

Determination 2024/002

The issue of a notice to fix for building work on an existing building's foundation.

14 Mona Avenue, Mangere Bridge, Auckland

Summary

This determination relates to a notice to fix where the authority considered that building work had been undertaken without a building consent and not in accordance with the building code, breaching Sections 40 and 17 of the Building Act 2004. The determination considers whether the building work was exempt from the requirement to obtain building consent, and discusses the remedies provided for in the notice.



Figure 1: Concrete piles on the south side of the property

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. 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.

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 the applicant who is the owner of the property, H Wang (“the owner”)
 - 1.2.2 Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. This determination arises from the decision of the authority to issue a notice to fix to the owner. The decision arose because:
 - 1.3.1 the building work was carried out without obtaining a building consent, which the authority believes is a breach of section 40
 - 1.3.2 the authority believes that the building work to the existing pile foundation does not comply with the Building Code Clause B1 *Structure* and B2 *Durability*.
- 1.4. The matter to be determined, under sections 177(1)(b) and (2)(f) of the Act, is the issue of notice to fix NOT 21506020 dated 27 August 2020.
- 1.5. In deciding this matter, I must consider whether:
 - 1.5.1 the building work required building consent or is within the scope of section 41 of the Act and Schedule 1
 - 1.5.2 the as-built work meets the requirements of Building Code Clauses B1 *Structure* and B2 *Durability*.
- 1.6. The notice referred to the building work as “new foundations”. The owner has advised that the extent of the building work was limited to ten piles on the south side of the building and the authority has not disputed the extent of work described by the owner. On that basis, this determination is limited to considering the building work carried out to

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

the ten piles and jack studs on the south side of the building only. I have not considered the subfloor bracing, other foundation piles, or any other features of the building.

2. The building work and background

- 2.1. Building work was carried out to the piles on the south side of the building, which the owner advised was limited to around 10 piles and replacement of some jack studs. The owner has not confirmed the number of jack studs replaced, but advised they did not replace any of the concrete piles or install any new piles. The owner has also referred to “jacking and packing, or trimming, in order to re-level the floor throughout the house” but has not described the extent of this work nor provided further detail.
- 2.2. The building work considered in this determination is the encapsulation of existing piles with concrete approximately 260mm in diameter and 350mm high, and the replacement of jack studs. Figure 2 below is based on a hand-drawn sketch from the owner of the piles as built.
- 2.3. From the evidence as presented, it appears that the replaced jack studs are not fixed to the concrete piles or subfloor framing. I have not received any information about the mix, type and strength of the concrete used to encapsulate the existing piles, or the strength grade, size and treatment of the timber used for the new jack studs.

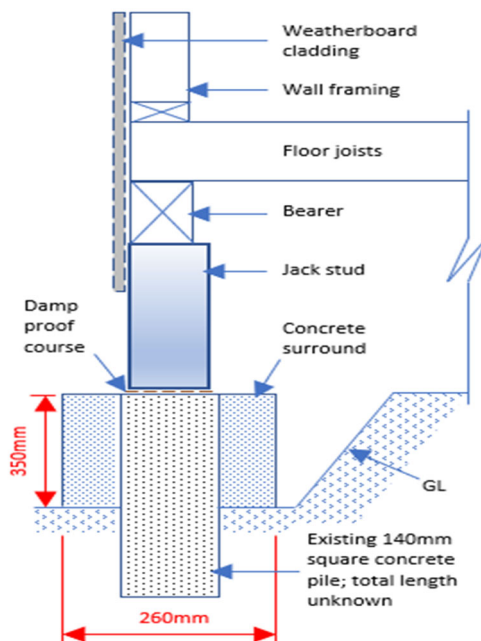


Figure 2: As-built construction detail

- 2.4. The authority was first notified in July 2018 that building work was being carried out on the property.

2.5. The authority attempted to inspect the property multiple times between August 2018 and July 2020. The authority conducted an inspection on 7 July 2020 and a copy of photographs taken during that inspection have been provided to me.

2.6. The authority issued a notice to fix to the owner on 27 August 2020. Under the heading 'Particulars of contravention or non-compliance' the notice stated:

Contrary to section 40 of the Building Act 2004, the following building works have been undertaken without first obtaining building consent

- New foundations have been laid

Contrary to section 17 of the Building Act 2004, the following building work has been identified as not complying with [the Building Code]:

This construction of new foundation does not meet the requirements:

- B1 structure
- B2 durability

2.7. The notice stated that to remedy the contravention or non-compliance, the owner must:

Choose one of the following options:

Pursue any legal options to make the building work compliant. This may include a certificate of acceptance (COA) in accordance with [section] 96 of the Act, or

Remove the non-complying building works and reinstate the works pursuant to the approved building consent, Act and Regulations.

3. Submissions

The owner

3.1. The owner submitted there is no evidence of a failure to meet the performance criteria of the Building Code, and that the building work that was carried out was exempt under Clause 1 of Schedule 1 from the requirement to obtain building consent. Therefore, the owner considers the notice to fix was incorrectly issued.

3.2. The owner advised they had undertaken building work to piles on the south side of the building that were cracked to repair the piles and bring the floor back to level, and they did not replace or install new piles.

3.3. The owner contends the building work meets the criteria in Clause 1 of Schedule 1 because:

- 3.3.1. it was "repairs with comparable materials" (concrete and timber) and "replacement with comparable components or assemblies"

- 3.3.2. The owner identified the piles on a hand drawn plan and submitted these were approximately 20% of the total number of piles in the building's foundation, which the owner believes is not "substantial replacement":
- 3.3.3. The repaired piles are in the same position as the existing piles.
- 3.3.4. Where the work included "jacking and packing, or trimming, in order to re-level the floor throughout the house", that work is considered to be "repair and maintenance" when comparable materials are used.
- 3.4. The owner referred to several Determinations in support of their views², and submitted that repair work would "often involve replacement of the component that has failed or deteriorated or nearing the end of its useful life, such as one or more of the foundation piles, or a section of drainage pipework".
- 3.5. The owner is of the view there is no evidence of a failure to comply with the Building Code but did not provide any additional information about the building work in support of that contention.
- 3.6. Regarding the remedies set out in the notice to fix, the owner believes that under section 96(1)(a)(ii) of the Act it is the owner's discretion whether to apply for a certificate of acceptance for building work carried out without building consent, and that such application for a certificate of acceptance "is not mandatory".

The authority

- 3.7. The authority is of the view that the notice to fix was correctly issued because the completed work required a building consent and does not meet the requirements of the Building Code. The authority did not comment on the application of Schedule 1.
- 3.8. The authority submitted that a certificate of acceptance under section 96 of the Act is an option available to the owner for building work already done by the owner where a building consent was required, and none was obtained.
- 3.9. The authority further submitted that if the owner believes that the building work was compliant with the Building Code, the owner could follow the process of applying for a certificate of acceptance.

4. Discussion

The power to issue the notice to fix

- 4.1. Section 164 of the Act provides authorities with the power to issue a notice to fix if the authority considers on reasonable grounds that a specified person (in this case the owner) is contravening or failing to comply with the Act or Building Code. Further, the authority

² Determinations 2019/036, 2013/071, 2013/058, 2013/015, 2009/115 and 1999/006.

must issue a notice to fix requiring the person to remedy the contravention or to comply with the Act or the Building Code.

4.2. Section 165 of the Act concerns the form and content of the notice to fix, and provides:

(1) The following provisions apply to a notice to fix:

...

(c) if it relates to building work that is being or has been carried out without a building consent, it may require the making of an application for a certificate of acceptance for the work

Was a building consent required?

4.3. Section 40 states that building work must not be carried out except in accordance with a building consent.

4.4. Section 41(1)(b) states that a building consent is not required if the building work falls within the exemptions under Schedule 1.

4.5. Schedule 1 of the Act prescribes building work for which building consent is not required, and Clause 1 of the Schedule allows for general repair, maintenance, and replacement subject to certain criteria and limitations:

1 General repair, maintenance, and replacement

(1) The repair and maintenance of a building product or an assembly incorporated in or associated with a building, provided that a comparable building product or assembly is used.

(2) Replacement of a building product or assembly incorporated in or associated with a building provided that—

(a) a comparable building product or assembly is used; and

(b) the replacement is in the same position.

(3) However, subclauses (1) and (2) do not include the following building work:

...

(b) complete or substantial replacement of a building product or an assembly contributing to the building's structural behaviour or fire-safety properties; ...

4.6. The exemption is for the purpose of repairing and maintaining existing building work. In my view, “repair and maintenance” does not necessarily exclude the addition of new building elements, as long as the new building elements are comparable to the existing building product or assembly.³

³ The definition of ‘building work’ in s 7 of the Act specifically includes ‘repair’. See the definition of ‘building work’ in s 7 that includes ‘work for, or in connection with the alteration of a building’ and ‘alter’ (also defined in s 7) includes ‘to repair, enlarge, and extend a building’.

- 4.7. Determination 2013/058 considered the installation of eight new piles, located adjacent to existing piles, as components of an assembly that provides support to the structure. That determination concluded the building work was exempt under then Schedule 1(a), as repairs and maintenance of the existing foundation assembly. I am of the view the same approach can be taken in this case to the current equivalent provision in Schedule 1, in particular with regard to the additional concrete added to the piles.
- 4.8. In this case it was jack studs that were replaced, and the existing concrete piles remain in place and additional concrete was added to the piles. The foundation system, of which jack studs and piles are one component, is a building assembly that provides support to the structure. I am of the view that the work to these two building elements is of a type that can be considered “repair and maintenance” for the purpose of subclause (1) and the addition of concrete to the piles does not exclude this work from that exemption.
- 4.9. However, the exemptions for repair, maintenance and replacement are subject to certain limitations and exclusions. First, I will consider the exclusion of complete or substantial replacement of a building product or an assembly contributing to the building’s structural behaviour (subclause (3)(b)) and whether the replacement of the jack studs excludes the building work that was carried out from the exemption.
- 4.10. Previous determinations⁴ have considered what constitutes “complete or substantial replacement” for building work to foundations of dwellings. In reaching my decision I have considered the approach taken in those determinations.
- 4.11. Although the number of jack studs replaced has not been quantified by either the owner or the authority, the owner has stated that it was only a “few rotten jack studs”.
- 4.12. Individual jack studs form part of the foundation assembly that contributes to the building’s structural behaviour. I do not consider that replacement of a small proportion of jack studs in the foundations in this case would constitute “complete or substantial replacement”. For that reason, I am of the view that the building work is not excluded from the exemption provided for in Clause 1 of the Schedule.
- 4.13. However, the exemption for repair and maintenance and replacement are all subject to the use of comparable products or assemblies (and for replacement, also in the same position). The building work to the piles and jack studs is comparable in that there has been no change to the function of those component parts as part of the foundation assembly. However, while the owner has used the same types of materials (concrete and timber), they have not provided any further information to establish that the component parts are comparable in terms of performance. It is for the owner to provide the relevant information to support their contention that the building work was exempt.

⁴ See for example 2013/058, 2013/071, 2015/016, 2015/072 and 2016/053.

Compliance with Clauses B1 and B2

4.14. Section 17 of the Act states that:

All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.

4.15. The authority is of the view that the building work does not comply with Building Code Clause B1 *Structure* and B2 *Durability*, but has not identified which performance requirements of those clauses the building work does not meet or which aspects of the work is not compliant.

4.16. The objectives of Clause B1 are to safeguard people from injury caused by structural failure, loss of amenity caused by structural behaviour, and to protect other property from physical damage caused by structural failure.

4.17. The objective of Clause B2 is to ensure that a building will, throughout its life, continue to satisfy the other objectives of this code and that the building materials, components and construction methods will be sufficiently durable to ensure that the building (without reconstruction or major renovation) satisfies the other functional requirements of this code.

4.18. The owner has not provided information to support their belief that the building work is compliant. For example, there is no information about the mix, type and strength of the concrete used to encapsulate the existing piles, or the strength grade, size and treatment of the timber used for the new jack studs.

4.19. I note the photographs do not show any structural fixings have been installed between the new jack studs and the concrete piles or existing timber bearers above. As such, it is largely the gravity loads from the structure above that would prevent any movement such as from wind or earthquake actions (clause B1.3.3 (f) and (h)). As this appears to be the case for all of the jack studs replaced along the south side of the building, I am of the view that the building could become unstable or lose equilibrium and cause a loss of amenity (clauses B1.3.1 and B1.3.2 respectively, and B1.3.3(b)). Therefore, based on the information available to me, I conclude the building work does not comply with Clause B1, and there is insufficient information to establish compliance with Clause B2.

The Notice to Fix

The particulars

4.20. A notice to fix is an enforcement notice that requires a person to remedy a breach of the Act or Code and specifies a time period for doing so. It is essential that a notice to fix contains sufficient particulars of the building work and contraventions or non-compliance, so that the recipient is fairly and fully informed of the issues with the building work and can take appropriate steps to remedy the situation.

- 4.21. In my opinion, the description of the building work that the authority considered was carried out in contravention of sections 40 and 17 was not adequate. Nor did the authority clarify which performance clauses had not been met.
- 4.22. I consider the grounds in section 164(1)(a) of the Act for a notice to fix to be issued are satisfied with regard to non-compliance of the 10 piles on the south side of the building with clauses B1.3.1 and B1.3.2, and B1.3.3 (b) (f) and (h).

The remedy in the notice

- 4.23. The owner believes that under section 96(1)(a)(ii) of the Act it is the owner's discretion whether to apply for a certificate of acceptance for building work carried out without building consent, and that such application for a certificate of acceptance "is not mandatory".
- 4.24. However, section 165(1)(c) provides for the authority to include in the notice the requirement to make an application for a certificate of acceptance. This was not the only remedy available to the owner, but it was correctly included as a remedy in respect of what the authority considered was a breach of section 40.

Conclusion

- 4.25. The nature of the building work carried out to the 10 piles on the south side of the dwelling is provided for as general repairs and maintenance and replacement in Clause 1 of Schedule 1. However, the owner has not established that the materials used are comparable.
- 4.26. Due to the lack of structural fixings installed between the new jack studs and the concrete piles or existing timber bearers, the building work does not comply with clauses B1.3.1 and B1.3.2, and B1.3.3 (b) (f) and (h).
- 4.27. I am exercising the discretionary powers in section 188 to reverse the notice to fix due to the inadequacies of the notice itself. This does not prevent the authority from issuing a new notice to fix with sufficient particulars that clearly identify the building work and the relevant performance clauses of the Building Code. The authority will need to consider any new evidence available and any modifications that have been made since the notice to fix was issued.
- 4.28. It is for the owner to provide the relevant information to the authority to support the owner's contention that the building work is exempt in terms of comparable products and to establish that the building work complies with clauses B1 and B2 of the Building Code.

5. Decision

- 5.1 In accordance with section 188 of the Act, I determine that the building work carried out to the 10 piles on the south side of the building does not comply with clauses B1.3.1, B1.3.2 and B1.3.3 (b) (f) and (h), and I reverse the authority's decision to issue the notice to fix.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 31 January 2024.

Peta Hird
Principal Advisor Determinations

APPENDIX A

The Building Act 2004

17 All building work must comply with building code

All building work must comply with the [building code](#) to the extent required by this Act, whether or not a building consent is required in respect of that building work.

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

- (1) A person must not carry out any building work except in accordance with a building consent.
- (2) A person commits an offence if the person fails to comply with this section.
- (3) A person who commits an offence under this section is liable on conviction to a fine not exceeding \$200,000 and, in the case of a continuing offence, to a further fine not exceeding \$10,000 for every day or part of a day during which the offence has continued.

41 Building consent not required in certain cases

- (1) Despite [section 40](#), a building consent is not required in relation to—
 - (a) a Crown building or Crown building work to which, under [section 6](#), this Act does not apply; or
 - (b) any building work described in [Schedule 1](#) for which a building consent is not required (see [section 42A](#)); or
 - (c) any building work in respect of which a building consent cannot practicably be obtained in advance because the building work has to be carried out urgently—
 - (i) for the purpose of saving or protecting life or health or preventing serious damage to property; or
 - (ii) in order to ensure that a specified system in a building that is covered by a compliance schedule, or would be covered if a compliance schedule were issued in respect of the building, is maintained in a safe condition or is made safe; or...

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

- (1) Despite [section 40](#), subject to the conditions set out in subsection (2) and whether or not a building consent would otherwise have been required, a building consent is not required for building work in the following categories:

- (a) building work described in [Part 1](#) of Schedule 1; or
 - (b) building work described in [Part 2](#) of Schedule 1 that is carried out by an authorised person (see subsection (3)); or
 - (c) building work described in [Part 3](#) of Schedule 1 if the design of the building work has been carried out or reviewed by a chartered professional engineer and the building work has been carried out in accordance with that design.
- (2) Subsection (1) is subject to the following conditions:
- (a) the building work complies with the [building code](#) to the extent required by this Act:
 - (b) after the building work is completed, the building,—
 - (i) if it complied with the [building code](#) immediately before the building work began, continues to comply with the [building code](#); or
 - (ii) if it did not comply with the [building code](#) immediately before the building work began, continues to comply at least to the same extent as it did then comply:
 - (c) the building work does not breach any other enactment:
 - (d) the building to which the building work relates is not a hazardous substance location that is required to be authorised under the [Health and Safety at Work Act 2015](#) or any regulations made under that Act.

96 Territorial authority may issue certificate of acceptance in certain circumstances

A territorial authority may, on application, issue a certificate of acceptance for building work already done

- (a) if
 - (i) the work was done by the owner or any predecessor in title of the owner; and
 - (ii) a building consent was required for the work but not obtained; or
- (b) if [section 42](#) (which relates to building work that had to be carried out urgently) applies; or
- (c) if subsections (3) and (4) of [section 91](#) (which apply if a building consent authority that is not a territorial authority or a regional authority is unable or refuses to issue a code compliance certificate in relation to building work for which it granted a building consent) apply.

164 Issue of notice to fix

- (1) This section applies if a responsible authority considers on reasonable grounds that—
- (a) a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent); or
 - (b) a building warrant of fitness or dam warrant of fitness is not correct; or
 - (c) the inspection, maintenance, or reporting procedures stated in a compliance schedule are not being, or have not been, properly complied with.

- (2) A responsible authority must issue to the specified person concerned a notice (a notice to fix) requiring the person—
- (a) to remedy the contravention of, or to comply with, this Act or the regulations; or
 - (b) to correct the warrant of fitness; or
 - (c) to properly comply with the inspection, maintenance, or reporting procedures stated in the compliance schedule.

Schedule 1 – Building work for which building consent not required

Part 1- Exempted building work

1 General repair, maintenance, and replacement

- (1) The repair and maintenance of any component or assembly incorporated in or associated with a building, provided that comparable materials are used.
- (2) Replacement of any component or assembly incorporated in or associated with a building, provided that—
- (a) a comparable component or assembly is used; and
 - (b) the replacement is in the same position.
- (3) However, subclauses (1) and (2) do not include the following building work:
- (a) complete or substantial replacement of a specified system; or complete or substantial replacement of any component or assembly contributing to the building's structural behaviour or fire-safety properties; or
 - (b) repair or replacement (other than maintenance) of any component or assembly that has failed to satisfy the provisions of the building code for durability, for example, through a failure to comply with the external moisture requirements of the building code; or
 - (c) sanitary plumbing or drainlaying under the Plumbers, Gasfitters, and Drainlayers Act 2006.

The Building Code

Clause B1 Structure

Functional requirement

- B1.2 *Buildings, building elements and sitework* shall withstand the combination of loads that they are likely to experience during *construction or alteration* and throughout their lives.

Performance

- B1.3.1 *Buildings, building elements and sitework* shall have a low probability of rupturing, becoming unstable, losing equilibrium, or collapsing during *construction or alteration* and throughout their lives.
- B1.3.2 *Buildings, building elements and sitework* shall have a low probability of causing loss of *amenity* through undue deformation, vibratory response, degradation, or other physical characteristics throughout their lives, or during *construction or alteration* when the building is in use.
- B1.3.3 Account shall be taken of all physical conditions likely to affect the stability of *buildings, building elements and sitework, including:*
- (a) self-weight,
 - (b) imposed gravity loads arising from use,
 - (c) temperature,
 - (d) earth pressure,
 - (e) water and other liquids,
 - (f) earthquake,
 - (g) snow,
 - (h) wind,
 - (i) *fire*,
 - (j) impact,
 - (k) explosion,
 - (l) reversing or fluctuating effects,
 - (m) differential movement,
 - (n) vegetation,
 - (o) adverse effects due to insufficient separation from other *buildings*,
 - (p) influence of equipment, services, non-structural elements and contents,
 - (q) time dependent effects including creep and shrinkage, and
 - (r) removal of support.

Clause B2 Durability

Functional requirement

- B2.2 *Building materials, components and construction methods* shall be sufficiently durable to ensure that the building, without reconstruction or major renovation, satisfies the other functional requirements of this code throughout the life of the *building*.

Performance

- B2.3.1 *Building elements* must, with only normal maintenance, continue to satisfy the performance requirements of this code for the lesser of the *specified intended life of the building*, if stated, or:
- (a) the life of the building, being not less than 50 years, if:
 - (i) those building elements (including floors, walls, and fixings) provide structural stability to the building, or
 - (ii) those building elements are difficult to access or replace, or

- (iii) failure of those building elements to comply with the building code would go undetected during both normal use and maintenance of the building.