



Determination 2018/015

Regarding a notice to fix and the refusal to issue a certificate of acceptance for alterations to a house at 34 White Swan Road, Mount Roskill, Auckland

Summary

This determination considers whether the authority was correct to issue a notice to fix in regard to unconsented building work and a change of use from a ‘sleeping single home’ to ‘sleeping accommodation’. The determination also considers the authority’s decision regarding the certificate of acceptance for the unconsented building work.



Contents

1. The matter to be determined	2
2. The building work and background	3
2.2 The existing house prior to 2012	3
2.3 The 2012 building consent application	3
<i>Figure 1: Existing house prior to the 2012 consent</i>	<i>4</i>
<i>Figure 2: The consent drawings at August 2013</i>	<i>5</i>
2.4 Consent Amendments B and D	6
2.5 Construction	7
2.6 The 2017 proposed resource consent	7
<i>Figure 3: The four proposed separate units at 15 June 2017</i>	<i>8</i>
2.7 The abatement notice	9
2.8 The notice to fix	9
2.9 Certificate of acceptance	10
3. The submissions	10
3.1 The applicant’s submission	10
3.2 The authority’s submission	11
4. The hearing and site visit.....	13
4.1 The hearing	13
4.2 The site visit	14
5. Discussion.....	14
5.2 Change of use.....	15
<i>Table 1: Use categories defined in Schedule 2 of the Regulations</i>	<i>16</i>
5.3 Classified use	20
<i>Table 2: Classified uses defined in Clause A1 of the Building Code</i>	<i>21</i>
5.5 Notice to fix	25
5.6 Certificate of acceptance	25
6. The decision	27
Appendix A.....	28
A.1 Relevant sections of the Act.....	28
A.2 Relevant clauses of the Building Code.....	29
A.3 Relevant clauses of the Building Regulations	30

Appendix B	31
B.1 As-built and 2016 consented floor plans.....	31

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, Katie Gordon, Manager Determinations, 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, Jayashree Limited (“the applicant”)
 - Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 The application for this determination arises from the following:
- Alterations to an existing building, commencing in 2015.
 - Before construction commenced, an amendment to the consent (“Amendment B”) was issued. The amendment was subject to a condition the altered house would be a “single household unit” for the purpose of the Act, and an encumbrance to that effect was registered on the property title in August 2015.
 - During construction a series of consent amendments were applied for and approved; two of these included significant changes to the size and internal layout of the house.
 - Alterations to the existing house were carried out intermittently from late 2015. When the alterations were substantially complete in June 2017, the applicant applied for resource consent to divide the altered house into a 4-unit development, through the construction of additional internal walls. Resource consent was refused. The authority subsequently issued an abatement notice under the Resource Management Act (“the RMA”) in August 2017 for the operation of a boarding house which was in breach of the District Plan.
 - On 26 September 2017 the authority issued a notice to fix for: building work carried out without building consent; building work not in compliance with the Building Code (First Schedule, Building Regulations 1992); and a change of use without written approval from the authority.
 - The applicant applied for a certificate of acceptance for the building work carried out without building consent, but the authority refused to issue the certificate.
- 1.4 This determination arises from the decisions of the authority to issue the notice to fix and to refuse to issue the certificate of acceptance. The authority considered the building had undergone a change of use under the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 (“the Regulations”) from a Sleeping Single Home (SH) to Sleeping Residential (SR), which resulted in the building having inadequate fire separations and fire resistance rated materials between various areas for its new use.

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.

- 1.5 The matters to be determined² are therefore the authority's exercise of its powers of decision in issuing notice to fix No. NOT21367031 and in refusing to issue the certificate of acceptance. In making my decision, I have considered the submissions of the parties and the other evidence in this matter.
- 1.6 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. Relevant sections of the Act and clauses of the Building Code are set out in Appendix A.
- 1.7 There are references in this determination to matters that relate to the Resource Management Act 1991 ("the RMA") and the Residential Tenancies Act 1986 ("the RTA"). While issues relating to those legislations are outside the ambit of this determination the references have been included to provide context to the contraventions described in the notice to fix.

2. The building work and background

- 2.1 The building is situated on a sloping site with access from the street via a shared driveway on the southwest boundary as shown in Figure 1 (over page). The site slopes gently from the front boundary down toward the southeast, with a steep bank along the rear boundary.

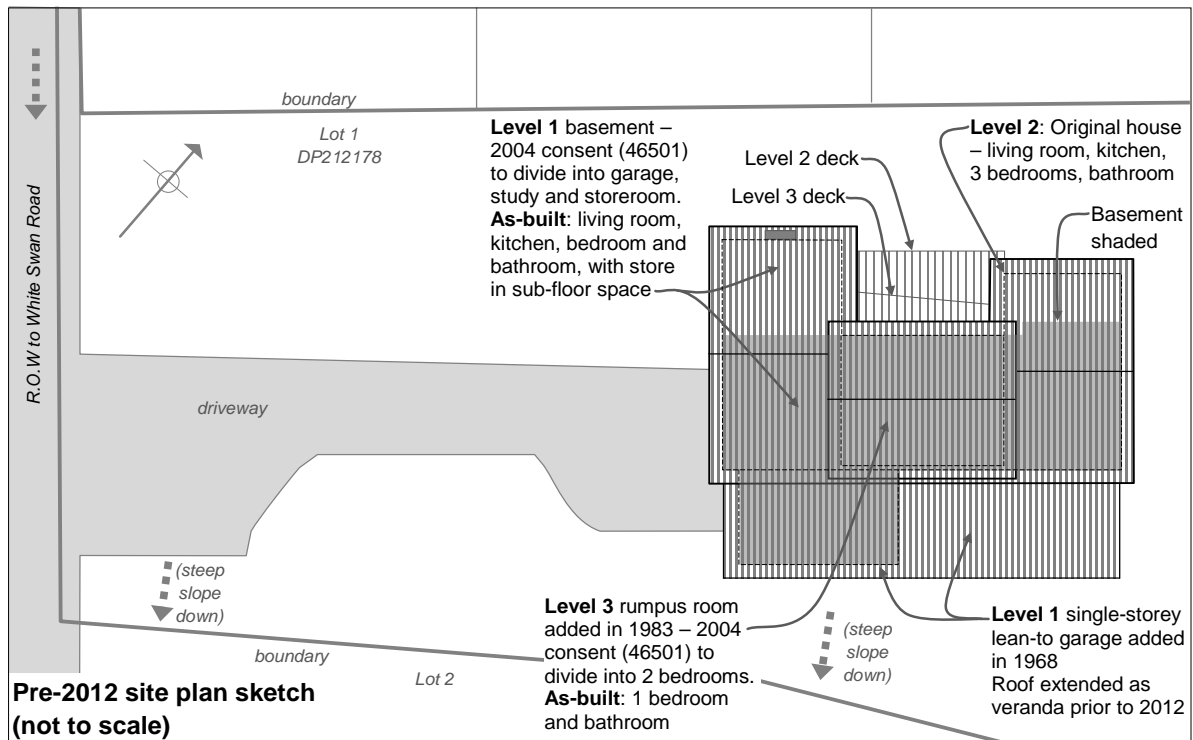
2.2 The existing house prior to 2012

- 2.2.1 The original three bedroom house was built on a large site during the 1960's, with a partial basement level garage and storage areas. Construction appears to have been traditional light timber frame with in-situ concrete foundations and basement walls, brick veneer cladding, a timber framed floor and a gable roof.
- 2.2.2 A small lean-to garage was added to the southeast wall in 1968. Other unrecorded minor alterations were apparently carried out over the next 15 years that included various interior alterations. In 1983, a partial upper level was added to provide a rumpus room; that work was carried out under a building permit.
- 2.2.3 After the site was subdivided in 2002, the former owners purchased the property in October 2002 and a building consent (No. 46501) was issued on 14 January 2004 for a 'minor addition to existing building'. Various changes were made either during or following these alterations without approval (see paragraph 2.3.3).

2.3 The 2012 building consent application

- 2.3.1 The applicant purchased the property in July 2012 and applied for a building consent in December 2012 for 'Alterations and additions to convert existing dwelling into two units, one new stormwater to stream'.

² Under sections 177(1)(b), 177(2)(f) and 177(3)(b) of the Act.

Figure 1: Existing house prior to the 2012 consent

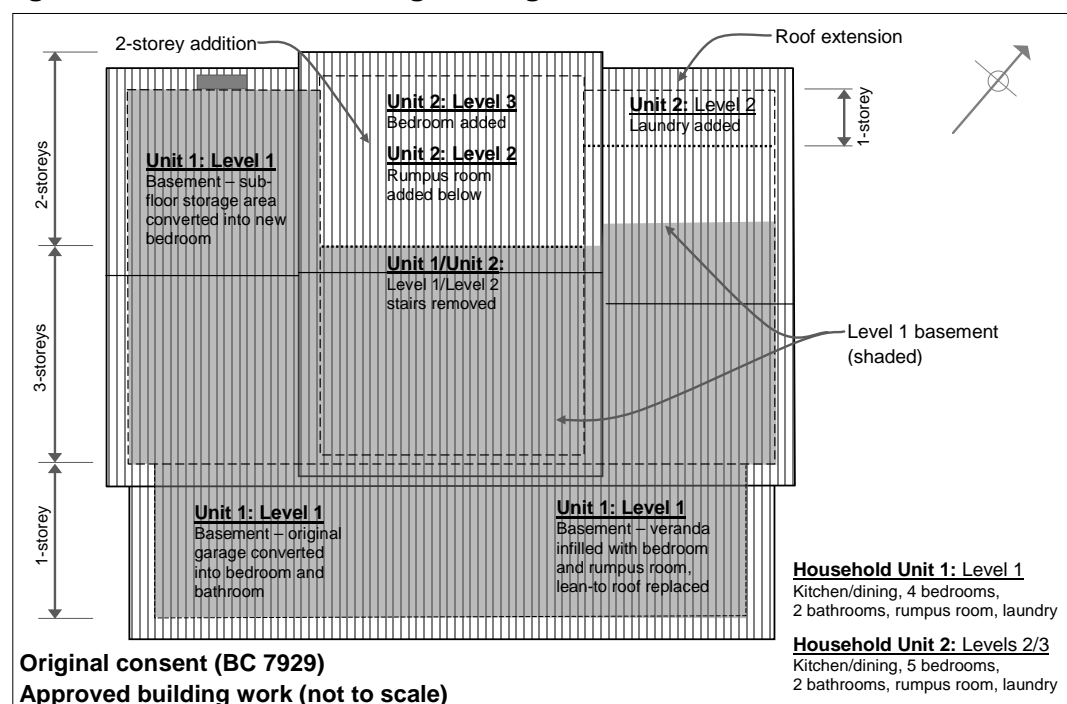
2.3.2 As shown in Figure 1, at the time building consent B/2012/7929 (“the 2012 building consent”) was applied for in 2012, the existing house provided:

- Level 1 (the basement):
 - a living room and kitchen
 - one bedroom, bathroom and laundry
 - a storage area in the east subfloor area
 - the single-storey lean-to garage
 - stairs up to the ground floor.
- Level 2 (the ground floor):
 - the original living room and kitchen to the southwest
 - the three original bedrooms to the northeast
 - the original bathroom and toilet to the southwest
 - stairs from the basement and up to the upper level
 - a deck to the northwest
- Level 3 (the upper floor):
 - one bedroom
 - ensuite bathroom and storeroom
 - a deck to the northwest.

2.3.3 In a request for further information on 3 January 2013, the authority referred to the plans of the existing house differing from ‘the existing approved plans under 1983 & 2004 consents.’

- 2.3.4 On 24 January 2013, the authority’s planner noted that the ‘proposed development as designed, appears to be capable of operating as four self-contained dwelling units’ [my emphasis] and the plans therefore required amendment or an application for resource consent. The planner advised that ‘work may not proceed’ because a section 37 notice had been placed on the building consent (refer Appendix A.1).
- 2.3.5 The authority wrote to the applicant on 12 June 2013, advising that under the RMA it considered the building work constituted multiple residential units. So, the section 37 certificate that had been placed upon the building consent application would not be removed ‘until substantial changes are made to the layout and design of the building’, or a resource consent was issued to convert the house for use as a multi-unit dwelling.
- 2.3.6 The applicant engaged a planning consultant (“the first planner”), who responded to the above on 3 July 2013. The planner noted the applicant accepted ‘the building and site are operated as two units’.
- 2.3.7 A revised site plan was approved by the authority on 11 July 2013 – the section 37 notice was removed and the authority issued building consent no. 2012/7929 to the applicant on 15 August 2013 for ‘Alterations and additions to convert existing dwelling into two units, one new stormwater to stream.’

Figure 2: The consent drawings at August 2013



- 2.3.8 As shown in the sketch in Figure 2, the 2012 building consent included demolition of the Level 1/Level 2 staircase, with:
- Level 1: Household Unit 1:
 - conversion of a sub-floor store into a new bedroom
 - conversion of the lean to garage into a new bedroom and bathroom
 - the veranda enclosed to provide a new bedroom and rumpus room.
 - Level 2/Level 3: Household Unit 2:
 - a single-storey extension to provide a new laundry to the north corner

- replacement of the northwest decks with a new 2-storey high addition to provide a new Level 1 rumpus room and new Level 2 bedroom
 - an extension to the Level 2 bathroom.
- 2.3.9 No work was carried out during the next 12 months. On 29 July 2014 the authority granted an ‘extension of time to commence building work’; however, the authority warned ‘any further extensions are unlikely to be considered’ and noted that work must ‘commence by 15 August 2015 or the consent will be lapsed.’

2.4 Consent Amendments B and D³

- 2.4.1 The authority received an application for an amendment to the consent on 22 May 2015 (no. 2012/7929/B) for ‘Amendment – Add new decks, revise internal layouts’.
- 2.4.2 In a letter to the applicant dated 9 July 2015, the authority attached a section 37 certificate, which required a resource consent ‘due to the internal layout and the number of bedrooms proposed’. The authority advised the proposal did not comply with the District Plan requirements in that it appeared to create a boarding house/hostel.
- 2.4.3 Following a meeting and email correspondence, it was agreed by the applicant and the authority the building consent application could proceed subject to an encumbrance on the property’s title, and the building consent would include a condition that the altered house would be a single household unit. The property’s title subsequently registered the following interest ‘Encumbrance to Auckland Council – 18.8.2015 at 1:13pm’.
- 2.4.4 On 21 July 2015 the authority issued building consent amendment 2012/7929/B. The amended building consent included the following condition:
- ... as a condition of granting this consent, the specified allotments (Lot DP 212178) must only be used as a single residential dwelling and by a single household.
- 2.4.5 A subsequent amendment was approved and another consent amendment (no. 2012/7929/D) was issued on 16 May 2016 for ‘Amendment – Internal revisions, extension to basement, re-roof’.
- 2.4.6 The drawings for Amendment B and Amendment D were stamped with ‘Approved as a Single Residential Unit Only’ and together covered the work indicated in Appendix B. The approved plans included two living areas, one kitchen, eleven bedrooms and seven bathrooms.
- 2.4.7 The approved building work included reinstatement of the Level 1/Level 2 stairs together with the following significant changes:
- Level 1 (the basement):
 - an extension to the north corner bedroom
 - the east rumpus room named as a bedroom
 - the laundry changed to an ensuite bathroom
 - a new expanded kitchen installed with an adjoining separate toilet.

³ Amendments to the consent A, C, F and G were rejected by the authority. Amendments E and H were sought and granted in relation to small alterations that did not substantially affect the layout.

- Level 2 (the ground floor): the stairs landing in the original hallway, with:
 - the original kitchen changed to a living area
 - the northwest rumpus room changed to a bedroom
 - a new roof deck along the southeast elevation.
- Level 3 (the upper floor): the stairwell landing in the original hallway, with:
 - a new large roof deck to the north corner.

2.5 Construction

2.5.1 Construction commenced in late 2015, and the authority recorded the following inspections:

- slab, foundations and concrete blockwork in November and December 2015
- cavity wrap inspections in March and June 2016
- preline and plumbing inspections from July to August 2016
- postline inspections in August and September 2016
- preline and plumbing inspections in December 2016 and March 2017
- fire-rated lining inspections in March 2017.

2.5.2 The 16 March 2017 inspection record for fire-rated linings noted:

1. SCOPE - Scope: Partial Inspection
2. FIRE - PS3 from system installer: To be provided at the next inspection
3. FIRE - Site observation from Engineer: To be provided at the next inspection

2.5.3 The inspection⁴ on 31 March 2017 failed, with the record noting that installation of basement fire-rated linings was not in accordance with the consented plans. According to the authority, the consented plans called for 1x16mm fire-rated plasterboard to the basement ceiling with a specific fixing pattern that had not been followed. Instead two layers of 13mm fire-rated plasterboard had been installed, with some areas missing the second layer.

2.5.4 A site meeting record on 6 April 2017 noted:

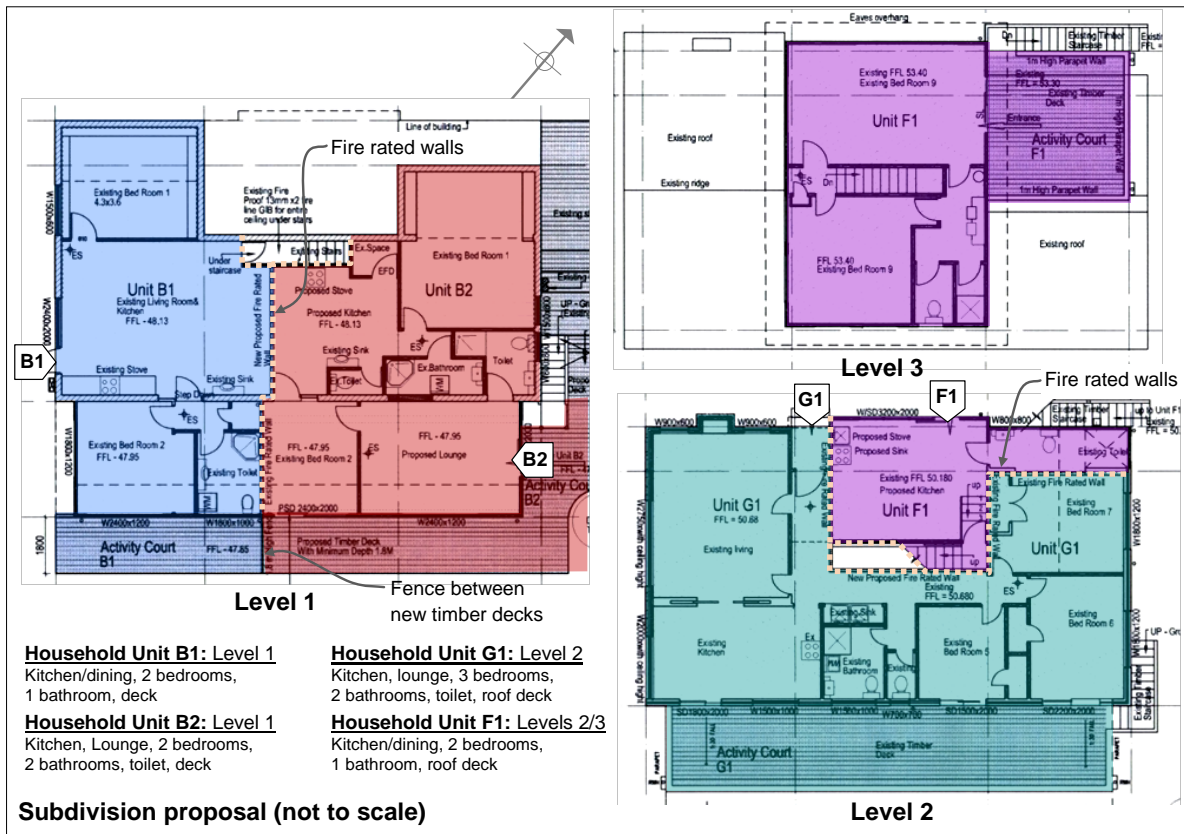
Fire report required,
 Penetration schedule required.
 As discussed with owner works can proceed when he is in receipt of the Fire Engineers report and site observations.
 The Fire Engineer must be approved by the [authority's] Register.

2.6 The 2017 proposed resource consent

2.6.1 In the meantime, the applicant's designer prepared plans for subdividing the house into four separate units as shown in Figure 3 (over page). On 20 June 2017 the applicant's design and planning consultants ("the consultants") submitted an application for resource consent for the four dwelling units. The application included drawings dated 15 June 2017 and an 'Infrastructure Assessment Report' dated 12 June 2017.

⁴ The Postline or fire rated linings inspection.

Figure 3: The four proposed separate units at 15 June 2017



2.6.2 The applicant’s proposal was to accommodate the following:

- Unit B1 in Level 1 (basement): new Unit B1/B2 fire-rated partition, with
 - living/kitchen area and separate entry to southwest
 - fire-rated staircase up to Level 2
 - two bedrooms and one bathroom
 - outdoor area new exterior timber deck to southwest.
- Unit B2 in Level 1 (basement): new Unit B1/B2 fire-rated partition, with
 - lounge and separate entry to southeast
 - kitchen with adjoining separate toilet
 - two bedrooms and two bathrooms
 - new exterior timber deck around east corner.
- Unit G1 in Level 2 (ground floor): new Unit G1/F1 fire-rated partition, with
 - living room and separate entry to northwest hallway
 - fire-rated staircase from Level 1
 - separate kitchen
 - three bedrooms, one bathroom and separate toilet
 - roof deck along southeast wall.
- Unit F1 in Levels 2 and 3: new Unit G1/F1 fire-rated partition, with
 - living/kitchen area in Level 2 with separate entry to northwest
 - one bathroom in Level 2
 - stairs up to Level 3

- two bedrooms and one bathroom in Level 3
- roof deck at Level 3 north corner.

2.6.3 I have seen no records of further inspections until the authority carried out a final inspection on 29 June 2017, which was failed due to unrelated matters.

2.7 The abatement notice

2.7.1 In the meantime, the authority wrote to the consultants on 14 July 2017, rejecting the proposed four dwelling units (see paragraph 2.6.1).

2.7.2 In order to assess compliance of the altered house with the authority's unitary plan rules, on 15 August 2017 a planning official from the authority visited the site and also spoke to several tenants present at the time. The official's observations included (in summary):

- the house includes ten bedrooms, each fitted with a door lock
- about 18 people live in the house
- nine bedrooms are currently tenanted
- Level 1 has two communal fridges with four in Level 2; all used by tenants
- Level 1 and Level 2 each have one communal bathroom shared by tenants, with some rooms having their own ensuite bathrooms
- kitchen facilities in Level 1 and Level 2 are communal
- tenancy agreements were apparently entered into at different times.

2.7.3 In a letter to the applicant dated 31 August 2017, the authority attached an abatement notice, and noted that the site visit had identified the dwelling was operating as a boarding house. The abatement notice dated 31 August 2017 was issued under section 322(1)(a)(i) of the RMA for the operation of a boarding house in breach of the District Plan.

2.7.4 The 'reasons for notice' described the above site visit and stated the notice was issued because:

...such an activity is a contravention of section 9(3) of the RMA and rule H4.4.1 (A12) in the Unitary Plan. Such a contravention is an offence.⁵

2.8 The notice to fix

2.8.1 The authority re-inspected the alterations on 29 August 2017 and the record noted the 'consent is made up of the original and amendment B, D, E and H' and stated:

...The plans state this building is a single household unit (SH). Having lockable bedroom doors would indicate a use of sleeping Accommodation (SA). If this is deemed to be a change of use then an amendment is required. [my emphasis]

The plans show one kitchen only so the extra kitchen needs to be removed or approved through an amendment.

2.8.2 In a letter to the applicant dated 26 September 2017, the authority noted the site visit had identified 'unconsented building works have been undertaken' and a notice to fix was attached to the letter.

⁵ It is not clear whether this notice has been followed up by the authority regarding the alleged offence.

2.8.3 The ‘particulars of contravention or non-compliance’ in the notice to fix cited breaches of sections 40, 17, 114 and 115 of the Act; stating ‘there has been a change of use of the building from Sleeping Single Home (SH) to Sleeping Residential (SR)’ without prior written notice and specifically identifying:

- Installation of fire separation walls and a fire door at the base of the internal stairs in the basement level
- The fire separation between the separately used areas of the building has not been formed to comply with the minimum requirement of clause C3 (fire affecting areas beyond the fire source)...
- You have changed the use of 34 White Swan Road, Mount Roskill, Auckland without receiving written authority from [the authority] that the building complies (as [near as is] reasonably practicable) with the provisions of the Building Code. In particular, airborne and impact sound, and fire rating performance.

2.8.4 The Ministry received an application for a determination on 29 September 2017, which was accepted on 5 October 2017. The Ministry sought further information from the parties, which was received on 19 October 2017.

2.8.5 In a letter to the parties dated 24 October 2017, the Ministry sought clarification that the applicant disputed the contraventions of Sections 17, 114 and 115 of the Act as identified in the notice to fix dated 26 September 2017.

2.9 Certificate of acceptance

2.9.1 The applicant applied for a certificate of acceptance for the construction of the fire-rated walls and fire door at the base of the stairs on the basement level. This work had been carried out in July 2017.

2.9.2 On 14 December 2017 the authority inspected the building and held a meeting with the parties on 15 December 2017. The authority stated its inspection had identified 28 tenants living at the property.

2.9.3 The applicant was informed at the conclusion of the meeting the certificate of acceptance application was refused because it was “difficult to determine compliance”.

3. The submissions

3.1 The applicant’s submission

3.1.1 In a statement dated 29 September 2017, the applicant explained the recent background to the abatement notice and the notice to fix, including the following comments (in summary):

- The recently renovated house has ‘13mm [fire-rated plasterboard] with double 13mm [fire-rated plasterboard] on all ceilings and outside perimeter walls’, and a fire door between ‘two proposed dwellings’.
- The building ‘is being converted into two dwellings as a permitted activity as per H4.4.1 (A5) of the Unitary plan’, with an amendment to the building consent soon to be lodged detailing that conversion. ‘Resource consent is being lodged to further convert the dwelling into 4 dwellings.’
- The allegation the house is used as a boarding house is denied. ‘The entire dwelling is rented as a single fixed term tenancy’, with the tenancy agreement ‘signed and accepted’ by all occupants, many of whom are long term.

- The rooms are not numbered or rented as separate tenancy agreements. There are no house rules governing the tenants nor are cleaning services provided for common areas, and only one bond is lodged for all tenants.
- 3.1.2 In a subsequent email to the Ministry dated 2 October 2017, the applicant stated that he disputed the contraventions of sections 17, 114 and 115 of the Act that were identified in the notice to fix.
- 3.1.3 In an email dated 4 January 2018 the applicant asked for the scope of the determination to be increased to include the authority's refusal of the certificate of acceptance.
- 3.1.4 The applicant provided copies of:
- some of the drawings relating to various consent amendments
 - some inspection records
 - some of the correspondence with the authority
 - photographs of the building work
 - various other letters, statements, and other information.

3.2 The authority's submission

- 3.2.1 The authority made no submission in response to the application, but provided access to the property file that contained additional information pertinent to this determination, including:
- information about the house prior to the original consent
 - correspondence regarding resource consent planning issues
 - correspondence with the applicant regarding various building issues
 - the original consent drawings and subsequent amended drawings
 - the 2012 building consent and consent amendments B, D, E and H
 - the inspection and site meeting records
 - correspondence regarding the encumbrance against the property title
 - the various resource consent reports
 - drawings of the proposed conversion into four separate units
 - the abatement notice dated 31 August 2017
 - the notice to fix dated 26 September 2017
 - various other statements and information.
- 3.3 A draft determination was issued to the parties for comment on 23 February 2018. The draft concluded the building had undergone a change of use from SH to SA, and there was insufficient information to establish that the framing will comply with Clause B1 (Structure) and the fire-rated lining and door will comply with Clause C3 (Fire affecting areas beyond the fire source).

3.4 Submissions in response to the draft determination

3.4.1 On 26 February 2018 the applicant responded that he did not accept the decision in the draft determination and requested a hearing, submitting:

- The comments regarding the transience of the occupants are speculative. The number of tenants is nearly constant.
- The occupants are responsible adults and have been living together for more than a year. They live together as a “cohesive group” and allocate cleaning jobs themselves.
- There is a single fixed term tenancy agreement and the building is occupied as a single household.
- In a recent Tenancy Tribunal hearing, the occupants stated they knew each other well and lived together “as a group”.
- The authority should accept the certificate of acceptance because the fire-rated systems throughout the building were installed correctly by the certified builder.
- The authority should dismiss the notice to fix and accept the certificate of acceptance application. Also, it should carry out the final inspection and issue the code compliance certificate.

3.4.2 On 6 March 2018 the applicant provided an excerpt from the transcript of an Order of the Tenancy Tribunal⁶ (“the Tenancy Tribunal Order”). The excerpt showed the adjudicator asked a series of questions about the occupation of the building. It was established the occupants did not know each other and each had made separate rental applications before moving into the building. One occupant stated she considered the other occupants as a family because they now knew each other. The applicant provided the full transcript in response to my request.

3.4.3 I note the same occupant who stated she considered the other occupants as family also stated:

...believe that there are a lot of families staying there so even (inaudible ...) cleaning it is difficult that more members are there (inaudible ...) arrange an agreement to keep the house clean because more than 10 members staying in the house, so we basically feel it's more like a boarding house.

The full transcript also records that each occupant pays rent separately to the applicant as the landlord.

3.4.4 On 26 March 2018 the authority accepted the draft determination's decision.

⁶ Order of the Tenancy Tribunal, Application Number: 4088218, 3 July 2017. The Tribunal's findings are considered relevant to this determination because they concern the way the building is being tenanted by the applicant in its current configuration.

4. The hearing and site visit

4.1 The hearing

4.1.1 On 26 March 2018, a hearing was held in Auckland at the applicant's request. This was attended by the following people:

- the applicant
- one officer of the authority and the authority's solicitor
- myself accompanied by one officer of the Ministry.

4.1.2 All attendees spoke at the hearing and were of assistance to me in preparing this determination. I have summarised the submissions made by the parties in the following paragraphs.

4.1.3 Regarding the certificate of acceptance:

The applicant

- The authority must give specific reasons for refusing the certificate of acceptance.
- The authority can employ non-destructive methods, such as radioscopy or x-ray, to inspect the completed wall instead of refusing to grant a certificate of acceptance. (The applicant provided information regarding the non-destructive methods of inspection he discussed in the hearing.)
- The rest of the building is constructed with fire-rated linings that complied with the manufacturer's specification. So, there is no reason why this one section of wall would not have been installed correctly.
- A licensed building practitioner installed the fire door and wall.
- The wall is not a load bearing wall.

The authority

- Inspecting the wall before the linings are installed is necessary to check the appropriate fixings and bolts have been used. The fire-rated system requires specific fixings and bolts to meet the manufacturer's specification.
- The alternative inspections methods proposed by the applicant to inspect the fixings would not indicate whether the correct fixings and bolts had been used.

4.1.4 In regard to the change of use:

The applicant

- The notice to fix relied on the building being considered a boarding house. The Ministry has stated it is not a boarding house.
- The draft determination was speculative in regard to the transience of occupants; many have lived there together for more than a year.
- When a new occupant joins they have to be accepted by the existing occupants. Generally, new occupants were found by the existing occupants.
- The transcript from the Tenancy Tribunal is evidence the occupants live as a cohesive group.
- The building has a SH use and operates as one building with two kitchens.

- There are 17 people currently living in the building.
- As a precaution the entire building is fire-rated and each floor has its own means of escape.

The authority

- The authority inspected the building in February 2017 and noted the occupants didn't appear to know each other. Also, there were families, including a family with a child, living in one room; this concerned the authority as the building consent was not granted for this type of use.
- There were decks that were not constructed as per the consented plans, and in some areas lacked adequate barriers.
- There were numerous inconsistencies between the building consent and what was constructed.
- Every bedroom had its own key.
- The authority considered the transcript provided by the applicant showed the occupants were not living in a family-like arrangement.

4.1.5 There was a discussion regarding the boarding house definition under the RTA and the ongoing High Court case regarding the Tenancy Tribunal Order. The applicant queried whether the determination would be invalid as the fixed term tenancy agreements were ending in April 2018.

4.2 The site visit

4.2.1 A site visit to the building was undertaken at the conclusion of the hearing. The invitation to visit the site was extended to all attendees at the hearing, and all except the authority's solicitor chose to attend.

4.2.2 The site visit included a walk through the building to view the communal areas, the decks, and outside areas. The officer of the authority identified additional areas of possible non-compliance regarding the exterior stairs and decks.

4.2.3 During the site visit, the applicant advised he intended to change the tenancy arrangements after the fixed term tenancy agreement ended. He noted he was considering appointing himself the head tenant, and signing the occupants on as his flatmates (though he did not intend to reside in the building).

4.2.4 I have taken the submissions from the parties into account and amended the final determination as appropriate.

5. Discussion

5.1 The matter in dispute is whether the authority correctly exercised its power in its decisions to issue the notice to fix and to refuse to issue the certificate of acceptance. In deciding this matter I must therefore consider:

- whether there has been a change of use under the Regulations. This requires that I consider:
 - whether there has been a change of use category as defined in Schedule 2 of the Regulations, and

- if there has been a change of use, whether the requirements for compliance with the Building Code in relation to the new use are additional to, or more onerous than, the requirements for compliance in relation to the old use;
- whether the unconsented building work complies with the Building Code;
- whether the consented building work complies with Clause C3 of the Building Code.

5.2 Change of use

5.2.1 There are a number of different categorisations of a building's use in or for the purposes of the Act, the Regulations, and the Building Code. In this instance, the categories that are relevant in this discussion include:

- the uses of buildings, SH (Sleeping single home), SR (Sleeping Residential) and SA (Sleeping Accommodation) defined in Schedule 2 of the Regulations, which are for the purpose of making decisions regarding buildings undergoing a change of use
- the Classified Uses, such as Housing, and Communal residential are defined in Clause A1 of the Building Code – for the purposes of applying the performance requirements of the Building Code.

5.2.2 In the following paragraphs, I consider which of the use categories defined in Schedule 2 of the Regulations applies to this building, and in paragraph 5.3 I consider the appropriate classified use.

5.2.3 Under section 114, if an owner is planning to change the use of a building as defined in Schedule 2 of the Regulations, the owner must provide written notice to the authority. An owner must not change the use of the building unless the authority has given written notice that the building in its new use will comply to the extent required by section 115.

5.2.4 Section 5 of the Regulations provides:

For the purposes of sections 114 and 115 of the Act, change the use, in relation to a building, means to change the use (determined in accordance with regulation 6) of all or a part of the building from one use (the old use) to another (the new use) and with the result that the requirements for compliance with the building code in relation to the new use are additional to, or more onerous than, the requirements for compliance with the building code in relation to the old use.

5.2.5 Accordingly, I must consider whether the building's use as defined in Schedule 2 of the Regulations has changed, and whether the Building Code requirements in its new use are additional to or more onerous than the requirements in its old use. For the purpose of establishing the performance requirements of the Building Code that apply in the building's new use I must consider what is the correct classified use under Clause A1 (refer Appendix A.2).

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

Table 1: Use categories defined in Schedule 2 of the Regulations

Use	Spaces or dwellings	Examples
<i>Uses related to sleeping activities</i>		
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
SR (Sleeping)	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
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

- 5.2.7 It is not disputed the house when constructed had a use "SH". I note the authority approved a change of use to SR (see paragraph 2.3.7), but later reversed its decision in amendment B.
- 5.2.8 Based on the contravention identified in the notice to fix, the authority is of the view the use of the building has changed from SH to SR, however I note the final inspection recorded the use had changed to "SA".
- 5.2.9 In the applicant's submission he stated the building is being converted into two dwellings, which would change the use to SR, but rejects that it is a boarding house which would have a use of SA. In the following paragraphs I discuss the layout of the building in relation to the occupants' use of the building, and I consider in turn each of the use categories under the Regulations.

The layout of the building

- 5.2.10 The layout of the building is a significant factor, but not the only factor, in establishing whether the building is occupied as a single household and in determining whether a change of use has occurred. The layout of a building influences the level of social cohesion and the occupants' awareness of each other's movements.
- 5.2.11 In this case, there are kitchen, laundry and bathroom facilities on basement and ground floor levels, and separate access from the outside is available to both. On the first floor there is a sink and bench, as well as a laundry machine⁷. I note also the

⁷ An advertisement posted on Trade Me dated 21 April 2017 has a photograph of a sink, benchtop and laundry machine on the first floor. (See also paragraph 5.2.18)

locking of the fire-rated door between the basement and ground floor would enable these levels to operate separately from each other.

- 5.2.12 Given the layout of this building it is unlikely that the occupants of each level would socialise on different levels to their bedrooms. The site visit revealed the communal areas on the basement and ground floor have less space than shown on the plans. Each area contains numerous fridges and storage units, which limits the seating in the communal areas. Therefore, I am of the view the shared areas, kitchen, living and dining area, will be unlikely to act as communal areas for the occupants.
- 5.2.13 As an aside, I note also the resource consent documentation shows a future change of use is proposed to convert the building into four separate units.

SH (Sleeping single home)

- 5.2.14 The applicant is of the view the use of the building is unchanged from the original SH use. For the use to fall within this category the occupants must live as a “single household or family”.
- 5.2.15 The building at this time is not solely occupied by one family, so the question is whether the occupants can be considered a “single household”. What constitutes a single household was considered within *Queenstown-Lakes District Council v The Wanaka Gym Limited*⁸. The Judge observed that determining whether a single household existed relied on a “combination of considerations including a degree of permanence in the residents, a connection with the other residents other than simple proximity, and an element of living together jointly”.
- 5.2.16 A “flat” can lend itself to being considered a single household where there is a level of interaction and community between flatmates. In previous determinations⁹ I have considered a “flat” means a residence of a group of people who have chosen to live together in a “family-like arrangement” with a similar atmosphere of trust, harmony and affection.
- 5.2.17 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.
- 5.2.18 I must now consider the evidence regarding the relationship between the occupants of this building, and whether they operate as a single household. I consider the following is relevant:
- The occupants are expected to obtain accommodation individually from the applicant.
 - An advertisement¹⁰ posted on Trade Me (dated 21 April 2017) stated the building can accommodate “26 flatmates”.
 - The authority’s site visit in August 2017 identified there were about 18 occupants living in the building at that time.
 - The authority’s site visit in December 2017 identified 28 occupants living in the building at that time. (This is disputed by the applicant.)

⁸ Queenstown-Lakes District Council v Wanaka Gym Ltd. CIV-2003-002-265 (18 November 2008)

⁹ Determination 2007/111 Fire safety provisions for two relocated buildings to be used as staff accommodation at Lakefront Drive, Te Anau (Department of Building and Housing) 17 September 2007.

¹⁰ <https://www.trademe.co.nz/flatmates-wanted/auction-1308077064.htm?rsqid=730d295273574c1b9f0d5abc59fbc029>

- The applicant confirmed 17 people were living in the building at 26 March 2018.
- A Tenancy Tribunal order (dated 3 July 2017) noted the occupants stated they had “completely separate lives and did not know each other before they moved in”¹¹.

- 5.2.19 The applicant has presented the fact the dwelling is rented on a single fixed term tenancy agreement as evidence it is a single household. However, the applicant acknowledged during the Tenancy Tribunal hearing that 10 occupants were named on one tenancy, but other agreements for the same tenancy named different occupants¹². Also, the occupants stated they replied to an advertisement and signed a blank document that over the weeks other occupants also signed as they moved in¹³ – they did not jointly agree to live together. Consequently, I consider the single fixed term tenancy agreement signed by the occupants is not sufficient evidence the occupants share a familial relationship.
- 5.2.20 I do not consider the occupants will have any reason to establish the familial relationships that would be expected of a “single household”. Based upon the number of occupants and how they acquire accommodation, and in conjunction with the building layout, I am of the view there is a lesser likelihood of occupants knowing or getting to know each other than would be the case in a flatting situation.
- 5.2.21 In conclusion, I consider the occupants do not live as a single household, and the building no longer falls within use category SH.
- 5.2.22 I consider it salient to comment on the applicant’s proposal to alter the tenancy arrangements to confirm a SH use. The applicant stated he would appoint himself the head tenant (not live in the building), and have the other occupants as flatmates.
- 5.2.23 A similar scenario was discussed in Determination 2017/036¹⁴, where a head tenant lived in a building that housed 14 people. The determination stated the agreements provide an indication of the building’s current use but the agreements are not the primary factor in considering whether the building has undergone a change of use. The applicant’s proposed alteration of the tenancy arrangements alone is unlikely to be sufficient to establish a SH use when the layout and occupation of building will remain unchanged.

SR (Sleeping residential)

- 5.2.24 I now turn to the question of whether the building’s use falls within the SR category.
- 5.2.25 Whereas SH covers detached dwellings that are separated by distance, SR concerns multi-unit dwellings and other residential dwellings that are attached. Residential dwellings, e.g. someone’s home, fall within use category SR when they are adjacent to another space with a similar or different use, reflecting the increased risks to life safety and other property.
- 5.2.26 For example, 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

¹¹ Order of the Tenancy Tribunal, Application Number: 4088218, 3 July 2017. The Tribunal’s findings are considered relevant here because they concern the way the building is being tenanted by the applicant in its current configuration.

¹² Ibid.

¹³ Ibid.

¹⁴ 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 (Ministry of Business, Innovation and Employment) 30 May 2017

independently of the other groups housed within the building. If the building in this case contained two or more household units, it would fall under the use SR.

- 5.2.27 In this case, the building layout after the alterations and the amenities available provides for a minimum of two individual household units. The basement and ground floors both have kitchens and laundries, and separate access (I note the first floor also appears to have kitchen and laundry facilities). Also, there is a door at the base of the stairs on the basement level separating the basement level from the other levels, and it is reasonably foreseeable the door would be locked, thus dividing the house into two separate units.
- 5.2.28 Taking into account the number of bedrooms, the amenities available on each floor, the fire-rated door and the layout of the building generally, I consider the building could be described as a multi-unit dwelling and fall within the use category SR.
- 5.2.29 However, I do not believe there are two adjacent household units within this building. I consider the Judge's comments in *Queenstown-Lakes District Council v The Wanaka Gym Limited* continue to be relevant:

As our lives become more complicated and the circumstances under which people choose to live together become more and more diverse, it is less and less easy to determine what amounts to a household.

- 5.2.30 A household unit is defined in the Act:
- means a building or group of buildings, or part of a building or group of buildings, that is—
- (i) used, or intended to be used, only or mainly for residential purposes; and
- (ii) occupied, or intended to be occupied, exclusively as the home or residence of not more than 1 household; but
- (b) does not include a hostel, boardinghouse, or other specialised accommodation

- 5.2.31 In this case I do not consider each level is the exclusive residence of only one household. With the high and varying numbers of occupants, and likely multiple occupants per bedroom, I consider it unlikely the occupants live as a single household in either the basement level or the ground/first floor level. I cannot clearly establish a single household unit on any level in this building.
- 5.2.32 The SR category would apply if there were adjacent household units, but is not appropriate when household units cannot be established. In this case, I do not believe SR is the appropriate use classification under the Regulations.

SA (Sleeping Accommodation)

- 5.2.33 In my view the use in this particular set of circumstances fits more appropriately within the SA category.
- 5.2.34 This category is separated from SH and SR because it is no longer limited to only household units. The examples provided in the use category SA are either where occupants require limited assistance or care, or the accommodation is available to the public, such as motels, hotels, and boarding houses etc¹⁵.
- 5.2.35 Regardless of whether the occupants are transient, the other criterion is if “limited assistance or care is provided for people”. The phrase “limited assistance or care” is not defined in the Act or Building Code and must be interpreted in its context.

¹⁵ The Tenancy Tribunal order found the occupants were living in a boarding house arrangement under the RTA and could give 48 hour notice to vacate the building, which would indicate transient occupants. However, this order is currently being appealed in the High Court.

Taking into account the use groups SC – Sleeping Care, which is for those spaces such as hospitals or care institutions where people are provided with special care or treatment, and SD – Sleeping Detention, in which people are detained or physically restrained, I consider “limited care or assistance” to mean some form of help is extended to the occupants less than that provided in the SC or SD use categories.

- 5.2.36 Boarding schools, dormitories and halls of residence are examples of Sleeping Accommodation where limited assistance or care is provided to children or young adults who reside in these places.
- 5.2.37 Buildings under uses SC and SD have occupants that are likely to require physical assistance in an emergency, whereas occupants of buildings with an SA use may need only limited assistance, such as guidance on where to go in an emergency event because they are transient, unfamiliar with the environment, or as in the case of children or young adults are more likely to panic.
- 5.2.38 While I have not been provided any evidence in this case that suggests there is a level of care or assistance similar to that which would be extended to children or young adults; I am of the view the use of the building falls within SA. My view is based on the intent of the Regulations to require upgrades when the use of a building changes to one with increasing safety and health risks.
- 5.2.39 I acknowledge the description of SA limits it to only buildings where transient accommodation or limited care or assistance is provided. However, given the reliance on the effective behaviour of occupants in a household unit in regard to life safety in SH and SR when compared to a group of disparate people’s lack of effectiveness, it only leaves SA. I conclude therefore, the use has changed from SH to SA under the Regulations.
- 5.2.40 The provisions of section 114 and section 115 are only triggered if the new use has more onerous or additional performance requirements than the old use. In order to establish whether those sections are triggered, I must now turn to the classified uses within Clause A1 to establish the performance requirements in the new use.

5.3 Classified use

- 5.3.1 The classified use is determined by the intended use of the building. I have noted in previous determinations¹⁶ it is not only the particular function that an owner may be using a building for at any particular point in time but also a building’s physical configuration and attributes (and/or the plans and specifications for proposed building work) that determines the various use categories. The layout of the building influences the level of social cohesion and the occupants’ awareness of each other’s movements, which along with the operation is a significant factor in determining the building’s use.

¹⁶ Determination 2011/069 Regarding conditions to a building consent and the use of a building (Department of Building and Housing) 12 July 2011, and 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 (Ministry of Business, Innovation and Employment) 30 May 2017

5.3.2 The classified uses considered in this determination are as follows:

Table 2: Classified uses defined in Clause A1 of the Building Code

Classified use	Examples
2.0 Housing	
2.0.1 Applies to buildings or use where there is self care and service (internal management). There are three types:	
2.0.2 Detached dwellings Applies to a building or use where a group of people live as a single household or family.	a holiday cottage, boarding house accommodating fewer than 6 people, dwelling or hut
2.0.3 Multi-unit dwelling Applies to a building or use which contains more than one separate household or family.	an attached dwelling, flat or multi-unit apartment
2.0.4 Group dwelling Applies to a building or use where groups of people live as one large extended family.	within a commune or marae
3.0 Communal residential	
3.0.1 Applies to buildings or use where assistance or care is extended to the principal users. There are two types:	
3.0.2 Community service Applies to a residential building or use where limited assistance or care is extended to the principal users.	a boarding house, hall of residence, holiday cabin, backcountry hut, hostel, hotel, motel, nurses' home, retirement village, time-share accommodation, a work camp, or camping ground.
3.0.3 Community care Applies to a residential <i>building</i> or use where a large degree of assistance or care is extended to the <i>principal users</i> . There are two types: (a) Unrestrained; where the <i>principal users</i> are free to come and go (b) Restrained; where the <i>principal users</i> are legally or physically constrained in their movements.	(a) hospital, an old people's home or a health camp (b) a borstal or drug rehabilitation centre, an old people's home where substantial care is extended, a prison or hospital.

Detached dwelling

5.3.3 The criterion for detached dwelling is that a group of people live as a 'single household or family'. I have already established the occupants are not living as a single household.

5.3.4 The following facts confirm this view:

- the occupants do not enter into a single tenancy agreement as one flat
- they have limited choice regarding the other occupants
- the high number of occupants
- the duplication of facilities on the basement and ground level

- the view of the occupants that they were living in a boarding house arrangement and have separate lives
- there are locks on the doors, which suggests a low level of trust.

5.3.5 Based on the occupation and layout of the building, I am of the view 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.

5.3.6 The importance of social cohesion is discussed in guidance issued by the Ministry under section 175, *Acceptable Solutions C/AS1 – C/AS7 interpretations*¹⁷. The guidance noted, because detached dwellings 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; it relies on occupants warning each other, being aware of the building and its escape routes and quickly evacuating.

5.3.7 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 building is an influencing factor. I note that in this case, the layout of the building, with separate entrances on each level, lockable doors and the number of occupants is such that it would not be clear who was present at any given time, and alerting others would be difficult.

5.3.8 I conclude therefore the building's use does not fall under the classified use “detached dwelling”.

Multi-unit dwelling

5.3.9 The performance requirements for multi-unit dwellings are similar to detached dwellings, but with more onerous performance requirements of the Building Code relating to fire and noise separation between household units.

5.3.10 If this building was two flats, as discussed in paragraphs 5.2.9 and 5.2.27, it would fall under the use “multi-unit dwelling”. Each unit would typically contain food preparation and sanitary facilities, and each flat or group of flatmates live independently of the other groups within the building.

5.3.11 In this instance, as previously described in paragraph 5.2.31 the building does not operate as two flats, nor does it appear to provide for a series of individual household units. Therefore, I am of the view the building cannot be correctly described as containing multiple units and does not fall within the classified use “multi-unit dwelling”.

¹⁷ 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)

Group dwelling

- 5.3.12 Based upon the high number of occupants, I considered whether the use would fit in the classified use “group dwelling”. There are higher performance requirements related to this classified use because of the increased number of people and the effect this has on escape times in fire events.
- 5.3.13 In Determination 2011/069, I provided a broader interpretation regarding what constitutes a “group”:
- Groups of people could encompass people undertaking similar work together, people of different nationalities who live together in groups, or groups of people in particular relationships.
- 5.3.14 The previous determination recognised there were reasons beyond familial relationships for people to live as one large extended family. This interpretation reflects the shared purpose and/or necessary cooperation to achieve a certain standard of living (such as in a commune) exhibited in group dwellings.
- 5.3.15 I do not believe the building falls within this classified use. I have seen no evidence the occupants as described, and rather to the contrary there is evidence the occupants live independently of one another.

Community service

- 5.3.16 I now consider whether the building falls within the classified use “community service”.
- 5.3.17 One of the examples given for community service is a boarding house. The term ‘boarding house’ has no definition under the Act or Building Code¹⁸. The *Oxford English Dictionary* defines “boarding house” as “a private house providing food and lodging for paying guest”.
- 5.3.18 The applicant has stated that he is not running a boarding house. Using the ordinary and natural meaning of the word I would agree this is correct.
- 5.3.19 However, the term “boarding house” is only an example to illustrate the types of uses that fall under “community service”. The examples within Clause A1 are not exhaustive. Just because the building is not a ‘boarding house’ in the ordinary and natural meaning of the term does not necessarily mean it does not fall within the classified use community service.
- 5.3.20 To determine whether the building falls within this use, I analysed the examples to understand the services expected in relation to the “limited care or assistance”, and I compared the examples against those in “community care”, which applies to residential buildings where a “large degree” of assistance or care is provided.
- 5.3.21 There is a varying degree of what constitutes “care or assistance” provided to the occupants, in some cases this could be considerably minor. Some examples of care or assistance include the provision of meals, cleaning, day-to-day upkeep, onsite management etc. Community care is intended to cover situations where occupants are largely dependent on another person, whereas users in “community service” are largely independent.
- 5.3.22 The degree of independence in community service explains the varying range of what “limited assistance or care” can manifest as within in the examples provided for

¹⁸ The term ‘boarding house’ is defined in other legislation, such as the Residential Tenancies Act 1986. However, that definition does not extend to the Building Act and I do not consider whether the building is classified as a ‘boarding house’ as defined in the RTA as I do not have jurisdiction in respect of matters under that Act.

that classified use. For example, back country huts offer minimal services to occupants, whereas hotels offer a wider range of assistance.

5.3.23 In a general flatting situation, the occupants:

- arrange for the set up of power and utilities to the property they are renting
- are in charge of paying the utilities directly
- are responsible for either cancelling or transferring the account once they leave.

5.3.24 Whereas in this instance the occupants pay a flat rate, which is inclusive of power, water and internet. The occupants do not need to set up, pay directly, or cancel the utility accounts. The landlord, who is the applicant in this case, is responsible for the payment and administration of the accounts. In this respect, I consider the fact the landlord is responsible for the payments and administration of the accounts constitutes the provision of “limited” assistance to the occupants.

5.3.25 I have also considered the performance requirements as they apply to the examples of community service buildings. Overall, buildings or uses that fall within community service have more demanding fire and accessibility performance requirements when compared to uses within Housing. Also, community service buildings have lower performance requirements for habitable space and amenities when compared to a detached or multi-unit dwelling.

5.3.26 The performance requirements reflect the typical short stay, varied occupancy numbers, likelihood of an unfamiliar environment, and that occupants are unlikely to have close relationships with the other building occupants. It reflects the fact occupants in those circumstances are exposed to higher risk in the event of an emergency than someone who is in a detached dwelling or multi-unit dwelling.

5.3.27 Whether or not the building in this case is classified as a ‘boarding house’ in terms of the ordinary and natural meaning of the term is not definitive regarding whether it belongs with the community service classification. The building in question has high occupancy numbers, is not a single household, and there is limited assistance. I consider the occupants in this building are exposed to similar conditions as other examples within community service. Accordingly, I conclude the correct classified use is community service.

5.3.28 The building in its new use has more onerous performance requirements, such as:

- Clause C3.4 regarding surface linings
- Clause C5.3 regarding access and safety for firefighting operations
- Clause F6 regarding visibility in escape routes
- Clause F8 regarding signs.

5.3.29 Therefore, as there has been a change in the use category under Schedule 2 of the Regulations and the new classified use has more onerous performance requirements than the old use, sections 114 and 115 are applicable.

5.4 What happens next?

5.4.1 Under section 115 there is the requirement for the owner to establish that the building will comply, as near as reasonably practicable, with either all the provisions of the Building Code or certain performance requirements depending upon the situation.

- 5.4.2 As I have determined 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 be satisfied 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.

5.5 Notice to fix

- 5.5.1 The applicant has accepted the building work to construct fire-rated walls and fire door required a building consent and has since sought a certificate of acceptance for the unconsented building work. I consider the authority was correct to include this work in the notice to fix. (I discuss the authority's refusal to grant the certificate of acceptance in paragraph 5.6.)
- 5.5.2 In regard to fire separations not being formed to comply with Clause C3, I understand this to be in relation to the basement ceiling construction. The "Postline or fire-rated linings" inspection failed because two layers of 13mm fire-rated plasterboard were installed (instead of one layer of 16mm), the second layer was incorrectly fixed, and some areas had only one 13mm layer.
- 5.5.3 There is also conflict between the consent drawings, with notations proposing different fire linings. The notation on sheet 05 states:
- All ceilings to all levels:
60/60/60 FRR ceiling – 2 layers of 13mm [manufacturer's fire rated plasterboard]
- While, the notation on sheet 10 states:
- Entire ceiling to basement level:
60/60/60 FRR ceiling – 1 layer of 16mm [manufacturer's fire rated plasterboard]
- 5.5.4 The authority has provided information that would indicate the non-compliance was in regard to the basement ceiling linings, but I note also the failed inspection (refer paragraph 2.5.3) and inconsistencies in the documentation noted above.
- 5.5.5 Consequently, I am of the view the authority correctly issued the notice to fix in respect of the unconsented building work and non-compliance with Clause C3. As I have established a change of use has occurred, I also conclude the authority correctly issued the notice to fix in respect of the change of use.

5.6 Certificate of acceptance

- 5.6.1 The building work that was carried out without building consent consists of the construction of the fire-rated wall system, (which includes the wall framing, fasteners, and plasterboard linings) and a fire door to the stairs on the basement level (see Appendix B). The authority has refused to issue a certificate of acceptance for the work because compliance would be 'difficult to establish'.
- 5.6.2 During the hearing the applicant questioned why the authority had refused the certificate of acceptance without undertaking alternative methods of inspecting the building work, such as the use of radioscopy or x-ray to check the construction. The applicant has carried out building work that required a building consent, and it is for

the applicant to provide sufficient evidence to the authority to establish that compliance with the Building Code was achieved.

5.6.3 I must now assess whether there was sufficient evidence for the authority be satisfied on reasonable grounds the building work complied with the Building Code at the time of application for the certificate of acceptance.

5.6.4 In the following paragraphs I consider compliance with Clauses B1 and C3 in respect of the wall framing, linings and fire door.

Clause B1 Structure

5.6.5 The applicant needed to establish the wall framing as installed complies with Clause B1 of the Building Code. While the wall framing is non-loadbearing, it must still meet the performance requirements in regard to normal use and occupancy to avoid collapsing or rupturing.

5.6.6 The authority can no longer inspect this work because the linings have been installed. The applicant provided photographs of a fire-rated wall under construction; however, the photographs are not of the unconsented building work. No other evidence was provided regarding the sizing or fixing of the framing.

Clause C3 Fire affecting areas beyond the fire source

5.6.7 In regard to the fire-rated wall system and fire door, the applicant has stated this has been installed according to the specifications and inspected by the authority.

5.6.8 The photographs provided by the applicant do not appear to show the wall in question. I note also the fire-rated specification requires a minimum size for the wall framing and it has not been established that this has been installed.

5.6.9 I received confirmation the door itself is fire-rated to -/60/30, which would provide 60 minutes integrity and 30 minutes insulation. However, no information was provided to show it was installed with the appropriate hardware to close automatically and self-latch in the event of a fire. I note the installed door closer observed on site is not on the fire door manufacturer's 'approved hardware' list.

Conclusion

5.6.10 Based on the evidence received to date, I consider the authority did not have sufficient grounds to be satisfied the building work complied with the Building Code. On that basis I conclude the authority was correct to refuse to issue the certificate of acceptance.

6. The decision

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby determine:
- a change of use has occurred and notification was required under section 114
 - there is insufficient information to establish that the framing installed without building consent complies with Clause B1
 - there is insufficient information to establish the fire-rated lining and fire-rated door installed without building consent complies with Clause C3.
- 6.2 Accordingly, I determine the authority correctly exercised its powers in issuing the notice to fix No. NOT21367031 and in refusing the certificate of acceptance, and I confirm those decisions.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 20 April 2018.

Katie Gordon
Manager Determinations

Appendix A

A.1 Relevant sections of the Act

37 Territorial authority must issue certificate if resource consent required

- (1) This section applies if a territorial authority considers that—
 - (a) a resource consent under the Resource Management Act 1991 has not yet been obtained; and
 - (b) the resource consent will or may materially affect building work to which a project information memorandum or an application for a building consent relates.
- (2) The territorial authority must issue a certificate, in the prescribed form, to the effect that until the resource consent has been obtained—
 - (a) no building work may proceed; or...

40 Buildings not to be constructed, altered, demolished, or removed without consent

- (1) A person must not carry out any building work except in accordance with a building consent...

96 Territorial authority may issue certificate of acceptance in certain circumstances

- (1) (1) A territorial authority may, on application, issue a certificate of acceptance for building work already done—
 - (a) If-
 - (i) the work was done by the owner or any predecessor in title of the owner; and
 - (ii) a building consent was required for the work but not obtained; or
 - (b) if section 42 (which relates to building work that had to be carried out urgently) applies; or
 - (c) if subsections (3) and (4) of section 91 (which apply if a building consent authority that is not a territorial authority or a regional authority is unable or refuses to issue a code compliance certificate in relation to building work for which it granted a building consent) apply.
 - (d) [Repealed]
- (2) A territorial authority may issue a certificate of acceptance only if it is satisfied, to the best of its knowledge and belief and on reasonable grounds, that, insofar as it could ascertain, the building work complies with the building code.
- (3) This section—
 - (a) does not limit section 40 (which provides that a person must not carry out any building work except in accordance with a building consent); and
 - (b) accordingly, does not relieve a person from the requirement to obtain a building consent for building work.

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...

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.2 Relevant clauses of the Building Code**Clause A1—Classified Uses 2.0 Housing****2.0.2 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, dwelling or hut.

2.0.3 Multi-unit dwelling

Applies to a building or use which contains more than one separate household or family. Examples: an attached dwelling, flat or multi-unit apartment.

Clause A1 - Classified Uses 3.0 Communal residential**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, holiday cabin, backcountry hut, hostel, hotel, motel, nurses' home, retirement village, time-share accommodation, a work camp, or camping ground.

3.0.3 Community care

Applies to a residential building or use where a large degree of assistance or care is extended to the principal users. There are two types:

- (a) Unrestrained; where the principal users are free to come and go. Examples: a hospital, an old people's home or a health camp.
- (b) Restrained; where the principal users are legally or physically constrained in their movements. Examples: a borstal or drug rehabilitation centre, an old people's home where substantial care is extended, a prison or hospital.

A.3 Relevant clauses of the Building Regulations¹⁹

5 Change the use: what it means

For the purposes of sections 114 and 115 of the Act, change the use, in relation to a building, means to change the use (determined in accordance with regulation 6) of all or a part of the building from one use (the old use) to another (the new use) and with the result that the requirements for compliance with the building code in relation to the new use are additional to, or more onerous than, the requirements for compliance with the building code in relation to the old use.

¹⁹ The Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005

Appendix B

B.1 As-built and 2016 consented floor plans

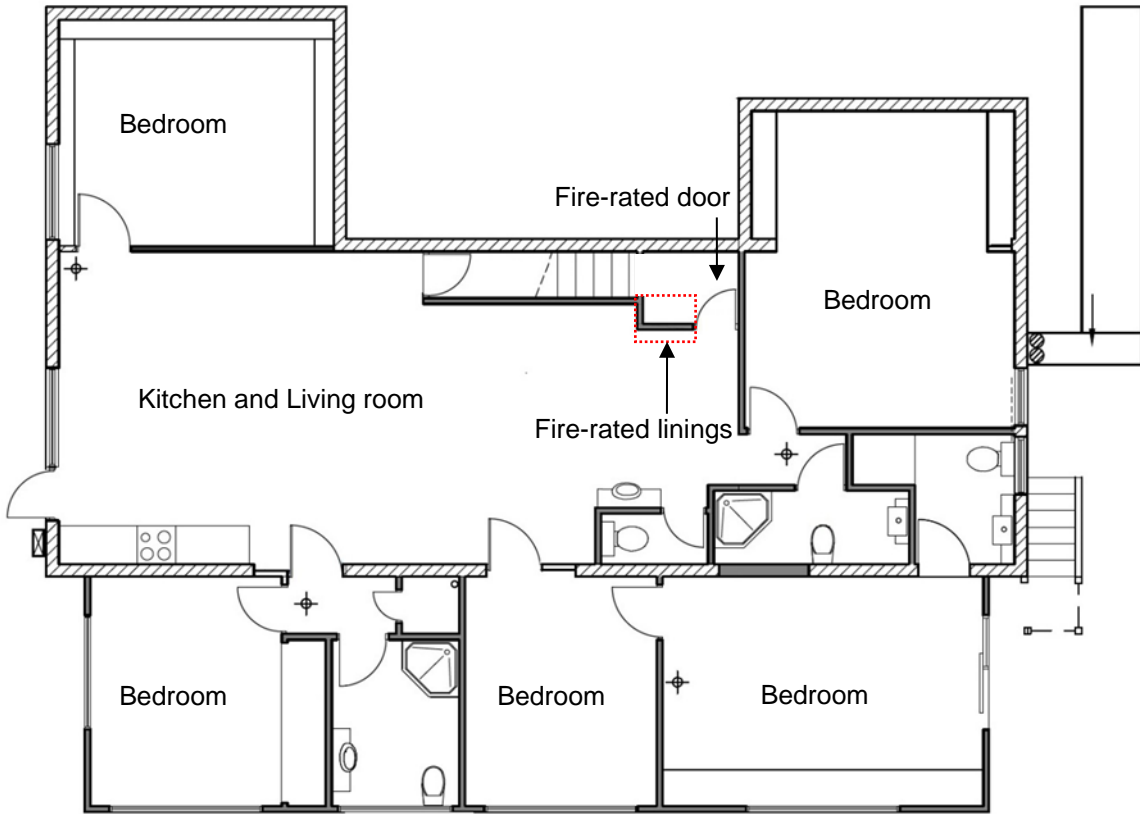


Figure B1(a): As-built basement floor plan (not to scale)

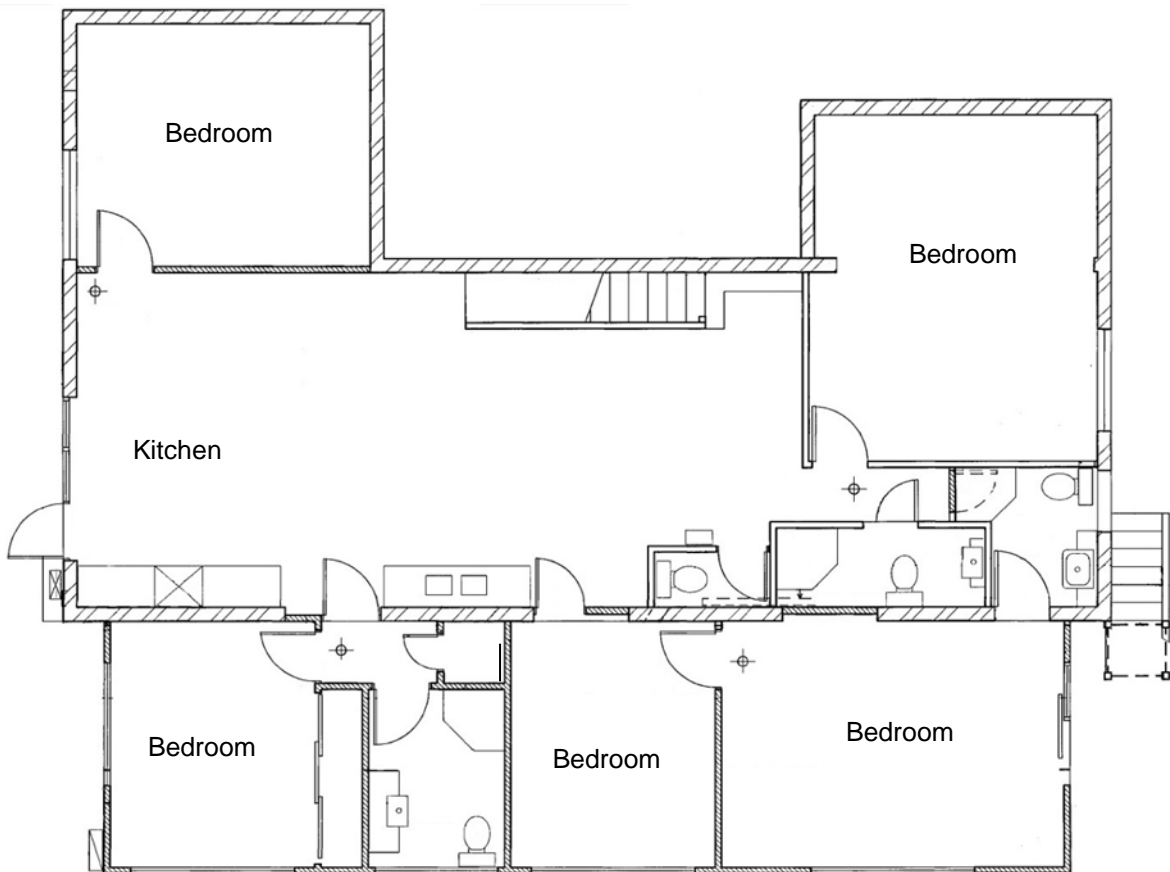


Figure B1(b): Consented basement floor plan (not to scale)



Figure B1(c): Consented ground floor plan (not to scale)

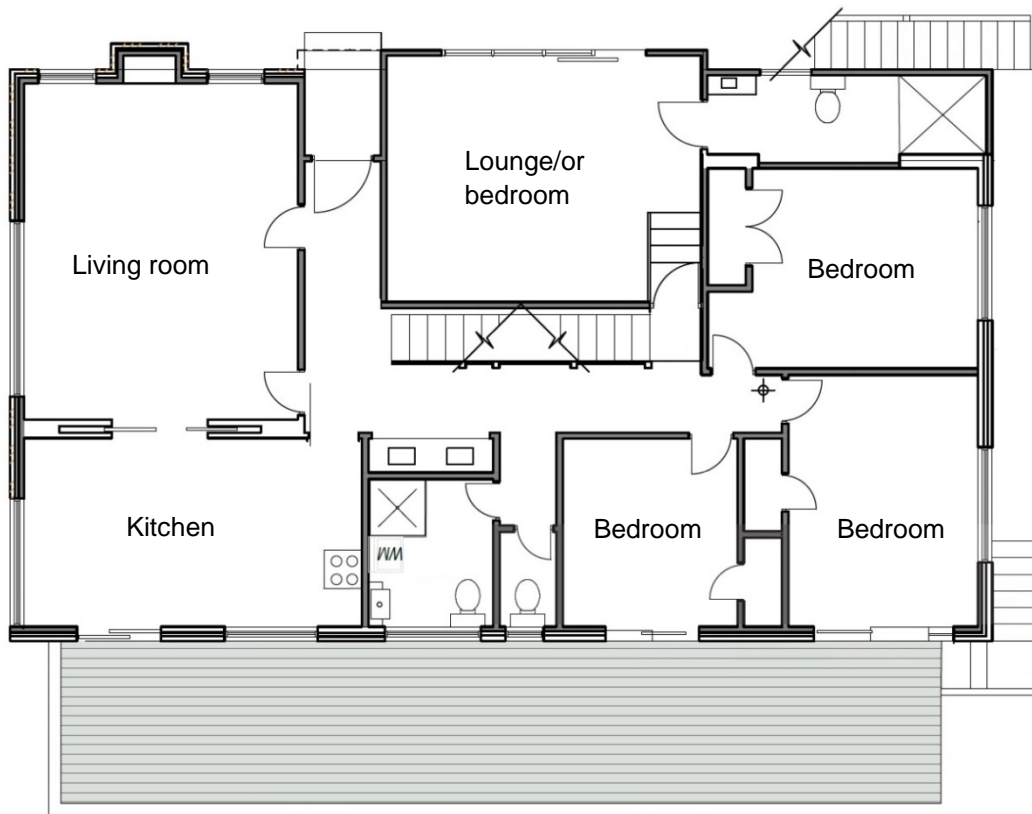


Figure B1(d): As-built ground floor plan (not to scale)

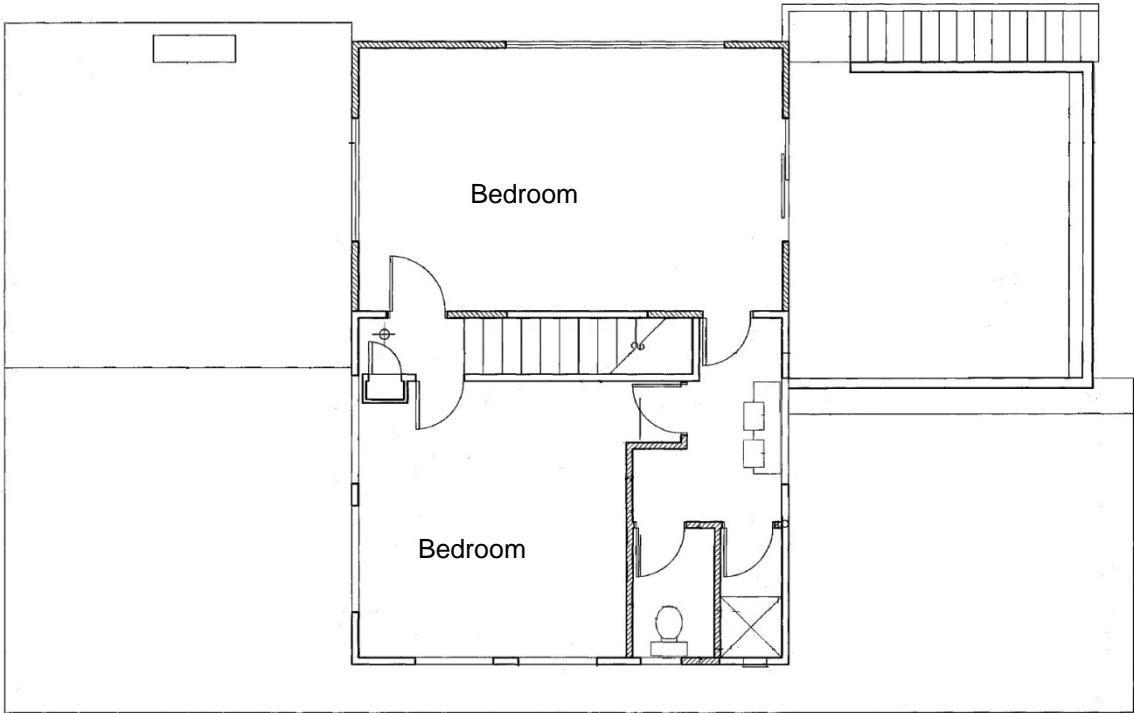


Figure B1(e): Consented first floor plan (not to scale)

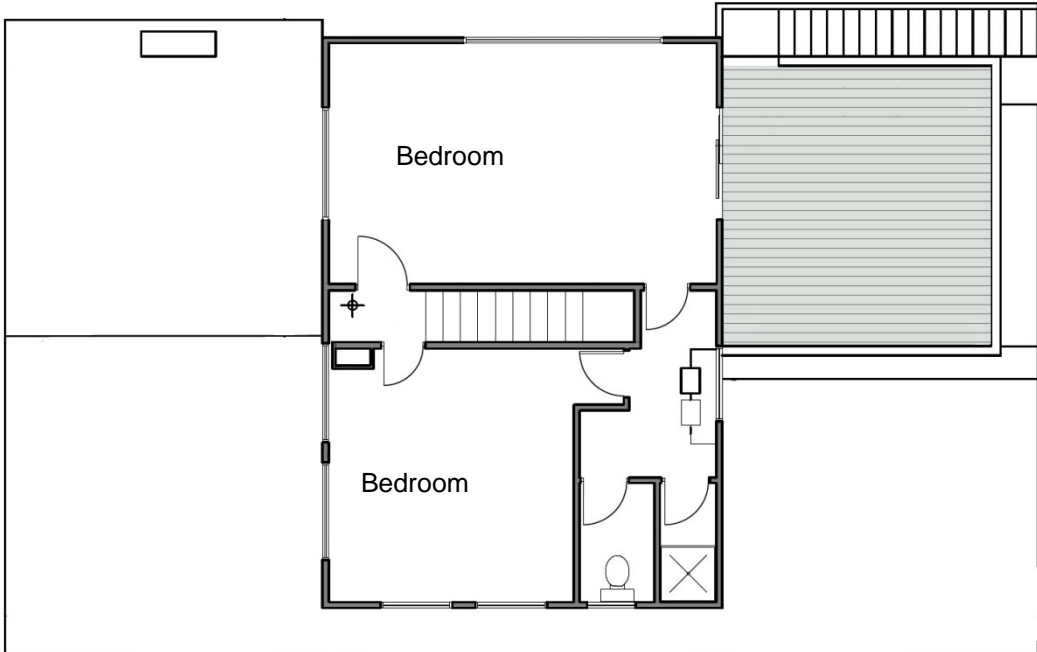


Figure B1(f): As-built first floor plan (not to scale)