Determination 2024/016

The issue of a notice to fix for building work associated with a two storey building with sanitary fixtures

10 Glenesk Road, Piha, Auckland

Summary

This determination considers the issue of a notice to fix for building work associated with a two-storey building with sanitary fixtures. The determination considers whether the building work was exempt from the requirement to obtain a building consent under Schedule 1, and whether adequate particulars were set out in the notice to fix. It also discusses several issues relating to the provisions in the Act for issuing notices to fix.

Figure 1: The building under consideration.

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, 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. L Towner and P Davies ("the owners"), the owners of the property at 10 Glenesk Road, who applied for this determination.

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 decisions of the authority to issue a series of notices to fix in respect of the construction of a two-storey building and installation of sanitary fixtures ("the building"). The notices to fix were issued because the authority considered that building work had been carried out without first obtaining a building consent where one was required, and that building work had been carried out that does not comply with the Building Code.

1.4. This determination considers the issue of the most recent notice to fix (NOT21552842), dated 24 May 2021 ("the notice to fix").

1.5. The matter to be determined, under section 177(1)(b) and (3)(e), is the authority's decision to issue the notice to fix. In determining this matter, I must consider:

1.5.1. whether there was a contravention of section 40 (which turns on whether the building work was exempt from the requirement for a building consent under Schedule 1)

1.5.2. whether the particulars given in the notice to fix were adequate

1.5.3. issues relating to the notice to fix provisions, including:

(1) whether the owners are specified persons under section 163

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

(2) whether a notice to fix can be issued under section 164 for building work that is completed

(3) whether the requirements in section 167 were satisfied

(4) whether the remedies in the notice to fix were in accordance with the provisions in section 165.

Matters outside this determination

1.6. I have not considered any other aspects of the Act or of the Building Code, or the compliance of any building details that were not raised in the notice to fix.

1.7. The information provided by the parties about the building includes references to matters that relate to the Resource Management Act 1991 ("RMA") and the Residential Tenancies Act 1986, which are outside the scope of this determination. I have no jurisdiction under other enactments, and this determination only considers matters relating to the Building Act and its regulations.

2. The building work and background

2.1. The property is a large rural coastal site of approximately 4300m^2. The property contains a dwelling and a number of smaller buildings, including the building that is the subject of this determination.

2.2. The building under consideration in this determination is a two storey "sleepout" with sanitary fixtures (see Figure 1). The owners state the building has a floor area[2] of 3.155m x 3.155m, ie slightly less than 10m^2.

2.3. The building is timber-framed and clad in vertical shiplap weatherboard cladding, with timber overlay flooring.

2.4. The building was originally a single level constructed on 125 x 125mm posts. According to a timeline provided by the owners, this was constructed in February 2010. This now forms the upper level of the building. The upper level contains a mezzanine, which I note has no barrier at its edge and is accessed by a ladder.[3]

2.5. Access to the upper level is by way of an external staircase to a deck. At the top of the staircase, there are two steps that wind towards the deck (see Figure 3 in Table 2, Appendix A). The original construction of the deck barrier and balustrade to the staircase is shown in Figure 1. The owners subsequently added a handrail to the inside of the balustrade, and additional elements to the top rail of the deck barrier to increase its height (see Figures 4 and 5 respectively, in Table 2, Appendix A).

[2] Clause A2 states "**floor area**, in relation to a *building*, means the floor area (expressed in square metres) of all interior spaces used for activities normally associated with domestic living".

[3] Photographs indicate the ladder may not be fixed in place.

2.6. In the following years, the lower storey was progressively enclosed and sanitary fixtures were added.

2.7. The ground level now includes an enclosed living/office area. There is also a partially enclosed area ("the veranda") with a kitchen sink, bench and cabinetry attached along one wall, and corrugated metal roof above (see Figure 2). The open end of this space has a plastic curtain.

2.8. A small area adjacent to the living area has been partly enclosed with timber framing and metal cladding. This area houses a shower and flushing toilet, which are accessed only from the outside. Adjacent to this, attached to the building's external wall, is a handbasin. There is a small shed nearby that contained what the owners describe as a "composting toilet"; which consisted of a bench seat with a hole over a pit, and a toilet seat lid.

2.9. The kitchen sink, shower and handbasin originally discharged to stone filled drainage fields. However, prior to the issue of the notice to fix, the sanitary fixtures were connected to an existing on-site wastewater treatment system. The flushing toilet was also installed next to the shower at this time. The owners state that the original composting toilet was "decommissioned" when the building consent for the waste connections was issued, and the shed housing it remains as a "garden feature / tool shed".

Figure 2: Photograph showing partially enclosed area on ground level.

2.10. On 1 March 2019, the authority carried out the first inspection of the building, resulting from a complaint made to the authority by the tenant concerning the building and its facilities.

The notices to fix

2.11. Between 22 March 2019 and 24 May 2021, a series of six notices to fix were issued.[4] The notices to fix all contained the same particulars of contravention or non-compliance, as follows:

> Contrary to **s.40 of the Building Act 2004**, the following building works have been undertaken… without first obtaining a building consent (note, these works do not meet the requirements to be considered exempt as described in schedule 1 of the Building Act 2004).
>
> - A 2-storey building located on the North Eastern boundary of the property, approximately 14 metres North of the stream has been constructed with kitchen and shower facilities.
> - An outdoor shower, and kitchen sink including all associated plumbing and waste, have been added in the lower area of this building.
> - An outdoor composting toilet has been installed to the North of this building.
>
> Contrary to **s.17 of the Building Act 2004**, the following building work does not comply with the requirements of schedule 1 of the Building Regulations 1992 (the Building Code):
>
> - The installation of sanitary fixtures in this building have not been connected to a wastewater treatment system contrary to clauses G1 (Personal hygiene), G13 (Foul water) of the NZ Building Code
> - The constructed stairway in this building is too steep, there is no compliant hand rail and the barrier is not constructed correctly contrary to clauses D1 (Access), F4 (Safety from falling) of the NZ Building Code
> - The buildings cladding system, has not been installed to the necessary requirements, contrary to clause E2 (External moisture) of the NZ Building Code

2.12. On 11 June 2019, following the second notice to fix, the owners requested a certificate of acceptance pre-application meeting.

2.13. In August 2019, the owners submitted a report (dated 26 August 2019) to the authority that was prepared by a building consultant on the extent to which Schedule 1 applied to the work and whether the building was 'safe and sanitary'.

2.14. In October 2019, the owners were granted a building consent (BCO10294945) for the connection of the sanitary fixtures to the existing on-site wastewater treatment system.

2.15. On 30 October 2019, the authority carried out a further site visit. The authority's file notes state the purpose of the site visit was to inspect the building as the second notice to fix had expired. On 1 November 2019, the authority issued the third notice

[4] I note that the first two notices to fix were issued only to L Towner. The subsequent notices were issued to both L Towner and P Davies, being both the owners listed on the Record of Title.

to fix, because the authority considered the owners had not complied with the second notice to fix.

2.16. On 13 November 2019, the owners wrote to the authority saying that the first notice to fix had been complied with to the extent required by the Act. The owners noted there was no building work being carried out contrary to section 40 of the Act, and work was proposed to the sanitary system that was subject to building consent BCO10294945. As part of this correspondence, the owners attached the report discussed at paragraph 2.13.

2.17. Further correspondence between the parties resulted in a meeting between the owners and the authority on 28 January 2020 about the third notice to fix.

2.18. On 27 February 2020, the authority carried out a further site visit. The authority's file notes state the purpose of the site visit was to inspect the building as the third notice to fix had expired. On 27 February 2020, the authority issued the fourth notice to fix, because the authority considered the owners had not complied with the previous notice.[5]

2.19. On 5 March 2020, the building work to connect the sanitary fixtures to the wastewater treatment system (carried out under building consent BCO10294945) passed the final inspection.

2.20. On 17 June 2020, the authority issued the fifth notice to fix.

2.21. On 5 November 2020, a certificate of acceptance pre-application meeting was held. The meeting minutes note the options discussed were to either apply for a certificate of acceptance for the building work, carry out any remedial work, and obtain a building consent for the remedial work if required; or to remove the building.

2.22. On 24 May 2021, the authority issued the sixth notice to fix, NOT21552842 to the owners, which is the notice to fix under consideration in this determination. The sixth notice to fix included the same particulars as the previous notices, and required the notice be complied with by 24 July 2021.

2.23. On 8 October 2021, a code compliance certificate was issued for the connection of the sanitary fixtures to the existing wastewater treatment system, undertaken under building consent BCO10294945.

[5] It is unclear whether this notice was in fact sent or received. Regardless, for simplicity I will refer to this notice as the "fourth" notice and the subsequent notices as the "fifth" and "sixth".

3. Submissions

The owners

3.1. The owners are of the view that the building work was carried out under Schedule 1 and therefore building consent was not required. The owners submit that the building was progressively developed over time as exempt building work, as set out in paragraph 4.5 and Table 1 (Appendix A).

3.2. The owners also advised that the lower storey living area has been lined and timber overlay flooring installed. The condition of the wall lining and flooring was dry even after a period of heavy rain, which the owners submit is a good indicator of the building's performance, and the building is not dangerous or insanitary as defined in sections 121 and 123 of the Building Act.

3.3. Further details from the owners' submissions are included in the discussion section and appended tables.

The authority

3.4. The authority submits that its documentation of the inspections clearly shows the scale of the building work undertaken and supports its decision to issue a notice to fix. The building is two storeys with kitchen and shower facilities, and there are no provisions of Schedule 1 that apply to the construction of two storey buildings. The authority disagrees with the owners' view that each individual part of the building was exempt work and therefore the collective whole is also exempt.

3.5. Further details from the authority's submissions regarding the contraventions listed in the notice are included in the discussion section and appended tables.

3.6. The authority also submitted that the internal mezzanine area does not have a barrier where one is required, contrary to clause F4 Safety from falling. However, I note this was not identified in the notice to fix and I have not considered it further.

4. Discussion

4.1. This determination considers the authority's decision to issue the notice to fix. Specifically, the determination considers:

4.1.1. whether there was a contravention of section 40 (which turns on whether the building work was exempt from the requirement for a building consent under Schedule 1)

4.1.2. whether the section 17 particulars given in the notice to fix were adequate

4.1.3. issues relating to the provisions in the Act for issuing notices to fix, including:

(1) whether the owners are specified persons under section 163

(2) whether a notice to fix can be issued under section 164 for building work that is completed

(3) whether the requirements in section 167 were satisfied

(4) whether the remedies in the notice to fix were in accordance with the provisions in section 165.

Whether there was a contravention of section 40

4.2. Section 40(1) provides that a person must not carry out any building work except in accordance with a building consent.

4.3. Section 41(1)(b) states that a building consent is not required if the building work falls within the exemptions under Schedule 1. Schedule 1 prescribes building work for which building consent is not required. Therefore, whether there has been a contravention of section 40 turns on whether the building work was exempt under Schedule 1.

4.4. The notice to fix alleges three contraventions of section 40, being:

- A 2-storey building located on the North Eastern boundary of the property, approximately 14 metres North of the stream has been constructed with kitchen and shower facilities.
- An outdoor shower, and kitchen sink including all associated plumbing and waste, have been added in the lower area of this building.
- An outdoor composting toilet has been installed to the North of this building.

4.5. The owners are of the view that the different parts of the building work constructed between 2008 to 2018 were exempt under various clauses of Schedule 1. The descriptions of building work and exemptions claimed by the owners are as follows:

- Clause 3 – A sleepout <10m2 in floor area has been constructed with a stair and landing [deck] to provide access.[6]
- Clause 35 – Fixtures have been relocated and substituted. Composting toilet has been provided for.
- Clause 34 – Provide for composting toilet and soakage system for sink and shower and basin.
- Clause 24 – A floor has been provided to the ground floor.
- Clause 15 – The ground floor space formed by the sleepout has been enclosed to provide an office lounge area.
- Clause 17 – Veranda formed under the landing [deck] area.
- Clause 8 – Timber window to provide protection to veranda.

[6] This refers to the original construction of upper level of the building on posts.

- Section 43[7] – Provide new electrical wiring and fittings.

4.6. The owners argue that "Schedule 1 is a permissive and liberal provision that owners are entitled to rely on if the work is 'described'. The meaning should be from the point of view of the average owner reading the words…".

4.7. I disagree with the owners on this point. An owner who relies on Schedule 1 will make an assessment about whether Schedule 1 applies. However, if an authority considers there is a contravention of section 40 (because it disagrees that the work is covered by Schedule 1), then there are grounds for the authority to issue a notice to fix under section 164.

4.8. I have assessed the building work against the exemptions claimed by the owners in Table 1, Appendix A. In my view, the only applicable exemptions are for the construction of the concrete pad (under clause 24) and the partially enclosed veranda on the lower level of the building including the window (under clauses 17 and 8). I also note that the electrical work did not require a building consent, as per section 43.

4.9. I do not consider that the construction of the upper level and the enclosed living area on the lower level was exempt building work. Also, the installation of the sanitary fixtures was not exempt under clause 35. Accordingly, building work was undertaken without consent when consent was required, in contravention of section 40. Therefore, there were grounds to issue a notice to fix.

4.10. In regard to the particulars in the notice to fix, I note that where some building work is exempt and some is not, the contravention needs to be clearly drafted so that it only captures the work that is in contravention of section 40.

4.11. In terms of the contravention relating to the composting toilet, the authority's determination submission states that this item will be removed from the notice to fix, due to the installation of the new flushing toilet. The owner has stated that the composting toilet was "decommissioned"; it is not clear to me whether this means it has been removed. I do not consider that decommissioning the composting toilet is equivalent to removing it. If the composting toilet had not been removed at the time the notice to fix was issued, then I consider there were grounds to issue is a notice to fix in relation to the composting toilet as it was not exempt building work.

The notice particulars

4.12. Section 165 prescribes the form and content of a notice to fix. The prescribed form[8] for a notice to fix provides a space to insert the "particulars of contravention or

[7] I note that this is not a Schedule 1 exemption but refers to section 43 of the Act.
[8] See Building (Forms) Regulations 2004, Form 13.

non-compliance". In *Andrew Housing Ltd v Southland District Council*,[9] the High Court said, in relation to the particulars of a notice to fix:

> What is crucial, however, is that **the particulars must fairly tell the recipient** of the notice what provision of the Act or the [Building Code] has allegedly not been complied with. [my emphasis]

4.13. Similarly, the District Court in *Bilsborough* noted that the recipient of a notice to fix needs to be "fairly and fully informed", so they can address the identified issues. The Court said:

> [106] … failure to comply with a notice to fix can result in the imposition of a significant financial penalty. **Accordingly, the particulars of the notice assume some importance.**
>
> [107] In my view, **it is appropriate that the recipient of a notice be provided with as much detail as possible, so the particular work should be identified**,… I appreciate that the recipient of a notice needs to be borne in mind, however, given the potential for monetary penalties for non-compliance **they need to be fairly and fully informed**, so they can address the identified issues, and if necessary seek specialist advice. [my emphasis]

4.14. The notice to fix alleges three contraventions of section 17 in relation to the owners' building.[10] These are:

- The installation of sanitary fixtures in this building have not been connected to a wastewater treatment system contrary to clauses G1 (Personal hygiene), G13 (Foul water) of the NZ Building Code
- The constructed stairway in this building is too steep, there is no compliant handrail and the barrier is not constructed correctly contrary to clause D1 (Access), F4 (Safety from falling) of the NZ Building Code
- This buildings cladding system, has not been installed to the necessary requirements, contrary to clause E2 (External moisture) of the NZ Building Code

4.15. The owners submit the authority has identified failure of five Building Code clauses in the notice to fix but has failed to identify non-compliances with the performance requirements of the Building Code.

4.16. The notice does not adequately describe the reasons why the authority considers the work does not comply, nor does it identify the relevant performance criteria the authority considered had not been met. For example:

4.16.1. The statement "…there is no compliant handrail and the barrier is not constructed correctly…" does not explain why the authority considered the handrail and barrier do not comply with clauses D1 and F4 (respectively).

[9] [1996] 1 NZLR 589.

[10] Section 17 of the Act provides "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."

From this it is not clear whether the concern with the handrail related to it being smooth, reachable and graspable (D1.3.3(j)), or of adequate strength and rigidity (D1.3.3 (k)), or something else. Likewise, for the barrier it is unclear which of the performance criteria in clause F4 was an issue.

4.16.2. The statement that the cladding system "…has not been installed to the necessary requirements…", does not explain which specific details of the cladding system the authority considers are non-compliant with clause E2, and the reasons why. Specific examples were not raised until the authority made its determination submission. This meant that it was not clear to the owners what needed to be remedied in order to bring the cladding system into compliance with E2.

4.17. In my view, the particulars of the section 17 contraventions were deficient, as they did not set out what performance criteria were not being met and why the building work did not comply. As such, they did not adequately specify the "particulars of contravention or non-compliance" as required by the prescribed form. I consider a notice to fix must contain sufficient details regarding the building, building work, and alleged contravention, to fairly and fully inform the recipient about the basis for the notice.

The authority's assessment against Acceptable Solutions

4.18. The owners submit that the authority based its views of non-compliance on the prescriptive Acceptable Solutions, which are not mandatory, and that compliance has been achieved to the extent required by the Act.

4.19. The authority's submission set out the reasons why it considers that various items of building work do not comply. However, the authority has assessed compliance against the relevant Acceptable Solutions rather than against the performance requirements of the Building Code clauses at issue.

4.20. Section 19 sets out various methods by which compliance with the Building Code can be established (eg Acceptable Solutions, Verification Methods etc), and an authority must accept compliance with these methods as establishing compliance with the Building Code. However, these methods are not the only way to comply with the Building Code.

4.21. The Building Code sets out the performance criteria for the assessment of building work, and an 'alternative solution' can meet the performance criteria. The performance criteria are the qualitative and quantitative criteria required to be satisfied in performing the functional criteria of a Building Code clause. If the performance requirements are satisfied, the functional requirements will also be satisfied. Conversely, to establish non-compliance with the Building Code, a demonstration of non-compliance with one or more of the performance criteria is required. While Acceptable Solutions may provide a helpful starting point or

reference point, non-compliance with an Acceptable Solution does not mean the building work does not comply.

Commentary on Building Code compliance

4.22. I have found that the particulars of the section 17 contraventions set out in the notice to fix were deficient. As such, it is not necessary for me to assess the compliance of the building work which was raised in the notice in order to make a determination about the notice to fix. However, to assist the parties, I have made observations about several items raised in the notice to fix and described in the authority's determination submission (refer to Table 2, Appendix A), though not all as there is not sufficient information on many of the items raised.

The notice to fix provisions

4.23. Section 164 provides for a notice to fix to be issued if "a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent)…". Further, the authority must issue a notice to fix requiring the person to remedy the contravention or to comply with the Act or the Building Code.

Whether the owners are specified persons

4.24. Section 163 states:

> …
> **specified person** means –
> (a) The owner of a building:
> (b) If a 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:
> …

4.25. The owners submit that "The NTF [notice to fix] alleges that [the owners] carried out work contrary to s40 when [they have] never carried out building work but relied on tradesman for this at the time and their advice (and [the authority's] at the time) that no consent was required."

4.26. The authority submits that the notice to fix was correctly issued to the owners because building work had been carried out without a building consent being obtained as required by section 40, and owners are responsible for obtaining any necessary consent.

4.27. The issue of whether an owner is a specified person if they did not physically carry out the building work themselves has been addressed in previous determinations. Determination 2016/009 states:

7.4.5 … a notice to fix can be issued to the owner of the building as well as to the person who is physically carrying out or supervising the building work. The issue of a notice to fix is not limited to only the person carrying out or supervising the building work.

7.4.6 The contravention in this case is the failure to comply with the requirement of section 40(1) of the Act; 'A person must not carry out any building work except in accordance with a building consent' and section 40(2) states 'A person commits an offence if the person fails to comply with this section'.

7.4.7 The person who is responsible for obtaining consent is identified in section 14B:

> 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:
>
> (c) ensuring compliance with any notices to fix.'

And section 44 provides that an owner must, before the building work begins, apply for a building consent.

7.4.8 It follows that the person responsible for obtaining a building consent (the owner) has committed an offence when building work is carried out, albeit on behalf of the owner, without consent being obtained when consent was required.[11]

4.28. Although the legislation has had a minor amendment[12] since Determination 2016/009 was issued, I maintain the view set out above. This view was also affirmed in Determination 2019/50, which states:

> … section 14B does not limit the responsibilities of an owner to a specific timeframe or to whether they physically carry out the works. I am of the view that the legislation is clear that an owner is responsible for building work carried out, whether or not the owner is physically carrying out the work.[13]

4.29. As such, I consider that the notice to fix correctly named the owners as specified persons under section 163, regardless of whether they physically undertook the building work.[14]

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[11] Determination 2016/009 *Regarding the issue of notices to fix and the refusal to issue a certificate of acceptance in respect of the conversion of a double garage over a boundary* (23 March 2016).

[12] Section 163 of the Building Act was replaced on 1 January 2017 by the Building (Pools) Amendment Act 2016. The amendment removed the word 'and' from the definition of 'specified person' in section 163.

[13] Determination 2019/050 *Regarding the issue of notices to fix in respect of building work to convert an existing shed and sleep-out to a self-contained unit* (15 October 2019), at [5.2.7].

[14] For clarity, I note that there is no argument that the building work at issue was undertaken by a previous owner.

Whether a notice to fix can be issued for completed building work

4.30. The owners also argue that "There is no building work being carried out at this time and the work is historic and out of time under s378 of the building act", and as there was no building work being carried out there was no breach of section 40.

4.31. The question of whether a notice to fix can be issued after the building work has been completed was also addressed in Determination 2016/009, which stated:

> 7.4.11 It would be incorrect to interpret the Act to mean that an authority could not issue a notice to fix if the building work was completed prior to the authority becoming aware of the building work being done. Offences are worded in the present tense rather than the past tense, and regulatory offences are less likely to be offences that are detected at the time that they occur. What is required is evidence of the offence and the person who did the work or was responsible for the work being done.
>
> …
>
> 7.4.15 … 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 – there is no particular time limit on when such a notice to fix might be issued...[15]

4.32. I also note that section 165 (which sets out the form and content of a notice to fix), refers to building work that "…is being **or has been** carried out…" [my emphasis].[16] Therefore, there is no requirement for the building work to be ongoing for there to be grounds to issue a notice to fix under section 164.

4.33. The owners have also argued that the authority was aware of the building in 2016 as it was marked on the plans submitted for a building consent to upgrade the onsite wastewater water system, and the work is "out of time" under section 378. Section 378 concerns the time within which a charging document must be filed, and a notice to fix is not a charging document. Therefore, section 378 is not relevant to the issuing of a notice to fix under section 164; there is no time limit on when a notice to fix can be issued.

The process set out in section 167

4.34. Section 167 sets out the process regarding the inspection of building work that is required to be completed under a notice to fix. Under section 167(1), if a notice to fix required notification to the authority that the relevant building work has been completed, the authority must inspect that building work.

[15] Determination 2016/009 *Regarding the issue of notices to fix and the refusal to issue a certificate of acceptance in respect of the conversion of a double garage over a boundary* (23 March 2016).
[16] Section 165(1)(c).

4.35. Under section 167(2), after building work has been inspected, the authority must give written notice to the specified person to either confirm the notice to fix has been complied with or refuse to confirm the notice has been complied with.

4.36. Under section 167(4), where an authority refuses to confirm that a notice to fix has been complied with, the authority must (a) give the specified person notice of the refusal and reasons for it, and (b) issue a further notice to fix in respect of the building work.

4.37. The owners state that the authority repeated "previous allegations and contrary to s167(4) not notifying owner of the reasons that [the authority] consider that a further NTF [notice to fix] needs to be issued before issuing the NTF". They also state that "a simple reinspection as required by s167 would have clarified the situation for [authority] officials and avoided the last NTF".

4.38. In this case, the authority issued several notices to fix to the owners. The most recent notice (issued on 24 May 2021, that is the subject of this determination), contained the same contraventions as previous notices. However, prior to this notice being issued, the owners had attempted to remedy several issues that had been raised in earlier notices to fix. These remediations included:

4.38.1. the connection of sanitary fixtures to the onsite wastewater treatment system and installation of a flushing toilet, with the final inspection undertaken in March 2020

4.38.2. remediations to the stairway handrail and to the barrier of the upstairs deck, with the authority notified in September 2020.

4.39. At the time the notice to fix was issued (24 May 2021), the work completed under the building consent for the "connection to existing sewage system" had passed its final inspection. Despite the items relating to waste in the notice to fix[17] being remedied, it appears that the authority did not give written notice to the owners to confirm that those items had been complied with, as required under section 167(2). Under section 167(4)(b) and section 164, there were no grounds to issue a further notice to fix in relation to these items. However, the authority issued the notice to fix with the same particulars as prior notices.

4.40. The owners emailed the authority on 7 September 2020 about the stairway handrail and barrier to the upstairs deck, stating that "appropriate handrails on both the deck and the stairs" had been installed, and providing photos. However, it appears that the authority did not inspect this work (either through an assessment of the information provided or through an on-site inspection. It also appears that written

[17] Including the "waste" in the section 40 contravention "An outdoor shower, and kitchen sink including all associated plumbing and **waste**…" [my emphasis], and the section 17 contravention "The installation of sanitary fixtures in this building have not been connected to a wastewater treatment system contrary to clauses G1 (Personal hygiene), G13 (Foul water) of the NZ Building Code".

notice to confirm whether the notice to fix had been complied in regard to these items was not given to the owners, as required by section 167(2).

The remedies in the notice to fix

4.41. Section 165 concerns the form and content of a notice to fix, and states:

> (1) The following provisions apply to a notice to fix:
> (a) it must be in the prescribed form:
> (b) it must state a reasonable timeframe within which it must be complied with:
> (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:
> (d) if it requires building work to be carried out, it may require the making of an application for a building consent, or for an amendment to an existing building consent, for the work:
> (e) if it requires building work to be carried out, it must require the territorial authority, the regional authority, or both to be contacted when the work is completed:
> …

4.42. The notice to fix stated:

> To remedy the contravention or non-compliance you must:
> Pursue any legal option to achieve compliance with the requirements of the Building Act 2004 and the New Zealand Building Code. (This may include obtaining a Certificate of Acceptance for the works)
> Or
> Remove the unauthorised building works and return the building to its former authorised use.

4.43. The compliance date was 24 July 2021, ie two months after the issue date.

4.44. The owners have raised the following issues regarding the remedies set out in the notice to fix:

4.44.1. "non-specific remedy's (sic) stated mean the owner has not known what is required to rectify the allegations of breach"

4.44.2. "suggesting a [certificate of acceptance] must obtaining a (sic) when this is at [the authority's] discretion and their onerous demands associated with this process have made it impossible to satisfy when the option is for the owner to only apply for one under s165"

4.44.3. "the issuing of a further NTF [notice to fix] on 24 May 2021… with a compliance date of 24 July 2021 only a month later"

4.44.4. "The unlawful demand to "must… remove" the building that has no basis in the Building Act as the building is neither dangerous or insanitary and no allegation of this condition has been made".

4.45. Regarding the owners' view that that the remedies were non-specific, I have already concluded that the particulars of the section 17 contraventions were deficient, as they did not set out what performance criteria were not being met and why the building work did not comply. It is up to the recipient of a notice to fix to decide how to bring any specified building work into compliance. However, read in conjunction, the particulars of the contraventions and the remedies should enable an owner to understand why the work is non-compliant, and therefore what is required to bring the work into compliance. In this case, this was not clear.

4.46. Section 165(1)I states that if a notice to fix "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" [my emphasis]. However, the notice to fix referred to "obtaining" a certificate of acceptance rather than "applying" for a certificate of acceptance.

4.47. Section 165(1)(b) provides that a notice to fix must state a "reasonable timeframe" within which the notice must be complied with. I note that the timeframe given in the notice to fix was two months (not one, as claimed by the owners). However, because of the deficiencies regarding the notice to fix (as previously discussed), I consider that an assessment of the timeframe is not necessary.

4.48. The owners have also argued that the authority unlawfully demanded that the owners must remove the building.[18] However, the notice to fix did not state that the owners "must" remove the building; it was given as an option available to the owners.

5 Conclusion

5.1. I conclude that:

5.1.1. The construction of the concrete pad and partially enclosed veranda was exempt building work. Therefore, there was no contravention of section 40 in relation to this work and no grounds for issuing the notice for this work.

5.1.2. The construction of the upper level and the enclosed living area on the lower level and installation of sanitary fixtures[19] was not exempt work under Schedule 1. Therefore, this work contravened section 40 and there were grounds for issuing the notice for this work.

[18] The owners also referred the authority's practice note regarding unauthorised building work (AC1805 *How unauthorised building work is assessed*). I note that this is guidance published by the authority and is outside the scope of the determination.

[19] Excluding the flushing toilet which was installed under the building consent.

5.1.3. The building work to connect the sanitary fixtures to the wastewater system was completed and deemed compliant by the authority (through the issue of the building consent and code compliance certificate). Therefore, there was no contravention of section 17 in relation to a lack of connection to a wastewater treatment system at the time the notice to fix was issued.

5.1.4. The particulars were deficient because they did not adequately specify the building work at issue (in relation to the cladding), what performance criteria were not being met nor the reasons why the authority considered the work was non-compliant. Therefore, the notice did not "fairly and fully" inform the owners of the issues.

5.1.5. In terms of the notice to fix provisions:

(1) The owners are specified persons under section 163.

(2) Building work does not need to be ongoing for a notice to fix to be issued under section 164.

(3) There were no grounds, under section 167(4)(b) and section 164, to issue a further notice to fix in relation to the wastewater from the building. Further, after being notified that the handrail and barrier had been remedied, the authority did not inspect this work and make a decision under section 167(2).

(4) In terms of the remedies, due to the deficiencies in describing the particulars of contravention, it was not clear what was required to bring the work into compliance. Also, the notice incorrectly referred to "obtain" rather than "apply for" a certificate of acceptance. However, to remove the building work is a lawful option to remedy the contravention.

6. Decision

6.1. In accordance with section 188 of the Building Act 2004, I determine that there were not grounds to issue notice to fix NOT 21552842 for all of the contraventions identified in the notice, and the notice was deficient in some other respects. I reverse the notice to fix.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 11 April 2024.

Peta Hird
Principal Advisor, Determinations

Appendix A

Table 1: Assessment of Schedule 1 exemptions

Upper level of building, including the deck and stairs (see Figure 1)	
Exemption claimed by owner	• The owners[20] table states this work was undertaken between 2008-2010, and their timeline specifies February 2010. • The owners maintain the construction of the original single-story building (now the upper level), which at that time did not contain sanitary fixtures, was exempt under clause 3 of Schedule 1. • The corresponding provision in force in February 2010[21] states: > A building consent is not required for the following building work: > … > (i) building work in connection with any detached building (except… a building closer than its own height to any… legal boundary) that – > … > (iv) does not exceed 1 storey, does not exceed 10 square metres in floor area, and does not contain sanitary facilities or facilities for the storage of potable water, but may contain sleeping accommodation (without cooking facilities) if the detached building is used in connection with a dwelling > … • The owners have confirmed that the surveyed site plan showed that the building is approximately 4m from the boundary but were not able to confirm the height of the building. • The owners note that the Schedule 1 exemption that applied before 2013 does not have a floor height limitation, and height was only restricted by distance from a boundary or residence. They also state that "There are limited facilities with the occupants intended to be part of the main household". • In response to my request for further information about the distance to the boundary, the owners referred to the definition of "relevant boundary" which is defined separately to the term "boundary" in clause A2 of the Building Code. The owners stated: > We confirm that the structure is approx 4.0m from the [boundary] although it was thought this was a greater distance. We also note that the neighbor is a council reserve and the owner understood that this was taken into account when establishing correct legal boundary. The neighboring land cannot be built on and in our view commonsense suggests that the relevant boundary should be considered as the 'legal boundary' as defined in Building Code. • The owners also submitted that: > … the determination should be considered on the basis of facts available to the [authority] and relied on by them. New criteria should not be introduced as this changes the basis for the exercise of power. The [authority] assumed as we did that location was not an issue and this was not a basis for their concern.

[20] The owners provided a table which describes the area of work, relevant Schedule 1 exemption, and the year the work was undertaken.

[21] Schedule 1 of the Building Act 2004 as at 1 February 2010.

	• The owners also state that "The NTF [notice to fix] alleges sanitary fixtures in the building but this is incorrect and the facilities are external to it".
The authority's view	• Clause 3 does not apply to the construction of the single storey on posts because the storey is greater than one metre above ground.
Ministry's assessment	• Any building that is closer than its own height to any legal boundary is excluded from this exemption. • The defined term "relevant boundary" is only referred to in clause C3 *Fire affecting areas beyond the fire source.* It is not referred to in Schedule 1. As such, when making an assessment under Schedule 1, I consider that the appropriate definition to use is the definition of "boundary" in clause A2 of the Building Code. This states "**boundary** means any boundary that is shown on a survey plan that is approved by the Surveyor-General and deposited with the Registrar-General of Land, whether or not a new title has been issued". • The building is clearly significantly higher than 4m and therefore is not exempt under Schedule 1. • Although the authority did not rely on the distance from the boundary in forming its view as to whether the building work was exempt under Schedule 1, it is a criterion of the exemption and therefore it is a relevant consideration for this determination. • Given that the height of the building exceeds the distance from the legal boundary, the exemption does not apply. • In regards to the owners' argument that the sanitary fixtures are external to the building, I note that the kitchen sink is in the partially enclosed veranda, and in my view this is not "external" to the building. I also note that the notice refers to "an outdoor shower". Despite the fact the shower is only accessible from outside, it still forms a part of the building and is clearly intended to be used in conjunction with the building. Nonetheless, I accept the owners' assertion that these fixtures were installed several years after the upper level of the building was constructed. Therefore, I have not taken the sanitary fixtures into consideration in determining whether this exemption applied to the upper level of the building.
Floor platform for ground floor	
Exemption claimed by owner	• The owners state this work was undertaken in 2012. • The owners consider it exempt under clause 24 of Schedule 1. • The corresponding provision in force in January 2012[22] states: 1 A building consent is not required for the following building work: … (ga) the construction or alteration of any platform, bridge, or the like from which it is not possible for a person to fall more than 1.5 metres even if it collapses. • The owners state this exemption provides for a floor to the ground floor.

[22] Schedule 1 of the Building Act 2004 as at 1 January 2011. I note that this provision is similar to the current clause 24, which states "Building work in connection with a deck, platform, bridge, boardwalk, or the like from which it is not possible to fall more than 1.5 metres even if it collapses".

Ministry's assessment	• Photos show a concrete pad that extends from the stairway to partway under the lower storey of the building. The other side of the lower storey (next to the concrete pad) is supported on timber piles. • I consider that the concrete pad is a "…platform… from which it is not possible for a person to fall more than 1.5 metres even if it collapses", and therefore, the exemption applies.
The enclosed ground floor living space	
Exemption claimed by owner	• The owners state this work was undertaken in 2012-2015.[23] • The owners consider it exempt under clause 15 of Schedule 1, which states: **15 Closing in existing veranda or patio** Building work in connection with the closing in of an existing veranda, patio, or the like so as to provide an enclosed porch, conservatory or the like with a floor area not exceeding 5 square metres. • The owners state that "walls, windows and doors have been provided to progressively enclose the ground floor space", and that a "porch or veranda can be enclosed 5.0m^2 at a time to provide an internal space".
The authority's view	• Clause 15 does not apply to enclosing the lower storey, because it applies to the enclosure of an existing veranda or patio, rather than an internal habitable space.

Ministry's assessment	• While the Act does not provide a definition for the words 'veranda' or 'porch', the Ministry's guidance document *Building work that does not require building consent* ("the Ministry's guidance") contains the following descriptions:
	  • Porches and verandas are usually made from permanent materials and often extend over raised decks or patios.
	  • Porches are roofed structures which project from the face of a building. They may have sides but they are open at the front. Porches are generally used to protect a building entrance and to provide shelter.
	  • A veranda is typically a long porch and can extend along the full length, or even around more than one side, of a building.[24]
	• I do not consider that the resulting enclosed space can be considered a "porch, conservatory or the like". It has been described by the owners as an "office lounge area" and was being used as a bedroom at the time the authority undertook its first inspection. The clause 15 exemption does not apply.

Installation of sanitary fixtures	
Exemption claimed by owner	• The owners state this work was undertaken in 2012-2015.[25] • The owners consider it exempt under clause 35 of Schedule 1, which states: **Clause 35: Alteration to existing sanitary plumbing (excluding water heaters)** (1) Alteration to existing sanitary plumbing in a building, provided that – (a) the total number of sanitary fixtures is not increased by the alteration…

[23] I note that the relevant provision at that time is the same as the current clause 15.

[24] Ministry of Business, Innovation and Employment *Building work that does not require building consent* (fifth edition, August 2020) at page 110.

[25] I note that the relevant provision at that time is the same as the current clause 35.

	• The owners state that "Fixtures have been relocated and substituted. Composting toilet, sink, shower and basin have been provided for". • The owners consider that if the sanitary fixtures "were relocated from other parts of the site then a consent was not required now", and "alteration includes relocation and replacement with new if required… in this case the fixtures were legitimately borrowed from other parts of the property". • Section 8(1)(c) states that 'building' "includes any 2 or more buildings that, on completion of building work, are intended to be managed as one building with a common use and a common set of ownership arrangements…". The owners state that "There are limited facilities with the occupants intended to be part of the main household".
The authority's view	• The plumbing work is all new plumbing work in this standalone building and is outside the discretion provided by Exemption 35. • The fact that some of the fixtures are 2nd hand and might once have been used in another building on the property does not make this 'existing plumbing work'". The authority referred to Determination 2019/50[26] in support of its position.
Ministry's assessment	• The building in question is self-contained and was being rented by tenants at the time of the authority's initial inspection. As such, I am not satisfied the building and the main dwelling were intended to be "managed as one building with a common use…", as per section 8(1)(c). It is a separate building, and therefore the relocation of fixtures from the main dwelling into this building are not covered by the exemption in clause 35. • The exemption only applies to 'alterations', and the total number of sanitary fixtures in the building must not be increased. These were new installations in the building, rather than alterations involving relocation of a fixture within the building. Whether they were second hand fixtures from the main dwelling is not relevant. • The exemption in clause 35does not apply.
Drainage	
Exemption claimed by owner	• The owners state this work was undertaken in 2012-2015.[27] • The owners consider the work exempt under clause 34 of Schedule 1, which states: **Clause 34 Minor alterations to drains** (1) Alteration to drains for a dwelling if the alteration is of a minor nature, for example, shifting a gully trap. (2) Subclause (1) does not include making new connection to a service provided by a network utility operator. • The owners state this exemption provides for the composting toilet and soakage system for the sink, shower and basin.
The authority's view	• In regard to the outdoor composting toilet, a building consent for minor plumbing works was approved which included "somewhat tenuously" a flushing toilet in the as-built plans. Despite a section 37 notice being issued to the owners to the effect that no work could commence until resource

[26] Determination 2019/050 *Regarding the issue of notices to fix in respect of building work to convert an existing shed and sleep-out to a self-contained unit* (issued 15 October 2019).

[27] I note that the relevant provision at that time is the same as the current clause 34.

	consent was obtained, work progressed and a code compliance certificate was issued.[28][29] The authority agrees that the work completed under the building consent complies with the Building Code, and states that it will amend the notice to fix to remove this breach.
Ministry's assessment	• In my view, this exemption is no longer relevant, as the sanitary fixtures have been connected to a wastewater treatment system under a building consent, and a code compliance certificate has been issued.
Veranda	
Exemption claimed by owner	• The owners state this work was undertaken in 2016.[30] • The owners consider this work exempt under clause 17 of Schedule 1, which states: **Clause 17 Porches and verandas not exceeding 20 square metres in floor area** Building work in connection with a porch or a veranda that – (a) is on or attached to an existing building; and (b) is on the ground or first-storey level of the building; and (c) does not exceed 20 square metres in floor area; and (d) does not overhang any area accessible by the public… • The owners state that this exemption was used to form a veranda under the second storey deck. (It appears that the building work referred to is the construction of the side walls and roof of the veranda.)
Ministry's assessment	• Photos show a protected area attached to the lower storey of the building (see Figure 2). • I am satisfied this area can be considered a veranda as it projects from the face of the building, protects the entrance and provides shelter. I consider the criteria in clause 17 are met, and construction of the veranda area (including the side walls and roof) is covered by this exemption.
Window to wall (in veranda)	
Exemption claimed by owner	• The owners state this work was undertaken in 2015.[31] • The owners consider this work exempt under clause 8 of Schedule 1[32], which states: **Clause 8 Windows and exterior doorways in existing dwellings and outbuildings** Building work in connection with a window (including a roof window) or an exterior doorway in an existing dwelling that is not more than 2 storeys or in an existing outbuilding that is not more than 2 storeys, except, - (a) [relates to replacement] (b) [relates to specified system]

[28] Section 37 applies where a resource consent is required but has not been obtained, and the territorial authority considers that the resource consent may materially affect building work related to an application for a building consent. Under section 37(2), the territorial authority must issue a certificate to the effect that until a resource consent is obtained, no building work may proceed or building work may only proceed to the extent stated in the certificate.

[29] The owners state that the section 37 notice was retracted by the authority at an early stage, prior to work.

[30] I note that the relevant provision at that time is the same as the current clause 17.

[31] The owner states the timber window was installed in 2015, while the 'veranda' was constructed in 2016. However, I presume this was an error.

[32] I note that the relevant provision at that time is the same as the current clause 18.

	• The owners state this exemption was used for the installation of "timber window to provide protection to veranda".
Ministry's assessment	• I consider that the installation of the timber window, used to partially enclose the veranda, is covered by this exemption.
Rewiring, new lights and power points	
Exemption claimed by owner	• The owners state this work was undertaken between 2010-2018. • Section 43 states: **Building consent not required for energy work** (1) Energy work does not require a building consent. …
Ministry's assessment	• As per section 43, a building consent is not required for energy work. Therefore, a building consent was not required for the energy work undertaken in connection with the building.

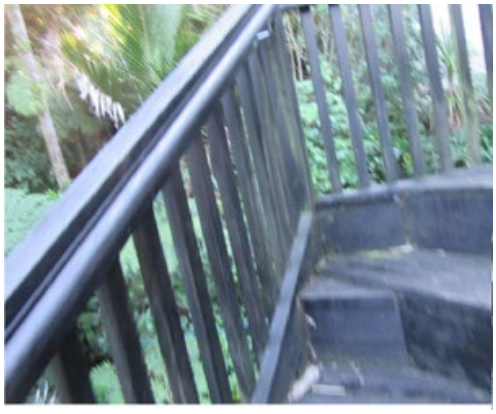
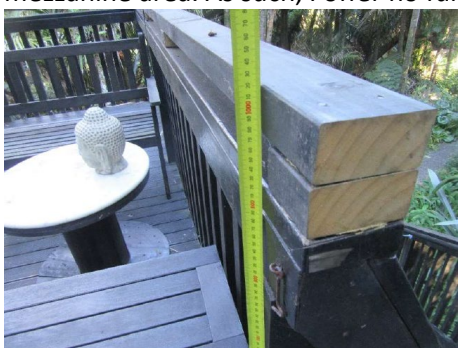
Table 2: Building Code compliance of items raised in the notice to fix

Item 1: "The installation of sanitary fixtures have not been connected to a wastewater treatment system contrary to clauses G1 (Personal hygiene), G13 (Foul water) of the NZ Building Code"	
The connection of sanitary fixtures to wastewater treatment system	• As noted in paragraph 4.39, a building consent was granted for "connection to existing sewage system", and a code compliance certificate was issued. • The authority's submission acknowledges that this item has been addressed, stating "We can confirm from a building code perspective only the works are now code compliant… This item will be removed from the notice to fix". • As sanitary fixtures have been connected to a wastewater treatment system under a building consent and a code compliance certificate has been issued, compliance with the Building Code has already been assessed.
Item 2: "The constructed stairway in this building is too steep, there is no compliant handrail and the barrier is not constructed correctly contrary to clause D1 (Access), F4 (Safety from falling) of the NZ Building Code"	
The stairway is "too steep"	• The notice to fix states that the stairway is "too steep". • The authority submits neither the stairs, the handrail, nor the "landing" (ie the winding step at the top of the stairs, see Figure 3) comply with the Building Code clause D1 Access Routes, specifically subclauses D1.3.3(f), (j) and (m). This is because the risers are too high, there is an absence of a graspable handrail, and the "landing" is an inadequate size for footfall. The authority also states that the barrier to the upper deck area is non-compliant (measuring 930mm high). • The risers (other than at the top and bottom of the stairway) are approximately 250mm and the treads are approximately 400mm, resulting in a pitch of approximately 32°. Acceptable Solution D1/AS1

	provides that the maximum pitch for main private stairways is 37°.[33] Therefore, the pitch of this stairway is within the parameters of the Acceptable Solution. • However, performance clause D1.3.3(f) states: "Access routes shall: … have stair treads… which… have uniform rise within each flight and for consecutive flights." • The owners state "We acknowledge that there are differences in rise at each end of the stair but the code clause recognises (f) (ii) that a uniform rise within each flight is required…". • In my view, the words "within each flight" include all of the risers up to the deck, including the winding steps. This interpretation is consistent with the objective at D1.1(a), to "safeguard people from injury during movement into, within and out of buildings". A uniform rise is required within each flight (and for consecutive flights) to reduce the likelihood of users tripping. • In this case, the top and bottom risers are significantly higher than the others (approximately 280mm rather than 250mm). The Acceptable Solution comments that "The foot is normally only lifted a few mm above the treads during ascent. A minor variation in riser height can cause someone to stumble".[34] • The authority also stated, in its determination submission, that it considers the dimensions of the "landing" (ie the winding step at the top of the stairs) are non-compliant. However, as the notice to fix did not refer to this issue I have not commented on it.  **Figure 3: Photographs showing winding steps.**
Handrail to stairs	• The authority states "There is the absence of a graspable handrail with only an under-height balustrade (less than 1m) to navigate the stairs…". • The owners state that the handrail was remedied, and the authority was informed of this on 7 September 2020. The owners have provided a photo showing a new handrail installed to the inside of the stairway balustrade (see Figure 4). • Clause D1.3.3(j) states "Access routes shall: have smooth, **reachable and graspable** handrails to provide support and to assist with movement along a stair or ladder" [my emphasis]. • In this case, I have not been provided any relevant dimensions of the handrail, including its height from the pitchline, its width and its clearance

[33] Acceptable Solution D1/AS1 *Access Routes* (Amendment 6, effective 01/01/2017), Table 6: Design Limits for Stairs.

[34] Acceptable Solution D1/AS1 *Access Routes* (Amendment 6, effective 01/01/2017), at 4.1.3 Uniformity.

	from the balustrade. As such, I do not have enough information to comment on this.  **Figure 4: Photograph showing the stairway balustrade, including the new handrail.**
Barrier to deck	• The authority states "Another non-compliance is the barrier off the upper deck area which measures 930mm…". • The owners state that the barrier was remedied, and the authority was informed of this on 7 September 2020. The owners have provided a photo which shows the current height of the barrier (approximately 1020mm) (see Figure 5). • Clause F4.3.1 states "Where people could fall 1 metre or more from an opening in the external envelope or floor of a building, or from a sudden change of level within or associated with a building, a barrier shall be provided". • Clause F4.3.4(b) states that "Barriers shall… be of appropriate height". • The photograph showing the side of the barrier shown (Figure 5) suggests the height complies with F4.3.4(b) via the Acceptable Solution, which provides for a minimum barrier height of 1000mm.[35] However, no evidence has been provided to confirm that the other sides have been remedied, and therefore, I cannot comment on the barrier as a whole. • The authority's determination submission also noted that the internal mezzanine area "does not appear to have a barrier where one is required". However, the notice to fix did not refer to the lack of barrier for the internal mezzanine area. As such, I offer no further comment on this.[36]  **Figure 5: Photograph showing the current height of the barrier (1020mm).**

[35] Acceptable Solution F4/AS1 *Safety from falling* (Amendment 2, effective 01/01/2017), Table 1: Minimum Barrier Heights.

[36] I also note that it appears that the ladder to the mezzanine area may not be fixed in place.

Item 3: "This buildings cladding system, has not been installed to the necessary requirements, contrary to clause E2 (External moisture) of the NZ Building Code"	
Flashings	• The authority's submission states: The detailing of the vertical shiplap lacks adequate flashings between the cladding and the raked soffits, inter-storey junctions and internal/external corners. The window head flashings lack upstands… • The authority has provided photos from its inspections showing the exterior of the windows and the building, as well as one photo showing an external corner (see Figure 6). It is not clear which windows the authority is referring to, or whether it is all of them. • I do not have enough information reach a conclusion on compliance of these items.  **Figure 6: Photo of an external corner, looking upwards towards the second storey deck.**
Lack of cavity to second storey	• The authority states "The ply shadow-clad product is installed to the second storey with no evidence of a cavity nor vermin protection". • The owner states that Figure 6 shows clear evidence of cavity battens, but this photo appears to show the lower storey. • The authority has not provided sufficient information about why this detail does not comply with the relevant performance clause, and I do not have enough information comment on this item.
The ply in the kitchen area	• The authority states "The ply is in connection with the ground at the edge of the kitchen area which allows water movement up the wall by wicking. Compliant cladding clearance has not been achieved…". • Performance clause E2.3.3 states "Walls, floors, and structural elements in contact with, or in close proximity to, the ground must not absorb or transmit moisture in quantities that could cause undue dampness, damage to *building elements*, or both."

	• As there is no clearance between the ply wall and the ground (see Figure 7), the ply is likely to absorb moisture causing undue dampness and damage to the ply wall.  **Figure 7: Photograph showing ply wall in connection with the ground.**
The plastic sheet with zip in the kitchen area	• The authority states "The kitchen area is deemed a habitable space and currently only protected with a clear plastic sheeting with a black zip that fails to keep water out which is deemed non-compliant…". • Performance clause E2.3.2 states: "Roofs and exterior walls must prevent the penetration of water that could cause undue dampness, damage to *building elements*, or both". • I acknowledge the authority's submission that "Kitchen cupboards are mouldy". I note that considering whether there is "damage to building elements", this would require consideration of whether the kitchen cupboards are fixtures as defined in clause A2. I do not have sufficient information to comment on whether the cupboards are in fact fixtures. • The authority also noted that this kitchen area is "deemed a habitable space"[37] and referenced Clause G5 Interior environment and to storage of food and access by vermin. • I note various code obligations arise with regard to habitable spaces, such as E3.3.1, and G5.3.1. and that performance criteria for food preparation facilities apply to housing. However, these issues were not raised in the notice to fix and so I have not commented further on these issues.

[37] **habitable space** a space used for activities normally associated with domestic living, but excludes any bathroom, laundry, water-closet, pantry, walk-in wardrobe, corridor, hallway, lobby, clothes-drying room, or other space of a specialised nature occupied neither frequently nor for extended periods.