



## Determination 2017/030

# Regarding two notices to fix issued in relation to a relocated house and shed at 38 Lomond Avenue, Tokoroa

### Summary

This determination concerns two notices to fix; one issued in relation to foundations and flooring constructed for a relocated shed without building consent, and the other for cladding installed to a relocated house. The determination discusses the scope of the building work covered by the building consent for the relocated house, the extent of compliance required by the Act, and whether the building work complies.

### 1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The parties to the determination are:
  - the owner of the house and property, R Hadlow, who is the applicant (“the applicant”)
  - South Waikato District Council carrying out its duties and functions as a territorial authority or a building consent authority (“the authority”)
- 1.3 I have included Waipa District Council as a person with an interest in this matter. Waipa District Council was the building consent authority of the district in which building work was carried out without a building consent first being obtained (refer paragraph 6.3).
- 1.4 This determination arises from a dispute between the parties concerning two notices to fix issued by the authority in relation to building work on a house and shed that were relocated onto the applicant’s property.
- 1.5 The matter to be determined<sup>2</sup> is the authority’s exercise of its power of decision in issuing the notices to fix. In making my decision, I must consider the code-compliance of the building work and the scope of the building consent granted by the authority in relation to it.
- 1.6 In making my decision, I have considered the application, the submissions of the parties, the report of the independent expert commissioned by the Ministry to advise on the dispute (“the expert”), and the other evidence in this matter.

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<sup>1</sup> The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at [www.building.govt.nz](http://www.building.govt.nz) or by contacting the Ministry on 0800 242 243.

<sup>2</sup> Under section 177(1)(b) and 177(2)(f) of the Act. In this determination, unless stated otherwise, all references to sections are to section of the Act and references to clauses are to clauses of the Building Code (First Schedule, Building Regulations 1992)

## 2. The building work

- 2.1 The property is located in a suburban area in Tokoroa. The eastern side of the property slopes up from the road to a flat platform covering approximately two-thirds of the property. The house is located to the rear (western side) of the property.
- 2.2 The applicant relocated the house to his property from a yard in Cambridge in May 2015. The house is estimated to be around 50 years old, and is single-storey, with a floor area of approximately 180m<sup>2</sup>. Originally the house was a simple rectangular shape, but at some stage an extension was added to its end, giving it an L-shape. The relocated house sits on timber piles, which were installed by a licenced building practitioner and which the authority has inspected and passed. The external wall framing for the house is constructed from a combination of Douglas fir and H1 treated pine.
- 2.3 The applicant has reclad the external walls of the house since he has owned it. The cladding used is a proprietary system of plywood external wall cladding. Around 70-80% of the recladding work was completed while the house was still in the yard of the removal company in Cambridge. The applicant installed the remainder of the external cladding once the house had been placed on its piles on his property.
- 2.4 Other building work that the applicant has completed on the house since it has been relocated includes the installation of two sets of second-hand exterior doors and one new aluminium window, and the replacement of three existing timber-framed windows with aluminium ones. The applicant has also built two new decks<sup>3</sup>, installed a kitchen and removed an internal wall. A new buried surface water drain has been installed from the house to the concrete footpath alongside the street. It has not yet been connected to gutters and downpipes on the house or to the authority's surface water system.
- 2.5 The applicant also relocated a shed onto his property. The shed was located in the middle of the property, on a flat area of land between the house and the fall to the road. This area was shown on the consented plans as the site of a 'proposed garage' measuring 6 x 7m. The shed measured 5.5 x 3.9m, giving a floor area of around 21m<sup>2</sup>, and stood 2.28 metres high at the apex of its roof. Its walls and roof were clad in zinc-coated profiled steel.
- 2.6 The shed was originally constructed as a garage, but at some point the original garage door opening has been enclosed with second-hand joinery (wooden double-doors and an aluminium full-height window) and an infill panel. After moving the shed onto his property, the applicant constructed a concrete slab foundation for it, and installed insulation and linings on the shed's internal walls and ceiling. None of this work has been approved or inspected by the authority. The applicant has advised that the shed was dismantled and removed in September 2016.

## 3. The background

### 3.1 The house prior to relocation

- 3.1.1 The applicant purchased the house sometime in 2013 from a house removal company in Cambridge. Photos provided by the applicant of the house at this stage show that nearly all of its external cladding had been removed, and the external walls were covered in synthetic building wrap to protect them from the weather. (The only area

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<sup>3</sup> The applicant disputes these are decks (refer paragraph 4.1.15).

where the original external cladding had not been removed was around a recessed door entrance, which has subsequently been filled in.)

- 3.1.2 The applicant states that, while the house was still located in the mover's yard in Cambridge, he removed the temporary wrapping and installed insulation, then building paper and the plywood wall cladding to approximately 70-80% of the external walls. I understand that this would have been sometime in December 2013 or January 2014. He advises that the reason he only completed part of the recladding work was because the house was not level, and had been cut so it could be transported.
- 3.1.3 The un-clad walls were those that would eventually become the eastern side of the house, and the southern end and western side of the extension, once it had been placed on its foundations on the applicant's property. I understand that when the house was shifted onto the property these walls were either still protected in places by building wrap or entirely unprotected. Other work that the applicant completed at this stage included the replacement of some of the existing timber windows with PVC-coated aluminium ones.
- 3.1.4 The applicant also advises that he contacted the authority in December 2013, before he began the work to insulate and reclad the house in the mover's yard, and was advised that he should approach Waipa District Council to inspect and approve this part of the building work, as it was occurring in that council's area. The authority agrees that it advised the applicant of this requirement (see paragraph 3.3.2). The applicant states that he then contacted the Waipa District Council about inspecting the building work, but this council declined to do so, on the grounds that the house was going to be moved to the authority's area and hence the proposed work was the authority's responsibility. The applicant went ahead with the insulation and recladding work without inspections or approval from either the authority or Waipa District Council.

## **3.2 The first inspection report**

- 3.2.1 On 24 January 2014, the applicant's house was inspected by a licensed building practitioner while it stood in the Cambridge yard. The licensed building practitioner provided a report dated 28 January 2014 ("the first inspection report"). The report commented on various aspects of the house's construction and condition. The comments that are relevant for the purposes of this determination are as follows:
- External cladding – confirmed that the original external wall cladding had been largely removed and replaced with the plywood wall cladding; one wall was identified as still unclad; the plywood cladding sheets had galvanised corner flashings, with some timber battens used over some sheet joints.
  - External wall framing – no cladding on external walls of bedrooms meant the backside of the internal linings and the framing had weathered.
  - Joinery – confirmed that some of the original joinery had been removed and replaced with aluminium joinery; noted that there was no air seal, head flashings, scribes or sealant in place around the aluminium joinery frames; some of the original timber sills and facings had 'moderate water damage'.
  - Roof – the house had no spouting or downpipes.

- Internal walls and insulation – some wall linings replaced with new plaster board; some wall insulation was visible where the internal linings were not in place, but the practitioner was unable to confirm the extent of the insulation.

### 3.3 The building consent application

3.3.1 On 4 February 2014, the applicant applied to the authority for a building consent. This was followed on 17 February 2014 by a ‘Building consent application checklist’.

3.3.2 By letter on 18 February 2014, the authority advised the applicant that the application for a building consent had not been accepted for processing because it lacked ‘important information’. This included information about the building work that the applicant had already completed on the house in relation to the external wall insulation and cladding. In this respect, the authority requested:

Please provide evidence from the [Council] where the building is currently sited that inspections of the reclad and installation of insulation was undertaken, one of [the authority’s] officers had previously advised you of this requirement.

The authority advised it could not consider the application until this information had been provided.

### 3.4 The second inspection report

3.4.1 On 6 November 2014, the applicant’s house was inspected in the Cambridge yard by a building inspection company. The building inspection company provided a report dated 10 November 2014 (“the second inspection report”). The report stated that the inspection had been conducted in accordance with NZS 4306:2005<sup>4</sup>, and that it was a visual inspection only and did not cover any ‘hidden or concealed defects’.

3.4.2 The second inspection report commented on various aspects of the house’s construction and condition. With respect to the external cladding it noted that:

As the building is to be re clad in its entirety to the [New Zealand Building Code], no comment is made to the condition of the existing cladding.

However, the cladding to be installed is [the plywood wall cladding]. The system is for a non cavity, as calculated by the NZS 3604 risk matrix.

At the final code compliance inspection, the cladding to be installed and the cladding presently fixed to the dwelling is to be applied to the structure as per the [the plywood wall cladding manufacturer’s] Specification & Installation Guide, June 2014.

3.4.3 Other comments made in the second inspection report that are relevant for the purposes of this determination are as follows:

- Exterior joinery – some exterior timber for the joinery is ‘in deteriorated condition’; ‘the exterior windows are a mixture of existing timber and retrofitted aluminium, they are in unfinished condition at the time of inspection’; unfinished flashing around one window; exterior doors ‘are not finished at the time of the inspection’.
- Roof cladding – deteriorated, recommended replacing.
- Soffits – deteriorated in areas.

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<sup>4</sup> Standards New Zealand. (2005). *NZS 4306:2005 Residential Property Inspection*.

- Internal wall linings and ceilings – in a deteriorated condition; ‘The internal reinstatement works are to be covered on the building consent for the relocation of the dwelling’.

3.4.4 On 14 November 2014, the applicant provided a copy of the second inspection report to the authority and re-submitted the building consent application checklist originally submitted in February 2014 (see paragraph 3.3).

### 3.5 The building consent

3.5.1 On 15 December 2014, the authority issued building consent No. 140456 for the building work, which was described in the consent as ‘RELOCATE 3 BEDROOM DWELLING TO SITE AND DO INTERNAL ALTERATIONS (OWNER BUILDER)’.

3.5.2 The approved plans for the consent are dated 14 January 2014. They include a site plan, which shows the location of the ‘proposed relocated residence’ and the ‘proposed garage 7mx6m’. The floor and demolition plans show the structural reconfigurations of the internal areas of the house and the location of the two new decks; while the section and elevation plans show that the external walls of the house are to have insulation and the plywood wall cladding.

3.5.3 Also stamped as forming part of the building consent documentation is an undated ‘statement of intent’, written on the authority’s letterhead and signed by the applicant (“the Statement of Intent”). It is unclear when this statement was drafted and signed, but the applicant recalls that it may have been when he visited the authority to pick up his building consent file. The relevant portions of the statement read:

STATEMENT OF INTENT BY [the applicant] TO COMPLETE ALL BUILDING WORK IN ACCORDANCE WITH THE APPROVED PLANS ATTACHED TO THE BUILDING CONSENT, AND THE ASSOCIATED DISTRICT PLAN RULES.

I [the applicant] hereby agree to:

1/ Reclad the dwelling in strict accordance with the manufacturers [sic] specifications as discussed at the pre-lodgement meeting, and as outlined in the [second inspection report] supplied to the [authority].

2/ Provide confirmation to [the authority] by a Licensed Building Practitioner (Builder), that the internal walls intended for removal are non load-bearing. This information to be supplied to [the authority] prior to any internal works commencing.

3/ Complete all other building work in accordance with the information added to the plans and specifications by [authority] staff, including insulation to floors and ceilings to satisfy District Plan requirements.

4/ Employ registered Plumbers/Drainlayers to perform all associated plumbing and drainage work.

3.5.4 Several other documents were stamped as forming part of the consent documentation. Those that are relevant to this determination include:

- the garage floor foundation and rebate details
- the second inspection report
- the manufacturer’s instructions for installing the plywood wall cladding as a cavity system.

3.5.5 The documents listed as attachments to the building consent included a site inspection sheet. I have been provided with a copy of a blank ‘Inspection Summary Form’ dated 12 June 2014 in relation to the applicant’s building consent. I am unclear whether this form is the attached site inspection sheet referred to in the

consent, or another authority document. The form lists four inspections as required in relation to the building consent: footings/foundation, pre-line building, pre-line plumbing/drainage, and final residential. The applicant claims that he was not provided with a copy of the site inspection sheet at the time he was issued with the building consent (see paragraph 3.7.3).

### **3.6 The shed**

3.6.1 Sometime in early 2015, an officer of the authority passing the applicant's property noted that the applicant had shifted a shed onto the property. I have not been provided with any information about when the shed was relocated, but assume it was also early in 2015. The officer took some photos of the shed, which show that at this stage it was standing on temporary blocks, in more or less its current position.

3.6.2 On 20 April 2015, an officer of the authority conducted a site visit at the applicant's property for the purpose of inspecting the shed. The officer noted that the shed had been placed on permanent concrete foundations.

3.6.3 On 23 April 2015, the authority sent a letter to the applicant advising that the shed was in breach of District Plan, that a building consent was required for the permanent foundations and this needed to occur within two months of the building being moved onto the site. The letter advised that if the matter was not rectified within 20 working days the authority may take enforcement action under the Resource Management Act 1991.

3.6.4 On 24 April 2015 the applicant emailed the authority about the number and order of the inspections required in the respect of the building consent. The authority replied in an email dated 29 April 2015, listing the inspections required for the house as follows:

- Foundation – pile holes prior to concrete being poured
- Framing – proper to building wrap being fitted to walls, and insulation if fitted from exterior
- Preclad – when wall wrap has been fitted
- Preline plumbing – all sanitary plumbing and water supply pipe-work
- Preline building – insulation if fitted from interior
- Drainage – connection to sewerage system
- Final.

The email noted that further inspections may be required once other aspects of the building work had been finalised (for example, in relation to the proposed removal of internal walls, or if any structural wall or roof framing was removed or altered). The authority advised that for the garage an inspection would be required when the slab was ready to pour, and the remaining inspections confirmed once the authority received the plans and specifications.

3.6.5 On 4 May 2015, the authority conducted a further site visit at the applicant's property.

3.6.6 On 5 May 2015, the authority issued Notice to Fix NF0097 (“the first notice to fix”) in respect of building consent No. 140456 and the applicant's shed. The notice gave the following particulars of non-compliance:

**Particulars of non-compliance**

Following an inspection dated 04/05/2015 11:00am of the above premises by [officers of the authority], I can confirm that we observed the construction of a floor and resite of a building that had been undertaken not in accordance with your current building consent.

Section 40(1) of the Building Act 2004 states:

*A person must not carry out any building work except in accordance with a building consent.*

To remedy the non-compliance you must:

1. Remove the floor and make amendment to the existing building consent by providing foundation/floor slab details, elevations and photos.
2. Should [the authority] be satisfied that the amended work complies then we shall expect to be notified and undertake a foundation inspection in due course.

This notice must be complied with by: 5/06/2014

**3.7 The relocated house**

- 3.7.1 The applicant has stated that the house was moved onto his property on 19 May 2015.
- 3.7.2 On 21 May 2015, the authority conducted a site inspection of the siting and foundations for the house. The foundations, installed by a licensed building practitioner, passed the inspection. It appears that the officer could not find the inspection record sheet relating to the building consent on the day of the inspection, so instead recorded his inspection notes on the back of the consented plans. He subsequently completed a second 'Inspection Checklist' on the authority's form later that day. The two inspection records are essentially the same, although the notes recorded on the plans state 'New Bearers to be fitted' (while the inspection checklist does not) and the inspection checklist states 'NOTE: Amended plans to come for changes to the pile layout, prior to signing project off' (while the notes recorded on the plans do not). This inspection is the only one that the authority has carried out of the building work to date.
- 3.7.3 On 27 May 2015, an officer of the authority conducted a further site visit at which he noted that the applicant was doing some work on the unclad eastern wall of the house. The authority states that, at this visit, the officer discussed with the applicant the contents of his Statement of Intent (see paragraph 3.5.3), and advised him that he was obliged to call for a pre-line inspection before the cladding was installed. The applicant states that at this inspection he was supplied with a copy of the site inspection sheet, listing the inspections required. I understand that after this the applicant continued installing the plywood cladding to the external walls; which the applicant states was because it was raining and he wished to avoid further weather damage to the house.

**3.8 The notices to fix**

- 3.8.1 On 9 June 2015, the authority re-issued the first notice to fix, as the applicant had not taken any action in relation to it.
- 3.8.2 On 12 June 2015, the authority conducted a further site visit at the applicant's property.

- 3.8.3 On 15 June 2015, the authority issued Notice to Fix NF0098 (“the second notice to fix”) in respect of building consent No. 140456 and the applicant’s house. The notice gave the following particulars of non-compliance:

**Particulars of non-compliance**

Following an inspection dated 12/06/2015 2:30pm of the above premises by [officers of the authority], I can confirm that we observed cladding that had been fixed without first calling for an inspection of the framing and/or building wrap. This work is not in accordance with your current building consent.

Section 40(1) of the Building Act 2004 states:

*A person must not carry out any building work except in accordance with a building consent.*

To remedy the non-compliance you must:

1. Remove the cladding and notify [the authority] in preparation for a framing inspection.

This notice must be complied with by: 14/07/2015

- 3.8.4 On 17 July 2015, the authority re-issued the second notice to fix, as the applicant had not taken any action in relation to it.
- 3.8.5 On 24 June 2015, the authority issued a formal warning to the applicant under the Resource Management Act 1991 requesting the removal of the shed from his property.
- 3.8.6 On 4 August 2015, the applicant advised the authority that he was seeking advice from the Ministry about the notice to fix relating to the shed. The authority responded on 5 August 2015 that it would take no enforcement action until the end of August to allow this to occur.
- 3.8.7 The applicant subsequently emailed the Ministry about the possibility of his shed being exempt from the requirement for a building consent under Schedule 1 of the Act. The Ministry provided the applicant with informal advice relating to this, and other matters relating to the current dispute. The Ministry advised the applicant that he could apply for a determination if he was unable to reach agreement with the authority about these matters.
- 3.8.8 On 5 November 2015, following a meeting of its Decision Enforcement Group, the authority reissued the notices to fix (NF0097 and NF0098) as the applicant had taken no steps to comply with them.
- 3.8.9 I note here that the applicant has advised that the shed had been dismantled and removed in September 2016 (refer paragraph 4.1.12).

## **4. The submissions**

### **4.1 The applicant’s submissions**

- 4.1.1 The applicant applied for a determination, and this was received by the Ministry on 20 November 2015.
- 4.1.2 The applicant made a submission, in an email dated 20 November 2015 accompanying his application for a determination. In this email he states:

My Position in simple terms is:

1. NF0097 is inappropriate as it has been issued under Consent no. 140456. and is NOT part of the building works of this consent;



This is an existing Builders Shed moved onto the site before the house arrived and as such is exempted under the act.

2. NF0098 is inappropriate as it has been issued under Consent No. 140456 and is not part of the building works of this consent.

The requirement demanded “to inspect the framing and remove ALL the cladding” to do so, for an existing building is NOT part of my consented building works.

- 4.1.3 The applicant subsequently made numerous other submissions in emails and other correspondence with the Ministry, including in response to the expert’s report and in response to a draft of this determination. These submissions, and their various attachments, are listed in Appendix B. The contextual information in these submissions has been included where appropriate in the background section of this determination (see paragraph 3). I have summarised the main points from these submissions as follows.

***The house***

- 4.1.4 The applicant discussed his plan to buy an unclad removal house with the authority before he purchased it. The authority advised him that he would need to obtain a building report on the house, and provided a list of licenced building practitioners in the Tokoroa area. The author of the first inspection report came from this list. The authority subsequently advised it would not accept this report and required another: the second inspection report. The applicant submits that there is no requirement under the Act to provide ‘a building report for a resite home and...no one can demand it as a requirement’.
- 4.1.5 The applicant attached a ‘Cladding to Finish Plan’ to his application for a project information memorandum. The plan was produced at the authority’s request to ‘show the extent of the cladding that was to be undertaken when the house was onsite’ on the applicant’s property. The building consent was based on the plan and ‘agrees’ that cladding only had to be done on certain walls, as shown in the plan.
- 4.1.6 The Statement of Intent signed by the applicant related to the Cladding to Finish Plan. It was signed at the authority’s insistence, and did not form part of the building consent documentation.
- 4.1.7 The Notice to Fix in relation to the house states that the authority wishes to view the framing, but this was not necessary as it was an existing house. The two inspection reports both show there was nothing wrong with the framing. The applicant offered to remove a cladding sheet so the authority can view the framing, but the authority insisted that all the cladding needed to be removed.
- 4.1.8 The applicant was never provided with the original site inspection sheet, either with the building consent or when he subsequently requested it. He did not request for the sheet to be amended. He was given an amended version of the sheet at the site inspection on 27 May 2015. The applicant did not call for inspections because he did not know when he needed to. The applicant is of the view that the authority ‘knowingly withheld’ the inspection sheet to ‘injure’ the applicant, hold up the project and bring the builder’s shed within the scope of the building consent.
- 4.1.9 The recladding of the house, including installation of insulation and wrap, occurred in the yard in Cambridge prior to relocation; the only cladding work that was carried out after the house arrived on site was to the East wall, and this work was consented. Both Waipa District Council and the authority refused to inspect the cladding work carried out at the yard.

### ***The shed***

- 4.1.10 The shed was always to be used as a builder's shed, and the authority was advised of this before it was purchased and moved onto the property. It was a temporary building used for storing equipment, and machining timber and joinery used for constructing the applicant's house. It is not the proposed garage shown in the consented plans, or a sleep-out, and does not form part of the building consent. It is exempt under Schedule 1 of the Act from the requirement to obtain building consent. As such, the first notice to fix does not apply.
- 4.1.11 The 'proposed garage' was never intended to be part of the consent and was only shown on the consented plans at the authority's insistence. References to the garage on the authority's internal Master Processing Checklist have been added at a later date to 'confuse and muddy the water'. The authority has subsequently 'altered, withheld, lost and added to' pre-consent documents to try and bring the shed within the scope of the building consent.
- 4.1.12 On 21 April 2017 the applicant advised that the shed was dismantled and removed in September 2016.

### ***Other matters***

- 4.1.13 The authority's internal Master Processing Checklist has had comments 'added at a much later date' in order to 'prove something after the event'.
- 4.1.14 The Ministry's expert site visit and report should have restricted to 'the legality of the Notices to Fixes' and should not have been a 'full building report'.
- 4.1.15 The applicant disputed a number of things in the expert's report, including: references to 'decks' – which the applicant contends were a landing and 'temporary platform' to work from; the compliance of cladding with the manufacturer's details; and the need for an amendment to the consent for the internal walls and kitchen installation. The applicant advised he would apply for a minor variation in respect of the additional kitchen window.

## **4.2 The authority's submission**

- 4.2.1 The authority made a submission dated 23 February 2016. The authority also made other submissions in emails and other correspondence with the Ministry. These submissions, and their various attachments, are listed in Appendix B.
- 4.2.2 The main points from the authority's submissions are summarised as follows:
- The authority issued the notices to fix 'following failure of the applicant to follow any statutory requirement once the building consent was obtained and as a recourse to stimulate compliance'.
  - Building work has been undertaken that is not in accordance with the building consent and contravenes section 40(1) of the Act.
  - The original site inspection sheet went missing after it was posted to the applicant and was amended at his request.
  - The authority made very clear to the applicant, before the building consent was issued, that the whole house was to be reclad in accordance with the manufacturer's specifications. The Cladding to Finish Plan was replaced in the consent documentation with the full manufacturer's specifications for the plywood wall cladding. It was explained to the applicant at lodgement that 'finishing' the cladding was not sufficient, and he agreed to completely reclad

the house, and ‘subsequently signed a statement of intent to indicate his agreement to comply with that requirement’.

...the signed statement of intent by [the applicant] proves that he understood fully what details were included in his Consent documents, and this was explained to him in lengthy detail. The “Cladding to finish plan x 2” became a full [plywood wall cladding] specification before the Building Consent was issued.

## **5. The expert’s report**

- 5.1 As mentioned in paragraph 1.6, I engaged an expert to assist me with this determination. The expert carried out a site visit on 25 May 2016, and provided a report dated 14 July 2016. The parties were provided with a copy of the report on 2 August 2016.
- 5.2 The expert based his report on his observance of the internal and external features of the applicant’s house and shed, and invasive tests of the moisture content of the external wall framing at selected locations. He also referred to the documents supplied by the parties as part of this determination process, and industry publications, including New Zealand Standards and manufacturer’s information for products used in the building work.
- 5.3 The expert described the applicant’s property, house and shed, and the building work that the applicant completed on these buildings, both before and after they were relocated to his property. The expert gave an opinion about the code-compliance of various aspects of this building work, the application of various provisions in the Act in the current case, and provided potential options for resolving the matter.
- 5.4 I have referred to the specific content of the expert’s report where relevant in the discussion section of this determination (see paragraph 6).

## **6. Discussion**

### **6.1 General**

- 6.1.1 The applicant has applied for a determination about the two notices to fix issued by the authority in relation to building work on his property. The applicant’s view is that the notices to fix are ‘inappropriate’ as they are stated to be in relation to Building Consent No. 140456 and the building work they relate to does not, in his opinion, form part of that consent.
- 6.1.2 The applicant further states that the building work relating to the shed is exempt from the requirement for a building consent under Schedule 1(4); and that the building work for the house cladding is part of ‘an existing building’ and not part of the consented building works.
- 6.1.3 As stated in paragraph 1.5, in order to determine this matter I must also consider the code-compliance of the building work and the scope of the building consent granted by the authority in relation to it. The parties’ submissions, including the evidence submitted, have raised many issues and perspectives relating to these matters.
- 6.1.4 In particular, the parties have expressed differing opinions as to what building work was intended to be covered by Building Consent No. 140456, and the degree of compliance required for this work and other building work carried out by the applicant in order for it to comply with both the Building Code and the Act. I will now consider each of these matters in turn.

6.1.5 I will look first at matters concerning the building work on the applicant's house.

## **6.2 The extent of the external cladding work to the house covered by the building consent**

6.2.1 A substantive issue, and cause for disagreement, between the parties is the extent of the building work to replace the external cladding on the applicant's house that was intended to be covered by the building consent. The applicant states that the building consent only related to the portion of the external cladding that he affixed once the house was onsite on his property. The authority contends that all of the external cladding was covered and that it was made clear to the applicant that he was to reclad the entire house in accordance with the manufacturer's specifications.

6.2.2 This issue has arisen because the building consent is not clear about the scope of the works it encompasses, in particular the status of the work completed by the applicant while the house was in the yard in Cambridge. This lack of clarity has been a major cause of the dispute between the parties.

6.2.3 Looking at the consent documents, I note that the applicant's original building consent application in February 2014 included a copy of the Cladding to Finish Plan and the first inspection report, which stated that the house had already been partially reclad. The description of the cladding given in this first inspection report accords with the cladding work that the applicant states he completed in the removal company's yard before he applied for a building consent. However, this application was not accepted by the authority and the applicant was required to provide further information, including evidence that Waipa District Council had inspected the external wall insulation and cladding work.

6.2.4 The building consent, when issued, was described as being for the relocation of a three bedroom dwelling and internal alterations. The consent documents include copies of plans, and the second inspection report (but not the first). The consented plans have no annotation for any cladding to the 'Existing elevations' (plan 6), the "Proposed elevations" (plan 7) show 12.5mm plywood cladding to all elevations.

6.2.5 The second inspection report states on the one hand that 'the building is to be re clad in its entirety', and on the other that 'At the final code compliance inspection, the cladding to be installed and the cladding presently fixed to the dwelling is to be applied to the structure as per the [manufacturer's specifications]'.

6.2.6 The authority's master processing checklist for the issue of the building consent refers to the Statement of Intent as forming one of the conditions for the Building Consent. In this statement, the applicant agrees to 'Reclad the dwelling in strict accordance with manufacturers specifications as discussed at the pre-lodgement meeting, and as outlined in the [second inspection report].' The authority submits that this agreement to reclad applied to the entire dwelling. The applicant asserts that it related only to the unclad portions of the house, as shown in the Cladding to Finish Plan.

6.2.7 In my opinion, none of these documents shows decisively how much of the house was to be reclad under the building consent. Although the authority was clear in its letter of 18 February 2014 that the applicant would need to provide evidence that the already-completed insulation and cladding work had been inspected and approved by Waipa District Council, it appears to have forgotten about this requirement, as the building consent was issued without this evidence being provided.

- 6.2.8 The photos that form part of the second inspection report, which was accepted by the authority as part of the consent documentation, makes clear that the external cladding was still essentially the same at that inspection as it had been at the time of the first inspection report. The wording of the report reinforces the ambiguity around whether this cladding was to be retained or replaced.
- 6.2.9 In my opinion, if the authority intended that the applicant must completely reclad the house once it arrived on site, this needed to be spelled out in the consent documentation. In particular, the consent itself should have specified that the building was to be totally reclad. The authority was aware that the applicant had already reclad the majority of his house before he moved it onto the site. The authority relies on the Statement of Intent as demonstrating that the applicant accepted the requirement that this work would have to be redone. However, the statement is not itself clear.
- 6.2.10 In the absence of a clear indication to the contrary in the documentation, I consider that the building work covered by the building consent is limited to that required to relocate the house and complete internal renovations and includes cladding any remaining unclad portions of the house. Given that the house was already largely clad when it arrived on site, it would not in my opinion, include redoing this cladding.
- 6.2.11 The outcome of this is that the external cladding completed by the applicant at the removal company's yard forms part of the existing building in terms of the building as it arrived on the applicant's site and within the authority's district and hence jurisdiction. I discuss the significance of this further in paragraph 6.4.

### **6.3 The status of the building work completed at the yard**

- 6.3.1 Even though I have determined that the external cladding work completed at the removal yard did not form part of the consented works, it is still clearly building work within the meaning of the Act, and was work for which a building consent was required.
- 6.3.2 Under Section 40(1) of the Act, a person must not carry out any building work except in accordance with a building consent. Sections 41 and 42 state that there are exceptions to this, notably when one of the exemptions in Schedule 1 of the Act apply. In his report, the expert has discussed the possibility that one of these exemptions may apply.
- 6.3.3 In the current case, the potential exemption would be under Clauses 1(1) and 1(2) of Schedule 1. These relate, respectively, to the repair and maintenance, and the replacement, of any component or assembly incorporated in or associated with a building. In my opinion, the building work completed at the removal yard does not fall within either of these exemptions, for several reasons.
- 6.3.4 Both Clauses 1(1) and 1(2) require that a 'comparable component or assembly is used'. In the current case, the house was originally clad with asbestos tiles, which at some point had been removed, and the new cladding is plywood sheets. These two cladding systems cannot be considered comparable. In addition, the house was completely unclad before the recladding work began, so the building work cannot be viewed as maintenance or repair.
- 6.3.5 For these reasons, I do not consider that the building work came within the categories of exempt building work set out in Schedule 1, and that it was therefore completed without a building consent when consent was required under Section 40.

- 6.3.6 I note here that the possibility has also been raised in the applicant's correspondence with the Ministry that because Waipa District Council was approached about inspecting the house and declined to do so, this could be taken as its exercising its discretion under Schedule 1(2). I do not agree that this is the case.
- 6.3.7 From my understanding of events, Waipa District Council declined to inspect the building work because it considered that as the house would ultimately be leaving its area this was not its responsibility. The council did not inspect or otherwise view any documentation that would have allowed it to exercise its judgement about code-compliance or safety, as is required when an authority exercises its discretion under Schedule 1(2).
- 6.3.8 In my opinion, as the building work that was carried out in the removal yard was to a building that was to be relocated, the building consent application submitted to the authority (i.e. South Waikato District Council as the BCA in the area where the final building site is located) should have included the recladding work that was intended to be carried out in the removal yard, and the application submitted prior to the undertaking of that building work. The authority would have then had the option to contract Waipa District Council to carry out inspections of the building work undertaken in the removal yard.

#### **6.4 The extent of compliance required by the Act**

- 6.4.1 Section 17 of the Act states that all building work must comply with the Building Code to the extent required by the Act. This is the case whether or not a building consent is required for the building work: it must still comply.
- 6.4.2 Section 112 governs situations where the building work relates to an alteration to an existing building (which includes maintenance and repairs). This section has been considered in the courts and in numerous previous determinations, and its meaning is now well established. In essence, the section sets out the degree of compliance required from the existing building after the alterations. With respect to certain provisions (relating to means of escape from fire, and access and facilities for people with disabilities), the altered building must comply 'as nearly as reasonably practicable' with the Building Code. In all other respects, the altered building must continue to comply with the Building Code to the same extent that it did before the alterations. That is, the alterations cannot diminish the existing building's compliance.
- 6.4.3 As discussed in paragraph 6.2.11, in my opinion the existing building, in relation to the matter being considered in this determination, is taken to mean the house as it arrived on site, and includes the building work already completed by the applicant in the removal yard. And the "alterations" is the building work that was carried out after the house arrived on the site. The significance of this in relation to sections 17 and 112 is that while the work on the external cladding completed on the applicant's property would be new building work, and as such must comply fully with the Building Code, with respect to the balance of the cladding, the Act only requires that it continues to comply to the same extent that it did before the alterations occurred.
- 6.4.4 I note, however, that this distinction is only relevant when viewed in terms of the building work for which the authority is responsible. The authority cannot require that the existing cladding be brought into compliance if it has not previously achieved this. It can only require that any degree of compliance that the cladding already had is not reduced. However, the original recladding work completed in the

removal company's yard still needed to comply with the Building Code; it was new building work and so needed to fully comply.

## 6.5 The code-compliance of the building work

- 6.5.1 I will now consider the code-compliance of the building work on the applicant's house. This was considered in depth by the expert in his report, and I concur with his assessment.
- 6.5.2 Looking first at the external cladding, I consider it clear that this does not comply with the relevant provisions of the Building Code. In the building consent documents the applicant cited the Acceptable Solution as the means of compliance with Clause E2 External moisture. However, the plywood wall cladding system installed by the applicant is an alternative solution.
- 6.5.3 The manufacturer's specifications for the plywood wall cladding formed part of the consent documentation. As such, the cladding needed to be installed in accordance with the specifications in order to achieve compliance with the consent. This has not been achieved, in particular in relation to how the cladding is installed (including the corner flashings) and fixed (including the depth of the fixings, and their placement at the top and bottom of the cladding sheets), and the junctions between the cladding and the joinery (including the sill and head flashings). I note that the cladding also does not comply with E2/AS1 in relation to fixings and joints for external plywood cladding.
- 6.5.4 It is important to note that this assessment of compliance applies both to the consented works on the cladding, and those that occurred before the consent was issued. In my opinion, neither complies with Clauses E2 and B2 of the Building Code.
- 6.5.5 Turning now to the other aspects of compliance of the building work, I again concur with the expert's assessment. The table below summarises the various aspects of the building work that the expert found to be either incomplete or non-compliant.

Aspect of building work	Expert's comment
Internal walls and kitchen	Included in building consent. Wall has been removed between bedroom and lounge, and a kitchen has been installed. No inspections called for. Minor amendment required where work does not follow consent drawings.
Decks	Consent documents lack detail, but indicate NZS3604 as means of compliance. Neither deck has been built in accordance with the Standard. North deck is considerably higher than a metre, so does not comply with Clause F4 Safety from falling. North deck lacks bracing and lateral resistance. Structure is also substandard (posts, connections, bearers, joists). South deck lacks permanent foundations, and is hard up against the cladding. Both decks are larger than shown on plans. Both decks are unlikely to comply with Clause B1 Structure. South deck will not comply with Clause B2 Durability (re connections between posts and bearers).
Joinery – replacements	No consent required under Schedule 1, but must still comply with Building Code. Window lacks head flashing, and sill flashings, in accordance with the manufacturer's specifications.
Joinery – new	New doors – openings were not inspected, but should have been. One door lacks sill flashings, and sill has got fungal decay. New PVC windows – one window not shown on plans: minor amendment required. Installation may have ramifications for bracing of wall. No inspections called for. Sill flashings on all windows appear inadequate and do not comply with acceptable solution E2/AS1 or the manufacturer's

	specification for the plywood wall cladding.
Gutter and downpipes	Installed, but not yet connected to stormwater disposal system.

## 6.6 The second notice to fix

- 6.6.1 The authority issued the second notice to fix (NF0098) in respect of the external cladding (see paragraph 3.8.3). The notice states that the ‘cladding had been fixed without first calling for an inspection of the framing and/or building wrap’ and was not in accordance with the building consent. The notice directed that to remedy the non-compliance the applicant must remove the cladding in preparation for a framing inspection.
- 6.6.2 The notice to fix does not specify the extent of the cladding that it relates to: that is, all of the cladding or only the cladding that was installed on site. However, the applicant has stated that he was subsequently advised by an officer of the authority that he had to remove all the cladding, and the authority has submitted that all of the house was to be reclad under the building consent. Accordingly, I take the second notice to fix to apply to all the external cladding.
- 6.6.3 The applicant has objected to the notice to fix on the grounds that the authority has no reason to inspect the framing for an existing house. The applicant is correct that in terms of section 112, the external wall framing would form part of the existing house. However, the applicant has elected to direct fix the plywood wall cladding, rather than installing it over a cavity. This means that the wall framing that the cladding will be fixed to forms an integral part of the cladding assembly, and the authority is correct to require it to be inspected to ensure that it will continue to comply with the durability provisions of the Building Code. This inspection would be even more important in light of the observation in the second inspection report that the exposed framing had weathered.
- 6.6.4 Section 164 of the Act sets out the circumstances in which a responsible authority can issue a notice to fix. Section 166 elaborates on this in situations where a building consent authority has granted a building consent for building work, and considers that it is not being carried out in accordance with the Act or the building consent. This is the situation that applies here, and it is clear that the authority was entitled to issue a notice to fix under section 164 if it considered that the applicant was not carrying out the work in relation to the external cladding either in accordance with the building consent, or in compliance with the Building Code, or both.
- 6.6.5 The question therefore becomes whether the scope of the notice to fix is correct. As noted in paragraph 6.6.2, the notice itself does not expressly define the extent of the cladding it applies to. However, the context makes clear it was intended to apply to all the external cladding on the house. As I have found that the cladding work covered by the building consent is restricted to the ‘new’ work that occurred after the applicant’s house arrived on site (see paragraph 6.3); and as I have further found that with respect to the balance of the cladding that was installed while the house was in the removal company’s yard the extent of compliance is as defined by section 112 and it need only continue to comply to the same extent as before the alterations, then it becomes apparent that the authority’s intention to extend the notice to fix to all of the external cladding is erroneous.



- 6.6.6 Put another way, with respect to non-compliance with the building consent, in this case the authority can only issue a notice to fix for work covered by that consent; that is the cladding completed on site. With respect to non-compliance with the Act, in this case the authority can only issue the notice to fix in relation to the existing house (including the already completed cladding), as it arrived within its district if the effect of the alterations is to lessen the existing building's compliance.
- 6.6.7 There is, however, another subsection that is relevant in the current case. Section 164(3) applies in situations where a responsible authority considers that another authority should issue a notice to fix:
- 164 Issue of notice to fix**
- (3) However, if a responsible authority considers that it is more appropriate for another responsible authority to issue the notice to fix, it must—
- (a) notify the other authority that it holds that view; and
- (b) give the other authority the reasons for that view.
- (4) The other responsible authority referred to in subsection (3) must issue the notice to fix if it considers that this section applies.
- 6.6.8 In my opinion, the provisions in subsection 164(3) and (4) apply in the current case. As stated in paragraph 6.5, I do not consider that the external cladding installed on the applicant's house complies with Clauses E2 and B2 the Building Code in several important regards. This assessment applies to both the cladding installed in the removal yard, and to that subsequently applied onsite. The latter work also did not comply with the consent it was completed under.
- 6.6.9 A notice to fix need not be issued pursuant to a building consent; under section 164 it can be issued because a specified person is failing to comply with the Act. This includes the requirement in section 17 of the Act for all building work to comply with the Building Code. It follows that if the building work completed in the removal company's yard does not comply with the Building Code, then a notice to fix can be issued in respect of it.
- 6.6.10 The responsible authority for issuing a notice to fix is generally the one in the district in which the building work has been carried out. When the building work was undertaken in the removal company's yard, the responsible authority was the Waipa District Council. However, in this case the building has been moved to another district and the Waipa District Council is not afforded the opportunity to inspect the completed building work for compliance.
- 6.6.11 I am therefore of the view therefore that it is for the Waipa District Council to notify the authority that it would be the more appropriate responsible authority to issue the notice to fix in this case. It is for Waipa District Council to decide if it wishes to take action in respect of the section 40 breach.

## **6.7 The application of section 96**

- 6.7.1 The expert raised the possibility of the applicant applying for a certificate of acceptance for the portion of the cladding work that was carried out without a building consent. However, as I have concluded that the external cladding work does not comply with the Building Code, this option is not available to the applicant.
- 6.7.2 Section 96(2) requires that, before it can issue a certificate of acceptance, a territorial authority must first be satisfied 'to the best of its knowledge and belief and on reasonable grounds' that building work complies with the Building Code. That

cannot be the case here. A certificate of acceptance cannot be issued for non-compliant work. I note that remedial work to the cladding can be addressed in the open consent.

## **6.8 The shed**

6.8.1 Turning now to the building work in relation to the applicant's shed to which the first notice to fix (NF0097) relates. It states that the shed's relocation to the applicant's property and the construction of its floor have not been undertaken in accordance with the building consent, and requires the applicant remove the floor and apply for an amendment to the building consent. The applicant has objected to the notice to fix on the grounds that it has been issued in relation to Building Consent No. 140456 and the shed is not part of the building works for this consent.

6.8.2 The applicant's building consent does make provision for a proposed garage at the site where the shed was located, although the consented plans and related documentation make it clear that the details for this are yet to be provided. The applicant has submitted that he never intended to construct the garage, and that it was only included in the plans at the authority's insistence.

6.8.3 I accept the applicant's submission that the shed is not an altered form of the consented garage, but a separate building in its own right. As such, the notice to fix should not have been issued in respect of the building consent, or required the consent to be amended to show the shed.

6.8.4 This does not mean, however, that the authority should not have issued a notice to fix in relation to the shed at all. The applicant's actions in relocating the shed on to his property, constructing the floor, and insulating and lining the ceiling and walls are all building work, and as discussed in paragraph 6.3.2, section 40 of the Act requires that buildings must not be constructed or altered without a building consent.

6.8.5 The applicant has submitted that the shed is exempt from the requirement for a building consent under Clause 4 of Schedule 1 of the Act, which relates to unoccupied detached buildings. The clause reads:

### **4 Unoccupied detached buildings**

(1) Building work in connection with any detached building that—

(c) is used only by people engaged in building work—

(i) in relation to another building; and

(ii) for which a building consent is required.

(2) However, subclause (1) does not include building work in connection with a building that is closer than the measure of its own height to any residential building or to any legal boundary.

6.8.6 The applicant submits that his shed is a builder's shed, used for storing equipment, and machining timber and joinery used in the construction of his house. He submits that this makes it exempt under Clause 4(1).

6.8.7 The success of the applicant's submission depends upon the use to which the shed is to be put. In considering this, I must take into account not only the current use, but also any reasonably foreseeable occasional use to which the shed may be put. In this regard, I consider the building work that the applicant carried out on the shed is material. The applicant placed the shed on a permanent concrete floor, and fully insulated and lined the shed's interior. This to me is not consistent with a temporary structure used in association with the construction of the house. Instead, it indicates

to me that the shed was intended to be used as a permanent structure that in future may be put to other uses, perhaps as a garage, storage shed or sleep-out.

- 6.8.8 Such uses do not come within the Clause 4 exemption, and requires a building consent for the building work associated with the building. It is noted that Clause 1(3) of Schedule 1 allows the replacement of any component or assembly that is not otherwise the complete or substantial replacement of any component or assembly contributing to the building's structural behaviour, etc.
- 6.8.9 No building consent was applied for or issued in relation to the applicant's shed, yet the shed was not exempt and building consent was required. Therefore, the authority was entitled to issue a notice to fix in relation to it.
- 6.8.10 In addition, as discussed in relation to the applicant's house, irrespective of whether building consent is required or obtained, under section 17 all building work must comply with the Building Code to the extent required by the Act.
- 6.8.11 In his report, the expert considered the code-compliance of the shed and concluded that it did not comply with the Building Code in several important regards, and in the draft of this determination issued to the parties on 31 October 2016 I stated that I agree with the expert's assessment and listed the items of non-compliance and concern.
- 6.8.12 I note here that in a submission dated 17 April 2017, the applicant advised that the shed was dismantled and removed from the site. I therefore make no determination as to the compliance of the building work relating to the shed.

## **6.9 Conclusions in respect of the notices to fix**

- 6.9.1 With respect to the first notice to fix (NF0097), I conclude that the authority incorrectly issued the notice to fix as being in relation to Building Consent No. 140456, as the building work in relation to the shed did not form part of that consent.
- 6.9.2 However, I consider that the authority was correct to issue a notice to fix for the building work, as it was undertaken without a building consent when consent was required.
- 6.9.3 With respect to the second notice to fix (NF0098), I conclude that the authority correctly issued this notice, as the building work was not undertaken in compliance with the building consent or with the Act.
- 6.9.4 However, I note that the scope of the building work is not specified in the notice, and the authority has subsequently over-stated the building work to which it applies. The authority may choose to reissue the notice to provide certainty around the work that it applies to.

## **6.10 Other matters**

- 6.10.1 The applicant has raised several other matters, mainly in relation to the authority's documentation. It was not necessary for me to consider these matters in deciding this determination. However, for completeness, I will discuss them briefly here.
- 6.10.2 Confusion has arisen in the current case in part due to difficulties in locating the site inspection sheet. The parties disagree as to whether this was provided with the building consent. In any event, a copy was supplied to the applicant at the site inspection on 27 May 2015 and the authority confirmed the required inspections in correspondence to the applicant on 29 April 2015. The authority is correct that it is

the applicant's responsibility to call for inspections; however, the authority also has responsibilities under the Act and its associated regulations in relation to how it carries out inspections. This includes an obligation under Clause 7(2)(a) of the *Building (Accreditation of Building Consent Authorities) Regulations 2006* to provide information to people who are applying for building consents about how building work will be inspected. That the order and nature of the required inspections in the current case has not been particularly clear is apparent on the facts. For example, the 'Inspection Summary Form' for the applicant's building consent that I was provided with does not mention the need for framing or wrap inspections, even though this forms part of the particulars of non-compliance in the second notice to fix.

- 6.10.3 The applicant has questioned what he submits was the authority's requirement that he obtain inspection reports to support his application for a building consent. It is the applicant's responsibility to detail how he will achieve compliance, and the authority's responsibility to consider the material submitted to it and decide whether it will accept or refuse the application. The applicant is correct that an authority cannot direct an applicant to adopt a certain way of demonstrating compliance. However, in terms of practicality in situations such as the current case, where the applicant has failed initially to demonstrate compliance, I consider it a sensible approach for the authority to indicate what evidence it would consider effective for demonstrating compliance.
- 6.10.4 The applicant has also raised queries about the Master Processing Checklist. This is an internal authority document used for processing building consents. It is not material to the matter being determined, and beyond the mention made in paragraph 6.2.6 has not had an impact on my decision in this determination.
- 6.10.5 Finally, the applicant has queried the scope of the expert's report and whether this should have been restricted to considering the legality of the notice to fix. Under section 187 of the Act, the Chief Executive may engage a person to assist with a determination, and that person may investigate and consider many of the same matters as the Chief Executive is empowered to under the Act. However, only the Chief Executive may make a determination. In the current case, in order to determine the legitimacy of the two notices to fix, I needed to understand both the scope of the building work and its compliance with the Building Code. The expert was engaged for this purpose, and the parties were advised of this engagement.

## **6.11 What should be done now**

- 6.11.1 With respect to the first notice to fix (NF0097) I suggest that the authority satisfy itself that the shed has been demolished or removed as advised by the applicant (refer paragraph 6.8.12).
- 6.11.2 With respect to the second notice to fix (NF0098), the notice requires modification to clarify the scope of the external cladding that it applies to and I leave this to the authority to attend to. The authority could amend the notice to fix to incorporate the other non-compliant elements of the building work discussed in this determination.
- 6.11.3 With regards to the remaining external cladding (that portion that was installed in the removal company's yard), the Waipa District Council can request the authority to issue a notice to fix in respect of it, pursuant to section 164(3) of the Act.

## **7. The decision**

7.1 In accordance with section 188 of the Building Act 2004, I determine:

- that, notwithstanding that the shed has subsequently been demolished, the authority incorrectly issued the first notice to fix (NF0097) in relation to Building Consent No. 140456, but correctly issued the notice for building work carried out without consent when consent was required;
- the authority correctly exercised its power of decision in issuing the second notice to fix (NF0098), and the notice is to be modified as discussed in this determination.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 15 May 2017.

John Gardiner

**Manager Determinations and Assurance**

## Appendix A: The legislation

### A.1 Relevant sections of the Building Act 2004 referred to in this determination:

#### **17 All building work must comply with building code**

All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.

#### **40 Buildings not to be constructed, altered, demolished, or removed without consent**

(1) A person must not carry out any building work except in accordance with a building consent.

...

#### **41 Building consent not required in certain cases**

(1) Despite section 40, a building consent is not required in relation to—

...

(b) any building work described in Schedule 1 for which a building consent is not required (see section 42A); ...

#### **96 Territorial authority may issue certificate of acceptance in certain circumstances**

(1) A territorial authority may, on application, issue a certificate of acceptance for building work already done—

(a) if—

(i) the work was done by the owner or any predecessor in title of the owner; and

(ii) a building consent was required for the work but not obtained; ...

(2) A territorial authority may issue a certificate of acceptance only if it is satisfied, to the best of its knowledge and belief and on reasonable grounds, that, insofar as it could ascertain, the building work complies with the building code.

(3) This section—

(a) does not limit section 40 (which provides that a person must not carry out any building work except in accordance with a building consent); and

(b) accordingly, does not relieve a person from the requirement to obtain a building consent for building work.

#### **164 Issue of notice to fix**

(1) This section applies if a responsible authority considers on reasonable grounds that—

(a) a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent); ...

(2) A responsible authority must issue to the specified person concerned a notice (a notice to fix) requiring the person—

(a) to remedy the contravention of, or to comply with, this Act or the regulations...

### **Schedule 1 Building work for which building consent not required**

#### **1 General repair, maintenance, and replacement**

(1) The repair and maintenance of any component or assembly incorporated in or associated with a building, provided that comparable materials are used.

(2) Replacement of any component or assembly incorporated in or associated with a building, provided that—

(a) a comparable component or assembly is used; and

(b) the replacement is in the same position.

(3) However, subclauses (1) and (2) do not include the following building work:

(a) complete or substantial replacement of a specified system; or

(b) complete or substantial replacement of any component or assembly contributing to the building's structural behaviour or fire-safety properties; or

(c) repair or replacement (other than maintenance) of any component or assembly that has failed to satisfy the provisions of the building code for durability, for example, through a failure to comply with the external moisture requirements of the building code; or

(d) sanitary plumbing or drainlaying under the Plumbers, Gasfitters, and Drainlayers Act 2006.

## **2 Territorial and regional authority discretionary exemptions**

Any building work in respect of which the territorial authority or regional authority considers that a building consent is not necessary for the purposes of this Act because the authority considers that—

(a) the completed building work is likely to comply with the building code; or

(b) if the completed building work does not comply with the building code, it is unlikely to endanger people or any building, whether on the same land or on other property.

## **4 Unoccupied detached buildings**

(1) Building work in connection with any detached building that—

(a) houses fixed plant or machinery and under normal circumstances is entered only on intermittent occasions for the routine inspection and maintenance of that plant or machinery; or

(b) is a building, or is in a vicinity, that people cannot enter or do not normally enter; or

(c) is used only by people engaged in building work—

(i) in relation to another building; and

(ii) for which a building consent is required.

(2) However, subclause (1) does not include building work in connection with a building that is closer than the measure of its own height to any residential building or to any legal boundary.

## Appendix B: Summary of the parties' main submissions

Date Format	Matters raised	Attachments
<b>Applicant's submissions</b>		
20 November 2015 Email to Ministry*	The two notices to fix and their validity in relation to the building consent.	
February 2016 Written submission – Part 1: history	History of the applicant's previous building projects in Tokoroa and relationship with the authority.	
01/03/16 Email to Ministry	Determination process and costs.	
01/03/16 Email to Ministry	Status of shed. Installation of insulation, noggins, battens and windows.	Photos shed and house on applicant's property.
07/03/16 Written submission – Part 1: history (new version)	Condition of applicant's property when purchased. Dealings with authority before purchasing the property and in relation to the initial insulation and recladding work.	Photo of section and house before purchased. First inspection report.
14/03/16 Email to Ministry	Site inspection sheets.	
15/03/16 Email to Ministry	Site inspection sheets and site inspections. Key dates of project. Authority's corruption.	
16/03/16 Two emails to Ministry	Master processing checklist. Correspondence with authority re site inspections. Inclusion of proposed garage in the building consent.	Email correspondence with authority
31/03/16 Email to Ministry	Statement of Intent and Cladding to Finish Plan	
03/04/16 Email to Ministry & Expert	Requesting expert delay site visit	
06/04/16 Written submission	Statement of Intent. Site inspection sheets. The notice to fix for the house and the need to inspect the external wall framing.	Statement of Intent. Building consent application attachments. Redrawn Cladding to Finish Plan. First inspection report.
25/05/16 Written submission	Notices to fix and decisions by the authority's enforcement group. Site inspection sheets.	
28/05/16 Two emails to Ministry's expert	Expert's site visit, brief and report. Requested photos of building work.	Photos of building work undertaken on site.
30/05/16 Email to Ministry's expert	Requested photos of building work.	Photos of building work undertaken on site.
06/06/16 Three emails to Ministry's expert	Requested photos of building work.	Photos of building work undertaken on site. Photos of house arriving on site.
09/06/16 Written submission	Authority's documents and submissions.	
28/06/16 Written submission	Requirement for building inspection reports. Authority's submissions. Costs associated with inspection reports, expert's report and building work inspections.	



Date Format	Matters raised	Attachments
31/10/16: Draft determination issued to parties for comment		
22/02/17: Parties advised final would be issued on or shortly after 22 March 2017		
21/03/17	Requesting copy of expert's photographs (duly provided on 22/03) Advice of submission to come	
17/04/17 Written submission	Response to expert's report	Notice to fix no. NF0097 Undated photograph with annotation 'Builders shed removed Sept 2016'
21/04/17 Written submission	Response to draft determination and expert's report	

<b>Authority's submissions</b>		
23/02/16 Written submission	Back ground to the dispute. The notices to fix. Compliance of the building work.	Correspondence between the parties. Building consent. The two notices to fix. Documents from the authority's property file.
29/02/16 Email to Ministry	Photos of building work.	Photos of house, shed and building work taken on site.
14/03/16 Email to Ministry	Site inspection sheets.	Original and amended site inspection sheets
21/03/16 Email to Ministry and applicant	Statement of Intent	Statement of Intent
05/04/16 Email to Ministry	The external cladding and Cladding to Finish Plan.	
31/10/16: Draft determination issued to parties for comment		
12/12/16 Email	Response to draft of determination	Completed response form Two pages of draft noting minor errors
22/02/17: Parties advised final would be issued on or shortly after 22 March 2017		

\*Note that all submissions, including those contained in emails to the Ministry and Ministry's expert, have been copied to all parties.