Determination 2025/013

The issue of a notice to fix for building work carried out without building consent

3B Princes Street, Waikari, Hurunui

Summary

This determination considers an authority's decision to issue a notice to fix for work it considered was building work carried out without a building consent when one was required. The dispute centres on whether the work that was carried out is building work regulated under the Building Act and for which a notice to fix could be issued. The determination also considers the form and content of the notice to fix.

Figure 1: The cottage (photograph taken by the authority)

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

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

1. The matter to be determined

1.1. This is a determination made under due authorisation by me, Rebecca Mackie, 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. Hurunui District Council ("the authority"), carrying out its functions as a building consent authority or territorial authority, and the applicant for this determination.

1.2.2. T Burrell ("the owner"), who was issued with the notice to fix and is the owner of the property.

1.3. The matter to be determined, under sections 177(1)(b) and 177(3)(e), is the authority's decision to issue notice to fix NF0358 dated 18 March 2024 ("the notice") for a contravention of section 40 of the Act.

1.4. In deciding this matter, I must consider whether building work had been carried out without building consent when one was required.

2. The background and notice to fix

2.1. Two units have been relocated to the owner's property and joined together to form a 'T-bone' shaped cottage ("the cottage") (see Figure 1). There is open internal access between the units.

2.2. The cottage has lightweight cladding, profiled metal roofing with guttering and downpipes, and aluminium joinery. Each unit is built on a steel chassis with wheels.

2.3. The units were relocated to the property via transport truck, where they were towed up the driveway and into position. The units are joined together by ratchet straps and a rubber pad forming a "pressure fit", and silicone is used to seal the joining of the units on the internal and external corner flashings. An adhesive rubber strip is used to seal the join on the roof.

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

2.4. Photographs taken by the authority on 8 March 2024 show:

- a heat pump/air conditioning unit attached to the west facing exterior wall
- an external water heating unit attached to the south facing wall
- a connection to a power supply box
- storm water downpipes which discharge into in-ground risers
- waste water pipes fitted underneath the cottage
- a gully trap connecting to drains
- timber steps leading to the French doors on the east facing entrance
- a number plate and registration attached to one unit
- a connection to potable water supply
- two disconnected tow bars on the ground beneath one of the units.

2.5. Sewer and stormwater drainage systems have been installed to the authority's outfalls.

2.6. The units' chassis' are supported by timber blocks placed on concrete pads. Several wheels were off the ground at the time of the inspection due to the site being unlevel.[2]

The notice to fix and the owner's response

2.7. The notice was issued 18 March 2024 and identified the 'particulars of contravention or non-compliance' as:

> Date the breach occurred: **8th March 2024**
>
> Building work has been carried out without the required building consent. This includes the building (tiny home trailers which are connected and are not moveable) and the installation of an on site drainage system in breach of Sec 40 of the Building Act 2004.

2.8. The notice to fix provided for the following remedies:

> Apply for a Certificate of Acceptance by **18/04/24** (any request for information (RFI) letters and rectification work must be completed within 28 days of any request) or
>
> Remove the illegal building work by **18/04/24**.

[2] The owner has since built up timber ramps for the wheels.

2.9. The notice also stated "This notice must be complied with by: 18th April 2024".

2.10. On 17 April 2024, a consultant acting on behalf of the owner wrote to the authority. Their letter described various features of the cottage:

2.10.1. "The connecting [sic] is by a pressure fit and restraint is by quick release straps".

2.10.2. "A gully trap and toilet connection has been provided with connection to onsite lateral to [the authority's] infrastructure. There is also a stormwater connection provided for".

2.10.3. The fabrication of the units was carried out off site. The units are trailer based and intended to be towed, and "the trailers are registered as farm huts".

2.10.4. "Removable tow bar is ready for use at any time".

2.10.5. "…temporary jacking [is] to provide amenity".

2.11. The consultant referred to *Marlborough District Council v Bilsborough* ("*Bilsborough*")[3], noting that the structure in that case involved units (from the same manufacturer) bolted and rivetted together "which is not the case here".[4] The owner maintains the units are intended to be moveable "and this has been allowed for with no permanent connection used".

2.12. The consultant states that the notice implies that the building was created on site, which is denied. The letter referred to the *Woods v Waimakariri District Council* decision,[5] and states:

> … even if a vehicle becomes a building (due to becoming immovable and permanent occupation) it happens in a point in time and doesn't make the previous work illegal or unlawful (if it was a vehicle at that time).
>
> The owner maintains that on this basis the [notice to fix] can only be issued for building work done at this time or subsequently (and that building work needed a consent), Schedule 1 allows for significant building work such as decks, verandas and carports and electrical work without consent. Even minor drainage is allowed under exemption 34…

2.13. The consultant's letter also raised the following concerns:

2.13.1. The "inadequate time for remedy being only one month in which time a [certificate of acceptance] was demanded".

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[3] [2020] NZDC 9962.

[4] For completeness, I note the manufacturer states that the units were not welded or bolted together in the *Bilsborough* case.

[5] [2022] NZDC 24083.

2.13.2. The condition of requiring [requests for further information] to be satisfied within 28 days is an "unlawful demand".

2.13.3. The removal as a remedy "is unlawful" and not a remedy for section 40, and an application for a certificate of acceptance cannot be demanded/required.

2.13.4. "If there are no lawful remedies then we suggest this is an indication that the particulars of contravention are misstated as no offence is present".

2.14. The owner "…accepted that a [certificate of acceptance] for drainage connection was acceptable…".

2.15. The letter stated that the owner "formally [notifies the authority] under s167 that the [notice] has been complied with to the extent the law requires".

2.16. On 14 May 2024, the authority responded to the owner with a "notice of decision under section 167". The authority referred to a site visit carried out on 24 April 2024 and what it had observed about the units and the cottage. Inspections carried out by the authority observed various points about the joining of the two units which prevent the units moving apart easily (for example, carpet, sealant and tape). The authority also notes that drainage and plumbing work had been carried out.

2.17. The authority set out its view that the units joined together became components of a larger single structure and became "a combined non-moveable unit that is not a vehicle", and that it was an immovable structure intended for occupation by people and falls within the definition of a building under section 8(1)(a) of the Act. The authority also noted that the units when combined were immovable and were being used for long term occupation, so met the criteria in section 8(1)(b)(iii). In drawing this conclusion, the authority observed the "combined unit has the wheels of one unit at 90 degrees to the wheels of the other unit".

2.18. The authority considered the work carried out "to convert the units to a building, and any subsequent building work" was within the ambit of the Act, and building consent was required unless it was exempt work under section 41.

2.19. The authority's letter advised the date for the notice to be complied with was extended and that it would apply for a determination. It also referred to various points relating to the Resource Management Act 1991 and District Plan requirements.[6]

2.20. On 15 May 2024, the manufacturer wrote to the owner and authority, stating:

[6] I note that the definition for a building under the Building Act differs from that under the Resource Management Act.

2.20.1. "these mobile homes are factory assembled in lighter weight materials… instead of 'normal' housing materials… the internal layout is really little different to a caravan or house bus…"

2.20.1. when the units are towed away the timber support blocks "…simply roll over and the full weight of the mobile home then rests on the wheels"

2.20.2. the units "are designed for moveability within an hour of wanting them towed away"

2.20.3. "there are no bolts, rivets, screws, weld or glues that hold these units alongside one and the other. They are simply stropped below to bring one alongside the other where silicone [not glue] offers a weather proofing between both vehicles…"

2.20.4. "silicon is not a glue and is therefore not a connective component… when we move these units to new sites… we don't even cut the silicone bead because it simply pulls away when we release the strops to tow each unit away. As does the sticky back rubber membrane ["sill tape"] on the mono pitch roof between both mobile homes".

2.21. On 16 May 2024, the owner's consultant responded to the authority, noting that the owner has applied for a certificate of acceptance for the drainage work. They also stated:

> Notwithstanding our position that these are vehicles; even if a building has been inadvertently created [the authority has] not identified building work undertaken that required a building consent except for drainage that is now subject to a [certificate of acceptance]. It is well established principle that only building work undertaken by a current owner on site now can be subject to a NTF for the work they are responsible for…

3. Submissions

The owner

3.1. In addition to the correspondence sent to the authority, the owner submitted:

> The offence committed on site is not particularised.
>
> The council has not reissued a NTF [notice to fix] that reflects a current and continuing offence and required under s167.
>
> If [the authority] considered the situation correctly they would form one of two positions
>
> 1. They are dealing with vehicles (that not immovable) are not buildings or
>
> 2. They are dealing (in their view) with a building but to which no building work is/has been done on site that required a building consent (with exception of drainage that is subject to [certificate of acceptance] application).

> If either 1 or 2 applies then there is still no current or continuing offence under s40 to which a NTF could be considered. There is nothing to "fix". (because no building work has been done on site not covered by a CoA application)

3.2. The owner has made an application for a certificate of acceptance for the drainage, “which must alone justify a new NTF”.

The authority

3.3. With the application for determination, the authority submitted it considered whether the cottage came within the definition of a building under section 8(1)(b)(iii). The authority “confirmed that the [cottage] was for long term accommodation” and considered it to be immovable.

3.4. The authority noted that sewer and stormwater drainage systems were installed to the authority’s outfalls, with no building consent having been applied for in relation to that work.

4. Discussion

4.1. The matter for determination is the authority’s exercise of its power of decision in issuing the notice to fix. To decide this matter, I have considered:

4.1.1. whether the cottage is a building under the Act

4.1.2. whether building work was undertaken by the owner in contravention of section 40

4.1.3. the form and content of the notice.

Is the cottage a building under the Act?

4.2. The authority considers the cottage is a ‘building’, and that the owner carried out ‘building work’ for which building consent was required without such consent, in contravention of section 40.

4.3. The owner’s view is that the cottage is not a ‘building’ but rather it is two vehicles that are not immovable.

4.4. For the authority to issue the notice to fix for a contravention of section 40, the cottage must fall within the definition of ‘building’ under section 8 and not be excluded under section 9. Further, ‘building work’ as defined by section 7 must have taken place, and was carried out without building consent when consent was required.

4.5. Section 8 defines what ‘building’ means and includes in the Act:

> **8 Building: what it means and includes:**
> (1) In this Act, unless the context otherwise requires, building–
> (a) means a temporary or permanent movable or immovable structure (including a structure intended for occupation by people, animals, machinery, or chattels); and
> (b) includes – …
> (iii) a vehicle or motor vehicle (including a vehicle or motor vehicle as defined in section 2(1) of the Land Transport Act 1998) that is immovable and is occupied by people on a permanent or long-term basis; …

4.6. Section 9 defines what the term 'building' does not include. The cottage does not fall into any of the categories excluded from being a building in section 9.

4.7. The Court of Appeal set out the correct way to apply sections 8 and 9, in cases such as the present, in *Thames-Coromandel District Council v Te Puru Holiday Park Ltd* [2010] NZCA 633 ("*Te Puru (CA)*").

4.8. Previous determinations, such as 2022/018[7], have described the decision process that must be followed, including how the term 'vehicle' is defined, and I will not repeat that here.

4.9. The first question to consider is whether the cottage is a "vehicle or motor vehicle". In this matter, I have taken the approach used in *Te Puru (CA)*. The appeal was of a High Court judgment, which stated:

> [21] … Whatever the character of the units might be when separate, I do not see how, when linked together as a "duplex", they can be said to be a vehicle in terms of s 8(1)(b)(iii). … the locking together of two units to form a "duplex" has the effect of creating a new item that is distinguishable from the individual units of which it is comprised. Furthermore, I consider that it is this new single item, rather than its constituent parts, which falls for consideration under s 8(1)(b)(iii). Looked at in this way, I conclude, therefore, that the unit as it is sited on C22 cannot be a vehicle in terms of s 8(1)(b)(iii).[8]

4.10. The Court of Appeal stated:

> [31] It would have been wholly artificial to assess the duplex by its constituent parts. The evidence was clear that the units had been constructed of normal housing materials and had the internal layout of a small holiday home. The towbar for each unit had been removed. The duplex sat on concrete blocks and timber packers. Slatter screens had been installed between the floor and ground level and a removal deck had been added. The duplex was connected to power

[7] Determination 2022/018 *Regarding a notice to fix issued for a relocated unit* (5 October 2022), [4.13 – 4.21].

[8] *Te Puru Holiday Park Ltd v Thames Coromandel District Council HC Auckland* CRI-2008-419-25 (11 May 2009).

> and water. Wastewater pipes were plumbed into an inground facility. There was even a bay window and a ranchslider.
>
> [32] Judge Thomas and Duffy J were both correct in finding that the C22 duplex was a building within the general definition. …

4.11. In this case, the cottage has many of the same characteristics as the 'duplex' in *Te Puru (CA).* Its construction consists of many normal housing materials, and it has the internal layout of a small home. The towbars for each unit have been removed and the cottage sits on timber blocks. The cottage is connected to power and water, and waste and stormwater drainage systems have been installed (in this case to the authority's outfalls). It has ranch sliders and French doors.

4.12. Further, and critical to my decision, is that like in *Te Puru*, the cottage in this case is formed of two units that independently may fall within the definition of 'vehicle' (as submitted by the owner) but have been joined together to form a 'T-bone' shape or duplex. *Te Puru* (HC) is clear that this new, single 'item' or cottage, is what falls for consideration under section 8(1)(b)(iii) and the cottage in this case cannot be considered a vehicle. The Court of Appeal found "It would have been wholly artificial to assess the duplex by its constituent parts", and confirmed the duplex was a building under the general definition in section 8(1)(a).

4.13. I acknowledge the manufacturer has designed the units to limit the number of steps and time that would be necessary to 'de-link' the units and has used connections that are intended to be easily detached, such as strops/ratchet straps and sealant. However, I must follow the approach taken by the courts and assess the cottage as it presents. The units are clearly joined together creating the cottage, regardless of the fact that they are able to be detached. As such, I find that the cottage is a building under the general definition in section 8(1)(a).

Contravention of section 40

4.14. 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. In this case, the notice to fix has been issued to the owner, who is a specified person under section 163.[9]

4.15. The notice alleges a contravention of section 40. Section 40(1) provides that a person must not carry out any building work except in accordance with a building consent.

4.16. 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. To issue a notice to fix, an authority must

[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.

have enough information to identify building work and establish that it is not exempt from requiring building consent under Schedule 1. I note that the cottage does not fall under any of the categories of exempt building work in Schedule 1, including clauses 3A and 3B, as it is larger than 30m^2 and contains sanitary facilities, sleeping accommodation and cooking facilities.[10]

4.17. Building work is defined in section 7, and includes work "for, or in connection with, the construction, alteration, demolition, or removal of a building". As discussed in previous determinations,[11] relocation, on its own, is not building work in terms of the definitions of 'building work' and 'construct' in section 7. There must be work *in connection with the relocation* for it to be considered building work (eg connecting the building to foundations or services).[12]

4.18. In this case, it is clear that there was building work carried out onsite in connection with the cottage, and that work required a building consent. This included joining the units together into a T-bone shape using strops, silicone sealant on the internal and external corner flashings, and an adhesive rubber strip on the roof section and which created the cottage. It also included the waste and storm water disposal systems, which connect to the authority's outfall.

4.19. As this building work was undertaken without building consent when consent was required, there was a contravention of section 40 of the Act, and grounds to issue a notice to fix to the owner under section 164.

4.20. In regard to the consultant's submissions regarding the interpretation and application of sections 40 and the notice to fix provisions, I refer to Determination 2024/056.[13]

The form and content of the notice

4.21. Section 165 prescribes the form and content of a notice to fix. The prescribed form[14] for a notice to fix provides a space to insert the "particulars of contravention or non-compliance". Previous determinations[15] have discussed the requirement

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[10] The manufacturer's website states the 'Eco Cottage T-Bone' is 42.5m^2 (Our Tiny Houses - Eco Cottages, accessed 19/12/24).

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

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

[13] Determination 2024/056 *An authority's decision to issue a notice to fix in relation to building work at a residential property* (4 October 2024), at [4.7]-[4.33]. This determination is currently under appeal to the District Court.

[14] See Building (Forms) Regulations 2004, Form 13.

[15] For example, 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 [4.12-4.13].

that owners must be “fairly and fully” informed by the particulars in the notice to fix, so that they can address the identified issues.

4.22. In this case, under ‘Particulars of contravention or non-compliance’, the notice stated:

> Building work has been carried out without the required building consent. This includes the building (tiny home trailers which are connected and are not moveable) and the installation of an on site drainage system in breach of Sec 40 of the Building Act 2004.

4.23. As described previously, the individual units were constructed offsite by the manufacturer and relocated to the owner’s property. In my view, the notice is not sufficiently clear that it is the connection or joining of the units which is the building work carried out onsite by the owner in contravention of section 40, rather than the construction of the units themselves. I also consider that there is a lack of detail given in relation to the drainage.

4.24. As such, the notice did not adequately specify the “particulars of contravention or non-compliance” as required by the prescribed form. I consider a notice to fix must contain sufficient clear and specific details regarding the contravention, in this case a contravention of section 40 required a description of the building work and its requirement for building consent, to inform the recipient fairly and fully about the basis for the notice. The notice was not clear on the particulars of the contravention in respect of the building work carried out on site in contravention of section 40.

4.25. Regarding the remedies and timeframe, the notice stated:

> **To remedy the contravention or non-compliance you must**
>
> - Apply for a Certificate of Acceptance by **18/04/24** (any request for information (RFI) letters and rectification work must be completed within 28 days of any request) or
> - Remove the illegal building work by **18/04/24**.
>
> **This notice must be complied with by: 18/04/2024**

4.26. Section 165(1)(b) provides that a notice to fix must state a “reasonable timeframe” within which the notice must be complied with. The owner considers that the timeframe (one month) was inadequate. In my view, the timeframe was reasonable, as it provided sufficient time for the owner to either remove the building work or to apply for a certificate of acceptance.

4.27. The owner also considers that a certificate of acceptance cannot be “demanded”. Section 165(1)(c) states that if a notice to fix “relates to building work that is being or has been carried out without a building consent, it may require the making of an application for a certificate of acceptance for the work”. Therefore, applying for a certificate of acceptance is a lawful option to include as a remedy for a section 40 contravention.

4.28. However, in regard to the authority's requirement that any information requests or rectification work is completed within 28 days, I note that a notice to fix is not an appropriate place to manage timeframes for the certificate of acceptance process.

4.29. The owner has also argued that the authority unlawfully demanded they remove the building. However, the notice to fix did not state that the owner must remove the building; it was given as an option (as an alternative to applying for a certificate of acceptance). I note that removing the building work is a lawful option to include as a remedy for a section 40 contravention.

Section 167

4.30. Section 167 sets out the process regarding the inspection of building work that is required to be completed under a notice to fix.[16] The owner submitted a letter on 17 April 2024 in which they "formally [notified the authority] under s167 that the NTF has been complied with to the extent the law requires". The letter noted "this is on the basis that a CoA will be applied for in respect to drainage work…".

4.31. I do not consider the letter was a notification under section 167 that building work had been completed. The letter was disputing the grounds on which the notice had been issued and the form and content of the notice. Further, a certificate of acceptance application is not itself building work requiring notification and inspection under section 167. Therefore, section 167 does not apply.

[16] This process is described in detail in 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 [4.34-4.36].

5. Conclusion

5.1. The cottage is a building under section 8(1)(a). The onsite joining of the individual units and the connection to the authority's waste and storm water disposal systems was building work undertaken without building consent when consent was required. As such, there were grounds to issue the notice to fix to the owner under section 164.

5.2. However, the particulars of contravention were inadequate, as the notice did not clearly set out what building work was undertaken by the owner in contravention of section 40. Further, a notice to fix is not an appropriate place to manage timeframes for the certificate of acceptance process.

6. Decision

6.1. In accordance with section 188 of the Building Act 2004, I determine that there were grounds to issue notice NF0358. However, because the particulars of contravention were inadequate, I reverse the notice.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 28 February 2025.

Rebecca Mackie

PRINCIPAL ADVISOR DETERMINATIONS