

# Determination 2023/017

**Date: 19 June 2023**

**The proposed issue of a notice to fix regarding the change of use of motel units**

**337 Fenton Road, Rotorua**

## **Summary**

This determination considers whether there was a change of use in relation to a building that was used for emergency housing, where previously it had been used as tourist accommodation. More specifically, the determination considers whether the use group changed from 'sleeping accommodation' to 'sleeping residential' and, if so, whether that resulted in additional or more onerous Building Code requirements.

In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”) and references to “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

The Act and the Building Code are available at [www.legislation.govt.nz](http://www.legislation.govt.nz). Information about the legislation, as well as past determinations, compliance documents (eg Acceptable Solutions) and guidance issued by the Ministry, is available at [www.building.govt.nz](http://www.building.govt.nz).

## 1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Katie Gordon, Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.<sup>1</sup>
- 1.2. The parties to the determination are:
  - 1.2.1 I Wilson and Vautier Trustee Limited (together “the landlord”) who, as trustees of the Isobel Cresswell Family Trust, are the registered owners and lessor of 337 Fenton Street (“the property”) where a motel business operates
  - 1.2.2 K M Premium Accommodation Ltd (“the motel operator”) who is the registered lessee of the property
  - 1.2.3 Rotorua Lakes Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.<sup>2</sup>
- 1.3. I also consider the Ministry of Social Development (“MSD”) to be a person with an interest in this matter, due to its role in administering the Special Needs Grant for Emergency Housing, which was used to pay for accommodation at the property.<sup>3</sup>
- 1.4. The authority first applied for a determination on 10 January 2022. Following correspondence with the Ministry, the matter for determination was refined and the authority reapplied for a determination specifically relating to the property. The Ministry accepted the application on 23 February 2022.
- 1.5. This determination arises from the authority’s view that there has been a ‘change the use’ (“change of use”) under the Building (Specified Systems, Change the Use,

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<sup>1</sup> The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

<sup>2</sup> In relation to the property, the landlord and the motel operator are ‘owners’ for the purposes of the Act and are therefore parties to this determination. See section 7 for the definition of ‘owner’ and section 176 for those who are deemed parties to a determination.

<sup>3</sup> It is appropriate to include in the determinations process persons whose rights, obligations or interests may be affected by the outcome of the determination. Where such persons do not meet the test of a party under section 176, they are included as a ‘person with an interest’.

and Earthquake-prone Buildings) Regulations 2005 (“the Change of Use Regulations”). More particularly, the authority considers the use of part of the building at the property has changed from ‘sleeping accommodation’ (“SA”) to ‘sleeping residential’ (“SR”), as units in the building were no longer being used for transient accommodation. Further, the authority considers the change from SA to SR gives rise to additional and more onerous obligations under the Building Code.

- 1.6. The authority is concerned that it was not notified of a change of use under section 114. As a result, the building has not been assessed under section 115, which may give rise to further requirements under the Act. On or about 24 January 2022, the authority proposed to issue a notice to fix to the landlord for contravening section 115 of the Act.
- 1.7. The matter to be determined under section 177(1)(b) and (3)(e) is whether the authority was correct in its proposal to issue a notice to fix under section 164 to the landlord for contravening the Act. In deciding this matter, I consider whether there has been a change of use for the purposes of the Act in relation to the part of the building that was used for emergency housing. This includes the units and any communal areas but excludes the manager’s residence.<sup>4</sup>

### **Matters outside this determination**

- 1.8. This determination is limited to the matters set out in paragraph 1.7. If I find that part of the building has changed use for the purposes of the Change of Use Regulations, I will not go on to consider whether the building complies with the Building Code to the extent required under section 115 – that will be for the authority to assess. Neither will I consider any other aspects of the Act or any associated regulations.
- 1.9. The landlord and manager have advised that there has been a subsequent change to the operation of the motel. However, as the determination is concerned with the use of the buildings on or about 24 January 2022, these changes will not be taken into account for the purposes of the determination.<sup>5</sup>

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<sup>4</sup> I note that different parts of buildings can have different uses according to the Change the Use Regulations and clause A1 of the Building Code; see Regulations 5 and 6 of the Change the Use Regulations and clause 3(3) of the Building Regulations 1992.

<sup>5</sup> For further information about the subsequent change, see paragraphs 2.23 to 2.25 below.

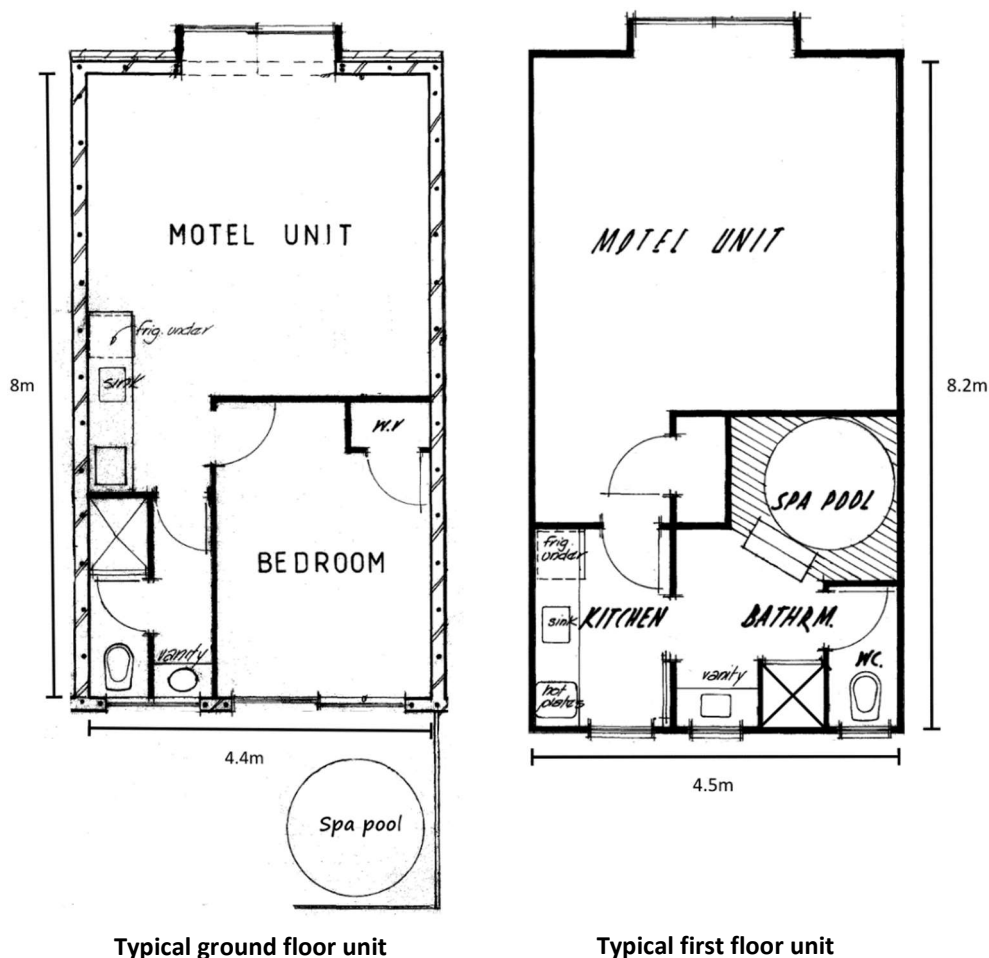
## 2. Background

### The building

- 2.1. The property is located in a commercial area of Rotorua. The building was constructed as a motel during 1988 and 1989.
- 2.2. The building is a 422sqm two-storey structure and is constructed of masonry walls on concrete slab to the ground floor, in situ concrete on the first floor with timber framed walls and roof frames to this level with heavy weight roof on a timber structure. The building's fire alarm system consists of a Type 1 bell in one warning system installed to NZS 4561:1973.
- 2.3. The building contains a manager's residence and 13 units (the "units"), with seven on the ground floor and six on the first floor.<sup>6</sup> The units are offered individually. Based on the plans and specifications provided as part of the building permit application in 1987, nine of the units incorporate a combined bedroom and living area with a small kitchen and a separate bathroom. In four of the units on the ground floor, the bedroom/living area, kitchen and bathroom are all in separate rooms. The ground floor units have spa pools on outside decks and the first floor units have spa pools/baths incorporated in their bathrooms (see Figure 1).

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<sup>6</sup> There are 13 units; however, they are numbered 1 to 14 with no number 13.



**Figure 1: Individual motel units**

- 2.4. All of the units are entered by their own outside doors. The first floor units are accessed via an external flight of stairs and veranda that runs the length of the upper floor. Car parking is provided outside the ground floor units.
- 2.5. On the ground floor, there is also a separate laundry,<sup>7</sup> storeroom and boiler room. Underneath this, in the basement, are two further laundries, one for use by the motel operator and the other for guests.
- 2.6. Since 1989, the building at the property has been operating as a motel business, providing guest accommodation in its units.

#### **The emergency housing grant**

- 2.7. In 2016, the Government introduced the Special Needs Grant for Emergency Housing (the “emergency housing grant”), which is administered by MSD.

<sup>7</sup> It is not clear whether this laundry is used by the motel operator and/or guests.

- 2.8. The emergency housing grant pays for accommodation for people who have an ‘immediate emergency housing need’.<sup>8</sup>
- 2.9. ‘Emergency housing’ is defined as “premises that are intended to be used as temporary accommodation by people who have no usual place of residence or who are unable to stay in their usual place of residence (whether also used as temporary accommodation by other people)”.<sup>9</sup>
- 2.10. MSD pays the grant to an emergency housing provider on behalf of the person needing accommodation. This may include the payment of a security deposit, where required by the provider. Providers must register as a Work and Income supplier before they can receive emergency housing payments.<sup>10 11</sup>

### **Emergency housing at the property**

- 2.11. In January 2018, the motel operator entered into an agreement to lease the property.<sup>12</sup> The motel operator says that they continued an established practice at the motel of accepting “social housing clients”.
- 2.12. When the landlord purchased the property on 1 November 2021, the motel operator carried on as lessee of the property.
- 2.13. At some point, the authority became aware that, along with other properties in the Rotorua area, the landlord’s property was being used to provide emergency housing for MSD clients. The authority says that it obtained a list of emergency housing providers from MSD which confirmed the use of the property for emergency housing. The authority became concerned that the units at the property were being occupied as single households on a long-term or indefinite basis and that, as a result, a change of use may have occurred according to the Change of Use Regulations. The authority considered this would give rise to an

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<sup>8</sup> For the definition of ‘immediate emergency housing need’, see the *Unofficial consolidated version of the Special Needs Grants Programme as at 1 July 2022*, clause 14A.2. Retrieved on 26 October 2022 from [www.workandincome.govt.nz/map/legislation/welfare-programmes/special-needs-grants-programme/special-needs-grants-programme.html](http://www.workandincome.govt.nz/map/legislation/welfare-programmes/special-needs-grants-programme/special-needs-grants-programme.html).

<sup>9</sup> *Unofficial consolidated version of the Special Needs Grants Programme as at 1 July 2022*, clause 3.1.

<sup>10</sup> Retrieved on 26 October 2022 from [www.workandincome.govt.nz/online-services/supplier-registration/index.html](http://www.workandincome.govt.nz/online-services/supplier-registration/index.html).

<sup>11</sup> In the *Inquiry into the Ministry of Social Development’s funding of private rental properties for emergency housing*, paragraph 2.12, MSD says it has no contractual relationship with emergency housing providers. In information provided during the determination process, MSD submitted that the requirement for emergency housing suppliers to register is ‘solely for administration and payment purposes’, and to establish the supplier has the right to use the property and receive the MSD payment on behalf of its clients.

<sup>12</sup> I understand that this lease is registered under the land title register. I have not seen a copy of the lease agreement.

obligation for the owners of the property to give notice of a change of use under section 114. The authority proposed to issue a notice to fix to the owner for contravention of section 115.

- 2.14. On 25 January 2022, the authority viewed the online booking system for the motel business, which appeared to show that none of the units were available for bookings over a six-month period, until mid-August 2022.
- 2.15. On 15 February 2022, the authority visited the property to carry out a building warrant of fitness audit (the “BWOFA audit”). The building compliance officers recorded that the manager confirmed that the units were being used solely for emergency housing, with 20 occupants staying for at least 6 months and sometimes longer. The building compliance officers observed some occupants had pets staying with them in the units.
- 2.16. The motel operator has provided information, at my request, about the length of stays of the people occupying each unit as at 15 February 2022 (being the date of the BWOFA audit):

**Table 1**

Unit no.	Length of stay	
1	11 months and 9 days	346 days
2	1 month and 15 days	46 days
3	6 months and 25 days	209 days
4	4 months and 25 days	147 days
5	15 months and 12 days	469 days
6	9 months and 12 days	288 days
7	2 months and 23 days	84 days
8	2 months and 8 days	70 days
9	22 months and 3 days	674 days
10	6 months and 2 days	211 days
11	6 months and 2 days	186 days
12	20 days	20 days
14 <sup>13</sup>	1 month and 29 days	60 days
	Average stay > 7 months	Average stay = 216 days

- 2.17. I also understand as at the date of the audit:

- each unit:

<sup>13</sup> There is no unit 13 at the motel.

- was occupied by one person and any ‘immediate family’<sup>14</sup> as emergency housing<sup>15</sup>
- was let furnished
- MSD was paying the motel operator on behalf of each person for the cost of their stay
- the occupants:
  - had chosen to stay at the motel
  - did not have any other place of residence or were unable to remain in their previous place of residence<sup>16</sup>
  - were not independently paying, or separately charged, for internet, power or any other utilities supplied in relation to their unit
  - were not receiving any onsite services or support from MSD, other than paying the cost of their stay.

2.18. The authority says the occupants, as at the date of the BWOFF audit, were not receiving typical motel services which previously had been provided by the motel operator to their tourist and business guests on a regular basis. These included the refreshing of the unit on a daily basis, replacement of towels and sheets and assistance with booking activities/services. This is disputed by the landlord who says, “Motel services are being provided to customers”, but the landlord has not provided any further information as to what those services are. Subsequently, the motel operator provided a list of services which they say were provided to the occupants.<sup>17</sup>

2.19. The landlord says “[they] are not registered with [MSD] and the [landlord] is not aware of the [motel operator] being registered with MSD.” I note, however, that emergency housing providers are required to register as a Work and Income

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<sup>14</sup> For the definition of ‘immediate family’, see the *Unofficial consolidated version of the Special Needs Grants Programme - as at 1 July 2022*, clause 3 Definitions.

<sup>15</sup> I understand that twenty people were in the units as at 15 February 2022; however, I do not know how this number was split up across the units each despite asking the motel operator for that information.

<sup>16</sup> People are eligible for the emergency housing grant *only* if they have no usual place of residence or are unable to remain in their usual place of residence. See the *Unofficial consolidated version of the Special Needs Grants Programme - as at 1 July 2022*, clause 3 (for the definition of ‘Emergency Housing’), clause 14A.1 (for the criteria for making an emergency housing grant) and clause 14A.2 (for the definition of ‘immediate emergency housing need’).

<sup>17</sup> For the list, see paragraph 4.32.



supplier before they can receive emergency housing payments.<sup>18</sup> Despite this, I understand there has been no agreement or contract in place regarding emergency housing between any government agency and the motel operator or the landlord.

- 2.20. The manager of the motel says that the contact with MSD is all through the people that are staying – not directly between the motel and MSD. However, the landlord says, “WINZ Rotorua phones when making bookings.”
- 2.21. While the determination is considering the situation as it was when the authority proposed to issue the notice to fix, I have been provided with information by the landlord confirming that as of October 2022 the motel was no longer being used for emergency housing or long term stays.

### **3. Initial submissions**

- 3.1. The authority and landlord both made initial submissions in relation to the application for a determination, and these are summarised in this section.
- 3.2. The motel operator responded to a request for information, but did not make any initial submissions. MSD also made no initial submissions.
- 3.3. All of the parties made further submissions in response to the draft determination, and these are summarised in section 4.

#### **Authority**

- 3.4. The authority considers that the building has undergone a ‘change of use’, as that term is defined in the Change of Use Regulations.
- 3.5. The authority states that 13 units in the building, on or about 24 January 2022,<sup>19</sup> were being occupied by people on a long-term basis as separate household units (with the result that the building became a multi-unit dwelling). It says the units were previously occupied by tourists and business people as transient accommodation.
- 3.6. The authority submits:

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<sup>18</sup> See footnote 10. I assume that the motel operator must have registered with Work and Income. Otherwise, it would not have been able to receive payment for any of the MSD clients staying at the property.

<sup>19</sup> The authority submits that “it is the use at the time that the application for determination was made which is to be considered.”

- 3.6.1. When “used as a motel” the landlord’s building would be categorised as SA under Schedule 2 of the Change of Use Regulations. However, if people are being housed in the units for extended periods and were no longer transient, the authority considers that the building should be categorised as SR as it would be “more akin to flats and by default household units”.
- 3.6.2. The authority submits that, “Transient describes a situation which lasts only a short time and is constantly changing. The traditional use of a hotel or motel would be transient accommodation.”
- 3.7. The authority submits that the following facts “suggest a significant level of permanence” and that the accommodation is not being used as transient accommodation:

...some of the units are being occupied for periods of at least six months...

The most recent Public Housing Quarterly Report published by [the Ministry of Housing and Urban Development] states that the mean time to house someone on the Public Housing Register is 289 days,<sup>20</sup> which suggests that if a person does not choose to move to different emergency housing, they are likely to be living in this accommodation for periods in excess of nine months.

This is the only place of residence for the occupants of the units. The occupants live in the units with members of their family and have moved their pets in.

- 3.8. The authority submits there was no ‘limited assistance or care’ being provided to those that occupied the units as emergency housing. The authority says:

The typical services or care provided in a motel/hotel would include a refresh of your room on a daily basis, replacement of towels and sheets by the motel/hotel operator, assistance with booking activities/services.

...its understanding is that none of these services are available to people residing at [the building]. Nor is there care or service being provided by MSD (or another third party such as an employer).

...the only potential care being provided is that the units are paid for by MSD and they are furnished. Apartments are commonly tenanted as furnished. Economic assistance towards rent and utilities by way of grants is provided to many different people including people who own their own homes and cannot on its own meet the threshold of care.

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<sup>20</sup> Ministry of Housing and Urban Development *Public Housing Quarterly Report* (September 2021) at 14.

- 3.9. The authority submits that the “overall raison d’être<sup>21</sup> of the building is consistent with domestic use in a multi-unit dwelling setting” and makes the following comments:

...the layout [of the units] is common to one-bedroom apartments in multi-unit dwellings...

...[t]he occupiers have sole exclusive use of their units and have no other place of residence.

...all the units are now [as at 26 April 2022] being used for emergency housing and none of the units are occupied by traditional motel guests.

The very limited service (if there is any service) does not change the overall nature of the building.

The possible future upgrade and return to standard motel use does not change this.

- 3.10. The authority submits that “what classified use [under clause A1 of the Building Code] that the building falls into... will inform whether there has been a change from SA to SR.”
- 3.11. The authority submits that “the [classified] use is closer to an apartment (which fall within the housing category [in clause A1 of the Building Code] and specifically within the multi-unit dwelling category).”
- 3.12. The authority submits, “Even if a limited service is provided, there are some circumstances where the small number of occupants means that the building is given a household categorisation [in clause A1 of the Building Code], not community service.”
- 3.13. The authority refers to Determination 2019/045<sup>22</sup> and submits “the classification of a building [under the Building Code] will ultimately be a balancing exercise...”.
- 3.14. The authority submits the change from SA to SR would, for the purposes of Regulation 5 of the Change of Use Regulations, create additional or more onerous requirements under Building Code including:

- the fire safety requirements under clause C for SR

<sup>21</sup> According to the Oxford English Dictionary (online publication), ‘raison d’être’ means, “A reason or purpose for the existence of a person or thing.” Accessed on 26 October 2022 at [www.oed.com](http://www.oed.com).

<sup>22</sup> Regarding the classified use of a building, which is let out for public accommodation. Issued 26 September 2019.

- clause G2 Laundering
- clause G3 Food preparation and prevention of contamination
- clause G6 Airborne and impact sound.

3.15. The authority submits that “the fact that there are additional or more onerous requirements under the Building Code is expected to be uncontroversial.”<sup>23</sup>

3.16. The authority says that, in applying for a determination, it is seeking to ensure it does not “impose on building owners upgrade requirements without merit”, and that the determination “will be of benefit in understanding what process to apply to other premises being operated in a similar [manner] acknowledging that each case is unique.”

### **Landlord**

3.17. In response to the authority’s assertion that a change of use has occurred, the landlord submits that:

...there has not been a change of use... [the] basis for [the authority’s] belief that the property use has changed to SR is based on incorrect assumptions and incorrect information...

...it does not consent to a change of use of the [building]...

...[it is not] in breach of the Building Act...

...[the building] is configured like a normal motel and nothing like an apartment complex... [this] factor is... consistent with the use of the property remaining the same [use], SA.

...[it] is disingenuous for [the authority] to say the customers do not have any other place of residence, they are only very temporarily at the property. There is no evidence whatsoever to support [the authority’s] assumption...

...it is completely irrelevant what the Public Housing Quarterly Report says, that does not assist with determining how the property is used...

...[it] is incorrect to say that there is a level of permanence, let alone that there is a significant level of permanence. Given the length and nature of the occupation, it is clearly transient...

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<sup>23</sup> I take this statement to mean the authority considers any potential dispute about the change of use of the building was likely to be focused on whether the building had changed from SA to SR rather than whether the building in its possible new use was subject to additional or more onerous requirements.

...[it] is an unhelpful submission for [the authority] to say that being fully furnished accommodation is not limited to serviced property and is more common in multi-unit dwellings and apartment complexes...

...in every other motel, it is common for groups in each unit to be small and connected to each other...

...[it] does not assist [the authority] whatsoever to say that the occupiers have exclusive use of their units...

3.18. Regarding the use of the property for emergency housing, the landlord submits:

With the downturn of tourism, the property has had capacity to host the customers referred by Government agencies, which would not normally be the case.

It is difficult, for a number of reasons, for the [motel operator] to turn away customers that are paid for by Government agencies. It would be discriminatory if customers were turned away depending on who was paying their bill.

...[this] motel, along with all others throughout the country has suffered extreme financial pressure during the Covid pandemic. All accommodation providers have needed to improvise just to survive. Improvising was done to survive, and was not done by choice.

3.19. With respect to the inability to book units via the online booking system, the landlord submits:

Since purchasing the property in November 2021, [it] has been making arrangements to carry out improvements to each of the units of the motel...

...[once the improvements are] carried out the motel units will be available for general customers pursuant to the permitted use pursuant to the Lease being that of a motel...

...until the units are upgraded there is no online booking system for them, as they need to be available to have work done to them when contractors are available.

## 4. Draft determination and further submissions

4.1. A draft determination was circulated to the parties for comment on 14 November 2022.

4.2. The draft determination concluded that the building had, by 24 January 2022, undergone a 'change of use' for the purposes of the Act. It also concluded that the authority was correct to propose to issue a notice to fix under section 164 to the landlord for failing to comply with the Act.

- 4.3. All of the parties made submissions on the draft determination. These are summarised in this section and were taken into account in making the final determination.

### **Ministry of Social Development**

- 4.4. MSD made a submission on the draft determination dated 6 December 2022.
- 4.5. MSD submits that the Special Needs Grant for Emergency Housing is a vital tool for addressing homelessness. The emergency housing system relies on there being a sufficient supply of accommodation available, and MSD is concerned that the determination could have “far reaching and unintended consequences” in this regard. In particular, it could influence moteliere’s decisions whether to provide emergency housing and authorities’ decisions to take enforcement action against them.
- 4.6. MSD submits the findings in the draft determination will be an issue for the Ministry of Housing and Urban Development, which is also responsible for providing emergency and other housing programmes.
- 4.7. In MSD’s view, there was a gap in the draft determination, which should start with the purpose of the Act in section 3(a). Earlier determinations, such as Determination 2019/050 have considered that the “intent of the Change of Use Regulations is to require upgrades when the use of a building changes to one with increased safety and health risks”.<sup>24</sup>
- 4.8. MSD is concerned much of the draft determination comes down to the determining factor of whether the occupants require direction if there is an evacuation.<sup>25</sup> It considers there is a thin line between the SA and SR categories. Emergency housing does not fall neatly in either and post-dates the Change of Use Regulations, meaning a first principles approach is appropriate. MSD considers the SA standards are better suited to emergency housing than the SR ones.
- 4.9. MSD submits the standards required for SA tend to be higher than for SR, because people may be unfamiliar with their environment. MSD does not think that people in emergency housing in motels should be subject to the lower standard in SR, as they have the same rights as other motel occupants, and are akin to people staying in hostels and boarding houses, which are SA. Some emergency housing

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<sup>24</sup> Regarding the issue of notices to fix in respect of building work to convert an existing shed and sleep-out to a self-contained unit. Issued 15 October 2019.

<sup>25</sup> The comments in the draft determination relating to the provision of assistance in the event of an emergency have been replaced with a broader comparison between SC (Sleeping Care) and SA (Sleeping Accommodation). See paragraph 5.46.

occupants only stay short term, and all will initially require guidance in an emergency.

- 4.10. Similarly, with respect to which classified use emergency housing motels fall into, MSD believes emergency housing occupants receive care and assistance akin to those in the community services category, in that they receive some motel services and require guidance in an emergency, unlike occupants in a multi-unit dwelling. It notes many people within the community service category reside in these places longer term, such as boarding house tenants, retirement village occupants, and students in halls of residence.
- 4.11. MSD submits the second limb of the change of use test warrants further discussion and should be read as “has more onerous and additional Building Code requirements overall” to avoid “perverse results”.
- 4.12. MSD says the authority’s reference to the time to house data from the public housing register is incorrect, as it includes different types of living situations and tenancies, not just emergency housing. MSD’s data shows the average stay of a person in emergency housing in Rotorua over the time in question was 21 weeks. People often enter emergency housing for a short period, but stay longer, which raises practical questions around how a motel owner knows a unit has changed from SA to SR, and at what point this occurs. It is difficult for a motel owner to know when to notify a change of use or ask a person to leave.
- 4.13. MSD submits SA is “now accommodation”, as opposed to the permanent accommodation options in SR, which if not owned, will have security of tenure through a residential tenancy agreement. In its view, it seems perverse if building categorisation depends on whether a person stays longer than intended, or moves to other emergency housing or another accommodation option. It submits “...categorisation [should] depend on whether the people staying in the motels are in a class that requires higher regulatory protection akin to those in boarding houses and hostels.”
- 4.14. MSD says the draft determination does not detail the nature of the services provided that support the change of use to SR. It would be useful for the determination to “go into detail about the exact services/degree of service provided and not provided” that support the change of use to enable the determination to be applied to other motels providing emergency housing.
- 4.15. MSD expects emergency housing suppliers to “provide the same level of typical motel services to [emergency housing] clients as they would any other paying customer”. These services are paid for under the emergency housing grant nightly

rate, and should include cleaning, linen and access to amenities. Guests can decline the services, but they should be offered.

- 4.16. MSD does not consider that lack of assistance with booking activities and services is the type of assistance or care that should be taken into account in assessing the change of use.
- 4.17. MSD says it provides a complaints process for emergency housing clients and suppliers, and support to find alternative accommodation. It does not provide “on-site support services” at the motel, but does offer other types of support and services to emergency housing clients, including “dedicated case managers and contracted housing navigators” who connect clients to other support services.
- 4.18. MSD does not consider its registration requirement for emergency housing suppliers should have any bearing on the determination, as this is purely administrative to enable payment.
- 4.19. MSD does not consider the security deposit demonstrates the long-term nature of emergency housing, as this is common among short-term tourism accommodation suppliers.

### **Authority**

- 4.20. The authority made a submission dated 13 December 2022, in response to the draft determination and MSD’s submission on it. Overall, the authority considered it would be helpful if the determination contained an overview of the change of use provisions in the Act and the Change of Use Regulations, and how these operate. It would also be useful if the determination provided:

...guidance on the time period which would indicate that a change of use has (likely) occurred (while acknowledging that this is but one factor) and proposes that a 28-day period be adopted as a general guide.

- 4.21. The authority noted that the term ‘transient accommodation’, while not defined in the Act or Change of Use Regulations, is defined in the Residential Tenancies Act 1986 as “accommodation that is ordinarily provided for less than 28 days at a time”. Given this definition, the authority says it may be difficult to argue that the use of a motel unit used for emergency housing had not changed where occupants were staying for 28 days or longer.
- 4.22. The authority considers that motel owners should notify the authority of a change of use under section 114 where people who are staying under emergency housing grants have their grants renewed beyond 28 days. They say the 28-day period



coincides with the time under the Residential Tenancies Act 1986 when a tenancy agreement is required.

- 4.23. The authority does not agree that people extending their stay under an emergency housing grant is the same as people extending their stay in a boarding hostel. The classified use of boarding hostels depends on the number of rooms available for boarding, with the length of stay not relevant. By contrast, a motel's purpose is to provide temporary accommodation.
- 4.24. The authority submits the definition of 'intended use' in the Act allows "any reasonably foreseeable occasional use that is not incompatible with the intended use", which accommodates the situation where an emergency housing occupant extends their stay.
- 4.25. The authority says the motel operator's decision to accept emergency housing occupants was intentional due to the downturn in tourists, and it is well-known and publicised that the length of stay of these occupants is unlikely to be short term.
- 4.26. The authority considers that the assessment of whether the requirements for compliance with the Building Code in relation to the new use are additional to, or more onerous than, those in relation to the old use should be done on a "requirement by requirement basis", rather than an assessment of the requirements overall as suggested by MSD.
- 4.27. In addition, the authority submits section 115 only requires that the building in its new use complies "as nearly as is reasonably practicable" and this test is an objective one.
- 4.28. With respect to MSD's submission that the intent of the change of use legislation is to require upgrades when the use of a building changes to one with increased safety and health risks, the authority notes that:

...there have been at least eight fires in motels used as emergency housing in the past two years in Rotorua. [The authority's] position is that the use of motel buildings for emergency housing accommodation does increase the health and safety risks.

- 4.29. The authority submits Determination 2022/012:<sup>26</sup>

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<sup>26</sup> Whether a building which is occasionally used for public accommodation falls within the classified use 'detached dwellings'. Issued 04 July 2022.

...supports its position that some care or assistance being provided by the motelier will not determine whether limited care is being provided. The fact that limited services (such as cleaners and some laundry services) may have been available to residents, will not be determinative.

### **Landlord**

- 4.30. The landlord submitted that, with the lease variation (see paragraph 2.21), the authority's concern for the safety of the motel's occupants was now "purely a historical/theoretical question".

### **Motel operator**

- 4.31. The motel operator made a submission on the draft determination dated 6 February 2023. They confirm that they were providing the following services to emergency housing occupants when the authority visited the motel to undertake the BWOFF audit:

- 24/7 onsite manager/site minder like usual operation
- motel reception
- providing all motel furniture, full bedding, equipment and kitchen utensils
- ensuring proper heating, hot water and electricity system [were] all going well
- room service/housekeeping services
- changing of linen and bedding services
- providing guest laundry free of charge
- providing motel amenities such as toilet rolls, tea towels, coffee & tea etc.
- frequent room inspection and ongoing repair and maintenance to motel equipment & furniture
- ground parking control and onsite ground cleaning and maintenance
- internal safety control and management including visitor policy, noise control, child safety and protection.

- 4.32. The motel operator disagrees with the statement in the draft determination that assistance or care was not being extended to the occupants of the units, as the operator:

...exercised extensive management and control and provided extensive guest services with [an] onsite manager living in the motel residence. Whether with tourists or emergency housing guests, our operation practice remains the same...

- 4.33. The motel operator submits that the information the authority received on its visit to the motel "may be biased". Since August 2022, the motel had undergone

extensive renovation and no longer accepted emergency housing guests. The motel operator says they “had entered into a lease variation with the landlord that the entire motel would not be permitted to accept any emergency housing guests nor any long-term stayers”.

## 5. Discussion

- 5.1. The matter in dispute is whether the authority was correct in its proposal, on or about 24 January 2022, to issue a notice to fix under section 164 to the landlord for contravening section 115 of the Act. In deciding this matter, I must consider whether there has been a change of use of the building for the purposes of the Act.
- 5.2. A change of use is determined according to regulations 5 and 6 of the Change of Use Regulations.<sup>27</sup>

### 5 [Change of use]: what it means

For the purposes of sections 114 and 115 of the Act, [change of 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.

### 6 Uses of buildings for purposes of regulation 5

- (1) For the purposes of regulation 5, every building or part of a building has a use specified in the table in Schedule 2.
  - (2) A building or part of a building has a use in column 1 of the table if (taking into account the primary group for whom it was constructed, and no other users of the building or part) the building or part is only or mainly a space, or it is a dwelling, of the kind described opposite that use in column 2 of the table.
- 5.3. I will consider whether there has been a change of use in relation to the part of the building that was used for emergency housing (that being the units and any communal areas).

## Two different categorisations are relevant to a change of use

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<sup>27</sup> See section 114(1) of the Act.

5.4. There are various categorisations of buildings used in the Act and associated regulations, which have different purposes. There are two which are relevant to this determination, being:

- the ‘uses’ (the “use groups”) in Schedule 2 of the Change of Use Regulations
- the ‘classified uses’ in clause A1 of the Building Code.

5.5. To decide this matter, I must consider whether part of the building has changed from one use group to another (the “first criterion”).<sup>28</sup> If I find that it has, I must go on to consider whether the new use group gives rise to Building Code requirements which are additional to or more onerous than the requirements under the old use group (the “second criterion”).<sup>29</sup> This further criterion requires me to consider the classified use for both the old and new uses, as this step is necessary to identify the relevant Building Code requirements.

5.6. Both of the criterion above must be satisfied for there to be a change of use for the purposes of the Act.

### **The change of use provisions**

5.7. The change of use provisions act as one of the mechanisms in the Act which trigger a gradual upgrade of existing buildings. They are also the mechanism in the Act which ensures a building is appropriate for any new use it is put to during its economic life.

5.8. Under section 114, the owner of a building must provide written notice to the relevant territorial authority if they propose to change the use of a building or part of a building in the manner described in the Change of Use Regulations, providing information about how the building will comply to the extent required under section 115.<sup>30</sup> An owner must not change the use unless the authority has given the owner written notice that the building, or part of the building, in its new use will comply to the extent required by section 115. I note the Act does not require an owner’s consent for a change of use to occur.

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<sup>28</sup> See regulations 5 and 6 of the Change of Use Regulations.

<sup>29</sup> See regulation 5 of the Change of Use Regulations.

<sup>30</sup> Section 114 provides for a building owner to be prosecuted for failing to give their territorial authority written notice of a change of use. By making this a criminal offence, Parliament clearly intends for building owners to remain alert to changes of use and to give notice to their territorial authority when required by the Act to do so.

- 5.9. Upon receiving notice of a proposal to change the use of a building, the territorial authority must apply the ‘as nearly as is reasonably practicable’ test as set out in section 115. This assessment approach balances the benefits of the relevant Building Code requirements with compliance costs and the financial ability of owners to bring buildings up to today’s requirements.
- 5.10. This assessment is undertaken according to one or other of two subsections in section 115. Where the change is to incorporate a household unit or units in a building where previously there were none, compliance is measured against the building code *in all respects*.<sup>31</sup> In all other circumstances, compliance is measured against a qualified set of Building Code requirements<sup>32</sup> (being those which relate to means of escape from fire, protection of other property, sanitary facilities, structural performance and fire-rating performance and, if this is a requirement under section 118, those which relate to access and facilities for persons with disabilities).

### Whether the use group has changed

- 5.11. I now turn to the first criterion; that being the question of whether the use group had changed for the part of the building which was being used as emergency housing (ie the units and communal areas). More particularly, I will consider whether, at the time the authority proposed to issue a notice to fix, that part of the building was use group SR, when previously it had been SA.
- 5.12. Table 2 sets out the SA and SR use groups as they appear in the Schedule 2 of the Change of Use Regulations:

**Table 2**

Use	Spaces or dwellings	Examples
<b>Uses relating to sleeping activities</b>		
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’	multi-unit dwellings, flats, or apartments

<sup>31</sup> Section 115(a).

<sup>32</sup> Section 115(b).

	flats, and residential accommodation above a shop	
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- 5.13. The authority considers that by 24 January 2022, the use group for the building was SR when previously it had been SA. The landlord, the motel operator and MSD dispute that the use group for the building had changed.
- 5.14. In my view, section 3(a) and the scheme of the Act assist with evaluating the correct use group, as they provide context for the change of use provisions, particularly their purpose.
- 5.15. Section 3(a) lists the purposes of the Act in setting performance standards for buildings. The section 3(a) purposes are as follow:

### 3 Purposes

...

(a) ...to ensure that---

- (i) people who use buildings can do so safely and without endangering their health
- (ii) buildings have attributes that contribute appropriately to the health, physical independence and wellbeing of the people who use them
- (iii) people who use a building can escape from the building if it is on fire; and
- (iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development...

- 5.16. These purposes are turned into explicit requirements in the change of use provisions. As stated above, the change of use provisions are intended to ensure a building is appropriate for a new use, should a change of use occur during its economic life (particularly in terms of health and safety, and essential amenities).<sup>33</sup>
- 5.17. Additionally, the change of use provisions are part of a broader scheme in the Act which triggers assessments that can result in an existing building having to undergo certain upgrades.<sup>34</sup> It is clear Parliament enacted the change of use

<sup>33</sup> Territorial authorities must determine the appropriateness of a building in its new use according to the requirements in section 115.

<sup>34</sup> The levels of performance for existing buildings are generally less rigorous than that required by today's Building Code.

provisions (and the other provisions which are part of that scheme<sup>35</sup>) as a means to improve existing building stock, in the absence of retrospective effect being given to any amendments made to the Act or the Building Code.<sup>36</sup>

- 5.18. Further, I note that the change of use provisions place more onerous obligations on building owners where the change involves the incorporation in a building of one or more household units where previously there were none.<sup>37</sup> Clearly Parliament considers a change of this nature so important, it legislated for such buildings to be assessed against the Building Code *in all respects*.
- 5.19. The authority alleges there has been the incorporation of one or more household units in the building where previously there were none.<sup>38</sup> The SR use group explicitly includes “household units attached to spaces or dwellings with the same or other uses” (see Table 2).<sup>39</sup> As Parliament places an elevated status on this type of change of use, I will start by considering the degree to which the units fell within this description.

### **Sleeping residential (SR)**

- 5.20. A ‘household unit’ as defined in the Act:<sup>40</sup>
- (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, boardinghouse, or other specialised accommodation
- 5.21. I must consider, for the purposes of the first limb of the definition, whether the units and communal areas were used, or intended to be used, only or mainly for residential purposes. I must then go on to consider, for the purposes of the

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<sup>35</sup> For example, section 112.

<sup>36</sup> To apply current requirements retrospectively would necessitate constant upgrading of every existing building each time the Code was updated.

<sup>37</sup> See paragraph 5.9 above.

<sup>38</sup> See section 115(a) and my comments in paragraph 5.9 above.

<sup>39</sup> For the full description for the SR category, see the second column in either table 2 above or Schedule 2 of the Change of Use Regulations.

<sup>40</sup> See section 7.

second limb, whether the units were occupied, or intended to be occupied, exclusively as the home or residence of not more than one household.

- 5.22. The phrase ‘residential purposes’ is not defined in the Act or associated regulations. The Oxford English Dictionary defines ‘residential’ as “serving or used as a residence; in which one resides; providing accommodation in addition to other services”<sup>41</sup>
- 5.23. I understand that the occupants of each unit either had no other adequate place to live or were unable to remain where they were living previously.<sup>42</sup> I also note that the average length of stay, as of 15 February 2022, was more than 7 months. Further, at that time the occupants had no certainty as to an end date for their stays. In essence, the occupants were living in their units on a long-term or indefinite basis. Given that the units were their only place of abode and their stays were long-term or indefinite, I consider that the units and associated communal areas, by 24 January 2022, were being used only or mainly for residential purposes.<sup>43</sup>
- 5.24. I must now establish whether each of the units were occupied exclusively by a single household. I understand that accommodation sourced from an emergency housing provider is occupied by an individual and any ‘immediate family’ *to the exclusion of others*.<sup>44</sup> However, not only must I establish exclusive use in order to satisfy the definition; I must also be satisfied that each unit was occupied as a single household for the purposes of the Act.
- 5.25. Before undertaking this step, I note the Judge’s comments in *Queenstown-Lakes District Council v The Wanaka Gym Limited (“Wanaka Gym”)*:<sup>45</sup>

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

- 5.26. The Judge also cited two earlier cases, both of which considered the meaning to be given to the term ‘household’, although for the purposes of different statutory

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<sup>41</sup> Oxford English Dictionary (online publication), accessed on 19 June 2023.

<sup>42</sup> According to the criteria for the emergency housing grant; see *Unofficial consolidated version of the Special Needs Grants Programme as at 1 July 2022*, clause 14A.2.

<sup>43</sup> Having reached this conclusion, I do not have to consider whether the units were *intended* to be used only or mainly for residential purposes.

<sup>44</sup> The emergency housing grant pays for accommodation for individuals and any ‘immediate family’; see *Unofficial consolidated version of the Special Needs Grants Programme as at 1 July 2022*, clause 3.1 (for the definition of ‘immediate family’) and clauses 14A.1 and 14A.2

<sup>45</sup> *Queenstown-Lakes District Council v The Wanaka Gym Limited* DC Christchurch CIV-2003-002-000265, 18 November 2008 at [1].



regimes.<sup>46</sup> Notably, the Judge included an excerpt from *Hopper Nominees v Rodney District Council*:<sup>47</sup>

The word ‘family’ has a wide meaning adequate in modern use to connote relationships of blood or marriage or other intimate relationships of a domestic nature, including, for example, persons sharing a dwelling such as students or friends. The essential connotation of the term is familial domesticity.

5.27. The Judge adopted a similar approach to those cases and decided that the building in question was not a ‘single household unit’ but instead a ‘group dwelling’. Two subsequent High Court cases adopted the same approach.<sup>48</sup>

5.28. In my view, it is appropriate to compare the facts that the Judge considered relevant in the *Wanaka Gym* case with those in this determination:

**Table 3**

<b>Wanaka Gym</b>	<b>Fenton Steet</b>
There is considerable variance in the numbers at any given time.	It appears that each of the units were occupied by the same or similar number of people at any given time.
There are large numbers of people involved in the occupation of the building.	I understand there were a small number of people involved in the occupation of each unit. <sup>49</sup>
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.	A degree of restriction was placed on the occupants by the motel operator, for example, a visitor policy and noise control.
The relatively short term of the residence.	The units were occupied for long-term or indefinite periods. <sup>50</sup>
The fact that there is no necessary connection with the others residing in the house.	I understand each unit was occupied by either by an individual only or by an individual with their ‘immediate family’. <sup>51</sup> That being so, there was a necessary

<sup>46</sup> *Hopper Nominees Ltd v Rodney District Council* [1996] 1 NZLR 239; and *Simmons v Pizzey* [1977] 2 All ER 432.

<sup>47</sup> At page 6.

<sup>48</sup> *The Wanaka Gym Ltd v Queenstown Lakes District Council* [2012] NZHC 284; *The Wanaka Gym Ltd v Queenstown Lakes District Council* [2012] NZHC 2662.

<sup>49</sup> Following the BWO audit at the property, building compliance officers recorded that the manager of the property confirmed that there around 20 occupants in total staying in 13 units.

<sup>50</sup> For further discussion regarding the meaning of ‘transient accommodation’ and the duration of the stays, see paragraphs 5.32 to 5.37.

<sup>51</sup> See clause 14A.1 of the Special Needs Grants Programme which provides the criteria for the making of an emergency housing grant to an applicant.

	connection wherever there was cohabitation.
There is no agreement of the residents to reside together.	Where immediate family live or reside together, there is generally tacit agreement to do so.
The whole raison d'être of the building essentially is commercial rather than domestic.	The building was owned and operated for commercial purposes. However, the units were the sole place of residence for their occupants and, as such, were being used for domestic purposes.

- 5.29. The *Wanaka Gym* decision assists with identifying factors which may be relevant for an assessment as to whether a single household is present. However, there may also be other factors which are relevant in the circumstances.
- 5.30. The most notable difference between the facts in *Wanaka Gym* and this case is the duration of the stays. In *Wanaka Gym* the stays were short whereas in this case the stays were long-term or indefinite. In my view, this is a strong indication of there being a single household in each of the units. In addition, each unit in the motel was occupied either by an individual only or by an individual with their immediate family.
- 5.31. However, there are similarities with *Wanaka Gym* which would seem to indicate otherwise. Notably, the building was constructed for a commercial purpose and was operated as such by 24 January 2020. Further, there were restrictions placed on the occupants of the units by the motel operator. However, I consider those factors not significant enough to be inconsistent with people living or being resident in a household. I note that the units were the occupants' sole place of residence and, to that end, were wholly occupied for domestic purposes and not commercial.<sup>52</sup> Also, by way of comparison, a body corporate for a multi-unit dwelling may impose operational rules which restrict the use of a unit to the extent any use or uses interfere with occupants in other units (for example, prohibiting pets, parties after certain hours, and any other activities which interfere with occupants in other units).
- 5.32. There are other factors which are particularly relevant in this case. The occupants had no other place of residence and did not know when their occupancy would

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<sup>52</sup> The landlord submits the building is configured and has facilities like a normal motel. I consider that the purpose of the building by 24 January 2022 should not be determined solely by its layout; it was designed/constructed for use by tourists and other short stay guests, and not for emergency housing on a long-term or indefinite basis.

come to an end. Further, any cohabitation in the units was by ‘immediate family’ only. These factors further indicate that each unit contained a single household.

- 5.33. For the reasons above, I conclude that each unit was occupied by a single household by 24 January 2020. Having established that, I am satisfied the second limb of the definition of ‘household unit’ is met (ie that each unit in the building was occupied exclusively as the home or residence of not more than one household).
- 5.34. I note the definition of ‘household unit’ excludes hostels, boardinghouses and other specialised accommodation.<sup>53</sup> MSD submits that those who were “transitioning through [emergency housing]” at the building by 24 January 2022 were “more akin to those who might, for example, stay in a hostel or a boarding house for an extended period, both of which fall within the SA [use group]”. The use of the building in question differs to a hostel or boarding house situation, where residents have separate rooms that they pay to occupy on an individual basis, but where cooking, living and laundry facilities are shared. In this case, each unit contains a sleeping / living area, cooking facilities (either within the sleeping / living area or in a separate room), a bathroom and, in some but not all, a separate bedroom; the only shared facilities are the communal laundry areas.<sup>54</sup> In my view, the units were more akin to bedsit apartments, than a hostel or boarding house. Therefore, I find that the part of the building used for emergency housing was not a ‘hostel’ or ‘boarding house’ for the purposes of the Act.
- 5.35. I consider that by 24 January 2022, the units were “household units attached to spaces or dwellings with the same or other uses”. As such, the nature of the use falls within the description given for SR.<sup>55</sup> However, the landlord, motel operator and MSD submit the building at that time remained SA and have provided a range of arguments to support this view. That being so, I will consider the degree to which the units and communal areas can be considered SA. I will then go on to determine whether that part of the building was *mainly* SR or SA by 24 January 2022.

### **Sleeping accommodation (SA)**

- 5.36. The use group SA includes “spaces providing transient accommodation, or where limited assistance or care is provided for people”.

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<sup>53</sup> No order-in-council has yet been issued in respect of specialised accommodation. Therefore, only hostels and boarding houses can be classed as ‘specialised accommodation’.

<sup>54</sup> The Building Code provides for multi-unit dwellings to have shared laundry facilities; see clause G2.3.3.

<sup>55</sup> See Schedule 2 of the Change of Use Regulations.

- 5.37. 'Transient accommodation' is not defined in the Act or the Change of Use Regulations. The Oxford English Dictionary (OED) says the word 'transient' means "not lasting; temporary; brief; fleeting". The dictionary goes on to say, "...of a hotel, lodging, etc.: designed for short-term or temporary accommodation; (in later use also) used to accommodate people without permanent housing".<sup>56</sup>
- 5.38. In my view, what is 'transient accommodation' for the purposes of the Change of Use Regulations depends on the circumstances. I consider that the number of days is a key factor, but not the only relevant factor.
- 5.39. I note that the intent of the emergency housing grant is to provide "temporary accommodation" for people who have an "immediate emergency housing need".<sup>57</sup> The initial grant covers a maximum stay of seven days, which can be renewed if suitable longer-term housing cannot be found.
- 5.40. As at the date of the BWOA audit, the units had been occupied for periods ranging from 20 to 674 days. The average stay for all units was more than 7 months,<sup>58</sup> which would have required renewal by MSD at least 10 times.<sup>59</sup>
- 5.41. According to the OED, 'temporary' means, "Lasting for a limited time; existing or valid for a time (only); not permanent; transient; made to supply a passing need."<sup>60</sup>
- 5.42. In my view, despite the intent for emergency housing to be temporary, by 24 January 2022 the stays in the units were long-term or indefinite. Therefore, I consider that by that date, the units were *not* being used by their occupants as 'transient accommodation' for the purposes of the Change of Use Regulations.
- 5.43. I note that there is a second element of the description for SA under Schedule 2 of the Change of Use Regulations; more specifically, "where limited assistance or care is provided for people."
- 5.44. The phrase 'limited assistance or care' is not defined in the Act or the Change of Use Regulations.

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<sup>56</sup> Oxford English Dictionary (online publication), accessed on 3 November 2022.

<sup>57</sup> *Unofficial consolidated version of the Special Needs Grants Programme as at 1 July 2022*, clause 14A.

<sup>58</sup> This was the average length of stay as at 15 February 2022. Occupants continued their stays at the motel for varying periods beyond that date.

<sup>59</sup> According to the *Unofficial consolidated version of the Special Needs Grants Programme as at 1 July 2022*, there are circumstances where MSD may grant an emergency housing grant for up to 21 nights.

<sup>60</sup> Oxford English Dictionary (online publication), accessed on 3 November 2022.

- 5.45. In my view, the phrase should be interpreted in the context of the other use groups in the Change of Use Regulations, particularly the uses related to sleeping activities.<sup>61</sup>
- 5.46. I note use group SC (Sleeping Care)<sup>62</sup> covers situations where occupants are almost completely dependent on others; examples given include “hospitals, or care institutions for the aged, children or people with disabilities.” By comparison, the use group SA covers situations where occupants are more independent and do not require as much assistance or care; examples given include “motels, hotels, hostels, boarding houses, clubs (residential), boarding schools, dormitories, halls, wharenui.” These examples suggest the nature and degree of ‘limited assistance or care’ can vary according to type of occupancy. For example, a boarding school would provide a higher degree of assistance or care to its school aged boarders than would a university hall of residence to school leavers, but both would usually be SA by virtue of the provision of limited assistance or care. That being so, what amounts to ‘limited assistance or care’ depends on the particular circumstances.
- 5.47. Further, the mere presence of limited assistance or care is not in-of-itself determinative that the use group is SA. Other relevant factors must be taken into account and may provide sufficient grounds to conclude the use falls within a use group other than SA. I note that it is common for buildings to be SR despite limited assistance or care being provided to occupants; for example, an apartment building where a professional body corporate manager provides services to the residents in each unit.
- 5.48. The motel operator says they provided a broad range of services to those who were occupying the units as emergency housing.<sup>63</sup> They say these services have remained the same for all their guests throughout the duration of their lease of the property. They submit that these services are a form of assistance or care.
- 5.49. I consider that the services provided are of a kind that can be characterised as ‘assistance or care’. Further, because those using the building for emergency housing purposes were not completely dependent on the motel operator, the services can be characterised as ‘limited’. Therefore, I find that the services provided by the motel operator were ‘limited assistance or care’ for the purposes of the Change of Use Regulations.

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<sup>61</sup> See Schedule 2 of the Change of Use Regulations.

<sup>62</sup> ‘Sleeping Care’ which, according to the change of use table, is for those spaces such as hospitals or care institutions where people are provided with special care or treatment.

<sup>63</sup> For a complete list of these services, see paragraph 4.32 above.

## Whether the use group is SR or SA

- 5.50. A building or part of a building cannot, for the purposes of the Act, have more than one use group at the same time. However, there may be circumstances where the use of a building or part of a building fits the descriptions of two or more use groups. The Change of Use Regulations contemplates such circumstances. Where this occurs, an assessment must be undertaken to determine which is the *main* use group.<sup>64</sup>
- 5.51. Clearly the building's use straddles the descriptions for two use groups. By 24 January 2022, it fell within the description for SR largely because the units at the building were each a 'household unit' for the purposes of the Act. Concurrently, it fell within the description for SA, at least in part. This was largely because the motel operator was providing 'limited assistance or care' to those staying in each unit.
- 5.52. In this circumstance, therefore, I must determine whether the use group was *mainly* SR or SA.<sup>65</sup>
- 5.53. Earlier in this determination, I noted that the purposes of the Act and the scheme of the change of use provisions assist with the evaluation process which must be undertaken to determine a change from one use group to another. They are particularly helpful where a building or part of a building fits the description of more than one use group.
- 5.54. I note the purpose in section 3(a)(ii) that buildings have attributes that contribute appropriately to the health, physical independence and wellbeing of the people who use them. I consider that the amenities at the building in the areas used as emergency housing do not contribute appropriately to the health, physical independence and wellbeing of those who live or reside there on a long-term or indefinite basis.<sup>66</sup> That part of the building was constructed for temporary stays, and not for use as long-term or indefinite residences. In short, it is not fit-for the new purpose it was being put to.
- 5.55. MSD submits that the standards for SA are higher than SR. In its view, SA seems more desirable for emergency housing. I note that a building used for emergency

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<sup>64</sup> See regulation 6 of the Change of Use Regulations which provides that the use category for a building is determined by it being only or *mainly* a space or a dwelling of the kind described for that use category in Schedule 2 of the Change of Use Regulations.

<sup>65</sup> See regulation 6 of the Change of Use Regulations.

<sup>66</sup> For example, the food preparation facilities in each unit (which consist of a hotplate and sink inset in a 12600mm long countertop, with a mini/bar fridge under the counter) are not adequate for use by people who live there on a long-term or indefinite basis.

housing may be SA in some circumstances and a different use group in other circumstances. The use group is not determined by a generic description such as 'emergency housing', but by the nature of the actual or intended use of the particular building in question (which requires a broad assessment of the relevant facts in the circumstances). Once the use group is determined, any new requirements are those which are appropriate for that particular building, and ultimately the use it is put to, according to the Act and the Building Code.

- 5.56. Further, as noted above, the scheme of the change of use provisions provides an elevated status to household units. I have found that the units each were a 'household unit' by 24 January 2022, when previously there were none. This lends considerable weight to the use group at that time being more SR than SA.
- 5.57. I acknowledge that the motel operator was providing 'limited assistance or care' to the people using the units as emergency housing. As noted above, this alone is not determinative of the use group. In my view, the limited assistance or care that was provided by the motel operator is not incompatible with the building's use being SR by 24 January 2022.
- 5.58. I acknowledge that there may be situations where people occupy or reside in a building for a longer period than would ordinarily be considered temporary but the building is deemed SA; for example, a hall of residence which is occupied by university students. However, in this case, I am of the view that the relevant factors indicate the use group was *mainly* SR (rather than mainly SA).
- 5.59. For the reasons above, I conclude that the part of the building which consists of units and communal areas had, by 24 January 2022, changed to a new use group, that being to SR when previously it was SA.

### **More onerous Building Code requirements**

- 5.60. I now consider whether the second criterion is met – that the new use results in additional or more onerous Building Code requirements for the purposes of regulation 5 of the Change of Use Regulations.<sup>67</sup> If the second criterion is met, requirements in sections 114 and 115 are triggered with respect to the building.
- 5.61. In order to determine whether there are additional or more onerous Building Code requirements, first I must consider the classified use of the part of the building used for emergency housing.<sup>68</sup> This is because Building Code

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<sup>67</sup> I note that the Building Code requirements for buildings or parts of buildings vary according to their classified use. As a result, some buildings or parts of buildings are required to meet Building Code requirements that others are not.

<sup>68</sup> For the classified uses, see clause A1 of the Building Code.

requirements apply according to the building’s classified use or uses, and not according to its use group in the Change of Use Regulations.<sup>69</sup>

- 5.62. Clause A1 sets out the various classified uses that a building may have. They are grouped together based on the activity or use that will be carried out in the building, and then split further into subcategories.

## **2.0 Housing**

2.0.1 Applies to buildings or use where there is self care and service (internal management). There are three types:

...

### **2.0.3 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.

...

## **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. 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.

...

- 5.63. Clause 3(3) of the Building Regulations 1992 sets out how the classified use is established and states:

The classified use or uses of a building or part of a building shall be the ones that most closely correspond to the intended use or uses of that building or part of that building.

- 5.64. Under the title “Explanation”, clause A1.0.2 states “[a] building with a given classified use may have one or more intended uses as defined in the Act.”

- 5.65. Section 7 of the Act, provides an expansion to the ordinary meaning of “intended use”:

intended use, in relation to a building,—

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<sup>69</sup> See clause 3 of the Building Regulations 1992 together with the ‘Limits on application’ column for Building Code clauses B1 to H1.



(a) includes any or all of the following:

(i) any reasonably foreseeable occasional use that is not incompatible with the intended use: ...

5.66. The Act and Building Code clearly contemplate buildings changing their intended use(s) and classified use(s) over the course of their economic lives. In this case, the original intended uses of the building were as short stay accommodation for tourists and other visitors, and as a manager's residence.

5.67. In terms of 'reasonably foreseeable occasional use' I am of the view that by 24 January 2022 the occupation of the units as emergency housing was not occasional use<sup>70</sup>. Rather, by that time the intended use of the building had changed to long-term or indefinite emergency housing when previously it was short stay accommodation.

5.68. I note the landlord's submission that the building is used as a motel and there has not been a change of use. However, earlier determinations have noted the term 'intended use' as defined in section 7 of the Act is not a subjective view based on an owner's stated use of the building. While an owner's proposed use is taken into account, the assessment of the intended use also requires an objective assessment of the use the building has been, or can be, put to based on relevant facts.

5.69. As a first step, I will determine whether the change of intended use (from short stay accommodation to long-term or indefinite emergency housing) resulted in a change of 'classified use'. If so, as a second step, I will then consider whether, due to the change in the classified use, there are additional or more onerous Building Code requirements for the part of the building which was being used as emergency housing (ie the units and communal areas).

5.70. The authority is of the view that the use of motels for emergency housing is more akin to the 'housing' category (and, more specifically, the 'multi-unit dwelling' type). Neither the landlord nor the motel operator has made any submission regarding the classified use of the building. MSD is of the view that the classified use is 'community residential' category (and, more specifically, the 'community service' type).

5.71. The 'community residential' classified use applies to buildings or use where assistance or care is extended to 'principal users'. There are two subcategories or

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<sup>70</sup> By 24 January 2022, all units at the building had been occupied as emergency housing for an average period of more than 7 months.

types of community residential which are 'community service' and 'community care'.

- 5.72. The 'housing' classified use applies to buildings or use where there is self care and service (internal management). There are three subcategories or types of 'housing' which are 'detached dwellings', 'multi-unit dwelling' and 'group dwelling'.
- 5.73. I have considered the classified use categories of residential type buildings that accommodate people and compared this with the design/layout of the building including its intended use and how the building was being used, and I note the following:
- 5.73.1. The plans and specifications provided as part of the 1987 building permit application for the building show 13 self-contained units of which nine incorporate a combined bedroom and living area with a small kitchen and a separate bathroom and, for the remaining four units, the bedroom/living area, kitchen and bathroom are all in separate rooms.
- 5.73.2. The building permit issued on 20 December 1988 states the building's "main purpose of use" as a motel.
- 5.73.3. With changing circumstances, the building had – as at 15 February 2022 – approximately 20 people living in the units for the purpose of emergency housing, with an average stay of more than 7 months; under the emergency housing grant scheme, MSD was paying the motel operator on behalf of each person for their stay.
- 5.74. Based on the features of the units and the intended and actual uses of the building, I conclude that initially, when the building's construction was approved and the units were occupied by tourists and other transient guests, the classified use of the building was 'community residential' with the type 'community service'.
- 5.75. However, I am of the view that by 24 January 2022 the classified use category for this building was Housing, Multi-unit dwelling (Clause A1, 2.0.3) because, at that time, the building contained more than 'one separate household or family'. I expect that they practiced a significant degree of 'self care and service' by looking after themselves and each other. I note that assistance or care was being provided by the motel operator to the occupants but that it was not of a nature or type which is inconsistent with the classified use being 'housing, multi-unit dwelling'.

5.76. Therefore, I am satisfied, that the classified use of the building was – at the time the authority proposed to issue a notice to fix – ‘housing’, with the housing type being a ‘multi-unit dwelling’.

### **Additional or more onerous Building Code requirements**

5.77. Now that I have determined the building’s classified use as ‘housing’ with the type ‘multi-unit dwelling’, as a second step, I must go on to determine whether the change from SA to SR gives rise to additional or more onerous Building Code requirements for the building according to its ‘housing’ classification.

5.78. MSD submits that “[regulation 5 of the Change of Use Regulations] must be read as ‘has more onerous and additional Building Code requirements *overall*’ than the previous use...”. I disagree; it is not appropriate in these circumstances to read a word into the Regulations that is not there.<sup>71</sup> That being so, this particular requirement is met where there is at least one Building Code requirement which is in addition to, or more onerous than, the Building Code requirements for the previous use.

5.79. It is clear that under the classified use of housing, multi-use dwelling there are additional or more onerous Building Code requirements when compared with the requirements for the classified use of communal residential, community service.

5.80. For example, Clause G3 *Food preparation and prevention of contamination*<sup>72</sup> did not apply to the building when its classified use was ‘community residential’. However, when the building’s classified use changed to ‘housing’, specific requirements under clause G3 then applied to the building, when previously they did not<sup>73</sup>.

5.81. As another example, Clause H1.3.4(c), which relates to constructing hot water systems to facilitate the efficient use of hot water, did not apply to the building when its classified use was ‘community residential’. However, the requirement did apply once the building’s classified use changed to ‘housing’.

## **6. Conclusion**

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<sup>71</sup> See *R v Steigrad* [2011] NZCCLR 24 (CA) at 61 where Glazebrook J says “Adding words is very rarely legitimate”.

<sup>72</sup> This clause requires the safe and adequate provision of space and facilities for the hygienic storage, preparation and cooking of food for buildings with specified classified uses.

<sup>73</sup> For example, functional requirement clause G3.2.1 and performance criteria clause G3.3.1.

- 6.1. I conclude that the part of the building used for emergency housing had, by 24 January 2022, undergone a ‘change of use’ for the purposes of the Act because:
- the building’s use group, as appears in the Change of Use Regulations, had changed from SA to SR
  - the new use has Building Code requirements which are additional to, or more onerous than, the old use.
- 6.2. Therefore, the authority was correct, on or about 24 January 2022, to propose to issue a notice to fix under section 164 to the landlord for contravening or failing to comply with the Act. The basis of the contravention or failure to comply is section 115; more particularly, for changing the use of the part of the building used for emergency accommodation without receiving prior notice from the authority.<sup>74</sup>
- 6.3. A determination under section 177(1)(b) is in respect of the authority’s exercise of its powers of decision. Section 188(1) provides that a determination must confirm, reverse, or modify that decision, or determine the matter to which it relates.
- 6.4. The District Court, in *Estate Properties Ltd v Hastings District Council* stated “[t]he Chief Executive’s choice of remedy under s 188(1) is an exercise of discretion” and that it was open to the Chief Executive to not apply one of the positive steps required by section 188(1)(a).
- 6.5. I am of the view the following factors are relevant in considering the remedy in this case:
- 6.5.1. the authority had only proposed to exercise its power of decision not actually exercised that power
- 6.5.2. the landlord and motel operator have advised that the occupation of the units has reverted back to its original use.
- 6.6. In these circumstances, I elect not to exercise any of the powers in section 188(1)(a).

## 7. Additional Comments

- 7.1. Given the time elapsed, for the authority to consider exercising its powers under section 164, it will need to assess whether there are reasonable grounds to do so under section 164(1)(a). This would include revisiting the particulars, including the

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<sup>74</sup> With respect to this determination, the authority says the landlord contravened section 115. I note the landlord may have also contravened the Act by not giving written notice for a change of use as required by section 114.

basis for the contravention or failing to comply with the Act or the regulations. The authority will need to consider any new evidence available regarding the status of the building, including how the building is being used at that time. Any notice to fix must comply with the requirements for form and content as set out in the prescribed form<sup>75</sup> and in section 165 of the Act.

- 7.2. Should an owner propose to change the use of a building, they need to give written notice to the authority proposing to change the use of the building and providing information on how the building will comply to the extent required under section 115. Any building work necessary may require a building consent. It will be for the authority to assess the proposal against the requirements of section 115. In doing so, the authority must apply the ‘as nearly as is reasonably practicable’ test as set out in section 115.

## 8. Decision

- 8.1 In accordance with section 188 of the Building Act 2004, I determine that the authority was correct in its proposal, on or about 24 January 2022, to issue a notice to fix under section 164 to the landlord for failing to comply with the Building Act 2004.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 19 June 2023.

**Katie Gordon**

**National Manager, Building Resolution**

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<sup>75</sup> Form 13, in Schedule 2 of the Building (Forms) Regulations 2004.