BUILDING PERFORMANCE

Determination 2024/056

An authority's decision to issue a notice to fix in relation to building work at a residential property

226 Triangle Road, Massey, Auckland

Summary

This determination considers an authority's decision to issue a notice to fix in relation to several items of building work. The determination considers whether the building work was exempt from the requirement to obtain a building consent. The determination also considers the remedies in the notice to fix, and other points raised relating to the notice to fix provisions in the Building Act.

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 of the Act.

The Act and the Building Code (Schedule 1 of the Building Regulations 1992) 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, J and P Paul, ("the owners"), who applied for the 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 authority's decision to issue a notice to fix to the owners in relation to building work carried out at their property. The authority considers the building work required a building consent, and that the work does not comply with the Building Code. The owners dispute the authority's grounds for issuing the notice to fix, as well as its form and content.

1.4. The matter to be determined, under section 177(1)(b) and 3(e), is the authority's decision to issue notice to fix NOT21630062 dated 3 August 2022 ("the notice"). In making this determination I will consider whether section 40 has been contravened, which turns on whether the building work was exempt (under Schedule 1 of the Act) from the requirement to obtain building consent.

Issues outside this determination

1.5. I have not considered the section 17 contraventions specified in the notice, relating to compliance of the building work with the Building Code, as the authority is no longer pursuing them.[2]

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

[2] The notice alleged seven section 17 contraventions relating to building work not complying with the Building Code. However, the authority accepted that the particulars as drafted in the notice should not have referred to compliance with Acceptable Solutions in place of the Building Code and "therefore withdraws the section breaches in the form specified in the [notice]."

1.6. The owners are of the view that the authority has acted contrary to its inspection powers[3] under the Act in the way it carried out its visit to the owners' property. However, the exercise of the authority's inspection powers is not a determinable matter under section 177, therefore I have not considered this issue further.[4]

2. Background and building work

2.1. The owners purchased the property in 2017. At that time, there were three buildings on the property; a two-bedroom house, a garage, and a workshop.

2.2. On 8 July 2022, the authority inspected the property. The authority advises that the following building work was observed at its visit, and that the work had been undertaken without a building consent:

- The carport was enclosed,
- the outdoor [veranda] was enclosed to create a living area,
- A storage [unit] was installed onto foundations with a height of between 1.2-1.9 metres ...
- [The workshop] was converted to habitable space with the installation of a toilet, shower, handbasin and kitchen sink.
- A … garage was converted to habitable space with toilet, handbasin and shower.

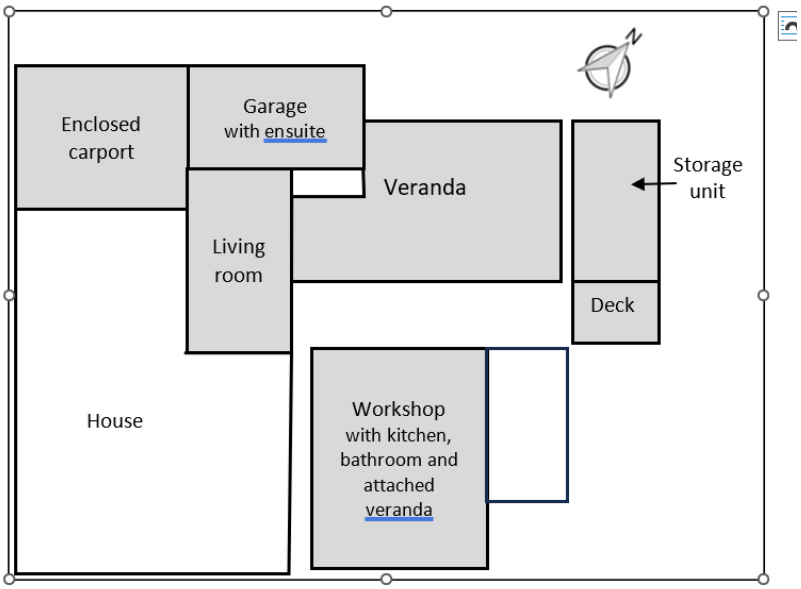

Figure 1: Plan showing approximate locations of the building work[5]

[3] Section 222 empowers a territorial authority to enter land to carry out inspections. Section 226 restricts entry to a household unit without the consent of the occupier or a court order.

[4] I note that there are other options available to the owners to address this issue, including provisions and procedures in the Act and in other enactments, or through the courts.

[5] Not to scale. Relative positions and sizes are based on the site plan provided by the authority and Map Data ©2024 Google. Structures referred to in the notice are shaded.

2.3. On 3 August 2022, the authority issued the notice to the owners. The 'Particulars of Contravention or Non-compliance' section of the notice states:

> Contrary to s.40 of the Building Act, the following building works have been undertaken at [the property] without first obtaining a building consent:
>
> - The existing, unauthorised, carport, measuring approximately 22.4 square meters in area, attached the north-western side of the existing garage has been enclosed to form a storage room.
> - The existing unauthorised veranda attached to the north-eastern side of the existing garage has been removed and replaced with a living room, measuring approximately 22.8 square meters in area.
> - The existing 1975 garage on the north-western boundary has been altered to form a bedroom with ensuite bathroom, including the installation of a toilet, shower and handbasin and the associated plumbing and drainage.
> - Construction of a veranda approximately 42.86 square metres in area in the courtyard area between the existing dwelling and the existing 1975 garage.
> - A prefabricated storage unit, approximately 17.61 square metres in area, has been installed on a foundation system on the north-eastern side of the existing retaining wall with a floor level approximately 1.9m above the existing ground level.
> - A deck with a fall in excess of 1.6 metres has been erected at the south-eastern end of the prefabricated storage unit.
> - The existing workshop, to the north-east of the existing dwelling, has been converted to a separately occupied household unit including the installation a toilet, shower, a handbasin and a kitchen sink with associated plumbing and drainage.
>
> Contrary to s.17 … [the alleged section 17 contraventions have been omitted, as per paragraph 1.5 above]
>
> **To remedy the contravention or non-compliance you must:**
>
> Choose <u>one</u> of the following options to achieve compliance:
>
> (1) Pursue any legal option to achieve compliance with the requirements of the Building Act 2004 and the New Zealand Building Code. This may include applying for and obtaining a Certificate of Acceptance (COA) in accordance with s.96 of the Act; or
>
> (2) Remove the unauthorised building works and return the building back to its authorised use.
>
> Note: A building consent may be required to be obtained prior to undertaking any works.
>
> **This notice must be complied with by:** Date: 3 November 222 [sic]

2.4. On 26 October 2022, the owners' agent wrote to the authority responding to the notice, setting out their views on several points (which were also raised during the determination process). The owners' agent purported to "formally advise" the authority that the notice had been complied with (subsequently referred to as a "section 167 report" or "notice of compliance").

2.5. Communication about the issues continued between the parties, but they were unable to resolve their differing views and the owners applied for this determination.

3. Submissions

3.1. The parties' submissions in relation to whether each item of building work is exempt under Schedule 1 from the requirement to obtain building consent are set out in Appendix A, along with my assessment.

3.2. Further details of the parties' submissions on other points referred to below are set out in the discussion section.

The owners

3.3. The owners submit (in summary):

3.3.1. The notice is "technically defective" because the reference to section 40 is "not supported with particulars and appropriate remed[ies]":

- The reference to section 40 is "inappropriate as there is no offence under [section] 40 because no building work is identified as being undertaken by a person at this time that needs consent". There is no "current and continuing offence that needs a 'fix'".

- The remedies are "misstated", and the authority's "inappropriate demands are indicative of the lack of a breach". "Pursuing legal options is not a remedy that reflects the particulars". The notice cannot demand a certificate of acceptance be obtained because only the authority has discretion to issue one. Further, a certificate of acceptance "is not mandatory and cannot be 'required' except for work under urgency".

3.3.2. The authority "has failed to properly consider [section] 167 and has not provide[d] adequate reasons for refusal of the owner[s'] notice of compliance with the [notice to fix]".

The authority

3.4. The authority submits:

3.4.1. If the owners' "interpretation was correct, section 40 could never be contravened where a specified person undertook building works without consent once they completed those works". Such an interpretation would "entirely defeat" the purpose of the Act; if no notice to fix could be issued where the work is not ongoing, "this would provide very little incentive for a building consent to be obtained prior to the carrying out of building work".

3.4.2. The notice "provided flexibility to the owner[s] as to how to remedy the contravention". It is clear from section 165(1)(c) "that a requirement to apply for a [certificate of acceptance] is a valid requirement in a notice to fix". Removal of unauthorised building work is "commonly provided as an option" to remedy a section 40 contravention.

3.4.3. Regarding section 167, other than advising that soil had been built up to prevent a fall over 1.5m in relation to the deck, "[the section 167 report] did not provide notification that building work had been completed as required by the [notice]. Rather it disputed the reasons for the issue of the [notice], and the basis for the remedies it sought. [The authority] has been refused entry to the property and therefore was unable to inspect [this item] where potential compliance might have been achieved enabling [the authority] to agree it no longer disputed that item in the [notice]."

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.[6]

4.2. The notice alleges two types of contravention or failure to comply, relating to sections 40 and 17. As noted earlier, I have not considered the section 17 contraventions because the authority is no longer pursuing them. Accordingly, I only consider whether there were grounds to issue the notice in relation to section 40.

Whether there were grounds to issue the notice

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

[6] 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".

4.4. 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 in this case turns on whether the building work was exempt under Schedule 1.

4.5. The notice alleges section 40 has been contravened in relation to seven items of building work. The owners consider that all the building work is exempt under various clauses of Schedule 1. The parties' views on each of the items in the notice, and my assessment of whether the building work was exempt from the requirement to obtain building consent, are set out in Appendix A.

4.6. In conclusion, I consider (with reference to item numbers in Appendix A):

4.6.1. Regarding the garage with ensuite (item 3), there is no evidence that additional sanitary fixtures (and associated plumbing and drainage) were installed in the garage by the owners. Accordingly, there were no grounds for the issue of the notice for contravention of section 40 in relation to this item.

4.6.2. In relation to the other items (ie items 1, 2, 4, 5, 6 and 7), none of this building work was exempt under Schedule 1. Regarding the deck (item 6), there were grounds for the issue of the notice for contravention of section 40 at the time of the authority's inspection. However, information and photographs provided by the owners indicate they have subsequently remedied this contravention (although the authority has been unable to re-inspect this work to confirm that is the case).

4.6.3. Consequently, for these six items, building work was undertaken without building consent when consent was required, in contravention of section 40. Therefore, there were grounds to issue the notice under section 164.

Other submissions regarding notices to fix and sections 40 and 378

4.7. The agent acting for the owners made a number of detailed submissions regarding the interpretation and application of sections 40 and 378 and the notice to fix provisions (sections 163 to 168). The agent's submissions regarding these provisions and my responses are set out below.

4.8. The agent submitted that section 40 is concerned with a person carrying out building work without a building consent or contrary to a building consent, and that in most cases this would be the builder (as provided for in paragraph (b) of the definition of "specified person" in section 163). The agent considers the use of a notice to fix should be focused on ensuring the owner or builder stops the non-compliant building work and once the person has stopped the building work this marks the successful resolution of a contravention of section 40 and the notice to

fix process. In support of this conclusion, the agent notes that the remedies in section 165 that may be contained in a notice to fix are all focused on the person who carried out the non-compliant building work.

4.9. The agent considers that if a prosecution is required the non-compliance should be dealt with by way of an infringement notice to the person who carried out the non-compliant building work.

4.10. The agent submitted that a notice to fix is only intended to require a remedy that is required by the Act. For example, the agent states that requiring an owner to remove non-compliant building work is not something that can be required by the Act so is not something that can be required by a notice to fix. Similarly, the agent notes that because an owner has a discretion under section 96 whether to apply for a certificate of acceptance where building work has been carried out without a building consent when one was required, a notice to fix cannot require an owner to apply for a certificate of acceptance, although the agent accepts that an owner must apply for a certificate of acceptance where they have carried out urgent building work under section 42.

4.11. The agent also considers that as long as the non-compliant building work has stopped it will always be an option for an owner to do nothing in response to a notice to fix (provided the building is not dangerous or insanitary).

4.12. Once the owner or builder has decided how they will comply with a notice to fix, the agent considers that the remedy chosen by the owner or builder must be communicated to a building consent authority so the building consent authority can assess under section 167(1) whether that remedy satisfies the requirements of the notice to fix. The building consent authority must then advise the owner or builder under section 167(2) of its decision whether the notice to fix has been complied with.

4.13. The agent notes that if the offence involves the carrying out of non-compliant building work, section 378 provides that any charges for the offence may only be laid within 12 months of when the building consent authority became aware of the non-compliant building work. Although if the offence is a continuing offence the 12 month limitation period would run from the last day on which the continuing offence was still occurring.

4.14. The agent cited various passages from *Andrew Housing Ltd v Southland District Council*[7] in support of their submissions. The High Court decision in the *Andrew* case does not support the agent's submissions. The *Andrew* decision requires a careful reading because it concerns two quite different offences. The first offence concerned a failure to comply with a notice to fix, which wrongly cited a contravention of a Standard when it should have cited a contravention of the relevant clause of the Building Code or a contravention of the Act because the

[7] [1996] 1 NZLR 589 (HC).

building work did not comply with the building consent. The second offence concerned carrying out building work otherwise than in accordance with a current building consent. However, the second offence was out of time because the information had been laid more than 6 months after the Council knew Andrew Housing Ltd carried out the non-compliant building work. Further, the offending conduct could not be characterised as a continuing offence because the offending ceased when Andrew Housing Ltd ceased to carry out the non-compliant building work.

Section 40 – carrying out building work without a building consent or contrary to a building consent

4.15. As discussed earlier in this determination, building work requires a building consent unless it is exempt, and section 40 creates an offence of carrying out building work except in accordance with a building consent. Section 40 and the notice to fix provisions are fundamental to the enforcement of the Act. It is critical that an owner is advised by a building consent authority when the building consent authority considers building work has been carried out that does not comply with a building consent or the Building Code, and that the owner is provided with a reasonable opportunity to remedy that non-compliance.

4.16. The types of conduct that contravene section 40 are considerably broader than contemplated in the agent's submissions. There are two distinct types of building work that could contravene section 40: carrying out building work without a building consent when a building consent is required; and carrying out building work contrary to a building consent, for example, carrying out building work that does not comply with a building consent or the Building Code.

4.17. Proceedings for an offence under section 40 may be commenced by filing a charging document for an offence or issuing an infringement notice for an infringement offence.[8] The choice of proceeding is at the discretion of the person laying the charging document, but a charging document for an offence under section 40 will generally be used for more serious contraventions of section 40 and an infringement notice will be used for less serious contraventions. A building consent authority may have an enforcement policy that provides guidance for such decisions.

4.18. Section 378 requires the charging document to be laid within "12 months after the date when the matter giving rise to the charge first became known, or should have become known" by the person filing the charging document. In the case of a contravention of section 40, this will most likely be 12 months from when the building consent authority became aware that building work has been carried out without a building consent, or pursuant to a building consent but contrary to a building consent or the Building Code.

[8] Sections 370, 371, 377, and Schedule 1 of the Building (Infringement Offences, Fees, and Forms) Regulations 2007.

Sections 163 to 167 – notices to fix

4.19. As stated earlier in this determination, the notice to fix provisions in the Act apply to a person who is "contravening or failing to comply with this Act or the regulations".[9] The notice to fix provisions are considerably broader than claimed by the agent. The notice to fix provisions are not just about stopping non-compliant building work, but are also concerned with remedying building work that does not comply with a building consent or the Building Code.

4.20. The notice to fix provisions make an important contribution to achieving the purposes in section 3, as they enable a building consent authority to require building work that does not comply with a building consent or the Building Code to be brought into compliance with the building consent or the Building Code. This helps to ensure that buildings are safe and have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them.

4.21. Section 164(1)(a) provides that a notice to fix may be issued to a "specified person", which is defined in section 163. "Specified person means … the owner of a building" (paragraph (a) of the definition), and if the notice relates to building work being carried out "means … the person carrying out the building work" (paragraph (b)(i) of the definition). A notice to fix will therefore always be issued to the owner of the building and may, when building work is being carried out, also include the person carrying out that building work. It would be contrary to the definition of "specified person" for a notice to fix to be issued to a builder carrying out building work and not also issued to the owner of the building.

4.22. An important aspect of a notice to fix is ensuring that the contravention is clearly described in the notice so the owner has full knowledge of the building work that contravenes the Act or Building Code and can make an informed decision about how that contravention is best remedied. There will usually be more than one way of remedying a contravention of the Act or Building Code, and a notice to fix may provide options for the owner or builder to consider. For example, non-compliant building work may be remedied by removing the non-compliant work, or further building work may be required to bring that non-compliant building work into compliance with the Building Code.

4.23. Section 165(1) sets out certain matters that may be contained in a notice to fix and prescribes certain matters that must be contained in a notice to fix. When the notice to fix provisions are applied to a contravention of section 40, the notice to fix is likely to include a number of the following matters, for example:

4.23.1. The notice to fix must state a reasonable timeframe within which the notice to fix must be complied with (section 165(1)(b)).

[9] Notices to fix also apply to building warrants of fitness, dam warrants of fitness and compliance schedules, but are not relevant to this determination.

4.23.2. If a notice to fix relates to building work, it may direct that the site be made safe immediately and that all or any building work cease immediately (section 165(1)(f)).

4.23.3. If the notice to fix requires building work to be carried out it must require the territorial authority to be contacted when the work is completed (section 165(1)(e)).

4.23.4. If the person is carrying out building work without a building consent when a building consent is required, the notice to fix could require the person to cease such building work and apply for a certificate of acceptance (section 165(1)(c) and (f)).

4.23.5. If the person is carrying out building work contrary to a building consent, for example, building work that does not comply with a building consent or the Building Code, the notice to fix could require the person to cease such building work, and require either of the following: to remove the non-compliant building work and apply for a building consent to do so; or to carry out building work to bring the non-compliant building work into compliance with the building work and apply for a building consent to do so (section 165(1)(d) and (f)).

4.24. The agent considers a notice to fix cannot require an owner to apply for a certificate of acceptance because the decision whether to apply for a certificate of acceptance under section 96 is at the discretion of an owner. While the agent's observation regarding how section 96 applies is correct, section 165(1)(c) expressly provides "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". Section 165(1)(c) therefore expressly empowers a notice to fix to require an owner to apply for a certificate of acceptance in those circumstances.

4.25. In this case, the agent says the remedies in the notice required the "obtaining" of a certificate of acceptance. The notice stated, "this may include applying for and obtaining a certificate of acceptance" [my emphasis], so a certificate was an option rather than a requirement. However, I agree with the agent that a notice to fix cannot require a certificate of acceptance be obtained, only that one be applied for.

4.26. I also note that "Remove all unconsented work" is a lawful option to remedy any contravention.[10]

4.27. The agent also considers that any remedial action undertaken by an owner to comply with a notice to fix must be treated as building work and notified to the

[10] The owners also say, "Obtaining a [certificate of acceptance] and removal of the unauthorised works (if so) cannot be required and is contrary to the [authority's] own AC1805 guidance document". This practice note, AC1805 *How unauthorised building work is assessed* (v9, March 2020), is guidance published by the authority and is outside the scope of this determination.

building consent authority, so the building consent authority can consider whether the notice to fix has been complied with. However, section 165(1)(e) only applies if the "notice to fix requires building work to be carried out". The definition of "building work" in section 7 is already very broad and will encompass a wide range of design, construction or demolition work that must be notified to a territorial authority. There is no basis for broadening the definition of "building work" in section 7, or as the term is used in section 165(1)(e), to include other types of remedial action undertaken by an owner to comply with a notice to fix.

4.28. I do not consider the 'section 167 report' provided to the authority, which the agent considers notified compliance with the notice, was a notification under section 167 that building work had been completed. Rather, it was disputing the grounds on which the notice had been issued. Therefore, section 167 does not apply.

Section 168 – the offence of failing to comply with a notice to fix

4.29. Section 168 creates a separate offence of failing to comply with a notice to fix (which could be an offence under section 168 or an infringement offence). The nature of the offence will depend on the requirements contained in a notice to fix. For example, if a notice to fix has been issued in respect of a contravention of section 40, the notice to fix might require the recipient to apply for a certificate of acceptance (where building work has been carried out without a building consent when one was required), or to carry out building work to bring non-compliant building work into compliance with the building consent or Building Code. In these situations, the recipient would commit an offence under section 168 if they failed to apply for a certificate of acceptance within the time stated in the notice to fix, or if they failed to bring the non-compliant building work into compliance with the building consent or Building Code within the time stated in the notice to fix.

4.30. If a building consent authority issues a notice to fix after the owner or builder has ceased to carry out the non-compliant building work, it is an enforcement matter for the discretion of the building consent authority whether a charging document is filed if the owner or builder fails to comply with the notice to fix. The agent is correct that it is always an option for the recipient of a notice to fix to 'do nothing', but that recipient takes a risk if they fail to comply with a notice to fix a building consent authority could decide to file charges for an offence under section 168 or issue an infringement notice.

4.31. It is important to note that the offences in sections 40 and 168 are different offences and the contraventions that make up each offence will be different. For example, even if a notice to fix relates to a contravention of section 40 the section 168 offence will concern a failure of the person to comply with the remedies specified in the notice to fix, and this will be different from a contravention of section 40.

4.32. Similarly, the 12 month limitation period will apply to an offence under section 168 in a different way from how it will apply to an offence against section 40. The 12

month period in respect of a section 168 offence will run from when the person issuing the charging document knew of the failure of the person to comply with the notice to fix, which in the above example will be the failure to apply for a certificate of acceptance before the date stated in the notice, or the failure to bring the non-compliant building work into compliance with the building consent or Building Code before the date stated in the notice. In each case, the failure of the owner to comply with the notice to fix will occur at the time of the failure to remedy the non-compliance identified in the notice to fix.

4.33. The failure to comply with a notice to fix will generally be a discrete offence and will not be a continuing offence, unless there is some ongoing non-compliant activity the owner or builder is required to cease carrying out. For example, if a notice to fix required the owner to cease carrying out building work and the owner fails to do so the continued carrying out of building work will be a continuing offence while the owner continues to carry out that building work. In this situation, the offence could include a daily penalty for the days the building work was being carried out after the date stated in the notice to fix when the building work was required to cease. A continuing offence will have the effect of extending the time within which a charging document must be filed under section 378, as the time will start to run from the last date on which the continuing offending occurred.

Conclusions

4.34. The building work in relation to items 1, 2, 4, 5, 6 and 7 (ie the carport, living room, veranda, storage unit, deck, and workshop) was not exempt under Schedule 1 from the requirement to obtain a building consent. Therefore, there were grounds to issue the notice under section 164 for a contravention of section 40 regarding this building work.

4.35. There were no grounds for the issue of the notice for contravention of section 40 in relation to item 3 (ie the building associated with the ensuite in the garage).

4.36. Although not an issue for consideration in this determination, the particulars of the section 17 contravention in the notice were not appropriate (as conceded by the authority).

4.37. The notice incorrectly included “obtaining” a certificate of acceptance (rather than simply “applying” for a certificate) in the remedies.

5. Decision

5.1. In accordance with section 188 of the Building Act 2004, as a result of the conclusions I have reached, I reverse notice to fix NOT21630062.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 4 October 2024.

Peta Hird
Lead Determinations Specialist

Appendix A

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

1. Enclosure of existing carport	
Particular in notice	"The existing, unauthorised, carport, measuring approximately 22.4 square meters in area, attached the north-western side of the existing garage has been enclosed to form a storage room".
Owners' view	• "schedule 1 allows for progressive enclosure (5.0m2 each time) and other work is possible such as doors and windows, but in any event this carport was the work of the previous owner, and this enclosed place is only being used as a storage area". • "Enclosing a verandah porch can occur in increments of 5.0m2 and there is no reference to a total enclosure in the long term and undertaken progressively".
Authority's view	• "Enclosing the sides of an attached carport to form a storage room of 22.4 Sqm. This meets neither exemption 1 as it is not repairs and maintenance, exemption 4 as it is unoccupied but is not detached, and nor does it meet any other specific exemption within schedule one".
My assessment	• It appears the owners may be referring to clause 15, 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 • 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.[11] • I do not consider that the carport is a "veranda, patio, or the like", nor that its "closing in" has created a "porch, conservatory or the like". In any event the resulting "storage" room, at 22m^2, well exceeds the limit of 5m^2 under this exemption. Clause 15 does not apply.

[11] Ministry of Business, Innovation and Employment *Building work that does not require building consent* (fifth edition, August 2020) at page 110. In addition, 'Veranda' is defined on page 230 as "A roofed space extending from a building" and refers to this definition being taken from a Standards New Zealand publication.

	• No other exemption has been referred to by the owners. I agree with the authority that clauses 1 and 4 do not apply.
2. Replacement of veranda with living room	
Particular in notice	"The existing, unauthorised, veranda attached to the north-eastern side of the existing garage has been removed and replaced with a living room, measuring approximately 22.8 square metres in area".
Owners' view	• "[The authority] suggest the veranda was removed but this is clearly incorrect and self-evident. The original veranda was only open on one side. Again, changes have occurred over time and are … changes possible with schedule 1 over time. Responsibility of the existence of the veranda itself remains with previous owners. The footprint has never been increased or decreased in any way". • "A deck can be removed and replaced or a new platform constructed without consent".
Authority's view	• "The removal and replacement of a deck to living room of approx. 22.8 sqm. Again, there is no specific exemption in schedule one to cover partial demolition and rebuilding of a room from a deck. Exemption 1 relates to replacement of building elements of a building and would not be expected to cover a whole room addition".
My assessment	• It appears the owners may be referring to clause 15 (see above), and/or clause 24: **24 Decks, platforms, bridges, boardwalks, etc** 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. • The veranda over the timber deck spanned the space between the house and garage and was open to the rear yard. Photographs show that this space is now an enclosed room with lined walls and ceiling. • Regarding clause 15, I do not consider that the resulting enclosed space can be considered a "porch, conservatory or the like", and at 22.8m^2, the floor area is not less than 5m^2. Therefore, this exemption does not apply. • Regarding clause 24, the removal of the deck slightly above ground level if it was removed would be covered by the exemption. However, that would only cover the floor of the room, not the other building work undertaken to enclose the veranda. • No other exemption has been referred to by the owners. I agree with the authority that clause 1 does not apply.
3. Existing garage altered to bedroom with ensuite	
Particular in notice	"The existing 1975 garage on the north-western boundary has been altered to form a bedroom with ensuite bathroom, including the installation of a toilet, shower and handbasin and the associated plumbing and drainage".
Owners' view	• "This is a legitimate change possible under schedule 1. The installation occurred under previous owner and the current owners have renovated the ensuite in recent times. The fixtures have not been increased during recent renovations and satisfy exemption 35 of schedule 1".

	• The garage "had an annex that was accessed … from the exterior to shower small basin and [toilet]. The door was removed and an internal door provided to the bedroom to create the ensuite arrangement". "… this ensuitespace already existed as a separate room, The owner did not add it to this dwelling". • "Existing sanitary fixtures were relocated and renovated and plumbing pipes replaced to address what the owner considered were poor installations by previous plumber and in some [cases] damaged pipes".
Authority's view	• "The 1975 garage now contains plumbing and drainage works to support a new en-suite bathroom including installation of a toilet, shower and handbasin. These do not meet exemption 32 Repair, maintenance and replacement or exemption 34 minor replacement of drains nor is it covered by exemption 35. These are new works to create new sanitary spaces and furthermore increases the number of sanitary fixtures on the property". • "We have been unable to find any as-built drainage plans for the network connection to this garage".
My assessment	• Clause 35 states: **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; • According to the owners, the previous owners installed the sanitary fixtures; the owners simply "relocated and renovated" them, and replaced damaged pipes. • Photographs of the property from the real estate listing in 2017, provided to me by the authority, do not indicate whether this building included an ensuite. In response to a question from the Ministry as to the basis on which the authority considered these were "new works" increasing the number of sanitary fixtures, the authority referred to photographs from the real estate listing. However, these photographs relate to the workshop (item 7) rather than this garage. • Based on the information I have been provided, there is no evidence that additional sanitary fixtures were installed by the owners, or that associated plumbing and drainage work was not an alteration (in terms of clause 35) or repair (in terms of clauses 32 and 34) of existing elements. Therefore, in the absence of evidence it is not possible to reach a conclusion on whether the building work, if carried out by the owners, was exempt or in contravention of section 40.
4. Veranda	
Particular in notice	"Construction of a veranda approximately 42.86 square metres in area in the courtyard area between the existing dwelling and the existing 1975 garage".
Owners' view	• "[T]his is a pergola and a lightweight open structure with only a plastic roof to allow light. It is not intended to be walked on as a veranda might. Pergolas do not have a size restriction under exemption 6. Alternatively, the structure can be considered a veranda with awnings attached at each end also conforming to exemption 16 16A and 17A".

	• "A guidance document cannot create a binding definition of a pergola when it is not defined so in the [A]ct. We rely on an ordinary meaning of pergola that relates to its function rather than being prescribed. Conversely a verandah is normally attached to a dwelling part of the dwelling and intended to be walked on for maintenance. In fact the description in schedule 1 (exemption 16) makes this relationship clear". • "If we are wrong [in] this and this structure is deemed a verandah then we protest the way it has been measured. If the maximum floor area is exceeded then the appropriate response is to remove a small section of translucent roofing to create two veranda under 20m2".
Authority's view	• "At more than 40sqm, this structure meets none of exemptions 16, 16A, 17, 17A. The [owners assert] this structure is a pergola and is covered by exemption 6. We note the [Ministry's guidance] on pergolas which would suggest this was not a pergola as soon as polycarbonate roofing was installed. The addition of the roof turned it into a verandah".
My assessment	• The clauses referred to by the authority relate are: **16 Awnings not exceeding 20 square metres in size.** **16A Awnings exceeding 20, but not exceeding 30, square metres in size.** **17 Porches and verandas not exceeding 20 square metres in floor area.** **17A Porches and verandas exceeding 20, but not exceeding 30, square metres in floor area.** • The Oxford English Dictionary defines 'awning' as "A roof-like covering of canvas or similar material, used as a shelter from sun, rain, etc. …".[12] • Clause 6 states: **6 Pergolas** Building work in connection with a pergola. • The Ministry's guidance states (at page 122): Pergolas are simple-framed and unroofed structures which are often used as garden features. For the purposes of this exemption, pergolas may either be attached to a building or freestanding. There is no limit on their size, but they must not be roofed. • This is consistent with the Oxford English Dictionary, which defines 'pergola' as follows:[13] An arbour; a covered walk or shelter (usually in a garden), *esp.* one formed of growing plants trained over a (usually wooden or metal) framework; this framework itself. ... • I am satisfied this structure is a veranda as it projects from the face of the building, protects the entrance to the "living room" and provides shelter. It is not a pergola or an awning in terms of the above definitions. However, as its area exceeds 20m^2 (clause 17) and 30m^2 (clause 17A), construction of the veranda is not covered by an exemption.

[12] Oxford English Dictionary (online publication), accessed 27 June 2024. This definition is similar to the definition of 'awning' in the Ministry's Guidance, at page 219, which adds an awning is "often used to shelter a window, door or the side of a building".

[13] Oxford English Dictionary (online publication), accessed 27 June 2024.

5. Storage unit on raised foundation	
Particular in notice	"A prefabricated storage unit, approximately 17.61 square metres in area, has been installed on a foundation system on the north-eastern side of the existing retaining wall with a floor level approximately 1.9m above the existing ground level".
Owners' view	• "Prefabrication does not need a consent and the offence can only be work done on site. This unit is sitting on a platform and when the ground is levelled only 1.5m off the ground. This is exempt work. The ground has been levelled and the prefabricated unit is now only 1.45 mm off the ground". • "[The authority's] own statement is that this is a prefabricated building. Previous determinations been clear that only building work done on site is building work for the purposes of s40. The exemptions quoted [by the authority] do not apply and the platform on which the prefabricated unit was placed is under 1.5m high".
Authority's view	• "The installation of a prefabricated storage unit onto a foundation system with a floor level over 1.5m above ground. This is not the replacement of outbuilding [in] accordance with exemption 7 as it is a new installation nor is it covered by exemptions 3A or 3B due to excessive ground levels, nor exemption 43 unless evidence can be provided the foundations and installation were supervised by a chartered professional engineer and the ground level reduced to 1m or less".
My assessment	• I take the owners reference to a "platform" to relate to clause 24, which exempts building work in connection with a platform from which it is not possible to fall more than 1.5m even if it collapses. However, as the 'platform' in this case is the foundation for the storage unit I have not considered this separately. • It appears the owners may also be referring to clause 3A, 3B and/or 43. • Clause 43 specifically relates to kitset or prefabricated buildings where the design of the building has been carried out or reviewed by a Chartered Professional Engineer. However, there is no evidence that this is the case in relation to the storage unit here. • Clauses 3A and 3B provide for construction of single storey detached buildings subject to certain criteria being met, one of which is that the building "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)". • I agree with the authority. Even if it is accepted the ground is to be levelled off at 1.45m or 1.5m as stated by the owners, that doesn't meet the requirement in clauses 3A and 3B for the floor level of the building to be not more than 1m above the supporting ground. • None of the exemptions referred to apply.
6. Deck	
Particular in notice	"A deck with a fall in excess of 1.6 metres has been erected at the south-eastern end of the prefabricated storage unit".

Owners' view	• "This deck is in fact less than 1.5m high and is exempt under exemption 24. The work [the authority] observed was incomplete and is now finished with a handrail installed for safety …". • "It is 1.28m to 1.5m high measured to the top of the deck".
Authority's view	• "A deck has been constructed to the entry of the storage unit without a balustrade, 1.6m off the ground. Without entry to the property, it is not possible to identify if this item has been resolved by increasing the ground level".
My assessment	• Clause 24 exempts building work in connection with a deck from which it is not possible to fall more than 1.5 metres even if it collapses (clause 24 is set out above under item 2). • There is no information in the authority's inspection record specifically relating to the height of the deck from the ground. However, I accept that at the time of the authority's inspection the height of the deck was more than 1.5 metres. A statement by the owners to the authority following the issue of the notice suggests that the ground was to be levelled to reduce the height of the storage unit to 1.5m or less, though it is unclear whether the intention was for this to extend to the ground under the deck. • I consider clause 24 did not apply at the time of the authority's inspection. • In response to a request from the Ministry, the owners provided current photographs showing the measurement of the height of the deck, from the ground to the decking, at the deck's highest points. A photograph at the "high end" is stated to be 1.495m. This indicates the owners have subsequently remedied this contravention (although the authority has been unable to re-inspect this work to confirm that is the case).
7. Workshop converted to household unit	
Particular in notice	"The existing workshop, to the northeast of the existing dwelling, has been converted to a separately occupied household unit including the installation [of] a toilet, a shower, a handbasin and a kitchen sink with associated plumbing and drainage".
Owners' view	• "This self-contained space is for the use of the same household unit as the main house and is not a separate additional household. This occurred under previous owner and the current owners have renovated it in recent times. In any case the plumbing has been checked/tested by a registered plumber and is found functioning in a safe and sanitary manner as intended".
Authority's view	• "These do not meet exemption 32 Repair, maintenance and replacement or exemption 34 minor replacement of drains nor is it covered by exemption 35. These are new works to create new sanitary spaces. They also increase the number of sanitary fixtures on the property".
My assessment	• Based on the real estate listing photographs, which show this workshop did not contain any sanitary fixtures in 2017, the sanitary fixtures and associated plumbing and drainage are all new and so the exemptions in clauses 32, 34 and 35 do not apply.