



Determination 2017/004

Regarding the issue of a notice to fix in respect of building work undertaken without building consent at 5 Marie Avenue, Red Beach, Auckland

Summary

This determination considers building work done without consent to an existing house: the building work included the replacement of insulation and external wall cladding, installation of jack trusses, and affixing cladding over an existing cladding. The determination discusses whether the building work was exempt from the need to obtain a building consent under Schedule 1 of the Building Act, the drafting of the notice to fix and the remedies, and whether a building consent authority can withdraw a notice to fix.

1. The matter 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 owners of the house, S Kelly and L Clark (“the applicants”), represented by an agent (“the agent”)
- Auckland City Council (“the authority”), represented by a legal adviser.

1.3 This determination arises from the authority’s decision to issue notice to fix No. 6575 for building work that was carried out without building consent first being obtained. The applicants are of the belief that the building work is exempt under Schedule 1 of the Act (refer Appendix A).

1.4 The matter to be determined is therefore the authority’s exercise of its powers of decision in issuing the notice to fix.²

1.5 In making my decision, I have considered the submissions of the parties, the report of the agent, and the other evidence in this matter.

2. The building work

2.1 This determination relies on the description of the building work provided by the agent. The Ministry has not seen the building work, nor has it had an independent assessment carried out on its behalf. The authority has provided the Ministry with photographs of the building work.

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

² The matter to be determined under section 177(1)(b) and (2)(f) of the Act

- 2.2 The building work is to an existing single level building which was originally constructed in 1958. The building's exterior consisted of asbestos cement sheets and corrugated iron roofing.
- 2.3 The scope of the repairs and renovations undertaken by the applicants was outlined in a letter from the agent to the authority (refer paragraph 3.8).
- 2.4 The authority has reviewed the agent's letter and contends that the following building work requires building consent:
- installation of external wall insulation
 - the complete replacement of the cladding
 - the installation of 'four small' jack trusses to the roof structure
 - the installation of rusticated cladding over the existing cladding under the veranda.

3. Background

- 3.1 The applicants elected to repair and renovate the 1950's "batch style" house without building consent on the understanding that the building work was exempt from the requirement to obtain consent under Schedule 1.
- 3.2 When the applicants purchased the property in 2012 they added a walk-in wardrobe and cupboard in the bedroom; divided the kitchen into a kitchen and study; and incorporated a shower room in the kitchen. The applicants also replaced 'a few rafters' and all of the original asbestos cement cladding to the exterior of the house. The original cladding was replaced with 12mm plywood. The existing timber windows, and remaining ceiling and wall insulation were also replaced.
- 3.3 On 19 April 2016, the authority requested to inspect the property. On inspection, the authority stated that consent was required for the insulation of the external walls. The authority also said that 'other work' might require building consent.
- 3.4 On 20 April 2016, the applicants received notification from the authority to 'cease all building works' and were asked to provide the authority with an outline of the work already completed. The applicants provided the authority with this information on 26 April 2016.
- 3.5 On 5 May 2016, the authority issued the notice to fix. The notice identified the contravention as follows:
- Contrary to section 40 of the Building Act the following building works have been carried out without first obtaining a building consent:
- Including but not limited to the removal, replacement and addition of structural elements to the interior and exterior of the building.

- 3.6 The covering letter to the notice to fix, also dated 5 May 2016, stated:

[an authority official] conducted a site visit on 19 April 2016 and items of non-compliance were identified; therefore, we regret to advise that [the authority] must issue a NTF. The purpose of this letter is to explain the reasons for issuing the notice, attached to this letter.

The letter provided no other reasons why the notice to fix was issued.

- 3.7 On 24 June 2016,³ the applicants met with the authority and were advised to obtain advice from a building consultant. The applicants engaged the agent, who then viewed the property on 12 July 2016. The agent disagreed with the authority's decision to issue the notice to fix. The agent believed the building work falls within Schedule 1 of the Act and does not require building consent.
- 3.8 On 18 July 2016, the agent submitted his findings to the authority and requested the notice to fix be withdrawn. In an email on 3 August 2016, the authority declined to withdraw the notice to fix stating that it had 'no ability to do so under legislation'. The agent did not accept this response and subsequently applied for this determination: the Ministry received the application for determination on 4 August 2016.
- 3.9 The authority has since reviewed the agent's findings and sought legal advice. The authority believes that some of the applicant's building work sits outside the scope of Schedule 1 (refer paragraph 2.4).
- 3.10 On 26 August 2016, I proposed to convene a meeting with the parties to assist in resolving the question of which building work fell within the scope of the exemptions stated in Schedule 1. The agent elected not to take the offer at that time.

4. The submissions

4.1 The initial submissions

The applicant

- 4.1.1 The supporting documentation provided by the applicant included:
- a covering letter from the agent, and the agent's report dated 4 August 2016
 - the email correspondence between the agent and the authority
 - the notice to fix and the authority's covering letter
 - the applicants' personal statements
 - a proposal from the applicants to the authority to obtain building consent for the recladding of the external walls
 - information provided by the authority to the agent under an Official Information Act request.
- 4.1.2 The agent submitted that the building work falls within the scope of exempt work under Schedule 1. I have summarised the applicants' personal statements, the report of the agent, and the agent's correspondence with the authority as follows:
- The applicants took advice from the authority before undertaking the building works. It is on this advice that the applicants thought that building consent was not required.
 - The building work has now been completed and the authority claims that 'the removal, replacement and addition of structural elements to the interior and exterior of the building' requires building consent.
 - The authority relies on the single inspection undertaken in April 2016.
 - The notice to fix does not identify what work requires consent and what work is exempt under Schedule 1.

³ The applicants initially submitted that they met with the authority on the 14 June 2016. This date has been amended following subsequent submissions.

- The authority has since outlined the specific works that required consent (refer paragraph 2.4). The agent disagrees with the authority's submission, on the basis that:
 - the insulation of the external wall is exempt from consent under Schedule 1(1)(2)
 - the complete replacement of the cladding is exempt from consent under Schedule 1(1)
 - the installation of jack trusses to the roof structure is not excluded under Schedule 1(1)(3)
 - the installation of the weatherboard cladding over the existing plywood under the veranda serves as a 'decorative coating' and is therefore exempt under Schedule 1(1)(1).

4.1.3 The agent submitted that there were no reasonable grounds established to issue notice to fix No. 6575 and consequently the notice to fix should be withdrawn.

The authority

4.1.4 The authority provided a submission dated 12 September 2016. The submission included the following supporting documentation:

- email correspondence between the authority's lawyer and the agent dated 9 August 2016
- email correspondence between the agent and the authority
- email correspondence between the authority's lawyer and the Ministry summarising the authority's current position
- photographs of the building work date-stamped 19 April 2016
- a summary list of all relevant correspondence between all parties
- a timeline of the relevant events.

4.1.5 The authority submitted that:

- Although some of the building work may fall within Schedule 1, some of building work is outside the scope of Schedule 1 and required building consent.
- Any building work already undertaken that required building consent can be addressed through an application for a certificate of acceptance.
- Other work carried out, with respect to the cladding, that was within Schedule 1 is not considered compliant.

4.2 The first draft determination and submissions received

4.2.1 A first draft of this determination was provided to the parties for comment on 11 October 2016. The draft concluded that the work undertaken as described in paragraph 2.4, except for the installation of the weatherboards, was exempt building work under Schedule 1.

4.2.2 Both the applicants and the authority accepted the draft determination subject to amendments.

- 4.2.3 The agent responded to the draft in a letter dated 25 October 2016. The agent accepted the draft but made the following submission (in summary):
- The content and the wording of the remedies stated in the notice to fix need to be discussed in the determination.
 - Reference to section 40 of the Act in the notice to fix is mis-stated and the wording of “obtaining a consent” is strictly attributable to section 44 not section 40 of the Act. Guidance should be included in the determination.
 - It is not known why the notice to fix was issued; the authority should be required to demonstrate ‘reasonable grounds’ before issuing a notice to fix.
 - The existence of weatherboard cladding over existing plywood ‘should be understood as a replacement ...of the protective coating to the cladding’. The weatherboard cladding is ‘not incomparable’ to the existing plywood, in that the weatherboard cladding ‘has the same effect as cover battens at very close centres’. The comparable ‘test must be as “as good as and not incomparable” and not just “the same” ’.
 - Concerns about the code-compliance of other building work referred to in the draft determination (refer 5.9.2 herein) ‘exceeds the threshold of reasonableness’. A notice to fix should only be issued for serious breaches, and uncertainty about compliance does not satisfy this threshold.

4.2.4 The authority responded to the draft determination in a letter dated 27 October 2016. The authority accepted the draft, noting that it would consider an exemption for the isolated veranda cladding. The authority stressed that building consent would be required if the owner intended to finish the existing plywood cladding by way of installing weatherboards.

4.2.5 The agent responded to the authority’s submission, identifying grammatical and factual errors.

4.2.6 The agent provided a further submission on 30 November 2016 accepting a proposal to finalise and issue the draft, provided the decision ‘remains unchanged’ and a paragraph dealing solely with the cladding to the veranda as exempt work ‘is amended to allow for enclosing a porch under 5.0m² or accepting that battens/boards over plywood could be weatherboards in appearance’.

4.2.7 I amended the determination as I considered appropriate, and a second draft was issued to the parties on 5 December 2016.

4.3 The second draft determination and submissions in response

4.3.1 The draft second concluded that the work undertaken as described in paragraph 2.4, except for the installation of the weatherboards, was exempt building work under Schedule 1.

4.3.2 The agent responded on behalf of the applicants on 2 January 2017, noting that the reference made in his submission of 30 November 2016 was not to the authority’s discretionary powers under Schedule 1(2) but rather to Schedule 1(15) which provides for the enclosing of a porch or veranda as ‘the effect on the house is [no] different (and likely much less) than if a full 5.0m² [porch] was enclosed (and this is allowed without consent)’. The agent also expressed the view the authority does not have the power to require an owner to remove building work unless it is dangerous or insanitary.

- 4.3.3 The authority responded on 18 January 2017, noting it had no further comment to make.

5. Discussion

5.1 General

- 5.1.1 The matter to be determined under section 177 of the Act is the authority's exercise of its powers in its decision to issue the notice to fix. The notice to fix 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 the required building consent. Conversely, the applicants are of the view that the building work is exempt under Schedule 1 of the Act and the notice to fix was incorrectly issued.
- 5.1.2 Section 41(1)(b) of the Act states that a building consent is not required for any building work described in Schedule 1. The matter in dispute concerns the interpretation of Schedule 1 of the Act.

5.2 The insulation of the external wall

- 5.2.1 According to the applicants, the building's existing insulation was removed and replaced with proprietary woollen insulation. Schedule 1(1)(2) provides for the replacement of 'any component or assembly incorporated in or associated with a building, provided that — (a) a comparable component or assembly is used; and (b) the replacement is in the same position'.
- 5.2.2 The applicants advised that the original insulation consisted of glass wool fibre batting and it was replaced in the same position with the proprietary woollen insulation that the applicants consider is a comparable component.
- 5.2.3 While the material properties of glass wool fibre and the woollen fibre are different, I consider the two types of insulation to be comparable in that both are batting-type products using a fine fibrous material, they are installed using similar tools and techniques, and they have similar dimensional properties and similar insulation performance characteristics (both trap still air and rely on the thickness of the material in order to work).
- 5.2.4 None of the exceptions in Schedule 1(1)(3) are applicable to the insulation of the external wall, and I therefore conclude that this building work is exempt under Schedule 1(1)(2).

5.3 The complete replacement of the cladding

- 5.3.1 The building's existing asbestos cement sheets on the exterior of the home were replaced with treated structural plywood. I note here that building work involving the removal of asbestos products is covered under various legislation including: Health and Safety in Employment Act 1992, Health and Safety in Employment (Asbestos) Regulations 1998, Building Act 2004, and the Resource Management Act 2004. I have not considered this aspect of the building work; this determination considers only whether the replacement cladding is a comparable material for the purpose of Schedule 1(1)(2).
- 5.3.2 In this case, the existing cladding had deteriorated; it was nearing the end of serviceability and needed replacement. If a component requires replacement, then Schedule 1(1)(2) permits replacement as long as (a) the replacement uses 'comparable materials' and (b) the replacement is in the same position.

5.3.3 I consider that plywood cladding is comparable to the asbestos cement sheets for the following reasons:

- There is no question that the plywood cladding is used in the same position and in the same configuration as the original. Both perform the same function.
- Both asbestos cement sheets and plywood are sheet materials readily comparable in size and thickness, and use similar installation methods.
- The plywood cladding is a commonly used material, typically used as a cladding.
- B2/VM1 provides for the durability to be proven by comparable performance of similar building elements; the asbestos cement sheets and plywood would have comparable in-service exposure conditions when assessed under B2/VM1 1.3.2.

5.3.4 In my view, none of the exceptions in Schedule 1(1)(3) are applicable to the cladding. I note that the assessment of 'structural behaviour' in Schedule 1(1)(3)(b) concerns the buildings structural behaviour rather than the structural behaviour of 'any component or assembly'. I consider that it is unlikely that the original cladding provided any bracing to the building's structural behaviour, and therefore the re-cladding of the external walls is not a structural component or assembly. However, if the evidence did suggest that the cladding provided bracing to the building's structural behaviour, then my conclusions on this aspect of the building work would be different.

5.3.5 In conclusion, setting aside the requirements with regard to the removal of the asbestos cladding (refer paragraph 5.3.1), I consider the installation of the replacement cladding is exempt building work under Schedule 1(1)(2). There is no provision in Schedule 1 that prevents an entire cladding system from being replaced so long as the other exceptions in Schedule 1(1)(3) do not apply.

5.4 The installation of jack trusses to the roof structure

5.4.1 The applicants installed 'four small' jack trusses to the roof structure of the building. The authority submitted that this deviation from what was previously there affected the structural performance of the building. The authority did not provide any evidence to support this position.

5.4.2 In my view, none of the exceptions in Schedule 1(1)(3) are applicable to the installation of jack trusses to the roof structure. It is highly unlikely that 'four small' jack trusses constitute a 'complete or substantial' replacement of the roofing component contributing to the buildings structural behaviour. In conclusion, I consider that this building work is exempt under Schedule 1(1)(2).

5.5 The installation of weatherboards over the existing plywood cladding

5.5.1 The applicants submit that the installation of the weatherboard cladding is over the existing plywood and serves as a 'decorative coating to the [original] cladding' and that the weatherboards are 'not incomparable' with the existing plywood. The authority submits that this building work is a deviation from the original veranda cladding system.

- 5.5.2 The term ‘decorative coating’ is typically used when referring to paint that is used in the normal maintenance of a cladding, and not to the application of a new cladding. The outer cladding to, say, a ventilated cavity system is not considered the decorative coating in respect of the expected performance of the cladding system as a whole.
- 5.5.3 I consider the rusticated cladding installed over the plywood does not fall within Schedule 1(1) as it is not ‘repair, maintenance, or replacement’. This is consistent with other determination decisions made in similar cases. In Determination 2014/055,⁴ which considered plywood installed over texture coated fibre-cement, I said:
- The building work carried out in this case was not a repair or maintenance using comparable materials, nor replacement with a comparable component or assembly. The addition of the overlay was an alteration of the cladding system and is not building work that falls within the exemptions set out in Schedule 1...
- 5.5.4 Given my view that the addition of the weatherboards is not work that falls under Schedule 1(1), there is no need for me to consider whether the weatherboards are comparable with the existing plywood. However, in terms of comparability I note that a weatherboard cladding differs in configuration and assembly, and uses different fixing and detailing to that of plywood.
- 5.5.5 The agent for the applicants also submitted that the installation of the cladding over the existing plywood has the same effect as enclosing the veranda: the latter is provided for under Schedule 1(15). I accept that installing the over-cladding or enclosing the veranda would have a similar or limited effect on the performance of the external envelope. However, I do not accept that building work that has the same effect as exempt work under Schedule 1 can also be considered exempt because of this.
- 5.5.6 I am of the view that the effect of “closing in of an existing veranda, patio, or the like” is substantively different to that of installing a new cladding to an existing cladding, and that the exemption does not apply in respect of over-cladding.
- 5.5.7 In the draft of this determination I commented that given this area of cladding is located under a wide veranda the authority could consider the matter as a discretionary exemption under Schedule 1(2). I note the authority has indicated it will consider an exemption for the weatherboard cladding installed under the veranda (refer paragraph 4.2.4).

5.6 Drafting of the Notice to Fix

- 5.6.1 The contravention described in the notice to fix is with respect to work done without building consent and it refers to ‘the removal, replacement and addition of structural elements’, although the notice advises it is not limited this. The letter accompanying the notice to fix refers to work that had been identified as non-compliant: the notice to fix makes no reference to non-complaint work.
- 5.6.2 The authority has since identified four items of building work carried out without consent that it contends lead to the notice being issued; three of which I consider are exempt work under Schedule 1.
- 5.6.3 The notice to fix should clearly state the contravention(s) to enable the recipient of the notice to respond accordingly. It cannot be inferred that work done without consent is not compliant with the Building Code. If there is work that does not

⁴ *Determination 2014/055 Regarding the issue of a notice to fix for building work carried out to a house* (10 November 2014) Ministry of Business, Innovation and Employment.

comply with the Building Code, then this should be clearly identified in the notice or in correspondence accompanying the notice. Neither has been done in this case.

- 5.6.4 I consider the notice to fix is poorly drafted and should be withdrawn. The authority can revisit the matter and make another decision to issue a new notice to fix if it has reasonable grounds to be satisfied as to a breach of the Act or Regulations.

5.7 Withdrawing the Notice to Fix

- 5.7.1 I have decided to exclude this issue from the matters determination as the authority has not yet provided the applicants with a clear refusal to withdraw the notice to fix. However, in declining this part of the application, I make the following comments.
- 5.7.2 The agent requested the authority withdraw the notice to fix in a letter dated 18 July 2016, but the authority has stated it does not consider it has the power to do so (refer paragraph 3.8).
- 5.7.3 The authority's conclusion that the Act does not allow it to withdraw a notice to fix is not consistent with the provisions of the Act concerning notices to fix. The Act contemplates successive notices to fix being issued for the same matter. For example, when a building consent authority inspects work that has been undertaken in response to a notice to fix the building consent authority must confirm whether the notice has been complied with, and if it has not been complied with, must issue a further notice to fix (section 167(2) and (4)(b)).
- 5.7.4 Similarly, a notice to fix must state the timeframe within which it must be complied with (section 165(1)(b)). Sometimes an authority may need to provide a person with further time to comply if the person has been unable to comply through no fault of their own. This is one of the scenarios contemplated by the authority's own code of practice relating to notices to fix: a new notice to fix with a new timeframe for compliance will have to be issued by the authority.
- 5.7.5 In each of these situations, the new notice will supersede the old notice, and the authority will not be able to bring proceedings under section 168 of the Act for a failure to comply with the old notice. The old notice is effectively spent and of no further effect. Good practice dictates that when issuing a notice to fix that replaces a previous notice to fix, that fact should be clearly communicated to the person to whom the notice is being issued. The person to whom the notice to fix is issued, should be able to identify which notice to fix they must comply with.
- 5.7.6 Given the clear powers in the Act for a building consent authority to issue a notice to fix that replaces a previous notice to fix on the same matter and makes the previous notice redundant, the Act must allow a building consent authority to withdraw a notice to fix where circumstances change and where there is no longer a contravention of the Act or Regulations, or it turns out the basis for issuing a notice to fix was wrong.

5.8 Remedies under a notice to fix

- 5.8.1 I have decided to exclude this issue from the matters for determination because discussion on this matter will not alter the decision; however, I make the following comments.

5.8.2 The notice to fix stated that in order to remedy the identified contravention(s) in the notice to fix, the applicants were required to:

Remove the unauthorised building works; **Or**

Carry out all building work required to make the building fully comply with the Building Act and regulations; **And/Or**

Pursue any other option/s required to make the building fully comply with the Building Act and regulations.

5.8.3 The notice to fix does not require only that the applicants remove the unauthorised building work; rather this is one option that can be undertaken to remedy the identified contraventions. Instead of removing the building work, a certificate of acceptance is an acceptable alternative in ensuring that the unauthorised building work is compliant with the Building Code. I am of the view the notice to fix should have included reference to the owner applying for a certificate of acceptance; it is important that the notice to fix clearly states the options available to the applicant under the Act.

5.8.4 In addition, the second and third remedies do not directly apply to the identified contravention(s). In future, the authority must clearly detail remedies that directly relate to the contravention(s) so that the recipient of the notice can respond accordingly. Remedies are an essential part of the notice to fix and they should clearly detail the options available to owners to rectify the breach.

5.9 Conclusions

5.9.1 In this case I have found that the building work undertaken as described in paragraph 2.4, with the exception of the weatherboards and setting aside other legislative requirements relating to removal of asbestos, is exempt building work under Schedule 1. I conclude that the authority's interpretation of the requirement to obtain consent for all the building work was incorrect.

5.9.2 While I have found that the majority of the building work is exempt from the need for building consent, the building work is still required to comply with the Building Code. The authority has submitted that it has concerns about the compliance of some of the other building works (refer paragraph 4.1.5, 3rd bullet). This determination does not consider the compliance of the building work, and my decision does not prevent the authority from taking appropriate regulatory actions in respect of any building work that does not comply with the Building Code.

5.9.3 That said, the onus is on the authority to establish evidence of non-compliance; general matters of concern cannot be added to the notice to fix without satisfying the required threshold. 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 its regulations. In such circumstances, that belief will require specific evidence of non-compliance with the performance requirements of the Building Code.

5.9.4 In my view, the authority's concerns regarding the code compliance of 'other works', without further specific evidence do not meet the reasonable grounds threshold required for issuing a successive notice to fix. Any action in respect of building work that the authority considers to be non-compliant must be based on evidence of a Building Code breach.

6. The decision

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority incorrectly exercised its powers of decision in issuing notice to fix No. 6575 in relation to the building work described herein. I therefore reverse the authority's decision to issue notice to fix No. 6575.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 20 January 2017.

John Gardiner
Manager Determinations and Assurance

Appendix A

A.1 Relevant clauses of Schedule 1 Building work for which building consent not required

1 General repair, maintenance, and replacement

- (1) The repair and maintenance of any component or assembly incorporated in or associated with a building, provided that comparable materials are used.
- (2) Replacement of any component or assembly incorporated in or associated with a building, provided that—
 - (a) a comparable component or assembly is used; and
 - (b) the replacement is in the same position.
- (3) However, subclauses (1) and (2) do not include the following building work:
 - (a) complete or substantial replacement of a specified system; or
 - (b) complete or substantial replacement of any component or assembly contributing to the building's structural behaviour or fire-safety properties; or
 - (c) repair or replacement (other than maintenance) of any component or assembly that has failed to satisfy the provisions of the building code for durability, for example, through a failure to comply with the external moisture requirements of the building code; or
 - (d) sanitary plumbing or drainlaying under the Plumbers, Gasfitters, and Drainlayers Act 2006.

15 Closing in existing veranda or patio

Building work in connection with the closing in of an existing veranda, patio, or the like so as to provide an enclosed porch, conservatory, or the like with a floor area not exceeding 5 square metres.