



## Determination 2017/036

# Regarding whether there is a change of use in respect of building work carried out to create a 12-bedroom building with an associated sleepout at 784 High Street, Lower Hutt

### Summary

This determination considered whether there was a change of use for the purpose of sections 114 and 115, in regard to building work carried out to increase the number of bedrooms in a building to 12.

### 1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“the 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 owner of the house, Raewar Property Holding Trust, acting through the director (“the applicant”)
  - Hutt City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 This determination arises from a dispute regarding building work that converted an attached double garage into a six-bedroom extension, and increased the number of bedrooms in the associated main house from three to six. A building consent was not sought for the building work.
- 1.4 The authority is of the view that the conversion has resulted in a change of use under Schedule 2 of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 (“the Regulations”) from use category SH to SA; and therefore the applicant should have notified the authority of the change of use as required under section 114<sup>2</sup> and the provisions under section 115 of the Act apply. The authority has not yet carried out any actions under the Building Act such as issuing a notice to fix for a breach of the Act or the Regulations.
- 1.5 The matter to be determined<sup>3</sup> therefore is the authority’s proposed exercise of its powers of decision in requiring notification of a change of use under section 114 is correct.
- 1.6 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.

<sup>1</sup> The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at [www.building.govt.nz](http://www.building.govt.nz) or by contacting the Ministry on 0800 242 243.

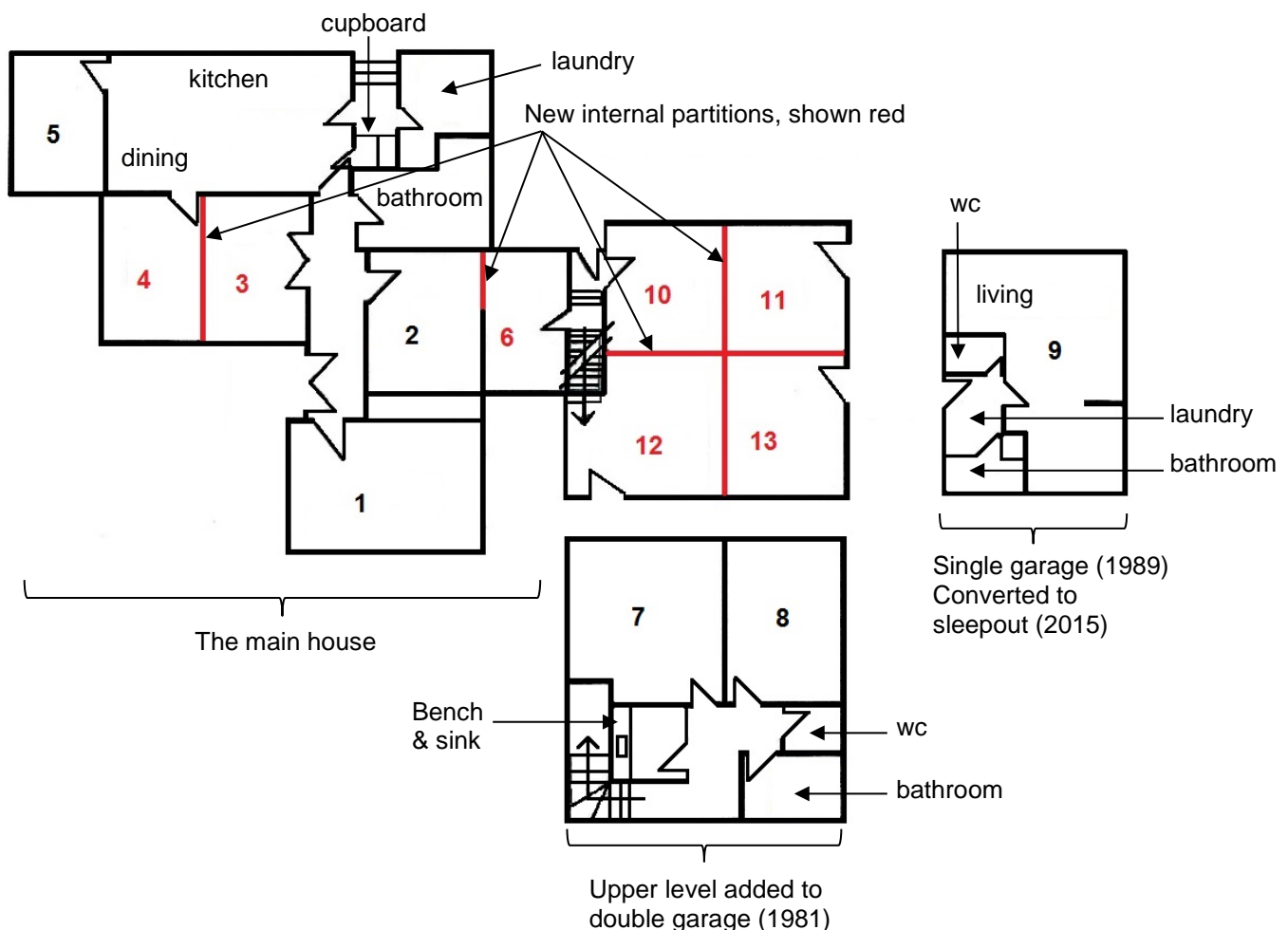
<sup>2</sup> In this determination, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

<sup>3</sup> Under sections 177(1)(b) and 177(3)(f)

- 1.7 Relevant sections of the Act and the Regulations are set out in Appendix A.
- 1.8 I have not considered any other aspects of the Act, nor have I considered whether the building work that has already been undertaken complies with the Building Code.

## 2. The building and background

- 2.1 The existing building, located in a residential area and constructed circa 1950, was a single-storey house containing three bedrooms (“the main house”).
- 2.2 According to the applicant, at sometime around 1981 a second level was added to the garage (“the double garage”), providing an additional two bedrooms, a bathroom, toilet and kitchenette<sup>4</sup>; and a single garage was constructed in 1989.
- 2.3 The single garage was converted to a sleepout (“the sleepout”) in 2015. (The applicant refers to this occurring under building consent No. 150390. I have not seen this consent.)



**Figure 1: Floor plan showing bedrooms numbered (not to scale)**

- 2.4 The applicant has advised that the following building work was carried out without consent being obtained as the applicant was of the view consent was not required:
- internal partitions to create three additional bedrooms in the house
  - lower level of the double garage converted to create four bedrooms.

<sup>4</sup> In the site inspection carried out by the authority, it identified that a sink is present on the top level of the double garage, although there were no cooking facilities.

- 2.5 The authority received complaints from members of the public regarding the property, with the first received on 4 April 2016, querying whether it was a boarding house, and commenting on the disruption caused by the increased number of cars at the property.
- 2.6 On 28 April 2016, the authority visited the building with the tenancy manager from the property management company that manages the property, and observed that all the doors to bedrooms had individual locks. A follow up inspection by the authority was cancelled by the applicant on 10 May 2016.
- 2.7 There was correspondence during 13 May 2016 to 5 September 2016 between the parties in regard to the authority gaining access to the building to carry out an inspection to assess if a change of use had occurred and whether it was operating as a boarding house.<sup>5</sup>
- 2.8 In an email dated 8 September 2016, the applicant responded to the authority that the property was not a 'boarding house' and it did not contain 'boarder/lodger[s]'. The applicant reiterated that there were no individual tenancy agreements; there was a head tenant and he has 'flatmates'.
- 2.9 The authority responded to the applicant on 9 September 2016 outlining the following:
- There are 'elements' that differ between a typical flatting arrangement and boarding houses and the authority would consider the property a boarding house. The authority needs to be able to inspect the property to determine if this is the case.
  - The authority's concern is with the occupants' safety and is not related to the letting arrangement.
  - The authority questioned whether it was a flat that contained people who were aware of each other, a group of people that knew each other, or whether one person controlled the operation and nobody would be aware if a person in a locked bedroom was away or asleep in a fire event.
  - The authority requested the applicant allow access and gave assurance that the inspection by the authority would not be intrusive.
- 2.10 Further correspondence occurred between the parties from 17 September 2016 to 6 October 2016, with continued discussion regarding gaining entry.
- 2.11 On 13 October 2016 the authority inspected the property with the applicant and observed the following:
- Single level garage – is 'fully self-contained' and approved under a resource consent and building consent. Noted that there were cleaners cleaning the unit.
  - Two storey double garage – identified that this part of the property prompted the initial complaint. The authority noted that the garage doors had been removed, with the ground floor divided into four bedrooms, each having their own entrance and security door lock. Upstairs there were two bedrooms, and a kitchen with a sink but no cooking facilities, and a fridge in the hallway outside the kitchen door. There were security locks on the bedrooms upstairs, and one tenant per bedroom. The bathroom was shared with a number of occupants.

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<sup>5</sup> Under section 222 of the Act, an officer of the territorial authority is entitled to inspect any building and enter the premises for the purposes of inspecting the building.

- Main house – there is a full kitchen and small lounge that is the only communal area in the property. One bedroom had two tenants, and there were six bedrooms in total in this part of the property.
- There were 14 people living in 13 bedrooms (including the double garage and the sleepout) and each room had a security lock.

2.12 On 8 December 2016 the Ministry received an application for determination.

### **3. The submissions**

3.1 The applicant provided a covering letter with the application, setting out the applicant's views regarding the use of the buildings. The applicant noted that the property is let on a periodic tenancy to one tenant, and the tenant 'has a number of flatmates and that most of the bedrooms are occupied'. The applicant set out a number of points he considered salient:

- The applicant understood there were flatmate agreements in place but had not seen these.
- The tenant and flatmates are not transient; the property is their principal place of residence.
- There are three bathrooms, 'all of which are shared use'; none of the bathrooms are ensembles.
- There is one kitchen, which is shared by all of the residents.
- The residents are known to each other and socialise together to varying degrees.
- With the exception of a few items, nearly all of the furniture is owned by the residents.
- The applicant 'has minimal involvement in the day to day operation of the property'.

3.2 The applicant provided copies of plans dated 2015 showing the existing house and garage, with annotations indicating the most recent additions of bedrooms (refer paragraph 2.4), and a tenancy agreement dated 6 May 2016.

3.3 On 20 December 2016, I requested the authority provide additional information in regards the building work and the building's use under the Regulations, along with a submission on the matter.

3.4 The authority advised it would be able to provide a submission in late December; the submission was received on 16 February 2017 (in summary):

- The authority had received four complaints from three different members of the public regarding the apparent conversion of the property to a boarding house, the increased number of cars, the addition of extra rooms, and the increased noise associated with the 'change of use'.
- The investigation carried out by the authority established that 'unconsented building works to bring the number of bedrooms to a total of 13' had been carried out. It believed after further inspection and discussion that the property was being occupied by 'independent and unrelated occupants, likely transient in nature' rather than a 'single family household unit or group with close relational ties similar to a household unit'.

- The layout and operation of the building has lead the authority to believe there has been a change of use from Sleeping single home (SH) to Sleeping accommodation (SA), and the new use likely had more onerous or additional requirements for complying with the Building Code.
- Written notice under section 114 must be given and it will trigger the requirements of section 115. It is then up to the applicant to demonstrate how the building in its new use will comply as near as is reasonably practicable under section 115(b).
- The authority is concerned with how the building ‘is actually operating’ rather than the agreement between the occupant and owner.

3.5 The authority provided copies of:

- approved drawings for a building consent granted 9 July 2015
- site inspection notes
- sketch of the bedroom locations
- correspondence between the parties
- complaints lodged by members of public
- Determination 2016/008<sup>6</sup> concerning a change of use to a 13-bedroom building involving the same owner.

3.6 A first draft of this determination was issued to the parties for comment on 24 March 2017. The draft concluded that the applicant was required to notify the authority regarding the change of use.

3.7 On 30 March 2017 the applicant submitted a response to the draft determination (in summary):

- There is a level of cohesion beyond what could be expected in a boarding house, with the occupants sharing some chores, and socialising in the evening on a Friday and/or Saturday night as well hosting parties.
- The restriction on noise after 10.00pm, noted in the agreement between the tenant and owner (refer paragraph 4.5.6), is to ensure that the neighbours are not “unreasonably” disturbed.
- The occupants stay between 6 - 12 months, and are not transient.
- There are two laundries, and the one inside the main dwelling “does not have direct access to the outside of the house”.
- The applicant was concerned that the draft determination inferred a negative conclusion by not including that the property management company also manages “standard residential properties” and not just “rent-by-the-room”.
- The applicant has had discussions with the head tenant and property manager as to whether the flatmates are transient. For the draft determination to assume that the applicant “could not know” whether the flatmates were transient raises concerns that the determination was “biased and predetermined” (I note here that applicant had stated he had not viewed the flatmate agreements.)

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<sup>6</sup> Determination 2016/008 *Regarding whether there is a change of use in respect of the conversion of a house to include 13 bedrooms at 68 McParland Street, Upper Hutt* (Ministry of Business, Innovation and Employment) 7 March 2016

- 3.8 I have taken the applicant's submission into account and amended the determination where I consider appropriate.
- 3.9 The authority accepted the draft determination on 26 April 2017, and made no further comment.

## **4. Discussion: The change of use**

### **4.1 The legislation**

- 4.1.1 There are a number of different categorisations of buildings used in or for the purposes of the Act, the Regulations and the Building Code. Examples of categorisations that are relevant in this discussion include:
- uses of buildings, such as CS (Crowd small), SH (Sleeping single home), WH (Working high) defined in Schedule 2 of the Regulations – which are for the purpose of making decisions about buildings undergoing a change of use, and
  - Classified uses, such as Housing, Commercial, Industrial, etc. defined in Clause A1 of the Building Code – which are for the purpose of applying the performance requirements of the Building Code.
- 4.1.2 Under section 114 of the Act, if an owner is planning to change the use of a building (defined in Schedule 2 of the Regulations) they must provide written notice to the authority. A person commits an offence if the person does not give written notice of a change of use (section 114(3)).
- 4.1.3 If the change of use involves incorporating one or more household units where household units did not exist before (such as would be the case, for example, if a house was converted into two separate flats), section 115 of the Act provides that the owner must not change the use unless the authority has given the owner written notice that the building will comply as nearly as is reasonably practicable with the Building Code in all respects.
- 4.1.4 In all other circumstances where a change of use is proposed, the authority must be satisfied on reasonable grounds that the building in its new use will comply, as nearly as reasonably practicable, with every provision of the Building Code that relates to:
- means of escape from fire, protection of other property, sanitary facilities, structural performance, and fire-rating performance; and
  - access and facilities for people with disabilities (if this is a requirement under section 118); and
  - if the building complied with the other provisions of the Building Code immediately before the change of use, continue to comply with those provisions; or
  - if the building did not comply with the other provisions of the Building Code immediately before the change of use, continue to comply at least to the same extent as it did then comply.

### **4.2 The dispute**

- 4.2.1 The applicant states that the creation of additional bedrooms to the main house and the double garage do not constitute a change of use, and holds the view that the use remains SH.

4.2.2 The authority has likened the building to a boarding house. In its submission, the authority stated its view that the building is housing ‘independent and unrelated’ occupants and there has been a change of use to SA.

### 4.3 The uses under Schedule 2 of the Regulations

4.3.1 The dispute centres on whether there has been a change in the use category under Schedule 2 of the Regulations. It is not disputed by the parties that the building’s original use was SH.

4.3.2 The following table sets out the three use categories discussed in this determination as defined in Schedule 2 of the Regulations:

Use	Spaces or dwellings	Examples
SA (Sleeping Accommodation)	spaces providing transient accommodation, or where limited assistance or care is provided for people	motels, hotels, hostels, boarding houses, clubs (residential), boarding schools, dormitories, halls, wharehousi
SR (Sleeping Residential)	attached and multi-unit residential dwellings, including household units attached to spaces or dwellings with the same or other uses, such as caretakers' flats, and residential accommodation above a shop	multi-unit dwellings, flats, or apartments
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

### 4.4 The layout of the building

4.4.1 The layout of the building is a significant factor in determining whether a change of use has occurred, as it will influence the level of social cohesion and the occupants’ awareness of each other’s movements.

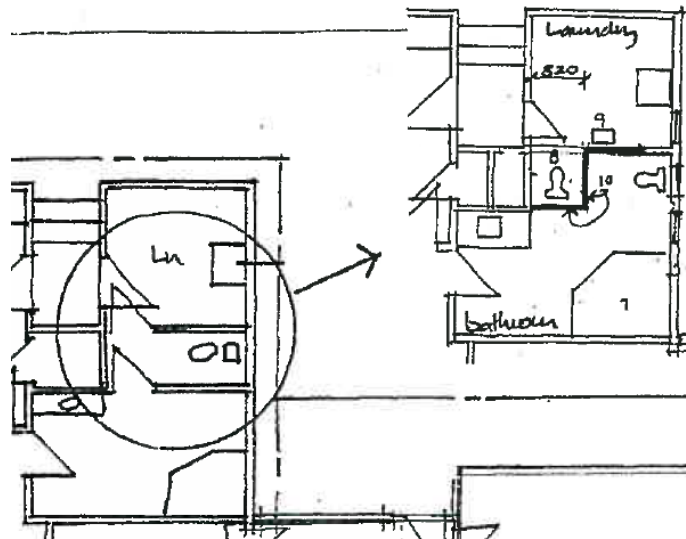
4.4.2 I discussed in Determination 2014/026<sup>7</sup>, where the shared areas are small I consider it is more likely that, while the residents may chat if they encounter each other, the shared areas are not likely to act as communal areas for gathering or living in. In this case the communal living space is small relative to the number of people occupying the main house and double garage.

4.4.3 Also, I note that only occupants in bedrooms 1- 5 have internal access to the communal living space. Those living in bedrooms 6 – 8 and 10 – 13 have to exit the building and re-enter it to access the living room and kitchen. Access to bedrooms 6 – 8 and 10 – 13 is also separate to the main house and further reduces the interaction between occupants; in particular bedrooms 10 – 13 have completely individual separate access.

4.4.4 The cooking facilities are limited in the buildings, and internal access to the main kitchen is only available to the occupants of bedroom 1 – 5. Due to the number of occupants I consider that the limited cooking facilities raise the risk of individuals using bench top appliances for cooking within their own rooms.

<sup>7</sup> Determination 2014/026 Regarding which fire risk group should be used in determining the compliance of proposed accommodation at 64A Rosella Road, Mangere East, Auckland (Ministry of Business, Innovation and Employment) 21 May 2014.

- 4.4.5 I note that kitchen and bathroom facilities are present in the upper level of the double garage, which could further discourage the occupants of bedrooms 6 – 8 and 10 – 13 from entering the main house to use the communal living spaces. Apart from the use of the laundry in the main house, the occupants of the converted garage could operate as a separate flat.
- 4.4.6 Although the applicant has stated that the laundry in the main house can only be accessed from the interior of the house, I note that the consented drawings for the building work carried out in 2015 show the internal doors removed and access by way of an external door at an entrance of the main house.



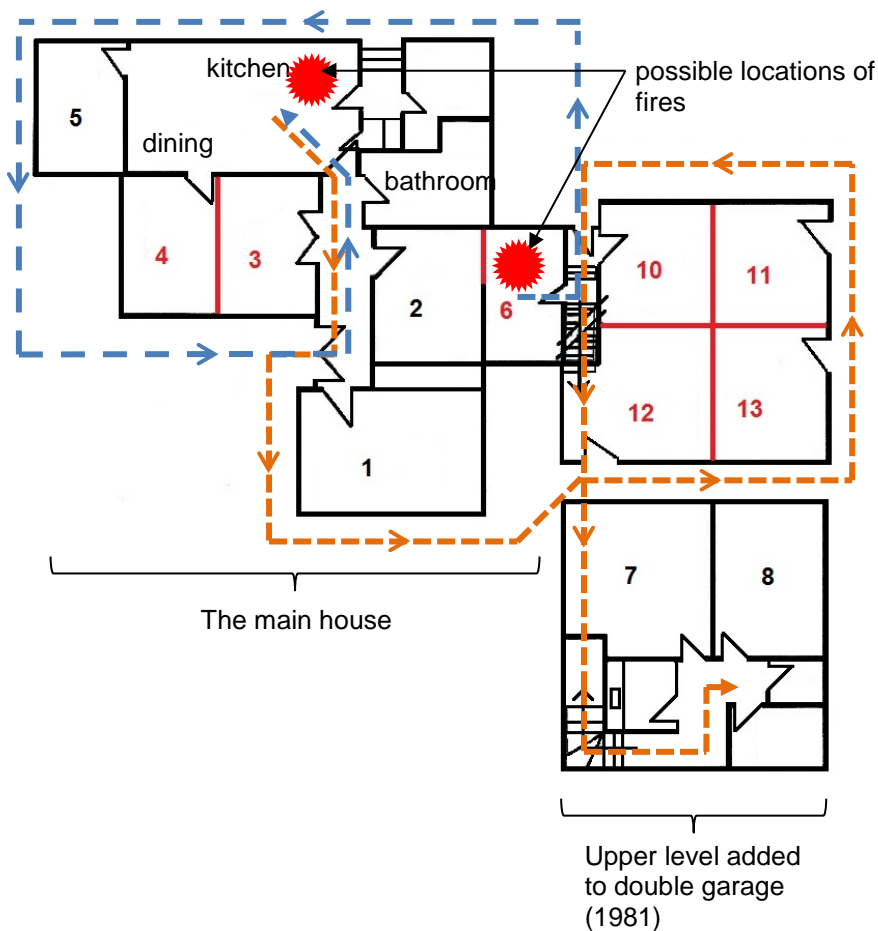
**Figure 2: Consented drawing of the altered laundry (not to scale)**

- 4.4.7 The layout of the building in this case does not appear to encourage social interaction, where the occupants can establish a connection and live alongside each other.
- 4.4.8 I am of the view, based on the number of occupants and layout of the building, the occupants are more likely to live independently of each other and be less aware of fellow occupants' presence and movements. There is a lower expected level of familiarity between the occupants, and less social cohesion than that which would ensure any individual becoming aware of fire would naturally alert and assist others within the building to escape.
- 4.4.9 The importance of social cohesion is discussed in guidance issued by the Ministry under section 175, *Acceptable Solutions C/AS1 – C/AS7 interpretations*<sup>8</sup> noted that because household units have “very low fire protection (minimum Type 1 alarm system)” a high degree of social cohesion and mutual responsibility between occupants is necessary to ensure they assist each other in a fire event. A high degree of social cohesion is justification for the lower fire protection requirements for household units to satisfy the Acceptable Solutions; wholly relying on occupants warning each other, being aware of the building and its escape routes and quickly evacuating (refer Appendix A).
- 4.4.10 To function as a household all occupants need to be known to each other to gain social responsibility to help each other in an emergency, and the layout of the

<sup>8</sup> Acceptable Solutions C/AS1 – C/AS7 interpretations: 1.7 Can key locks be provided on doors within household units or suites?  
<https://www.building.govt.nz/building-code-compliance/c-protection-from-fire/c-clauses-c1-c6/protection-from-fire-faqs/acceptable-solutions-cas1-cas7-interpretations/> (Ministry of Business, Innovation and Employment)



building is an influencing factor. I note that in this case, the layout of the building is such that in a fire event it would require an occupant to exit the building and then re-enter to alert others. I have shown two instances of a fire located in either the kitchen or bedroom 6, which would require an occupant to exit, and re-enter to alert others (see Figure 3).



**Figure 3: Outline of path to alert (not to scale)**

- 4.4.11 As previously discussed, the occupants' awareness of each other is reduced because of the building's layout, and subsequently reduces the ability of occupants to assist and alert each other in a fire event, which is only worsened by the lockable doors. The guidance previously discussed states that key locks on bedroom doors will slow the ability of other occupants to assist others and therefore key locks cannot be provided within a household unit without fire separations between bedrooms and exitways<sup>9</sup>. The guidance also notes that key locks are only permitted on doors between household units and final exits. In the event of a fire the lockable doors as well as further impeding the ability to alert others, they also indicate a lack of trust between individuals where locks are required to protect occupants' property.

## 4.5 SH (Sleeping Single Home)

- 4.5.1 The applicant has stated that there is a head tenant who has 'flatmates' and accordingly the use remains SH.

<sup>9</sup> Exitway is defined in Acceptable Solution C/AS2 as all parts of an escape route protected by fire or smoke separations, or by distance when exposed to open air, and terminating at a final exit.

- 4.5.2 A single flat would fall under the use SH if it is a detached dwelling where people live as a single household, or family. A flat can lend itself to being considered a single household where there is a level of interaction and community between the flatmates. In New Zealand, flats are often formed by groups of friends, or students attending universities or other educational institutions. It is typically the flatmates that select who they will share the flat with, and there is usually some level of social cohesion formed due to age, occupation, or a shared sense of belonging, alongside the sharing communal areas and contributing to common flat expenses and chores.
- 4.5.3 I consider the intended use, as described by the applicant, has some features that are similar to a flat, in that the occupants will have separate bedrooms and will share common facilities such as the kitchen and bathroom areas and communal living spaces. However, it has a larger number of occupants than is typical for a flat.
- 4.5.4 The applicant has submitted that the property is let to one individual who has agreements with the other occupants. The authority has submitted that it does not consider an agreement between the owner and occupant as evidence that a change of use has not occurred, and rather the layout and operation of the building is salient.
- 4.5.5 I concur with the authority that the primary factor in considering whether the building has undergone a change of use is not the agreements in place between the applicant and the occupants; however I also consider it relevant to acknowledge the agreement in place as being one indicator of the building's current use.
- 4.5.6 The tenancy agreement supplied by the applicant includes rules that place restrictions upon the occupants. In the 'Other terms of this tenancy' agreement, it listed the following 'behaviour' rules that the tenant must adhere to (emphasis mine):
- Named tenants only in rooms, **no overnight guests are permitted and all noise must cease at 10.00pm...**
- 4.5.7 In a flat situation, an occupant should know another occupant well enough to be able request that they lower their noise, and a level of courtesy is expected amongst a group of flatmates. It seems unusual that it needs to be included in the agreement with the head tenant.
- 4.5.8 In addition to the noise restrictions, according to the tenancy agreement, the occupants are also not allowed to have visitors to stay overnight. I am of the view that limiting the visitors who can stay the night is a highly unusual practice for a residential flat. It is unclear how this rule would be enforced unless it is a controlled situation, with a live-in manager or allocated occupant overseeing the other occupants. Therefore, I am of the view that limiting noise and placing restrictions on visitors are rules that are 'more akin to a commercial dwelling than a domestic one'.
- 4.5.9 The matter of tenancy agreements in relation to establishing the use of a building arose in *Queenstown-Lakes District Council v Wanaka Gym Ltd*<sup>10</sup>, which considered whether a building was a single household unit or similar to a boarding house. In that case it was observed that there is a distinction between what might amount to a student flat as opposed to a hall of residence, with one household involving a 'group of people who have agreed to live together jointly' and the other is 'effectively a series of different households...with a degree of communality'. The following factors were identified as relevant in the case:
- ...There is a significant degree of restriction as a matter of contract on the freedoms of the occupant which is inconsistent with people being resident in a household;...

<sup>10</sup> *Queenstown-Lakes District Council v Wanaka Gym Ltd*, CIV-2003-002-265

The fact that there is no necessary connection with the others residing in the house;

There is no agreement of the residents to reside together

It was also considered significant that the occupants were ‘not even allowed visitors to stay overnight’.

- 4.5.10 I agree with the approach taken in *Queenstown-Lakes District Council v Wanaka Gym Ltd*, and I am of the view this applies to the circumstances in this case.
- 4.5.11 The applicant enquired if the restriction on overnight guests and noise were to be removed would the Ministry still view that a change of use had occurred. Also, if the removal of the restrictions did not alter the Ministry’s view, the applicant enquired “what would the situation be” if also the bedroom door locks were removed.
- 4.5.12 I note that any proposals the applicant has in regards to changing the use of the building under the Regulations must be put to the authority for its consideration (refer paragraph 4.1). The applicant’s future proposals are outside the matter to be determined. In addition, my decision does not turn solely on the restrictions on overnight guests and noise, and the presence or absence of bedroom door locks; these issues are some of the indicators of how the building is occupied.
- 4.5.13 Given factors discussed above, the number of rooms, and the layout of the building, I am of the view there will be a lower level of social cohesion formed in this situation than in a typical flat. In my opinion the building cannot be correctly described as a “flat” and does not fall within the use category SH.

#### **4.6 SR (Sleeping Residential)**

- 4.6.1 A group of flats, where there are a number of household units within one building, falls under the use SR. Each individual flat will typically contain food preparation and sanitary facilities, and each flat or group of flatmates live independently of the other groups within the building. If the building in this case (the main house and double garage) contained two or more household units, it would fall under the use SR.
- 4.6.2 In this case the building does not appear to provide for a series of individual household units; although there are separate sanitary facilities in each of the buildings, there is only one laundry, one kitchen with cooking facilities (in the main house) and one kitchenette available to all of the occupants.
- 4.6.3 Given the number of rooms, the amenities available to the occupants in the main house and the converted double garage, and the layout of the building generally, I am of the view the building cannot be correctly described as containing two “flats” and it does not fall within the use category SR.

#### **4.7 SA (Sleeping Accommodation)**

- 4.7.1 The authority is of the view the building is being used as a boarding house and the correct use category is SA.
- 4.7.2 The term “boarding house” is used as an example for use category SA, and the use category is defined as ‘spaces providing transient accommodation or where limited assistance or care is provided for people. The term is not defined in the Act or Regulations, though it is referred to in the definition provided for “household unit” under section 7:

Household unit

(a) means a building or group of buildings, or part of a building or group of buildings, that is—

(i) used, or intended to be used, only or mainly for residential purposes; and

(ii) occupied, or intended to be occupied, exclusively as the home or residence of not more than 1 household; but

(b) does not include a hostel, **boarding house**, or other specialised accommodation. [my emphasis]

4.7.3 I have also considered the term in its ordinary and natural meaning, as well as its use in the Building Regulations 1992, Schedule 1 (“the Building Code”) and in the Acceptable Solutions for Clause C of the Building Code.

4.7.4 The *Oxford English Dictionary* defines “boarding house” as “a private house providing food and lodging for paying guests”. My understanding of the current common use of the term in New Zealand is that boarding houses:

a) typically provide accommodation for members of the public who have a bedroom within a building with shared facilities (for example a group kitchen)

b) usually involve more than six people accommodated in the one building

c) may be transient in nature, in terms of the length of stay

d) have no expected level of social cohesion between the occupants.

4.7.5 The term “boarding house” is also used in the Building Code in defining Classified uses:

2.0 Housing

2.01 Applies to buildings or use where there is self care and service (internal management)

2.02 Detached Dwellings

Applies to a building or use where a group of people live as a single household or family. Examples: a holiday cottage, **boarding house accommodating fewer than 6 people...**

3.0 Communal residential

3.0.1 Applies to buildings or use where assistance or care is extended to the principal users...

3.0.2 Community Service

Applies to a residential building or use where limited assistance or care is extended to the principal users. Examples: **a boarding house**, hall of residence...

4.7.6 As used in defining a classified use, the term boarding house includes situations where groups of people live together, either with limited care or assistance or not. In regard to the use of the term boarding house as an example in use category SA, it is a space providing transient accommodation.

4.7.7 Under section 115 of the Act, upgrading fire safety systems and features is one of the key areas triggered by a change of use, and I consider it salient to address being that it is a life safety issue rather than an amenity issue. I consider how the term “boarding house” is used in the Acceptable Solutions to Clause C of the Building Code. The Acceptable Solutions for Clause C are based around the concept of different buildings, or parts of buildings, belonging to different risk groups. Risk groups are allocated depending on the activities that will occur within the building or part of the building.

- 4.7.8 The term “boarding house” is referred to in the Acceptable Solutions C/AS1<sup>11</sup> and C/AS2<sup>12</sup>. There is a clear distinction made in the Acceptable Solutions around the risks in relation to the numbers of occupants in a boarding house. Boarding houses for fewer than six people are included in the Risk Group “SH” and the Acceptable Solution C/AS1 can be used as a means of compliance. Those with more than six people are included in Risk Group “SM”, which is outside the scope of C/AS1 and C/AS2 can be used, which generally has more onerous requirements.
- 4.7.9 The applicant has stated that the flatmates are not transient, and the building is their ‘principal place of residence’. I note that transience is not the sole determining factor when analysing if a change of use has occurred.
- 4.7.10 As discussed in Determination 2014/026, I considered that permanence is not only a matter of how long people stay in a place, but is also how they view and relate to the other occupants. An occupant who does not consider their accommodation to be permanent are considered more at risk of a fire, and are less likely to be familiar with escape routes.
- 4.7.11 The applicant referred to student flats where they reside in a house for a full academic year. I note that in a guidance document<sup>13</sup> produced by the Ministry, student hostels are considered temporary accommodation despite the fact that students may reside in the hostel for a full academic year. The reason it was included is because a student may only reside in the hostel for a “few weeks or months”.
- 4.7.12 I have previously discussed the level of social cohesion between the occupants (refer to paragraph 4.4), and I have noted that the layout of the building, including the lockable doors, limits the awareness and would not encourage social cohesion between the occupants that could be relied upon in an emergency.
- 4.7.13 I am of the view that this building is more akin to a boarding house than a single household based upon the permanence of the occupants and the layout of the building. The main house and double garage contain 12 bedrooms with 13 occupants living within the building, which is a higher occupancy than a typical household. Also, I consider the layout of the building is such that there is a significantly lower level of social cohesion between the occupants than what would be expected in a dwelling containing a single household. The lower level of social cohesion means the assumption of mutual responsibility between occupants in alerting and assisting others in a fire event in this building cannot be relied upon, and coupled with the fact that occupants may be transient; results in a higher fire risk to the occupants. Therefore, I consider that the building falls within the boarding house definition and subsequently falls within the use category SA.
- 4.7.14 Based on the information that has been provided, I am of the view that the conversion of the main house and double garage to contain 12 bedrooms has resulted in a change of use under the Regulations from SH to SA. As a result, the applicant was required give notice of the intention to change the use under section 114 of the Act and the provisions under section 115 apply.

## 5. What happens next?

- 5.1 As the applicant has not given written notice to the authority, the authority should issue a notice to fix under section 164 of the Act, because there are reasonable

<sup>11</sup> C/AS1 Acceptable Solution for Buildings with Sleeping (residential) and Outbuildings (Risk Group SH)

<sup>12</sup> C/AS2 Acceptable Solution for Buildings with Sleeping (non institutional) (Risk Group SM)

<sup>13</sup> Commentary for Acceptable Solutions C/AS1 to C/AS7 (Ministry of Business, Innovation and Employment) December 2013

grounds that a 'specified person' (in this instance the applicant) is 'contravening or failing to comply with this Act or the regulations...'

5.2 As I have determined that a change of use has occurred from SH to SA, it is now for the applicant to provide sufficient information to the authority for it to be able to satisfied that the building, in its new use, will comply under section 115:

- as nearly as reasonably practicable with the Building Code provisions relating to means of escape from fire, protection of other property, sanitary facilities, structural performance, fire-rating performance and access for people with disabilities
- to at least the same extent as before the change of use occurred in respect of the remaining Building Code provisions.

5.3 The applicant could assess the compliance of the building using C/AS2, which covers risk group – SM sleeping (non institutional) for transient and permanent accommodation. The following would need to be assessed:

- upgrades to the alarm system, with C/AS2 requiring a Type 5 alarm system
- establishing the level of compliance for the means of the escape from the buildings, which includes all active and passive protection features required to warn people of fire and to assist in protecting people from the effects of fire as they escape
- the smoke and fire separations that currently exist between the sleeping and non-sleeping areas, and what potential upgrades would be required.

## 6. The decision

6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority was correct in the proposed exercise of its powers of decision in requiring notification of a change of use under section 114.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 30 May 2017.

John Gardiner  
**Manager Determinations and Assurance**

## Appendix A: The legislation

A.1 The relevant provisions of the Building (Specified Systems, Change the Use and Earthquake Prone Buildings) Regulations 2005, include:

### Uses related to sleeping activities

Use	Spaces or dwellings	Examples
SC (Sleeping Care)	spaces in which people are provided with special care or treatment required because of age, or mental or physical limitations	hospitals, or care institutions for the aged, children, or people with disabilities
SD (Sleeping Detention)	spaces in which people are detained or physically restrained	care institutions for the aged or children and with physical restraint or detention, hospitals with physical restraint or with detention quarters, detention quarters in police stations, prisons
SA (Sleeping Accommodation)	spaces providing transient accommodation or where limited assistance or care is provided for people	motels, hotels, hostels, boarding houses, clubs (residential), boarding schools, dormitories, halls, wharehousi
SR (Sleeping Residential)	attached and multi-unit residential dwellings, including household units attached to spaces or dwellings with the same or other uses, such as caretakers' flats, and residential accommodation above a shop	multi-unit dwellings, flats, or apartments
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

A.2 The relevant provisions of the Building Act 2004 include:

#### 42A Building work for which building consent is not required under Schedule 1

- (1) Despite section 40, subject to the conditions set out in subsection (2) and whether or not a building consent would otherwise have been required, a building consent is not required for building work in the following categories:
  - (a) building work described in Part 1 of Schedule 1; or
  - ...
- (2) Subsection (1) is subject to the following conditions:
  - (a) the building work complies with the building code to the extent required by this Act:
  - (b) after the building work is completed, the building,—

(i) if it complied with the building code immediately before the building work began, continues to comply with the building code; or

(ii) if it did not comply with the building code immediately before the building work began, continues to comply at least to the same extent as it did then comply:

...

**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.

(3) A person commits an offence if the person fails to comply with subsection (2).

(4) A person who commits an offence under this section is liable on conviction to a fine not exceeding \$5,000.

**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

(b) in any other case, 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,—

(i) will comply, as nearly as is reasonably practicable, with every provision of the building code that relates to the following:

(A) means of escape from fire, protection of other property, sanitary facilities, structural performance, and fire-rating performance;

(B) access and facilities for people with disabilities (if this is a requirement under section 118); and

(ii) will,—

(A) if it complied with the other provisions of the building code immediately before the change of use, continue to comply with those provisions; or

(B) if it did not comply with the other provisions of the building code immediately before the change of use, continue to comply at least to the same extent as it did then comply



A.3 Schedule 1: Building work for which building consent not required, includes:

*Existing buildings: additions and alterations*

**8 Windows and exterior doorways in existing dwellings and outbuildings**

Building work in connection with a window (including a roof window) or an exterior doorway in an existing dwelling that is not more than 2 storeys or in an existing outbuilding that is not more than 2 storeys, except,—

(a) in the case of replacement, if the window or doorway being replaced has failed to satisfy the provisions of the building code for durability, for example, through a failure to comply with the external moisture requirements of the building code; or

(b) if the building work modifies or affects any specified system.

**11 Internal walls and doorways in existing building**

Building work in connection with an internal wall (including an internal doorway) in any existing building unless the wall is—

(a) load-bearing; or

(b) a bracing element; or

(c) a fire separation wall (also known as a firewall); or

(d) part of a specified system; or

(e) made of units of material (such as brick, burnt clay, concrete, or stone) laid to a bond in and joined together with mortar.

A.4 The relevant guidance from *Acceptable Solutions C/AS1 – C/AS7 interpretations*:

1.7 Can key locks be provided on doors within household units or suites?

The function of a household unit or suite is a high degree of social cohesion and mutual responsibility between occupants to assist each other in the event of fire. Suites and household units have very low fire protection (minimum of a Type 1 alarm system) and wholly rely on occupants warning each other, being aware of the building and its escape routes and quickly evacuating.

Key locks on bedroom doors will slow the ability of other occupants to assist others and therefore key locks cannot be provided within a household unit or suite without fire separations between bedrooms and exitways. To function as a household all occupants need to be known to each other to gain social responsibility to help each other in an emergency.

If there is any proposal to let bedrooms separately on short-term basis then the bedrooms cannot be within a suite and cannot be classed as permanent accommodation. Key locks are only permitted on doors between household units and final exits.

## A.5 The relevant definitions and comments from Acceptable Solution C/AS2:

**Household unit**

- (a) means a *building* or group of *buildings*, or part of a *building* or group of *buildings*, that is—
- (i) used, or intended to be used, only or mainly for residential purposes; and
  - (ii) occupied, or intended to be occupied, exclusively as the home or residence of not more than 1 household; but
- (b) does not include a hostel, boarding house, or other specialised accommodation.

**Suite** A *firecell* providing residential accommodation for the exclusive use of one *person* or of several people known to one another. It comprises one or more rooms for sleeping and may include spaces used for associated domestic activities such as hygiene and cooking.

**Comment:**

1. Bed numbers are limited to six in *risk group* S1 or 12 in *risk group* SM in accordance with C/AS2 and C/AS3. Examples may be found in hotels, motels and residential care facilities, such as old people's homes or in hospices providing temporary family accommodation.
2. It is assumed that the social cohesion of the occupants by virtue of the personal relationship (as family members, friends or associates) would ensure that any individual, becoming aware of *fire*, would naturally assist others within the *firecell* to escape. The term *suite* does not apply to a group of bedrooms where each room is available to different "key-holders". In some cases a *suite* may be a single bedroom.