



Determination 2015/073

Regarding the issue of a notice to fix for building work carried out without building consent and non-compliance with the Building Code at 12 Hobson Terrace, Onetangi, Waiheke Island

Summary

This determination discusses who can be issued with a notice to fix, in particular when building work was undertaken by a previous owner without building consent having been obtained. It also considers the compliance of building work and discusses circumstances where building work departs from Acceptable Solutions or New Zealand Standards.

1. The matters to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to the determination are:

- the owner of the house, H Davies (“the applicant”), acting through an agent (“the agent”)
- Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

1.3 Background to the application

1.3.1 The authority had previously issued a notice to fix (“the first notice”) for construction of the deck carried out without consent being obtained. An application for a determination was made in respect of that matter (“the first determination”²).

1.3.2 This determination arises from the decision of the authority to issue a second notice to fix (“the second notice”) for the construction of a sleep out, retaining wall, and deck that was done without building consent first being obtained, and for non-compliance with the Building Code in respect of the deck. The second notice was issued on 21 January 2014 while the first determination was being considered.

1.3.3 The authority subsequently advised that the second notice was a nullity and advised the applicant that the authority would await the outcome of the first determination before deciding on the appropriate action to take on the additional matters identified (refer paragraph 3.8.5).

¹ The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.building.govt.nz or by contacting the Ministry on 0800 242 243.

² Determination 2014/051 The issue of a notice to fix for the construction of a deck without building consent at 12 Hobson Terrace, Onetangi, Waiheke Island (*Ministry of Business, Innovation and Employment*) 20 October 2014

- 1.3.4 In a submission dated 4 March 2014 in response to a draft of the first determination, the agent requested the issues raised in the second notice be considered. On 5 May 2014 I proposed the matter of the second notice to fix be considered in a second determination to allow the matters in respect of the first notice to be brought to a conclusion in a timely manner.
- 1.3.5 The first determination was issued on 20 October 2014. The agent requested the determination on the second notice remain suspended while the applicant lodged an appeal against the first determination in the District Court. The appeal was dismissed on 30 July 2015.
- 1.3.6 On 2 February 2015 I sought confirmation from the applicant or the agent whether the applicant wished to proceed with this determination or withdraw it. On 19 August 2015 the agent confirmed the applicant wished to continue with this determination.
- 1.3.7 In regards to the status of the second notice to fix, on 18 September 2015 the authority advised of the likelihood the second notice to fix will be withdrawn, and a new notice to fix that is effectively a duplicate of the second notice will be issued (refer paragraph 4.7.9).

1.4 The matter for determination

- 1.4.1 Given the dispute arose regarding the issue of the second notice during the time the first determination was being made, and that the authority has stated both that the second notice is a nullity but also that it proposes to withdraw the notice and issue a new notice that is effectively a duplicate, I consider the matter to be determined³ is the exercise of the authority's powers of decision made on 21 January 2014 to issue the second notice to fix.

1.5 Matters outside this determination

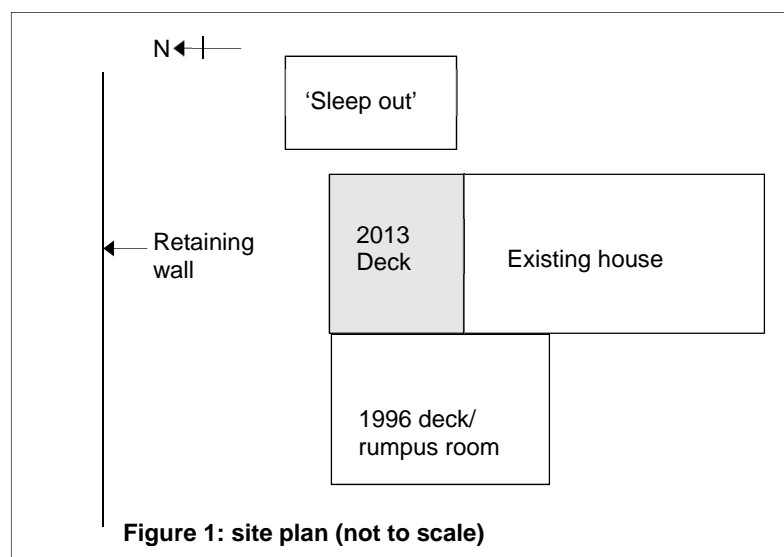
- 1.5.1 Both the first and second notices list contravention of section 40 for construction of a deck ("the 2013 deck") without consent first being obtained. As this matter has been canvassed in the first determination, and I maintain the views set out in the first determination, I have not considered that issue further in this determination.
- 1.5.2 In submissions to the first determination, the agent raised concerns regarding the application of sections 183 and 378. These matters have also been canvassed in the first determination. I maintain the view set out in the first determination (refer paragraph 5.6.2) and I do not consider the application of those sections further in this determination.
- 1.5.3 A determination under section 177 of the Act is in respect of the authority's exercise of its powers of decision, and section 188 provides that the determination must confirm, reverse, or modify that decision. Put more simply, the matter being considered is whether the authority's decision was correct, as opposed to a 'judicial review' type assessment of how the authority reached that decision; and the determination must decide whether or not the authority's decision should stand or not, or be modified in some way.

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

- 1.5.4 While the grounds on which the authority made its decision provide context to the decision, it is the decision itself that is the matter being determined. I note that in some cases the outcome of an incorrect process by an authority may still reach a correct decision, in which case the determination would confirm or possibly modify the decision.
- 1.5.5 The agent has also made a number of comments regarding the authority's conduct; the authority's conduct is not a matter that can be considered in a determination under section 177.
- 1.6 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.

2. The building work

- 2.1 The following description of the site and building work and the background events are based on the papers provided by the parties, including some photographs.
- 2.2 The site consists of an existing detached house that is two-storeys-high in part, a sleep out situated to the east, and a retaining wall to the north. The authority described the 2013 deck as being to the north elevation of the existing house (refer paragraph 3.8.3), and I have followed that convention in this determination.
- 2.3 The sleep-out is a single level timber framed structure, on pile foundations, with board and batten cladding. The authority has stated that the sleep out is greater than 10 square meters in area and is sited 1.6m from the east boundary and 1.2m from the house.
- 2.4 The timber retaining wall runs east to west across the property; it is located on the north side of the property between the house and a driveway. The retaining wall ranges from 1m to 3m in height along its length.



3. Background

- 3.1 In 1996 building consent No. YC/96/10580 was issued for a detached single level structure ("the rumpus room") to be added to the west of the existing two storey house. The roof to the rumpus room also served as a deck ("the 1996 deck"). A code compliance certificate was issued for that consent on 22 September 2000.

3.2 Photographs dated June 2002 show a verandah structure to the north elevation of the house, adjacent to the 1996 deck, with a narrow deck adjacent to the north face of the house. There is a building apparent to the east of the house, with a connecting roof cover between that building and the verandah. The building appears to be the sleep-out that is subject to the second notice.

3.3 On 1 May 2003 the applicant purchased the property.

3.4 A resource consent application, dated as approved on 14 April 2004 sets out the purpose for the application as follows:

2.1 The applicant seeks consent to construct a new bedroom building and to undertake additions/alterations to the existing dwelling... These buildings and the additions to the dwelling have already been constructed on the site.

2.2 The development involves a small increase in the area of the bedroom located on the ground floor level of the dwelling, the covering of the pergola over the deck on the first floor level and the removal of the roof of the building over the spa pool. The building containing two bedrooms located to the rear of the dwelling on the site will be demolished.

3.5 The plans accompanying the resource consent application show:

- the sleep-out (referred to on the plans as “bedroom 3”) 1.690m from the east boundary
- the removal of a detached building containing bedrooms at the rear (southern end) of the property
- the extension of a ground floor bedroom
- the addition of a pool fence around an existing spa pool
- cutting back along the edge of an existing drive way
- installation of a septic tank
- a new timber retaining wall adjacent to the driveway/carpark; described as 1.5m high
- a new timber retaining wall located between the dwelling and the driveway [the subject of the second notice]; described as maximum 3m high tapering to 1m.

It is not clear exactly when each item of work was carried out; however given the photograph of June 2002 and the reference in the resource consent application to the works having already been constructed on site, I am of the view that the resource consent for the addition of the sleep-out was retrospective.

3.6 It appears that the applicant began building the 2013 deck some time prior to 23 January 2013; on that date the authority carried out a site visit and building work was underway but not completed.

3.7 The first notice

3.7.1 On 13 September 2013 the authority issued the first notice to the applicant for the demolition of the verandah/narrow deck structure and the construction of the 2013 deck without consent.

3.7.2 The applicant subsequently engaged the agent. The agent wrote to the authority on 22 November 2013, setting out the view that the building work was exempt under Schedule 1 and that the applicant was entitled to rely on their interpretation of exempt work under Schedule 1, and requesting the authority withdraw the notice to

fix. The matter fell into dispute and the Ministry received the application for determination in respect of the issue of the first notice on 16 December 2013.

3.8 The second notice

3.8.1 On 8 January 2014 the authority carried out a further inspection of the property. On 21 January 2014 the authority wrote to the applicant advising that:

Given the extent of additional matters identified [the authority] has decided to withdraw [the first notice to fix], and re-issue a new Notice, NTF 4570, ... to identify all known issues associated with building works carried out at [the] property.

3.8.2 The covering letter described the building work the authority considered had been carried out without consent being obtained when consent was required, and noting that the work was not exempt under Schedule 1. The covering letter also set out the building work that the authority considered did not comply with the Building Code as follows:

1. Deck joist spans and centres – outside scope of NZS 3604
2. Lack of mid span nog's to joists – over 3m span & 4 x joist thickness
3. Ridge beam undersized – outside scope of NZS 3604
4. Ceiling joist spans and centres – outside scope of NZS 3604
5. Timber treatment and grading – requires verification for areas subject to wetting
6. Under sized deck support posts – outside scope of NZS 3604
7. Lack of structural bracing to deck & porch – requires adequate bracing to be installed
8. Discontinuous top plates – requires 3kn plate connections
9. Lack of appropriate structural connections for exposure zone D – Stainless proprietary connections required
10. Lack of external wall/s to ablutions area to lower floor under new deck – external walls required.

3.8.3 The attached second notice described the 'particulars of contravention or non-compliance' as follows:

The following works have been undertaken without building consent, where such consent was required under Section 40 of the Building Act 2004:-

- Entirely new deck (including structural supports) constructed on the Northern side of the main residential unit, from which it is possible to fall more than 1.5 metres. (Not exempted building work under Schedule 1)
- Retaining wall constructed on the Northern side of the property in front of the main residential unit and the road, a portion of which retains more than 1.5 meter of depth of ground. (Not exempted building work under Schedule 1)
- Detached sleep-out constructed on the Eastern boundary adjacent to the main residential unit and the Eastern boundary closer than the measure of its own height in relation to the dwelling and boundary. (Not exempted) building work under Schedule 1)

The following building work fails to comply with the Building Code Section 17 of the Building Act 2004:-

- B1 (Structure) and B2 (Durability) – The newly constructed deck on the Northern side of the main residential unit has undersized and/or over spanned posts, beams, joists, lack of bracing and requires timber treatment for durability.

- B1 (Structure) and E2 (External moisture) – Porch structure over the newly constructed deck on the Northern side of the main residential unit has undersized and/or over spanned ceiling joists and ridge rafters and fails to prevent external penetration of moisture to the porch and deck.
 - E2 (External moisture) – Lower floor level under new deck houses an ablation area without external walls to prevent moisture penetration.
- 3.8.4 The agent disputed the withdrawal of the first notice to fix and the issuing of the second notice to fix; stating his view that section 183 of the Act means that the authority had no power to withdraw the first notice while the determination was being made. (The application of section 183 is discussed in the first determination).
- 3.8.5 In a letter to the Ministry dated 3 February 2014, the authority accepted the agent's view and stated that the first notice to fix remained in effect. The authority went on to comment that it remained concerned about the deficiencies identified in the building work and that the intent in issuing the second notice was to provide clear advice to the applicant of all of the issues. The authority considered it would have been unfair to the applicant if matters continued without the applicant's knowledge of those issues. The authority indicated that it would address those issues once the first determination was completed.
- 3.8.6 In an email to the agent on 3 February 2014, the authority advised the agent that although it considered the second notice a nullity;
- It is important to note that [the authority] has serious concerns about the other matters listed in the second [notice]. These other matters involve structural deficiencies which are a concern and cannot be ignored. At some stage these other matters will need attention.
- 3.8.7 By letter dated 10 October 2014 the agent requested this determination be suspended until the first determination was made; I accepted that request and this determination was suspended until 19 August 2015 (refer paragraph 1.3.6).

4. The submissions

- 4.1 Submissions from the parties initially received as part of the first determination and which relate to this determination have been taken account of and include copies of the following documents:
- Photographs dated June 2002.
 - Resource consent site plan approved on 14 April 2004.
 - The second notice to fix and covering letter, dated 21 January 2014.
 - Various items of correspondence between the parties and to the Ministry.
- 4.2 I summarise the views of the agent that have been expressed in submissions received during the first determination as follows:
- Section 165(1)(c) regarding certificate of acceptance is for work being done or been carried out, and is consistent with section 163 in respect of a specified person being a person carrying out building work; the offence is with the person carrying out the work rather than the person in possession of the work.
 - There is uncompleted work as there has been a stop work order in place since the issue of the first notice.

- The covering letter to the second notice refers to non-compliance with NZS3604; this is not a mandatory standard; there is no evidence of failure (or likely failure) to meet the requirements of the Building Code.
- The matters identified are not serious enough to warrant the issue of the second notice; the authority can always act under section 121 if the building is dangerous or insanitary at some stage in the future.
- The authority approved the details of the sleep-out in 1996.
- The retaining wall can be subject to a certificate of acceptance at the applicant's discretion.
- The sleep-out and retaining wall were visible at the time of the authority's inspection in January 2013, but had not been included in the first notice to fix.
- The matters listed in the second notice do not detail contraventions or serious breaches but rather outline 'a lack of satisfaction' of code-compliance.
- There is no evidence of failures of performance associated with the building work; there is no sagging or deflections (Clause B1).
- The stop work order in the first notice has prevented the closing in of the ablutions area; this item should not have been included in the second notice as it was of the authority's making.
- The reference to 3m height for the retaining wall appears to be the height of the poles and not of the retained earth height; there is a resource consent for the retaining wall (2006); only a small portion of the wall is over 1.5m high and this portion is largely hiding the self-supported septic tank rather than retaining earth – this higher section is more strictly a wall that is allowed under Schedule 1(21) up to 2.5m without consent
- The sleep-out was building work done by a previous owner.

4.3 In an email to the Ministry on 17 April 2014 the authority submitted that, based on a resource consent issued on 14 June 2004 and that the owner purchased the property on 1 May 2003, the work to the sleep out and retaining wall was carried out by the current owner some time from June 2004 and without building consent being obtained.

4.4 On 30 June 2014 I sought further information from the parties in regards to the matters considered in this determination.

4.5 The authority responded by email on 22 July 2014, providing further details on the sleep-out and the retaining wall, and submitting that:

- It is reasonable to assume that the building works noted in the resource consent were constructed by the current owner following the issue of that consent. The authority considers this a reasonable assumption in the absence of any building consent application for the works 'as the Resource Compliance officers visited the site during the consenting process and these structures did not exist.'
- Deficiencies to the deck structure have been previously noted in the authority's correspondence attached to the second notice as well as in photographs provided for the first determination.

- 4.6 The agent responded by letter of 18 August 2014. In regards to the issue of the second notice, the agent submitted the following (in summary):
- The sleep-out was existing when the owner purchased the property, and this is indicated in paragraph 2.1 of the resource consent application.
 - The retaining wall is not 3m high and the agent has sought the authority's evidence of its on site assessment of this measurement and also the measure of the sleep-out.
 - Reasonable grounds for issuing a notice to fix must be backed by certain processes and steps undertaken by the authority prior to issuing the notice, and those processes and steps should be recorded.
 - The onus is on the authority to show on what information the decision to issue the second notice is based, including evidence of non-compliance with the Building Code as opposed to non-compliance with Acceptable Solutions.
 - The notice to fix should be issued only for the work that required a building consent and only when the threshold of a serious offence has been reached.

4.7 Submissions in response to the draft determination

- 4.7.1 On 22 September 2014 a draft determination was issued to the parties for comment.
- 4.7.2 The authority responded by email on 9 October 2014, noting that it did not accept the draft and in particular the legal analysis regarding who can be issued a notice to fix. The authority submitted (in summary):
- Section 164(1)(a) is broadly framed to capture not only active breaches but also omissions of the Act or regulations. "Failing to comply" must be something different to "contravening" the Act or regulations. An owner can be a specified person under section 164(1)(a) if they omit to do something they were required to do in order to comply with the Act or Building Code.
 - The meaning of section 164 must be ascertained from its text and in light of the Act's purposes. The authority considers that the analysis in the draft is contrary to section 3(b) and undermines the accountability of owners to ensure building work is brought into compliance with the Building Code.
- 4.7.3 The agent responded by email on 10 October 2014. The agent did not accept the draft but noted 'the clarification of the sleepout and retaining wall is appreciated'.
- 4.7.4 The agent also submitted the following (in summary):
- Issuing the second notice was 'vindictive' and an abuse of power, and the authority should have come to the same conclusion as set out in the draft.
 - The second notice being issued without the authority reading the property file and on the day after an inspection indicates 'a less than cursory attitude'. This second determination is an unfair burden to the applicant.
 - The second notice should not be considered as the authority's exercise of powers is suspended under section 183.
 - Evidence of a breach of the Building Code is required, rather than justification for lack of conformity with a standard. The authority is required to provide empirical evidence to support its allegation.

- When building work is ‘outside the compliance regime’, such as exempt work under Schedule 1, there is no requirement for an authority to be satisfied of compliance. Authorities have ‘no right to challenge the building work unless there is a clear and serious contravention of the Building Act’.
- 4.7.5 The agent reiterated his interpretation of the application of section 378, referring to *Andrew Housing Ltd vs Southland District Council*⁴, stating that the authority first became aware of the issues in 23 January 2013 and issued a memo, and that this ‘started the clock’ in terms of filing a charging notice. The first notice to fix was issued nearly nine months later, and the second notice to fix was issued at nearly 12 months.
- 4.7.6 The agent also compared the current situation with those where building work has received a code compliance certificate and where the authority is unable to take any action except in specific circumstances⁵. The agent is of the view that the same restriction on action applies to work completed without a building consent.
- 4.7.7 In a letter dated 18 August 2015 confirming that the applicant wished to continue with this determination, the agent reiterated the view that the authority’s power to issue the second notice to fix was limited by section 378 of the Act and action could only then be taken under section 124. The agent also restated his view that ‘failure to satisfy [the authority] of code compliance is not an offence under section 17’. The agent also submitted:
- Nine of the items in the covering letter to the second notice (refer paragraph 3.8.2 and 5.5.7) are clearly references to perceived omissions from standards, and there is no evidence of failure to meet the performance requirements of the Building Code.
 - The reference to the authority’s inspection (refer paragraph 5.5.6) overlooks that the authority was on site on 23 January 2013.
- 4.7.8 On 31 August 2015 I sought clarification from the authority as to the status of the second notice, requesting the authority confirm whether a notice to fix had been issued or whether the authority intended to issue a notice to fix.
- 4.7.9 The authority responded on 10 September 2015 stating that a notice to fix had been issued but enforcement action was suspended pending the issue of this determination. In further emails on 15 and 29 September 2015 the authority referred to the likelihood of the notice being withdrawn and a new notice (in effect a duplicate of 4570) being issued, and that the notice as issued may not be a nullity as previously stated.
- 4.7.10 Given the response from the authority (above) and that the status of the second notice remains unclear to me; I have taken the matter to be determined as the authority’s exercise of its powers of decision in respect of the issue of the second notice on 21 January 2014.

⁴ *Andrew Housing Ltd vs Southland District Council*, 23 November 1995, Tipping J (52/95)

⁵ Where a code compliance certificate has been issued an authority is unable to take any action in regards to that building work unless: the building is dangerous, is affected, is earthquake-prone, or is insanitary, or the owner decides to alter the building, change its use, or change its intended life.

5. Discussion

5.1 The second notice was issued as the authority was of the view that, in contravention of section 40 of the Act, building work had been carried out without building consent first being obtained when consent was required, and that in contravention of section 17 building work had been carried out that does not comply with the Building Code.

5.2 For a notice to fix to be issued under section 164 of the Act, the authority must consider on reasonable grounds that ‘a specified person is contravening or failing to comply with [the] Act or the regulations ...’.

5.3 Who can be issued with a notice to fix?

5.3.1 The main purpose of a notice to fix is to ensure compliance with the Act and Building Code and provide effective penalties for those that do not comply. A notice to fix can be issued to a ‘specified person’ under section 164(1)(a) of the Act. The definition of a ‘specified person’ is found under section 163 of the Act:

specified person means—

- (a) the owner of a building; and
- (b) if the notice to fix relates to building work being carried out,—
 - (i) the person carrying out the building work; or
 - (ii) if applicable, any other person supervising the building work.

5.3.2 Under this definition the ‘owner’ of a building is a specified person. However, one needs to read the definition in conjunction with section 164(1)(a) of the Act, which requires the specified person to be contravening or failing to comply with the Act or regulations. In my view a notice to fix can only be issued to an owner in respect of a contravention or failure to comply with the Act or Regulations. If the person who contravened the Act is no longer the owner of the building, a notice to fix cannot be issued to that former owner, as they are no longer the owner of the building, but nor can a notice to fix be issued to the new owner, as they have not contravened or failed to comply with the Act or Regulations⁶.

5.3.3 A notice to fix is issued to a specified person as opposed to being issued for the building, in contrast to a building consent or a dangerous buildings notice which are specific to the building itself. A notice to fix is issued to an individual and carries the ability for that individual to be prosecuted for failure to comply with the notice under section 168 of the Act. The wording of section 164 indicates that the specified person must do something, for example, carry out building work without a building consent and contravene section 40, to be issued with a notice to fix. If a person carries out building work without a building consent a notice to fix can be issued *to that person*.

5.3.4 If a person purchases a house on which a previous owner has carried out building work without a building consent, a notice to fix cannot be issued to the current owner, as they have not contravened the Act in that they did not carry out the building work that contravened section 40.

5.3.5 The authority has put forward the view that section 164(1)(a) encompasses omissions of the Act or regulations, such that an owner can be a specified person under section 164(1) if they omit to do something they were required to do in order to comply with the Act or Building Code.

⁶ Refer also 2014/035 The issue of a notice to fix for weathertightness remedial work carried out by a previous owner at 16B Sunbrae Grove, Tauranga (*Ministry of Business, Innovation and Employment*) 15 August 2014.

- 5.3.6 While I agree that section 164(1)(a) may encompass an omission, such as not obtaining a building consent for building work that requires a building consent, I do not agree that this would extend to a subsequent owner failing to bring non-compliant building work into compliance with the Building Code where that non-compliant building work was undertaken by a previous owner. The obligation for an owner to comply with the Building Code arises from section 17 of the Act, which applies only to the *carrying out of building work*. Section 17 does not impose an obligation on an owner to ensure that their building must always comply with the requirements of the Building Code.
- 5.3.7 This responsibility of the owner is reflected in section 14B:
- 14B Responsibilities of owner
- An owner is responsible for—
- (a) obtaining any necessary consents, approvals, and certificates:
- (b) ensuring that building work carried out by the owner complies with the building consent or, if there is no building consent, with the building code:
- 5.3.8 The reference in 14B(b) is to ‘building work carried out by the owner’, and accordingly, the responsibility for the building work lies with the person who was the owner at the time the building work was carried out. While it may be important that a subsequent owner is aware of any non-compliance so they can choose whether to remediate the non-compliance, there is no obligation on the subsequent owner to bring existing building work (that is the building work carried out during the previous ownership) into compliance with the Building Code.
- 5.3.9 Under section 163 a notice to fix can also be issued to the person carrying out the building work. For example, if a builder is carrying out the building work they can be issued with a notice to fix; however, where the builder has no legal right to carry out the building work⁷ and therefore has no ability to remedy the contraventions and non-compliances listed in the notice to fix, the builder cannot be included as a specified person on the notice to fix.⁸ The legislation makes it clear that the builder can only be a specified person when they are carrying out the building work. The same reasoning applies to an owner and is reflected in section 164(1) and the definition of “specified person” in section 163, if the owner did not carry out the contravention of the Act because it was the actions of a former owner, under section 164(1) the owner cannot be held responsible for that non-compliant building work carried out by the former owner.
- 5.3.10 Where an authority intends to issue a notice to fix, the authority needs to identify the provision of the Act or regulations that has been contravened, and satisfy itself that the person to whom it intends to issue the notice to fix is in fact the person who contravened the provision (and that it wasn’t a previous owner who was responsible for the contravention).

5.4 The building work identified in the second notice as being in breach of section 40

- 5.4.1 The second notice listed three separate items of building work that the authority considered were carried out without building consent being obtained when consent was required; the 2013 deck, a retaining wall, and a detached sleep out. The 2013

⁷ For example; is not engaged to carry out the building work, or is restricted from doing so.

⁸ 2010/073 The issuing of a notice to fix to the owner only of a house at 16A Lyall Parade, Lyall Bay, Wellington (*Department of Building and Housing*) 23 August 2010.

deck was identified in the first notice to fix and is the subject of the first determination, it is not considered in this determination.

- 5.4.2 The owner purchased the property on 1 May 2003, and the resource consent application approved on 14 April 2004 describes building work as having ‘already been constructed on site’ (refer paragraph 3.4). In addition, photographs provided by the agent for the first determination show that the sleep out structure was in place by June 2002, which is prior to the owner purchasing the property and prior to the application for resource consent in 2004. It would appear therefore that the applicant did not carry out the building work to construct the sleep out and cannot be issued with a notice to fix for that building work.
- 5.4.3 It is less clear when the retaining wall was constructed; however, the evidence of the sleep out being an existing structure prior to the application for resource consent supports the statement made in the resource consent application that the building works had already been carried out. Given this, there is sufficient doubt in my mind in respect of the date of construction of the retaining wall and whether the applicant was the owner at the time of construction.
- 5.4.4 In its submission of 22 July 2014, the authority considers that it had made a reasonable assumption that the work was carried out after the resource consent was issued. Though I accept that on the face of it the issuing of the resource consent would appear to support the authority’s assumption, the detail in the content of the resource application (refer paragraph 3.4) indicates that the consent was applied for retrospectively; the authority has not provided records from the resource compliance officers’ site visits that would contradict that view.
- 5.4.5 Given the above, I consider that the authority incorrectly exercised its powers of decision in issuing the second notice to fix for breaches of section 40 of the Act in respect of the sleep out and the retaining wall, and this determination reverses the authority’s decision in that respect.

5.5 The building work identified in the second notice as being in breach of section 17

- 5.5.1 The content of the second notice also refers to non-compliance with the Building Code identified by the authority, largely in regard to the structural and weathertightness elements of the 2013 deck and ‘porch structure’ and the lack of walls to an ablution area on the lower floor level (refer paragraph 3.8.3).
- 5.5.2 Section 17 of the Act requires all building work to comply with the Building Code to the extent required by the Act regardless of whether building consent is required.
- 5.5.3 In the second notice the authority identified the particular items of building work it considered do not comply with the Building Code and the relevant code clauses.
- 5.5.4 The agent has submitted that the onus is on the authority to provide evidence of non-compliance and has referred to Determination 2013/015⁹ in respect of a ‘threshold’ for issuing a notice to fix.
- 5.5.5 Determination 2013/015 considered circumstances in which a notice to fix is issued at the same time as the refusal for a code compliance certificate and provided commentary regarding the relationship between a notice to fix and a notice under section 95A. In that commentary I stated:

⁹ Determination 2013/015: The refusal to issue a code compliance certificate and the simultaneous issue of a notice to fix for a 14-year-old house at 25 Gilberd Place, Torbay, Auckland (*Ministry for Business, Innovation and Employment*) 8 April 2013

- 4.2.7 The common practice for authorities inspecting building work during the construction phase is to identify any work that does not comply with the consent and/or the Building Code and to issue a site notice requiring the work to be remedied. If the site notice is not complied with, a notice to fix will usually be the appropriate response. Similarly, on a final inspection when an authority refuses to issue a code compliance certificate the usual response should be the provision of a notice with reasons for the refusal under section 95A. Then, if an owner fails to carry out the work that will be the appropriate time for an authority to consider whether to issue a notice to fix.
- 4.2.8 There will of course be some circumstances when it will be appropriate to issue a notice to fix at the same time as refusing to issue a code compliance certificate. For example, if the breach is significant, the building work is unsafe or is likely to become unsafe, or there have been repeated breaches by the owner of the Act or Building Code. However, in these circumstances, there are particular requirements of the Act in respect of the issue of a notice to fix that must be satisfied. For example, an authority must consider on reasonable grounds that a person is contravening or failing to comply with the Act or regulations. The authority's belief that the Act or regulations are being contravened will require some specific evidence in support of that belief before a notice to fix can be issued.
- 5.5.6 Determination 2013/015 involved consented building work that had been subject to inspections by the authority. In this determination however the building work has been carried out without consent first being obtained. I consider that in the absence of plans and specifications that would normally be provided to support a building consent, the authority is entitled to form a view on compliance based on the findings of any inspections carried out and on the authority's own experience and knowledge.
- 5.5.7 The agent also considers that a decision regarding compliance should not be based on a comparison with an Acceptable Solution. In the covering letter to the notice to fix four of the ten items were identified in as being outside the scope of NZS 3604, which is the standard cited in the Acceptable Solution B1/AS1 for timber, and the agent considers other items clearly reference perceived omissions from standards.
- 5.5.8 The authority identified a number of issues where the building work relating to the structure is not in accordance with NZS3604. While not mandatory, departures from standards and Acceptable Solutions mean the authority may require additional information in order for it to be satisfied on reasonable grounds as to the compliance of the building work.
- 5.5.9 As the building work was carried out without consent first being obtained the authority was not afforded the opportunity to check compliance of the building work before the work was undertaken. Had the owner sought building consent for the 2013 deck, or had the owner applied for a certificate of acceptance subsequently, the authority would have been entitled to request sufficient information in order to establish that any building work that falls outside the scope of NZS 3604 or the relevant Acceptable Solutions would comply with the performance requirements of the Building Code.
- 5.5.10 The site notice of 23 January 2013 noted that the authority had advised the owner to seek a certificate of acceptance, and the agent submitted (to the first determination) that as-built drawings were being prepared for an application for a certificate of acceptance. In issuing a draft of this determination on 22 September 2014, I strongly suggested that the provision of these drawings to the authority would assist the parties in resolving the issues regarding compliance of the deck. It is my understanding that the applicants have not yet made an application for a certificate of acceptance or provided any further information as regards compliance of the building work.

5.5.11 In this instance the Ministry has not carried out a site visit to undertake an independent assessment of the building work; accordingly my decision on whether to confirm, reverse or modify the notice to fix in respect of the compliance of the building work is based on a review of the information provided by the parties. I summarise my observations below:

- The covering letter to the notice to fix lists 10 items, not all of which correspond to the photos.
- Though the authority states that members are undersized, dimensions & spans are not stated.
- There are few photos giving an overall picture of the extension, some of the close-ups are indistinct, and some of the authority's comments are unclear – for example: timber 'grading' in an area subject to wetting, and 'undersized posts'.
- The exterior appears to be ply which is likely to be able to be relied on for bracing providing it is properly nailed – but I have no information on this.
- The posts supporting the deck are not braced at all, and I consider it is very unlikely the deck floor itself can be relied to provide bracing as it appears insecurely fixed to the rest of the structure.
- Significant departures from NZS 3604 include the framing connections, which rely on skewed nails, and some of the roof framing (in particular the securing of the outrigger beams other than the ridge), and there is no information provided on details of the construction that would mitigate the effects of those departures.

5.5.12 Taking into account the authority's knowledge and experience in carrying out inspections, the construction details that are visible in the photographs provided, and that there has been no further information forthcoming from the applicants to support their view that the building work complies, I consider the authority correctly exercised its powers of decision in issuing the second notice to fix for breaches of section 17 of the Act in respect of the structural elements of the building work to the 2013 deck.

5.5.13 The particulars in the second notice also referred to non-compliance with Clause E2 in respect of the 'lower floor level under new deck houses an ablution area without external walls to prevent moisture penetration'.

5.5.14 The site notice of 23 January 2013 required 'all other work to stop until consent has been applied for and granted'. In complying with the site notice the owner did not have the opportunity to close in the lower floor level under the deck and should not have then been penalised by that being included in the second notice to fix.

5.5.15 As such I consider that the authority incorrectly exercised its powers of decision in issuing the second notice to fix for breaches of section 17 of the Act in respect of the lack of external walls to the lower floor level under the deck, and this determination reverses the authority's decision in that respect.

5.6 Other matters raised by the agent

5.6.1 The agent's letters of 18 August and 1 September 2014 raise additional matters the agent considers should be dealt with in this determination; namely the application of section 183 in relation to the decision to issue the second notice while the first notice

was subject to a determination, and the 6 month time limit for bringing prosecution already having expired.

5.6.2 The matters raised by the agent have been addressed in the first determination or in previous determinations and nothing in the agent's submission has persuaded me to change the way those matters have been dealt with in this determination in that:

- The issuing of the second notice was not contrary to section 183 (refer paragraph 5.5 of the first determination).
- A notice to fix can be issued more than 6 months after the completion of building work (refer paragraph 5.6 of the first determination) and further the application of section 378 is not a matter for determination under section 177 – the proper place for determining any disputes over the application of section 378 is the court where the charges are filed.
- Once building work has been completed a notice to fix may be issued if that work was carried out contrary to the Building Code or carried out without a building consent when one was required (refer section 4.3 of Determination 2013/015) – there is no particular time limit on when such a notice to fix might be issued although it cannot be issued once a code compliance certificate has been issued for work that is the subject of a building consent.

6. The decision

6.1 In accordance with section 188 of the Building Act 2004, I hereby modify notice to fix No. 4570 to:

- remove reference to the construction of the retaining wall and sleep out, and the lack of external walls to the lower floor level under the deck
- retain references to the building work that does not comply with Clause B1 of the Building Code and Clause B2 (insofar as it relates to Clause B1).

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 18 November 2015.



John Gardiner
Manager Determinations and Assurance

Appendix A

A.1 The sections of the Act discussed in this determination:

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.

...

41 Building consent not required in certain cases

(1) Despite section 40, a building consent is not required in relation to—

...

(b) any building work described in Schedule 1 for which a building consent is not required (see section 42A); ...

163 Definitions for this subpart

In this subpart, unless the context otherwise requires,—

...

specified person means—

(a) the owner of a building; and

(b) if the notice to fix relates to building work being carried out,—

(i) the person carrying out the building work; or

(ii) if applicable, any other person supervising the building work.

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); ...

(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;

...

183 Decision or exercise of power suspended until determination made

(1) Until the chief executive makes a determination on a matter, any decision or exercise of a power by any person referred to in section 177 that relates to that matter is suspended unless and to the extent that the chief executive directs otherwise.

(2) However, a requirement in a notice to fix issued under section 164 to cease building work for safety reasons remains in force until the determination is made.