authority's property database records the following building notes, dated 18 July 2011:

Change of use to habitable dwelling only by new owners in 2010 means building can be removed from earthquake-prone register. Any future work to convert to retail/commercial premises will require an engineer's report for [an earthquake-prone building].

5.107. The owners state that they were never informed of this change of use and would not have continued to reinstate the building had they known that it could only be used as accommodation for their family.

5.108. On 4 June 2015, the owners submitted an application for building consent for internal alterations and recladding (BC150141), which was subsequently withdrawn. The application included a question whether the building work would 'result in a change of use of any part of the building', but this was not answered. Instead a note on the application stated:

Will be used as residential building. Daughter in flat downstairs, mother-in-law master bdm. Possibly up to 5 boarders. Downstairs art/workshop.

5.109. On 9 November 2023, the authority received a query from the owner regarding rate payments for the property. The property database file note states:

Record show this was granted residential use and should have been rated as such from July 2011. This did not trigger any rating change at the time. Refund for

³² The national building consent authority competency assessment system includes competency levels for building consents which have been grouped into residential and commercial. Residential 1 to 3 (often referred to as RES1 – RES3) and Commercial 1 to 3 (referred to as COM1 to COM3).

payment 12 years has been processed ... being the difference between the charged commercial rates and what it should have been as residential. This current year 23/24 has been reassessed as residential rates – a decrease of [21%]. Planner's note – this is still zoned commercial from a planning perspective and if this should be used as a commercial venture again, they will have to formally apply for a change of use as far as rating is concerned.

- 5.110. The authority's submissions note that following the owners' discussions with the rates team in late 2023, the authority undertook a review, which confirmed the building's SH specified use and that as a result a rates refund was applied.
- 5.111. In my opinion, from the evidence provided, it remains unclear what initiated the authority to record a change of use for the building under section 115 in 2011. It appears that the building has been, and is intended to be, used as sleeping accommodation (SA) and not wholly as a single household unit (SH).
- 5.112. However, the authority's records do indicate that the owners were aware of the classification of the building as having a residential use prior to the authority's inspection in late 2024. The confirmation of the building's SH use and the reimbursement of commercial rates for the period 2011 to 2023 would further have indicated this to the owners.
- 5.113. While the owners may not have been aware of their obligations under the Act, following their decision in 2024 to let parts of the building to tenants with tenancy agreements, this does not alleviate them of their legal requirements. This included notifying the authority under section 114 that the building no longer had a purely residential use for a single household (SH).
- 5.114. As discussed above, the current use of the building as sleeping accommodation (SA) requires the building to include life safety features, which are specified systems. Section 100(1)(a)(i) requires that a building not used wholly as a single household unit requires a compliance schedule if it has specified systems³³. Section 101 states that an owner of a building for which a compliance schedule is required must obtain the compliance schedule. Failure to do so is an offence. These are all legal obligations that the owners need to be aware of and action if they intend to continue to lease parts of their building to tenants.
- 5.115. I confirm that the current use of the building is sleeping accommodation (SA) in respect of schedule 2 of the change the use regulations³⁴, and note that there does not appear to be any dispute between the parties about this. With regards to the authority's 2011 decision to record a change of use for the building under section 115, I conclude there is insufficient evidence to establish why or on what basis a change of use was instigated, and hence to whether and to what degree the owners may have been notified about it.

³³ Refer to paragraphs 5.45 to 5.48 of this determination.

³⁴ Also the classified use under Building Code Clause A1 of 'communal residential, community service'

6. Decision

6.1 In accordance with section 188 of the Building Act 2004, I determine that the building was dangerous, as defined by section 121(1)(b), at the time the dangerous building notice was issued on 10 October 2024, accordingly the authority had grounds to issue the notice under section 124. As per paragraph 5.93 I have elected not to exercise a remedy in respect of section 188(1)(a) in this determination.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 16 September 2025.

Rebecca Mackie

Principal Advisor Determinations