

Determination 2008/93

The refusal to issue a certificate of acceptance and the consequential issuing of a notice to fix for 5 outbuildings at 122 Lone Kauri Road, Karekare, which were subject to building work at various times

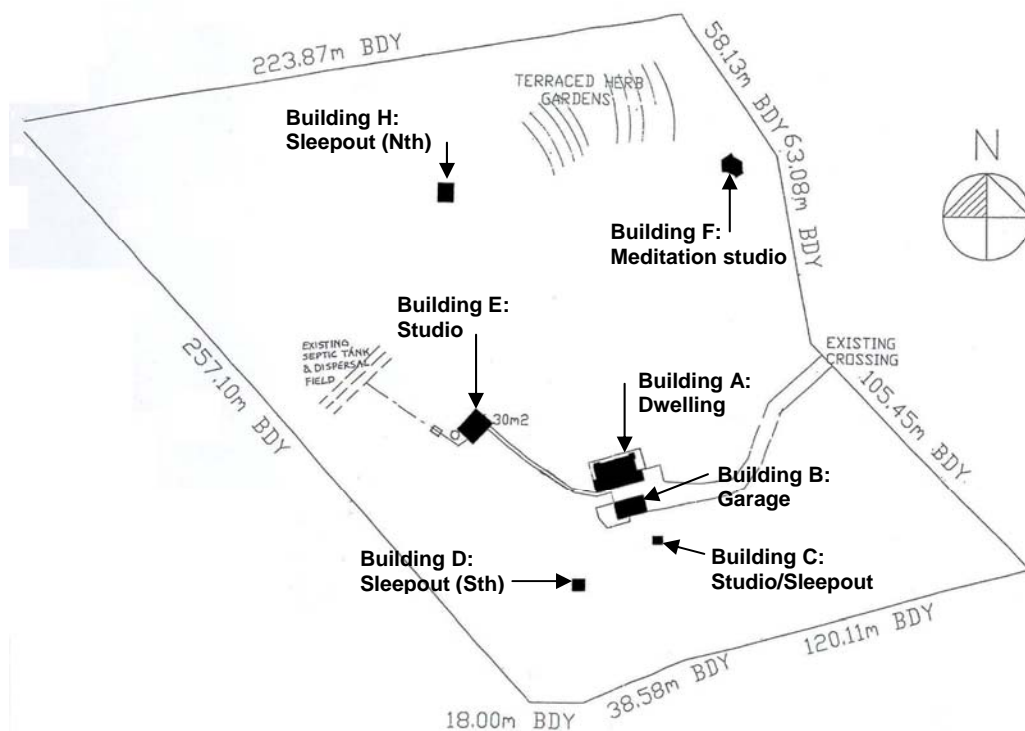


Figure 1: Site plan showing the 7 buildings

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the 2004 Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the

¹ The Building Act 2004 is available from the Department’s website at www.dbh.govt.nz.

Chief Executive of that Department. The applicants are the owners of the buildings, P and J Cottingham (“the applicants”), and the other party is the Waitakere City Council (“the authority”) carrying out its duties and functions as a territorial authority or a building consent authority.

1.2 This determination arises because the authority has refused to issue certificates of acceptance, and has issued a notice to fix.

1.3 The matters to be determined are the decisions of the authority to issue a notice to fix and to refuse to issue the certificates of acceptance. In order to determine these matters, I must consider:

- how the legislation applies to the building work and the procedures that must therefore be followed
- whether the building work is code compliant to the extent required by the relevant Building Act.

The application of the legislation to the building work

I note that with the possible exception of some work carried out on the sleeping accommodation (refer to paragraph 4.4), all the building work that is subject to this determination was carried out before the 2004 Act came into force and after the Building Act 1991 (“the former Act”) became law. Accordingly, I have considered certain of the matters subject to this determination in terms of the former Act where that legislation is directly applicable. In order to form a view about the application of the legislation to the building work I need to consider the following questions:

- a) Is any of the building work exempt from the need for a building consent as provided for in the Third Schedule of the former Act (“the Third Schedule”) or its replacement, Schedule 1 of the 2004 Act?
 - i) If yes, a building consent is not required and the authority has no power to take any action, unless certain circumstances apply or it becomes aware of significant non-compliance with the Building Code
 - ii) If no, then a building consent is required.
- b) Does the completed building work, for which a building consent should have been obtained, but was not, comply with the relevant clauses of the Building Code?
 - i) If yes, then a certificate of acceptance can be issued in respect of the completed work.
 - ii) If no, then the authority should issue a notice to fix setting out those items that it considers non-compliant.

In the context of this question, I refer to paragraph 6.3 that sets out the circumstances where an authority can issue a certificate of acceptance.

- c) Whether the various buildings in their changed use or altered form comply, as nearly as is reasonably practicable, with the Building Code, to at least the same extent as before that change of use or alteration?

The code compliance of the building work

In order to form a view as to the code compliance of the building work I must consider whether the building work complies with the relevant clauses of the Building Code to the extent required by either of the Building Acts. I address this in paragraph 6.

- 1.4 In making my decision, I have considered the submissions of the parties, the report of the independent expert commissioned by the Department to advise on this dispute (“the expert”), and the other evidence, including that produced at the hearing, in this matter.
- 1.5 In this determination, unless otherwise stated, references to sections are to sections of either the former Act or the 2004 Act and references to clauses are to clauses of the Building Code.

2. The buildings

- 2.1 The large rural allotment is sloping and tree-covered; and accommodates a total of 7 existing buildings shown in Figure 1 and described as follows:

Reference used herein	Building	Description of building
A	Principal dwelling	3-storey 3-bedroom house
B	Garage building	2-storey large detached building
C	Studio/sleepout	Original spa house converted to studio/sleepout known as “Kuti’s”
D	Sleepout (South)	Sleepout known as “Shiva’s”
E	Studio	Original stables converted to self-contained studio
F	Meditation studio	1-storey small octagonal building
H	Sleepout (North)	Sleepout known as “Tane Mahuta”

- 2.2 Based on the information I have received, I conclude that building permits (issued prior to the former Act coming into force) and consents under the former Act were issued for various buildings and building work as follows:

Permit or consent No.	Date issued	Building	Description of work covered by permit or consent
18532	1981	A	Relocation, with extensive alteration and additions to provide the principal dwelling on the site.
18404	1981	B	Construction of original detached garage.
94/1499	18 Mar 94	D	Installation of wood burner.
95/9104	26 Oct 95	F	Construction of detached "meditation studio".
99/4230	17 Nov 99	A B H	Basement addition to the main dwelling. Loft addition to provide office over existing garage. New detached sleepout building.
01/1708	5 June 01	E	Installation of wood burner.
01/1728	11 June 01	C	Installation of wood burner.
03/2013	12 July 03	B	Installation of wood burner.

2.3 I note that there are no matters in dispute relating to the meditation studio (Building F) (refer to paragraph 3.5) or to the principal dwelling (Building A) (refer to paragraph 3.8), and these buildings are not included in the matters considered within this determination.

2.4 The buildings are generally simple in plan and form, with a mixture of concrete slabs and timber-framed subfloors, conventional light timber framing, timber weatherboard claddings, timber joinery and profiled metal gable roofs.

2.5 The building work considered in this determination

2.5.1 The authority maintains that some of the building work carried out to 5 of the buildings on the property does not comply with the building code, and has issued a notice to fix with respect to the following building work (refer paragraph 3.11):

Buildings concerned		Non-compliant area(s) outlined	
B	Garage building:	B(1)	Loft area subdivided, with a change of use from an office to an open living area.
		B(2)	Ground floor garage area subdivided with a change of use from garage to living area.
		B(3)	Extension to rear of building to provide bedroom and bathroom constructed under upper deck.
C	Studio/sleepout	Original "spa house" converted to studio/sleepout (also referred to as "Kuti's").	
D	Sleepout (South)	Sleepout (also referred to as "Shiva's").	
E	Studio	Original "stables" converted to self-contained studio.	
H	Sleepout (North)	Sleepout (also referred to as "Tane Mahuta").	

I note that the descriptions B(1) and B(2) as set out in the above table designate the various parts of Building B, and are not references to Clauses B1 and B2 of the Building Code.

3. Background

- 3.1 In 1981, the local authority issued a building permit (No. 18404) for a simple detached garage building (Building B), with the permit noting “not to be developed into a habitable unit”. At that time, an old stables building (later developed into Building E) was sited to the north west of the garage together with an indeterminate number of other minor outbuildings.
- 3.2 Later in 1981, the local authority issued a building permit (No. 18532) for the relocation of an existing house onto the property. The approved building work included extensive additions and alterations to the house, and resulted in a substantial dwelling (Building A). It appears that various changes from the permit drawings were made during or following construction (refer paragraph 3.8).
- 3.3 From the information that I have received, I consider that a sleepout (Building D) and a spa hut (Building C) were constructed during the 1980’s. I am not aware of any building permits issued for these buildings. A woodburner was installed in Building D under a building consent issued in 1994.
- 3.4 The current owners purchased the property in January 1995.
- 3.5 On 26 October 1995 the authority issued a building consent (No. 95/9104) for the construction of a new meditation studio (Building F). This building was completed and apparently approved, so is not in dispute (refer paragraph 2.3).
- 3.6 On 17 November 1999, the authority issued a building consent (No. 99/4230) for the following building work:
- Addition of a basement level to the main dwelling (Building A)
 - Addition of a loft living area and timber deck to the garage (Building B(1))
 - Construction of a new detached sleepout (Building H).
- The building work was completed, with some amendments apparently approved.
- 3.7 Based on information provided by both the applicants and the authority, I conclude that alteration work has taken place over the last 7 years in respect of all the individual buildings that are subject to this determination. This work includes the installation of wood burners. Initially, the authority was of the opinion that some of the work on the sleeping accommodation has taken place in the past 3 years. However, it was established at the hearing described in paragraph 5 that the work was all carried out under the former Act.
- 3.8 In 2006, the applicants arranged for a specialist inspection company (“the consultant”) to provide the authority with an “Independent Consultants Report for Pre-1993 Building Work” for the principal dwelling (Building A). The consultant inspected Building A on 23 February 2006, and provided a “Safe and Sanitary Report” dated 14 June 2006. The report noted that the alterations to the original permit drawings appeared to have been carried out at the time the house was constructed, and concluded that the building was safe and sanitary. It appears that

the authority accepted the finding of the report, as Building A is not included in the matters to be considered in this determination (refer paragraph 2.3). I also note that “safe and sanitary” reports are a means by which building owners can notify authorities about the status of work undertaken where a building consent may not have been obtained, and in general terms, they indicate that a building is not dangerous. While authorities may accept such reports at their discretion, the reports are not covered in terms of the Act, nor are they matters that can be determined by the Chief Executive.

- 3.9 In 2006, the applicants commissioned the preparation of “as-built” drawings for Buildings B, C, D, E and H (refer paragraph 2.5.1), and drawings dated May 2006 and October 2006 were produced. The drawings generally show the original plans and the buildings as they currently exist. It appears that the applicants then sought from the authority a certificate of acceptance for the 5 buildings.
- 3.10 The authority inspected the buildings on 23 January 2007, and issued a certificate of acceptance (No. 2006-3006) under section 99 of the 2004 Act. A report attached to the notice, dated 13 March 2007, described the alterations and accepted several items as outlined below:

Buildings concerned		Items accepted	
B	Garage	B(1)	Partition wall to subdivided loft area.
		B(2)	Extension of garage front and garage door. Cupboards installed in living area. Internal non-loadbearing walls.
		B(3)	No items accepted.
C	Studio/sleepout	No items accepted.	
D	Sleepout (South)	No items accepted.	
E	Studio	No items accepted.	
H	Sleepout (North)	No items accepted.	

- 3.11 The authority issued a notice to fix, also dated 13 March 2007, which required the following actions to be taken by 14 April 2007:

Buildings concerned		Items to be remedied	
B	Garage building	B(1)	Loft area alterations: 1. Remove sink bench, including cabinets and plumbing. 2. Provide structural engineer’s report for deck and steps. 3. Deck balustrade non-compliant. 4. Provide compliance certificate for woodburner flue pipe.
		B(2)	Ground floor garage area: 1. Install DPC under concrete slab to living area. 2. Provide compliance certificate for woodburner. 3. Install engineered beam above French doors and windows. 4. Increase clearance of floor level above ground level. 5. Insulate garage walls. 6. Fire rate ceiling between upper and lower levels.

		B(3)	<p>Ground floor addition under upper deck:</p> <ol style="list-style-type: none"> 1. Install DPC and ventilation and access to subfloor. 2. Expose wall structure and upgrade to B1 level. 3. Expose ceiling and roof structure and upgrade to B1 level. 4. Provide structural engineer's design and upgrade retaining wall. 5. Install DPC to retaining wall. 6. Expose bathroom plumbing and upgrade water pipes. 7. Expose bathroom plumbing and upgrade waste pipes. 8. Expose water tank overflow and upgrade. 9. Insulate walls, ceilings and underfloor.
C	Studio/ sleepout <i>(Conversion of spa building to self-contained flat)</i>		<ol style="list-style-type: none"> 1. Expose all plumbing and upgrade. 2. Provide ventilation and access to subfloor. 3. Retain ground to rear of building. 4. Provide rainwater disposal system. 5. Provide proof of insulation. 6. Expose foundations and upgrade. 7. Provide barrier to deck over 1 m high. 8. Provide compliance certificate for woodburner.
D	Sleepout (South) <i>(Conversion to sleepout)</i>		<ol style="list-style-type: none"> 1. Provide compliance certificate for woodburner. 2. Remove stainless steel basin. 3. Increase subfloor crawl space to 450 mm. 4. Install retaining wall to rear bank. 6. Provide rainwater disposal system. 7. Upgrade subfloor to approved design. 8. Insulate walls, ceilings and underfloor.
E	Studio <i>(Conversion of stable building to self-contained flat)</i>		<ol style="list-style-type: none"> 1. Provide compliance certificate for woodburner. 2. Expose kitchen pipework and upgrade. 3. Expose bedroom wall structure and upgrade. 4. Expose bathroom pipework and upgrade. 5. Expose/upgrade foundations and non-compliant floor level. 6. Expose timber structure and upgrade. 7. Expose pipework to septic tank and upgrade. 8. Upgrade retaining wall. 9. Insulate walls, ceilings and underfloor.
H	Sleepout (North) <i>(Conversion to self-contained flat)</i>		<ol style="list-style-type: none"> 1. Upgrade barrier to deck. 2. Remove chemical toilet. 3. Remove lower workshop/shower/toilet room. 4. Remove sink in upper floor.

I note that the references to the woodburner "compliance certificates" in the above table refer to the equivalent of producer statements and are not references to code compliance certificates.

3.12 On 22 May 2007 the Department received an application for a determination.

4. The submissions

- 4.1 The applicants made a submission in the form of “Notes to accompany application for Determination”, together with an undated statement by a builder, which provided comments on various items in the notice to fix (refer paragraph 3.11). The applicants’ and builder’s comments are summarised in the following table:

	Comments by applicants	Comments by builder
B(1)	<p>Loft area alterations:</p> <ol style="list-style-type: none"> 1. The sink and plumbing had already been removed at time of inspection. 2. The deck was signed off by TA at time of construction. 3. TA accepted balustrade when built. 4. Woodburner certificate attached. 	<ol style="list-style-type: none"> 1. There is no need to remove the cabinet, as the sink is no longer there. 2. The deck was built to the consent documents and inspected by the TA 3. Deck balustrade complied when built. 4. No comment.
B(2)	<p>Ground floor garage area: <i>This area is not used as a living room.</i></p> <ol style="list-style-type: none"> 1. A dampproof course was installed. 2. Woodburner certificate attached. 3. TA accepted framing when built. 4. The floor is over 300 mm above ground. 5. The garage walls are insulated. 6. The ceiling separates the office from the gymnasium space. 	<ol style="list-style-type: none"> 1. The concrete is existing. 2. No comment. 3. TA inspected framing when constructed. 4. Clearance complies with E2. 5. The garage walls are insulated. 6. No requirement for fire rating ceiling as area is not used for sleeping.
B(3)	<p>Ground floor addition under upper deck:</p> <ol style="list-style-type: none"> 1. No comment. 2. No comment. 3. No comment. 4. No comment. <p>5,6,7. No comment 8. Agree to fit water tank overflow 9. No comment.</p>	<ol style="list-style-type: none"> 1. Floor has DPC, ventilation is adequate. 2. The wall structure complies with B1. 3. The ceiling and roof complies with B1. 4. The retaining wall is under 1 m high, so does not need structural engineering. 5,6,7. No comment. 8. No comment. 9. The walls are insulated.
C	<p>Conversion of spa building: <i>This building is not self-contained.</i></p> <ol style="list-style-type: none"> 1. The building has no plumbing. 2. Crawl space is 400 mm to most of area. 3. No comment. 4. No comment. 5. No comment. 6. No comment. 7. No comment. 8. Woodburner certificate attached. 	<ol style="list-style-type: none"> 1. The building has no plumbing. 2. Provide subfloor ventilation – agreed . 3. Retain rear ground – agreed. 4. Rainwater disposal system – agreed. 5. Insulation provided in ceiling, underfloor insulation – agreed. 6. Original foundations unchanged, extension foundations comply with B1. 7. Barrier to deck over 1 m high – agreed. 8. No comment.

D	<p>Conversion to sleepout: <i>This building was already a sleepout.</i></p> <ol style="list-style-type: none"> 1. Woodburner certificate attached. 2. Basin is needed as w.c already exists. 3. No comment. 4. No comment. 5. No comment. 6. No comment. 7. Insulate walls, ceilings and underfloor. 	<p>Conversion to sleepout:</p> <ol style="list-style-type: none"> 1. No comment. 2. Basin provided only for hand washing. 3. Increase subfloor crawl space – agreed.. 4. Retaining wall to rear bank – agreed. 5. Rainwater disposal system – agreed. 6. Subfloor upgrade – agreed. 7. The walls are insulated.
E	<p>Conversion of stable building:</p> <ol style="list-style-type: none"> 1. Woodburner certificate attached. 2. Kitchen pipework is exposed. 3. Wall to storeroom is non-loadbearing. 4. Agree to upgrade bathroom pipework. 5. Floor is concrete, with timber overlay. 6. No comment. 7. No comment. 8. No comment. 9. Walls are insulated. Floor is concrete. 	<p>Conversion of stable building:</p> <ol style="list-style-type: none"> 1. No comment. 2. Kitchen pipework is exposed. 3. Wall to storeroom is non-loadbearing. 4. Bathroom pipework is exposed. 5. Floor is concrete, with timber overlay on a damp course – could add drain. 6. What timber structure? 7. TA pumps septic tank out annually. 8. Upgrade retaining wall – agreed. 9. The walls are insulated.
H	<p>Conversion to self-contained flat:</p> <ol style="list-style-type: none"> 1. Agree to upgrade deck barrier if needed. 2. Toilet is composting, not chemical. 3. Remove lower workshop/shower/toilet room. 4. Sink in upper floor needed for herb drying activity. 	<p>Conversion to self-contained flat:</p> <ol style="list-style-type: none"> 1. Deck barrier is code compliant. 2. Toilet is composting, not chemical. 3. Lower workshop/shower/toilet room are in 2 detached sheds, with no connection. 4. No comment.

4.2 The applicants have also confirmed by telephone that:

- Building C was built in 1981 and altered in 2000
- Building D was built in 1998 and was altered in 1998
- Building E was built between 1990 and 1992 and was altered in 1998.

4.3 The applicants forwarded copies of:

- consent documentation for various buildings
- as-built drawings of the buildings
- information relating to the wood burners
- the notice to fix dated 13 March 2007
- various certificates, photographs, statements and other information.

4.4 Initially, the authority did not make a submission following the application for a determination in May 2007. However in an email to the Department dated 18 March 2008, the authority submitted that work had been carried out on 7 of the buildings over the past 7 years. This information was based on the evidence, including site

inspection records, held by the authority. In particular, the conversion into sleeping accommodation had occurred over the last 3 years.

- 4.5 Copies of each party's submissions were forwarded to the other party and the other evidence was provided to each of the parties. Neither party made any further submissions in response to the submission of the other party.
- 4.6 The first draft determination was sent to the parties on 7 December 2007. The applicants responded on 14 January 2008 advising that a barrier to the deck and under-floor insulation had been provided to Building C. I have amended the determination accordingly.
- 4.7 The authority commented on the first draft determination in a letter dated 29 January 2008 and provided a submission containing a file of documents relating to the background to the determination. The authority made three comments in relation to the draft, saying that:
- paragraph 6.1 of the draft should be amended to remove an inaccurate reference to prosecution by the authority. I have removed that reference
 - paragraphs 9.1 to 9.5 of the draft (now paragraphs 7.1 to 7.5), should be amended. As those paragraphs simply report what the expert said in his report, and the report was copied to the parties, I have not amended them
 - "Council does not agree that certificate of Acceptance (CoA-2006-3006) should be revoked and a new one issued until such time that the works outlined in the determination report are undertaken". I respond to that matter in paragraph 14.2.
- 4.8 The second draft determination was sent to the parties for comment on 11 April 2008.
- 4.9 The applicants accepted the second draft determination.
- 4.10 The authority responded to the draft in a submission to the Department dated 30 May 2008. While it was not in disagreement with the decision reached at the conclusion of the determination, the authority considered that the determination had not clearly defined the compliance or otherwise of the various buildings. The authority also queried the compliance of the wood burners that have been installed in some of the buildings and it also had concerns regarding the waste water disposal from the property.
- 4.11 I have taken note of the authority's response to the second draft determination, in conjunction with the arguments put forward at the hearing (refer paragraph 5).
- 4.12 I amended the draft determination accordingly, and the third draft determination was sent to the parties for comment on 19 August 2008. Both parties accepted the third draft determination without comment.

5. The hearing

- 5.1 The authority requested a hearing, which was held on 16 July 2008 before me. The hearing was attended by:
- the applicant together with a legal advisor
 - a legal advisor representing the authority
 - two other staff members of the Department, a determinations referee, and a legal advisor.
- 5.2 Both parties spoke at the hearing. The evidence from those present enabled me to amplify or clarify various matters of fact and was of assistance to me in preparing the third draft determination.
- 5.3 The authority's legal advisor referred to the comments made in the authority's submission described in paragraph 4.10. The main concerns raised were in regard to the lack of certainty as to whether the various buildings were or were not code-compliant. Buildings that were subject to a change of use needed to be upgraded to ensure that they were safe and weathertight. It was the authority's opinion that the buildings in question were part of a "household unit". It was noted that the composting toilet and the waste-water disposal from the site were no longer issues. The documentation regarding the wood burners had been clarified and this information would be forwarded to the Department.
- 5.4 The applicant accepted that activities additional to sleeping had taken place in some of the buildings in the past but these would no longer be allowed. In addition, any fridges, stoves, sinks and the like would be removed. It was accepted that Building B2 needed to be fire-rated, Building H required further investigation, and the other buildings were required to meet certain standards. The complex was considered to be equal to a house with several rooms. The applicant also described the changes that had been made to the individual buildings.
- 5.5 Both parties were of the opinion that a less ambiguous wording in some instances would give the determination more clarity and would provide assistance to an ongoing court action.

6. The application of the legislation to the building work

6.1 Was the building work carried out exempt from the need for a building consent?

6.1.1 I note that both of the following categories of building work are still required to comply with the Building Code:

- Repairs and maintenance of existing buildings that are exempt from the requirements for a building consent by virtue of the Third Schedule of the former Act or Schedule 1 of the 2004 Act.

- The additions, the alterations or the changes of the use, of various buildings and areas within buildings.

6.1.2 Section 32(2)(b) of the former Act states that a building consent is not required for any building work described in the Third Schedule. This matter revolves around the interpretation of paragraph (ab) of the Third Schedule, which states:

Exempt building work

A building consent is not required for the following building work:

- (ab) Any other lawful repair with comparable materials, or replacement with a comparable component or assembly in the same position, of any component or assembly incorporated or associated with a building, but excluding—
 - (i) The complete or substantial replacement of any system listed in section 44(1) or section 44(5) of this Act:
 - (ii) The complete or substantial replacement of any component or assembly contributing to the structural behaviour or fire-safety properties of the building:
 - (iii) The repair or replacement of any component or assembly that has failed to satisfy the provisions of the building code for durability.

6.1.3 I note that at the time the application for determination was received, the exclusions set out in paragraphs (ab) (i) to (iii) of the Third Schedule were more restrictive than those set out in the equivalent paragraph (a) of Schedule 1 of the 2004 Act.

6.1.4 I consider that the building work described in this determination would have included some repairs and replacement. However, the work carried out appears to be primarily associated with adding to, altering or changing the use of various buildings and/or areas within buildings. The interpretation of “comparable” materials and replacement has been discussed in previous determinations (see for example Determinations 2001/1 and 2008/5). Following this interpretation, I am of the opinion that much of the building work undertaken in this case is outside the ambit of “repairs and replacement” and includes elements that fail “to satisfy the provisions of the building code for durability”. Other items also involve building work relating to the structural integrity and fire-safety of the building. Based on this opinion, I consider that the building work subject to this determination required building consents.

6.1.5 Despite the less restrictive requirements of Schedule 1, I am also of the opinion that any work carried out since the 2004 Act came into effect would also require a consent in accordance with the interpretation described in paragraph 6.1.4.

6.2 Change of use and alterations

6.2.1 The relevant legislation as set out in the former Act is:

2. Interpretation

“Household unit” means any building or group of buildings, or part of any building or group of buildings, used or intended to be used solely or principally for residential purposes and occupied or intended to be occupied exclusively as the home or residence of not more than one household; but does not include a hostel or boarding house, or other specialised accommodation.

38. Alterations to existing buildings

No building consent shall be granted for the alteration to an existing building unless the territorial authority is satisfied that after the alteration the building will—

- (a) Comply with the provisions of the building code for means of escape from fire, 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 alteration.

46. Change of use of buildings, etc

(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.

6.2.2 I observe that section 38, like section 46(2), refers to means of escape from fire, but, unlike section 46(2), does not refer to protection of other property, sanitary facilities, structural performance, or fire-rating performance, as matters with which compliance “as nearly as is reasonably practicable” is required.

6.2.3 In Determination 2003/10, the Building Industry Authority (the antecedent of the Department) considered the interpretation 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”. The Authority determined that upgrading is required only in regard to the provisions that were listed in the section. Accordingly it was determined that:

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.

6.2.4 I am prepared to accept this interpretation, which I consider would also apply to an alteration, and have applied it when discussing the notice to fix in paragraph 6.4. I note also that the equivalent sections 112, 114 and 115 of the 2004 Act, while not worded exactly the same as sections 38 and 46 of the former Act, have basically the same requirements and would, therefore, be subject to the same interpretation. I also note that any new elements forming part of the alteration work must comply with the requirements of the Building Code provisions current at the time the work was carried out.

6.2.5 In my view, the former Act does not authorise an authority to take any action in respect of an existing building unless:

- (a) the owner decides to alter (section 38) the building, to change its use (section

46(2)), to change the length of its limited life (section 46.(3) or;

- (b) the building is dangerous or insanitary (section 64), earthquake-prone (section 66).

6.3 The certificates of acceptance

6.3.1 The circumstances under which an authority may issue a certificate of acceptance are set out in section 96 of the 2004 Act, which says:

- (1) A territorial authority may, on application, issue a certificate of acceptance for building work already done—
 - (a) if—
 - (ii) a building consent was required for the work but not obtained; . . .
- (2) A territorial authority may issue a certificate of acceptance only if it is satisfied, to the best of its knowledge and belief and on reasonable grounds, that, insofar as it could ascertain, the building work complies with the building code.

6.3.2 I note that the applicants do not dispute that most of the items identified in the notice to fix dated 13 March 2007 (refer paragraph 3.11) were associated with building work completed without building consents. The authority elected to inspect the building work and issue a certificate of acceptance for several aspects of the building work (refer paragraph 3.10), along with a notice to fix for items and areas it considered to be non-compliant or which were not visible.

6.3.3 Section 437 makes transitional provision for the issue of a certificate of acceptance in certain circumstances. One of these is where a building consent was required under the former Act and the building consent was not obtained, when an authority may, on application, issue a certificate of acceptance. In the case of the building work undertaken on these buildings, this circumstance applies and I accept that the issuing of a certificate is appropriate for those aspects of the building work where code compliance can be established. However, certain of these aspects may be affected by the interpretation of section 46 of the former Act.

6.3.4 As the installation of the various wood burners, is in general, subject to building consents separate from those issued for the buildings themselves, I have considered these separately in paragraph 12.

6.4 The notice to fix

6.4.1 In the case of the buildings considered in this determination, the authority maintains that the items of building work outlined in paragraph 2.5.1 have been altered and changed in their use, and the resulting building works do not comply with the Act. The first provision (as set out in paragraph 6.2.5 above) therefore applies, and the authority was entitled to issue the notice to fix. However, the applicants have disputed some of the items identified in the notice to fix and this determination addresses the validity of those items.

The code compliance of the building work

7. Discussion

- 7.1 As outlined in paragraph 6.1.1, whether or not the additions and alterations required a building consent, the building work is still required to comply with the Building Code. In this case the authority has inspected the building work, and maintains that the matters outlined in the notice to fix dated 13 March 2007 (refer paragraph 3.11) do not comply with the building code. I must therefore address the question of code compliance of the alterations.
- 7.2 In order to determine the compliance of this building work, I must also take into account the implications, (when applicable) of the building work on the compliance of the altered buildings.
- 7.3 I must also consider the implications for compliance of any changes of use or alterations that may have occurred (see paragraph 6.2).
- 7.4 I note that the terms “sleepout” and “self contained flat” are not defined in the Act or the Building Code. However, for the purpose of clarity within this determination, I consider that a sleepout would not contain the cooking and toilet facilities that would be present in a self contained unit. I note also that the applicants have agreed to remove those additional facilities that are present situated in the sleepout.
- 7.5 As the change of use requirements are those set out in the former Act, I do not have to consider the more stringent requirements relating to household units that are described in section 115(a) of the 2004 Act.

8. The expert's report

- 8.1 As discussed in paragraph 1.4, I engaged an independent expert to provide an assessment of the condition of those building elements subject to the determination. The expert is a member of the New Zealand Institute of Building Surveyors.
- 8.2 The expert inspected the buildings on 18 September 2007, and furnished a report that was completed on 11 October 2007. The expert noted that he did not inspect the main dwelling or the meditation studio, as these buildings were not part of the matters to be determined.
- 8.3 The expert made the following general comments on the buildings:
- Building B generally appears compliant, with no significant problems apparent.
 - The original part of Building C is set into the slope of the hill, and the building has been extended at the rear by about 9 m².
 - Building D is a sleepout set into the slope of the hill, with a toilet and wash hand basin connected to an effluent disposal system.
 - Building E does not appear unsafe or unsanitary, but it has been converted over a period of time from an old stable building into a self-contained unit.

- Building H is a sleep-out with a composting toilet.

8.4 The expert made the following comments with regard to the items outlined in the notice to fix dated 13 March 2007:

Notice to fix item	Expert's comments
Building B: the garage building	
B(1) Loft alterations: 1. Sink bench 2. Deck and steps 3. Deck balustrade 4. Woodburner	1. The sink and plumbing has been removed. 2. No comment. 3. The 950 mm high deck balustrade is close to compliant. 4. The compliance certificate has been supplied.
B(2) Ground floor: 1. Damp-proof membrane 2. Woodburner 3. Door/window lintel 4. Floor level clearance 5. Insulation 6. Ceiling fire rating.	1. Damp-proof membrane is evident at tiled entry passage. 2. Compliance certificate has been supplied. 3. No comment. 4. Set down appears reasonable, considering the slatted deck outside the French doors. 5. Photographs show insulation at wall sockets. 6. No comment.
B(3) Addition under deck: 1. DPC and subfloor 2. Wall structure 3. Ceiling/roof structure 4. Retaining wall 5. DPC to retaining wall 6. Bathroom water pipes 7. Bathroom waste pipes 8. Water tank overflow 9. Insulation.	1. Floor slab appears to have damp-proof membrane. 2. Could not inspect or comment. 3. Could not inspect or comment. 4. Will only need structural engineering if over 1 m high. 5. No comment. 6. Water pipes appear adequate. 7. Waste pipes appear adequate. 8. Water tank requires overflow provision. 9. Photographs show insulation at wall sockets.
Building C: Conversion of spa building to self-contained flat:	
1. Plumbing 2. Subfloor 3. Retain ground 4. Rainwater disposal 5. Insulation 6. Foundations 7. Deck barrier 8. Woodburner.	1. There is no plumbing provided. 2. Subfloor clearance is minimal. 3. Some work done, but more is required. 4. Rainwater collection and disposal is inadequate. 5. No underfloor insulation, ceiling and wall not confirmed. 6. No comment. 7. Deck Barrier is over 1 m high in part – needs barrier. 8. Compliance certificate has apparently been supplied.
Building D: Sleepout:	
1. Woodburner 2. Stainless steel basin 3. Subfloor 4. Retain ground 6. Rainwater disposal 7. Subfloor 8. Insulation.	1. Compliance certificate has apparently been supplied. 2. Basin is connected to septic tank. 3. Some areas have inadequate subfloor crawl space. 4. Rear and side banks need retaining. 6. Rainwater collection and disposal is inadequate. 7. No comment. 8. Photographs show insulation at wall sockets.

Building E: Conversion of stable building to self-contained flat:	
1. Woodburner	1. Compliance certificate has apparently been supplied.
2. Kitchen pipework	2. Does not appear unsanitary.
3. Bedroom wall structure	3. Does not appear unsafe.
4. Bathroom pipework	4. Does not appear unsanitary.
5. Foundations/floor level	5. Adequacy of foundations is doubtful, and floor level is close to ground level.
6. Timber structure	6. Unable to assess adequacy, but does not appear unsafe.
7. Pipework to septic tank	7. Does not appear unsanitary.
8. Retaining wall	8. No comment.
9. Insulation.	9. No comment.
Building H: Sleepout:	
1. Deck barrier	1. Deck barrier is code compliant.
2. Chemical toilet	2. Toilet is composting, not chemical.
3. Workshop/shower/w.c	3. Lower workshop/shower/toilet room appear reasonably suitable for purpose and installed in a sanitary manner.
4. Sink in upper floor.	4. Appears reasonably suitable for purpose and installed in a sanitary manner.

8.5 The expert concluded that:

- the stable conversion (Building E) requires further investigation, and may not be economically viable for upgrading to a code compliance level appropriate for its current use
- the other buildings require relatively minor work to bring them into a reasonable and acceptable level of compliance appropriate for their current use.

8.6 A copy of the expert's report was provided to each of the parties on 17 October 2007.

9. The level of compliance required by the Act

9.1 In order to determine the compliance of this building work, I need to take into account the result of the building work with regard to the compliance of the altered buildings (refer paragraph 6.2).

9.2 Some of the building work involves alterations to existing buildings which appear to have existed prior to the Building Act 1991. The use of some of the altered buildings has changed. Based on my examination of the 1999 site plan submitted for the building consent 99/4230 (refer paragraph 2.2), I observe that the current or foreseeable uses of the following buildings seem to have significantly changed since 1999:

- Building C converted from a "spa house" to a studio/sleepout
- Building D converted from a "shed" to a sleepout
- Building E converted from "stables" to a self-contained studio.

9.3 As Buildings C, D and E have changed in use to become buildings in which people sleep, I consider section 46(2) of the former Act, excluding the requirements for access and facilities for people with disabilities, applies to them.

9.4 In the case of Buildings B and H, that have also been altered, their use has essentially not changed (refer paragraph 3.6); and there are reasonable grounds to be satisfied that the alterations to those parts of the buildings that existed on completion of the 1999 consented building work will generally, under section 38(b) of the former Act, “continue to comply with the other provisions of the building code to at least the same extent as before the alteration”.

10. Compliance of Buildings B, C, D and H

10.1 I have taken into account the following factors when assessing these buildings:

- Some of the original buildings were constructed under “permits” issued prior to the Building Act 1991 coming into force.
- Some concealed structural elements in some alterations were altered under a building consent. (See paragraph 3.6).
- Other alterations were carried out to buildings without a building consent, so concealed elements could not have been inspected by the authority at the time of alteration.
- Some buildings, or spaces within buildings, have changed in their use during the course of the building work (refer paragraph 9.3).
- Some buildings, or spaces within buildings, have not changed significantly in their use during the course of the building work (refer paragraph 9.4), and the threshold for compliance after alteration is as described in paragraph 9.4. Compliance with the current Building Code is not mandatory in such cases.
- Some of the building elements would have complied with the building code at the time they were erected, but do not, in only minor respects, comply with current provisions, and comply with the requirements of section 38(b) as described in paragraph 9.4.
- There is no evidence of these buildings being unsafe or unsanitary.

10.2 Taking account of the applicants’ and the builder’s comments as outlined in paragraph 4.1, together with the expert’s comments in paragraph 8.4, I accept that, with certain exceptions, most of the building work to Buildings B, C, D, and H has been carried in accordance with good trade practice and in reasonable compliance with the provisions of the building code.

10.3 The expert’s report and the other evidence notes that some elements in the various buildings are non-compliant if measured against the Building Code for new work. The report establishes that various aspects of the building work to Buildings B, C and D do not comply with the Building Code but that the work to Building H is adequate. However, as described in paragraph 6.2, I have accepted that in terms of sections 38 and 46(2) of the former Act and the equivalent sections of the 2004 Act, a building that does not comply in its former use does not have to be fully upgraded so as to comply in its new use. Accordingly, I am of the opinion that certain of the elements that are set out in the notice to fix do not require to be upgraded and have noted these in the following paragraphs.

B(1): Loft additions

10.4 This loft living area and the timber deck were originally subject to a building consent (No 99/4230). However, amendments have been carried out that have resulted in a change of use and have altered the extent of the originally consented work. The authority has granted a certificate of acceptance for some elements of this building. However, as a code compliance certificate has not been issued for this building, I consider that the consent is still current. This is also verified by the authority in its issuing of a notice to fix for this building. Accordingly, I am of the view that the changes cannot be subject to a certificate of acceptance, and that the original consent should be amended accordingly.

10.5 With regard to this building, the authority has accepted the compliance of the partition wall. Based on this acceptance, and the expert's report, I am satisfied, on reasonable grounds that the building work to area B1, with the exception of the deck and stairs, complies with the Building Code.

The authority has indicated that it would accept a structural engineer's report to establish the code-compliance of the deck and steps. Once the authority is satisfied that these elements are indeed compliant, it should be in the position to issue a code compliance certificate for building B1.

B(2): Alterations to the ground floor

10.6 As the building work for this area, with the exception of the woodburner, was not carried out under a building consent, it can only be subject to a certificate of acceptance. However, a building consent was issued for the woodburner and I have been informed that a code compliance certificate has been issued.

10.7 The authority has accepted the compliance of the extension to the front of the building and the garage door, the installed cupboards, and the internal load-bearing walls. Based on these approvals and the expert's inspection of the visible components in this area, I am satisfied there are reasonable grounds to accept that the building work complies with the Building Code, with the following exceptions, and noting that the applicants have accepted that the building requires to be fire-rated:

- the adequacy of the lintel above the new French doors and the windows that replace a single exterior door from the former garage
- the fire-rating of the ceiling.

Once the authority is satisfied that these two matters have been properly rectified, and following an application from the applicants, it should issue a certificate of acceptance for the building work.

B(3): Addition to the ground floor

10.8 I note that this extension to the ground floor of the garage building was constructed without a building consent, therefore it can only be subject to a certificate of acceptance. The authority has not accepted that any of the work is code-compliant. However, based on the expert's inspection of the visible components in this area, I am of the view there are reasonable grounds to accept that the building work complies with the Building Code, with the exception of the wall and ceiling framing. With

respect to this framing, the expert has noted that while he was unable to inspect it, there was no indication of any obvious problems. In reaching the above conclusions, and in accordance with my comments set out in paragraph 10.3, I am of the view that that the overflow facilities from the water tank do not require to be upgraded.

Following an application from the applicants, the authority should issue a certificate of acceptance for all the building work, with the exception of the wall and ceiling framing.

Building C: conversion to studio/sleepout

10.9 I note that the alterations and additions to the “spa” building were constructed without a building consent, therefore they can only be subject to a certificate of acceptance. The authority has not accepted that any of the work is code-compliant. However, based on the expert’s inspection of the visible components in this area, I am of the view that there are reasonable grounds to accept that the building work complies with the Building Code. For the reasons given in paragraph 10.3, I am of the opinion that the following elements are not required to be upgraded:

- The sub-floor clearances and ventilation.
- The retention of ground to the rear of the building.
- The rainwater disposal system.
- The under-floor insulation.
- The deck being more than 1 m above ground.

Following an application from the applicants, the authority should issue a certificate of acceptance for the building work.

Building D: conversion to a sleepout

10.10 I note that these alterations were constructed without a building consent, and therefore can only be subject to a certificate of acceptance. However, based on the expert’s inspection of the visible components in this area, I am of the view there are reasonable grounds to accept that the building work complies with the Building Code. For the reasons given in paragraph 10.3, I am of the opinion that the following elements are not required to be upgraded:

- The sub-floor crawl space in some areas.
- The banks to the rear and side of the building.
- The rainwater disposal system.
- The sub-floor framing.
- The under-floor insulation.

Following an application from the applicants, the authority should issue a certificate of acceptance for the building work.

Building H: conversion to self-contained unit

10.11 I note that the original sleep-out was constructed under building consent No 99/4230, but these alterations and additions were carried out without a building consent. For the reasons given for Building B1, I am of the opinion that this work, with the exception of the wood burner, should be the subject of a code compliance certificate and an amended building consent. Based on the expert's inspection of the visible components in this area, I am of the view that there are reasonable grounds to accept that the building work complies with the Building Code.

Once the authority is satisfied that these elements are indeed compliant, it should issue a code compliance certificate for building B1.

10.12 It is emphasized that each determination is conducted on a case-by-case basis. Accordingly, the fact that particular alterations have been established as being satisfactorily compliant in relation to a particular building does not necessarily mean that the alterations will be satisfactorily compliant in another situation.

11 Compliance of Building E

11.1 Taking account of the expert's report, the adequacy of the foundations is doubtful, and I accept that more extensive investigation (see paragraph 11.4) is required in order to establish the extent of any work required to achieve compliance.

11.2 As Building E has been subject to a change of use, section 46(2)(a) of the former Act (as does section 115 of the 2004 Act) requires compliance with the provisions of the building code for structural behaviour or performance as nearly as is reasonably practicable to the same extent as if it were a new building. I am therefore of the opinion that, if the foundations are found to be non-compliant after an intensive investigation, appropriate measures should be taken to ensure the stability of the building as a whole but only to the extent that is reasonably practicable.

11.3 Although the expert reported that there was no obvious evidence of the building being unsafe or insanitary in terms of sections 121 and 123 of the 2004 Act, he has emphasised that his inspection of this building was limited in its scope, and I accept that a more thorough and detailed inspection would be required to consider all aspects of its construction and condition.

11.4 I recommend that the authority requests the applicants to arrange for further investigation to be undertaken by an appropriate independent consultant, in order to:

- confirm, or otherwise, that Building E (in its current condition) is neither dangerous nor insanitary in terms of Sections 121 and 123 of the 2004 Act
- establish the extent of building work necessary for the structure to achieve building compliance in accordance with the requirements of the legislation in force at the time the alterations were made.

- 11.5 Should such an investigation conclude that Building E is dangerous or insanitary; the authority will no doubt issue written notice of that fact to the applicants, in accordance with section 124 of the 2004 Act

12. The wood burners

- 12.1 As I have only received incomplete documentation regarding the installation of the various wood burners, their current situation is somewhat confused. I therefore set out the information that has been provided regarding each wood burner.

Building B1

- Building consent ABA 20032013 issued on 12 June 2003
- Code compliance certificate issued on 16 July 2003
- In the certificate of acceptance of 13 March 2007, the authority required a certificate regarding the flue pipe penetrating the floor adjacent to the sink
- Applicant has submitted that “woodburner certificate” has been produced.

Building B2

- A producer statement regarding the installation issued on 30 March 2007
- Applicant has submitted that “woodburner certificate” has been produced.

Building C

- Building consent ABA 20011728 issued on 11 June 2003
- Applicant has submitted that “woodburner certificate” has been produced.

Building D

- Application for a building consent made on 11 June 2001
- Applicant has submitted that “woodburner certificate” has been produced.

Building E

- Application for building consent ABA 2008585 made on 15 April 2008
- Producer statement issued 5 May 2008
- Certificate of completion as requested by the authority, issued 5 May 2008
- Application for code compliance certificate made on 9 May 2008.

- 12.2 Based on the above information, it is likely that building consents have been issued for all the wood burners with the exception of the one installed in Building B2. In

the latter instance, the information is insufficient to make such an assumption. In the case of Buildings B1 and E, final code compliance certificates should be issued for the wood burners. Regarding Buildings C and D, once the authority has received the required certificates, then it should be in a position to issue code compliance certificates in respect of the wood burners in these buildings. If a consent has not been issued for the woodburner in Building B2, then this should be subject to a certificate of acceptance once the authority has received the appropriate documentation. Otherwise, the process described for Buildings C and D should be followed.

13. What is to be done now?

- 13.1 The authority should now issue a new notice to fix that requires the owners to bring Building E into compliance with the Building Code. The notice to fix should not specify how those defects are to be fixed. That is a matter for the owners to propose and for the authority to accept or reject.
- 13.2 I would suggest that the parties adopt the following process to meet the requirements of paragraph 13.1. Initially, the authority should issue the notice to fix. This should be carefully worded so as not to require compliance in excess of that required by the change of use requirements, to which I refer in paragraph 8.4, where those requirements apply. The owners should then produce a response to this in the form of a detailed proposal, produced in conjunction with a competent and suitably qualified person, as to the rectification or otherwise of the specified defects. Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.

14. The decision

- 14.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:
- (a) once the items of rectification that are listed in this determination in relation to the buildings are completed to the satisfaction of the authority, then the authority should issue code compliance certificates for Buildings B1 and H.
 - (b), once the items of rectification that are listed in this determination in relation to the buildings are completed to the satisfaction of the authority, and following an application from the applicants, the authority should issue certificates of acceptance in respect of the building work to Buildings B2, B3, C, and D
 - (c) Building E does not comply with the building code as regards its foundations and more extensive investigation is required in order to establish the extent of work required for achieving compliance in accordance with the requirements of the legislation in force at the time the alterations were made
 - (d) if the authority is of the opinion that they are code-compliant, it should issue code compliance certificates for the wood burners that were subject to building consents in Buildings B1, C, D, and E and, alternatively, a code compliance certificate or a certificate of acceptance for the wood burner in Building B2

(e) the authority should withdraw the notice to fix dated 13 March 2007.

14.2 I make no determination as to when or if the certificate of acceptance (CoA-2006-3006) should be revoked as part of this decision.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 1 October 2008.

John Gardiner
Manager Determinations