

# Determination 2024/029

**An authority's decisions to issue a series of notices to fix**

**417 Stafford Loop Road, Awatuna, Hokitika**

## **Summary**

This determination considers an authority's decisions to issue three successive notices to fix alleging the same contravention. The determination discusses the details required in a notice to fix, and the obligations of authorities in issuing notices to fix.

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

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

## 1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Andrew Eames, Manager Advisory, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.<sup>1</sup>
- 1.2. The parties to the determination are:
  - 1.2.1. The owner of the property, W Kroupa (“the owner”), who applied for this determination.
  - 1.2.2. Westland District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. The matter to be determined, under section 177(1)(b) and 2(f) relates to the authority’s decisions to issue notices to fix NF0338 dated 7 March 2023, NF0352 dated 30 May 2023, and NF0367 dated 30 August 2023 (collectively “the notices”).
- 1.4. The authority issued the notices because it is of the view that the owner has carried out building work at the property otherwise than in accordance with a building consent, in contravention of section 40. The owner disputes the authority’s grounds for issuing the notices, as well as the form and content of the notices.

### Issue outside this determination

- 1.5. The owner is of the view that the authority has acted contrary to its inspection powers<sup>2</sup> under the Act, in the way it carried out its visit to the owner’s property. However, the exercise of the authority’s inspection powers is not a determinable matter under section 177, therefore I have not considered this issue further.<sup>3</sup>

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

<sup>2</sup> Section 222 empowers a territorial authority to enter land to carry out inspections. Section 226 restricts entry to a household unit without the consent of the occupier or a court order.

<sup>3</sup> I note that there are other options available to the owner to address this issue, including provisions and procedures in the Act and in other enactments, or through the courts.

## 2. Background

- 2.1. On 7 March 2023, an officer of the authority visited the owner's property. This followed an enquiry from a member of the public in relation to information available on a property listing website.
- 2.2. The day before the visit, the authority had emailed the owner advising it would be "undertaking enforcement action shortly regarding much of what you have built, over and above the work you have Building Consent for (BC0430147 – Erect shed and install effluent disposal system), without Building Consent." The authority referred to "safety concerns regarding the two fires you have installed". It also required written confirmation by 9 February 2023<sup>4</sup> that the hot water system had been installed by a certified plumber.
- 2.3. The report completed by one of the two officers of the authority who visited the property on 7 March 2023 records:<sup>5</sup>
  - 2.3.1. On arrival, the officers "noticed several small 'Outbuildings'" and "significant extension to the original consented structure consisting of a two-story addition and attached carport, additional windows, door and a flu".
  - 2.3.2. The owner did not allow the officers to carry out the site visit, and they left without taking any photographs; however, photographs on the property listing website "align with what we could observe from approach to the property".
- 2.4. The authority advises the building consent for the "shed" (described on the building consent plans as a "barn") was granted to the owner in 2004. The plans show the 14m x 8m timber-pole building is 4.2-4.8m high, and clad in corrugated iron on three sides and open along one side. A toilet is located in a small room on one side.
- 2.5. According to the authority, one of three specified inspections occurred in May 2004, however there were no other inspections and a code compliance certificate was never sought or issued in relation to the building.

### Notices to fix

- 2.6. On 7 March 2023, following the visit to the property, the authority issued notice to fix NF0338 ("the first notice") to the owner. The first notice stated:

#### Particulars of contravention or non-compliance

- Breach of Section 40 of the Building Act 2004 by carrying out building work except in accordance with a Building Consent.

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<sup>4</sup> This date appears to be an error, given the email was dated 6 March 2023.

<sup>5</sup> The other officer who attended the property also completed a report, which contains similar information.

**To remedy the contravention or non-compliance you must:**

1. Apply for a Certificate of Acceptance OR
2. Remove all unconsented work.

This notice must be complied with by: **30/05/2023**

- 2.7. The first notice accompanied a letter dated 7 January 2023<sup>6</sup>, which stated:

The notice is in relation to the un-consented building work you have undertaken at your ... property. In particular, but not limited to, all the additions and alterations that have been made to your shed (Building Consent 040147), that has not yet achieved [a code compliance certificate].

- 2.8. On 30 May 2023, the authority issued notice to fix NF0352 (“the second notice”) to the owner. The second notice was identical to the first notice, except for a compliance date of 22 August 2023. The second notice accompanied a letter dated 30 June 2023<sup>7</sup>, which repeated the paragraph in the 7 January 2023 letter quoted above, and also stated:

In addition, the building on the left as you drive up the driveway, contains a space heater, and it has to be removed as it was not installed under a Building Consent. And is not able to be covered by a [certificate of acceptance] due to its age.

- 2.9. On 21 August 2023, the owner provided a report to the authority responding to the second notice, which raised concerns about the particulars of the second notice not being “clear as to the allegation”. The report purported to “formally advise” the authority that the second notice had been complied with (the owner has since referred to this as a “section 167 report”).

- 2.10. On 30 August 2023, the authority issued notice to fix NF0367 (“the third notice”) to the owner, with a date for compliance of 30 November 2023. The third notice accompanied a letter of the same date, which was identical to the 30 June 2023 letter. The particulars of contravention and remedies in the third notice were identical to the first and second notices. In addition, the third notice stated the building name as “Pole shed”) and stated, under the heading ‘Further particulars’, “You must contact [the authority] on completion of the required building work”.

### 3. Submissions

#### Owner

- 3.1. The owner submits (in summary):

- 3.1.1. The notices are “technically defective” because the reference to section 40 is not supported with particulars and appropriate remedies. The remedies

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<sup>6</sup> This date appears to be an error.

<sup>7</sup> This date appears to be an error.

“are misstated and the demands of the authority indicate a lack of a breach”.

- 3.1.2. The “work is consented and was completed under an operable [building] consent in 2004”. The authority “inspected the work at the time and no issue was raised at changes to consent”.
- 3.1.3. There is “no offence under [section] 40 because no building work is identified being undertaken by a person at this time that needs a [building] consent”, and “the matter is time barred under [section] 378”.
- 3.1.4. The authority “lack proper evidence for the allegations”; it has not undertaken an inspection, and it is “unethical and unlawful” to use photographs from a property listing website.
- 3.1.5. The authority “has failed to properly consider [section] 167 and has not provided adequate reasons for refusal of the [owner’s] notice of compliance with the [notices to fix]”.

## Authority

- 3.2. The authority submits (in summary):
  - 3.2.1. “A covering letter was included with the [first] notice, to support the notice and give advise [sic] on the options of applying for a [certificate of acceptance] and explaining what this does ...”.
  - 3.2.2. Once the first notice expired, the second notice “was issued, for the same issues as the first notice, as no action had been undertaken”.
  - 3.2.3. The owner requested the authority “conclude the notice under section 167, which we have declined to agree the notice is complied with, as neither option has been taken”.

## 4. Discussion

### Requirements of notices to fix

- 4.1. Notices to fix are governed by sections 163 to 168. Section 164(1)(a) provides for an authority to issue a notice to fix if it considers, on reasonable grounds, that a specified person is contravening or failing to comply with the Act or its regulations”.<sup>8</sup> In this case, the authority considers the owner has contravened section 40, which provides that “A person must not carry out any building work except in accordance with a building consent”.

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<sup>8</sup> Section 163 defines a ‘specified person’ to whom a notice can be issued, and this includes the owner of the building and the person carrying out the building work if the notice relates to the building work being carried out. Section 7 defines ‘Regulations’ as meaning “regulations in force under this Act”.

- 4.2. Section 165 sets out the form and content of a notice to fix. The prescribed form<sup>9</sup> for a notice to fix provides a space to insert the “particulars of contravention or non-compliance”. In *Andrew Housing Ltd v Southland District Council*,<sup>10</sup> the High Court said, in relation to the particulars of a notice to fix:

What is crucial, however, is that **the particulars must fairly tell the recipient** of the notice what provision of the Act or the [regulations] has allegedly not been complied with. [my emphasis]

- 4.3. Similarly, the District Court in *Marlborough District Council v Bilsborough*<sup>11</sup> noted that the recipient of a notice to fix needs to be “fairly and fully informed”, so they can address the identified issues. The Court said:

[106] What is clear from [section] 164 of the Act is that the recipient of the notice to fix must have their attention drawn to any Act or Regulations that are to be complied with, and the recipient must be fairly informed as to what needs to be done to put matters right. Furthermore ... failure to comply with a notice to fix can result in the imposition of a significant financial penalty. **Accordingly, the particulars of the notice assume some importance.**

[107] In my view, **it is appropriate that the recipient of a notice be provided with as much detail as possible, so the particular work should be identified, and if breaches of Building Code subclauses and standards are alleged, then those details should be contained in the notice to fix.** ... I appreciate that the recipient of a notice needs to be borne in mind, however, given the potential for monetary penalties for non-compliance **they need to be fairly and fully informed**, so they can address the identified issues, and if need be seek specialist advice.

[my emphasis]

- 4.4. In this case, the three notices, which are identical in terms of the “particulars of contravention or non-compliance” part of the notice, simply state “Breach of Section 40 of the Building Act 2004 by carrying out building work except in accordance with a Building Consent”. The notices do not identify which buildings on the property they relate to (the authority’s officers noted “several” buildings), with the possible exception of the third notice (see paragraph 4.7 below). Nor do the notices provide details about the building work that it is alleged has been carried out otherwise than in accordance with a consent, or without consent.
- 4.5. While the letters that the notices accompanied (albeit incorrectly dated) provide some further information, this does not rectify the shortcomings of the notices. The words “... in particular, but not limited to, all the additions and alterations that have been made to your shed” do not specify what the additions and alterations are that it is alleged were not covered by the building consent (or were not exempt work

<sup>9</sup> See Building (Forms) Regulations 2004, Form 13.

<sup>10</sup> *Andrew Housing Ltd v Southland District Council* [1996] 1 NZLR 589. The case related to a ‘notice to rectify’, which was the equivalent of a notice to fix in the predecessor to the Act, the Building Act 1991.

<sup>11</sup> *Marlborough District Council v Bilsborough* [2020] NZDC 9962.

under Schedule 1 of the Act). The reference to the “space heater” is also unclear. In any event, there are no details regarding these items in the notices.

- 4.6. The notices are deficient, as they do not adequately specify the “particulars of contravention or non-compliance” as required by the prescribed form. This requires sufficient details regarding the building, building work, and alleged contravention, to fairly and fully inform the recipient about the basis for the notice to fix so they can address the issues.
- 4.7. The owner questioned the adequacy of the particulars in the second notice, however the authority did not amend the “particulars of contravention or non-compliance” in the third notice, and simply reissued it with identical particulars to the first and second notices. The third notice does include a “building name” (being “Pole shed”), so arguably identifies one of the buildings the authority considers the third notice relates to. However, there remains a substantial lack of any other details.
- 4.8. The authority has provided information during the determination process to support its position that the owner has contravened section 40. The owner “accept[s] that some historical work may have exceeded the scope of schedule 1 but generally it is exempted even now”.<sup>12</sup> There may have been grounds to consider the owner had contravened the Act, but those grounds (if they exist) are not adequately particularised in the notices themselves.

### **Other points raised by the owner**

- 4.9. While I have concluded the notices are deficient, the owner has raised several other points which I consider it is appropriate to respond to, as set out below.
- 4.10. Regarding the owner’s view that there is no section 40 “offence” because the building work was completed in 2004, this argument was considered in Determination 2024/026,<sup>13</sup> where it was concluded that there is no requirement for building work to be ongoing for there to be grounds to issue a notice to fix. In addition, there is no time limit on when a notice to fix can be issued.
- 4.11. In relation to the evidence relied on by the authority, it is expected that prior to issuing a notice to fix, an authority will have carried out a thorough investigation. The authority needs to clearly document its evidence regarding the building work which it is alleged was carried out without consent or otherwise contravenes the Act or regulations.

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<sup>12</sup> I take this statement to refer to the fact that since 2004 there have been amendments to Schedule 1 of the Act, changing the scope of building work that may be exempt from the requirement to obtain a building consent. However, exemptions in Schedule 1 are available from when they come into force and do not have retrospective effect. An authority may take into account current exemptions in Schedule 1 in deciding whether or not to issue a notice of fix.

<sup>13</sup> At paragraphs 4.7-4.9.

- 4.12. If an owner or occupier does not allow an inspection for a household unit (ie private dwelling), an authority can apply to the court under section 226 for a warrant. An authority can also consider any other sources of information available, such as a property listing website as in this case, or other publicly available information.
- 4.13. Regarding the owner's view that the remedies in the notices are inappropriate, I consider the requirement to apply for a certificate of acceptance is an available remedy, as expressly stated in section 165(1)(c) in the case of building work carried out without building consent. "Remove all unconsented work" is also an option to remedy any contravention. However, due to inadequate particulars of the contravention it was not clear what the work was these remedies applied to.
- 4.14. In relation to the 'section 167 report' provided to the authority, which the owner considers notified compliance with the notices, previous determinations have discussed the process in section 167 regarding the inspection of building work that is required to be completed under a notice to fix.<sup>14</sup>
- 4.15. While the first and second notices did not require the owner to notify the authority that building work had been completed, the third notice did.<sup>15</sup> However, as at the date of the report, it appears the owner had not completed any building work that was required by the second notice. Therefore, section 167 does not apply, as the authority had not been notified that relevant building work had been completed.

### **Considerations when exercising enforcement powers**

- 4.16. As noted by the District Court in *Marlborough District Council v Bilsborough*, failure to comply with a notice to fix can result in the imposition of a significant financial penalty.<sup>16</sup> For this reason it is essential that a notice contains sufficient particulars (in the words of the Court "as much detail as possible"), so the recipient can address the identified issues.
- 4.17. Authorities must consider the relevant statutory provisions in the Act and regulations, including whether the threshold for issuing a notice to fix in section 164 is met (based on the information gathered, as discussed above at paragraphs 4.11-4.12). On deciding that it is, authorities must comply with the requirements for the form and content of a notice to fix as set out in the legislation and by the courts.

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<sup>14</sup> See Determination 2024/016 *The issue of a notice to fix for building work associated with a two storey building with sanitary fixtures* (11 April 2024), at paragraphs 4.34-4.36; and Determination 2024/026 *The authority's decision to issue a notice to fix in relation to a retaining wall* (27 May 2024), at paragraphs 4.23-4.25.

<sup>15</sup> Form 13 states under the heading 'Further particulars' "You must contact the [territorial or regional authority] on completion of the required building work", and notes in regard to this statement "Delete if inapplicable".

<sup>16</sup> Section 168(2) provides that a person who commits an offence under subsection (1) is liable on conviction to a fine not exceeding \$200,000. Under section 168(1) a person commits an offence if they fail to comply with a notice to fix (other than a notice to fix in respect of the means of restricting access to a residential pool, which is covered by section 168(1AA) and (1AB)).



## **5. Decision**

- 5.1. In accordance with section 188 of the Building Act 2004, I determine that the notices did not adequately particularise the contravention, and the notices are deficient. Therefore, I reverse all three notices to fix.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 7 June 2024.

**Andrew Eames**

**Manager Advisory**