



Determination 2018/035

Regarding the refusal to issue a certificate of acceptance and the issue of a notice to fix for alterations to a building at 119 Grant Road, Thorndon, Wellington



Summary

This determination concerns alterations carried out without a building consent. The determination considers the authority's decisions to refuse to issue a certificate of acceptance and the issue of a notice to fix, and whether the building work was exempt work or was subject to an existing building consent. The determination discusses the content of the notice to fix and of the notification of refusal.

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, Katie Gordon, Manager Determinations, 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 building, A Morris (“the applicant”) acting via an agent (“the agent”)
 - Wellington City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 This determination arises from the decisions of the authority to refuse to issue a certificate of acceptance and to issue a notice to fix for alterations to an existing building. The authority refused to issue a certificate of acceptance and issued the

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.

notice to fix because the alterations were carried out without building consent and the authority is of the view consent was required.

- 1.4 The matter to be determined² is therefore the authority's exercise of its powers of decision in refusing to issue the certificate of acceptance and in issuing the notice to fix. In deciding whether the authority's decisions should be confirmed, reversed or modified, I must consider:
- in relation to the notice to fix, whether the subject alterations ("the study extension") are subject to an existing building consent and, if not, whether the building work is exempt under Schedule 1 of the Act from the requirement to obtain a building consent (I address this matter in paragraph 4)
 - in relation to the refusal to issue the certificate of acceptance, whether the authority had sufficient and adequate information to establish on reasonable grounds that the study extension complies with the Building Code in order that a certificate of acceptance could be issued (I address this in paragraph 5).
- 1.5 This determination is limited to the building work indicated in Figure 1 and does not consider the compliance of the earlier alteration work, which had been issued with a code compliance certificate on 21 August 2017. My decision is limited to the matter outlined in paragraph 1.4.
- 1.6 In his submission and in correspondence with the authority, the agent raised other matters which have informed this determination. However, the process of applying for a certificate of acceptance under section 98³ is not a matter I can determine under section 177 of the Act and this determination is therefore limited to the matters outlined in paragraph 1.4.
- 1.7 In making my decision, I have considered the submissions of the parties and other evidence in this matter. The relevant sections of the Act are set out in the Appendix.

2. The building work and background

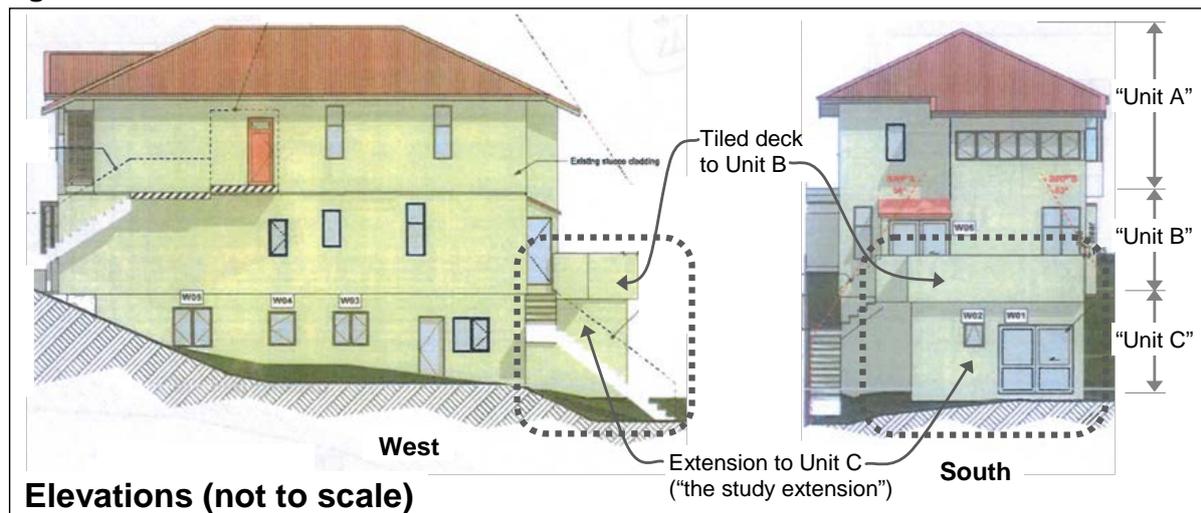
- 2.1 The building is situated on a narrow urban site in a very high wind zone⁴ as described in the NZS 3604⁵. The as-built elevations nominate the street elevation as facing north and this determination follows that convention. The site slopes from the street down to the rear boundary, with two storeys on the north elevation and three storeys to the south as shown in Figure 1.
- 2.2 The original house was built during the 1920s, with various alterations carried out as the building's function changed over time. Construction of the original house appears to have been traditional light timber frame with masonry foundation walls, an undeveloped sub-floor area, timber framed floors, corrugated steel hipped roof, stucco wall cladding and timber joinery.

² Under sections 177(1)(b), 177(3)(b) and 177(2)(f) of the Act

³ In this determination, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code

⁴ According to the application for the certificate of acceptance

⁵ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

Figure 1: The extension

2.3 The consented alterations

2.3.1 When the applicant purchased the building in January 2016, the building appears to have accommodated the following:

- First floor level (“Unit A”): a four bedroom flat with entry from the west.
- Ground floor level (“Unit B”): a four bedroom flat with entry from the street.
- Basement level (“Unit C”): a two bedroom flat to the south.
- A detached single garage on the street boundary.

2.3.2 The applicant applied for a building consent for alterations in October 2016, and the authority issued a building consent on 24 November 2016 (which I have not seen) for:

Extension to basement level. Internal alteration to create new additional bedrooms & bathrooms.

(In this determination I refer to these alterations as “the consented alterations”.)

2.3.3 The consented alterations included various interior alterations to all floors. The alterations to Unit C included development of the north subfloor area to provide two additional bedrooms and a bathroom. That building work included excavation of the subfloor, new concrete block retaining walls and a new concrete slab. The consent floor plan showed french doors from the living area opening to a small ground level deck to the south, with new external stairs providing access up to the rear door to Unit B.

2.3.4 The consented alterations were completed and the authority issued a code compliance certificate for the building work on 21 August 2017. A photograph taken of the south elevation to Unit C during the final inspection shows:

- French doors to the living area, with a small raised platform deck
- a timber pergola over the platform deck; with corner posts, a ‘lintel beam’, and 7 beams fixed with joist hangers into a ribbon plate attached to the south wall
- timber decking extending between the west and east boundary fences.

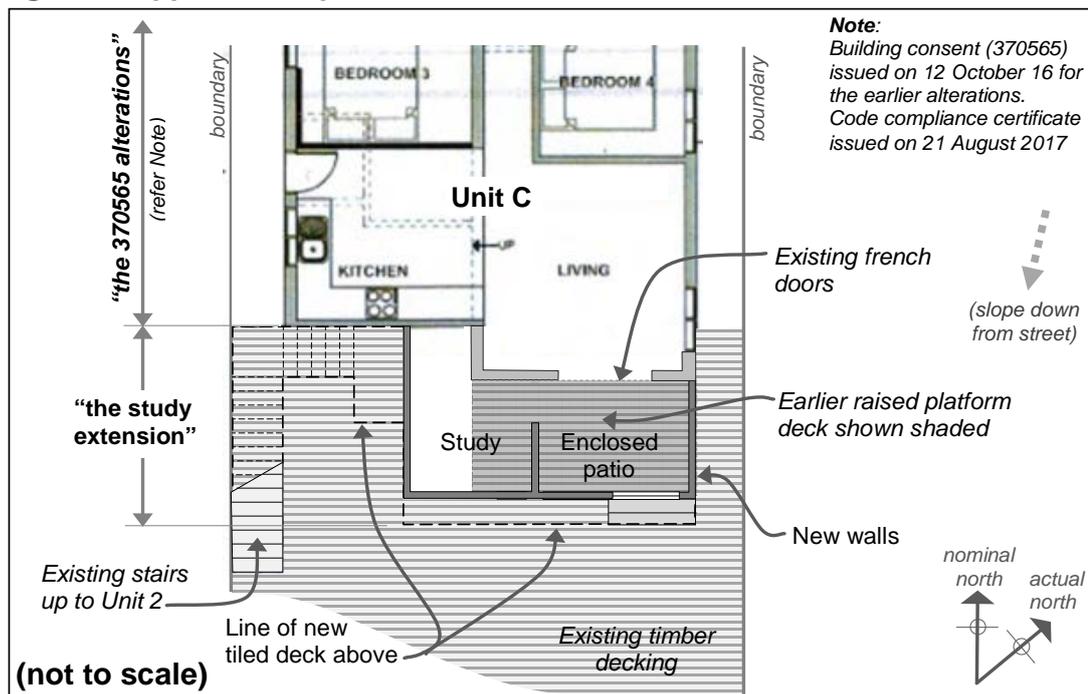
2.4 The study extension

2.4.1 According to the applicant, prior to completion of the consented alterations the applicant decided to add a minor extension to the middle and bottom units. The applicant states that work was initially intended:

...to be confined to aspects allowed for in Schedule 1 of the Building Act such that there would be no consent issues. However, the extension work eventually turned out to be a little more than the Schedule 1 parameters, but was completed because of the pressure of having already arranged for new tenants to start on 17 September 2017.

2.4.2 The subsequent alterations (“the study extension”), which are the subject of the notice to fix, were to the south of Unit C beneath a tiled deck added to Unit B as shown in Figure 2.

Figure 2: Approximate plan



2.4.3 According to the as-built drawings, Unit C now accommodates the following:

- entry on the west into the open plan kitchen/living area
- four bedrooms and two bathrooms to the north
- a study area and enclosed patio to the south.

2.4.4 Existing stairs now lead up to a new south deck to Unit B.

2.4.5 Construction of the study extension appears to be conventional light timber frame with timber flooring, plywood sheet cladding with battened joints and aluminium joinery. The new tiled deck to Unit B included open timber balustrades, with timber posts and horizontal spaced timber slats. I am unable to determine the treatment level (if any) of framing timbers.

2.4.6 The study extension was completed during September 2017 and it appears that a complaint was made to the authority in regard to the extension exceeding the terms of the resource consent for the consented alterations. The authority visited the site and took photographs of the study extension on 5 October 2017.

2.5 The first notice to fix

- 2.5.1 The authority wrote to the applicant on 10 October 2017, noting the alterations had been carried out without a building consent and attaching a notice to fix (No 395394).
- 2.5.2 The notice to fix stated that the particulars of contravention or non-compliance were:
- 1 Building work with no building consent**
Building work, namely extension to the existing building has been done without a building consent. Section 40 of the Building Act 2004 requires that a building consent must be obtained prior to undertaking any building work.
- 2.5.3 The notice required the applicant to remedy the contravention, stating:
- You must either apply for a Certificate of Acceptance, or remove the building work within 10 working days of the date of this notice. Any additional work not yet undertaken must not be started until a building consent has been obtained from the [authority].
- 2.5.4 The notice to fix required the applicant to comply with the above by 24 October 2017 and also noted that:
- All building work must cease immediately until the [authority] is satisfied that you are able and willing to resume operations in compliance with the Building Act 2004 and regulations under the Act.
 - It is your responsibility to ensure that all work complies with the Wellington City District Plan and that any aspects of non-compliance are identified and appropriately assessed in a resource consent.

2.6 The application for a certificate of acceptance

- 2.6.1 On 24 November 2017⁶ the authority received an undated application for a certificate of acceptance (No. SR 398813) from the builder on the applicant's behalf. The application noted that the date of construction was September 2017 and described the building work as follows:
- Added additional study and closed in patio approx 11 sq.m to ground floor Unit C.
Build a deck on top of roof of it for access from middle Unit B of approx 11 sq.m.
Cladded lower level ply and batten, deck tiled.
- 2.6.2 The application attached supporting documentation, which included:
- A statement from a licensed building practitioner ("LBP") noting he had advised on setting out the roof and deck structure, exterior cladding, deck balustrade and the LVL⁷ beam to Unit B's deck doors – and had checked on beams for the window and ranch slider and noted that all areas had been 'fully insulated'. The LBP considered that 'the addition was completed to an acceptable standard to meet the building requirement as set out in NZS3604'.
 - Construction photographs of the study extension, showing wall and deck framing, insulation, flooring, cladding, new deck balustrades etc.
 - As-built drawings dated 22 November 2017, including the floor layout for Unit C and the elevations showing the study extension.
- 2.6.3 In a letter to the applicant dated 7 December 2017, the authority noted that receipt of the application satisfied the requirement included in the notice to fix.

⁶ The application is date stamped as received by the authority twice – once on 24 November 2017 and once on 1 December 2017

⁷ Laminated veneer lumber (LVL) is an engineered wood product that uses multiple layers of thin wood assembled with adhesives

2.7 The refusal of the certificate and the second notice to fix

2.7.1 On 16 January 2018, the authority inspected the building work and took photographs of visible building items which it identified as non-compliant. A plumbing site notice dated 17 January 2018 also identified an item requiring attention. Items identified during the authority's inspection were:

- lack of fire resistant lining
- lack of head flashings to joinery
- lack of sill flashing to window
- underlying joints and junctions to plywood wall cladding
- wall to deck junction not weathertight
- wall to deck tile junction not weathertight
- exposed plywood edges under deck tiles at junction with decking
- deck edge not weathertight
- lack of drip edge into gutter
- deck downpipe discharging into sump in lieu of main stormwater drain.

2.7.2 In a letter dated 24 January 2018, the authority advised that the:

... application for a certificate of acceptance has been declined under section 96 of the Building Act 2004 as the [authority] is not satisfied to the best of its knowledge and belief from the information provided that the building work complies with the Building Code.

2.7.3 The authority attached a second notice to fix (No. 398813), which stated that the particulars of contravention or non-compliance were:

1 Building work with no building consent

On 16 January 2018⁸ at 1:30pm the above property was inspected by [the authority]. Building work, namely addition of a study and closed in patio to Unit C. Build deck for access from Unit B. Cladding to lower level and tile deck has been done without a building consent. Section 40 of the Building Act 2004 requires that a building consent must be obtained prior to undertaking any building work.

2.7.4 The notice stated that to remedy the contravention, the applicant must:

... remove the building work within 60 days of the date of this notice. Any additional work not yet undertaken must not be started until a building consent has been obtained from the [authority].

The following inspections are required with respect to the remedial work;

- Once building work has been removed.

This notice must be complied with by; 25th March 2018.

2.8 The applicant's objections

2.8.1 In a letter to the authority dated 8 March 2018, the applicant objected to the refusal and the notice to fix. The letter set out the applicant's view on the matter (in summary):

⁸ The date when the photographs were taken of the visible defects

- The study extension was in conjunction with major consented alterations.
- Building officials were aware of extra work, which was being done during the authority's inspection of the consented alterations.
- It is not uncommon for 'minor variances' to arise during extensive projects, and these are normally dealt with via a certificate of acceptance process.

2.8.2 The agent also set out what he considered were 'instances of careless wording' in the authority's correspondence and notices, and included the following comments (in summary):

- The description of building work in first notice to fix was 'severely inadequate'.
- The letter of 7 December 2017 stated that the notice was 'complied with', which was 'manifestly absurd' because no work had been inspected.
- Site notices are not clear, with descriptions of 'Pass with non-compliant items', 'PassNC', references to 'photos and descriptions', and no detail.
- A site notice one day later then changed the outcome to 'fail', references to the same 'photos and descriptions' and no detail.
- Site notices show print dates not dates that correspond with the actual date of inspection.
- No further information was provided until photographs were supplied during a visit to the authority to seek further information on 5 February 2018.

2.8.3 The applicant stated that the sequence of events had resulted in 'irregularities' including (in summary):

- The authority received the application for a certificate of acceptance on 24 November 2017 and section 98(1) requires the authority to make a decision within 20 working days – which would be by 16 January 2018. However the authority did not decline the application until 24 January – which is 'legally defective'.
- The authority failed to communicate any formal notification detailing alleged defects following the January inspections of the building work.
- The site notices for the inspection carried out on 16 January 2018 were altered 'to reflect a different conclusion to that originally reached by the building inspector.' In reversing the initial conclusions, the authority did not consider that 'the alleged deficient aspects were entirely capable of being remedied.'
- The authority's refusal to grant the certificate of acceptance does not comply with section 99A(2) as it simply repeated the wording of that section, without providing detail of how the building work is regarded as not complying with the Building Code.
- Issuing the notice to fix which required removal of the unconsented extension was 'grossly unreasonable'.

2.8.4 The applicant concluded by stating that he expected the authority to (in summary):

- cancel its refusal, because in the applicant's view it is legally defective
- withdraw the notice to fix

- not pursue any enforcement or prosecution for the time being
- formally advise the applicant of aspects that prevent issuing a certificate of acceptance.

2.9 The authority's response to the applicant's objections

2.9.1 The authority responded on 3 April 2018, noting the applicant's points but confirming that its position was unchanged and stating that compliance would 'continue to be monitored' against the second notice to fix.

2.9.2 In regard to the applicant's background comments, the authority noted (in summary):

- The building consent for the consented alterations did not include the study extension, which did not exist at the time of the final inspection.
- The platform deck and pergola were in place at the final inspection.
- It is the owner's responsibility to apply for 'minor variations' to a building consent⁹.

2.9.3 In regard to the comments on inspections, the authority noted (in summary):

- During the inspection on 16 January 2018, it was explained that 'there were many items of non-compliance and a review of the supporting documentation back in the office would be required'. The builder was informed by phone of the outcome, with formal notification on 24 January 2018.
- As the authority could not be satisfied on reasonable grounds or ascertain the building work complies with the Building Code, as required by section 96(2), the authority therefore stands by its decision to refuse the certificate of acceptance.

3. The submissions

3.1 The Ministry received an application for a determination on 8 May 2018 and in a letter to the parties dated 17 May 2018 clarified the matters to be determined and what the determination would consider (see paragraph 1.4). On 21 May 2018, the authority was asked to provide additional information to demonstrate the background to and support for its decisions; the authority provided some information on 15 June 2018.

3.2 The applicant's submission

3.2.1 The applicant provided a submission dated 8 May 2018, which set out the background to the dispute and the applicant's view on the authority's actions. The applicant expanded on some matters raised in the 8 March 2018 letter to the authority (see paragraph 2.8), and included the following comments (in summary):

- Towards the end of the consented alteration work, it had been decided that 'some minor extension would make the middle and bottom units even more attractive as rental propositions' and work was completed during September 2017.

⁹ I note here that minor variations do not require a formal application in the way that a building consent amendment is applied for. However all proposed minor variations need to be communicated to the relevant building consent before the building work is undertaken. Decisions about whether a change meets the definition of a minor variation are the responsibility of the building consent authority. For more information on minor variations see: <https://www.building.govt.nz/projects-and-consents/build-to-the-consent/making-changes-to-your-plans/minor-variations-guidance/>

- The study extension ‘eventually turned out to be a little more than the Schedule 1 parameters’ and a certificate of acceptance was sought after the first notice to fix was issued.
- In contrast to the authority’s claim regarding the inspection on 16 January 2018 (see paragraph 2.9.3), the builder was given the impression that ‘the situation was no big deal, that they were not unduly concerned and that there should be little problem in issuing’ the certificate of acceptance.
- The authority refused to issue a certificate and issued a second notice to fix; then responded to detailed objections with a ‘brief letter’ that ‘avoided addressing the critical points’.
- The authority has failed to:
 - provide formal advice of particular matters underlying its decisions
 - directly specify its objections
 - acknowledge that alleged defects can be rectified
 - allow opportunity to rectify any defects.

3.2.2 The applicant submitted:

... the most appropriate way of resolving this dispute would be to determine:

- a) that the [authority] issue a Certificate of Acceptance forthwith, given its failure to comply with the statutory time limit for advising refusal, or (if this submission is not preferred);
- b) that the [authority] withdraw both its Notice to Fix dated 24 January 2018 and the associated refusal to grant our application for a Certificate of Acceptance;
- c) that the [authority] formally and specifically advise us of the particular matters that it regards as standing in the way of a Certificate of Acceptance being issued, either in a new Notice to Fix or in some other written format; and
- d) that the [authority] stand willing to issue a Certificate of Acceptance when these matters have been rectified.

3.2.3 The applicant provided:

- the first notice to fix dated 10 October 2017
- the undated application for a certificate of acceptance, which included:
 - a statement from a licensed building practitioner
 - construction photographs of the study extension
 - the as-built drawings dated 22 November 2017
- the inspection site notices and photographs dated 16 January 2018
- the refusal to issue a certificate of acceptance dated 24 January 2018
- the second notice to fix dated 24 January 2018
- the applicant’s objections to the refusal dated 8 March 2018
- other correspondence between the applicant and the authority.

3.3 The authority’s submission

3.3.1 The authority made no submission but provided the following information and additional documents pertinent to this determination, which included:

- file notes that included:

- a photograph of platform deck and pergola taken in August 2017
- a photograph of study extension dated 5 October 2017
- the consented floor plan of Unit C showing a platform deck only
- various other internal and external emails and records.

3.4 The draft determination and submissions in response

- 3.4.1 A draft of this determination was issued to the parties for comment on 5 July 2018.
- 3.4.2 The authority responded on 13 July 2018, accepting the draft determination without further comment.
- 3.4.3 The applicant responded on 20 July 2018, accepting the draft determination subject to minor amendments, and submitting that the site report of 16 January 2018 was another example of inadequate record keeping by the authority.
- 3.4.4 I have taken into account the submissions received and have amended the determination as I consider appropriate.

4. The decision to issue notices to fix

4.1 The status of the study extension

- 4.1.1 The first question I will address is whether the study extension was subject to an existing building consent and, if not, whether the building work is exempt under Schedule 1 of the Act from the requirement to obtain a building consent. If the building work was subject to building consent, a code compliance certificate is the appropriate regulatory ‘sign-off’, or if the building work was exempt then no certificate of acceptance would be required.
- 4.1.2 In the letter to the authority on 8 March 2018, the agent put forward his view that the study extension was undertaken in conjunction with the consented alterations and it is not uncommon for such ‘minor variances’ to arise. The agent also maintained that the authority’s inspectors were aware of the extra work being carried out during the authority’s final inspection.
- 4.1.3 However, I make the following observations:
- The August 2017 photograph taken during the final inspection of the consented alterations clearly shows a completed south elevation, which included an exterior timber pergola over a deck platform, surrounded by timber decking.
 - The applicant indicated that the study extension was completed shortly after the final inspection ‘because of the pressure of having already arranged for new tenants to start on 17 September 2017’.
 - The rear south elevation is not visible from the street, so it is unlikely that the authority would have had cause to revisit the property had it not received a complaint regarding the resource consent.
- 4.1.4 It is apparent from the background and the submissions that the building work covered by the building consent was completed when the code compliance certificate was issued on 21 August 2017. Taking account of the observations outlined above, I am of the view that the study extension was not subject to the building consent for the consented alterations.

- 4.1.5 I must also consider whether the study extension required approval from the authority or whether the building work is exempt from the requirement to obtain building consent by way of section 41(1)(b). Section 41(1)(b) provides for building work described in Schedule 1 of the Act to be carried out without building consent. The applicant's submission acknowledged that the building work 'eventually turned out to be a little more than the Schedule 1 parameters'; however I have commented on this aspect for completeness.
- 4.1.6 The clauses of Schedule 1 set out various categories of building work which are exempt. I have considered the clauses that may be relevant and note:
- no request was made to the authority for a discretionary exemption under Clause 2;
 - the extension is not a detached building and also exceeds the 10m² criterion so cannot be exempt under Clause 3;
 - the building work is not 'in connection' with the construction of a pergola and so is not exempt under Clause 6 (the pergola was completed prior to the final inspection and the study extension forms a larger enclosed space and roof deck);
 - the 11m² area of the study extension is beyond the 5m² limit of Clause 15.
- 4.1.7 Taking account of the above observations, I conclude that the study extension is not subject to an existing building consent and is not exempt under Schedule 1 of the Act from the requirement to obtain a building consent. Accordingly a certificate of acceptance is the appropriate certificate for the applicant to seek.

4.2 The notices to fix

- 4.2.1 An authority has the power to issue a notice to fix if a specified person has, for example, failed to obtain a building consent for building work when building consent was required. In regard to the study extension, the applicant is the 'specified person' and a building consent was required but was not applied for. I conclude therefore that the authority correctly exercised its powers of decision when it issued the first notice to fix for a contravention of section 40 of the Act.
- 4.2.2 The first notice to fix (which is not disputed) required the applicant to submit an application for a certificate of acceptance. The authority received this on 1 December 2017 and acknowledged that the application satisfied the first notice to fix.
- 4.2.3 In regard to the particulars of 'contravention or non-compliance' identified in the second notice to fix dated 24 January 2018, I note that although the authority had reached the view the building work was not compliant with the Building Code (refer paragraph 2.7.1) there was no reference in the notice to a breach of section 17 of the Act and the building work the authority had identified as not compliant. The notice was limited to the lack of building consent, which was a matter already addressed in response to the first notice to fix. I note here that it is important that an owner is given sufficient information regarding issues of non-compliant building work in order for the owner to address those matters.
- 4.2.4 In addition, the remedial action set out in the notice to fix did not include the option of the building work being brought into compliance with the Building Code, instead it required the building work to be removed. The issue of the demolition of

unapproved building work has been considered in a number of previous determinations¹⁰, and I continue to hold the view expressed in those determinations.

- 4.2.5 Demolition of building work which is neither dangerous nor insanitary is a drastic step which should only be taken for compelling reasons. Although the building work in this case was carried out without a building consent first being obtained when consent was required, I do not consider that the breach of the Act in this case constituted a compelling reason for the building work to be removed or demolished. Given the applicant appears not to have been given sufficient information regarding the non-compliant work to be able to address those items and bring the building work into compliance with the Building Code, I am of the view the authority erred in requiring the building work be removed.
- 4.2.6 I am therefore of the view the notice to fix must be modified and reissued taking into account my comments in paragraphs 4.2.3 to 4.2.5 above.

5. The refusal to issue the certificate of acceptance

- 5.1 Section 96(1)(a) provides for the issue of a certificate of acceptance where an owner has carried out building work without obtaining a building consent when building consent is required. In regard to the study extension, I have concluded that a building consent was required. In this situation, the authority may, on application, issue a certificate but 'only if it is satisfied, to the best of its knowledge and belief and on reasonable grounds, that, insofar as it could ascertain, the building work complies with the building code' (section 96(2)).
- 5.2 Section 99(2) and Form 9¹¹ both provide for a certificate of acceptance to attach a list of the building work an authority has been able to inspect for the purpose of limiting the liability of the authority to that work it has been able to inspect.
- 5.3 When an application for a certificate of acceptance is made, in order to ascertain whether the building work complies with the Building Code the authority is required to consider all available evidence, such as: plans and specifications, the builder's records, the owner's records, any expert reports, and the authority's own experience and knowledge of the builders and designers involved in the work. The application must include (if available) plans and specifications, and any other information that the authority reasonably requires.
- 5.4 It is the owner who must provide sufficient information to the authority to establish the level of compliance achieved. The authority may also inspect the building work and this information, along with that supplied by the owner, would assist the authority in forming a view as to compliance with the Building Code.
- 5.5 A certificate of acceptance can exclude those clauses of the Building Code or particular building elements which the authority cannot ascertain comply with the Building Code. The fact that compliance may not be able to be determined in respect of certain Building Code clauses does not necessarily mean that the work concerned is non-compliant.
- 5.6 Any exclusion should only relate to the building work for which compliance cannot be determined and should not include building work that is not compliant; a certificate of acceptance cannot be issued if the building work does not comply with

¹⁰ See Determinations 1999/006, 2000/1, 2009/115, and 2010/008 for example.

¹¹ Schedule to the Building (Forms) Regulations 2004 <http://www.legislation.govt.nz/regulation/public/2004/0385/latest/DLM296493.html>

the Building Code. Grounds for refusing to issue a certificate would be that there was non-compliant building work, and/or that exclusions are of such an extent that the certificate would be severely limited in nature and of little or no value.

- 5.7 The authority carried out an inspection of the study extension on 16 January 2018 to inform its decision about compliance of the building work. During the inspection the authority identified 10 visible items considered to be non-compliant. The authority recorded these as a photo file of 11 photographs taken during the inspection.
- 5.8 Neither the refusal to issue the certificate of acceptance nor the notice to fix issued on the same day referred to the non-compliant items identified by the authority. The applicant states that the inspection photo file was not provided until almost two weeks after the refusal to issue the certificate.
- 5.9 In my opinion, the authority failed to fulfil the obligations set out in section 99A(b). The applicant was given no specific reasons for the refusal and no idea what aspects must be fixed in order to obtain a certificate of acceptance. It is important that, should an owner be declined a certificate of acceptance they be given clear reasons why. Owners can either then act on those reasons or if they dispute them apply for a determination if the matter is not resolved with the authority.
- 5.10 Notwithstanding the lack of detail and wording in the refusal, I am of the view that the authority's photo file and the other evidence provided sufficient grounds for the authority to refuse to issue a certificate of acceptance and accordingly I confirm that decision.
- 5.11 The applicant has stated that the refusal was 'legally defective' as notification of the refusal was outside the period set out in section 98 of the Act. I make no comment on whether the authority met its obligations in this respect as this is not a matter for determination under section 177 of the Act. However, I am of the view that even if the authority had not met its obligations under section 98 with regard to the time period in which to make a decision, it does not follow that the decision to refuse to issue the certificate of acceptance is invalidated for that reason.

6. Conclusion and what happens next

- 6.1 This determination can only confirm, reverse, or modify the decision made by the authority. In this case I have concluded:
- the authority was correct to refuse to issue the certificate of acceptance, notwithstanding the authority did not provide sufficient detail in the reasons provided for that refusal; and
 - the authority was correct to issue the first notice to fix for contravention of section 40; however
 - the second notice to fix is to be modified as discussed in this determination.
- 6.2 It is my opinion that the parties should be able to resolve outstanding matters without recourse to enforcement. I suggest the parties take the following steps in order to conclude this matter:
- In compliance with this determination, the authority shall amend and reissue the notice to fix, notifying the applicant of those areas the authority considers do not comply with the Building Code and setting a reasonable timeframe during which it considers the matters can be addressed. In the case of the study

extension, I note that defects photographed during the authority's inspection primarily relate to the weathertightness and durability of the exterior building envelope, which concerns the performance clauses in Clause E2 External moisture and B2 Durability.

- The applicant can then produce a detailed proposal in conjunction with a competent person with suitable experience, addressing the matters of non-compliance identified. That proposal should be submitted to the authority for its consideration and approval. Any outstanding items of disagreement are able to be referred back to the Chief Executive for a further binding determination if necessary.

7. The decision

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

- the authority was correct to refuse to issue the certificate of acceptance, and I confirm the authority's decision
- the authority was correct to issue the first notice to fix dated 10 October 2017 for contravention of section 40; however the second notice to fix is to be modified as discussed in paragraphs 4.2.3 to 4.2.6 of this determination.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 6 August 2018.

Katie Gordon
Manager Determinations and Assurance

Appendix: The legislation

A.1 The relevant Clauses of Schedule 1 of the Act discussed in this determination:

Schedule 1 Building work for which building consent not required

Part 1 Exempted building work

2 Territorial and regional authority discretionary exemptions

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

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

3 Single-storey detached buildings not exceeding 10 square metres in floor area

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

- (a) is not more than 1 storey (being a floor level of up to 1 metre above the supporting ground and a height of up to 3.5 metres above the floor level); and
- (b) does not exceed 10 square metres in floor area; and
- (c) does not contain sanitary facilities or facilities for the storage of potable water; and
- (d) does not include sleeping accommodation, unless the building is used in connection with a dwelling and does not contain any cooking facilities.

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

6 Pergolas

Building work in connection with a pergola.

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.

A.2 Relevant 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...

96 Territorial authority may issue certificate of acceptance in certain circumstances

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

- (a) if—
 - (i) the work was done by the owner or any predecessor in title of the owner; and
 - (ii) a building consent was required for the work but not obtained; or...
- (2) A territorial authority may issue a certificate of acceptance only if it is satisfied, to the best of its knowledge and belief and on reasonable grounds, that, insofar as it could ascertain, the building work complies with the building code.
- (3) This section—
 - (a) does not limit section 40 (which provides that a person must not carry out any building work except in accordance with a building consent); and
 - (b) accordingly, does not relieve a person from the requirement to obtain a building consent for building work.

99A Refusal of application for certificate of acceptance

If a territorial authority refuses to grant an application for a certificate of acceptance, the territorial authority must give the applicant written notice of—

- (a) the refusal; and
- (b) the reasons for the refusal.

164 Issue of notice to fix

- (1) This section applies if a responsible authority considers on reasonable grounds that—
 - (a) a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent); or...
- (2) A responsible authority must issue to the specified person concerned a notice (a notice to fix) requiring the person—
 - (a) to remedy the contravention of, or to comply with, this Act or the regulations; or..