

Determination 2024/039

An authority's decision to issue a notice to fix

183 Hautapu Street, Taihape

Summary

This determination considers an authority's decision to issue a notice to fix alleging the owners had contravened several provisions of the Act. The determination discusses the details in the notice and whether the owners were fully and fairly informed of the basis for the notice being issued.

In this determination, unless otherwise stated, references to:

- “sections” are to sections of the Building Act 2004 (“the Act”)
- “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992
- “the Regulations” are to the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005.

The Act, the Building Code, and the Regulations 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, for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment (“the Ministry”).¹
- 1.2. The parties to the determination are:
 - 1.2.1. the owners of the property, M Robinson and N Taransky (“the owners”), who applied for this determination
 - 1.2.2. Rangitikei District Council (“the authority”), carrying out its duties as the territorial authority or building consent authority.
- 1.3. The matter to be determined, under section 177(1)(b) and 3(e), is the authority’s decision to issue notice to fix NF0372 dated 6 July 2022 (“the notice”).
- 1.4. The authority issued the notice because it is of the view several provisions of the Act have been contravened, relating to a change of use of the building on the property. The owners dispute the authority’s grounds for issuing the notice, as well as its form and content.

2. Background

- 2.1. Prior to the owners’ purchasing the property in mid-2021, the building on the property was used as a gym. The property listing photographs² show a main open-

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

² <https://harcourts.net/nz/office/feilding/people/robyn-dagger/listing/fg7069-183-hautapu-street-taihape-manawatu-whanganui> Added 04 June, 2021. Accessed 9 August 2024.

plan area, and smaller rooms with bathroom facilities (including shower and toilet) and kitchen facilities.³

2.2. On 26 May 2021, prior to purchasing the property, the owners emailed the authority asking, “what would be involved in possible future change of use to include living in the building.”

2.3. On 27 May 2021, the authority replied stating:

If you wish to live in the building you will need to apply for a change of use. This means you will need to take out a building consent to show how the building will meet all the requirements of the building code clauses as near as reasonably practically.^[4]

2.4. On 5 August 2021, the owners notified the authority of their “wish to a permanent ‘change of use’ of the building at this property into a dwelling (category SH)”.⁵ The owners stated they believed the building “already complies with the building code clauses relating to the change ... as near as reasonably practicable”.

2.5. Following a request by the authority on 11 October 2021 for evidence as to how the building would comply, on 18 October 2021 the owners made a formal application for a change of use which included a floor plan and other supporting documents.⁶

2.6. On 10 November 2021, the authority declined the owners’ application, stating:

The plans the [authority] has on file^[7] shows that there is no kitchen, showers, or laundry in the building, and these would need a consent to be installed. The information provided doesn’t show us how compliance has been met for the relevant code clauses, for example the building would need to be at 67% of the NBS (New Building Standard) as being a change of use under the Building Act 2004, this would need to be carried out by a structural engineer. The [h]ot water supply system has been changed from electric to gas so we would need to be provided documentation to prove that the installation is compliant as well. The bathroom, kitchen and laundry also need to have mechanical ventilation installed to comply with [clause] G4.

³ The property listing did say “Property Type: House”. However, the listing was entitled “Business Premises”, and the photographs show a number of items of gym equipment in the main open-plan area.

⁴ Section 115 provides that an owner must not change the use unless notified that the territorial authority is satisfied that the building in its new use will comply to the extent required under section 115(a) or (b) “as nearly as is reasonably practicable”. [my emphasis]

⁵ Refer clause A1 for classified uses (including ‘Detached dwellings’), and Schedule 2 of the Regulations for use groups (including ‘SH (Sleeping Single Home)’).

⁶ I have not been provided with this application, only an email chain which includes the cover email and refers to the attachments provided with the application, being a

⁷ The authority has provided floor plans from the last building consent granted for the building, in 2009, for alterations to the building.

... If bathrooms, showers and kitchens have been installed then these would need to be covered under a Certificate of Acceptance as these would have need[ed] a consent to be installed.

Notice to fix

- 2.7. On 6 July 2022, the authority issued the notice to one of the owners. The 'Particulars of Contravention or Non-compliance' part of the notice states:

Non compliance: Sections 17, Sections 40 and Section 115 of the Building Act 2004.

- Changed the use of the building from Commercial to Residential use without satisfying the Territorial Authority that the change of use will comply as near as reasonably practicable with the building code as per Section 115 (A,B,C) of the Building Act 2004

To remedy the contravention or non-compliance, you must:

- Change the building use back to commercial and stop using it as a dwelling.
- Apply for A certificate of Acceptance for any works undertaken without a consent that would have needed one to change the use.
- Apply to the Territorial Authority via the Building Consent Authority for a change of use for the building by applying [for] a building consent for all the necessary changes to satisfy the TA that the building will comply as near as reasonably practically (sic) with the building codes.

This notice must be complied with by: 25/8/2022

- 2.8. On 22 August 2022, the owners wrote to the authority responding to the notice, stating "the particulars fail to describe any breach and the basis for the allegation". The report purported to "formally advise" the authority that the notice had been complied with (the owners have since referred to this as a "notice of compliance" under section 167).
- 2.9. Following further correspondence between the parties, the owners applied for this determination.

3. Submissions

The owners

- 3.1. The owners submit (in summary):
- 3.1.1. The notice is "technically defective" because the references to non-compliance with sections 17 and 40 are not supported with particulars, and the reference "to s115 is inappropriate as there is no offence under s115 to satisfy [the authority]".

- 3.1.2. The remedies in the notice are “misstated”, and the authority’s “inappropriate demands are indicative of the lack of a breach”. The owners “have not undertaken any building work and none has been identified by the [authority]”.
- 3.1.3. Given the defects in the notice, the owners “were left struggling to understand why the [authority] were taking their position and what requirements they were unaware of”.
- 3.1.4. While “there was a movement in uses under [the R]egulations, there are no more onerous requirements that are applicable that the building doesn’t already satisfy or have been identified as additional or more onerous.^[8] Therefore a change of use has not occurred that triggers s114 and 115”.
- 3.1.5. The authority “has failed to properly consider s167 and has not provide[d] adequate reasons for refusal of the [owners’] notice of compliance with the [notice to fix]”.

The authority

- 3.2. The authority submits (in summary):
 - 3.2.1. Section 17 “is broad and as such in the notice to fix referring to section 17 is relevant to the change of use of the building , the [owners] are indicating that the building in its new use meets all code clauses ...”.
 - 3.2.2. Regarding the reference in the notice to section 40, “We agree that the [notice] could have been more specific to section 40(1). [The authority] has not been provided with any evidence that the floor plan submitted by the new owners is how they purchased the building”.
 - 3.2.3. In relation to section 115, the owners “have not provided any evidence relating to how the building meets any of the building code clauses in its new use with regards to more onerous or additional code clauses”. The owners “have changed the use without [the authority’s] approval”.

4. Discussion

- 4.1. Notices to fix are governed by sections 163 to 168. Section 164(1)(a) provides for an authority to issue a notice to fix if it considers, on reasonable grounds, that a specified person is contravening or failing to comply with the Act or its regulations.⁹

⁸ The owners state the property was “marketed as a house”, and that the “building has the appearance of a house and has all the amenities and attributes of a residential dwelling”.

⁹ Section 163 defines a ‘specified person’ to whom a notice can be issued, and this includes the owner of the building and the person carrying out the building work if the notice relates to the building work being carried out. Section 7 defines ‘Regulations’ as meaning “regulations in force under this Act”.

- 4.2. Section 165 sets out the requirements for the form and content of a notice to fix. The prescribed form¹⁰ provides a space to insert the “particulars of contravention or non-compliance”. The courts and previous determinations have discussed the requirement that the recipient of a notice to fix be “fairly and fully informed” by the particulars in a notice, so they can address the identified issues.¹¹
- 4.3. In this case, the notice simply refers to the non-compliance as being with sections 17, 40 and 115, stating that the use of the building changed “from Commercial to Residential use without satisfying the [authority] that the change of use will comply as near as reasonably practicable with the building code as per Section 115(A,B,C)”.
- 4.4. In the notice, the authority did not identify or provide details about the building work that it considers:
- does not comply with section 17 (ie that does not comply with the Building Code); and
 - does not comply with section 40 (ie that has been carried out otherwise than in accordance with a building consent, when one was required).
- 4.5. I consider the notice is deficient in respect of any section 17 and 40 contraventions, there being no particulars set out in the notice as to how these sections had been contravened.
- 4.6. I note also that the authority stated in correspondence that “There has been other work carried out in the building after the [code compliance certificate] was issued for [the 2009 building consent], either by the current owners or the previous owners without a consent being applied for ...” It is well established that a notice to fix for a contravention of section 17 or 40 cannot be issued to a current owner in relation to building work carried out by a previous owner.¹²
- 4.7. In relation to the alleged section 115 contravention, the notice does not specify what the change of use is with reference to the use groups in Schedule 2 of the Regulations.¹³

¹⁰ Form 13 of the Building (Forms) Regulations 2004.

¹¹ See *Andrew Housing Ltd v Southland District Council* [1996] 1 NZLR 589 (which related to a ‘notice to rectify’, the equivalent of a notice to fix in the predecessor to the Act, the Building Act 1991); *Marlborough District Council v Bilsborough* [2020] NZDC 9962 at [106]-[107]; and Determination 2024/029 *An authority’s decisions to issue a series of notices to fix* (27 May 2024) at paragraphs 4.2-4.3.

¹² See *Waikato Regional Council v The District Court at Hamilton* [2023] NZHC 1271 at [34], discussed in Determination 2024/030 *The authority’s decisions to issue two notices to fix for a retaining wall constructed by a previous owner of the neighbouring property* (7 June 2024), from paragraph 4.4.

¹³ A change of use is determined according to regulations 5 and 6 of the Regulations. 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. The owner must not change the use unless notified in writing that the territorial authority is satisfied that the building in its new use will comply to the extent required under section 115.

- 4.8. While ‘Commercial’ is a category of classified use in clause A1, which is relevant for ascertaining whether the Building Code obligations of a use are additional to or more onerous than the old use,¹⁴ ‘Residential’ is not itself a classified use. There is ‘Housing’ (which includes ‘Detached dwellings’, where a group of people live as a single household or family) and ‘Communal residential’ (which are where assistance or care is extended to the principal users).
- 4.9. In addition, the notice does not reference section 115 correctly. In response to a query from the Ministry, the authority advised that the reference in the notice to “Section 115(A,B,C)” was an “administrative error and should have only referenced [section] 115(a)”.
- 4.10. The owners notified the authority of an intention to change the use of the building, as required under section 114. However, it is unclear whether the authority established or ascertained that a change of use had in fact occurred prior to issuing the notice to fix. There is no indication the authority carried out an inspection of the property before issuing the notice to fix or what other information it may have been relying on for the purpose of establishing the new use of the building.
- 4.11. In a response to a request for information from the Ministry, the owners have confirmed that they occupy the building “as their family home” and have done since mid-2021. While there may have been grounds for the authority to consider the owners had contravened the Act on that basis, and for the issue of a notice to fix in relation to a change of use without satisfying section 115, the grounds are not adequately described in the notice itself.
- 4.12. The notice is deficient because it does not adequately specify the “particulars of contravention or non-compliance” as required by the prescribed form. This requires sufficient details regarding the building, building work, and alleged contravention(s), to fairly and fully inform the recipient about the basis for the notice so they can address the identified issues.
- 4.13. Previous determinations have discussed the considerations for authorities when exercising enforcement powers, particularly in relation to issuing notices to fix.¹⁵
- 4.14. In the case of a notice to fix for a contravention of section 115,¹⁶ the particulars in the notice to fix could be expected to include, but not be limited to, the following:
- which paragraph of section 115 – (a) or (b) – the authority considers has been contravened;

¹⁴ The process for ascertaining whether there has been a change of use is set out in Determination 2023/034 *An authority’s decision to issue a notice to fix for a change of use of a building* (15 November 2023), from paragraph 5.2.

¹⁵ See, for example, Determination 2024/029 at paragraphs 4.16-4.17.

¹⁶ I.e., that the building has undergone a change of use without the authority giving the owner written notice that it is satisfied as to paragraph (a) or (b).

- what the change of use is from and to, with reference to the uses in Schedule 2 of the Regulations;
- the basis for the authority's views about the new use, such as reference to particulars in an inspection report; and
- in the remedies, the clauses of the Building Code the owner needs to satisfy the authority the building complies with as nearly as is reasonably practicable.

Other points raised by the parties

4.15. While I have concluded the notice is deficient, the owners have raised several other points which I consider it is appropriate to respond to.

4.16. Regarding the owners' view that the remedies in the notice are inappropriate:

4.16.1. The requirement to apply for a certificate of acceptance is an available remedy, as expressly stated in section 165(1)(c) in the case of building work carried out without building consent. However, due to inadequate particulars of the contravention, it was not clear what building work carried out by the owners that this remedy applied to (if any).

4.16.2. The Act does not impose an obligation on an owner to apply for a building consent to change the use of a building. The effect of section 115 is that an owner must satisfy the authority that the building, in its new use, will comply with the Building Code to the extent required under that section. This may require building work to be carried out, but it may also be achieved by an owner providing information which enables the authority to make a decision as to compliance. In such a case, or if the necessary building work is exempt under Schedule 1, a building consent may not be required to bring the building into compliance with the additional or more onerous Building Code requirements of the new use. For this reason, the requirement to apply for a building consent was not an appropriate remedy in this case.

4.17. In relation to the 'notice of compliance' provided to the authority by the owners, previous determinations have discussed the process in section 167 regarding the inspection of building work that is required to be completed by a notice to fix.¹⁷ In this case the notice did not require building work to be carried out, nor for the owners to notify the authority that building work had been completed. Therefore section 167 does not apply.

¹⁷ See Determination 2024/016 *The issue of a notice to fix for building work associated with a two storey building with sanitary fixtures* (11 April 2024), at paragraphs 4.34-4.36; and Determination 2024/026 *The authority's decision to issue a notice to fix in relation to a retaining wall* (27 May 2024), at paragraphs 4.23-4.25.

4.18. The authority's correspondence with the owner suggests the authority is using 67% NBS¹⁸ as a threshold for being satisfied that the building in its new use complies to the extent required under section 115 for Building Code clause B1 Structure. The threshold for the purpose of a decision under section 115(a) is compliance, **as nearly as reasonably practicable**, with the Building Code. In some circumstances this may equate to full compliance, and in others the extent of what is "reasonably practicable" will be something less than full compliance. In this regard the %NBS index used for the purpose of seismic assessments is not an equivalent threshold for compliance to the extent required under section 115.

5. Decision

5.1. In accordance with section 188 of the Building Act 2004, I determine notice to fix NF0372 is deficient, and I reverse the notice to fix.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 13 August 2024

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Peta Hird

Principal Advisor

¹⁸ Percentage of new building standard (%NBS) is an index used to characterise the expected seismic response of a building to earthquake shaking.