



Determination 2014/051

The issue of a notice to fix for the construction of a deck without building consent at 12 Hobson Terrace, Onetangi, Waiheke Island



1. The matters to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“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, H Davies (“the applicant”), acting through an agent (“the agent”)
 - Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 This determination arises from the decision of the authority to issue a notice to fix for building work carried out to a deck that was done without building consent first being obtained.
- 1.4 The matter to be determined² is therefore the exercise of the authority’s powers of decision in issuing the notice to fix. In order to determine this matter I must consider whether the building work was exempt under Schedule 1 of the Act that was current at the time the building work was carried out. I have also discussed the wording and content of the notice to fix (refer paragraph 5.3).
- 1.5 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.

¹ The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.dbh.govt.nz or by contacting the Ministry on 0800 242 243.

² Under sections 177(1)(b) and 177(2)(f) of the Act

1.6 The agent requested that references in the determination to Schedule 1 of the Act be to the Schedule as amended on 28 November 2013 in order to provide guidance for future situations. However, in this instance the building work was undertaken prior to that amendment coming into effect and it is Schedule 1 that was in force at the time of the building work being carried out that applies.

1.7 Matters outside this determination

1.7.1 The agent has requested that I consider the issue of a second notice to fix (refer paragraph 4.6.4). The second notice was issued by the authority after the application for this determination was made. The authority holds the view that the second notice to fix is a nullity but has signalled its intention to follow up the issues raised in the second notice once this determination has been issued. I proposed to the parties that the issue of the second notice to fix be considered in a separate determination (reference No. 2666).

1.7.2 I have not considered in this determination whether the addition of the roof and walls to the deck falls under Schedule 1 as exempt building work.

2. The building work

2.1 The building is an existing detached house that is two-storeys-high in part and is situated on a sloping site located in an exposure zone 'D' for the purposes of NZS 3604³.

2.2 The authority has described the disputed deck as being to the north elevation of the existing house (refer paragraph 3.4.3), and I have followed that convention in this determination.

2.3 The 1996 deck & extended deck

2.3.1 In 1996 building consent No. YC/96/10580 was issued for a detached single level structure ("the rumpus room") to be added to the west of the existing two storey house. The rumpus room is conventional light timber frame, with concrete foundations and floor slab and was situated 300mm apart from the existing house. The roof to the rumpus room also served as a deck ("the 1996 deck"), with a butynol membrane over ply surface and a 'pool fence'-type barrier; the deck abutted the house. A code compliance certificate was issued for that consent on 22 September 2000.

2.3.2 It appears that either during those works or subsequently the deck was extended along the north face of the two-storey building ("the extended deck"). Photographs dated June 2002 show a verandah structure to the north elevation of the house, adjacent to the 1996 deck. The verandah extended beyond the north edge of the deck and was covered with what appears to be a plastic corrugated roofing material. The photographs also show the extended deck, and I estimate the width to be approximately 1.2m; it is clear that the deck did not cover the full extent of the verandah. The extended deck was fenced with the same pool fence-type barrier.

2.3.3 Other than a description provided verbally from one of the applicants⁴ (refer paragraph 4.4), which accords with the photographs later provided, I have no further

³ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

⁴ The application for determination listed two people as owners, however the certificate of title provided at a later date lists one owner (the applicant as set out in paragraph 1.2)

information about the construction details of the extended deck, nor confirmation of the date it was constructed.

- 2.3.4 It is clear from the lack of records available that no building consent was sought for the extended deck at the time of construction.

2.4 The 2013 deck

- 2.4.1 The timber framed deck as currently constructed (“the 2013 deck”) is 2.4m above the ground, and partly above a wash room and ablutions area. The 2013 deck effectively extends the northern end of the upper level to the house, bringing the north elevation into line with the 1996 deck (see figure 1). The agent has described the extended deck area as 17m². The section of deck above open ground is supported on timber posts.

- 2.4.2 The 2013 deck has been fully roofed over, with wide overhanging eaves, and is partially enclosed with walls added to the east and north and a part wall to the west. The wall to the east is fully enclosed; the north wall has a large ‘picture window’-type opening; and the west is largely open to the adjacent 1996 deck. The south side of the deck leads into the existing house via a ranch slider.

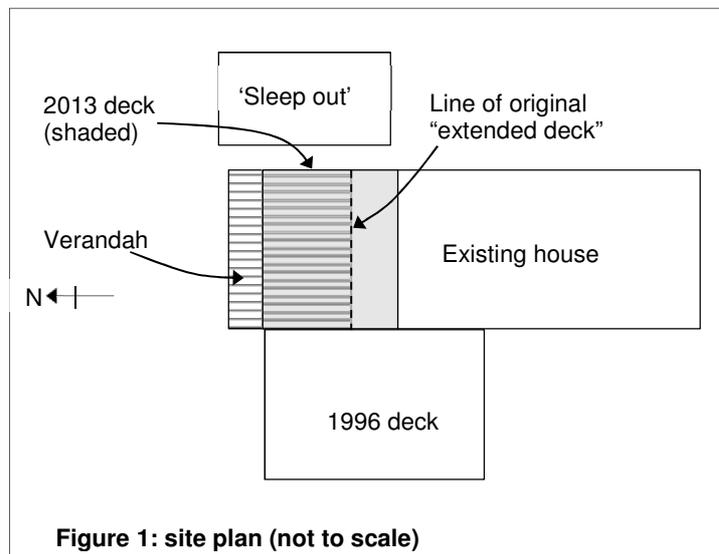


Figure 1: site plan (not to scale)

3. Background

- 3.1 It appears that the applicant began building the 2013 deck some time prior to 23 January 2013; on that date the authority carried out a site visit and building work was underway but not completed. The authority issued a site memo to the applicant that day, which described the work as ‘replacing existing deck & enclosing North East South West elevations, build without consent’. The memo went on to state:

Advised the owners that a [certificate of acceptance] – footings only and apply for a consent for the balance – walls subfloor [illegible] & claddings wall and roof.

Advised owners that they can line south elevation and sheet close to the wall to wall junction to be tacked only to protect music system.

All other work to stop until a consent has been applied for and granted.

3.2 The notice to fix

3.2.1 On 13 September 2013 the authority issued notice to fix No. 4399 (“the notice to fix”) to the applicant. The notice stated the particulars of contravention or non-compliance as:

The following works have been undertaken on the building without building consent, such consent was required under Sec 40 of the Building Act 2004:-

- Old deck demolished and new deck constructed (Not exempted work)

The notice required the applicant to

Remove the unauthorised work,

Or

Pursue any other option that may be available to you to make the aforementioned structure fully compliant in accordance with the Building Act 2004 and regulations under the Act.

3.2.2 The applicant subsequently engaged the agent. The agent wrote to the authority on 22 November 2013, setting out the view that the building work was exempt under Schedule 1 and that the applicant was entitled to rely on their interpretation of exempt work under Schedule 1, and requesting the authority withdraw the notice to fix. The letter referred to the authority’s file photos that showed ‘the deck existing in 2003’ (I take this to be reference to the extended deck and verandah structure).

3.2.3 In correspondence to the agent on 26 November 2013, the authority advised it would extend the time for compliance with the notice to fix by six weeks, but did not expand on its reasons for considering the building work was not exempt under Schedule 1.

3.2.4 On 2 December 2013 the agent again wrote to the authority requesting that it provide its reasons for considering the work was not exempt.

3.2.5 The authority responded to the agent in a letter dated 11 December 2013. The authority confirmed its view that the building work was not exempt work under Schedule 1 and that building consent was required. The authority noted that the notice to fix was in respect of the deck rebuild only; which it described as ‘the complete replacement of the deck including all of the piles supporting the deck’. The authority’s view was stated as being that the complete replacement of all structural elements meant the work was not exempt under Schedule 1.

3.2.6 In regards to an owner being entitled to decide for themselves if work is exempt and undertaking building work on that basis: the authority put forward its view that where the owner’s interpretation is erroneous the authority has a regulatory role to issue a notice to fix to achieve compliance with the Act.

3.2.7 In regards to the notice to fix not including the requirement to apply for a certificate of acceptance: the authority noted that ‘[section] 165 of the Act states that the [notice to fix] *may* include a requirement to apply for a certificate of acceptance but it is not mandatory.’ The authority also pointed out that the notice provided the option to take any other action which may be available under the Act, and that the authority considered it was for the applicant to decide whether to apply for a certificate of acceptance.

3.3 The application for determination

- 3.3.1 The Ministry received an application for a determination on 16 December 2013.
- 3.3.2 On 6 January 2014 the Ministry sought further information from the agent, in particular a description of the original extended deck and when it was built, and information that describes the replacement 2013 deck and when it was built.
- 3.3.3 The agent responded on 6 January 2013, commenting that he was unsure as to the relevance of the information requested and noting that there was an existing deck that had been replaced. The agent went on to restate his views regarding the matter to be determined.
- 3.3.4 In an email of 8 January 2014 an officer of the Ministry responded to the agent that the information sought was relevant to whether the replacement of the deck was exempt building work as a ‘complete and substantial replacement’. The Ministry then sought the requested information from the authority.

3.4 The second notice to fix

- 3.4.1 On 8 January 2014 the authority carried out a further inspection of the property. On 21 January 2014 the authority wrote to the applicant advising that
- Given the extent of additional matters identified [the authority] has decided to withdraw [the first notice to fix], and re-issue a new Notice, NTF 4570, ... to identify all known issues associated with building works carried out at [the] property.
- 3.4.2 The covering letter described the building work the authority considered had been carried out without consent being obtained when consent was required and building work that the authority considered does not comply with the Building Code.
- 3.4.3 The attached notice to fix No 4570 (“the second notice to fix”) described the ‘particulars of contravention or non-compliance’ as follows:

The following works have been undertaken without building consent, where such consent was required under Section 40 of the Building Act 2004:-

- Entirely new deck (including structural supports) constructed on the Northern side of the main residential unit, from which it is possible to fall more than 1.5 metres. (Not exempted building work under Schedule 1)
- Retaining wall constructed on the Northern side of the property in front of the main residential unit and the road, a portion of which retains more than 1.5 meter of depth of ground. (Not exempted building work under Schedule 1)
- Detached sleep-out constructed on the Eastern boundary adjacent to the main residential unit and the Eastern boundary closer than the measure of its own height in relation to the dwelling and boundary. (Not exempted) building work under Schedule 1)

The following building work fails to comply with the Building Code Section 17 of the Building Act 2004:-

- B1 (Structure) and B2 (Durability) – The newly constructed deck on the Northern side of the main residential unit has undersized and/or over spanned posts, beams, joists, lack of bracing and requires timber treatment for durability.
- B1 (Structure) and E2 (External moisture) – Porch structure over the newly constructed deck on the Northern side of the main residential unit has undersized and/or over spanned ceiling joists and ridge rafters and fails to prevent external penetration of moisture to the porch and deck.
- E2 (External moisture) – Lower floor level under new deck houses an ablution area without external walls to prevent moisture penetration.

- 3.4.4 The agent disputed the withdrawal of the first notice to fix and the issuing of the second notice to fix; stating his view that section 183 of the Act means that the authority had no power to withdraw the first notice while the determination was being made.
- 3.4.5 In a letter to the Ministry dated 3 February 2014, the authority accepted the agent's view and stated that the first notice to fix remains in effect. The authority went on to comment that it remained concerned about the deficiencies identified in the building work and that the intent in issuing the second notice was to provide clear advice to the applicant of all of the issues. The authority considered it would have been unfair to the applicant if matters continued without the applicant's knowledge of those issues. The authority indicated that it would address those issues once the determination was completed.

4. The submissions

- 4.1 There has been a large volume of correspondence received from the parties during the determination process. In the following paragraphs I do not record all correspondence received, but I have summarised the submissions relevant to the matter being determined.

4.2 The applicant

- 4.2.1 In a letter dated 12 December 2013 with the application, the agent provided a brief background to the situation and a detailed submission on his interpretation of the Act and Schedule 1 and its application in this instance. I have taken account of the full submission and I summarise the views of the agent as follows:

- It is for the owner to make the decision as to whether Schedule 1 applies to planned building work, and authorities cannot overrule that decision and issue a notice to fix.
- Benefit of doubt must be given to owners where there is doubt as to the interpretation of Schedule 1, and owners should be able to rely on their own reading of the Act and not require expert and technical opinion.
- A notice to fix issued by an authority should detail specific breaches and provide sufficient evidence.

- 4.2.2 The agent also submitted:

- The content and wording of the first notice was incorrect as it required removal of the building work or making the work fully compliant, but it did not provide for an application for a certificate of acceptance.
- The building work is the replacement of an existing deck.
- The rebuilt deck is an assembly that
 - does not contribute to the building's structural behaviour
 - used the same materials and assembly
 - is in the same location and is the same size.
- The original deck cladding membrane and substrate was well over 15 years old and rebuilding was not triggered by failure.
- The deck has a structural role within itself, but the test for Schedule 1 is in the context of the building's structural behaviour. As part of the building the deck

is 'associated with 3 piles in the building foundation, and has some joists associated with the flooring system of the dwelling.' The role that the deck plays in the structural behaviour of the building is small; it cannot be considered complete or substantial.

4.2.3 The application included copies of

- the site memo, dated 23 January 2013
- the notice to fix and covering letter, dated 13 September 2013
- a letter from the agent to the authority, dated 22 November 2013
- various email correspondence between the authority and the agent from 22 November to 2 December 2013
- a letter from the authority to the agent, dated 11 December 2013.

4.2.4 On 9 January 2014 the agent provided a copy of a plan for a resource consent application dated 2006. The plan included an outline of a deck (I note the deck indicated is the 1996 deck to the west), the sleep out, and a detached building at the rear of the property with the notation 'existing bedrooms to be removed'. The applicant had also advised the agent that the extended deck was in place when the property was purchased around 1997, and was either built at the same time as the rumpus room (approx. 1996) or may have been there already.

4.2.5 Various email correspondence was carried out between the agent and an officer of the Ministry regarding the matter to be determined, the actions of the authority and the issue of the second notice to fix, and the agent's interpretation of various sections of the Act. I have taken account of the submissions received from the agent but have not included a detailed summary here. I note that the authority was provided with a copy of all of the correspondence.

4.3 The authority

4.3.1 On 9 January 2014 the authority provided

- building consent documentation for consent 96/10580, dated 27 November 1996, issued to previous owners for a new or relocated building described as 'single room to be used as rumpus/office' adjacent to an existing 'cottage'
- a code compliance certificate dated 22 September 2000 for building consent 96/10580
- photographs taken during its site visit on 8 January 2014, and a site plan and elevations marked to show the building work the authority considered had been carried out without consent.

4.4 On 7 February 2014 an officer of the Ministry phoned both the authority and the applicant seeking information on the nature of the extended deck and the date of its construction. The authority considered the extended deck was likely to be built sometime after 1996, as it was not shown on the 1996 plans, but had no further information. One of the applicants stated his understanding that there was a 'narrow deck' built at the same time as the rumpus room deck. This was surfaced with 'old ply and concrete', and that it had leaked; the leaks caused damage to the house and necessitated the replacement of the deck.

4.5 The first draft determination and submissions

4.5.1 A draft determination was issued to the parties for comment on 18 February 2014. In regards to whether the building work was exempt under Schedule 1, the draft noted:

- Although there was limited information available on the extended deck and the authority had no record of it, there was an existing deck in place on the north elevation and it was likely that the 2013 deck was a replacement that could be considered a comparable assembly in the same position for the purposes of Schedule 1(a).
- The extended deck was demolished with no impact on the structural behaviour of the house, and the addition of the deck, walls and roof has not impacted on the bracing. The external envelope has remained largely intact, and the deck joists and roof structure of the deck are independent from the house framing. Given those factors the draft concluded that the 2013 deck was not a complete or substantial replacement of any component or assembly contributing to the building's structural behaviour.

4.5.2 The first draft concluded:

- The issuing of the notice to fix for building work that the authority considered required consent was within the authority's powers under section 164 of the Act.
- The content and the wording of the notice to fix was adequate to identify the building work and the specific breach of the Act.
- The building work to the 2013 deck was exempt building work under Schedule 1(a), and accordingly the authority's decision to issue the notice to fix was reversed.

The applicant's submission in response to the first draft

4.5.3 The agent provided a submission on 4 March 2014 in response to the first draft determination. The agent submitted the following (in summary):

- It is the sole responsibility of an owner to assess whether building work is exempt under Schedule 1.
- The issuing of the second notice to fix was contrary to section 183.
- When the authority carried out its first site visit in January 2013 the authority had the opportunity to view the other building work that is alleged to be non-compliant and so the 6 month limitation period in section 378 on filing a charging document commenced to run from the time of the first site visit and has now expired and the authority cannot issue a notice to fix in respect of those matters of non-compliance.
- Once consented building work has been completed, an authority has no power to issue a notice to fix unless the building is dangerous, earthquake-prone or insanitary, or the owner decides to alter the building, change its use or intended life. A similar 6 month limitation period should apply to building work carried out without building consent, so that 6 months after the completion of such work an authority can only take further action if the building is dangerous, earthquake-prone or insanitary, or the owner decides to alter the building, change its use or intended life.

- The authority did not have reasonable grounds for issuing the notice to fix and the determination needs to conduct an inquiry into the factual and evidential basis on which the authority issued the notice to fix.
- The authority did not act reasonably in carrying out a second site visit in January 2014 and identifying further matters of alleged non-compliance that were then included in a second notice to fix, when all of the matters should have been addressed in the first notice to fix issued after the first site visit in January 2013.

4.5.4 The first 5 matters raised by the agent were addressed in the draft determination or in previous determinations and nothing in the agent's submission has persuaded me to change the way those matters have been dealt with in the determination below in that:

- an owner is not solely responsible for determining whether building work is exempt and the authority is not bound by such a decision if the authority believes it is incorrect: the application of Schedule 1 is governed by the words of that provision and whether work is exempt will be determined at some point in the following process. In the first instance the exemption may be determined by the owner (and this assessment could be based on professional advice or the general guidance of the building consent authority or guidance issued by the Ministry). The building consent authority, when it becomes aware of work being done or that has been completed, will decide if it agrees with the owner's assessment and if it doesn't the authority may issue a site notice initially, and subsequently a notice to fix. The decision of the authority to issue a notice to fix can be the subject of an application for a determination, and finally any determination is subject to an appeal to the District Court (refer also paragraph 5.4);
- the issuing of the second notice to fix was not contrary to section 183 (refer paragraph 5.5);
- a notice to fix can be issued more than 6 months after the completion of building work (refer paragraph 5.6) and further the application of section 378 is not a matter for determination – the proper place for determining any disputes over the application of section 378 is the court where the charges are filed;
- once building work has been completed a notice to fix may be issued if that work was carried out contrary to the Building Code or carried out without a building consent when one was required (refer paragraph 4.3 of Determination 2013/015⁵) – there is no particular time limit on when such a notice to fix might be issued although it could obviously not be issued once a code compliance certificate has been issued for work that is the subject of a building consent.

4.5.5 The agent raised a further matter concerning the situations when a notice to fix may be issued by an authority. The agent submitted a notice to fix under section 164 can only be issued in respect of an owner carrying out building work and failing to obtain a building consent when one is required or carrying out building work contrary to the Building Code: an authority has no power to issue a notice to fix for building work that was undertaken by a previous owner, and it is not an offence for an owner to

⁵ Determination 2013/015: The refusal to issue a code compliance certificate and the simultaneous issue of a notice to fix for a 14-year-old house at 25 Gilberd Place, Torbay, Auckland (*Ministry of Business, Innovation and Employment*) 8 April 2013

have or possess such non-compliant building work on their property if the building work was carried out by a previous owner.

- 4.5.6 I do not think there is any controversy in this submission by the agent and it is an accurate statement of the law. Further, I don't understand the authority to be asserting it has the power to issue a notice to fix in respect of building work carried out by a previous owner. The notice to fix issued in January 2013 concerns building work that was being undertaken at that time by the owner.
- 4.5.7 The last two matters raised by the agent concern the authority's exercise of powers in issuing the notice to fix.

The authority's submission in response to the first draft

- 4.5.8 The authority provided a submission dated 7 March 2014 in response to the first draft determination and the agent's submission. The authority disagreed with the conclusions regarding the building work being exempt and submitted (in summary):
- it is not possible to conclude that the 2013 deck structure was constructed using comparable materials in the same position as the existing deck and to do so would set a potentially dangerous precedent;
 - the reference to a narrow deck (refer paragraph 4.4) implies that any existing deck structure was not as large as, or at least was different to, the 2013 deck;
 - the deck structure is a separate structure with separate structural supports from the rest of the house;
 - the deck structure is a "building" itself and replacing all of the support posts of the deck is a complete replacement of the components and assembly contributing to the structural behaviour of the "building" being the deck structure, therefore in terms of Schedule 1(a)(ii) it is not exempt building work.
- 4.5.9 The authority also maintains the view that the second notice to fix is a nullity and stated that the authority would await the outcome of the determination before deciding on the appropriate action to take on the additional matters identified. The authority concluded the submission with a request that I reconsider the conclusions and decision presented in the first draft determination.

4.6 The second draft determination

- 4.6.1 I considered the submissions received in response to the first draft and amended the determination as I considered appropriate. I issued a second draft determination to the parties on 3 April 2014. The second draft concluded that
- the authority took the appropriate regulatory action under section 164 in issuing the notice to fix for building work it considered required consent
 - the original structure was a verandah and narrow deck and the 2013 deck is a different assembly; accordingly the 2013 deck was not a replacement of a comparable assembly in the same position for the purposes of Schedule 1(a) and was not exempt building work
 - the content and the wording of the notice to fix was adequate to identify the building work and the specific breach of the Act

- as the building work to the 2013 deck was not exempt building work under Schedule 1(a), the authority's decision to issue the first notice to fix was confirmed.

4.6.2 The agent for the applicant responded to the second draft determination by email on 15 April 2014. The agent disagreed with the decision and reiterated views expressed earlier. The agent also submitted that

- the authority was not correct to issue the notice to fix as the building work was not a serious breach or contravention and the applicant already had a site memo issued to give directions and the applicant was not continuing with the work
- the extended deck was timber framed with plywood and a waterproofing membrane similar to the consented deck; the thin concrete topping was a 'failed attempt or decorative finish' applied by a previous owner to waterproof the deck
- the 2013 deck is both comparable in components and an assembly in the same position; the scale and bulk of the existing structure was the same and in the same position and comparable
- there is a 'lack of desire' or inability from the authority to allow schedule 1 to be exercised by the applicant
- it is not the authority's responsibility to 'police' owner's decisions to rely on schedule 1, nor to ensure that building work that does not require consent complies with the Building Code
- the authority's reasons for considering the deck was not exempt were not set out at the time the first notice to fix was issued (11 September 2103) and were not made clear to the applicant until 11 December 2013
- the view set out in the draft determination regarding the deck's contribution to structural behaviour (refer paragraph 5.2.13) is also supported under section 8(1)(c) which includes two or more buildings in the definition of "building"
- having overturned the authority's reasons for issuing the notice to fix (complete or substantial replacement of an assembly contributing to the structural behaviour of the building) the determination should be made that the authority incorrectly exercised its powers and reverse the decision
- the limitation under section 378 should be determined and a statement made as to the moment in time that unconsented building work can no longer be subject to action by the authority. (Refer also paragraph 4.5.4 bullet point #3, and paragraphs 4.7.11 and 5.6.)

4.6.3 The agent included in his submission an extract from the authority's code of practice which set out examples of major non-compliances or contraventions that would result in a notice to fix being issued. Included in the examples was the following:

There is a serious contravention of the Building Act or Building Regulations including but not limited to:-

- Failing to obtain a building consent for work which requires a building consent ...
- Failing to complete work in accordance with the Building Code for work which does not require a building consent.

...

Note: If the work was done without a building consent (when one was required) the applicant will need to apply for a certificate of acceptance, (COA).

4.6.4 In regards to the issuance of the second notice to fix the agent submitted the following:

- the authority does not have the statutory power to nullify a document formally issued (the second notice to fix); the purported exercise of the authority's power of decision should be a matter in this determination (refer paragraph 1.7.1)
- the authority has not provided evidence of a failure to meet the performance criteria of the Building Code (for the 2013 deck); particulars of contravention should be specific and stated in the notice
- if the sleep out was built by the previous owner this matter cannot be pursued against the applicant
- the retaining wall is 'only possibly non-complying in a small part' and the authority should apply leniency and common sense unless there is an issue of safety or insanitary
- requiring removal of unauthorised work is not something that an authority can require and cannot be part of the particulars in a notice to fix
- if relevant, the requirement for an application for a certificate of acceptance must be stated in the notice to fix.

4.6.5 The authority responded to the second draft determination by email on 17 April 2014. The authority accepted the draft subject to clarification and amendment of the following:

- Clarification regarding the effect on the authority's powers to make decisions due to section 183 of the Act (refer paragraph 5.5.3)
- Regarding work done by a prior owner; the authority noted that the applicant purchased the property on 1 May 2003 and a resource consent was subsequently issued on 14 June 2004. The authority considers that this establishes that the work related to the sleep out and the retaining wall was undertaken by the applicant following resource consent approval but without the applicant obtaining a building consent.

4.6.6 The agent for the applicant set a further submission by email on 5 May 2014. I hold the view that the points noted in the agent's submission that are relevant to the matter in this determination have been sufficiently well canvassed in the discussion at paragraph 0. Those points in the submission that relate to items in the second notice to fix are considered in a separate determination.

4.7 The third draft determination

4.7.1 I considered the submissions received in response to the second draft and amended the determination as I considered appropriate. Though the material provided in submissions to the second draft did not cause me to change the views stated in that draft, there were some changes to wording and clarification of some points in the discussion. I issued a third draft determination to the parties on 5 May 2014 and sought confirmation from the parties as to whether a hearing was requested.

4.7.2 The authority responded on 12 May 2014 stating that it did not seek a hearing on the matter.

- 4.7.3 On 5 August 2014 I sought confirmation from the agent as to whether the applicant wished a hearing be held.
- 4.7.4 The agent provided a further submission on 1 September 2014, referring to *Andrew Housing Ltd vs Southland District Council*⁶ in regards to the application of section 378, and noting that the applicant wished to have a hearing held on the matter. The submission included the following:
- The first draft was the correct decision and it is unclear why that has been changed when ‘the assumptions of [the authority], and the information that [it] based the exercise of [it’s] power on has been found to be so flawed...’
 - Any enquiry by the Ministry is unlawful, as investigation and the gathering of new evidence is not a power that is available to the Chief Executive⁷.
 - The determination should only consider whether the authority was correct in its decision based on the facts as presented to the authority at the time
 - The notice to fix was technically deficient, contains unlawful requirements, and was not descriptive of any serious contravention of the Act; the notice did not describe unauthorised or unlawful work as replacement of a deck is exempt under Schedule 1; requiring an application for a certificate of acceptance is the only action the authority could have required.
 - The conclusion at paragraph 5.2.4 could have been reached by the authority but this wasn’t ‘what they chose to allege, make enquiry of, or took the trouble to research to ascertain’; the authority incorrectly exercised its power.
 - The question of whether the seriousness in extending an existing deck justified a notice to fix should be addressed.
 - Whether the deck was exempt building work under Schedule 1 is not a matter for determination.
- 4.7.5 In a letter dated 11 September 2014, the authority commented on the proposed hearing, noting the issues it wished to be heard on, including:
- The information available concerning the existing deck, and referred to in the second and third drafts, amounts to irrefutable evidence that the new deck is different to the old deck and not exempt from the requirement to obtain a building consent.
 - The photographs provided by the agent together with the verbal information provided by one of the applicants are ‘credible, reliable and relevant evidence that the building work to construct the deck is not exempt work in terms of Schedule 1’.
 - The time limit for filing a charging document does not apply to the issue of a notice to fix.
 - The form and content of the notice to fix fairly informs the owner of the work undertaken which the authority considers is in contravention of the Act and includes ‘appropriate options to consider in order to remedy the contravention’.

⁶ Andrew Housing Ltd vs Southland District Council, 23 November 1995, Tipping J (52/95)

⁷ The agent referred to Ian Beattie vs Far North District Council, DC Whangarei CIV-2011-088-31314 November 2012

- 4.7.6 In an email on 17 September 2014, the agent set out the following submission:
- Determination 2014/035⁸ supports the agent's view that the authority issued the notice to fix after the limit for prosecuting a non-compliance with a notice to fix had expired; the authority had no power to enforce the notice.
 - The applicant was not the builder and was not carrying out building work; the permitting of building work was an offence under section 80 of the Building Act 1991 but the wording in section 40 of the Act is different; section 96 allows unapproved works to be regularised by way of a certificate of acceptance but section 96(3) distinguishes 'between and owner and the person doing the work who commit the offence'.
- 4.7.7 The authority responded on 18 September, noting that it considered the agent's submission did not correctly state the law and the authority did not agree with the agent.
- 4.7.8 Further correspondence was received from both parties regarding the proposed hearing.
- 4.7.9 On 22 September 2014 I sought clarification from the parties regarding the agent's request that a hearing be held on the matter.
- 4.7.10 The agent responded in two letters dated 10 October 2014. The agent was of the view that any charging document should have been filed within 6 months of the site inspection (2013), and that as the notice to fix was issued some 9 months after that date and in the agent's view could not be enforced through the courts, the authority had incorrectly exercised its powers in issuing the notice. In regards to a hearing being held, the agent stated that the hearing was requested 'subject to' the authority providing a submission on its interpretation of the application of section 378.
- 4.7.11 In addition to the discussion at paragraph 5.6 regarding section 378, I note here that
- a notice to fix is issued requiring an owner to remedy a contravention of the Act or Building Code; the notice to fix states the timeframe within which it must be complied with
 - a charging document is that which is laid with the District Court for an offence
 - non-compliance with a notice to fix is an offence for which a charging document could be laid.
 - the limitation period of 6 months in section 378 is in respect of the offence for which the charging document is laid.
- 4.7.12 The authority responded by email on 14 October 2014, noting that it had no further submission to make on the matter.

⁸ Determination 2014/035: The issue of a notice to fix for weathertightness remedial work carried out by a previous owner at 16B Sunbrae Grove, Tauranga (*Ministry of Business, Innovation and Employment*) 14 August 2014

5. Discussion

5.1 The issue of the notice to fix

- 5.1.1 The matter to be determined under section 177 of the Act is the authority's exercise of its powers of decision in respect of the issue of the first notice to fix. The notice was issued as the authority was of the view that, in contravention of section 40 of the Act, building work had been carried out without building consent first being obtained when consent was required.
- 5.1.2 The extended deck was constructed either during 1996 or some time after and without consent having been obtained. It is not clear whether the applicant sought appropriate advice prior to carrying out the building work to replace the deck (refer also paragraph 5.4); however the authority was not aware of the building work until January 2013. At that time the authority made its position clear by instructing the applicant to apply for a certificate of acceptance for the building work that had already been carried out and to obtain building consent for the remainder. The agent for the applicant has submitted that as-built drawings were being prepared for an application for a certificate of acceptance. I have not been provided with a copy of the drawings and it appears that the authority was not made aware of the applicant's intention. The authority issued the notice to fix some eight months after its site visit.
- 5.1.3 For a notice to fix to be issued the authority must consider on reasonable grounds that a person is contravening or failing to comply with the Act or regulations; that belief will require some specific evidence in support of that belief. In this instance the authority had carried out a site visit (January 2013) and observed the building work that was being carried out that the authority considered required consent. The authority notified the applicant at that time of its view that the building work was not exempt.
- 5.1.4 Given that the authority had presented its view in January 2013 that the building work required consent and the applicant had taken no steps since then to support a claim that the work was exempt or to apply for a certificate of acceptance, I consider the authority took the appropriate regulatory action in issuing the first notice to fix for building work it considered required consent.

5.2 Was the building work exempt under Schedule 1?

- 5.2.1 The agent considers the building work is exempt under Schedule 1(a) of the Act. Accordingly, and in order to confirm, reverse, or modify the notice to fix, I must also consider whether the authority's view was correct or whether the building work was in fact exempt under Schedule 1(a).
- 5.2.2 Schedule 1(a) that was current at the time the building work was carried out stated that a building consent was not required in respect of:
- (a) any lawful repair and maintenance using comparable materials, or replacement with a comparable component or assembly in the same position, of any component or assembly incorporated or associated with a building, including all lawful repair and maintenance of that nature that is carried out in accordance with the Plumbers, Gasfitters, and Drainlayers Act 2006, except—
 - (i) complete or substantial replacement of a specified system; or
 - (ii) complete or substantial replacement of any component or assembly contributing to the building's structural behaviour or fire-safety properties;or

- (iii) 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 ...

- 5.2.3 The exemption under Schedule 1(a) is for two different types of building work: any repair and maintenance using comparable materials; and any replacement with a comparable component or assembly in the same position. I accept that, although the authority has no record of it, there was an existing deck in place on the north elevation (the extended deck). Accordingly in this instance it is the replacement of the deck, including the foundations to the deck, which is under consideration.
- 5.2.4 Given that the extended deck was constructed without consent and there are no records held by the authority, there is limited information available on the construction details of the extended deck as originally constructed. However, the agent has supplied photographs dated 2002 which corroborate the applicant's description and clearly show that the original structure (verandah and extended deck) is not comparable with the 2013 deck in terms of the assembly's construction and location.
- 5.2.5 The original construction included a relatively small area surfaced to be used as a deck. The applicant has described the flooring of the extended deck as ply with a layer of concrete, and the agent has described it as timber framed with plywood and a waterproofing membrane similar to the consented deck. The agent noted there was a thin concrete topping, which he stated was applied by a previous owner to waterproof the deck. It is my understanding that has not been replicated in the 2013 deck.
- 5.2.6 In addition, the structure as shown in the photographs included a verandah with a roof made up of what appears to be a corrugated plastic material ("the verandah"). The verandah extended out past the northern edge of the 1996 deck and was not surfaced to be used as a deck. The north end of the 2013 deck is in line with the north edge of the 1996 deck and there is now no verandah.
- 5.2.7 Given the differences between the original extended deck/verandah structure and the 2013 deck, I am of the view that construction of the 2013 deck in place of the verandah and extended deck was not a 'replacement with a comparable component or assembly in the same position' for the purposes of Schedule 1(a) and accordingly was not exempt building work.
- 5.2.8 I note here that in some circumstances an owner or subsequent owner may be in possession of building work that has been carried out prior to the introduction of the Building Act, or that was exempt building work at the time of its construction, or that was carried out without consent, and in such cases there may be little or no information on the construction held by the owner or on the authority's records. However, where the owner's intention is to replace the building work with a comparable component or assembly under Schedule 1, particularly for extensive building work, I suggest it would be prudent for the owner to seek advice from a qualified builder or the authority in regards to establishing the nature of the original construction before relying on Schedule 1 in undertaking the new work.

Complete or substantial replacement of any component or assembly contributing to the building's structural behaviour

- 5.2.9 As I have concluded that the 2013 deck is not a replacement of the original structure with a comparable assembly in the same position, and accordingly that the building work was not exempt under Schedule 1(a), then it follows I do not have to consider

Schedule 1(a) any further. However, as there is a question of interpretation of the exemption provided for under Schedule 1(a)(ii) I have opted to address this issue.

- 5.2.10 Schedule 1(a)(ii) specifically excluded the complete or substantial replacement of any component or assembly contributing to the building's structural behaviour or fire safety properties.
- 5.2.11 The authority has taken the view that the 2013 deck is a "building" and that the complete replacement of the original structure, including all of the piles supporting the deck, constitutes a complete or substantial replacement of a component or assembly contributing to the building's structural behaviour.
- 5.2.12 The agent disputes this view, suggesting that the deck framing does not contribute substantially to the buildings structural behaviour and 'is independent of the building in this regard'. The agent states that 'it may make some minor contribution to the building but not a complete or substantial replacement contributing to the building's structural behaviour'.
- 5.2.13 Whilst I acknowledge the authority's position that the 2013 deck is a "building" under section 8(1)(a) of the Act, I consider that view provides too broad a meaning of the term. The 2013 deck is an addition to and provides an additional living area to the house. In that respect I consider it to be an alteration to an existing building. Section 7 defines "alter" in relation to a building as including 'to rebuild, re-erect, repair, enlarge, and extend the building' (my emphasis).
- 5.2.14 I am of the view therefore that the 2013 deck, the existing house, and the 1996 rumpus room/deck together can be considered a "building".

5.3 Content and wording of the notice to fix

- 5.3.1 The agent has identified some issues regarding the content and wording of the notice to fix. In particular the agent submitted that
- a notice to fix issued by an authority should detail specific breaches and provide sufficient evidence, and
 - the content and wording of the first notice was incorrect as it required removal of the building work or making the work fully compliant, but it did not provide for a certificate of acceptance to be applied for.
- 5.3.2 The notice to fix identified the particulars of contravention or non-compliance as:
- The following works have been undertaken on the building without building consent, such consent was required under Sec 40 of the Building Act 2004:-
- Old deck demolished and new deck constructed (Not exempted work)
- 5.3.3 The covering letter to the notice described the works as:
- Unauthorised works**
- Illegal building work:-
 - a. Deck which is over 1.5 meters in height has been demolished and has been rebuild (sic)

This is not exempted work and requires a building consent.
- 5.3.4 Given that the work was originally identified during construction in January 2013 and a site memo issued at that time (refer paragraph 3.1), I consider that the wording of the notice to fix was sufficient to identify to the applicant the breach of the Act and the building work to which it related.

5.3.5 The remedies provided for in the notice were to:

Remove the unauthorised work,

Or

Pursue any other option that may be available to you to make the aforementioned structure fully compliant in accordance with the Building Act 2004 and regulations under the Act.

5.3.6 The authority had previously advised the applicant, by way of the site memo issued on 23 January 2013, that a certificate of acceptance should be sought, however this was not included in either the notice to fix or the covering letter.

5.3.7 I accept the authority's view that the pursuit of 'any other option' available to the applicant *could* include the applicant seeking to obtain a certificate of acceptance. However it is my view that not including a specific reference to seeking a certificate of acceptance in either the notice to fix or the covering letter was not helpful to the applicant in understanding the options available under the Act at the time the notice to fix was issued; the options available to owners to remedy a contravention should be clearly set out in a notice to fix.

5.4 An owner's decision as to whether work is exempt

5.4.1 The agent has submitted his view regarding an owner's power to decide whether building work is exempt and whether building consent authorities have the power to issue a notice to fix when the owner's decision is in doubt.

5.4.2 The Building Act gives the owner responsibility for deciding whether proposed building work is exempt under Schedule 1; the Ministry's guidance document on exempt work⁹ states that it is an owner's obligation to check whether work is exempt before carrying out the building work and that it is up to the owner to seek appropriate advice in making that decision. This view is also supported by a previous Codewords¹⁰ article which states 'DIYers and builders are advised to read Schedule 1 in full and check with their local council before starting work on projects of this kind.'

5.4.3 Sections 14A to 14F 'Outline of responsibilities under this Act' also supports this view, in particular section 14B(a) which sets out the responsibility is for the owner to obtain any necessary consents, approvals, and certificates.

5.4.4 Determination 2013/071¹¹ noted that while the owner is responsible for deciding whether building work is exempt, building consent authorities are not bound to accept the owner's position in regard to the interpretation of Schedule 1, and I continue to hold that view. In addition I am of the view that it would be better for an exemption to be sought under Schedule 1(k) or an application for consent made, than for an owner to apply Schedule 1(a) incorrectly; if a building consent authority was of the view that proposed work fell within the scope of Schedule 1(a) then it should advise the owner accordingly¹².

5.4.5 Section 164(1)(a) of the Act provides for an authority to issue a notice to fix:

... if a responsible authority considers on reasonable grounds that—

⁹ Department of Building and Housing. A guide to building work that does not require a building consent (2nd Edition December 2010)

¹⁰ Codewords issue 17 January 2007: Schedule 1 – work that doesn't require consent (published by the then Department of Building and Housing)

¹¹ Determination 2013/071: The compliance of proposed repairs to an earthquake-damaged foundation including partial replacement of a concrete perimeter foundation wall, at 130 St Martins Road, St Martins, Christchurch (*Ministry of Business, Innovation and Employment*) 15 November 2013

¹² Refer also Determinations 2010/107 and 2011/041

(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); ...

5.4.6 I consider therefore that where an owner has incorrectly interpreted Schedule 1 of the Act and has carried out building work without consent where consent was required, an authority is acting within its powers to issue a notice to fix in respect of the unconsented building work. If an owner disputes the authority's view the owner can apply for a determination on the issue of the notice to fix, as has happened in this case. (Refer also paragraph 4.5.4).

5.5 The issue of the second notice to fix

5.5.1 While the second notice to fix has been withdrawn by the authority and is not a matter considered in this determination, the agent has requested that the second notice to fix be considered in terms of the 'threshold for issuing a [notice to fix]' and I am of the view it may be helpful to the parties to record my views.

Section 183

5.5.2 In my view, section 183 does not prevent an authority making a decision or exercising any power under the Act after an application for a determination has been made and before the Chief Executive has made the determination. There is nothing in the Act that prevents an authority from exercising such powers.

5.5.3 Section 183 concerns the effect of a decision or exercise of power pending a determination. It does not prevent an authority from making such a decision or exercising such a power whilst an application is being made; though that decision or exercise of power would be suspended until the determination is being made. Section 183 is predicated on the assumption that an authority has a power to make a decision or exercise a power under the Act pending a determination, because it sets out what the effect of such a decision or exercise of power will be.

5.5.4 In response to the second draft determination, both the authority and the agent sought clarification on this issue. I have provided the following as examples regarding the suspension of a decision or exercise of an authority's powers and the application of section 183:

- A building consent authority issues a notice to fix under section 164 for non-compliance with certain clauses of the Building Code. The notice requires the building work be brought into compliance and notes that if the owner does not comply with the notice the owner may be liable, on conviction, to a fine. The building owner disputes the authority's view regarding compliance and applies for a determination on the issue of the notice to fix. The effect of the notice (that is the requirement for work to be carried out to bring the building work into compliance with the Building Code) is suspended while the matter is subject to determination. Conviction on failing to comply with the notice could not be brought against the owner while the matter is subject to determination.
- A building consent authority issues a dangerous building notice under section 124 of the Act. The notice requires the building not be occupied and that it be made safe or demolished. An application for determination is made on the issue of the section 124 notice. The effect of the notice (requiring it not be occupied, or that work is carried out to make it safe or remove it) is suspended while the matter is subject to determination: in such cases the Chief Executive may issue notice under section 183 directing that the effect of the notice that

requires the building not be occupied remains in force while the matter is determined.

- A building consent authority issues a dangerous building notice under section 124(2)(c) of the Act for an earthquake prone building; the notice does not require the owner to vacate. The owner disputes the notice and applies for a determination. While the determination is being processed, information emerges that the building is insanitary, and the authority issues another notice under section 124 based on the insanitary condition and requiring the building be vacated. The Chief Executive may issue notice under section 183 that the effect of the second 124 notice remains in force.

5.5.5 If there was no power to make a decision or exercise a power there would be no need for section 183 to set out what the effect of such a decision or exercise of power is. The ability of an authority to make a decision or exercise a power pending a determination is also affirmed by the express power in section 183 for the chief executive to direct that section 183 doesn't apply – in other words – that particular decisions or exercises of power are to have full effect notwithstanding section 183.

The building work identified in the second notice to fix as being in breach of section 40 and/or section 17

- 5.5.6 The second notice to fix listed three separate items of building work that the authority considered were carried out without building consent being obtained when consent was required; the 2013 deck, a retaining wall, and a detached sleep out. The 2013 deck was identified in the first notice to fix and is considered in this determination. The retaining wall and detached sleep out are matters considered under a separate determination (refer paragraph 1.7.1)
- 5.5.7 The content of the second notice to fix also refers to non-compliance with the Building Code identified by the authority, largely in regard to the structural elements of the 2013 deck (refer paragraph 3.4.3); the compliance of the building work was not included in the first notice to fix and is not a matter in this determination. I note here that section 17 of the Act requires all building work to comply with the Building Code to the extent required by the Act regardless of whether building consent is required.

5.6 Section 378

- 5.6.1 The agent has made a number of comments regarding the effect of section 378. The agent considered the 6 month time limit within which proceedings must be brought for the enforcement of a notice to fix prevents any notice to fix being issued more than 6 months after the time the offending building work was undertaken.
- 5.6.2 However, section 378 only concerns the time within which a charging document must be filed. In my view section 378 does not affect the power of an authority to issue a notice to fix. Even where the time limit for commencing enforcement proceedings has expired there will still be valid reasons for an authority to issue a notice to fix. A notice to fix forms an important record of the work that is required to bring a building into compliance with the Building Act.
- 5.6.3 Further, the time limit in section 378 runs from when the offending conduct 'first became known, or should have become known' to an authority, and this will not just be from when the offending work was carried out. What an authority should have known will be a question of fact and degree and in my view cannot simply be taken from when the building work occurred, nor will the time necessarily run from when

the authority first carried out an inspection when the offending conduct would have been apparent.

5.7 Conclusions

- 5.7.1 The authority took the appropriate regulatory action under section 164 in issuing the notice to fix for building work it considered required consent.
- 5.7.2 The content and wording of the first notice to fix was adequate to identify the building work and specific breach of the Act.
- 5.7.3 The construction of the 2013 deck in place of the original deck/verandah construction was not a replacement of a 'comparable component or assembly in the same position' and was not exempt building work under Schedule 1(a).
- 5.7.4 In order to remedy the contravention the applicant had the option of seeking a certificate of acceptance.

6. The decision

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby confirm the authority's exercise of its powers of decision to issue the notice to fix No. 4399 in respect of the breach of section 40 of the Act.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 20 October 2014.

John Gardiner
Manager Determinations and Assurance

Appendix A

A.1 The sections of the Act discussed in this determination:

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); ...

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; ...

183 Decision or exercise of power suspended until determination made

(1) Until the chief executive makes a determination on a matter, any decision or exercise of a power by any person referred to in section 177 that relates to that matter is suspended unless and to the extent that the chief executive directs otherwise.

(2) However, a requirement in a notice to fix issued under section 164 to cease building work for safety reasons remains in force until the determination is made.

378 Time limit for filing charging document

Despite anything to the contrary in section 25 of the Criminal Procedure Act 2011, the limitation period in respect of an offence against this Act ends on the date that is 6 months after the date when the matter giving rise to the charge first became known, or should have become known, to any of the following persons:

- (a) the chief executive; or
- (b) a territorial authority; or
- (c) a regional authority; or
- (d) any person referred to in section 176(g)

A.2 The Schedule 1 current at the time the building work was carried out

Schedule 1 Exempt building work

1 A building consent is not required for the following building work:

(a) any lawful repair and maintenance using comparable materials, or replacement with a comparable component or assembly in the same position, of any component

or assembly incorporated or associated with a building, including all lawful repair and maintenance of that nature that is carried out in accordance with the Plumbers, Gasfitters, and Drainlayers Act 2006, except—

- (i) complete or substantial replacement of a specified system; or
- (ii) complete or substantial replacement of any component or assembly contributing to the building's structural behaviour or fire-safety properties; or
- (iii) 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; ...