

Before the Building Practitioners Board

BPB Complaint No. 26520

Licensed Building Practitioner: Paul Matthew Smith (the Respondent)

Licence Number: BP 127107

Licence(s) Held: Carpentry

Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner Under section 315 of the Building Act 2004

Complaint or Board Inquiry Complaint

Hearing Type: Audiovisual Conference

Hearing Date: 26 February 2025

Board Members Present:

M Orange, Chair, Barrister (Presiding)

Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2

Mr T Tran, Barrister— Legal Member

Mr G Anderson, LBP, Carpentry and Site AoP 2

Mr P Thompson, LBP, Carpentry and Site AoP 3, Quantity Surveyor

Ms E Harvey McDouall, Registered Architect

Ms S Chetwin CNZM, Barrister and Solicitor, Professional Director

Mr C Lang, Building Surveyor and Quantity Surveyor

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

Disciplinary Finding (Majority Decision):

The Respondent **has** committed a disciplinary offence under section 317(1)(da)(ii) of the Act.

The Respondent is fined \$500 and ordered to pay costs of \$700. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

Dissenting (Minority) Decision:

Mrs F Pearson-Green and Mr C Lang dissent from the majority's finding and would have found that the building work did not constitute restricted building work, and therefore no disciplinary offence had been committed.

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Introduction

- [1] This case concerns a fundamental question about the scope of “restricted building work” under New Zealand’s building regulatory framework. At its heart lies the question of whether a sleepout without a kitchen can be considered a “residential unit” for the purposes of determining when building work requires oversight by licensed building practitioners.
- [2] The case arose from a complaint by [OMITTED] against Paul Matthew Smith, a licensed building practitioner who constructed roof, walls, columns and beams for a new building at [OMITTED]. The building comprises a garage with games room and sleepout. Mr Smith failed to provide a Record of Work, but an issue arose as to whether such a record was required because the building lacks a kitchen.
- [3] This matter came before the full Board due to the complexity of the legal question involved. Determining whether buildings without complete residential amenities fall within the restricted building work regime required detailed analysis of the relevant statutory definitions and their practical application.

The Charges and Procedural Background

- [4] The prescribed investigation and hearing procedure is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. The Board sets the charges and decides what evidence is required.¹
- [5] The Board resolved to investigate whether Mr Smith failed, without good reason, to provide a Record of Work for restricted building work contrary to section 317(1)(da)(ii) of the Act. However, a threshold question immediately arose: was the building work actually “restricted building work” requiring such a record?
- [6] On 6 September 2024, the Board noted that whilst the Building Consent Authority had classified the building work as restricted building work, the consented work contained bedrooms, a living space, a bathroom and a laundry attached to a garage, but did not have a kitchen. The Board identified that it needed to determine whether the building

¹ Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law. The evidentiary standard is the balance of probabilities, *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

work came within the definition of restricted building work as set out in the Building (Definition of Restricted Building Work) Order 2011 (“the RBW Order”).

- [7] Given the novel and complex nature of this legal question, the Board appointed Mr David Collins of Meredith Connell as Special Adviser to provide legal analysis on the restricted building work issue.²

Summary of the Board’s Majority Decision

- [8] The Board considered whether the building work carried out by the Respondent constituted “restricted building work” requiring a Record of Work under section 88(1) of the Act. This presented an important legal threshold question, as the building involved a sleepout without a kitchen and with an attached large garage.
- [9] After careful legal analysis of the relevant facts and with the assistance of a Special Adviser, the majority of the Board finds that the:
- (a) Construction of a roof, walls, columns and beams for a new Kiwispan steel framed garage with games room and sleepout on concrete slab constitutes restricted building work;
 - (b) Building qualifies as a “house” under the Order despite lacking a kitchen;
 - (c) Absence of a kitchen does not preclude a building from being classified as a “residential unit” if its overall design and intended use is primarily for residential purposes;
 - (d) Presence of a larger-than-standard garage does not change the classification when the building contains two reasonably sized bedrooms (approx. 4m x 3m), a fully equipped bathroom, and a laundry with living area;
 - (e) Auckland Council classified the building as “housing, detached dwelling” in the building consent documentation, further supporting this conclusion.
- [10] Having established that the work was restricted building work, the majority of the Board finds that the Respondent had failed to provide a Record of Work as required under section 88(1) of the Act without good reason, in breach of section 317(1)(da)(ii) of the Act.
- [11] The Respondent is fined \$500 and ordered to pay costs of \$700.

The Facts

- [12] The essential facts, which are largely undisputed, paint a picture of a substantial building project on a rural property that has created genuine uncertainty about regulatory classification.

² Report dated 15 January 2025.

- [13] On 26 August 2022, work commenced on a project to construct a garage with games room and sleepout on concrete slab at [OMITTED]. On 16 January 2023, Auckland Council issued building consents for a new Kiwispan steel framed garage with games room and sleepout on concrete slab, and a revised onsite effluent drainage report.
- [14] Mr Smith was engaged to carry out construction of roof, walls, columns and beams between 17 March 2023 and 12 July 2023. The project was completed by 12 July 2023, and Auckland Council issued a code compliance certificate on 24 April 2024.
- [15] The building itself presents the characteristics that have generated this legal uncertainty. It is situated on a rural 4,997m² site with an existing dwelling and contains:
- (a) A garage of 108m² with doors measuring 4.8 metres wide by 3.65 metres high and eaves height of approximately 4.2 metres;
 - (b) A sleepout area of 84m² containing two reasonably sized bedrooms (approximately 4 metres by 3 metres each), a fully equipped bathroom, a laundry, and a living space;
 - (c) No kitchen facilities; and
 - (d) Total building area of 192m².
- [16] Auckland Council classified the building as “housing, detached dwelling” in the building consent documentation. The wastewater design indicates the sleepout is suitable to accommodate up to four people.
- [17] The failure to provide a Record of Work came to light during the Code Compliance Certificate process. Mr [OMITTED] made multiple attempts to contact Mr Smith for the Record of Work, including five emails and five phone calls in April 2024, all of which proved unsuccessful, leading to the complaint filed on 19 April 2024.

The Legal Framework

- [18] The starting point for our analysis is the definition of “restricted building work” in section 7 of the Act, which provides that such work means any building work that is building work of a kind declared by the Governor-General by Order in Council to be restricted building work.
- [19] The relevant Order in Council for the purposes of “restricted building work” is contained in the RBW Order. Clause 5 of the RBW Order provides as follows:

5 Certain building work relating to primary structure or external moisture-management systems of residential buildings to be restricted building work

- (1) *The kinds of building work to which this clause applies are restricted building work for the purposes of the Act.*
- (2) *This clause applies to building work that is—*
 - (a) *the construction or alteration of—*
 - (i) *the primary structure of a house or a small-to-medium*

- apartment building; or
- (ii) the external moisture-management system of a house or a small-to-medium apartment building; and
- (b) of a kind described in subclause (3); and
- (c) of a kind for which a licensing class to carry out or supervise the work has been designated by Order in Council under section 285 of the Act.
- (3) The kinds of building work referred to in subclause (2)(b) are—
 - (a) bricklaying or blocklaying work:
 - (b) carpentry work:
 - (c) external plastering work:
 - (d) foundations work:
 - (e) roofing work.

[20] Relevant definitions in the RBW Order include:

bricklaying or blocklaying work means the laying of bricks or blocks or erection of brickwork or blockwork.

house means a free-standing, fully detached building consisting of a single residential unit (or a single residential unit and 1 or more residential facilities)

household unit—

- (a) means a building or group of buildings, or part of a building or group of buildings, used or intended to be used solely or principally for residential purposes and 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 or boardinghouse, or other specialised accommodation

primary structure, in relation to a building, —

- (a) means those of its building elements that are intended to contribute to its ability to withstand vertical or horizontal loads (for example, its beams, bracing, columns, foundations, roof, subfloor framing, and walls); and
- (b) includes any part of its primary structure

residential facility means a part of a building that is not a residential unit, but is a facility (for example a corridor, foyer, garage, laundry, lift, sauna, or storage unit) whose principal or only purpose is ancillary to the use of a residential unit in the building (or 2 or more residential units in the building)

[21] For building work to fall within this definition, three cumulative criteria must be satisfied. As established in *MBIE Determination 2014/064*, these are:

- (a) The building work must involve construction or alteration of the primary structure of a “house” or small-to-medium apartment building, or the external moisture management system of such buildings;
 - (b) The work must be of a kind described in the Order (including carpentry work);
 - (c) The work must be of a kind for which a licensing class has been designated under the Act.
- [22] The central issue in this case concerns the first criterion. For the building work to fall within the restricted building work regime, the structure being built must qualify as a “house” under the RBW Order.
- [23] As set out above, the RBW Order defines “house” as “a free-standing, fully detached building consisting of a single residential unit (or a single residential unit and 1 or more residential facilities).” This definition immediately raises two subsidiary questions: what constitutes a “residential unit,” and how should buildings with mixed residential and non-residential elements be classified?
- [24] A “residential unit” is defined as “a building, or part of a building, that is so designed that it is more suitable for being lived in by a single household or family than for any other use.” This functional test requires us to consider not just the physical characteristics of the building, but its intended use and suitability for different purposes.
- [25] The definition of “residential facility” provides that it “means a part of a building that is not a residential unit, but is a facility (for example a corridor, foyer, garage, laundry, lift, sauna, or storage unit) whose principal or only purpose is ancillary to the use of a residential unit in the building.” Notably, “garage” is expressly included as an example of a residential facility.
- [26] “Primary structure” is defined as “those of its building elements that are intended to contribute to its ability to withstand vertical or horizontal loads (for example, its beams, bracing, columns, foundations, roof, subfloor framing, and walls); and includes any part of its primary structure.”

The Special Adviser’s Analysis

- [27] Mr Collins’ comprehensive legal analysis provided valuable assistance to the Board. His opinion, informed by relevant case law and MBIE determinations, concluded that the building work did constitute restricted building work.
- [28] Mr Collins placed particular emphasis on *MBIE Determination 2020/025*, which considered a converted shipping container used as a sleepout. That determination found that despite lacking a kitchen and having only basic toilet facilities, the sleepout qualified as a “residential unit” because its intended use was primarily residential and occupants were likely to demonstrate social cohesion.

- [29] The Special Adviser applied the factors established in *Queenstown Lakes District Council v Wanaka Gym Ltd*³ for determining whether a building is suitable for use by a “single household or family.” In that case, the District Court identified seven relevant considerations, including the connection between residents, the term of residence, and whether the building’s purpose is essentially commercial or domestic.
- [30] Mr Collins concluded that the present building, despite lacking a kitchen, was primarily designed for residential use. The presence of bedrooms, living space, bathroom and laundry indicated residential intent, whilst the garage qualified as a “residential facility” ancillary to the residential unit.

The Hearing Evidence

- [31] The hearing provided additional context and perspectives that informed the decision. Ms Natasha Fromont from Auckland Council explained that she classified the building as a residential unit rather than a sleepout that would not constitute restricted building work, based on the size of the dwelling and the presence of laundry and bathroom facilities.
- [32] Mr [OMITTED] confirmed his extensive efforts to obtain the Record of Work and confirmed he had no information about the intended purpose of the building, as he was contracted through intermediaries and had not been involved in discussions with the end user.
- [33] Mr Smith acknowledged his failure to provide the Record of Work, explaining that personal family matters had caused him to neglect his professional obligations. Importantly, Mr Smith indicated his normal practice was to complete Records of Work when requested, demonstrating a misunderstanding of the statutory obligation to provide them on completion of restricted building work.

Legal Analysis of Restricted Building Work

- [34] Having carefully considered the statutory framework, relevant case law, the Special Adviser’s opinion, and the evidence presented at the hearing, the Board makes the following findings regarding whether the building work carried out by the Respondent constituted restricted building work.

Criterion 1: Construction of Primary Structure of a House

- [35] It is clear from the information provided that the Project involves construction of the primary structure of the subject building, as it includes elements such as columns, beams, foundation and roof. These elements contribute to the subject building’s ability to withstand vertical or horizontal loads, and are expressly listed in the definition of “primary structure”.
- [36] To satisfy this limb, the completed building must also fall within the definition of a “house”, namely that it is a free-standing, fully detached building consisting of a single

³ *Queenstown Lakes District Council v Wanaka Gym Ltd* DC Christchurch CIV-2003-002-265, 18 November 2008 District Court, Christchurch.

residential unit (or a single residential unit and 1 or more residential facilities). The information confirms that the building is free-standing and fully detached. However, the building must satisfy the “single residential unit” criteria.

Legal Authorities on “Single Household or Family”

- [37] The definition of “residential unit” requires that the building is more suitable for being lived in by a single household or family than for another purpose. In *Queenstown Lakes District Council v Wanaka Gym Ltd*, the District Court made observations regarding the interpretation of “single household” in the context of the Act, identifying seven factors relevant to determining whether occupants constitute a “single household”:

- (a) Variance in numbers of occupants;
- (b) Number of people involved in occupation;
- (c) Degree of restriction on freedoms;
- (d) Term of residence;
- (e) Connection between residents;
- (f) Agreement to reside together; and
- (g) Whether the building’s purpose is commercial or domestic.

- [38] The District Court ultimately concluded that a building used for between 19-36 travellers at a time was more in the nature of a hostel, hotel or hall of residence than a house or home. On appeal, the High Court in *The Wanaka Gym Ltd v Queenstown Lakes District Council*⁴ approved the criteria set out as applicable to determining whether a single household exists, noting that the issue of whether a building is used as a dwelling for a single household is a question of fact and degree.

MBIE Determination 2020/025 – Applicable

- [39] *MBIE Determination 2020/025* provides the most relevant guidance. It considered a converted shipping container sleepout with two bedrooms and a lean-to containing a bucket compost toilet. Occupants had access to communal facilities in separate buildings. The sleepout had been used by friends and family but was later rented to the public.
- [40] Despite lacking a kitchen and permanent toilet facilities, the Adjudicator concluded the sleepout qualified as a “residential unit” under the detached dwellings classification. The Adjudicator found that although there were short stays and commercial elements, the fact that occupants would know each other and had agreed to stay together was determinative. This arrangement was considered to demonstrate the self-care and internal management characteristics similar to small boarding houses

⁴ *The Wanaka Gym Ltd v Queenstown Lakes District Council* [2012] NZHC 2662.

(fewer than six people) which fall within the detached dwellings category rather than requiring external care and assistance.

Application to Present Case

- [41] Consistent with the approach taken in *MBIE Determination 2020/025*, we assessed the characteristics of the subject building against the *Wanaka Gym* criteria. The wastewater design indicates the sleepout is suitable to accommodate up to four people. There is no information suggesting that the building will be used by anyone other than persons related to the occupants of the main dwelling. The building appears to be intended for use as accommodation for family and friends.
- [42] Having regard to the authorities cited, the fact that the subject building may not be fully self-contained due to the absence of a kitchen is not determinative when assessing whether the building is used or intended to be occupied by a single household.
- [43] The subject building contains a garage and adjacent sleeping accommodation in the form of two bedrooms, as well as other residential amenities such as a bathroom, laundry and living room. There is no suggestion that the building is intended for use by persons other than those connected to the owners of the site. Provided the subject building is for use by friends and family it is likely that there will be social cohesion between the occupants of the subject building, such that the intended use would most closely resemble a single household rather than any other use.

Functional Approach to “Residential Unit”

- [44] The Board adopts a functional approach to the definition of “residential unit”, focusing on whether the building is “more suitable for being lived in by a single household or family than for any other use” rather than on the presence of specific amenities.
- [45] The building contains two reasonably sized bedrooms (approximately 4m x 3m each), a living space, a fully equipped bathroom, and a laundry, which are all features typically associated with residential use. The absence of a kitchen does not preclude the building from being classified as a “residential unit”, particularly where occupants may have access to kitchen facilities in an adjacent dwelling on the same property.
- [46] This interpretation is consistent with the approach taken in *MBIE Determination 2020/025*, where the Adjudicator found that a sleepout still qualified as a residential unit even though occupants used sanitary facilities in a nearby house.

Garage as Residential Facility

- [47] The definition of “house” allows for part of the building to be used not as a residential unit, but rather as a “residential facility” such as a garage, provided its principal or only purpose is ancillary to the use of a residential unit in the building. The use of part of the subject building as a garage meets the definition of residential facility in the RBW Order.

- [48] The fact that the building includes a garage with larger-than-standard doors (4.8m wide by 3.65m high) does not change this analysis. The definition of residential unit focuses on the building's suitability for residential purposes rather than on proportional usage. The garage portion serves a purpose that is ancillary to the residential use, which is consistent with the definition of a "residential facility" in the RBW Order.

Criterion 2: Carpentry Work

- [49] The work involved construction of walls, roof, columns and beams of a Kiwispan steel framed structure. The terms "carpentry work" and "foundations work" are not defined in the RBW Order. The natural ordinary meanings can be derived from the New Zealand Standards Glossary and the competencies under the Licensed Building Practitioner Rules 2007 being:
- (a) Carpentry -The production of work or construction (either temporary or permanent) in wood other than joinery;
 - (b) Foundation - those parts of a building or structure such as piles, piers or footings which transmit and distribute loads to the ground.

- [50] The competencies for a carpentry class licence are not limited to work with wood and require the carpenter to have competency in working with a range of construction materials, including concrete and steel. The natural ordinary meaning of carpentry should be interpreted to include carpentry work relating to a steel framed structure.

Criterion 3: Designated Licence Class

- [51] Carpentry is a designated licence class specified in the Building (Designation of Building Work Licensing Classes) Order 2010.

Consumer Protection Purpose

- [52] Our interpretation above is consistent with the purpose of the restricted building work regime, which is to ensure that certain types of building work that affect the structural integrity or weathertightness of residential buildings are carried out or supervised by appropriately qualified persons. It would be contrary to this purpose to exclude buildings from the regime based solely on the absence of specific amenities or the presence of ancillary non-residential spaces, particularly where the building is otherwise designed and used for residential purposes.

Auckland Council's Classification

- [53] The building consent was processed and approved on the basis that the building was a "housing, detached dwelling", indicating that the Territorial Authority considered the building to fall within this classification, despite the absence of a kitchen and the presence of a large garage. While not determinative, this provides corroborating evidence supporting the conclusion that the building qualifies as a "house" under the RBW Order.

Majority Finding on Restricted Building Work

- [54] For the reasons outlined above, we conclude that the building work carried out by Mr Smith meets all three criteria specified in clause 5(2) of the RBW Order:
- (a) It involved the construction of the primary structure of a house;
 - (b) It was carpentry work; and
 - (c) It was of a kind for which a licensing class (carpentry) has been designated under section 285 of the Act.
- [55] Accordingly, the building work constituted restricted building work for the purposes of the Act.
- [56] This finding demonstrates that a building that lacks certain amenities typically associated with a standalone dwelling (such as a kitchen) may still qualify as a “residential unit” under the RBW Order if its overall design and intended use is primarily for residential purposes. The absence of a kitchen is not determinative; what matters is whether the building is more suitable for being lived in by a single household or family than for any other use.

Dissenting Decision: Mrs F Pearson-Green and Mr C Lang

- [57] We respectfully dissent from the majority’s conclusion that the building work carried out by the Respondent constituted “restricted building work” under the RBW Order. While we concur with the majority’s careful analysis of the legal framework, we diverge on its application to the particular facts of this case.
- [58] The threshold question in this case is whether the building at [OMITTED] qualifies as a “house” under the RBW Order. For the reasons detailed below, we conclude that it does not.

The Statutory Framework

- [59] We agree with the majority that the RBW Order establishes three cumulative criteria that must all be satisfied for building work to constitute restricted building work:
- (a) The building work must involve the construction or alteration of either the primary structure or the external moisture-management system of a “house” or a “small-to-medium apartment building”; and
 - (b) The building work must be of a kind listed in clause 5(3) (bricklaying/blocklaying, carpentry, external plastering, foundations, or roofing); and
 - (c) The building work must be of a kind for which a licensing class has been designated under section 285 of the Act.
- [60] It is the first of these criteria that we believe has not been satisfied in this case.

Analysis of "House" and "Residential Unit"

- [61] The RBW Order defines "house" as "a free-standing, fully detached building consisting of a single residential unit (or a single residential unit and 1 or more residential facilities)."
- [62] A "residential unit" is defined as "a building, or part of a building, that is so designed that it is more suitable for being lived in by a single household or family than for any other use."
- [63] Although we acknowledge that this definition does not explicitly require the presence of specific amenities such as a kitchen, in our view, the absence of such an essential feature for independent living is highly relevant when determining whether a building is "designed" to be "more suitable for being lived in" than for any other use.

The Property and Building's Characteristics

- [64] The building is situated on a rural 4,997m² site with an existing 192m² 1950s standalone 3-bedroom dwelling.
- [65] The building in question is approximately 15-20m from the existing dwelling and contains the following significant features:
 - (a) A high-volume garage, eaves height approximately 4.2m and a floor area of 108m² with large doors (4.8 metres wide by 3.65 metres high), not a typical standard residential garage which suggests a different intended purpose;
 - (b) The garage comprises a significant proportion of the building's total floor area, making it the dominant intended purpose;
 - (c) Two bedrooms, a bathroom, a laundry, and a living space totalling 84m² in floor area with a 2.4m ceiling height;
 - (d) No kitchen facilities are included within the building.

Interpretation of "More Suitable for Being Lived In"

- [66] The primary consideration is whether this building is "more suitable for being lived in by a single household or family than for any other use." In our view, this evaluation must consider:
 - (a) The building's full characteristics and configuration;
 - (b) The reasonable inferences that can be drawn about its intended use from those characteristics;
 - (c) What constitutes "being lived in" as opposed to temporary or intermittent occupation.
- [67] We note that the Board did not receive direct evidence from the owners regarding the intended use of the building. In the absence of such evidence, we must draw reasonable inferences from the physical characteristics of the building itself.

- [68] The unusual size of the garage doors (4.8m x 3.65m), the high-volume garage space, and the lack of essential independent living facilities such as a kitchen are observable facts that provide a reliable basis for determining the building's primary intended purpose. While direct evidence from the owners would have been helpful, the absence of such evidence does not prevent us from reaching a conclusion based on the features within the Building Consent application.
- [69] While we do not suggest that a kitchen is a defining requirement for a building to qualify as a "residential unit" under the RBW Order, we are of the view that its absence is a strong indicator that permanent, independent residential occupation was not the building's primary intended purpose.
- [70] We note that this interpretation is consistent with how "residential unit" is defined in other New Zealand legislation. For example, the Resource Management Act 1991 defines "residential unit" as:
- (a) means a building or part of a building that is used for a residential activity exclusively by 1 household; *and*
 - (b) includes sleeping, cooking, bathing, and toilet facilities.
- [71] While this definition is not directly binding for Building Act purposes, it reflects the common understanding across New Zealand's legislative framework that cooking facilities are an essential component of a building designed for independent residential use. The legislature's inclusion of cooking facilities in this definition of a residential unit provides relevant context for interpreting what constitutes appropriate residential accommodation. This further reinforces our view that a structure lacking these facilities cannot reasonably be considered "more suitable for being lived in by a single household or family than for any other use" under the RBW Order.
- [72] The courts have established clear criteria for assessing whether a building qualifies as a single household. In the *Wanaka Gym Ltd v Queenstown Lakes District Council*, the High Court confirmed that determining whether a building is used as a dwelling for a single household unit "is a question of fact and degree." That case involved a converted gymnasium building where the company argued it operated as a single household unit for visitors to Wanaka, but the Court found it more closely resembled group accommodation. The High Court adopted seven relevant factors (referred in the majority's decision) identified by the District Court Judge for this evaluation, including the building's purpose being essentially commercial rather than domestic.
- [73] The High Court noted in *Wanaka Gym*, when considering whether a building serves as a single household, the "whole raison d'être of the building" is relevant. In this case, the proportions and configuration indicate that the garage component dominates the building's overall purpose. The oversized garage with (4.8m x 3.65m) doors (beyond standard residential requirements) suggests vehicle/equipment storage is the primary purpose. Even accounting for the habitable spaces, the substantial garage portion remains the defining feature, with the other elements being ancillary to this dominant garage function.

- [74] We further note that the oversized garage with high-volume dimensions and oversized doors strongly suggest that the building was designed with non-standard vehicle storage or other non-residential purposes in mind. The proportional size of the garage relative to the habitable spaces further indicates that other non-residential activities are the dominant purpose of the structure.
- [75] We acknowledge that the RBW Order includes “garage” as an example of a “residential facility” whose purpose is ancillary to a residential unit. However, the definition of “residential facility” assumes the facility serves a purpose ancillary to residential use. In this case, the proportions are reversed - it is the habitable space that appears ancillary to the garage. The oversized dimensions (4.8m x 3.65m), and high-volume capacity far exceed what would be required to serve typical residential needs. The garage’s scale suggests it is not ancillary to residential use but rather the primary feature of the building, with the residential components being secondary.

Divergence from MBIE Determination 2020/025

- [76] We suggest that undue weight has been placed on *MBIE Determination 2020/025* in the majority’s decision. While that determination found that a converted shipping container that was not self-contained qualified as a “detached dwelling” under Clause A1—Classified Uses of the Building regulations, there are important distinctions:
- (a) The High Court in *The Wanaka Gym Ltd v Queenstown Lakes District Council* confirmed that whether a building is used as a dwelling for a single household unit is a question of fact and degree that must be evaluated case by case;
 - (b) The building in the *MBIE determination* did not include an oversized garage suggestive of non-residential use;
 - (c) The determination concerned a different regulatory context than the question before this Board.

- [77] We believe that each case requires evaluation of its specific facts, and the presence of oversized garage dimensions in this case distinguishes it from the sleepout considered in *MBIE Determination 2020/025*.

Proper Interpretation of Building Use

- [78] The critical question is whether this building, viewed in its entirety, is “more suitable for being lived in by a single household or family than for any other use.”
- [79] In our view, a building where the garage appears to be the dominant feature in terms of volume and floor area and lacks self-care facilities for independent living (such as a kitchen), these features suggesting other potential uses that cannot reasonably be considered “more suitable for being lived in” other than for other purposes.
- [80] When considering the proportional allocation of space within the building, the substantial garage portion suggests that the primary use under Schedule 2 of the

Building Regulations is more likely WL (Working Low) rather than SH (Sleeping Single Home) inconsistent with residential use.

[81] The more likely interpretation is that this building was designed to serve mixed purposes:

- (a) The garage portion (with its high-volume dimensions and 4.8m x 3.65m doors) appears to be the dominant feature of the building and was designed for substantial vehicle or equipment storage beyond residential needs;
- (b) The bedroom and living spaces were designed for occasional, supplementary, or temporary accommodation, not as a primary household unit.
- (c) Under such an interpretation, the building would not qualify as a “house” under the RBW Order, and consequently, the work performed by the Respondent would not constitute “restricted building work”.

Council Classification Not Determinative

[82] The description of the building work on the Application for Building Consent described the work as “New Kiwispan steel framed garage with games room and sleep out on concrete slab”.

[83] While it is noted the Auckland Council classified the building as “housing, detached dwelling”, we emphasise that such administrative classifications are not determinative of a building’s status under the RBW Order.

[84] The Council’s classification may have been based on incomplete information or administrative omission. Indeed, the conflicting statements by Ms Fromont, CCC Assessor, (Code Compliance Certificate) Auckland Council, during the hearing indicated some confusion even on the part of the Council regarding the building’s classification.

[85] It is also noted that while the Building Consent was classified as RBW, a Certificate of Design Work (COW) was provided for structural elements only, no COW was provided or sought by the Council covering other building code clauses including E2 (External Moisture), at application vetting or during the building consent approval process.

[86] Our interpretation must be guided by the statutory definitions and the actual characteristics of the building rather than administrative classifications that may have been applied for other purposes.

Purposive Interpretation

[87] We acknowledge the important consumer protection purposes of the restricted building work regime. However, these purposes must be applied as intended when introduced.

[88] The RBW Order creates specific categories of building work that require licensed practitioners. If the legislation intended all habitable structures to be subject to the

regime regardless of their specific characteristics or intended use, it would have been drafted with wider definitions.

Dissenting Conclusion

- [89] For the reasons stated above, we respectfully dissent from the majority's conclusion that the building at [OMITTED] qualifies as a "house or residential unit" under the RBW Order. We believe that when viewed in its entirety, this building cannot reasonably be considered "more suitable for being lived in by a single household or family than for any other use".
- [90] Consequently, we would find that the work carried out by the Respondent did not constitute "restricted building work", and therefore the obligation to provide a Record of Work under section 88(1) of the Act did not arise.

Failure to Provide a Record of Work (Majority Finding)

- [91] The majority, having found the work constituted restricted building work, considered whether Mr Smith failed to provide a Record of Work as required under section 88(1) of the Act.

Statutory Requirement

- [92] A Licensed Building Practitioner must provide a record of work for any restricted building work that they have carried out or supervised to the owner and the Territorial Authority on completion of their restricted building work.⁵
- [93] There is a statutory requirement under section 88(1) of the Act for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work⁶ unless there is a good reason for it not to be provided.⁷

Did the Respondent carry out or supervise restricted building work

- [94] Mr Smith held a current LBP licence (BP127107) with a Carpentry licence class at all relevant times when the restricted building work was carried out at the site. The evidence establishes that Mr Smith was contracted to carry out construction of roof, walls, columns and beams. As established above, this work constituted restricted building work.

Was the restricted building work complete

- [95] The evidence indicates that the Project was completed by 12 July 2023. This is confirmed by the Registrar's Report, Mr Smith's evidence that he finished work around that date, and Auckland Council's issuance of a code compliance certificate on 24 April 2024.

⁵ Section 88(1) of the Act.

⁶ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁷ Section 317(1)(da)(ii) of the Act

Has the Respondent provided a record of work

[96] The evidence establishes no Record of Work was provided:

- (a) The complaint filed on 19 April 2024 stated that a Record of Work had not been provided despite numerous requests;
- (b) Auckland Council confirmed on 29 July 2024 that no Record of Work had been received;
- (c) Multiple attempts by Mr [OMITTED] in April 2024 received no response; and
- (d) Mr Smith admitted during the hearing that he had not completed a Record of Work for this job.

Was there a good reason

[97] Mr Smith attributed his failure to personal family matters. However, when asked when these circumstances began impacting him, he stated this would have been towards the later end of 2023, which continued through most of 2024.

[98] The Record of Work obligation arose when the restricted building work was completed in July 2023, before Mr Smith's personal circumstances became difficult. There was therefore a period during which Mr Smith could have provided a Record of Work before his personal issues began.

[99] Mr Smith's indication that he would normally complete Records of Work when requested demonstrates a misunderstanding of the statutory obligation, which requires provision on completion of restricted building work, not when requested.

[100] While the Board acknowledges Mr Smith's difficult personal circumstances, no good reason was established for the failure to provide a Record of Work when it was due in July 2023.

Did the Respondent fail to provide a record of work

[101] Accordingly, the Respondent failed to provide a record of work on completion of the restricted building work in breach of section 88 (1) of the Act.

Majority Decision

[102] The Respondent **has** failed to provide a record of work on the completion of restricted building work.

Penalty, Costs and Publication

[103] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Actⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

Penalty

- [104] The Board has the discretion to impose a range of penalties.ⁱⁱ Exercising that discretion and determining the appropriate penalty requires that the Board balance various factors, including the seriousness of the conduct and any mitigating or aggravating factors present.⁸ It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:⁹
- (a) protection of the public and consideration of the purposes of the Act;¹⁰
 - (b) deterring other Licensed Building Practitioners from similar offending;¹¹
 - (c) setting and enforcing a high standard of conduct for the industry;¹²
 - (d) penalising wrongdoing;¹³ and
 - (e) rehabilitation (where appropriate).¹⁴
- [105] Overall, the Board should assess the conduct against the range of penalty options available in section 318 of the Act, reserving the maximum penalty for the worst cases¹⁵ and applying the least restrictive penalty available for the particular offending.¹⁶ In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty¹⁷ that is consistent with other penalties imposed by the Board for comparable offending.¹⁸
- [106] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above prior to it considering any aggravating and/or mitigating factors present.¹⁹
- [107] Record of work matters are at the lower end of the disciplinary scale. The Board's normal starting point for a failure to provide a record of work is a fine of \$1,500, an amount which it considers will deter others from such behaviour.
- [108] In this case, the Board takes into account that Mr Smith has accepted responsibility for his failure to provide a Record of Work, has expressed willingness to provide one, and has explained his personal circumstances. At the hearing, the Board indicated that

⁸ *Ellis v Auckland Standards Committee* 5 [2019] NZHC 1384 at [21]; cited with approval in *National Standards Committee (No1) of the New Zealand Law Society v Gardiner-Hopkins* [2022] NZHC 1709 at [48]

⁹ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

¹⁰ Section 3 Building Act

¹¹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹² *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

¹³ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

¹⁴ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354; *Shousha v A Professional Conduct Committee* [2022] NZHC 1457

¹⁵ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹⁶ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

¹⁷ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹⁸ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹⁹ In *Lochhead v Ministry of Business Innovation and Employment* 3 November [2016] NZDC 21288 the District Court recommended that the Board adopt the approach set out in the Sentencing Act 2002.

if he provided a Record of Work by close of business on Friday, 28 February 2025, to both the Council and the Board, the fine would be reduced.

- [109] Given Mr Smith’s cooperation and acceptance of responsibility, together with his personal circumstances and his provision of the Record of Work within the specified timeframe, the majority of the Board sets the fine at \$500.

Costs

- [110] Under section 318(4) of the Act, the Board may require the Respondent to pay the costs and expenses of, and incidental to, the inquiry by the Board. The rationale is that other Licensed Building Practitioners should not be left to carry the financial burden of an investigation and hearing.²⁰
- [111] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings²¹. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case²².
- [112] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings: simple, moderate, and complex. The current matter was simple. Adjustments are then made.
- [113] The Board’s scale provides \$3,500 for a Full Board in-person hearing to \$700 for decisions made on the papers.
- [114] This hearing was substantially for the Board’s benefit in determining whether a sleepout without a kitchen can qualify as a “residential unit” for the purposes of the RBW Order. This is an important issue with implications for many building practitioners. The appointment of a Special Adviser was required to assist the Board in determining a novel legal question, rather than due to any particular complexity in Mr Smith’s conduct.
- [115] Ordinarily, the Board would have dealt with this matter on the papers, as it is a straightforward Record of Work case. The majority of the Board, therefore, considers it appropriate to order costs at the on-the-papers level of \$700.

Publication

- [116] As a consequence of its decision, the Respondent’s name and the disciplinary outcomes will be recorded in the public Register maintained as part of the Licensed Building Practitioners’ scheme as is required by the Act,²³ and he will be named in this decision, which will be available on the Board’s website. The Board is also able, under section 318(5) of the Act, to order further publication.

²⁰ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

²¹ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

²² *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

²³ Refer sections 298, 299 and 301 of the Act

- [117] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.²⁴ Further, as a general principle, publication may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing, and the courts have stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published.²⁵
- [118] Given that this case is primarily significant for its clarification of when a sleepout constitutes a “house” for the purposes of the RBW Order, the Board directs that the Registrar prepare an article for licensed building practitioners explaining when a sleepout without a kitchen may still qualify as a “residential unit” requiring restricted building work to be carried out by appropriately licensed practitioners. This article should not identify the Respondent by name but should focus on the key matters established in this decision.

Section 318 Order

- [119] For the reasons set out above, the majority of the Board directs that:

Penalty:	Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$500.
Costs:	Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$700 (GST included) towards the costs of, and incidental to the inquiry of the Board.
Publication:	The Registrar shall record the Board’s action in the Register of Licensed Building Practitioners in accordance with section 301(1)(l)(iii) of the Act. The Registrar is directed to prepare an article for licensed building practitioners explaining when a sleepout without a kitchen may still qualify as a “residential unit” requiring restricted building work, without identifying the Respondent by name.

- [120] The Respondent should note that the Board may, under section 319 of the Act, suspend or cancel a licensed building practitioner’s licence if fines or costs imposed as a result of disciplinary action are not paid.

²⁴ Section 14 of the Act

²⁵ Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

Right of Appeal

[121] The right to appeal Board decisions is provided for in section 330(2) of the Actⁱⁱⁱ.

Signed and dated this 7th day of August 2025



Mr M Orange
Presiding Member

ⁱ **Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
 - (a) *do both of the following things:*
 - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*
 - (f) *order that the person pay a fine not exceeding \$10,000.*
- (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
- (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
- (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
- (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."*

ⁱⁱ **Section 318 Disciplinary Penalties**

- (1) *In any case to which [section 317](#) applies, the Board may—*
 - (a) *do both of the following things:*
 - (i) *cancel the person's licensing and direct the Registrar to remove the person's name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*

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- (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*
 - (f) *order that the person pay a fine not exceeding \$10,000.*
 - (2) *The Board may take only 1 type of action in subsection (1)(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
 - (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
 - (4) *In any case to which [section 317](#) applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
 - (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.*

iii **Section 330 Right of appeal**

- (2) *A person may appeal to a District Court against any decision of the Board—*
 - (b) *to take any action referred to in section 318.*

Section 331 Time in which appeal must be brought

An appeal must be lodged—

- (a) *within 20 working days after notice of the decision or action is communicated to the appellant; or*
- (b) *within any further time that the appeal authority allows on application made before or after the period expires.*