

Determination 2015/077

Regarding the authority's exercise of its power of decision in requiring notice of a change of use at 5 Tawa Street, Kaikohe



Summary

This determination involves two adjoining household units. The determination discusses whether the Building Code obligations relating to fire separation apply given the age of construction and whether there has been a change of use.

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the current Act”) made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The parties to the determination are:
 - the owners of the building S Bennett and J Stephens (“the applicants”)
 - Far North District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

¹ The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.building.govt.nz or by contacting the Ministry on 0800 242 243.

- 1.3 This determination arises from the decision of the authority to issue a field advice notice requiring the applicants to either:
- remove the kitchen, cooking and laundry facilities from the flat and apply for a change of use² to convert the flats use to a sleepout, or
 - to install fire safety systems.

The authority is concerned that there is not sufficient fire separation between the house and the adjoining flat, and the authority is also of the opinion that the building work to connect the house to the flat was carried out without a building permit³ or building consent.

- 1.4 The matter to be determined⁴ is therefore:
- whether the authority was correct in its decision to require the owners to give written notice of a change of use under section 114
 - whether the building complies with the Building Code in regard to fire safety to the extent that was required when the building work was carried out
 - the failure of the authority to exercise its power of decision in not issuing a dangerous building notice under section 124.

- 1.5 In order to determine these matters, I must consider:
- when the building work was carried out
 - how the legislation applies to the building work
 - whether there has been a change of use under the Regulations.

- 1.6 In making my decision, I have considered the submissions of the parties, the expert's report and other evidence in this matter.

2. The buildings

- 2.1 The property contains three attached buildings – the front house, flat, and the rear garage (collectively referred to as “the buildings”). The buildings were constructed in stages and now form one continuous, connected structure, generally as indicated in Figure 1 (over page). The house and the flat are currently rented out as separate household units.
- 2.2 The house is a three bedroom single storey construction of approximately 115m². Construction is generally conventional light timber framing, with concrete block foundations, fibre-cement weatherboard cladding and profiled metal roofing.
- 2.3 The adjoining single story flat contains two bedrooms, a kitchen, bathroom and laundry facilities, and is approximately 75m². It has been constructed in two stages, with one part (the northern end) on concrete foundations and the southern end on timber foundations. The flat's construction is light timber framing with fibre-cement weatherboard cladding and profiled metal roofing.

² As defined in the *Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005*, herein after referred to as “the Regulations”.

³ Building permits were issued for building work carried out prior to the introduction of the Building Act 1991.

⁴ Under sections 177(1)(a), 177(1)(b) and 177(3)(f) of the current Act. In this determination references to sections are to sections of the current Act and references to clauses are to clauses of the Building Code (Schedule 1, Building Regulations 1992)

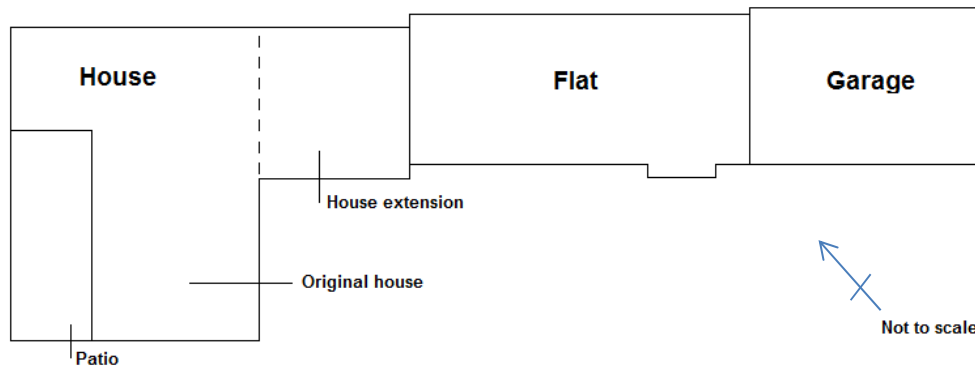


Figure 1: Approximate site plan

- 2.4 At the rear of the flat is a single garage and workshop, approximately 55m² in size. It has concrete foundations, light timber framing, fibre-cement sheet cladding and profiled metal roofing.

3. Background

- 3.1 A number of building permits have been issued by the authority for building work to be carried out at this property. These are as follows:

3.2 **7 November 1955 (BP1955-367)**

Permit issued for a three bedroom standalone house.

An extension to the south has been added to the house at some point as the current house is larger than its original shape. No record of any permit or consent has been sighted for the extension.

3.3 **24 April 1972 (BP1972-361)**

Permit issued for a standalone garage and workshop to be constructed at the rear of the property.

The plans for the proposed garage show a standalone building labelled 'flat' on the property, located between the existing permitted house and the proposed garage. It is unclear from the plans, and the authority's records, whether this flat was already constructed at the time of this permit application (1972) or if it is a proposed flat. No record of a permit has been sighted for the construction of this flat.

3.4 **18 March 1975 (BP1975-649839)**

A permit was issued to:

- convert an existing building on the site into a combined garage and one bedroom flat. The proposed flat is self-contained (it includes kitchen and bathroom facilities).
- construct a carport between the existing house and the proposed garage and flat

The existing building referred to in this permit is in place of the building labelled as 'flat' on the plans accompanying the 1972 permit and confirms that a building was constructed in this location prior to 1975. It appears unlikely that this building was actually used as a flat prior to this permit being issued in 1975, it is more likely to have been used as a garage, storage facility, or sleep-out, as no plumbing or drainage appears to have been connected to the building until 1975.

The plans indicate that the garage, as shown in its proposed location on the 1972 permit, had not yet been constructed.

3.5 **19 March 1975 (BP1975-949)**

Permit issued for plumbing and drainage work to be carried out to the flat. The authority's records note that they inspected and passed this work on the 26 March 1975.

3.6 **8 June 1977 (BP1977-8104236)**

Permit issued for a patio to be constructed adjoining the northern wall of the house. It is likely that the addition to the southern end house had not yet constructed, as the house plans accompanying the permit application show the house consistent with its original design as per the 1955 permit.

3.7 **31 March 1980 (BP1980-9043468)**

Permit issued for a garage and workshop. The authority's records note the construction of this garage as being completed by 19 April 1980.

The plans submitted with the permit application show the garage as standalone and not connected to the flat. This indicates that either the location of the garage was changed and it was built adjoining the flat or at some stage after 1980 the flat was extended to connect to the garage.

3.8 The authority's records do not account for all of the building work carried out at the property and the work that has been permitted differs significantly from that described on the permit application and approved by the authority.

I have not sighted a record of any building permit or consent for the following work, and therefore conclude that this work is unpermitted and/or unconsented:

- The extension to the southern end of the house that connects the house to the flat. This work appears to have been carried out after 1977 and has been constructed in the location of the carport as identified in the 1975 permit.
- The building (constructed prior to 1975) that was converted into the current flat.
- The existing two bedroom flat in its current layout. The permit granted in 1975 was for a combined one bedroom flat and garage, with a significantly different layout and without laundry facilities.
- The possible extension to the south end of the flat that connects the flat to the garage, or the change to the location of the garage and its construction adjoining the flat.

3.9 **The safe and sanitary report**

3.9.1 In 2006 the then owner of the buildings engaged a building consultant to carry out a "safe and sanitary" assessment on the mid-section of the buildings (the flat) as the owner did not believe a permit or consent had been issued for its construction.

3.9.2 The building consultant carried out the assessment on 9 August 2006 and in a report issued on the same date noted:

This "mid-section" part of the dwelling requires additional care and general maintenance, however at the time of the inspection this part of the building can be considered both "safe and sanitary".

This part of the building has been assessed as a sleepout type structure in association with the rest of the attached buildings on the site. If a separate flat is to be formed at a future date then fire and sound separations will be necessary.

3.9.3 Following the issue of the report, the authority issued a letter dated 5 September 2006 (BC2007-303) acknowledging that the building can be considered both safe and sanitary. The authority's letter stated:

If the building work should in the future become dangerous or unsanitary then [the authority] will take action in accordance with Sections 121 & 123 of the New Zealand Building Act 2004.

3.9.4 The applicants purchased the house in January 2007, at which time it was occupied by tenants as two separate household units, and listed on the authority's rates database as a Residential-Multi Use dwelling.

3.10 **The field advice notice**

3.10.1 On 8 September 2014 the authority received a complaint from the property manager who was managing the property on the applicant's behalf. The property manager was concerned that the flat was unpermitted or unconsented and could not be rented out as a separate household unit.

3.10.2 As a result of this complaint the authority met with the applicants on 18 September 2014 to inspect the building and clarify its use as a flat or sleepout.

3.10.3 Following the inspection the authority issued a field advice notice dated 23 September 2014 (BC2015-292) requiring the applicants to either:

1. Remove the kitchen, cooking and laundry facilities from the flat and 'apply for Change of Use Building Consent application' to change the use of the building to a sleepout, or
2. Apply for a building consent to install a fire safety system to the requirements of a fire report, to address the walls where the flat is attached to the house and garage.

The authority noted that if a decision was not made by 6 November 2014 then 'Option 1 will be instructed' to the applicant.

3.10.4 I note here that a field advice notice has no regulatory status and is simply advice to the owners.

3.11 **The second report**

3.11.1 The applicants engaged the building consultant to issue a second report dated 27 February 2015, which helped to clarify the reasons for assessing the building as a sleepout in the original 2006 safe and sanitary report. The consultant noted:

... the lack of visible compliant fire wall separations indicated that the separate flat should only be used as a sleepout and not a separate dwelling unit (flat).

3.11.2 The Ministry received an application for determination on 7 April 2015.

4. The submissions

4.1 In a statement provided with their application, the applicants summarised their views on the matters and submitted that:

The building was permitted as a flat but the construction differs from the plans. I do not believe that we should have been issued with a notice of change of use because we have never changed the use – it was permitted as a flat, built as a flat according to the regulations of the time and has been used as a flat since 1975.

4.2 The applicants provided the following documents in support of their application:

- copies of email correspondence with the authority
- photos of the buildings
- a CD containing copies of all files relating to the building as held by the authority, including the safe and sanitary report and the field advice notice
- a report dated 27 February 2015 from the building consultant who carried out the 2006 Safe and Sanitary inspection
- a copy of a rates invoice and valuation report
- a timeline for work carried out on the property.

4.3 The applicants also provided an email from the son of a previous owner of the property which stated:

The original garage (what is now the flat) was built in 1972 as per the permit. The permit for the flat was issued in 1975 at which point the garage was converted into a flat.

...

The wall between the house and the flat is double [gibbed] both sides with standard 10 mm [gib] board, ie a total of 40 mm of [gib] board.

4.4 A submission from the authority was received on 3 July 2015. The authority submitted that in its opinion:

... the connection of the permitted dwelling and flat was carried out other than in accordance with a building permit or consent and [the authority] has acted appropriately in advising the owner that its “use” should be limited to a ‘sleepout’ as a result.

4.5 The authority also provided a CD containing all files held relating to the buildings.

4.6 A draft determination was issued to the parties for comment on 16 November 2015.

4.7 The authority responded to the draft determination on 25 November 2015, noting that it did not agree with the reasoning or decision reached in the draft:

- The 2006 safe and sanitary report provided clear guidance that it was only suitable for use as a “sleep-out” and that changing the use to a separate residential unit would require some consideration of fire separations and sound transmission.
- The authority is of the view that the building has been constructed mainly of second hand materials and as such it would be impracticable to determine a construction date. The draft determination relies on the assumption that works were carried out prior to the Building Act 1991 taking effect without sufficient evidence to support that view.

- The authority has acted in good faith and conscience in bringing this matter to the attention of the current owners through the field advice notice.

4.8 The applicants provided a response to the draft determination on 27 November 2015, accepting the findings and noting:

- As the authority had not issued a field advice notice prior to the applicants purchasing the property (after the safe and sanitary report), the applicants understood this to mean permits had been issued for the structures and the units were recognised as being separately tenanted.
- The applicants purchased the property as separately tenanted units, with two tenancy bonds and rates payable for two dwellings.
- The building consultant's report (refer paragraph 3.11.1) was based on a visual inspection and it was acknowledged in the amendment to the report that the construction was likely compliant with the regulations of the time.
- The age of the materials used matches up with the permits, with some aluminium windows and doors repaired or replaced as follows:
 - 14 August 2009 – Ranchslider replaced
 - 1 October 2010 – Window replaced
 - 24 October 2011 – Door replaced
 - 23 November 2011 – Ranchslider repaired/glass replaced
 - 6 August 2012 – Sliding door replaced and glass
 - 9 August 2013 – Laundry window replaced, sliding door repaired.
- The son of the previous owner has stated that the wall between the house and flat had been double gibbed on both sides (refer paragraph 4.3). The plasterboard manufacturer has stated that the likely system constructed would provide a -/60/60 FRR.
- Additional fire alarms have been installed on the advice of the local fire service, and batteries are checked at quarterly inspections. The 'electrics and cookers [were] checked by a qualified electrician' and there are no gas supplied facilities in the properties.

5. The expert's report

5.1 As discussed in paragraph 1.6, I engaged an independent expert, who is a member of the New Zealand Institute of Building Surveyors, to carry out an assessment of the buildings to ascertain when the various parts of the building work were undertaken and or completed.

5.2 The expert visited the buildings on the 8 September 2015 and provided a report dated 7 October 2015; this was forwarded to both parties for comment on the 9 October 2015.

5.3 The expert's findings are summarised in the following paragraphs:

5.4 House and extension to house

5.4.1 The particle board flooring of the house extension is a type of product that was typically used from the early 1970s onwards, possibly slightly later in areas such as Kaikohe which are further away from the main centres.

- 5.4.2 The ceiling tiles in the house extension are product known to be used in the 1970s.
- 5.4.3 Anodised joinery to the south wall of the original house indicates work possibly done to this area in the 1980s. The house extension has older style timber joinery; these were possibly moved from the original house into their current location or were second hand items.
- 5.4.4 The extension to the house appears to have been built after the construction of the flat as the floor beams of this extension are supported by the construction behind the weatherboards of the flat.

5.5 Flat

- 5.5.1 The ceiling lining is constructed of a soft fibre-board indicative of 1970s or 1980s installation.
- 5.5.2 The corrugated steel roofing is a product that has been used in New Zealand since 1982 (according to the manufacturer of the product). This does not necessarily imply the roof was constructed after 1982 as it might be a repair or later installation; some roofing areas are mismatched, indicating repairs have been carried out.
- 5.5.3 The built-in kitchen cabinetry is indicative of a late 1970s installation.
- 5.5.4 Joinery is powder coated aluminium as used from approximately early 1990s onwards. The joinery is mismatched throughout the flat and indicates second hand items were used.

5.6 Garage

- 5.6.1 The rear wall of the garage is identified as asbestos fibre-cement sheets. According to the manufacturer's records, these were not used in New Zealand after 1985. This indicates it is likely the garage was constructed before 1985; however the use of stored stock or re-used materials is a possibility.
- 5.6.2 A general mismatch of second hand materials was noted.

5.7 Conclusion

- 5.7.1 The expert concluded that the extension to the house connecting the house to the flat was likely to have been constructed after 1977 as it was not shown on a 1977 building permit; it appears to have taken the place of the carport shown on the 1975 plans. Materials used indicate construction in the late 1970s or 1980s.
- 5.7.2 The flat in its current state shows a mismatch of materials from different times, with built-in furniture and ceiling tiles likely from the 1970s, window joinery of the early 1990s as well as parts of the roof clad in a material not used before 1982.
- 5.7.3 As indicated by the use of materials, it appears likely that the flat and extension to the house were constructed in the later 1970s to early 1980s.

6. Discussion

6.1 When was the building work carried out?

6.1.1 The evidence I have received from the parties, as well as the expert's report, leads me to believe that the building work that is the subject of this determination was carried out prior to the Building Act 1991 coming into force on 1 July 1992.

6.1.2 The current Act does not authorise authorities to take action in respect of existing buildings constructed prior to the introduction of the Building Act unless:

- the owner decides to alter the building (section 112), to change its use (section 115), to change the length of its limited life (section 116), or to subdivide the allotment in a way that affects the building (section 116A), or
- the building is dangerous (section 121), affected (section 121A), earthquake-prone (section 122), or insanitary (section 123).⁵

6.2 Has there been a change of use?

6.2.1 A change of use occurs when a building's (or part of a building's) use, as defined in the Regulations, changes from one use (the old use) to another (the new use), and the new use has more onerous or additional Building Code requirements than the old use. The owner is required to notify the authority of the change of use (section 114) and must meet the requirements set out in section 115 which involve upgrading the building to comply as nearly as is reasonably practicable with certain relevant requirements of the Building Code.

6.2.2 A change of use from a self-contained space occupied by a member of the same family (defined in the Regulations as SH - Sleeping Home Single) to a separately occupied household unit attached to another dwelling (SR - Sleeping Residential) would place additional Building Code obligations, relating mainly to fire safety and protection of other property, on the owner and would be considered a change of use under the Regulations.

6.2.3 As noted in paragraphs 4.1 and 4.8, the applicants argued that the flat has been occupied as a flat since its construction and was so occupied at the time the applicants purchased the property. I assume by this the applicants mean it has been occupied by members of a separate household unit since its construction, although I have seen no evidence to support this view.

6.2.4 The previous owners had permits for a house and a separate self-contained flat to be constructed on the property; however the then owner's intention for the flat's use is unknown. While it is possible the flat was initially planned and built with the intention of being occupied by member of the same household unit as those residing in the house, and a change of use to a separately occupied household unit occurred at some stage since its construction, there is insufficient information to be conclusive on this issue.

6.2.5 However, I am satisfied that the applicants have not changed the use of the buildings. The applicants purchased the property in 2007 at which time the house and flat were rented out separately and occupied by two sets of tenants. Since then the applicants have continued to rent the house and flat out separately.

⁵ See also determinations 2010/053 and 2011/016

6.2.6 It is my view that if there was a change of use it would have occurred prior to the applicant's purchase of the property and likely before the taking effect of the Building Act legislation in July 1992. As there is uncertainty around if or when a change of use has occurred I do not believe that the authority can hold the applicants responsible for any previous change of use that may have occurred, nor require them change the current use of the buildings.

6.3 **The extent to which the building work must comply**

6.3.1 As noted in paragraph 6.1.1, I am of the opinion that all building work related to the construction of the house, flat, and garage was carried out prior to the Building Act 1991 coming into force.

6.3.2 As the building work was carried out prior to the commencement of the Building Act, and there is no evidence of any change of use occurring following the commencement of the Building Act, I am therefore of the opinion that there is no requirement for any of the existing building work to comply with the Building Code.

6.3.3 I note that as some of the building work was unpermitted and therefore not approved and inspected by the authority at the time of its construction it may not be compliant with the building regulations that were in force at the time the building work was carried out.

6.3.4 Although parts of the buildings were constructed without a building permit, and may not be compliant with the then building regulations, the current Act does not allow the authority to take any action in respect of an existing building unless it considers the building to be dangerous or insanitary (refer paragraph 6.1.2).

6.3.5 Fire rated walls between separate household units is a Building Code requirement under the current Act for new building work or where a change of use occurs. While there is no requirement for the existing buildings to comply with the current regulations, I suggest it would be prudent for the owners to consider improving the standards of fire safety in this regard or confirming that the construction of the wall separating the household units provides adequate fire resistance.

6.4 **Is the building dangerous under section 121 of the Act?**

6.4.1 The correspondence and evidence I have sighted from the authority in regard to this determination makes no reference to whether the authority considers the building to be dangerous.

6.4.2 The authority noted in its safe and sanitary acknowledgement letter dated 5 September 2006 that it considers, based on the building consultants safe and sanitary report, that the buildings can be considered both safe and sanitary. However, the letter implies this is on the basis the flat is used as a sleepout rather than a separate household unit.

6.4.3 Should the authority consider the building to be dangerous in its current use a field advice notice to the applicants is not an appropriate method for dealing with a dangerous building as it has no legal status under the current Act.

6.4.4 If the authority considers the building to be dangerous it may issue a notice under section 124 of the current Act requiring the owner to undertake any work necessary to reduce or remove the danger.

6.4.5 Section 121(1)(b) of the current Act sets out the meaning of 'dangerous' in relation to fire safety as follows:

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

...

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

6.4.6 There is always a risk that in the event of a fire death or injury to persons will occur, but there must be particular features of a building that make this risk 'likely to occur'.⁶ The analysis for a dangerous building notice in relation to fire must first focus on whether the building complies with the Building Code. If the answer is no, then the next analysis will focus on what features that do not comply with the Building Code make it dangerous for the purposes of 121(1)(b). A building may be non-compliant with the Building Code however this does not necessarily mean it meets the threshold of being a dangerous building. Analysis of any non-compliant features of the building would need to be undertaken to establish whether or not the non-compliance amounts to 'dangerous' so as to warrant the seriousness of a dangerous building notice.

6.4.7 I note here that the authority can also seek advice from the New Zealand Fire Service for the purpose of determining whether a building is dangerous.

7. The decision

7.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:

- the authority was incorrect in requiring the owners to give written notice of a change of use under section 114 as there is no clear evidence that the flat has been used as anything other than a separate household unit since its construction and the applicants have not changed the use of the buildings
- given the date of construction the building work being prior to the commencement of the Building Act 1991, it is not required to comply with the Building Code
- there is insufficient evidence to establish whether the building is dangerous under section 121, therefore I make no determination as to whether there has been a failure of the authority to exercise its power of decision in not issuing a dangerous building notice under section 124.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 1 December 2015.



John Gardiner
Manager Determinations and Assurance

⁶ See determination 2015/014 for further analysis on the definition of 'likely to occur'.

Appendix A

A.1 Relevant sections of the Building Act 2004

114 Owner must give notice of change of use, extension of life, or subdivision of buildings

- (1) In this section and section 115, change the use, in relation to a building, means to change the use of the building in a manner described in the regulations.
- (2) An owner of a building must give written notice to the territorial authority if the owner proposes—
 - (a) to change the use of a building; or
 - (b) to extend the life of a building that has a specified intended life; or
 - (c) to subdivide land in a manner that affects a building.

...

115 Code compliance requirements: change of use

An owner of a building must not change the use of the building,—

- (a) in a case where the change involves the incorporation in the building of 1 or more household units where household units did not exist before, unless the territorial authority gives the owner written notice that the territorial authority is satisfied, on reasonable grounds, that the building, in its new use, will comply, as nearly as is reasonably practicable, with the building code in all respects; and

...

121 Meaning of dangerous building

- (1) A building is dangerous for the purposes of this Act if,—
 - (a) in the ordinary course of events (excluding the occurrence of an earthquake), the building is likely to cause—
 - (i) injury or death (whether by collapse or otherwise) to any persons in it or to persons on other property; or
 - (ii) damage to other property; or
 - (b) in the event of fire, injury or death to any persons in the building or to persons on other property is likely.
- (2) For the purpose of determining whether a building is dangerous in terms of subsection (1)(b), a territorial authority—
 - (a) may seek advice from members of the New Zealand Fire Service who have been notified to the territorial authority by the Fire Service National Commander as being competent to give advice; and
 - (b) if the advice is sought, must have due regard to the advice.

**124 Dangerous, affected, earthquake-prone, or insanitary buildings:
powers of territorial authority**

- (1) This section applies if a territorial authority is satisfied that a building in its district is a dangerous, affected, earthquake-prone, or insanitary building.
- (2) In a case to which this section applies, the territorial authority may do any or all of the following:
 - (a) put up a hoarding or fence to prevent people from approaching the building nearer than is safe:
 - (b) attach in a prominent place on, or adjacent to, the building a notice that warns people not to approach the building:
 - (c) except in the case of an affected building, issue a notice that complies with section 125(1) requiring work to be carried out on the building to—
 - (i) reduce or remove the danger; or
 - (ii) prevent the building from remaining insanitary:
 - (d) issue a notice that complies with section 125(1A) restricting entry to the building for particular purposes or restricting entry to particular persons or groups of persons.

...