

Determination 2022/020

Regarding the issue of a notice to fix and the refusal to issue two discretionary exemptions under schedule 1(2) for building work to an outbuilding at 125 Blacks Road, Opoho, Dunedin

Summary

This determination considers the authority's decision to issue a notice to fix for building work carried out in contravention of section 40 of the Building Act (building work not to be carried out without building consent). In deciding this, consideration is given to whether the building work falls within the exemption outlined in Schedule 1(7) of the Act. This determination also considers the authority's decision to refuse to issue two discretionary exemptions applications under Schedule 1(2) of the Act (exemption from the requirement to obtain a building consent).



Figure 1: Photograph of the outbuilding

The legislation which is discussed in this determination is contained in Appendix A. 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 (e.g., 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, Katie Gordon, National Manager, Building Resolution, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry¹.
- 1.2. The parties to the determination are:
 - 1.2.1 the co-owner² of the property at the time the notice to fix was issued, F Jakobs (“the owner”)
 - 1.2.2 the co-owner of the property at the time the notice to fix was issued, A Broad (“the co-owner”)
 - 1.2.3 other co-owners of the property at the time the notice to fix was issued, J Jakobs and R Jakobs (“other owners”)
 - 1.2.4 Dunedin City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority. The authority is the applicant for the determination.
- 1.3. This determination arises from the decision of the authority to issue the notice to fix dated 22 June 2020 (NTF-2020-74) for building work to an outbuilding. The authority considers that the construction of the outbuilding was carried out in contravention of section 40 of the Act, as building consent was not obtained for the building work. The determination also arises from the authority’s subsequent decision to refuse to issue two discretionary exemptions under Schedule 1(2) of the Act, as the first exemption application was made after the building work had been carried and the second exemption application was “deferred at this stage pending the resolution of the [notice to fix]”.
- 1.4. The matters to be determined, under sections 177(1)(b), (3)(e) and (3)(c), are therefore:
 - 1.4.1 the authority’s decision to issue the notice to fix, NTF-2020-74 dated 22 June 2020, for the outbuilding; and
 - 1.4.2 the authority’s decision to decline to issue a discretionary exemption from the requirement to obtain a building consent for the construction of a glasshouse

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

² The owners are trustees of two separate trust which owned the property in partnership.

under Schedule 1(2) of the Act, following an application by the owner on 19 October 2020; and

- 1.4.3. the authority's decision to purportedly decline to issue a discretionary exemption from the requirement to obtain a building consent for the reinstatement of glass panels to some walls of the glasshouse under Schedule 1(2) of the Act, following an application by the owner on 3 November 2020.

Matters outside this determination

- 1.5. I have not considered any aspects of the Act other than those necessary to form a conclusion on the matters to be determined, nor have I considered the Building Code compliance³ of the outbuilding.
- 1.6. The authority, in their application for determination, requested I consider whether the authority was correct to decline the owners request to record building work to the outbuilding⁴ carried out under Schedule 1(7) against the property file. This is not a matter provided for in section 177, so I am unable to make a determination on it.
- 1.7. The owner has raised an issue with the 'means of delivery' of the notice to fix. This is not a matter for determination provided for in section 177. For the parties' benefit, section 394 of the Act sets out the provisions for the service of notices. Under section 394(1)(d), a notice is considered sufficiently served if it is posted in a letter addressed to the person at the person's usual or last known place of residence or business.
- 1.8. The other owners have referred to "an unlawful search" of the property as no warrant was produced when the authority visited the property. This is also not a matter provided for in section 177 that I am able to determine.
- 1.9. In correspondence between the parties there is reference to the requirements of the District Plan under the Resource Management Act 1991. I have no jurisdiction under other enactments, and this determination is limited to those matters set out in paragraph 1.4.
- 1.10. The owner has also requested that the determination make a conclusion on whether the notice to fix was satisfied by the removal of some of the panes of glass (as described in paragraphs 3.18 and 4.12). As this is not within the matters to be determined, I have not formed a conclusion on it.

³ In correspondence to the owner prior to the issuance of the notice to fix, the authority expressed a view that the outbuilding did not comply with the Building Code, however as section 17 was not included in the notice to fix as a contravention, it is not necessary to consider the matter of Building Code compliance of the outbuilding in order to determine the matter of the notice.

⁴ I note the owner made two notifications: one in respect of the replacement of the existing shed with the new shed utilising schedule 1(7) and one in respect of the 'deconstruction of an existing glasshouse to form a verandah/carport' carried out under Schedule 1 clause (17) and/or clause (18).

2. The building work

- 2.1. The property is a 697m² site located on the northern side of Blacks Road, Opoho, Dunedin. A dwelling is situated towards the south (towards the street side of the property). There is no vehicle access to the rear of the property.
- 2.2. Towards the rear of the property, near the northern and eastern property boundaries, is an outbuilding that is approximately 23m² in total floor area (“the outbuilding”). I have conflicting information from the owner and the authority on the exact distance of the outbuilding from the boundary, with the owner stating the external walls of the outbuilding were less than one metre to both boundaries, but “slightly more” than 0.30m from the north boundary and “perhaps a bit closer” on the eastern boundary” and the authority stating the outbuilding was located on both boundaries.

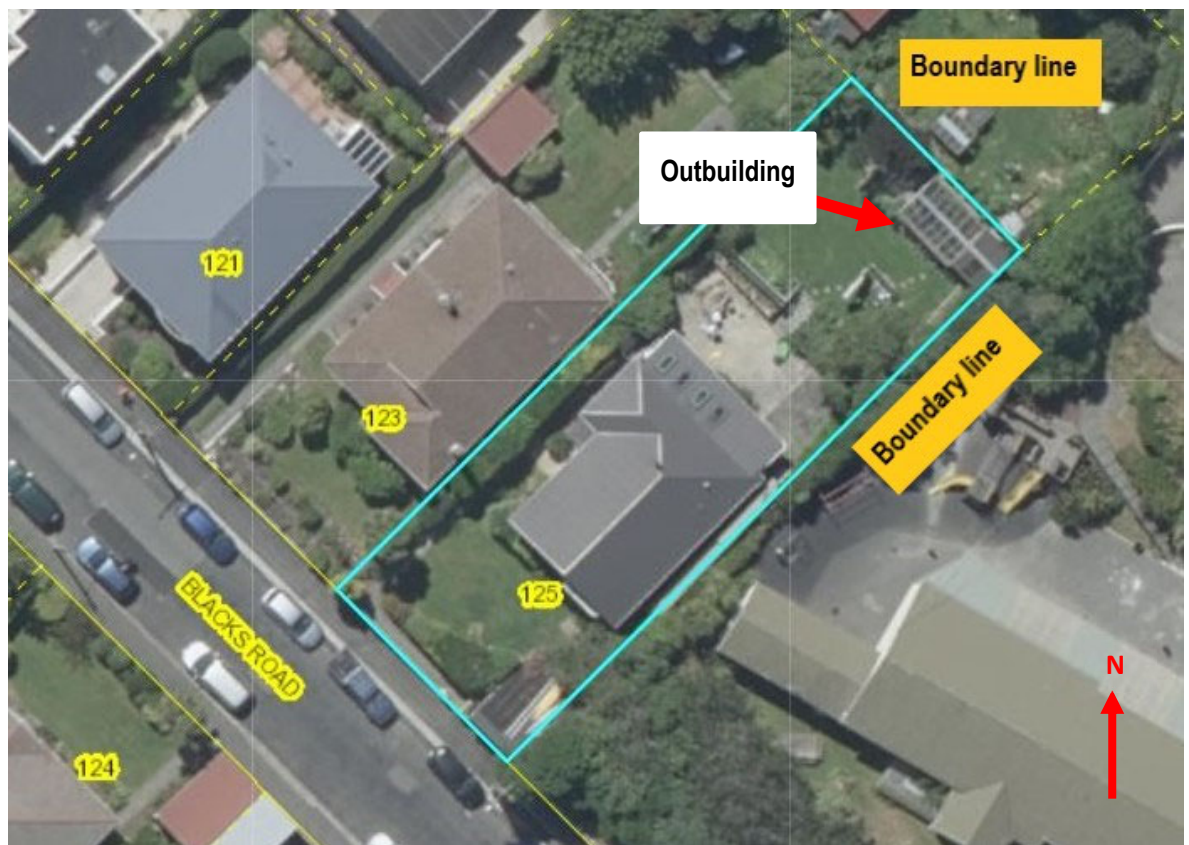


Figure 2: Aerial photograph showing the location of the outbuilding on the property (not to scale)

- 2.3. The outbuilding comprised a garden shed with an attached glasshouse. The owner asserts the construction of the garden shed portion of the building replaced an existing shed of the same footprint and in the same location. According to the owner the original shed was constructed prior to 1991 and comprised a timber structure and clad in a mixture of ‘tin and weatherboards’. It is not clear when the original shed was demolished or how much

time passed before the replacement shed was built, which occurred in 2016. Later on in 2016 the shed was extended through the addition of the glasshouse.

- 2.4. The replacement shed portion of the outbuilding was 3.27m wide x 2.52m deep, with a total floor area of 8.24m². The shed comprised a timber structure with corrugated steel-clad walls on the north and east elevations and timber weatherboard cladding to the south and west elevations. It had a corrugated steel-clad roof.
- 2.5. The glasshouse was constructed after the shed and was an extension to western side of the garden shed. The glasshouse was 3.20m wide and 4.62m deep, with a total floor area of 14.78m². It was a timber and glass structure clad with glass double glazing panels on its north, west and south walls and clad with a transparent acrylic sheet roof.
- 2.6. The property was sold, and settlement completed in January 2021. According to the owner the outbuilding has been removed by the new owner of the property.

3. Background

- 3.1. On 16 March 2020, the authority received a complaint relating to building work on the property. Between March and June 2020, the authority visited the property several times and found the outbuilding comprising the garden shed (described in paragraph 2.3) which had been extended to include the glasshouse (described in paragraph 2.5).
- 3.2. On 4 June 2020, the authority wrote to the owner advising the outbuilding was “an unauthorised structure” under the Council’s District Plan⁵ (“the District Plan”) and detailed non-compliances with the Act and the Building Code. The authority noted that:
 - 3.2.1. a building consent was required for building work such as erecting a structure
 - 3.2.2. as the construction of the outbuilding did not comply with Schedule 1(3), the structure could be modified to comply with the Schedule 1 exemption, a certificate of acceptance applied for, or the outbuilding removed.
- 3.3. On the 9 June 2020 the authority wrote to the owner outlining options to resolve the matter, including; demolish the outbuilding, relocate the outbuilding so that it was its own height from the boundary, apply for a certificate of acceptance for the shed and building consent to fire rate the walls closest to the boundary, or apply for a schedule 1(2) exemption. The authority noted that stormwater collected by the outbuilding would need to be connected to an approved outlet⁶.
- 3.4. On 10 June 2020, the owner wrote to the authority about the option of a discretionary exemption under Schedule 1(2)(b) and provided a draft application. The draft application was supported by a letter from a structural engineer dated 10 June 2020 noting the

⁵ Under the Resource Management Act 1991

⁶ I consider the authority is referring to Building Code Clause E1.3.3 Drainage systems for the disposal of surface water (also referred to as stormwater).

outbuilding 'will have little likelihood of endangering anyone or other property' and therefore the outbuilding was the type of structure intended to be covered by the discretionary exemption provided for in Schedule 1(2).

- 3.5. On 11 June 2020, the authority wrote to the owner advising that:
- 3.5.1. Schedule 1 exemptions are not intended to be granted retrospectively, and an application for a certificate of acceptance is the correct course of action for unconsented building work
 - 3.5.2. the outbuilding does not comply with the provision of the Building Code for protection from the spread of fire to other property across a boundary as required by section 17 of the Act
 - 3.5.3. the authority disagrees with the structural engineer's view and considers Schedule 1(2) is not appropriate for the outbuilding, as the situation is explicitly provided for by Schedule 1(3), and it could not have been parliament's intention that Schedule 1(2) provides for this situation if the exemption Schedule 1(3) exists.
- 3.6. On 22 June 2020, the authority issued a notice to fix (NTF 2020-74) ("the notice") to the owner, co-owner and the other owners. The authority stated the notice was to be read in conjunction with their letter dated 4 June 2020. The notice to fix stated the particulars of contravention or non-compliance were:
- 3.6.1. Failure to comply with section 40 of the Act, in that the owner had carried out building work without building consent;
 - 3.6.2. The construction of a garden shed and glasshouse on the boundary without building consent.
- 3.7. The notice to fix included the following remedies that were required to be met by 24 July 2020:
- 3.7.1. apply for and obtain a certificate of acceptance⁷ for the building work already completed and provide fire ratings to the boundaries; and
 - 3.7.2. apply for and obtain a building consent under section 45 of the Act for the remedial work that will be required to bring the outbuilding into compliance with the Building Code; or
 - 3.7.3. demolish the outbuilding; or
 - 3.7.4. relocate the outbuilding so it complies with Schedule 1(3) of the Act as exempt building work.

⁷ Section 96 of the Act

- 3.8. On 30 June 2020 the owner requested an extension of time to comply with the notice to 30 November 2020.
- 3.9. On 6 July 2020 the co-owner wrote to the authority stating:
- 3.9.1. The notice has flaws because it was addressed to the occupier, favours demolition as the remedy, and requires compliance by an unreasonable timeframe.
- 3.9.2. The authority has discretion to legalise structures such as the outbuilding and confirmation from an engineer confirms the outbuilding ‘has little likelihood of endangering anyone’.
- 3.10. On 13 July 2020, in response to the co-owner’s correspondence of 6 July, the authority responded clarifying that the notice was issued to the owner, who is also the occupier, advised that it was currently considering the request for an extension of time and reiterated its views as set out in paragraph 3.5.
- 3.11. On 12 October 2020 the owner wrote to the authority requesting the notice be withdrawn given the ‘significant number of issues’ identified with the notice. The owner referred to Determination 2017/004⁸ in support of council’s ability to withdraw the notice.
- 3.12. On 14 October 2020, as a result of discussions with the owner, the authority wrote to the owner stating:
- 3.12.1. There is no evidence to suggest the original shed was ‘legally established’.
- 3.12.2. The building work must comply with the Building Code, which “includes the provision of a 30/30/30⁹ fire rating for a building on a domestic boundary”, and this is not met.
- 3.12.3. An application for a certificate of acceptance or building consent application had not been received.
- 3.12.4. Schedule 1(7) does not apply as the outbuilding has not been constructed within the original footprint.
- 3.13. On 19 October 2020, the owner applied for an exemption under Schedule 1(2) of the Act for the construction of the glasshouse. The owner provided:
- 3.13.1. advice from a fire engineer dated 3 September 2020 with a proposal to install non-combustible fibre cement board on the inside of the shed walls close to the

⁸ MBIE. (2017). Determination 2017/004 *Regarding the issue of a notice to fix in respect of building work undertaken without building consent.*

⁹ Fire resistance rating 30/30/30 is a term used to describe the minimum fire resistance required. It comprises three numbers giving the time in minutes for which each of the criteria structural adequacy, integrity and insulation are satisfied, and is presented always in that order.

boundary, and noted that it is 'not practicable' to fire rate the external walls of the glasshouse

- 3.13.2. a letter from a Fire Risk Management Officer of Fire and Emergency New Zealand dated 9 October 2020 noting 'a glasshouse positioned near the boundary with an average quantity of plants is not likely to contribute to the external spread of fire in the same way that a fully lined or enclosed timber-framed structure would'.
- 3.14. On 21 October 2020, the authority wrote to the owner noting the owner had notified the authority of and requested to have documents detailing the building work associated with the replacement shed placed on the authority's files as a record of exempt building work (refer paragraph 1.6). The authority noted its view was "this is not exempt building work as there is no evidence that the garden shed has been legally established". The authority stated that because of this, "Schedule 1 does not apply to the building work".
- 3.15. On 23 October 2020, the authority wrote to the owner, advising that Schedule 1(2) "exemptions cannot be retrospective" therefore the application is declined and the only way to legitimise the construction of the outbuilding was by way of a certificate of acceptance. Further, the shed was unlikely to comply with the Building Code.
- 3.16. On 29 October 2020, the owner notified the authority of exempt building work under Schedule 1(17) and/or 1(18) of the Act for "... the deconstruction of the existing glasshouse to form a verandah/carport near the rear boundary". The owner requested the documents be placed on the authority's files detailing the building work that had been carried out. The notification did not detail specifically the work that was carried out, but as I understand it, the 'deconstruction' removed glass panels of two walls of the glasshouse. It is not clear to me which walls of the glasshouse this applied to.
- 3.17. On 29 October 2020, the authority wrote to the owner advising it remained of the view the exemptions under Schedule 1 are not available for use on the outbuilding and that claiming an exemption now does not make the building legally compliant. The authority reiterated the only way to legitimise a building that was constructed without a consent is to obtain a certificate of acceptance.
- 3.18. On 3 November 2020, the owner applied to the authority for a discretionary exemption under Schedule 1(2) of the Act to reconvert the "verandah/carport" to a glasshouse¹⁰ by proposing to reinstall the glass walls that were removed. In support of the application the owner provided the 9 October 2020 letter from Fire and Emergency New Zealand, 10 June 2020 letter from owner's structural engineer, and advice dated 3 September 2020 from the owner's fire engineer. The owner also provided a floor plan of the glasshouse, an acknowledgement of a previous notification of exempt building work from the authority,

¹⁰ I did not receive a copy of this application until 8th September 2021 with the owner's submission to the first draft.

a copy of a granted retrospective resource consent, a letter from a local Member of Parliament and a letter from the neighbouring property.

- 3.19. On 6 November 2020, the authority notified the owner the “... exemption requests were deferred at this stage pending the resolution of the [notice to fix]”.

4. Submissions

Authority

- 4.1. The authority considers that:
- 4.1.1. the original shed was not ‘legally established’ as the authority has no record of a permit for its construction
 - 4.1.2. it correctly issued the notice to fix because the construction of the glasshouse extension to the shed required a building consent (as it considers there are no relevant provisions within Schedule 1 for the outbuilding)
 - 4.1.3. the authority issued the notice to the owner, co-owner and the other owners, and it was confirmed that the owner carried out the building work to the outbuilding
 - 4.1.4. the notice to fix provided a sufficient and reasonable timeframe to the owners to comply.
- 4.2. In respect of the 19 October 2020 application for an exemption under Schedule 1(2), the authority considers it was correct to refuse to issue the exemption as exemptions cannot be retrospectively granted.
- 4.3. In respect of the 3 November 2020 exemption under Schedule 1(2), the authority considers it correctly refused to issue the exemption for the following reasons:
- 4.3.1. the matter was subject to a notice to fix
 - 4.3.2. the application was effectively to change the altered glasshouse/carport-like structure back into a glasshouse, the building of which was subject of the notice to fix
 - 4.3.3. Schedule 1 is not intended to be used to legitimise existing illegal building work
 - 4.3.4. A building must first be ‘legally established’ by way of building permit, building consent or be exempt building work in order to claim a Schedule 1 exemption
 - 4.3.5. The outbuilding did not comply with the Building Code; the authority therefore was able to refuse the application on the basis of Schedule 1(2)(a).
- 4.4. The authority considers the Act requires that any and all building work must comply with the Building Code, and the outbuilding does not comply with the Building Code as it is

closer than 1m to a relevant boundary and is not fire rated. Therefore, it does not provide appropriate protection for other property. Specifically, the authority considers:

- 4.4.1. the outbuilding did not meet the functional requirement of Clause C3.3 of the Building Code, which states “Buildings must be designed and constructed so that there is a low probability of fire spread to other property vertically or horizontally across a relevant boundary”
- 4.4.2. the outbuilding did not meet Clause C3.7(c), which requires that external walls of buildings that are located closer than 1m to the relevant boundary of the property must be constructed from materials that are not combustible or be constructed from materials that when subjected to a radiant flux of 30 kW/m², do not ignite for 15 minutes (for Importance Level 1 and 2 buildings, which includes the outbuilding).

Owner

- 4.5. The owner did not provide a submission on the substantive matters when the application for determination was made, however the owner considered that the determination should address whether:
 - 4.5.1. the notice to fix was issued in the correct form (including addressed to the correct persons, the timeframe for compliance and the means of delivery)
 - 4.5.2. the notice to fix was issued for the garden shed and/or the glasshouse extension
 - 4.5.3. building consent was required, or the outbuilding was within the scope of Schedule 1
 - 4.5.4. the outbuilding complied with the Building Code

The draft determination and submissions in response

- 4.6. A draft determination was sent to the authority and the owner for comment.
- 4.7. The draft determination considered the outbuilding as one building. The draft determination concluded the authority:
 - 4.7.1. was correct to issue the notice to fix in respect of a contravention of section 40 of the Act as the outbuilding as a whole was not within the scope of Schedule 1(7) and building consent was not obtained for the building work
 - 4.7.2. did not provide a reasonable timeframe to resolve the notice
 - 4.7.3. was correct to decline the 19 October 2020 exemption under Schedule 1(2)(b) for the outbuilding.
- 4.8. The draft determination did not include the application for a discretionary exemption under Schedule 1(2) made on 3 November 2020 as it was not clear this was a matter to be

determined and a copy of the application was not provided with the authority's application for determination.

- 4.9. The authority responded on 24 August 2021 accepting the draft determination.
- 4.10. The owner responded to the draft determination on 8 September 2021 indicating that they did not accept the draft determination. The owner's points are summarised in the following paragraphs. The owner also provided a response from the co-owner of the property dated 6 September 2021.
- 4.11. In respect of the notice to fix, the owner is of the view that the notice to fix contained so many errors that the notice is invalid.
 - 4.11.1. The breach was not properly described, the garden shed and the glasshouse should be treated separately. The owner considers the shed is exempt building work under Schedule 1(7), and therefore the notice incorrectly included the shed as a breach of section 40.
 - 4.11.2. The timeframe given did not provide enough time to resolve the notice.
 - 4.11.3. The notice was not made on the prescribed form because it was addressed to the occupiers rather than a 'specified person'.
 - 4.11.4. The possible remedies were not properly outlined.
 - 4.11.5. The notice was delivered by post.
- 4.12. The owner acknowledged the glasshouse was built in breach of section 40 of the Act (as there is no relevant provision within Schedule 1 to cover that building work). However, removing the glass panels from the sides of the glasshouse resolved that breach (as this brought the building work to within Schedule 1(17)).
- 4.13. In respect of the Schedule 1(2) discretionary exemption application made 19 October 2020 the owner agreed the authority was correct to decline the application. The owner acknowledged Schedule 1(2) exemptions are not intended to be applied retrospectively, and the authority was incorrect to recommend such an option.
- 4.14. The owner's application under schedule 1(2) made on 3 November 2020 for reinstalling the glass panels of the glasshouse was not retrospective and the authority should have considered that application, however the authority "refused to even consider" it. The authority should have considered the supporting information with the application, which the owner considers demonstrates the glasshouse was low risk.
- 4.15. The co-owner's response dated 6 September 2021 reiterated the owner's views that the procedural requirements of the notice are flawed.
- 4.16. On 25 November and 29 November 2021, the owner provided information about the original shed and the outbuilding, including the distance of the outbuilding to the

boundaries, the characteristics of the replacement shed and glasshouse, and information about when the replacement shed and glasshouse were constructed.

4.17. On 29 November and 1 December 2021 the authority subsequently clarified:

4.17.1. The term 'legally established' is used to indicate building had to be constructed in accordance with the relevant laws of the time, before a schedule 1 exemption could be applied. The original shed did not meet the requirements of any legislation even at the time it was estimated to be built, and would clearly not comply with the present Code.

4.17.2. The outbuilding was considered one building due to the configuration of the building being effectively one structure (as the shed and glasshouse are attached and share the same roofline).

4.17.3. If the shed and glasshouse are two buildings the authority considers that both buildings fail to comply with the Act and Building Code for the same reasons, being that both buildings are within 1m of the boundary and not fire rated, the shed was constructed without a permit, the glasshouse without a building consent, and neither building satisfies any of the provisions of schedule 1.

4.17.4. In responding to whether the 3 November 2020 schedule 1(2) application should be addressed in the determination, confirmed the authority's rationale for refusing to accept both the 19 October and 3 November 2020 applications is that the building was already the subject of the notice to fix and the building work was already completed.

The second draft determination

4.18. A second draft determination was sent to all parties for comment.

4.19. On 14 April 2022 the authority responded not accepting the second draft determination for reasons as summarised below:

4.19.1. The building is one building instead of two separate and distinct buildings, and therefore the authority was correct to issue the notice to fix for one building constructed without building consent.

4.19.2. The outbuilding is a single building, rather than two separate ones, because it has a single ridge flashing and it is not fire separated by either distance or fire-rated construction. There was no evidence that the shed and the glasshouse were constructed at different times.

4.19.3. Not all of the requirements of Schedule 1(7) had been met by the owner as the building (with the glasshouse extension) was not in the "same footprint", therefore the work was in "substitution of the original building" and not as repairs.

- 4.19.4. The building work to construct the outbuilding cannot be exempt because the original shed was not “legally established”. It cannot have been Parliament’s intent to allow an owner to “legitimise” previous work that did not have a building consent or a permit using Schedule 1 exemptions.
- 4.19.5. There is no record that a building permit had been issued and the building was not fire rated, therefore the original building did not comply with the applicable relevant law (City of Dunedin By-law No 1 [1912]).
- 4.19.6. Even if the glasshouse and shed were 2 separate buildings, the shed portion was constructed without a building permit or building consent.
- 4.20. The owner responded on 20 April 2022 and did not accept to the second draft determination for reasons as summarised below:
- 4.20.1. The notice to fix contained “so many errors” it was “invalid”.
- 4.20.2. The notice to fix was not addressed to the “specified person”. The notice to fix did not give sufficient time for remedial work and did not properly describe the breach. It did not properly outline the possible remedies.
- 4.20.3. The outbuilding is two buildings: a shed and a glasshouse. The work to replace the shed was exempt from the requirement to obtain consent and while the construction of the glasshouse required consent, this was remedied by removing the sides of the glasshouse to create a carport.
- 4.20.4. The owner disputed the authority’s submission regarding the shed and glasshouse’s distance to the boundary and the footprint of the shed.
- 4.21. The owner also made comments about the scope of the matter to be determined regarding the outbuilding’s compliance with the building code.
- 4.22. The co-owner responded on 20 April 2022 and also did not accept to the second draft determination. The co-owner considers that the issued notice to fix is not valid because the way in which the evidence for the notice was obtained did not adhere to the authority’s powers to enter building or land, and the notice did not meet the statutory requirements of a notice, therefore the Ministry should not recognise the validity of the notice. In summary:
- 4.22.1. The notice to fix was issued as a result of “an unlawful search” under section 133BO¹¹ as no warrant was produced when the authority visited the site and was not provided subsequently, and the visit was carried out by a ‘planner’¹².

¹¹ Section 133BO refers to powers to enter building or land in an emergency.

¹² A common term for persons from the authority who are empowered under the Resource Management Act 1991.

- 4.22.2. The notice to fix does not match the ‘must haves’ set out in section 165 as the notice was not given to all the property owners and there was insufficient “reasonable time for remediation”.
- 4.23. The other owners, on 20 and 21 April 2022 respectively, also responded and did not accept the second draft determination for reasons as summarised below:
- 4.23.1. The notice to fix was invalid, in terms of procedure, as outlined by the owner and co-owner.
- 4.23.2. The authority did not accept the “remedial improvements made to the structures to resolve the notice” especially considering that professionals were engaged; fire rating was installed in accordance with a fire engineer’s recommendations, Fire and Emergency New Zealand had no concerns from a safety perspective and the structural integrity was examined by an engineer who raised no safety issues. Agreed with the thorough responses made by the other trustees as they have adequately conveyed the issues.

5. Discussion

- 5.1. The matter to be determined is the issue of the notice to fix and the refusal of two applications for discretionary exemption from the requirement to obtain building consent.

Legislative requirements for Notices to Fix

- 5.2. Section 17 of the Act requires that all building work must comply with the Building Code irrespective of whether a building consent is required for that work. Section 40 requires that all building work must be carried out in accordance with a building consent, other than in cases where the exceptions in sections 41 and 42A apply. Section 41 sets out situations when building consent is not required and includes “any building work described in Schedule 1”.
- 5.3. Schedule 1 outlines low-risk building work for which building consent is not required, often referred to as ‘exempt building work’ or ‘Schedule 1 exemptions’. Schedule 1 clause 2 provides for territorial authorities to grant discretionary exemptions from the need to obtain a building consent and is the only exemption within schedule 1 that requires a decision from an authority.
- 5.4. Sections 163 to 168 of the Act set out the requirements of notices to fix. Under section 164(1)(a) an authority has the power to issue a notice to fix where the authority considers, on reasonable grounds, that a specified person is contravening or failing to comply with the Act or regulations, for example, the requirement to obtain a building consent under section 40. Section 163 defines a specified person as, among other things, the owner of a building.

- 5.5. A notice to fix is an enforcement notice; section 164(2)(a) requires a person to carry out work to remedy a breach of the Act or Building Code. The notice must specify a “reasonable timeframe” within which it must be complied with (section 165(1)(b)). The remedies required by a notice to fix under section 165 may require the owner to undertake building work to bring the work into compliance with the Building Code and to apply for a building consent in order to carry out such remedial work and may require an application for a certificate of acceptance in respect of building work that has already been carried out without a building consent.
- 5.6. A notice to fix must be in the prescribed form¹³, and in addition to the above, a notice must also:
- 5.6.1. detail the “failure or error” (to enable clear identification of the work concerned);
 - 5.6.2. state the building work that must be carried out and whether a certificate of acceptance must be applied for;
 - 5.6.3. require the specified person to contact the authority on completing this building work.

The notice to fix

- 5.7. In this case, the June 2020 notice to fix stated the particulars of contravention or non-compliance as failure to comply with section 40 of the Act and identified building work had been carried out to construct ‘a garden shed and glasshouse’ on the boundary without building consent. The parties agree that building consent was not obtained for the building work related to the outbuilding (either the shed or the glasshouse), so the issue at hand is whether building consent was required for the construction of the outbuilding, or more specifically whether Schedule 1 provided for the construction of the outbuilding without obtaining building consent.
- 5.8. In issuing the notice the authority was satisfied that those listed in the notice were specified persons as owners of the building, who carried out (or as the owners authorised/instructed the carrying out of) building work to construct the outbuilding without first obtaining building consent and therefore contravened section 40 of the Act. A contravention occurred as building consent was not obtained and there was no relevant clause of Schedule 1 that would have provided for the construction of the outbuilding of its size and in its location in close proximity to the boundary without building consent. The notice did not include a contravention of the section 17 requirement for all building work to comply with the building code to the extent required by the Act, whether or not building consent is required in respect of that building work.
- 5.9. In respect of the description of the building work detailed in the notice as it relates to the contravention of section 40, the parties dispute how the building should have been

¹³ As required by section 165(1)(a), refer to Form 13 of the Building (Forms) Regulations 2004 which prescribes the content of a notice to fix.

described. The authority considers, both at the time and currently, the outbuilding to be one building because the roof of the outbuilding had a single ridge flashing and there was no evidence that the shed and the glasshouse were constructed at different times. The owner asserts, which was only substantially clarified in response to the first and second draft determination, that the shed was constructed separately in reliance on Schedule 1(7), and later the same year the glasshouse extension was constructed.

- 5.10. It is clear from photos of the outbuilding that it presented as one building: the glasshouse and shed roof shared a ridge line, were of the similar materials and the shed and the glasshouse appeared to be of a similar age. It is not obvious looking at the shape and materials that the two elements of the outbuilding were constructed at different times. I consider that this was the correct interpretation of the building based on the information available to the authority at the time.
- 5.11. It was after the notice was issued that the matter of the outbuilding being considered as two parts arose. The owner's assertion is that the outbuilding had several alterations or discrete pieces of building work occur to it; sometime before 1991 the original shed was constructed, in early 2016 the replacement shed was constructed in reliance on schedule 1(7), then later the same year the glasshouse, being a second building, was constructed.
- 5.12. The authority considers the shed and the glasshouse to be a single building and considers the work to construct the outbuilding should be viewed as a whole, rather than the construction of two separate buildings. In my view, the outbuilding is a single building that was constructed over time; the building was first a replacement shed, which then had a glasshouse extension built to form the outbuilding. As it is building work that attracts the requirement for building consent, rather than buildings, I address separately the replacement of the shed and the construction of the glasshouse in considering the issue of the notice and the contravention of section 40.

The shed

- 5.13. Despite the acknowledgment of the construction of the glasshouse in contravention of section 40, the owners considers the notice to be wholly invalid because, among others things, the notice incorrectly includes the shed. The owner asserts that the shed portion of the outbuilding replaced a previous existing shed in the same location and is of comparable design. The owner asserts the shed was constructed in 2016 in reliance on Schedule 1(7), meaning building consent was not required for the construction of the shed. As a result, the owner is of the view that the shed was not constructed in contravention of section 40.
- 5.14. The authority considers Schedule 1 does not provide for the construction of the new shed. The authority has no record of the construction of the previous existing shed and therefore considers that Schedule 1 was 'not available', or could not be relied upon, for the replacement shed as the previous existing shed was not 'legally established'. The authority considers this term includes that the previous shed was unlikely to have obtained the correct approvals and/or did not comply with the Building Code compliance

requirements and/or the authority's by-laws at the time of its original construction. The authority considers the original building must comply with the Building Code and/or the authority's by-laws before Schedule 1 exemptions can apply or be 'available' for any subsequent building work.

- 5.15. The authority has expressed concern that without the original shed being "legally established" Schedule 1(7) would allow the construction of the replacement shed without fire-rated walls because the existing shed did not have fire-rated walls. Respectfully, I disagree with this view. Firstly, section 8 of the Building Act 1991 provided for the existing shed to remain as it was prior to the introduction of that Act, even if the existing shed did not comply with the Building Code. The existing shed, which was constructed sometime before 1991, was not required to comply with the Building Code when the 1991 Act and the Building Code come into force.
- 5.16. Secondly, the Act is concerned with the regulation of *building work*, contemplates buildings undergoing building work throughout their life and contains provisions to ensure the principles and purpose of the Act are achieved. Section 14B sets out the responsibilities of owner under the Act, which includes obtaining the necessary consents (section 40) and ensuring building work complies with the Building Code (section 17). Sections 40 (and the exceptions provided for by Schedule 1) and 17 are simultaneous/concurrent requirements, and Schedule 1 does not provide for building work to be undertaken in a way that does not comply with the Building Code.
- 5.17. Put another way, the owner could rely on Schedule 1(7) for the construction of the new shed (provided it complied with the requirements of Schedule 1(7)), but the owner is also obliged by section 17 to construct the outbuilding in a way that complies with the Building Code. In this case given the proximity to the boundary, the shed required fire-rated construction to prevent the spread of fire. If the authority was of the view a contravention of section 17 occurred, section 164 of the Act provides for the authority to issue a notice to fix for a contravention of section 17 to a specified person if the authority is satisfied that person has contravened that section of the Act.
- 5.18. Contrary to the authority's view I do not consider Schedule 1 is limited in "availability" as the authority suggests. The owner asserts the shed replaced the original shed and constructed the new shed in reliance on Schedule 1(7), meaning building consent (under section 42A) was not required for the construction of the new shed.
- 5.19. I will now consider whether the exemption outlined in Schedule 1(7) applied to the replacement shed. Under Schedule 1(7)¹⁴, an outbuilding can be "repaired or replaced" without building consent if:
- a) the repair or replacement is made within the same footprint area that the outbuilding or original outbuilding (as the case may be) occupied; and

¹⁴ Which came into force in 2015.

- b) in the case of any replacement, the replacement is made with a comparable outbuilding or part of an outbuilding; and
 - c) the outbuilding is a detached building that is not more than 1 storey; and
 - d) the outbuilding is not intended to be open to, or used by, members of the public.
- 5.20. The owner asserts the previous existing shed comprised a timber structure clad in a mixture of 'tin and weatherboards'. The new shed comprises a timber structure with corrugated steel-clad walls on the north and east elevations and timber weatherboard cladding to the south and west elevations, with a corrugated steel-clad roof. The owner states the replacement shed "sat exactly on the concrete pad from the earlier "replaced" shed".
- 5.21. In response to the second draft determination, the authority advised it considers that not all of the requirements of Schedule 1(7) had been met by the owner as the building was not in the "same footprint" as the original shed. The authority provided aerial photos of the property from 2006/2007 showing what appears to be the original shed and 2018/2019 showing the constructed outbuilding. The 2006/2007 photo provided is of a low resolution and clarity and could be interpreted in multiple different ways in terms of the size and location of the original shed. For these reasons, while it may be possible to form a view from the photo that the original shed was not in the same footprint as the replacement shed, I do not automatically accept that to be the case.
- 5.22. Considering this information against the submission from the owner that the building work to construct the replacement shed met the requirements of Schedule 1(7) and that the replacement shed "sat exactly on the concrete pad from the earlier "replaced" shed", I consider that the Schedule 1(7) applied to the building work to construct the replacement shed.
- 5.23. While the authority may have been correct at the time as the reliance on Schedule 1(7) was not made clear at that point, I now consider the inclusion of the shed in the notice was incorrect, at least in respect of contravention of section 40 of the Act.

The glasshouse extension

- 5.24. The owner acknowledges the glasshouse was constructed in contravention of section 40 of the Act as there is no relevant provision within Schedule 1 that provided for the construction of the glasshouse and no building consent was obtained for that work.
- 5.25. I agree the glasshouse was constructed in breach of section 40; nothing in sections 41 and 42A and no relevant clauses of Schedule 1 provided for the construction of the glasshouse without first obtaining building consent.
- 5.26. For completeness, I do not consider that the construction of the glasshouse extension to the shed falls under Schedule 1(7). The glasshouse extension cannot be considered "a

repair or replacement within the same footprint area” under Schedule 1(7)(a), as the building work involved an extension outside the footprint area of the original shed.

- 5.27. Accordingly, as a contravention of section 40 occurred, which forms the basis of the notice, I consider the authority had grounds to issue the notice to fix for a contravention of section 40 of the Act as it relates to the glasshouse extension.
- 5.28. I do not agree with the owner and co-owners’ view that the inclusion of the shed in the notice is so incorrect as to make the notice wholly invalid. A contravention of section 40 has occurred (by the construction of the glasshouse extension without building consent), which forms the basis of the notice, and in this respect the authority was correct to issue the notice for a contravention of section 40. I consider the notice describes the building work undertaken and the contravention of the Act to enable the recipient of the notice to respond accordingly. It was not until much later after the issue of the notice that the owner outlined the reliance on Schedule 1(7).

The notice timeframe for compliance and persons issued to

- 5.29. The owner is of the view the timeframe given to respond to the notice to fix was not reasonable. Section 165(1)(b) requires a notice to fix must state “a reasonable timeframe within which it must be complied with”.
- 5.30. The authority issued the notice to fix on 22 June 2020 and gave the owner until 24 July 2020 to comply. This timeframe gave the owner 24 working days from the date of issue to comply with the notice to fix. I am of the view this timeframe was not reasonable, because:
- 5.30.1. the owner did not have building professionals engaged at the time of the notice to fix. The owner would have had to engage such people to assist in preparing a certificate of acceptance application and/or a building consent application
- 5.30.2. the authority required the owner to not only apply for but also obtain a certificate of acceptance and a building consent within that timeframe. The authority has 20 working days to make a decision in granting or refusing a building consent application and certificate of acceptance application. As the requirement to comply included obtaining the certificate of acceptance and building consent, this left the owner 4 working days to prepare and lodge the two applications
- 5.30.3. the timeframe only provided a short amount of time to engage a builder, and for the builder to carry out the demolition or relocation of the outbuilding.
- 5.31. In addition to the matter of the timeframe, the owner and co-owner are of the view that the notice was not issued to a ‘specified person’ because the notice was addressed to the occupiers, not the owners. The authority in its correspondence to the owner and co-owner at the time clarified the notice was issued to the owners, some of whom are also the occupiers. In its submissions to the determination the authority also stated it issued

the notice to the owner, co-owner and the other owners. The notice itself names all owners and includes their addresses.

- 5.32. Section 164(1)(a) provides that where the authority is satisfied that a specified person is contravening or failing to comply with this Act or the regulations, a notice to fix may be issued to that person. In this case, at the time the notice to fix was issued the owners were the owners of the property and either carried out or authorised/instructed the carrying out of building work that resulted in the contravention, therefore are specified persons for which the notice to fix can be issued. In this respect I consider the notice was correctly issued to the owners as specified persons.

The refusal to grant an exemption under Schedule 1(2) of the Act

- 5.33. The owner made two separate applications to the authority under Schedule 1 Clause (2) of the Act; the first on 19 October 2020 and the second on 3 November 2020.

- 5.34. Schedule 1(2) of the Act states:

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.

- 5.35. Schedule 1(2) provides for, and requires, the authority to exercise its discretion whether to exempt proposed building work from the requirement to obtain a building consent in the circumstances specified in subclauses (a) or (b). The authority is not required to be satisfied of both subclauses, rather the authority need only be satisfied of (a) *or* (b).
- 5.36. In respect of discretionary exemptions available to the authority under Schedule 1(2), the Act, other than subclauses (a) and (b), does not provide any other guidance to the authority in the use of its discretion¹⁵. However, the Ministry has published guidance on exempt building work¹⁶.

¹⁵ As with all decisions that it makes under the Act, when considering an application for discretionary exemption from the requirement for building consent an authority should give effect to the purpose of the Act by taking into account the principles outlined in sections 4, the of the Act.

¹⁶ Building work that does not require a building consent: Exemptions Guidance for Schedule 1 of the Building Act 2004 (Fifth Edition, August 2020).

- 5.37. The Ministry's guidance¹⁷ also states with respect to Schedule 1(2) that "[t]his is the only exemption in Schedule 1 which requires a territorial or regional authority to make a decision about any proposed building work"¹⁸. It follows that a decision on whether building work is being exempted from building consent should occur before the work takes place and the provisions of Schedule 1(2) do not provide for the retrospective granting of an exemption.
- 5.38. There are many situations where it will be justifiable for an authority to refuse to grant a discretionary exemption. However, the authority must have particular reasons for doing so that relate to the specific application made to them against the tests set out in Schedule 1(2).
- 5.39. The Ministry's guidance suggests that authorities take into account the following when considering a discretionary exemption:
- 5.39.1. any substantial previous demonstration of competence in carrying out similar work
 - 5.39.2. the complexity of the work relative to the competence of the people who will carry it out
 - 5.39.3. any independent quality assurance systems or checks that will be applied in the course of the work
 - 5.39.4. the location of the building work
 - 5.39.5. how close it will be to any property boundary and/or other buildings.

The October 2020 application

- 5.40. The owner applied to the authority on 19 October 2020 for an exemption from obtaining building consent under Schedule 1(2) for the construction of the glasshouse, which was constructed in 2016 (refer to paragraph 3.13).
- 5.41. On 23 October 2020 the authority declined the application because Schedule 1(2) exemptions are not able to be granted retrospectively. I agree with the authority and the owner that the provisions of Schedule 1(2) are not retrospective. Therefore, the authority was correct to refuse the October 2020 application, as the glasshouse had already been constructed prior to the application.

¹⁷ Previous determinations have also considered the requirements of Schedule 1(2). MBIE. (2021). *Determination 2021/029 Regarding the authority's refusal to grant an exemption from the requirement to obtain a building consent is install sanitary plumbing and insulation.*

¹⁸ For all the other exemptions, it is up to the owners to decide whether an exemption in Schedule 1 applies.

The November 2020 application

- 5.42. The owner applied to the authority on 3 November 2020 for an exemption from obtaining building consent under Schedule 1(2), as described in paragraph 3.18. The application is not explicit as to whether the application was made in respect of Schedule 1(2)(a) and/or (b), however the owner provided information in respect of both (a) and (b), so I consider the application was made in respect of both subclauses.
- 5.43. The application did not relate to the primary glasshouse structure as the owner is of the view that the breach of section 40 (as detailed in the notice to fix) created by glasshouse structure was resolved by removing glass panels so that the glasshouse fell within the provision of Schedule 1(18) for carports. The authority disputes whether this resolved the breach. As outlined in paragraph 1.10, I have not formed a conclusion on this point as it sits outside the scope of the matters to be determined.
- 5.44. In respect of the November 2020 application, the owner is of the view that the authority did not decline the application, rather the authority did not consider the application before it because the authority stated the "... exemption requests were deferred at this stage pending the resolution of the [notice to fix]" in its 6 November 2020 correspondence to the owner.
- 5.45. In its submission to the determination, the authority considers it did refuse to grant the exemption, and its reasons for this include: the matter was subject to a notice to fix, the building work was already complete, the completed work was not 'legally established' by way of building consent, and the work did not comply with the Building Code. The authority also considered it was able to refuse the application on the basis of Schedule 1(2)(a), which required the authority to be satisfied the building work complied with the Building Code.
- 5.46. Although the authority's reasons for refusal of the application to grant an exemption under Schedule 1(2) are those summarised in the paragraph directly above, at the time the only reason it gave to the owner for its decision on 6 November 2020 was that the application was "deferred at this stage pending the resolution of the [notice to fix]".
- 5.47. In deciding whether to grant a discretionary exemption, the authority must have particular reasons for doing so that relate to the tests set out in Schedule 1(2), being subclauses (a) and/or (b). In this case, the authority did not consider the application and the supporting information provided by the owner in respect of Schedule 1(2)(a) and (b) and the authority's 6 November correspondence did not provide reasons for refusal which related to the tests in Schedule 1(2).
- 5.48. For the reasons above, I conclude that the authority was incorrect to refuse to grant a discretionary exemption under Schedule 1(2) for the reason given in its 6 November 2020 correspondence.

- 5.49. For the sake of clarity, I form no conclusion on whether the authority should have granted exemption or not. In deciding this, the authority should have considered the authority's application against both Schedule 1(2)(a) and 1(2)(b) and provided valid reasons for its decision.

Comments on type of buildings contemplated by Schedule 1(2)

- 5.50. Throughout their correspondence the owner, the co-owner and the authority disagreed whether a glasshouse is the type of building contemplated by Schedule 1(2). The Ministry's guidance on exempt building work states that Schedule 1(2) exemptions:

... can be applied across a wide range of building work. At one end of the scale, the council may choose to exempt simple, low-risk, repetitive-type building work, such as that relating to farm buildings, proprietary garages or bus shelters. These are typically buildings of importance level 1 from Building Code clause A3 – Building importance levels. At the other end of the scale, the building work could be for complex engineered projects where the construction will be designed and supervised by chartered professional engineers.

- 5.51. For the benefit of the parties:

- 5.51.1. I acknowledge the owner's views regarding the difficulty of fire rating glass walls of a glasshouse and Fire and Emergency New Zealand's view regarding the likely reduced fire load and risk posed by the glasshouse.
- 5.51.2. I disagree with the authority's view that the glasshouse is not the type of building appropriate for Schedule 1(2) simply because of the existence of Schedule 1(3). A glasshouse is clearly a structure that falls within the description of an Importance Level 1 structure as an ancillary building not for human habitation and satisfies the description of work described in the Ministry's guidance. The difference with Schedule 1(3) is that it also provides for the construction of habitable buildings (within the limits of that provision) and as a result likely to be constructed in such a way that makes them readily be able to be fire rated and they will pose a higher fire load compared with a glasshouse.
- 5.51.3. I also consider that the Schedule 1(2) provisions do not provide a basis for proceeding with building work that an authority or owner knows to be non-compliant. Section 17 still requires all building work to comply with the building code, regardless of whether that building work requires building consent.
- 5.51.4. Schedule 1(2) exemptions provide for situations where, after due consideration, an authority considers its involvement through the building consent process will add little value in ensuring compliance. While in the case of exemptions granted under Schedule (1)(2)(b) an authority's grounds for that belief that the building work will comply will likely be less than those granted under (1)(2)(a), this does not mean the authority should disregard information it holds the causes it to believe the work will not comply.

Conclusion and remedy

- 5.52. Taking account of the above reasoning, I conclude the authority was correct to issue notice to fix NTF-2020-74 because:
- 5.52.1. The building work describes the glasshouse which was constructed in contravention of section 40 (as building consent was not obtained and there was no relevant clause in Schedule 1 that provided for its construction without building consent).
- 5.52.2. The notice was issued to the owners as specified persons who the authority considered had contravened the Act, by either carrying out or authorising/instructing the carrying out of the building work that resulted in the contravention.
- 5.53. However, the authority did not provide a reasonable timeframe to resolve the notice.
- 5.54. I do not agree with the owners that the notice so incorrect as to make the notice “wholly invalid”. The construction of the glasshouse is clearly a contravention of section 40, which the owner acknowledges, and this contravention forms the basis of the notice. The notice contains enough information to enable clear identification of the contravention and provides information about what needs to be done to remedy the contravention.
- 5.55. Under Section 188 I am able to ‘confirm, reverse or modify’ the authority’s exercise of its power of decision to issue notice to fix NTF-2020-74. While I have concluded the authority was correct to issue the notice as the glasshouse was constructed in contravention of the section 40 of the Act, in this case, I would have modified the notice to remove the shed from the description of the building work (as I have found that it was not constructed in contravention of section 40¹⁹) and extended the timeframe by which the notice needed to be complied with. However, I cannot now modify the notice as it is no longer in effect because there is no longer a contravention of the Act. This is because the subsequent owners of the property have removed/demolished the outbuilding.
- 5.56. In addition the owners, who are considered the specified persons who contravened the Act, are no longer the legal owners of the property and therefore are unable to effect remedy of the contraventions. Previous determinations²⁰ have set out that the authority is unable to issue a notice to fix to a subsequent owner for those contraventions of the Act. Section 163 and 164 are to be read together: the subsequent owner, while a specified person in respect of section 163, is not the person who contravened the Act in respect of section 164.

¹⁹ The authority’s views on the non-compliance with the Building Code (section 17) were not raised in the notice and have not been considered in deciding on the matter to be determined.

²⁰ Determination 2020/019: Regarding the authority’s decision to issue a notice to fix in respect of an agricultural effluent storage pond. Issued 10 August 2020.

- 5.57. For these reasons, I am electing not to confirm, reverse or modify the decision to issue the notice to fix.
- 5.58. In respect of the 19 October 2020 application, I conclude the authority was correct to decline an exemption under Schedule 1(2) for the construction of the glasshouse because the glasshouse had already been constructed and the provisions of schedule 1(2) are not retrospective.
- 5.59. In respect of the 3 November 2020 application, I conclude the authority was incorrect to purportedly decline to issue a discretionary exemption under Schedule 1(2) in respect of its reason given in its 6 November 2020 correspondence.
- 5.60. In respect of both decisions relating to the applications for exemption from the requirement for building consent I am also electing not to confirm, reverse or modify the decisions. This is because the outbuilding to which they relate has since been demolished and doing one or other of these things would have no practical effect.

6. Decision

- 6.1. In accordance with section 188 of the Building Act 2004, I determine that:
- 6.1.1. The authority was correct to issue notice to fix NTF-2020-74.
- 6.1.2. In respect of the 19 October 2020 application, the authority was correct to decline to grant a discretionary exemption under Schedule 1(2).
- 6.1.3. In respect of the 3 November 2020 application, the authority was incorrect to purportedly decline to grant a discretionary exemption under Schedule 1(2) for the reasons given in its 6 November 2020 correspondence.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 28 October 2022.

Katie Gordon
National Manager Building Resolution

APPENDIX A - RELEVANT LEGISLATION

The relevant provisions of the Building Act are:

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—

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

....

163 Definitions for this subpart

In this subpart, unless the context otherwise requires,—

....

specified person means—

- (a) the owner of a building:
- (b) if a notice to fix relates to building work being carried out,—
 - (i) the person carrying out the building work; or
 - (ii) if applicable, any other person supervising the building work:
- (b) if a notice to fix relates to a residential pool, a person referred to in section 162C(4).

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); or
- (b) a building warrant of fitness or dam warrant of fitness is not correct; or

- (c) the inspection, maintenance, or reporting procedures stated in a compliance schedule are not being, or have not been, properly complied with.
- (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;
or
 - (b) to correct the warrant of fitness; or
 - (c) to properly comply with the inspection, maintenance, or reporting procedures stated in the compliance schedule.
- (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.

165 Form and content of notice to fix

- (1) The following provisions apply to a notice to fix:
- (a) it must be in the prescribed form:
 - (b) it must state a reasonable timeframe within which it must be complied with:
 - (c) if it 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:
 - (d) if it requires building work to be carried out, it may require the making of an application for a building consent, or for an amendment to an existing building consent, for the work:
 - (e) if it requires building work to be carried out, it must require the territorial authority, the regional authority, or both to be contacted when the work is completed:
 - (f) if it relates to building work, it may direct that the site be made safe immediately and that all or any building work cease immediately (except any building work necessary to make the site safe) until the responsible authority is satisfied that the person carrying out the work is able and willing to resume operations in compliance with this Act and the regulations:
 - (g) if it relates to a residential pool, it may direct that the pool be drained of water and be kept empty (until the requirements of section 162C are complied with).

394 Service of notices

(1) Any notice or other document required to be served on, or given to, any person under this Act is sufficiently served if it is—

- (a) delivered personally to the person; or
- (b) delivered to the person at the person's usual or last known place of residence or business; or
- (c) sent by fax or email to the person's fax number or email address; or
- (d) posted in a letter addressed to the person at the person's usual or last known place of residence or business.

(2) If a notice or other document is to be served on a body (whether incorporated or not), service on an officer of the body in accordance with subsection (1) is taken to be service on the body.

(3) If a notice or other document is to be served on a partnership, service on any one of the partners in accordance with subsection (1) or subsection (2) is taken to be service on the partnership.

(4) Despite subsection (1), if a notice or other document is to be served on a Crown organisation for the purposes of this Act, it may be served—

- (a) by delivering it personally to an employee of the organisation at its head office or principal place of business; or
- (b) by delivering it at the organisation's head office or principal place of business, including by fax; or
- (c) in accordance with a method agreed with the organisation.

(5) A notice or other document sent by post to a person in accordance with subsection (1)(d) must be treated as having been received by that person at the time at which the letter would have been delivered in the ordinary course of post.

The relevant provisions of Schedule 1 of the Act are:

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.**

7 Repair or replacement of outbuilding

The repair or replacement of all or part of an outbuilding if—

- (a) the repair or replacement is made within the same footprint area that the outbuilding or the original outbuilding (as the case may be) occupied; and
- (b) in the case of any replacement, the replacement is made with a comparable outbuilding or part of an outbuilding; and
- (c) the outbuilding is a detached building that is not more than 1 storey; and
- (d) the outbuilding is not intended to be open to, or used by, members of the public.

18 Carports not exceeding 20 square metres in floor area

Building work in connection with a carport that—

- (a) is on the ground level; and
- (b) does not exceed 20 square metres in floor area.

The relevant section of the Building Act 1991:**8 Existing buildings not required to be upgraded**

Except as specifically provided to the contrary in this Act, nothing in this Act shall be read as requiring any building, the construction of which was completed or commenced before the coming into force of Part VI of this Act, to meet the requirements of the building code.