Determination 2006/92

Is a compliance schedule required for a new IHC residential home at 9 Havelock Street, Timaru?

1. The dispute to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004[1] ("the Act") made under due authorisation by me, John Gardiner, Determinations Manager, Department of Building and Housing, for and on behalf of the Chief Executive of that Department. The applicant is IHC New Zealand Incorporated ("the owner"), and the other party is the Timaru District Council ("the territorial authority").

1.2 The matter for determination is the territorial authority's decision to issue a compliance schedule in respect of the fire safety systems installed in a newly constructed residential home ("the building").

1.3 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.

1.4 I have not considered any other aspects of the Act or the Building Code.

1.5 Throughout this determination references to "sections" are to sections of the Act and references to "clauses" are to clauses in the Building Code (the First Schedule to the Building Regulations 1992).

2. The Building

2.1 The building is a single storey detached house with a brick veneer cladding and concrete floor slab. It contains 5 bedrooms, a study, separate lounge and family rooms, a kitchen, two bathrooms and a garage. The building has an automatic fire detection system and a domestic sprinkler system complying with NZS 4517. All rooms except the bathrooms and the study have direct access to the exterior via sliding doors. The owner said that the intended use was:

[1] The Building Code and the Building Act 2004 are available from the Department's website at www.dbh.govt.nz.

> Permanent, long-term residential accommodation for up to 5 people with intellectual and/or physical disability receiving on-site support from IHC services. . .
>
> An IHC support person is present in the home at all times when the home is occupied.

3. Sequence of events

3.1 On 6 July 2004 the territorial authority issued a building consent for the erection of the building.

3.2 On 2 February 2006 the territorial authority wrote to the owner, enclosing an "amended Compliance Schedule and Statement of Fitness for the premises…."

3.3 On 3 February 2006 the territorial authority issued a code compliance certificate.

3.4 On 16 March 2006 the owner wrote to the territorial authority saying that it did not believe:

> these homes, or any other IHC residence, require a compliance schedule to comply with the requirements of the Building Act.

The owner suggested that the building met the criteria to be considered a household unit. In particular the owner said the building was not specialised accommodation because no buildings had been declared to be specialised accommodation by the Governor-General by Order in Council. The owner concluded that as the building was used as a single household unit section 100(2) applied and a compliance schedule could not be required.

3.5 On 24 March 2006 the territorial authority responded in a letter to the owner. The territorial authority expressed surprise that the owner believed a compliance schedule was not required. The territorial authority noted that in support of its application for building consent the owner had clearly identified the use of the building as

> "an SA occupancy" and
>
> "as *Housing – multi-unit dwelling and Communal Residential – Community service; . . . where limited care or assistance is extended to the principal users*."

3.6 The territorial authority also pointed out that the owner had submitted an alternative solution including an automatic detection system and a fire sprinkler system, together with alternative inspection procedures. The systems had been accepted and the alternative inspection, maintenance and reporting procedures nominated by the owner had been included in the compliance schedule.

3.7 On 16 May 2006 the Department received an application for determination from the owner.

4. The submissions

4.1 The owner made a submission dated 11 May 2006 and supplied copies of:

- a plan of the building
- the correspondence between the parties
- the PIM, building consent and code compliance certificate.

4.2 The owner's submission reiterated the points it had made in its letter to the territorial authority dated 16 March 2006.

4.3 The territorial authority made a submission dated 30 May 2006. In its submission the territorial authority provided a concise outline of the background to the dispute including a description of the consenting process that had occurred before the building was constructed. The submission confirmed the basis on which a building consent had been issued for what was recognised as an alternative solution submitted by the owner.

4.4 Copies of the submissions were provided to the parties. Neither party made any further submissions in response to the submission of the other party.

4.5 In the light of those submissions I prepared a draft determination ("the first draft") to the effect that for the purposes of section 100 the building was "used wholly as a single household unit" and therefore did not require a compliance schedule. I sent that first draft to the New Zealand Fire Service Commission and the Office for Disability Issues by way of consultation in accordance with section 170.

4.6 The New Zealand Fire Service Commission did not agree that the building came within the section 7 definition of "household unit", saying:

> . . . this determination has the potential to have far reaching, and possibly unforeseen, consequences. In making these comments, the NZFS is keenly aware of the balance between the rights of people with disabilities to live in the community with freedom, dignity and respect and the increased risk that such persons face from fire in the home due to difficulties in perceiving the risk of fire or in reacting to the danger. . . .
>
> . . . the provision of paid support staff by [the owner] means that the building should be properly characterised as a type of serviced accommodation and that therefore . . . the definition of "household unit" has not been satisfied as the occupancy is not a household.
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> If the determination finds that this building is a household unit then there is a significant disconnect between the Building Act 2004 and the provision of the Building Code. Table 2.1 of C/AS1 of the Building Code classifies this as an SA purpose group building as one ". . . providing . . . limited assistance or care . . . to principal users . . .". As a SA purpose group building the building is required to have a number of specified systems.
>
> Specified systems are designed to provide increased fire safety precautions due to the nature of the occupancy. In order to be effective the specified systems must be maintained and the compliance schedule regime is designed to ensure this necessary maintenance. If this building does not require a compliance schedule then there is a risk that the specified systems will not be adequately maintained and the fire safety precautions envisioned by the Building Code will be compromised.

4.7 The Office for Disability Issues agreed with the first draft, saying:

> . . . the house is not specialised accommodation but is an ordinary household unit and should not be subject to the requirement of a compliance schedule or a building warrant of fitness which are clearly intended for buildings where the occupants are unlikely to be familiar with the fire safety systems and means of escape.
>
> We consider that in these cases it is important to distinguish between residential accommodation where services are provided primarily to enable the person to be accommodated in the building itself, e.g. a hotel, hospital, or a nursing home, and those where the services are provided primarily to enable the person to live in the community. The IHC residence is set up primarily for the latter purpose.
>
> Although limited assistance is provided to residents, that assistance is not for the purpose of living in and carrying out normal activities in the household but primarily to support residents' integration into the community in which the household is located.
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> If, as NZFS suggests, there is a disconnect between the Building Act 2004 and the Building Code, this is the inevitable consequence of the gap between the coming into force of the new Act and the delay in generating a new Code . . . . A key policy underpinning the approach to household units under the new Act is to recognise the rights of disabled people, including those with intellectual impairments and mental health issues, to live ordinary lives, in ordinary households, in the community.

4.8 I amended the first draft to take account of those submissions, and sent the resulting second draft to those concerned, asking them to indicate whether they accepted the draft subject to non-contentious amendments, if any, or did not accept the second draft and requested a hearing.

4.9 The owner, the Fire Service, and the Office for Disability Issues accepted the second draft. The territorial authority accepted it subject to certain non-contentious amendments which have been incorporated in this determination.

5. Discussion

5.1 General

5.1.1 In the Building Act 1991 ("the former Act"), the definition of "household unit" was the same as it is in the Act, see 5.2.3 below, but there was no definition of "specialised accommodation", which was therefore given its ordinary and natural meaning in context. Now, however, the Act does define "specialised accommodation", which means that determinations under the former Act that related to "specialised accommodation" are no longer relevant in that respect.

5.1.2 The comments from the Fire Service and the Office for Disability Issues set out above illustrate the policy conflict between the need for buildings to:

(a) in the words of section 3(a), ensure that "people who use buildings can do so safely", which in some cases might require safety precautions for people with disabilities over and above those necessary for the rest of the population

(b) in the words of section 3b, "have attributes that contribute appropriately to the . . . physical independence, and well-being of the people who use them"

or, in the words of the Office for Disability Issues "live ordinary lives in ordinary households".

5.1.3 On the view I take as to the interpretation of the Act, see 5.2 and 5.3 below, the relevant provisions are clear and unambiguous so that I do not need to consider such policy matters, which should be discussed in the context of a possible Order in Council declaring certain buildings to be "specialised accommodation". However, that does not mean that I agree with either of those submissions. In particular, I record that:

(a) I do not agree with the Fire Service Commission's reasons for considering that there is a "disconnect" between the Act and the Building Code because:

- the apparent disconnect is between the Act and C/AS1, which is a compliance document and is not part of the Building Code; both compliance documents and the Building Code are subject to the Act, not the other way round. Compliance documents include acceptable solutions, such as C/AS1, which are in effect examples of buildings that comply with the Building Code and specify such things as the fire safety precautions to be installed in particular buildings. Compliance with a compliance document must be accepted as establishing compliance with the corresponding provision of the Building Code.

- whether or not the Building Code requires a particular building to have one or more specified systems is irrelevant to whether the Act requires that building to have a compliance schedule.

(b) I do not agree with the Office for Disability Issues's statement that compliance schedules and building warrants of fitness "are clearly intended for buildings where the occupants are unlikely to be familiar with the fire safety systems and means of escape" because the Act clearly requires compliance schedules (and therefore building warrants of fitness) for such buildings as household units with cable cars and apartment buildings with specified systems where occupants are in fact likely to be familiar with safety systems and means of escape. The fact that such buildings require compliance schedules does not affect whether or not their residents "live ordinary lives, in ordinary households, in the community".

5.2 Is the building a single household unit?

5.2.1 I have taken the view that before I can determine this matter I must decide whether this house is a single household unit. My decision on that point is important because, as prescribed by section 100 of the Act, a compliance schedule is not required if the house is a single household unit and does not have a cable car.

5.2.2 Section 100 of the Act, as amended by the Building Amendment Act 2005, says:

> (1) A building not used wholly as a single household unit –
>
> (a) requires a compliance schedule if-

(i) it has a specified system: or

(ii) . . . .

(2) A building used wholly as a single household unit -

(a) requires a compliance schedule only if it has a cable car attached to it or servicing it; and

(b) requires the schedule only for the cable car.

5.2.3 Section 7 of the Act says:

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, boardinghouse, or other specialised accommodation.

specialised accommodation means a building that is declared by the Governor-General, by Order in Council, to be specialised accommodation for the purposes of this Act.

5.2.4 I take the section 7 definitions of "household unit" and "specialised accommodation" to imply that hostels and boardinghouses are "specialised accommodation", and so are such, if any, other types of residential buildings as the Governor-General declares by Order in Council to be specialised accommodation.

5.2.5 Thus under section 100 a building such as the one concerned, which has one or more specialised systems (other than a cable car), does not require a compliance schedule unless it is:

(a) a hostel, or

(b) a boardinghouse, or

(c) some other type of building that has been declared by Order in Council to be "specialised accommodation".

5.3 Is the building a hostel, a boardinghouse, or some other type of building declared to be specialised accommodation?

5.3.1 The word "hostel" is not defined in the Act so I take the view that it must be given its ordinary and natural meaning in context.

5.3.2 The building is a detached house for up to 5 people with disabilities and a support person. Similar IHC houses were considered by the Building Industry Authority in determinations under the former Building Act 1991:

(a) Determination 98/002 concerned a house for up to 6 people with intellectual but not physical disabilities and 1 or 2 support persons. The question was whether section 47A of the former Act (now section 118 of the Act) applied. That question does not arise in this determination. However, in discussing section 47A(4)(j) of the former Act, now paragraph (j) of Schedule 2 of the Act, the Authority said that it "does not accept that the house concerned could properly be described as a "hostel, boardinghouse, or guest house".

(b) Determination 99/009 concerned alterations to a house intended to be occupied by up to 5 people with intellectual but not physical disabilities. The question was whether, after the alterations, the house would comply with certain provisions of the Building Code. That question does not arise in this determination. However, in discussing the application of the then current acceptable solution the Authority said that the house "can be seen as similar not so much to a . . . hospital as to a . . . boarding school or a hostel". I take that to imply that the Authority did not consider that the house could properly be described as a hostel although it was more similar to a hostel than to a hospital.

5.3.3 Those are persuasive decisions by the Authority even though it did not give its reasons for considering that the houses concerned could not properly be described as "hostels".

5.3.4 I note that:

(a) the *Concise Oxford English Dictionary* defines "hostel" as "a house of residence or lodging for students, nurses, etc"

(b) in New Zealand, the term "backpacker's hostel" is used to describe inexpensive accommodation for travellers

(c) in New Zealand, the term "IHC hostel" has been used in the past, but is no longer in current use. The IHC does not use the term to describe any of its properties

(d) my impression is that current New Zealand usage would apply the word "hostel" only to a building providing managed accommodation for:

(i) a significant number of people (certainly more than five or six),

(ii) sharing an occupation (student hostel, nurses hostel) or activity (youth hostel, backpackers hostel) but not sharing personal characteristics such as mental or physical disabilities.

Taking those matters into account, I conclude that, in current New Zealand usage, the building cannot properly be described as a hostel.

5.3.5 As to whether the building is a boardinghouse, the Fire Service said that the provision of support staff by the owner meant that the building was "a type of serviced accommodation" and not a household unit.

5.3.6 In current New Zealand usage I do not consider that the provision of support staff, whether or not on a "live-in" basis, is enough to prevent the building from being a "household unit" as defined. Caregivers, paid companions, servants, and the like frequently visit, or live as part of the household in, private houses and flats which are clearly household units. I do not consider that the building can properly be described as a "boardinghouse" in the ordinary and natural meaning of the word.

5.3.7 No Order in Council has yet been made in respect of types of buildings declared to be specialised accommodation.

5.3.8 Therefore, the building does not come within any of the exclusions from the section 7 definition of "household unit".

6. Conclusion

6.1 As the building cannot properly be described as specialised accommodation, I conclude that it must be accepted as being a single household unit for the purposes of section 100 and therefore as not requiring a compliance schedule.

6.2 Although the building is not required by the Act to have a compliance schedule, it is required by the Building Code to have certain fire precautions, including certain specified systems. Regular inspection and maintenance is of course vital to ensure that those systems can be relied upon throughout the life of the building.

6.3 I point out that this determination must be read subject to any future Orders in Council declaring buildings to be "specialised accommodation".

7. Decision

7.1 The building does not require a compliance schedule.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 19 September 2006.

John Gardiner
Determinations Manager