

Determination 2024/068

The issue of a notice to fix for a deck constructed without a building consent.

5/24 Eastglen Road, Glen Eden, Auckland

Summary

This determination considers the authority's decision to issue a notice to fix for an alleged contravention of section 40 of the Act in relation to the construction of a deck. This determination also considers whether the building work for the deck is exempt from the requirement to obtain a building consent under clause 24 of Schedule 1 of the Act. This determination further considers the form and content of the notice to fix.

In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”).

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, Andrew Eames, 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. the owners of the property A and S Kundu (“the owners”), who applied for the determination;
 - 1.2.2. Auckland Council, carrying out its duties as a territorial authority or building consent authority (“the authority”).
- 1.3. This determination arises from the authority’s decision to issue a notice to fix in respect of building work to construct a deck. The authority considers that the deck required a building consent. The owners consider the deck was exempt from requiring a building consent as it came within an exemption set out in clause 24 of Schedule 1 of the Act.
- 1.4. The matter to be determined, in terms of sections 177(1)(b) and 177(3)(e) of the Act, is the authority’s decision to issue a notice to fix (‘the notice to fix’) to the owners dated 27 March 2024 (NOT21717524) for a contravention of section 40 of the Act in relation to the construction of a deck.
- 1.5. In deciding this matter, I must consider whether there were grounds to issue the notice to fix, looking at whether the building work to the deck is exempt from the requirement to obtain a building consent under clause 24 of Schedule 1 of the Act. The determination will also consider the particulars of contravention and remedy as set out in the notice to fix in so far as they relate to the deck.

Issues outside this determination

- 1.6. I have not considered any aspects of the Act or the Building Code, other than those as outlined in paragraphs 1.4 and 1.5. In particular, the following matters are outside the scope of this determination:
 - the compliance of the deck with the Building Code;

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

- the compliance of the other matters listed in the authority's notice to fix, namely the retaining wall and shed;
- any of the other notices to fix issued by the authority in respect of the deck and associated building work;
- the authority's enforcement powers in respect of the notice to fix;
- any issues relating to the Resource Management Act 1991 or the district plan, including the abatement notices issued by the authority.

2. The building work

- 2.1. This determination relates only to a deck constructed on the owners' property.
- 2.2. The owners constructed the new deck measuring approximately 67m² on the side of their dwelling. The deck is constructed of wood and was completed sometime in 2022 or 2023. It had a small wooden shed constructed on the northern side of the deck. The remainder of the deck's northern side, between the shed and the deck's northeastern corner, has a 1.8m-high metal and wood screen installed to prevent falls from the edge, which the owners advise is designed to 'withstand human impact'.
- 2.3. A wooden barrier has been constructed along the deck's eastern side, which the owners advise is over 1.0m high. Access to the deck is via the house. The area under the deck is left exposed but is held up with wooden piles and boards. The owners initially placed impermeable weed mat underneath the deck, although this was subsequently replaced with a permeable fabric.
- 2.4. The deck was built over an area of sloping ground, with the fall from the edge of the deck to the ground below originally varying in height from 1.1m (adjacent to the house) to 1.9m (in its northeastern corner).
- 2.5. The owners later constructed a retaining wall and a raised retained garden below and around the northern and eastern sides of the deck, with the intention of raising the ground level in these areas and lessening the maximum fall height from the edge of the deck to the ground or gardens below. This structure was also constructed of wood and infilled with earth and gravel. It is 1.2m wide on the deck's eastern side, and a maximum of 900mm (0.9m) wide on the northern side, as shown in Figure 2. The maximum height from the deck's highest point, in its northeastern corner, to the raised garden beds below is now 1.38m.

3. Background

- 3.1. The owners purchased their property in a residential area of Auckland in 2021. There was an existing dwelling on the property when they purchased it.

- 3.2. The owners then carried out various building work associated with the dwelling, including constructing the new deck, along with the shed and barrier.
- 3.3. The authority carried out a site visit and identified the building work in dispute on 14 August 2023. At this visit, the authority measured the sloping ground levels under the deck as being between 1.1m and 1.9m below the deck's surface.
- 3.4. Following the site visit, the authority issued two notices to fix to the owners dated 22 September 2023 (NOT21693618) and 1 December 2023 (NOT21702867) respectively, and the latter intended to provide an extension of time to the owners to remedy the contravention stated in the notices to fix. Both notices included the construction of the deck as a contravention of section 40 of the Act (along with other building work that is not the subject of this determination). The authority considered that the deck was not exempt building work under schedule 1 of the Act and therefore required a building consent, because in certain places (specifically its northeastern corner) it was higher than 1.5m above ground level.
- 3.5. In response to the issue of the notices to fix, the owners engaged a building surveyor ("the building surveyor") to assist them in responding and taking steps of remediation works in their attempt to achieving compliance. The building surveyor provided a report on 21 February 2024. The report included an annotated photograph stating that at its highest point, in the northeastern corner, the deck was 1.7m above the ground level below, as shown in Figure 1.



Figure 1. Building surveyor's annotated photo showing maximum height of deck

- 3.6. The report advised that the ground level below the deck had subsequently been raised, and the deck 'made compliant' by now being exempt under Schedule 1 of the Act, due to 'installing a small retaining wall around the front area of the deck to reduce the height of the ground to meet the Schedule 1 requirement of exempt works'. The report included a second photo showing this retaining wall under construction and stated that as a result the maximum height from the edge of the deck to the ground was now 1.2m.
- 3.7. The building surveyor's report concluded by stating that, as the maximum fall height from the deck was now under 1.5m, the building work to construct the deck was exempt work under Schedule 1 of the Act, and no building consent or certificate of acceptance was required. The report therefore requested that the notice to fix relating to the deck should be withdrawn.

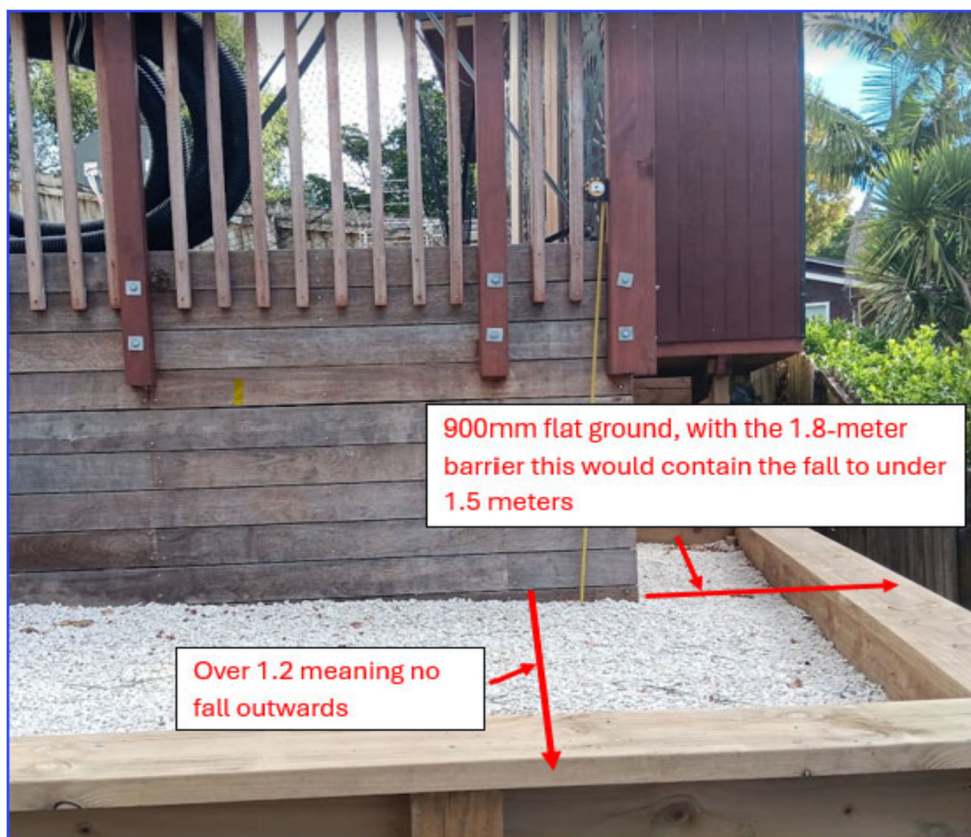


Figure 2. Building surveyor's annotated photo showing width of raised area constructed below deck

- 3.8. The parties corresponded but were unable to reach agreement, and on 27 March 2024 the authority issued the notice to fix (NOT21717524) to the owners, which is the subject of this determination. This notice cited three particulars of contravention or non-compliance, including:

Contrary to **s.40 of the Building Act 2004**, the following building works have been undertaken at 5/24 Eastglen Road Glen Eden Auckland 0602, without first obtaining a building consent.

- ... (not relevant to this determination)
- ... (not relevant to this determination)
- Deck on the Northern side of dwelling have a fall of more than 1.5 meters from the ground level.

3.9. The notice to fix gave a compliance date of 19 April 2024 and advised that:

To remedy the contravention or non-compliance you must:

Choose one 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.

3.10. The building surveyor provided a further report dated 2 April 2024 in response to the notice to fix. This report advised, and provided photos to confirm, that the ground area around the deck had been levelled out so that the maximum height from the edge of the deck (at the northeastern corner) was now 1.38m. It further advised, that:

- the ground level around the deck had been 'stripped for landscaping' but it had always been intended to be 'levelled out' to create a compliant deck;
- 'only one pile was higher than 1.5[m] during construction, and this has been resolved as the ground levels have changed';
- the 'height of the subfloor below the deck is also not over 1.5m high';
- as the deck was under 1.5m high it was exempt from requiring a building consent under Schedule 1 of the Act.

3.11. The authority did not accept the conclusions reached in the report.

4. Submissions

The owner

4.1. The owners submitted (in summary):

- 4.1.1. 'The ground level is sloping, and the actual measurement from the sloping ground to the highest point ... is at most 1.5[m] to the construction deck and meets the requirements of Schedule 1.' The ground was excavated during construction, which is a 'standard construction requirement...to get good ground'.
 - 4.1.2. '[T]here is a large landscaping retaining wall over 1.2m long [on the outside of the deck] to prevent falling outwards at the front elevation, meaning that the fall would not be over 1.5m and meets the requirement of Schedule 1.'
 - 4.1.3. There is 'a large fence wall over 1.8m in height to prevent outward falls in this area'. This barrier can 'withstand human impact' and even if the deck were to collapse, the barrier and the flat ground created by the landscaping retaining wall would 'contain the fall' and the 'collapse would not be over 1.5m'.
 - 4.1.4. The retained 'boxed retaining walls' were installed to create 'useable level space' and the deck height should be measured from the top of these. They consider landscaping to create the boxed retaining walls did not require consent and 'was never an issue raised'. What is relevant for Schedule 1 of the Act is the ground level before construction started. They believe 'the height of the landscaping is irrelevant to what has been built' and the photos provide 'proof of ground level to build a Schedule 1 deck'.
 - 4.1.5. '[T]he slope of the ground taken from the underside [of the deck] and the measurements clearly show that the ground to the underside is less than 1.5 metres at the highest point' and that the 'highest point to [the] pile further up the slope [is] not over 1.5m'.
 - 4.1.6. They conclude that it was not possible to fall more than 1.5m from the deck, whether it collapsed outwards or inwards, and therefore the building work was exempt.
- 4.2. The owners' building surveyor provided additional photos to demonstrate the height of the deck both during and after construction. These included several photos designed to show the maximum height in the area under the deck.²

The authority

- 4.3. The authority submitted (in summary):
- 4.3.1. The measurements taken by the authority at its site visit on 14 August 2023 showed the height of the deck on its northern side has a fall of more than 1.5m from the ground level and 'at the northern corner the deck sits at

² I note that these photos are unclear and do not indicate the point where that the building surveyor's measurements have been taken from or to.

approximately 1.9m from the ground'. This is confirmed by the photos taken at the visit.

- 4.3.2. The 1.5m height limit in clause 24 of Schedule 1 of the Act ensures that the risk of injury is appropriately managed in the event of a structural failure of a deck. 'Artificially raising the ground around the external perimeter of a deck exceeding 1.5m in height does not cure the risk of falling more than 1.5m in the event of a structural failure and nor does it bring the over-height deck within the restrictions placed on Exemption 24.'
- 4.3.3. '[N]ot all falls from a deck when it collapses will be off the edge of the deck where the planter type structures have been established.'
- 4.3.4. The 'garden [planter] beds might be ideal to break a fall from the deck in the absence of barrier and if a fall was outwards and off the deck, but the [garden planter] beds would not prevent a fall of over 1.5m if the deck were to collapse and a person standing on the deck was not thrown outwards but instead, downwards'.
- 4.3.5. The authority concluded that notwithstanding the introduction of the retained garden planter beds around the external perimeter of the base of the deck in an attempt to change ground levels, it does not solve the issue of the deck not meeting the requirements for an exemption in clause 24 in the event of structural failure of collapse and therefore the notice to fix 'has not been satisfied'.
- 4.3.6. As the deck has already been built, the owners need to apply for and obtain a certificate of acceptance for it.

5. Discussion

- 5.1. The matter for determination is the authority's decision to issue the notice to fix for the deck constructed on the owners' property. In determining this matter, I must consider whether there were grounds to issue a notice to fix, and also the form and content of the notice to fix.

Legislation

- 5.2. The provisions concerning notices to fix are found in sections 163 to 168 of the Act. Section 164(1)(a) of the Act provides for an authority to issue a notice to fix if it considers, on reasonable grounds, that a specified person³ is contravening or failing to comply with the Act or its regulations. This can include carrying out building work without a building consent when one is required.

³ Section 163 of the Act defines a 'specified person' to whom a notice can be issued, and this includes the owner of a building and the person carrying out the building work if the notice relates to building work being carried out.

- 5.3. It is accepted by parties that the notices were issued to the owners as specified persons under section 163 of the Act.
- 5.4. Section 165 of the Act sets out the form and content that a notice to fix is required to have.
- 5.5. Section 40(1) of the Act provides that a person must not carry out any building work except in accordance with a building consent.
- 5.6. Section 41(1)(b) of the Act states that a building consent is not required if the building work falls within the exemptions in Schedule 1 of the Act.
- 5.7. Schedule 1 of the Act prescribes categories of building work for which a building consent is not required. This includes the category of work being relied on by the owners, as described in clause 24 of Schedule 1 of the Act.

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.

Were there grounds to issue the notice to fix?

- 5.8. The particulars of contravention or non-compliance cited by the authority in the notice to fix were that contrary to section 40 of the Act, building work had been undertaken at the owner's property without first obtaining a building consent. For the purposes of this determination, this included the work on the 'Deck on the Northern side of the dwelling having a fall of more than 1.5 meters from the ground level.'
- 5.9. The reference to the fall height of the deck is a reference to clause 24 of Schedule 1 of the Act. For building work on a deck to be exempt from the requirement for a building consent under clause 24 of Schedule 1 of the Act, it must not be possible to fall more than 1.5m from the deck even if the deck collapses.
- 5.10. The constructed height of the owners' deck from the ground level is in dispute. Conflicting measurements have been provided by the owners and the authority that put the maximum height at anywhere between 1.1m to 1.9m. Part of this variation is due to the sloping ground below the deck. However, there is also significant variation and uncertainty in the provided measurements.
- 5.11. At its site visit on 14 August 2023, the authority measured the height of the deck and recorded that on its northern side, the height was more than 1.5m above ground level, and at its highest point at its northeastern corner, the deck was 'approximately 1.9m from the ground'.
- 5.12. In the first report dated 21 February 2024, the building surveyor acknowledged that the highest point of the deck (in its northeastern corner) was at 1.7m above the

ground level, indicating this on an annotated photo (see Figure 1). In the second report dated 2 April 2024, the building surveyor advised the height of the deck had been resolved by changing the surrounding ground level.

- 5.13. I have concluded that the height of the deck at its northeastern corner, and possibly at other points along that adjoining sides, is more than 1.5m above the level of the ground under the deck. This ground level would have been similar to that on the outside of the deck before the landscaping was done, which both parties' measurements have confirmed was over 1.5m.
- 5.14. The requirement in clause 24 of Schedule 1 of the Act is that it is not possible to fall more than 1.5m from the deck, even if it collapses (my emphasis). The adjustment of the level of ground around the outside perimeter of the deck and the addition of the barrier does not resolve the height from a which a person standing on the deck would fall if the deck were to collapse inwards or downwards.
- 5.15. From the evidence presented to me, I conclude that as the ground level underneath the deck is likely to be over 1.5m below the deck in places, the building work for deck was not exempt from the requirement for a building consent under clause 24 of Schedule 1 of the Act and constructing it without a building consent was a contravention of section 40 of the Act. This means that the authority had grounds to issue the notice to fix.
- 5.16. I note that in their submissions, the owners have provided measurements taken after the notice to fix and photographs taken under the deck which they consider show the maximum height of the deck is less than 1.5m. However, the photographs themselves are unclear and it is not possible to tell the exact measurements, or the locations where the measurements were taken from or measured to. I have concluded that the measurements have been taken up to some point underneath the deck when what is relevant is the height from the ground levels to the top of the deck where a person would be standing. In my opinion, this information is insufficient to support a finding that the possible fall from the deck, if it were to collapse, would not be more than 1.5m.
- 5.17. I note also that the building surveyor has made submissions about the width of the raised garden planter beds and retained level area in front of the deck's eastern side (which is stated as 1.2m wide) and that the width is sufficient to break a person's fall should there be a collapse from the edge of the deck in this location.
- 5.18. A similar garden planter bed or retained raised area has been constructed on the deck's northern side. The photos supplied by the building surveyor indicate that this garden planter bed and raised area are significantly narrower than the one on the eastern side (due to the proximity of the boundary), particularly in the area adjacent to the deck's northeastern corner. The building surveyor has advised that this garden planter bed or retained raised area is 900mm wide, although it is unclear if this is at its widest point as the width of the bed or area appear to vary.

- 5.19. I consider the ground level beyond the northern retained garden planter beds has been excavated or levelled, and that although no exact measurements have been given, the height of the raised area is well over 0.5m high in this area.
- 5.20. In my view, in the absence of accurate measurements, it is not clear that a person standing near the northeastern corner of the deck could not fall more than 1.5m if they fell outwards in a northern direction, let alone falling inwards or downwards, in the event of the deck collapsing. The width of the raised retained area is potentially insufficiently wide in this location to break a person's fall. The height of the raised garden planter bed below the surface of the deck (1.38m) when combined with the height of the retained raised area itself (at least 0.5m) mean that the potential fall in this case would exceed 1.8m.

The form and content of the notice to fix

- 5.21. Having found that the authority had grounds to issue the notice to fix I will now consider its form and content.
- 5.22. Section 165 of the Act sets out the requirements for the form and content of a notice to fix. The prescribed form provides a space to insert the "particulars of contravention or non-compliance".⁴
- 5.23. The courts and previous determinations⁵ have discussed what is required for the particulars of a notice to fix and stated that the recipient of a notice to fix must be "fairly and fully informed" by the particulars in a notice, so they can address and remedy the identified issues.
- 5.24. In this case, the notice to fix identifies the building work to construct the deck without a building consent as a contravention of section 40 of the Act. However, it is necessary that the notice contain enough specificity that a person receiving it fully understands the contravention so they can resolve it.
- 5.25. The notice to fix referred to the deck having "a fall of more than 1.5 meters from the ground level" but did not expand this to incorporate any explanation related to the term "even if it were to collapse" as set out in clause 24 of Schedule 1 of the Act. The circumstances in which it must not be possible to fall more than 1.5m from a deck even when it collapses are a crucial part of the exemption in clause 24 in Schedule 1 of the Act, and the lack of reference to "collapse" in the authority's notice to fix has resulted in the owners not fully understanding what would be required for the work to be considered exempt.

⁴ Form 13 of the Building (Forms) Regulations 2004.

⁵ 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 notice to fix (issued 27 Mar 2024) at paragraph 4.2 and 4.3.

- 5.26. The owners, in my view, have not understood why raising the ground level around the outside of the deck did not resolve earlier notices to fix, so as to avoid or prevent the notice to fix being issued. They were not fully and fairly informed and I consider the lack of detail in the notice to fix to be deficient in this respect.
- 5.27. I consider the remedies given in the notice to fix, in general, to be appropriate. It is for the owners to consider the options available to bring the building work into compliance with the Act. I note, however, that the authority has stated that this may include 'applying for and obtaining a Certificate of Acceptance (COA)'. This is not correct. The notice may only require a certificate of acceptance to be applied for, which is an available remedy under section 165(1)(c) of the Act for building work carried out without a building consent. The authority may not impose the requirement for a certificate of acceptance to be obtained.

Conclusion

- 5.28. The building work to construct the deck was not exempt under clause 24 of Schedule 1 of the Act from the requirement to obtain a building consent. Therefore, there was a contravention of section 40 of the Act and under section 164 of the Act, the authority had grounds to issue the notice to fix.
- 5.29. However, there were deficiencies with the lack of specificity of the particulars in the notice as they relate to the deck, and deficiencies with the remedies with regard to the requirement to 'obtain' a certificate of acceptance. In these circumstances, I consider it appropriate to reverse the notice to fix.

6. Decision

- 6.1. In accordance with section 188 of the Building Act 2004, I determine that the authority had grounds to issue the notice to fix (NOT21717524) dated 27 March 2024 in relation to the construction of the deck, but the notice to fix was deficient in its particulars and remedies, and I hereby reverse the notice to fix.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 29 November 2024.

Andrew Eames

Principal Advisor Determinations