

Determination 2024/013

The purported refusal to grant a building consent for building work and whether there would be a change of use.

11 Franklyn Street, Nelson South, Nelson

Summary

This determination considers an authority's purported decision to refuse to grant a building consent for an alteration to an existing workshop on a residential property to create a sleep-out. The determination considers whether a change of use is occurring with the proposed building work.



The legislation discussed in this determination is contained in Appendix A. 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.

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Peta Hird, Principal Advisor Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.¹
- 1.2. The parties to the determination are:
 - 1.2.1. D Curl (“the designer”), the licensed building practitioner who designed the relevant building work and applied for this determination
 - 1.2.2. K Stratford (“the owner”), the owner of the property
 - 1.2.3. Nelson City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. This determination arises from the authority’s decision to decline an application for a building consent on the basis that it does not meet the requirements of section 45 of the Act. The authority believes the proposed building work creates a change of use under the *Building Specified Systems, Change the Use, and Earthquake-prone Buildings Regulations 2005* (“the Regulations”) and does not comply with requirements of section 115 of the Act.
- 1.4. The matter to be determined, under section 177(1)(b) and (2)(d), is the authority's purported refusal to grant a building consent for alterations to an existing building under section 50.
- 1.5. The matter turns on whether the proposed building work constitutes a change of use under the Regulations, specifically in relation to the existing use of the building.
- 1.6. In deciding this matter, I have considered the requests for information raised by the authority on 12 and 13 April 2023 in relation to change of use and section 115.

Matters outside this determination

- 1.7. I have not considered whether the information provided in the application for a building consent met the requirements of section 45, nor whether the proposed

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

building work detailed in the consent documents complies with section 115 or section 112.

- 1.8. Neither have I considered the uses of any other buildings on the owner's property or compliance with the Building Code of those buildings.

2. The building and building work

- 2.1. The proposed building work, as outlined in the application for a building consent, is for alterations to an existing single-level outbuilding that was originally constructed around 1987. The building is located near the property's northwest boundary, approximately 900mm from the property's boundary (figure 1).



Figure 1: Aerial view of the location of the building subject to the proposed building work and the detached dwelling (north to top of image).

- 2.2. The owner proposes to create a habitable space in the building. It consists of a bedroom approximately 4.6m x 4.2m with ensuite bathroom, a second bathroom with external access only, and an external bench with a sink, a barbeque patio area and some fencing.
- 2.3. The proposed building work that is the subject of the building consent application includes installing:
- wall and ceiling insulation
 - the two bathroom fit outs
 - plasterboard linings throughout
 - new external joinery units

- a bench and sink on an exterior wall
 - new external vertical profiled metal wall cladding to the southeast and southwest elevations (other elevations will remain as horizontal metal weatherboards), and
 - removing the window unit in the northwest wall and filling in the opening.
- 2.4. It appears that there is no internal sink or cooking facilities, nor laundry facilities proposed in the building.
- 2.5. The property also has a detached dwelling and another outbuilding. The building consent does not include work to these buildings.

3. Background

- 3.1. The original building was constructed under a building permit in 1987. I note its construction pre-dates the Regulations (2005) that the building is now subject to.
- 3.2. The original building permit for the construction of the “workshop” shows a 4.8m x 6.0m floor plan with elevations showing a standard garage. It is unknown if the vehicle door was proposed to be installed, or ever was. Presently, there is no vehicle access to the building and no evidence that there ever has been.
- 3.3. On 11 April 2023, the designer applied to the authority for a building consent on behalf of the owner for “internal alterations including plumbing” that would make the building a habitable space.
- 3.4. The following day, the authority sent a request for information asking the designer to change the proposed use of the building in their application from a “detached dwelling” to an “outbuilding” based on Building Code Clause A1 for classified uses. The authority also asked the designer to “confirm the location of the proposed sleepout in relation to the side property line” as the authority believed the external wall may have been closer than 1m and that fire rating may be required.
- 3.5. The designer disagreed with the authority’s understanding of the proposed building work, stating that the building work was for a sleepout which is not an outbuilding, and therefore, fits within the classification of Detached Dwelling². They believed that the external wall complied with the requirements of section 112 *Alterations to existing buildings*.
- 3.6. The authority disputed this, indicating that the proposed building work was a change of use and fire rating to the external wall would be required as part of this change.
- 3.7. In communication with the authority, the designer submitted that the existing garage fell under the use *Sleeping Single Home (SH)* in the Regulations. This meant

² Clause A1 – Classified uses

that in their view, the building work would not constitute a change of use and that the building work should be assessed under section 112 as an alteration rather than under section 115 as a change of use.

- 3.8. Following further emails between the designer and authority, on 13 April 2023, the authority “rejected [the application] under section 45(1)(c)”. The authority stated that the application did not describe how the building, in changing its use from an outbuilding to a sleepout, would comply with section 115(b)(i)(A) of the Building Act “in relation to the fire rating of the wall closest to the boundary”.

4. Submissions

The designer

- 4.1. The designer is of the view that the proposed building work does not involve a change of use, and the external wall of the building is not required to be upgraded to a fire-rated wall. The designer submits (in summary):
- 4.1.1. The building, in its existing use, falls under use SH in the Regulations and therefore the building work to construct a sleepout will not constitute a change of use.
 - 4.1.2. The proposed work will be carried out under section 112 Alterations to existing buildings.
 - 4.1.3. They agree with the authority that a garage and a workshop are the same thing. However, they disagree with the authority’s position that the building in its existing state should be classed as Intermittent Low (IA) under the Regulations. The designer believes that for the use IA to be applicable, the building must be associated with a commercial or industrial use.
 - 4.1.4. The risk of external fire spread “continues to comply” with section 112 to the same extent in the proposed work.

The authority

- 4.2. The authority has highlighted that clause 6 of the Regulations specifies that the use set out in Schedule 2 of the Regulations can be of a building or *part of a building*. It has stated that “while the garage is within the SH use, it is of itself not SH, rather it is IA” because Schedule 2 “acknowledges that spaces such as corridors[,] stairways, toilets and other spaces that would be contained within an SH use, are indeed IA use”.

- 4.3. The authority submitted, in summary:
- 4.3.1. The proposed building work would change the building's use from IA to SH. Currently, the building functions as an IA building.
 - 4.3.2. The original building permit plans showed that the building would not be used as a "motor vehicle shelter", due to the lack of vehicular access.
 - 4.3.3. The original construction of the building was permitted as a workshop, and therefore, the building falls under the Building Code clause A3 Importance Level 1 (IL1). This means the building is typical of sheds and barns, is used for intermittent occupation, and is "non-habitable". This aligns with the Regulations definition of an IA use, that being "spaces for intermittent occupation or providing intermittently used support function".
 - 4.3.4. The proposed building work is a change of use and should be assessed under section 115 of the Act.
 - 4.3.5. The authority disagrees with the designer's statement that an IA building must be associated with a commercial or industrial use.
 - 4.3.6. For the building to be compliant with SH, it needs to meet the structural and fire safety requirements of the relevant clauses of the Building Code. The structural performance must meet the requirements of an Importance Level 2 building, and other code clauses must be met, such as E1 Surface Water and D1 Access that are not required to be assessed for IL1 structures.

The owner

- 4.4. The owner did not make a submission in relation to this application.

5. Discussion

The refusal

- 5.1. The authority has purportedly refused to grant a building consent under section 50 for the proposed building work.

50 Refusal of application for building consent

If a building consent authority refuses to grant an application for a building consent, the building consent authority must give the applicant written notice of—

- (a) the refusal; and
- (b) the reasons for the refusal.

- 5.2. The authority submits that it rejected the 2023 building consent application, but it did not refuse a building consent. Regarding its reasons for rejecting the application, the authority stated that the application did not provide information on how the building will comply as near as reasonably practicable with section 115(a), as the building is changing, in its view, from an uninhabited outbuilding to a habitable sleepout, which it considers is a change of use under the Regulations. The authority submitted that there was no justification provided for why the building work may not achieve full compliance in relation to fire rating of the wall closest to the boundary for protection of other property.
- 5.3. An authority can, under section 45(1)(c), request any information it “reasonably requires”. However, the requirements of section 45 are not in regard to Building Code compliance, but whether the building consent application contains comprehensive information for the authority to be able to make a decision about compliance under section 49. Section 45 only requires sufficient information to be provided to enable the processing of an application.
- 5.4. Where there is inadequate documentation to enable the authority to make a decision under section 49, the authority is entitled to refuse to grant the building consent under section 50 of the Act. This is on the basis that without adequate documentation, the authority cannot be satisfied on reasonable grounds that the provisions of the Building Code will be met if the proposed building work is completed in accordance with the plans and specifications that accompanied the application for the consent, as per section 49 of the Act.
- 5.5. Regardless, I note the authority’s decision related to a matter of compliance, not to the provision of information. I consider the authority’s decision to “reject” the application amounts to a purported decision to refuse to grant the building consent under section 50.
- 5.6. I am of the view that the authority’s initial requests on 12 April 2023 for information, which were responded to by the designer, were sufficient to gain clarification of the proposed work. However, the following questions on 12 and 13 April 2023 regarding the use of the building were related to compliance assessment under section 115 and the protection of other property.
- 5.7. Section 48(2) provides an authority with the ability to request further reasonable information deemed necessary to establish compliance with the Building Code once an application meets the requirements set out the Act. Section 49 sets out the test that authorities are required to carry out to confirm compliance with the Building Code.
- 5.8. The dispute between the parties’ is about whether the owner’s building will undergo a change of use, and therefore, whether the proposed building work is subject to the compliance requirements relating to changing a building’s use.

- 5.9. For the authority to grant a building consent where there is a proposal to change the use, the building work must demonstrate that it complies with the relevant requirements in section 115. The question that has arisen is whether there is in fact a change of use.

The building's existing use

- 5.10. There is no dispute between the parties about the proposed use. All agree that once the building work has been carried out, the building will fall under SH. I will therefore consider the building's existing use.
- 5.11. The building use categories are outlined in the Regulations. The term "garage" occurs in both SH and IA use categorisation. The table below shows the difference between the two relevant use categories.

Use	Definition	Example
Uses related to sleeping activities 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
Uses related to intermittent activities IA (Intermittent Low)	spaces for intermittent occupation or providing intermittently used support functions—low fire load	car parks, garages, carports, enclosed corridors, unstaffed kitchens or laundries, lift shafts, locker rooms, linen rooms, open balconies, stairways (within the open path), toilets and amenities, and service rooms incorporating machinery or equipment not using solid-fuel, gas, or petroleum products as an energy source

- 5.12. I note that the Regulations' wording of "spaces or dwellings", while providing some detail, should be read as only examples of typical uses. It would not be possible to include every conceivable space use within the Regulations.
- 5.13. The SH use in the Regulations includes detached dwellings containing a single household or family, as well as buildings and spaces with uses that are associated with a primary dwelling, namely "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)...". An important factor in considering the

inclusion of these buildings or spaces in the definition is that they are associated with a dwelling, and for self-contained spaces that they are occupied by a member of the same family.

- 5.14. In this determination, the owner has indicated that the space has been used as a workshop, which is consistent with the original building permit. There is no evidence of a change of use since the original construction. Both the authority and the designer agree that the terms “garage” and “workshop” can be used in the same context. I also agree with this in relation to residential garages and workshops, based on how these spaces can commonly be used across New Zealand. As an example, older residential garages can struggle to fit a modern car and therefore are used for storage or workshop areas instead, or garages can have workshop spaces within them.
- 5.15. In my opinion, the expansion of the term “garage” should be read as “*or garden implements*”, meaning that the building is not required to store vehicles *and* tools *and* garden implements, but that the primary use is to store any one or a combination of these. On that basis, a garage in the SH category doesn’t need to be primarily for storage of a vehicle, so whether there is vehicle access to it (which there isn’t in this case) is not a relevant factor.
- 5.16. The authority’s submission suggests that a garage remains IA even in circumstances where it is associated with a dwelling, on the basis that under clause 6 of the Regulations a part of a building may have a use distinct from another part of the same building.
- 5.17. My interpretation of SH is that garages have been included as accessory structures to a dwelling because they are primarily used by and for the occupants’ activities. The vehicle, tools, and garden implements are for the use of the dwelling’s occupants, and therefore, garages used to store them are within the use SH.
- 5.18. The Authority has also considered Building Code clause A3 *Importance Levels* in support of its view there is a change of use. Clause A3 categorises buildings only for the purpose of the C-Clauses of the Building Code, which relate to fire safety. It is not a factor in determining the use of a building in the Regulations.
- 5.19. I agree with the submissions that there is some overlap between the two “garages” included in both the SH and IA. Garages in both use categories are indeed spaces that can be used intermittently.
- 5.20. Use IA indicates that the space is being used for “intermittent occupation”. There is no legislative definition for “intermittent’ so I will take the natural definition: “not happening regularly or continuously; stopping and starting repeatedly or with periods in between”³.

³ [Cambridge Dictionary](#)

- 5.21. My interpretation of IA and the types of structures that would likely fall within this use category are those such as free-standing canopies over car parks and individual self-storage units not associated with a residential dwelling on the same site. These types of structures are likely to be used less frequently, such as when accessing goods and services or belongings. A garage or workshop used by the occupants of a dwelling is more likely to be used regularly and for continuous periods of time.
- 5.22. In this case, I consider the association with a detached dwelling and the occupants of the household to be the deciding factor in how the building has been used. The existing building has a use categorisation of SH under the Regulations and therefore, the proposed building work is not a change of use.

6. Conclusion

- 6.1. The proposed building work does not constitute a change of use, and therefore the proposed building work must comply with section 112 for any upgrade requirements.
- 6.2. As no change of use is occurring in the proposed building work, the authority did not have grounds for the purported refusal to grant the building consent.

7. Decision

- 7.1. In accordance with section 188 of the Building Act 2004, I determine that no change of use will occur in the proposed building work, and I reverse the authority's purported decision to refuse to grant the building consent.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 26 March 2024.

Peta Hird

Principal Advisor Determinations

APPENDIX A: Legislation

45 How to apply for building consent

- (1) An application for a building consent must—
- (a) be in the prescribed form; and
 - (b) be accompanied by plans and specifications that are—
 - (i) required by regulations made under section 402; or
 - (ii) if the regulations do not so require, required by a building consent authority...
 - (c) contain or be accompanied by any other information that the building consent authority reasonably requires; and...

49 Grant of building consent

- (1) A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.
- (2) However, a building consent authority is not required to grant a building consent until it receives—
- (a) any charge or fee fixed by it in relation to the consent; and
 - (b) any levy payable under section 53.
 - (c)[Repealed]

112 Alterations to existing buildings

- (1) A building consent authority must not grant a building consent for the alteration of an existing building, or part of an existing building, unless the building consent authority is satisfied that, after the alteration —
- (a) the building will comply, as near as reasonably practicable, with the provisions of the building code that relate to—
 - (i) means of escape from fire; and
 - (ii) access and facilities for persons with disabilities (if this is a requirement in terms of section 188); and
 - (b) the building will—
 - (i) if it complied with the other provisions of the building code immediately before the building work began, continue to comply with those provisions; or

(ii) if it did not comply with the other provisions of the building code immediately before the building work began, continue to comply at least to the same extent as it did then comply.

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

(1) In this section and section 115, change the use, in relation to a building, means to change the use of the building in a manner described in the regulations.

(2) An owner of a building must give written notice to the territorial authority if the owner proposes—

- (a) **to change the use of a building;** or
- (b) to extend the life of a building that has a specified intended life; or
- (c) to subdivide land in a manner that affects a building...

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 ...