



Determination 2009/21

Whether proposed building work for conversion of a garage to a sleep-out complies with the Building Code to the extent required by the Building Act at 160 Brecon Road, Stratford

1. The matter for determination

- 1.1 This is a Determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department. The applicants are the owners, M Fox and Y Rosewarne, (“the applicants”), acting through an agent (“the designer”) and the other party is the Stratford District Council (“the authority”) carrying out its duties and functions as a territorial authority or a building consent authority.
- 1.2 The application arises from a dispute between the applicants and the authority as to whether proposed alterations to an existing garage to create a sleep-out will comply with the Building Code to the extent required by the Act.
- 1.3 For the reasons set out below, I take the view that the matter for determination, in terms of sections 177(a) and 188², is whether the proposed building work complies with the Building Code to the extent required by the Act.
- 1.4 In making my decision I have not considered any other aspects of the Act or of the Building Code.

2. The background

- 2.1 On 12 August 2008 the designer applied for a building consent.
- 2.2 On 18 August 2008 the authority acknowledged the application. It said the plans and specifications had been checked and it was noted that they do not comply fully with the Building Code.
- 2.3 The authority went on to say:

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

² In this determination unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

You are advised that the building consent cannot be issued until the following information has been provided and approved:

- 1 Because the work involves a change of use for the building to a habitable unit it is required to comply as nearly as is reasonably practicable with the Building Code in all respects. This includes, but, is not limited to:
 - a [damp proof course] under slab,
 - b Moisture barrier in walls,
 - c Timber treatment,
 - d Insulation to walls, ceiling, windows and doors,
 - e Skillion roof requirements,
 - f Lighting and ventilation,
 - g Smoke Alarms.

Your application will be suspended until the above information is received...

2.4 On 27 August 2008 the designer responded to the authority pointing out that some of the required information is in the consent drawings. The designer also pointed out that his design philosophy, to comply 'as reasonably practicable' with the Building Code, was clearly stated on the first drawing.

2.5 By letter dated 29 August 2008 to the designer, the authority acknowledged that some of the information requests in its letter dated 18 August 2008 were made in error. The authority went on to say that the application 'pertains to a change of use', and said:

- A damp proof membrane is required 'due to the change of use to a habitable building'.
- 'No information has been provided as to the treatment status of the existing timber framing. The existing framing will require some form of treatment because the required insulation will now restrict airflow'.
- 'Details are required to show how the maximum R values are achieved (Schedule or calculation method). The amendments to H1 came into force on 30 June 2008'.
- 'The thickness of R2.6 Pink Batts is 110 mm. The air gap is required between the batts and building paper as opposed to between the batts and ceiling'.
- Details of the outlet of the channel drain and the means of surface water disposal need to be provided.

2.6 The authority also said:

It is not the belief of this office that the application either as submitted or as provided as further information meets the "as reasonably as is practicable" test for compliance, particularly given recent building code changes to the requirements for habitable spaces.

2.7 The designer responded to this in a letter to the authority dated 2 October 2008. The designer proposed a number of amendments to the drawings including:

- ceiling insulation to be reduced to R2.2
- change the intended life of the building to 25 years.

2.8 The authority responded in a letter dated 8 October quoting Section 112 and saying that:

the existing building complied fully as a garage before the alteration and it should comply fully as a habitable building after the alteration.

. . . the original requirements, in the letter . . . dated 29 August 2008, still apply.

2.9 The application for a determination was received by the Department on 12 November 2008.

3. The submissions

3.1 In a covering letter to the Department, dated 10 November 2008, the designer outlined the process he had followed in order to obtain a building consent for “improving an existing garage/shed for a sleep-out/extra room”. He explained that the building had long ceased to serve as a garage and “was currently being used as a lounge/projector room with clothes dryer out the back as well as general storage.”

3.2 In the same letter the designer recounted the content of correspondence he had had with an official of the Department regarding whether the proposed improvements to the garage/shed amounted to a change of use. The advice he had obtained was that the proposed improvements did not constitute a change of use.

3.3 The designer said the decided approach to improving the garage was to:

- remove the cladding and install new wrap, with the cladding then being reinstated
- replace the garage door with a new single-glazed slider door
- install two new windows in lieu of existing beaded in types
- insulate walls and ceiling as best as possible
- fully line with plasterboard and line the trusses with plywood for additional stiffness making an average situation much better
- install a perimeter exterior drain to alleviate ground level issues
- install new lighting, smoke alarm, linings, paint, and carpet.

3.4 The designer supplied:

- copies of the correspondence with the authority
- copies of correspondence with an official of the Department
- photographs of the existing building
- the construction plans
- the specification of a proprietary window sealing system.

3.5 The authority made no submission in response to the application.

3.6 The draft determination was sent to the parties for comment on 3 December 2008. The designer accepted the draft determination.

3.7 In a letter dated 10 December 2008 the authority accepted the determination but submitted that it had sought additional information from the designer, and that it had

not yet made a decision whether or not to grant the consent, as the draft determination had said. The authority also said that the regulations allowed for:

grossly inadequate habitable space conditions where any unlined garage, or indeed garden shed, can be legally converted into a bedroom . . . This situation is certainly in conflict with Section 3 and Section 4 of the [Act]. Whilst the presently considered applicant has made an effort to comply with the code in the consent application, there are many instances where that is not the case.

And that:

Retrospective enforcement action can not be seen as appropriate, given the wording of Section 3, for being the sole means of achieving the stated legislative purposes of ensuring that people who use buildings can do so without endangering their health and that buildings have attributes that contribute appropriately to the health and wellbeing of the people who use them.

- 3.8 I have taken account of the authority's submission and amended the determination accordingly, in particular I have amended the matter to be determined.
- 3.9 I reissued a second draft determination to the parties for comment on 29 January 2009. The designer accepted the second draft determination.
- 3.10 In a letter to the Department, dated 2 February 2009, the authority responded saying it accepted the second draft subject to some non-contentious amendments. In summary the authority said it was concerned that:
- the designer's proposal to install insulation in the proposed ceiling cavity requires the installation to be non-compliant with the product installation specifications with the consequent potential to cause maintenance and durability issues
 - the failure of the insulation installation to meet the insulation product specification calls into question whether the determination is correct in saying that the installation complies with the Building Code
 - the proposed work includes ceiling lining fixing, with respect to the centres of the fixing battens, that is potentially unsafe.
 - the authority faces a potential risk in approving the proposed ceiling fixing.
- 3.11 In an email to the Department dated 17 February 2009, the designer proposed the use of R1.8 batts (75 mm thick) in order to provide an air gap between the insulation and the underside of the roof cladding. I note the designer proposed using R2.2 batts (94 mm thick) in a letter to the authority dated 2 October 2008.
- 3.12 In response to the authority's submission I note that:
- the 35x50 ceiling battens for the plasterboard lining are at right angles to the purlins and fixed at 450 mm centres. The battens appear to be installed at the distance recommended by the lining manufacturer.
 - I acknowledge the authority's comment regarding the installation of the ceiling insulation and the provision of a ventilation gap above the fibreglass insulation. The designer has proposed the use of thinner insulation to provide the ventilation gap between the insulation and the roof cladding which appears reasonable in the circumstances. The consent documents should be amended accordingly.

4. The legislation

4.1 The relevant provisions of the Building Act 2004 are set out in section 112.

112 Alterations to existing buildings

- (1) A building consent authority must not grant a building consent for the alteration of an existing building, or part of an existing building, unless the building consent authority is satisfied that, after the alteration, the building will –
- (a) comply, as nearly as is reasonably practicable, with the provisions of the building code that relate to –
 - (i) means of escape from fire; and
 - (ii) access and facilities for persons with disabilities (if this is a requirement in terms of section 118); and
 - (b) continue to comply with the other provisions of the building code to at least the same extent as before the alteration.

4.2 The relevant parts of the Building (Specified Systems, Change the Use and Earthquake-prone Buildings) Regulations 2005 are Clause 6 and Schedule 2.

6 Uses of buildings for purposes of regulation 5

- (1) For the purposes of regulation 5, every building or part of a building has a use specified in the table in Schedule 2.

Schedule 2

Uses of all or parts of buildings

Uses related to sleeping activities

Use	Spaces or dwellings	Examples
SH (Sleeping Single Home)	detached dwellings where people live as a single household or family, including attached self-contained spaces such as granny flats when occupied by a member of the same family, and garages (whether detached or part of the same building) if primarily for storage of the occupants' vehicles, tools, and garden implements	dwellings or houses separated from each other by distance.

5. Discussion

5.1 It is clear from the provisions of the Building (Specified Systems, Change the Use and Earthquake-prone Buildings) Regulations 2005 that changing a garage to a sleep-out is not a change of use. The existing building use is classified as SH at the moment and will remain SH after the proposed building work has been completed.

5.2 As there is no change of use, section 112 of the Act applies in respect of the proposed work to the building. The applicants must therefore meet the provision of section 112 set out in paragraph 4.1 above.

5.3 In Determination 2008/93 I noted that, while sections 112, 114 and 115 of the Act are not worded precisely the same as sections 38 and 46 of the former Act, they have essentially the same requirements and would, therefore, be subject to the same interpretation. Accordingly I consider that any upgrading is required only in respect of the provisions that are specified in section 112(1)(a), namely means of escape

from fire, and provision for access and facilities for people with disabilities. I note that smoke detectors are to be installed that will satisfy the requirements for means of escape from fire. Provision for access and facilities for people with disabilities does not apply in this instance.

- 5.4 In the light of paragraph 5.3, I conclude that, contrary to the authority's letter to the applicants dated 18 August 2008, section 112 does not require them 'to comply as nearly as is reasonably practicable with the Building Code in all respects' (my emphasis). However, as noted in Determination 2008/93, any new elements forming part of the alteration work must comply with the provisions of the Building Code to the extent required by the Act. With respect to the building in question this means that the altered building must comply with the provisions of the Building Code to the same extent as before the alteration.
- 5.5 I have compared the requirements of section 112 with the work proposed in the building consent application. It is apparent that the applicant intends, not merely to meet all the requirements of section 112, but to exceed those requirements in some respects. I applaud that intention.
- 5.6 I acknowledge the authority's comments with respect to the apparent conflict between the regulations and Act. Enforcement is an option open to an authority in any situation where a building is considered unsafe or insanitary. However, based on what has been submitted in support of the application, I do not believe the subject building currently falls into this category.
- 5.7 If at a later date the TA considers that the building may have reached a point where it is considered dangerous or insanitary it may take appropriate action at that time. A similar situation was considered in Determination 2003/10 which I believe is still appropriate under the current Act. In particular, paragraph 5.9 of Determination 2003/10 said:
- ... [an authority] would have concerns where a garage has a change of use to a sleep-out and only the specific items set out [under the change of use provisions under the Building Act 1991] can be addressed.
- [The change of use provisions] would not exempt any building from the "dangerous or insanitary buildings" provisions of [the Building Act 1991]. In other words, even if the [change of use provisions] do not apply, the [authority] can still require problems to be rectified if it considers that they are of a sufficiently serious nature.
- Accordingly, if [an authority] has concerns about a change of use, it should point out to the building owner that, [the authority] can, once the code compliance certificate has been issued, consider invoking the ["dangerous or insanitary buildings" provisions of the Building Act 1991]. In addition, the cost of rectification ... would invariably be more expensive for a building owner than if he or she carried out the additional work during the initial building stage.
- 5.8 I conclude that the information submitted to the authority in the application for building consent shows the compliance with the Building Code to the extent required by the Act under section 112(1), because the building will comply, as nearly as is reasonably practicable, with the provisions of the Building Code that relate to means of escape from fire, and will continue to comply with the remaining provisions of the Building Code to the same extent as before the alteration.

6. Decision

- 6.1 In accordance with section 188 of the Act, I hereby determine that the proposed building work complies with the Building Code to the extent required by the Act.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 20 March 2009.

John Gardiner
Manager Determinations