BUILDING PERFORMANCE

Determination 2024/037

The authority's decisions to issue two notices to fix

14 Waitaki St, Henderson, Auckland

Summary

This determination considers the authority's decisions to issue two notices to fix to the owner. The notices were issued in relation to several structures at the owner's property, as well as sanitary fixtures located in the garage and carport, and for a change of use of the garage. The determination considers whether there were grounds to issue the notices to fix, the form and content of the notices (including the remedies), and the application of section 167 of the Building Act 2004.

The legislation discussed in this determination is contained in Appendix A. In this determination, unless otherwise stated, references to "sections" are to sections of the Building Act 2004 ("the Act") and references to "clauses" are to clauses in Schedule 1 ("the Building Code") of the Building Regulations 1992.

The Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (eg Acceptable Solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matter to be determined

1.1. This is a determination made under due authorisation by me, Peta Hird, Principal Advisor Determinations, Ministry of Business, Innovation and Employment ("the Ministry"), for and on behalf of the Chief Executive of the Ministry.[1]

1.2. The parties to the determination are:

1.2.1. A Lake, J Aston and K McKinnel, the owners of the property. A Lake ("the owner") is the owner that applied for the determination and was the person to whom the notices to fix were issued.

1.2.2. Auckland Council ("the authority"), carrying out its duties as the territorial authority or building consent authority.

1.3. This determination arises from the authority's decisions to issue two notices to fix in relation to several structures located in the owner's yard, as well as sanitary fixtures located in the garage and carport, and an alleged change of use of the garage.

1.4. The matters to be determined, under sections 177(1)(b) and (3)(e), are the authority's decisions to issue two notices to fix (NOT2651576 and NOT21685620). In deciding this I have considered:

1.4.1. whether there were grounds to issue the notices to fix

1.4.2. the form and content of the notices to fix, including the remedies

1.4.3. the application of section 167.

2. The building work and background

2.1. The house at the property was built in 1963 and the garage in 1970.

2.2. The layout of the property, including structures referred to in the notices to fix (shaded), is shown in Figure 1.

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

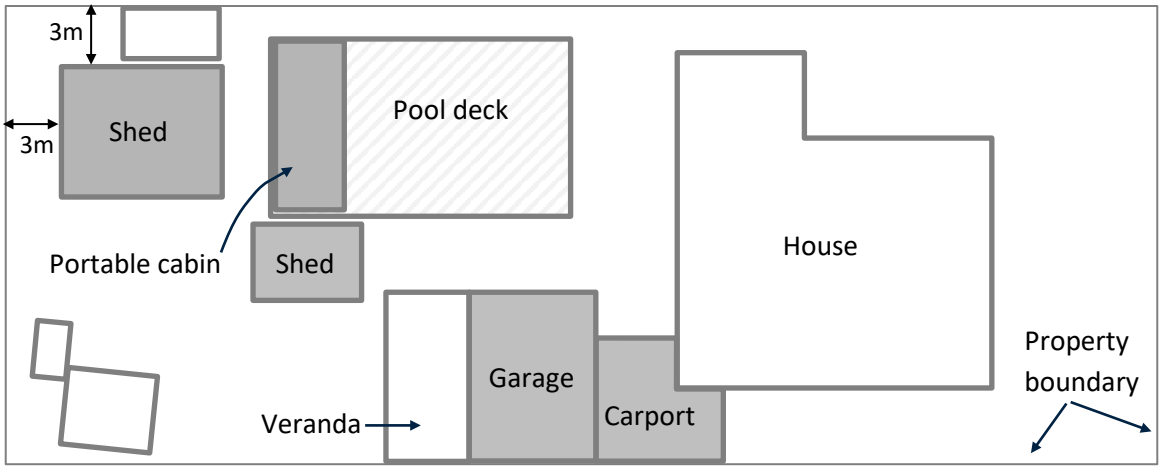

Figure 1: site plan showing approximate locations

2.3. The current owner purchased the property in 2002.

2.4. In 2022 the authority undertook a site visit and formed the view that several structures had been constructed, installed, or relocated to the property and sanitary features had been installed in the carport and garage, all without building consent.

2.5. On 19 December 2022, the authority issued NOT2651576 ("the first notice") to the owner. The first notice alleged eight contraventions of section 40 for building work carried out without building consent when one was required, six contraventions of section 17 for building work the authority considered did not comply with the Building Code, and a contravention of sections 114 and 115 for changing the use of a building without notifying the authority.

2.6. On 27 February 2023, the owner submitted to the authority a report prepared by a building consultant that was presented as "notification under s167(1) and (4)".

2.7. On 25 July 2023, the authority issued NOT21651576 ("the second notice") to the owner. The second notice identified fewer contraventions than the first notice.

2.8. The second notice identified five contraventions of section 40, including the installation of:

- the laundry area with associated sanitary fixtures in the carport
- the bathroom with associated sanitary fixtures in the garage
- the portable cabin located on the pool deck

- two sheds, measuring approximately 6.5m^2 and 36.5m^2, that are closer than their own height to the property boundary.[2]

2.9. The second notice also alleged a change of use in relation to the garage but did not allege any contraventions of section 17.

3. Submissions

3.1. The parties' submissions relating to whether each item of building work is exempt under Schedule 1 from the requirement to obtain building consent are set out in Table 1 (Appendix A).

The owner

3.2. In regard to the second notice, the owner states:

3.2.1. section 40 should not have been included in the notice. "[T]here is no offence under 40, because no building work is being undertaken by a person at this time that needs consent. A person carrying out work commits offence, not the existence of completed work"

3.2.2. the references to section 40 are not supported with particulars and appropriate remedies

3.2.3. "the change of use allegation is wrong and the change of use regulations have been wrongly applied"

3.2.4. regarding the remedies, pursuing legal options does not reflect the particulars, and obtaining a certificate of acceptance and removing building work cannot be required by the authority.

3.3. The owner also considers the authority failed to properly consider section 167 and "has not provided adequate reasons for refusal of the owners notice of compliance with [the first notice to fix]".

The authority

3.4. The authority considers:

3.4.1. The owner's view that there has been no contravention of section 40 because building work has finished does not accord with the purpose of the provisions of the Act, which require a building consent to be obtained *prior* to the carrying out of any building work that requires a building consent.

[2] The owner disputes the shed the authority refers to as being 36.5m^2, stating that the floor area is 30m^2.

3.4.2. "…the amount of building work and additional building units introduced to this site is reasonably extensive… the issue of [the first notice] was appropriate in the circumstances".

3.4.3. "Some of the earlier non-compliances contained within the [first notice] were accepted as no longer being an issue and the [second notice] was issued for a more limited number of non-compliances. These items remain outstanding to the best of our knowledge".

3.5. The authority accepts that the construction of the veranda (included as a contravention of section 40 in the first notice) meets the scope of exempt work and removed it from the subsequent notice to fix. It also accepts that "several of the smaller storage sheds [referred to in the first notice] are likely to largely meet the definition of exempt work for all that they are proximate to each other".

3.6. In terms of the remedies, section 165(1)(c) is clear that applying for a certificate of acceptance is a valid option in a notice to fix.

4. Discussion

4.1. This determination considers the authority's decisions to issue the notices to fix. In deciding this matter, I have considered:

4.1.1. whether there were grounds to issue the notices to fix

4.1.2. the form and content of the notices to fix (including the remedies)

4.1.3. the application of section 167.

Whether there were grounds to issue the notices to fix

4.2. 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) …".

Was building consent required?

4.3. Section 40 'Building work not to be carried out without consent' states:

> (1) A person must not carry out any building work except in accordance with a building consent.
>
> (2) A person commits an offence if the person fails to comply with this section.
>
> …

4.4. Section 41(1)(b) states that a building consent is not required if the building work falls within the exemptions described in Schedule 1. Therefore, whether there has

been a contravention of section 40 turns on whether the building work was exempt under Schedule 1.

4.5. The second notice contains fewer alleged section 40 contraventions than the first notice. The authority has advised that some of identified issues contained within the first notice were accepted as "no longer being an issue" and the second notice was issued for a more limited number. As the authority is not pursuing the additional items listed in the first notice, I have not assessed them as part of this determination.

4.6. The second notice to fix alleges the following section 40 contraventions:

> Carport
>
> • Addition on a laundry area with associated sanitary fixtures.
>
> Garage
>
> • Addition of a bathroom with associated sanitary fixtures.
>
> Single story detached buildings.
>
> • The addition of a portable cabin located on the deck adjacent to the swimming pool measuring approximately 15 square meters, with a height of approximately 2.5 meters. The cabin is set approximately 1.7 meters to the ground level. It set closer than its own height to adjacent buildings.
> • The addition of a single story detached building situated between the covered veranda and the building located on the deck measuring approximately 6.5 square meters with the height of approximately 2700mm. The building is set closer than its own height to adjacent buildings.
> • The addition of a single story detached building located approximately 3000mm from the Western and Northern boundary at the rear of the property, on timber piles, measuring approximately 36.5 square meters with a height of approximately 3.7 meters. The building is set closer than its own height to adjacent buildings.

4.7. The parties' views on each of these, and my assessment of whether the building work alleged in the second notice to fix was exempt from the requirement to obtain a building consent in Table 1 (Appendix A).

4.8. In conclusion, I am of the view:

4.8.1. there is insufficient evidence that additional sanitary fixtures (laundry and bathroom) were installed by the owner(s) or that alterations to existing drains and sanitary plumbing was carried out by the owner(s) prior to such alterations being exempt under Schedule 1, and

4.8.2. there is no evidence building work was undertaken in connection with the portable cabin;

4.8.3. accordingly, there are no grounds for the issue of a notice to fix for contravention of section 40(1) in relation to sanitary fixtures, plumbing and drainage, or the portable cabin.

4.9. The two sheds identified in the notice fall outside the exemptions in clause 3 and clause 3A, and the onsite building work associated with these sheds was not exempt from the requirement to obtain building consent. Accordingly, building work was undertaken without consent when consent was required, in contravention of section 40(1) and so there were grounds to issue a notice to fix under section 164 for that building work.

Ongoing building work

4.10. The owner submits "the refence to s40 is inappropriate as there is no offence under 40 because no building work is being undertaken by a person at this time that needs consent". The owner states that the shed which is located between the veranda and the pool deck (ie the smaller of the two sheds labelled in Figure 1) "is existing and no building work is being done at this time".

4.11. The owner has referred to Andrew Housing Ltd v Southland District Council ("Andrew Housing")[3] which concerned a prosecution for an offence under section 80(1)(a)4 of the Building Act 1991. The owner appears to interpret Andrew Housing as meaning there is no offence under section 40 once building work ceases.

4.12. In Andrew Housing, the High Court was considering whether an offence was continuing for the purpose of the time limit for laying a charge in relation to the offence. Section 80(4) provided for the laying of charges within 6 months of the contravention becoming known.[5]

4.13. In that case the charge alleged Andrew Housing had not only carried out building work, but that this was said to have been done on 21 September 1994 and on each day thereafter (ie a continuing offence) until the charge was laid on 9 February 1995.

4.14. In Andrew Housing, Tipping J stated:

> I do not consider that the action of carrying out building work can be regarded for the purposes of s 80(5)[6] as being the continued existence of anything. In this

[3] [1996] 1 NZLR 589 (HC).

[4] Building Act 1991. Section 80 Offences (1) Every person commits an offence who– (a) … does any building work, or permits any other person to do any building work, otherwise than in accordance with a current building consent.

[5] Building Act 1991. Section 80 Offences (4) … any information in respect of any offence against subsection (1) of this section may be laid by any person at any time within 6 months after the time when the contravention giving rise to the information first became known, or should have become known, to the Authority, territorial authority, or any other party as defined …

[6] Building Act 1991. Section 80 Offences (5) The continued existence of anything, or the intermittent repetition of any actions, contrary to any provision of this Act shall be deemed to be a continuing offence.

> case the relevant building work had ceased at the very latest by the time the Notice to Rectify was issued in February 1994. There can be no suggestion that any building work was being carried out … on 21 September 1994 or on any of the days between that date and 9 February 1995. The concept of the continued existence of anything simply does not fit with an offence against s 80(1)(a) … For the sake of completeness I should add that neither does the concept of the intermittent repetition of any action fit with an offence under s 80(1)(a). Such an offence ceases to be committed when the building work in question ceases.

4.15. The court did not conclude that no offence had been committed as that was not the matter before the court.

4.16. In this case, unlike in *Andrew Housing*, the authority has not prosecuted the owner for an offence. Rather, the authority has issued a notice to fix under section 164 (the equivalent of a notice to rectify under the Building Act 1991) for a contravention of the Act. A notice to fix requires the recipient to remedy the contravention and is a distinct enforcement mechanism from prosecution for an offence.

4.17. There is no time limit for issuing a notice to fix for a contravention of the Act, including for a contravention of section 40(1); rather it is the prosecution of an offence, through the filing of charging documents, that is time barred.[7] The fact that there is not a continuing offence is not relevant to the issue of a notice to fix.

4.18. 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].

4.19. As discussed in previous determinations,[8] 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 for a contravention of section 40(1).

Change of use

4.20. Under section 114, the owner of a building must provide written notice to the relevant territorial authority if they propose to change the use of a building or part of a building and provide information about how the building will comply to the extent required under section 115. An owner must not change the use unless the authority has given the owner written notice that the building, or part of the building, in its new use will comply to the extent required by section 115. The

[7] Section 78.

[8] For example 2024/026 *The authority's decision to issue a notice to fix in relation to a retaining wall* (27 May 2024)

framework for assessing whether there has been a change of use has been set out in previous determinations.[9]

4.21. In regard to the alleged change of use, the first notice states:

> Contrary to **Section 114 of the Building Act 2004**, there has been a change of use of the existing garage from Sleeping Single Home (SH) to Sleeping Residential (SR)… without giving the [authority] prior written notice of the change. Specifically:
>
> - The use of the building has been converted from storage of vehicles, tools and garden implements to currently being used for both storage and sleeping accommodation.
>
> Contrary to **Section 115** of the Building Act 2004 provides that, the owner must not change the use of the building unless the [authority] gives written notice that it is satisfied, on reasonable grounds, that the building, in its new use, will comply (as reasonably practicable).
>
> - if the change involves the incorporation in the building of 1 or more household units where none existed before, with every provision of the building code
>
> - in any other case, with every provision of the building code that relates to the following: means of escape from fire, protection of property, sanitary facilities, structural performance, fire rating performance and access & facilities for people with disabilities (if required)
>
> You have changed the use… without receiving written authority from [the authority] that it is satisfied on reasonable grounds the building complies (as reasonably practicable) with the Building Code.

4.22. The second notice states:

> Contrary to Section 114 of the Building Act 2004, there has been a change of use of the existing garage from Sleeping Single Home (SH) to Sleeping Residential (SR)… without giving the [authority] prior written notice of the change.

4.23. Schedule 2 of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 ("the change of use regulations") defines 'use groups' for the purposes of the Act. Use groups SR (Sleeping Residential) and SH (Sleeping Single Home) are defined as set out in Table 2.

[9] For example 2023/034 *An authority's decision to issue a notice to fix for a change of use of a building* (15 November 2023).

Table 2: Use groups SH and SR, as set out in Schedule 2 of the change of use regulations

Use	Definition	Example
SH (Sleeping Single Home)	detached dwellings where people live as a single household or family, including attached self-contained spaces such as granny flats when occupied by a member of the same family, and garages (whether detached or part of the same building) if primarily for storage of the occupants' vehicles, tools, and garden implements	dwellings or houses separated from each other by distance
SR (Sleeping Residential)	attached and multi-unit residential dwellings, including household units attached to spaces or dwellings with the same or other uses, such as caretakers' flats, and residential accommodation above a shop	multi-unit dwellings, flats, or apartments

4.24. As set out above, garages (whether detached or part of the same building) are use group SH when used primarily for the storage of the occupants' vehicles, tools and garden implements. Where there is a household unit[10] attached to a dwelling with the same use, this falls within use group SR.

4.25. The owner states that:

> The garage is being used primarily for much-needed storage, often making it largely inaccessible for weeks on.
>
> On a few occasions, that garage has been used for watching a film… Also a family member or friend may spend a night there when all the bedrooms are occupied and the garage is not full of boxes and other things stored there, including bikes…

4.26. The first notice to fix states the garage is being used "for both storage and sleeping accommodation". The garage contains a toilet, shower and handbasin. There are no kitchen facilities. At some point, the interior walls and ceiling have been lined and the floor has been carpeted. The authority's inspection photos[11] show the garage contains a couch, sofa bed, chest of draws and a TV, and personal effects in storage boxes.

4.27. The garage is not self-contained and based on the owner's statement it continues to be used in conjunction with the house by the occupants of the house and occasionally their friends or family. The garage is not occupied as household unit, and so does not meet the definition or examples given for the use group SR (Sleeping Residential), as set out above.

[10] Household unit (a) means a building or group of buildings, or part of a building or group of buildings, that is– (i) used, or intended to be used, only or mainly for residential purposes; and (ii) occupied, or intended to be occupied, exclusively as the home or residence of not more than 1 household; but (b) does not include a hostel, boardinghouse, or other specialised accommodation. (Section 7)

[11] Dated November 2022.

4.28. In my view, the use group under Schedule 2 of the Regulations has not changed from SH. As there has been no change of use, there was no contravention of sections 114 and 115 and no grounds to issue the notices to fix in relation to this matter.

The form and content of the notices to fix

4.29. Section 165 concerns the form and content of a notice to fix. Section 165(1)(a) provides that a notice to fix must be in the prescribed form. The prescribed form[12] for a notice to fix provides a space to insert the "particulars of contravention or non-compliance". Previous determinations[13] have discussed the requirement that owners must be "fairly and fully" informed by the particulars in the notice to fix, so that they can address the identified issues.

Section 17 particulars

4.30. Section 17 states "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". The Building Code prescribes functional requirements for buildings and the performance criteria with which buildings must comply.[14]

4.31. The first notice to fix listed several contraventions of section 17:

> Carport
>
> - The carport has been closed at Southern boundary with less 1 meter to boundary, it must comply with New Zealand Building Code (NZBC) C3 (Fire affecting areas beyond the source).
> - The plumbing and drainage associated with the washing machine has been installed in a manner that does not meet the requirements of the Building Code, in particular clause G12 (water supplies) and G13 (foul water).
>
> Garage
>
> - The plumbing and drainage associated with the sanitary fixture, toilet and shower has been installed in a manner that does not meet the requirements of the Building Code, in particular clause G12 (water supplies) and G13 (foul water).
>
> Single story detached outbuildings
>
> - The [single] story detached building located approximately 3000mm from the Western and Northern boundary at the rear of the property, has been

[12] See Building (Forms) Regulations 2004, Form 13.
[13] For example Determination 2024/016 *The issue of a notice to fix for building work associated with a two storey sleepout building with sanitary fixtures* (11 April 2024), at [4.12-4.13].
[14] Section 16.

constructed in a manner that does not meet the requirements of the Building Code, in particular, clause B1 (structure), B2 (durability), C3 (Fire affecting areas beyond the source).

- The portable cabin located on the deck adjacent to the swimming pool measuring approximately 15 square meters, with a height of approximately 2.5 meters has been constructed in a manner that does not meet the requirements of the Building Code, in particular B1 (structure), B2 (durability), C3 (Fire affecting areas beyond the source).

Shed

- The shed located on northern boundary measuring approximately 4.5 square meters with a height of approximately 2.7 measurements. The installation of the building must meet the requirements of the Building Code, in particular B1 (Structure).

4.32. The first notice did not identify the relevant performance criteria the authority considered had not been met, nor does it describe the reasons why the authority considered the work does not meet those criteria.

4.33. In my opinion, the section 17 particulars in the first notice were deficient as they did not adequately specify the "particulars of contravention or non-compliance" as required by the prescribed form. A notice to fix must contain sufficient details regarding the building, building work, and alleged contravention, to fairly and fully inform the recipient so they can address the identified issues.

4.34. As I have found that the particulars of the section 17 contraventions set out in the first notice to fix were deficient, I have not assessed the Building Code compliance of those items. I also note that the second notice did not allege any contraventions of section 17, and the authority did not pursue these matters in the second notice to fix.

The remedies in the notices to fix

4.35. The notices stated:

> **To remedy the contravention or non-compliance you must:**
>
> Choose one of the following options:
>
> (1) Pursue any legal options to make the building works comply with the Building Act 2004 and the Building Regulations. This could include applying for and obtaining of a Certificate of Acceptance (COA) pursuant to section 96 of the Act; **or**
>
> (2) Remove the non-compliance [sic] building works.

4.36. Section 165(1)(c) 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].

4.37. Applying for a certificate of acceptance is a lawful option to include as a remedy in relation to a contravention of section 40. However, the notice incorrectly referred to "applying for **and obtaining**" a certificate of acceptance, rather than simply "applying" for one.

4.38. Removing the building work is another lawful option to remedy a contravention of section 40(1); though I note in some circumstances this in itself may require building consent before carrying out the demolition or building work to remove a structure. I also consider that the stated remedy "pursue any legal options to make the building works comply with the Building Act 2004 and the Building Regulations" allows owners to consider other options that may be available to them.

The application of section 167

4.39. The owner considers that section 167 is applicable because they submitted a report dated 27 February 2023 to the authority as "notification under s167 (1) and (4)".

4.40. Section 167 sets out the process regarding the inspection of building work that is required to be completed under a notice to fix.[15] Section 167(1) states "If a specified person to whom a notice to fix was issued is required to notify a territorial authority … that the relevant building work has been completed, the territorial authority … must, on receipt of the notice from the specified person concerned, inspect … the building work to which the notice to fix relates".

4.41. Neither of the notices included a requirement to notify the authority that building work necessary to bring building work into compliance with the Building Code had been completed, and as such section 167 does not apply. I note that an application for a certificate of acceptance may or may not result in further building work being required to bring building work into compliance with the Building Code, which will depend on whether the building work carried out without building consent was already compliant with the Building Code.

4.42. I note also that the owner's "notification" was not a notification under section 167 that building work had been completed, rather it was disputing the grounds on which the first notice to fix had been issued.

5. Conclusion

5.1. The building work undertaken onsite in relation to the 6.5m^2 and 36.5m^2 sheds was not exempt from the requirement to obtain a building consent. Therefore, there were grounds for issuing the notices under section 164, in relation to these items.

5.2. There are no grounds for the issue of a notice to fix for contravention of section 40(1) in relation to sanitary fixtures, plumbing and drainage, or the portable cabin.

[15] This process is described in detail in Determination 2024/016 [4.34-4.36].

5.3. There was no change of use in relation to the garage, and therefore no contravention of sections 114 and 115.

5.4. The particulars of the section 17 contraventions set out in the first notice were deficient.

5.5. The notices incorrectly included "obtaining" a certificate of acceptance (rather than simply "applying" for a certificate of acceptance) in the remedies. However, to remove the building work is a lawful option to remedy the contraventions.

5.6. Section 167 is not relevant, as the notice to fix did not require the owner to notify the authority of building work completed to bring the building work into compliance with the Building Code.

6. Decision

6.1. In accordance with section 188 of the Building Act 2004, I determine that there were not grounds to issue notices NOT2651576 and NOT21685620 for all of the contraventions identified in the notices, and the notices were deficient in some other respects. Accordingly, I reverse both notices to fix.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 2 August 2024.

Peta Hird

Principal Advisor

Appendix A

Table 1: Assessment of whether the building work was exempt from the requirement to obtain building consent

Particular in second notice to fix	**Carport – addition of a laundry area with associated sanitary fixtures.**
Owner's view	• "The laundry tub was relocated. As long as the number of fixtures is not increased the laundry can be moved from elsewhere on the property. All the buildings are considered the same building under the [A]ct. Schedule 1 exemption 35 covers this and exemption 36 allows for drainage works".[16] • "The laundry features, sink, and toilet were already present in the garage/carport when the owner purchased the property in 2002". • A support letter from a past flatmate states "When viewing the property with [the owner] I noticed that full plumbing was in the garage… I also vividly remember the washing machine being in the garage". • The owner has provided a photo from the 2020 inspection which shows plumbing in the carport.
Authority's view	• "The introduction of a laundry with sink and drainage and plumbing to the carport does not meet the requirements of exemptions 32 or 35."[17] • "These works were not present at the time of 2020 notice to fix".[18]
Ministry's conclusion	• Schedule 1 provides that the following work is exempt from the requirement to obtain a building consent: **34 Minor alteration 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 any new connection to a service provided by a network utility operator. **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 in the building is not increased by the alteration… • The authority's photos from the 2020 inspection show existing plumbing in the carport. The owner states the "laundry features, sink, and toilet were already present in the garage/carport" when the owner purchased

[16] The submission referred to clause 36 of Schedule 1, which relates to the repair and maintenance of existing water heaters. However, clause 34 provides for minor alterations to drains for a dwelling and I have considered that exemption in my assessment.

[17] Clause 32 provides for repair, maintenance and replacement of sanitary plumbing and drainage.

[18] In 2020, the authority visited the property after a complaint that unauthorised building work was taking place on a legal boundary. The authority issued a notice to fix to the owner for the closing in of the carport, which was subsequently resolved.

	the property " in 2002. On that basis, drainage for those sanitary facilities in the garage or carport would have been present at that time. • There is nothing to suggest that the original construction of the carport or garage included installation of laundry facilities. However, there is also no evidence that additional sanitary fixtures were installed in the building by the current owner(s), as opposed to being relocated from one area of the garage/carport to another as claimed. • I note that an alteration carried out by the owner to existing sanitary plumbing and minor alterations to existing drains when relocating the laundry from one area of the garage/carport to another would have been exempt from the requirement to obtain building consent under Schedule 1, if carried out after 16 October 2008.[19] • In conclusion, there is no evidence that additional sanitary fixtures were installed by the owner(s) or that alterations to existing drains and sanitary plumbing was carried out by the owner(s) prior to 16 October 2008.
Particular in second notice to fix	**Garage – Addition of a bathroom with associated sanitary fixtures.**
Owner's view	• "This was already present. Exemption 35 applies to any subsequent work. [The authority] must have observed this in its previous inspection. Exemption 35 allows for relocation and substitution". • "The laundry features, sink, and toilet were already present in the garage/carport when the owner purchased the property in 2002". • "Moving the pre-existing toilet, sink, etc, while keeping the incoming plumbing and reusing the same drain outlet was discussed [with the authority's inspector in 2020], and the owner went on with the work only after being told that this was fine". • The owner has provided letters attesting to the presence of sanitary fixtures in the garage when they purchased the property. They have also provided a photo of the shower, which was taken in 2020. • A support letter from a past flatmate states "when viewing the property with [the owner] I noticed that full plumbing was in the garage. There was a washing machine, and bathroom facilities for when people used the pool".
Authority's view	• "The new bathroom in the 1970s garage and associated plumbing and drainage works. This work does not meet Exemption 32-repair, maintenance and replacement or exemption 35. These are works to create new sanitary spaces and furthermore increases the number of sanitary fixtures in the property. These works were not present in 2020…".

[19] On 16 October 2008, Schedule 1 was amended to insert clauses (ac) and (ad) which provided for alterations to existing drains and sanitary plumbing without building consent. Prior to that date this work would not have been exempt from the requirement to obtain building consent.

	• The authority provided photos from its 2020 inspection which do not show any sanitary fixtures. [I note that the entire garage is not visible in the photos.]
Ministry's conclusion	• The owner's submissions have not mentioned a shower or specified whether the "sink" they refer to was a handbasin or laundry sink, and the statement from a past flatmate does not specify which fixtures were present when the owner purchased the property. • Despite requesting this information from the owner, they have not confirmed whether a handbasin and shower were present in the garage when they purchased the property. • While I accept the owner's statements that there was a toilet and laundry sink in the garage when they purchased the property, it is not clear that the installation of the shower and handbasin in the garage did not increase the number of sanitary fixtures in the building (noting that a laundry sink appears to have been relocated to the carport). • There is nothing to suggest that the original construction of the garage included installation of bathroom facilities. However, there is also no evidence that additional sanitary fixtures were installed in the building by the current owner(s). • In conclusion, there is no evidence that additional sanitary fixtures were installed by the owner(s) or that alterations to existing drains and sanitary plumbing was carried out by the owner(s) prior to 16 October 2008.[20]
Particular in second notice to fix	**Single storey detached building - The addition of a portable cabin located on the deck adjacent to the swimming pool measuring approximately 15 square meters, with a height of approximately 2.5 meters. The cabin is set approximately 1.7 meters to the ground level. It set closer than its own height to adjacent buildings.**
Owner's view	• "… this is a prefabricated vehicle and no building work has been undertaken that needs a consent. The deck was existing. Only building work undertaken on site needs a consent…". • "The council has failed to identify building work undertaken to a building on site".
Authority's view	• "The installation of a prefabricated cabin onto a deck 1.2 metres of [sic] the ground with foundations of 500mm created on top of this deck that was not designed to support surcharge beyond people enjoying the pool amenity. This work falls into neither exemption 3A or 3B due to the building height and in the absence of confirmation of structural design by a chartered professional engineer, exemption 43 is also inapplicable. … the building work to connect this cabin to [the] deck as part of its foundation does not meet the specifics of any exemption including exemption 40".

[20] On 16 October 2008, Schedule 1 was amended to insert clauses (ac) and (ad) which provided for alterations to existing drains and sanitary plumbing without building consent. Prior to that date this work would not have been exempt from the requirement to obtain building consent.

Ministry's conclusion	• This is a prefabricated portable cabin that has been relocated to sit on top of the pool deck. The cabin appears to be resting on wood blocks and it's wheels. There is no indication that it has been connected to services or that there are any fixings between the deck and cabin. • As discussed in previous determinations,[21] relocation, on its own, is not building work in terms of the definitions of 'building work' and 'construct' in section 7. There must be work *in connection with the relocation* for it to be considered building work (eg connecting the building to foundations or services).[22] • No evidence has been provided of building work carried out in relation to the portable cabin. Accordingly, I find that there is no contravention of section 40 in relation to the cabin. As such, I have not assessed whether the structure is a vehicle or a building under the Act. • I acknowledge the authority's concerns regarding the surcharge on the deck structure. There are powers available to the authority if it is satisfied that the surcharge on the deck in the ordinary cause of events is likely to lead to structural failure causing injury or death or damage to other property.
Particular in second notice to fix	**Single storey detached building - The addition of a single story detached building situated between the covered veranda and the building located on the deck measuring approximately 6.5 square meters with the height of approximately 2700mm. The building is set closer than its own height to adjacent buildings.**
Owner's view	• "…the reference to own height is a reference to schedule 1 exemption that has exception for buildings closer than their height to bdy [boundary] or another building. The shed is existing and no building work is being done at this time."
Authority's view	• "It is acknowledged that the small storage unit is of a size to come easily within exempt work but for its proximity to other buildings on this site."
Ministry's conclusion	• Clause 3 provides that the following work is exempt: **3 Single-storey detached buildings not exceeding 10 square metres in floor area** (1) Building work in connection with any detached building that— (a) is not more than 1 storey (being a floor level of up to 1 metre above the supporting ground and a height of up to 3.5 metres above the floor level); and (b) does not exceed 10 square metres in floor area; and (c) does not contain sanitary facilities or facilities for the storage of potable water; and

[21] For example, 2022/018 *Regarding a notice to fix issued for a relocated unit* (5 October 2022).

[22] The District Court in *Marlborough District Council v Bilsborough* [2020] NZDC 9962, stated at [91]: "In my view, given that "building work" requires that work is "for, or in connection with, the construction, alteration and demolition, or removal of a building", there is a sound basis arguing that the relocating of a building to a site is not "building work", where there is no work undertaken in connection with the relocation."

	(d) does not include sleeping accommodation, unless the building is used in connection with a dwelling and does not contain any cooking facilities. (2) However, subclause (1) does not include building work in connection with a building that is closer than the measure of its own height to any residential building or to any legal boundary. • The building is closer than its own height to the portable cabin located on the pool deck and the patio. I consider the portable cabin is a residential building. As such, the construction of the 6.5m^2 shed is not exempt under clause 3 and there were grounds to issue a notice to fix under section 164 for the construction of this building. • As stated in paragraph 4.18, building work does not need to be ongoing for there to be a contravention of section 40(1).
Particular in second notice to fix	**Single storey detached building - The addition of a single story detached building located approximately 3000mm from the Western and Northern boundary at the rear of the property, on timber piles, measuring approximately 36.5 square meters with a height of approximately 3.7 meters. The building is set closer than its own height to adjacent buildings.**
Owner's view	• "…the reference to own height is a reference to schedule 1 exemption that has exception for buildings closer than their height to bdy [boundary] or another building. The relevant boundary is on the other side of the driveway." • "This relocated shed was bought on the understanding that it was under 30m^2. [The authority] have measured the exterior walls. If this area is incorrect then the floor area will be reduced". The shed was purchased as a "pre-made flat pack cabin" and "there are concerns about how [the authority's officer] measured it: [they] only took external measurements and measured from below the deck area". • "We believe [the authority] have measured roof area and the shed is understood to have a floor area under 30m^2. It is also a prefabricated building and building work was undertaken off site. The [authority] has failed to identify building work undertaken to a building on site".
Authority's view	• "The construction of a cabin of 36.5 sqm. This is building work requiring a building consent".
Ministry's conclusion	• Clause 3A provides that the following work is exempt: **3A Single-storey detached buildings exceeding 10, but not exceeding 30, square metres in floor area and constructed of lightweight building products** (1) Building work in connection with any detached building that— (a) is not more than 1 storey (being a floor level of up to 1 metre above the supporting ground and a height of up to 3.5 metres above the floor level); and (b) exceeds 10 square metres in floor area, but does not exceed 30 square metres; and …

	(2) However, subclause (1) does not include building work in connection with a building that is closer than the measure of its own height to any residential building or to any legal boundary. • Clause 3A covers "building work *in connection with* any detached building…", subject to certain criteria being met. • The owner states the shed was purchased as a "pre-made flat pack cabin" and that building work was undertaken offsite. While I make no findings as to how much of the structure has been constructed offsite, there has clearly been building work undertaken onsite *in connection with* the building; at a minimum, the shed has been attached to timber pile foundations, as stated in the notice to fix. • The parties have presented differing measurements for the size of the building. However, the building is approximately 3.7m in height and 3m from the boundary. As at least one of the criteria in clause 3A is not met, the building work undertaken onsite is not exempt under clause 3A. • In regard to the owner's argument that "the relevant boundary is on the other side of the driveway", the exemption in Schedule 1 refers to the 'legal boundary'. 'Relevant boundary' is a defined term used only in clause C3 *Fire affecting areas beyond the fire source*.