

# ***The requirement for insulation and appropriate floor level in relation to the change of use of a garage to a habitable space***

## **1 BACKGROUND**

- 1.1 The matter before the Authority is whether the building in question, under its changed use, meets the requirements of the Act with respect to insulation and floor level, in that the building complies with the building code to at least the same extent as before the change of use.
- 1.2 The applicant is the building owner and the other party is the territorial authority.
- 1.3 In making its determination, the Authority has not considered any other aspects of the building code.

## **2 THE BUILDING WORK**

- 2.1 The building in question is a garage/workshop that was used from 1995 as an architectural studio. In 1995, a timber tongued and grooved floor was installed on battens secured over the existing concrete floor, which was also painted with waterproofing sealer. In mid-2002, the existing tilt-up door was replaced with a set of French doors, some interior linings were replaced and some plastering and painting was also carried out. No building consent was applied for in relation to any of the work that was carried out.
- 2.2 The building lacks wall insulation, and the floor level, being less than 150mm above the exterior paved surface does not meet the clearance requirements set down in NZS 3604:1999 Timber Framed Buildings.
- 2.3 In July 2002, the territorial authority required the owner to apply for a building consent for “remedial work”.
- 2.4 The building owner applied to the territorial authority for a building consent for a change of use.
- 2.5 The territorial authority did not issue the consent on the grounds that the application did not fully comply with the building code in as much as the building lacked wall insulation and its ground level slab was below a certain level.

### **3 THE LEGISLATION**

3.1 The relevant legislation as set out in the Building Act 1991 is:

46. Change of use of buildings, etc

- (1) It is the duty of an owner of a building to advise the territorial authority in writing if it is proposed—
  - (a) To change the use of a building and the change of use will require alterations to the building in order to bring that building into compliance with the building code; or
  - (b) To extend the life of a building that has a specified intended life in terms of section 39 of this Act.
- (2) The use of the building shall not be changed unless the territorial authority is satisfied on reasonable grounds that in its new use the building will—
  - (a) Comply with the provisions of the building code for means of escape from fire, protection of other property, sanitary facilities, and structural and fire-rating behaviour, and for access and facilities for use by people with disabilities (where this is a requirement in terms of section 47A of this Act) as nearly as is reasonably practicable to the same extent as if it were a new building; and
  - (b) Continue to comply with the other provisions of the building code to at least the same extent as before the change of use.

### **4 THE SUBMISSIONS FROM THE PARTIES**

#### **4.1 General**

4.1.1 The Authority received a submission in the form of a written report from the applicant and 2 written submissions from the territorial Authority.

#### **4.2 The Applicant**

4.2.1 The applicant stated that the matters in dispute were:

- a) The need for a building consent to change an existing garage/workshop to a “habitable space”.
- b) Was it the owner’s duty to advise the council of the change of use?
- c) What work needed to be completed to meet compliance with NBC (*sic*)?
- d) Was consent needed for lining to ceiling, replacement of French doors and laying floor coverings?

4.2.2 The applicant stated that his understanding of section 46(2) “required compliance with the building code for specified items only such as escape from fire, other

property protection, sanitary facilities and fire rating behaviour and for disabled access. And also to comply with the other provisions of the building code to at least the same extent as before the change of use”.

- 4.2.3 The applicant acknowledged that the studio had no wall insulation but stated that no problems had emerged in 7 years in relation to this situation. In addition, while the existing concrete floor slab was less than 150 mm above the external ground, it did not present a problem as the external paved surfaces sloped away from the building. The slab has a DPC beneath it and sealant on the top surface. There had been no visible water ingress since 1995 and after 7 years there was no evidence of movement cracks or cupping in the T&G flooring fixed over the slab. This evidence was a sufficient background to say that the building is both safe and sanitary.
- 4.2.4 In the opinion of the applicant, there was no need to upgrade the building for the change of use.

### 4.3 The Territorial Authority

- 4.3.1 The territorial authority provided two submissions and couched some of its argument in terms of section 6 (Purposes and principles) of the Act. The Authority takes the view that section 6 is fundamental to the understanding of the Building Act and the Building Regulations, including the building code. However, the Authority takes the view that section 6 does not affect the territorial authority’s duty to apply the specific provisions of the Act relating to building consents, changes of use, and other relevant matters. In particular, the territorial authority must enforce the provisions of sections 46 with due regard to the matters listed in section 47.
- 4.3.2 One of the submissions made by the territorial authority noted that it could not retrospectively issue a building consent, while the other submission stated that the applicant needed to apply for a building consent
- 4.3.3 As regards section 46, the territorial authority has accepted that the fire clauses and requirements for disabled access do not apply to the building in question. It stated that if the requirements of the building code for the former and new uses are the same, then there would not be expected to be a lesser performance under a provision of the code. However, where a non-habitable space is concerned, a change of use to a habitable space may have greater requirements than those that existed before in terms of the building code provisions.
- 4.3.4 The territorial authority stated that regarding the change of use in question, it may effectively lessen the extent of compliance, as in its new use the building does not meet certain of the requirements given in the Authority’s Acceptable Solutions E2/AS1 of the Approved Document for building code clause E2 and E3/AS1 of the Approved Document for building code clause E3. The particular paragraphs being 4.2.5 of E2/AS1, which relates to the height of the ground floor level above the ground surface, and 1.1.1 of E3/AS1, which relates to R-values in external walls. So, whereas in its previous use the garage satisfied these requirements of the building code, it no longer does so and consequently, the building now complies to a lesser extent than before the change of use.

## 5 THE AUTHORITY'S VIEW

5.1 The Authority takes the following views on the four matters of doubt or dispute raised by the applicant:

- (a) "The need for a building consent to change an existing garage/workshop to a 'habitable space'."

Under section 18, the Authority may only determine "whether or not, or to what extent, particular building work or proposed building work . . . complies with . . . the building code, or whether or not the exercise by a territorial authority of the powers referred to in section 17(1)(d) of [the] Act is unreasonable in relation to the provisions of the building code". Accordingly, the Authority has no power to determine whether or not a building consent is needed.

However, the Authority notes that a building consent is a consent to carry out building work, it is not a consent for a change of use.

In most cases, a change of use will necessitate alterations to the building, and a building consent will be necessary for those alterations and for any additional upgrading work required under section 46(2).

- (b) "Was it the owner's duty to advise the council of the change of use?"

Again, this is a question that the Authority has no power to determine.

However, the Authority notes that the owner is required by section 46(1) to advise the territorial authority when it is proposed to change the use of a building (unless in its new use the building will comply in all respects with the building code).

- (c) "What work needed to be completed to meet compliance with the [building code]?"

This is addressed below, being a question that the Authority does have the power to determine.

- (d) "Was consent needed for lining to ceiling, replacement of French doors and laying floor coverings?"

Again, this is a question that the Authority has no power to determine, see under (a) above.

5.2 The Authority accepts that a consent cannot be issued retrospectively. However, the Authority is of the opinion that in this instance, it can determine whether or not the building in question complies with the building code to the extent required by the Act.

5.3 The territorial authority based some of its argument on the non-compliance with certain paragraphs of E2/AS1 and E3/AS1. The whole purpose of this determination is to decide whether there is any need to comply with Clauses E2 and E3 in the first place and, if so, to what extent. It should be noted, however, that even if it was

decided that full compliance with Clauses E2 and E3 was required this does not amount to a requirement to follow the acceptable solutions. As is stated in many other determinations the acceptable solutions are not mandatory but rather represent one way of complying with the code. Alternative solution proposals must always be considered on their merits, using the acceptable solution as a guideline or benchmark for achieving the performance criteria specified in the building code.

- 5.4 The applicant has stated that up to the present time there has been no evidence of any adverse affects on the building, despite the lack of insulation or its floor level. While the Authority is required to investigate building code compliance, some consideration can be given to the lack of any adverse affect on the performance of the building. However, the Authority is of the opinion that a period of 7 years is not sufficient to establish the performance of the building over the full term of its life.
- 5.5 The Authority accepts that neither the wall insulation or the floor level is included specifically or generically in the list of building code provisions set out to be complied with in terms of section 46(2)(a). Accordingly, they have to be considered specifically in terms of section 46(2)(b), which requires that the building in question must comply “at least to the same extent as before the change of use”.
- 5.6 There are three possible interpretations that can be placed on the Section 46(2)(b) requirement that, in its new use, the building must continue to comply with those provisions of the Building Code that are not mentioned in Section 46(2)(a) at least to the same extent as before the change of use.

The possible interpretations are that the building:

- (a) Complies fully with that provision in the old use and must continue to comply fully in the new use, subject to any waivers or modifications granted by the territorial Authority; or
  - (b) Complied fully with that provision when constructed (although due to changes within performance requirements of that provision it may no longer comply in its old use) and must continue to comply to the same extent in the new use, subject to any waivers or modifications granted by the territorial Authority; or
  - (c) Did not (and was not required to) comply to any extent with that provision in its old use, and is therefore not required to comply to any extent in its new use.
- 5.7 Obviously, Parliament must have intended there to be a distinction between the provisions of the building code listed in section 46(2)(a) and the other unlisted provisions referred to in section 46(2)(b). That being so, the Authority takes the view that upgrading is required only in regard to the provisions that are listed. Of course, that applies to requirements for upgrading only, and does not affect the requirement of section 7(1) that all new building work is to comply completely with all applicable provisions of the building code, subject to any waivers or modifications granted by the territorial authority.
- 5.8 Accordingly, applying this interpretation to the phrase “at least to the same extent as before the change of use”, means that, as the building does not comply in its former

use, it does not have to be upgraded so as to comply in its new use. This being the case, neither the provision of insulation, nor the work that the territorial authority requires in relation to the slab is required in terms of the change of the use of the building.

- 5.9 Having reached this conclusion, the Authority realises that this interpretation can place territorial authorities in a difficult position in situations more complex than the circumstances covered by this Determination. For example, a territorial authority would have concerns where a garage has a change of use to a sleep-out and only the specific items set out in section 46(2)(a) can to be addressed. The Authority emphasises that the term “at least” does not mean “only” and would not exempt any building from the “dangerous or insanitary buildings” provisions of section 64. In other words, even if the requirements of section 46(2) do not apply, the territorial authority can still require problems to be rectified if it considers that they are of a sufficiently serious nature. Accordingly, if a territorial authority has concerns about a change of use, it should point out to the building owner that, while the territorial authority must under the terms of the Act issue a consent, they can, once the code compliance certificate has been issued, consider invoking the provisions of section 64. In addition, the cost of rectification under section 64 would invariably be more expensive for a building owner than if he or she carried out the additional work during the initial building stage. The Authority has also made submissions regarding the new Building Bill that if implemented would overcome some of the problems arising from a change of use that exist in the existing legislation.

## **6 THE AUTHORITY’S DECISION**

- 6.1 In accordance with section 20 of the Building Act, the Authority hereby determines that the building in question, under its changed use, meets the requirements of the Act with respect to insulation and floor level, in that the building complies with the building code to at least the same extent as before the change of use.

Signed for and on behalf of the Building Industry Authority on this 1<sup>st</sup> day of September 2003.

R J Martin  
Acting Chief Executive