



Determination 2019/054

Regarding the issue of five notices to fix for a collection of buildings constructed without building consent at 501 Purangi Road, Whitianga

Summary

This determination concerns an authority's issue of five notices to fix for building work carried out on a rural property. The determination considers the time the owner was given to respond to the notices, and the non-compliances identified in the notices against the compliance of the work concerned.

The determination also discusses the limitation period in which an authority shall take enforcement action following the issue of 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, 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 this determination are:

- R Evans, the owner of the property ("the applicant")
- Thames-Coromandel District Council, carrying out its duties as a territorial authority or building consent authority ("the authority").

1.3 The determination arises from the authority's decision to issue five notices to fix² for a number of structures on the applicant's property and subsequent enforcement action relating to those notices.

1.4 The structures have been built without building consent and authority considers they do not meet the conditions for exempt work under Schedule 1 of the Act³, and that the structures do not comply with the Building Code⁴.

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.

² The notices to fix are also referred to herein as NTFs

³ Schedule 1 of the Act: Building work for which building consent not required

⁴ Schedule 1 of the Building Regulations 1992

- 1.5 The applicant disagrees with the process carried out by the authority with respect to the issue of the notices to fix. The applicant believes that the authority did not follow correct procedures as provided in the Ministry's guidelines⁵ prior to making its decision to prosecute for non-compliance with the notices to fix.
- 1.6 Accordingly, I consider the matter to be determined⁶ is the exercise of the authority's powers of decision in issuing the five notices to fix for building work on the applicant's property.
- 1.7 In making my decision I have considered the submissions from parties, the report of the independent expert ("the expert") engaged by the Ministry to assist me in making this determination, and the other evidence in this matter.
- 1.8 Unless otherwise stated, in this determination references to sections are to sections of the Act, references to Schedule 1 are to Schedule 1 of the Act, and references to clauses are to clauses of the Building Code. The relevant sections of the Act are provided in Appendix A.

1.9 Matters outside this determination

- 1.9.1 Matters relating to non-compliance with four of the five notices to fix are before the Court and proceedings have been suspended for the course of this determination (refer to paragraph 3.18).
- 1.9.2 The determination can only consider the matters under section 177 of the Act – specifically in this case the authority's exercise of its powers of decision in issuing the notices to fix under sections 177(1)(b) and 177(2)(f). While the determination will consider the process followed by the authority in relation to the notices to fix (leading up to and following the issue of the notices), it cannot consider the authority's decision to prosecute for failure to comply with those notices.
- 1.9.3 In addition, matters relating to other enactments, such as the Resource Management Act 1991, fall outside the matters that I can determine.
- 1.9.4 This determination also does not consider the compliance of shipping containers located on the applicant's property as described in paragraph 2.6. I note here the applicant has suggested that these structures are better referred to as "outbuildings" (refer paragraph 4.3.6). "Outbuildings" are a classified use defined under Clause A1 of the Building Code, and as I am not considering the use or compliance of these structures, I will refer to these as "shipping containers" in the determination.

2. The building work

- 2.1 The applicant owns a rural property of about 24 hectares at 501 Purangi Road, south of Whitianga.
- 2.2 There is a house and garage on the property. The structures that are the subject of this determination are located some distance from the house and garage on two elevated and level sites surrounded by sloping farmland. The lower of these two sites is about 600m from the Purangi River estuary.

⁵ The applicant's submission included extracts from "The Ministry's Prosecution Decision Making Framework" (January 2016). The current guidelines on issuing notices to fix and the building infringement scheme can be found at: <https://www.building.govt.nz/building-officials/guides-for-building-officials/>

⁶ Under sections 177(1)(b) and 177(2)(f)

2.3 The use and location of these structures⁷ are described in the following paragraphs. The approximate construction dates for each structure were supplied by the applicant.

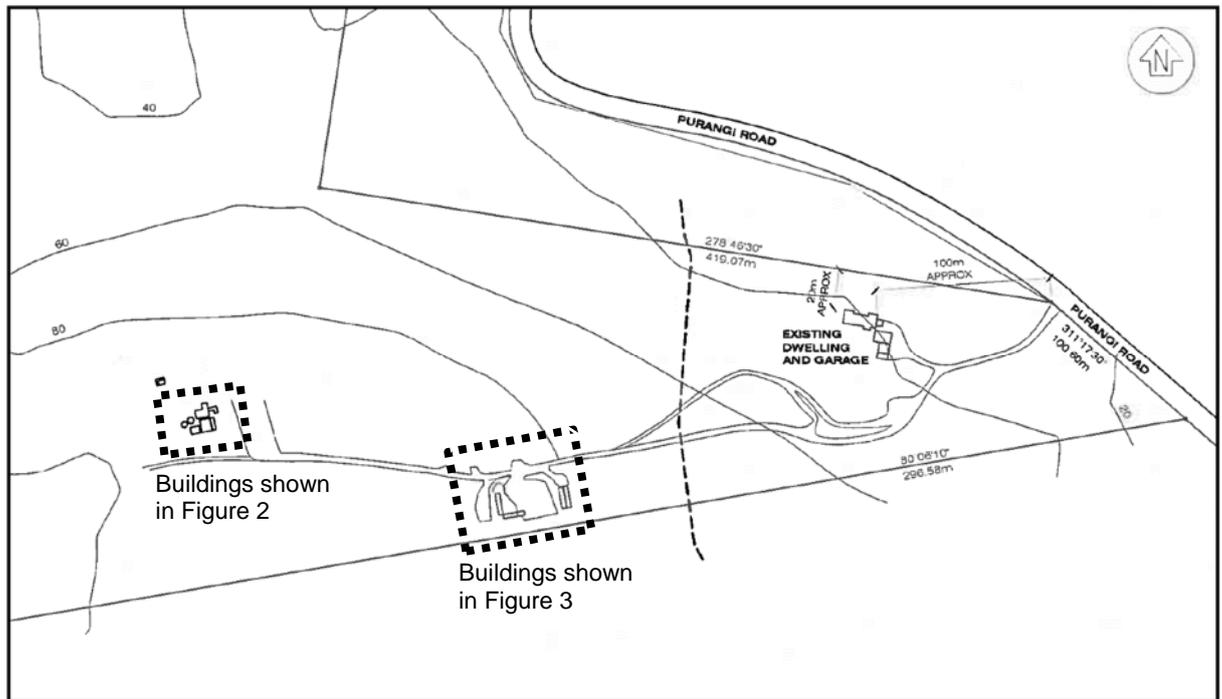


Figure 1: Overall site plan showing the location of buildings in Figures 2 and 3 (not to scale)

2.4 On the upper site are various accommodation and storage buildings including:

- a single storey structure constructed circa 2000 (“the bach”) comprising three connected buildings (the buildings are labelled as “the bunkhouse”, “the chowhouse”, and “the cookhouse”) plus exterior amenities under a lean-to roof
- a 9x6m kitset shed (“the storage shed”) constructed about four years ago with a lean-to on each side, and backing onto the “bunkhouse”
- a timber-framed structure with no amenities (“the sleepout”) about 4.2x2.4m in plan, with an attached timber deck, constructed circa 2000 and located about 30m northwest of the bach.

2.5 On the lower site are more buildings and other structures including:

- three structures that were previously pergolas (“the pergolas”), located near the access road across from the other buildings, with timber posts 2.25m high. The timber beams for these pergolas had been removed by the time the expert visited the site
- a green metal shed (“the green shed”), which is a 9x6m kitset shed, now with mostly open sides. When the expert visited, this shed was being used to store building supplies and equipment
- a 3.5x6m shed (“the mower shed”) clad with plywood on three sides and open at the eastern end, used as a mower shed and previously used for retail purposes.

⁷ At the time the expert visited on 24 August 2018 (refer to paragraph 5.1)

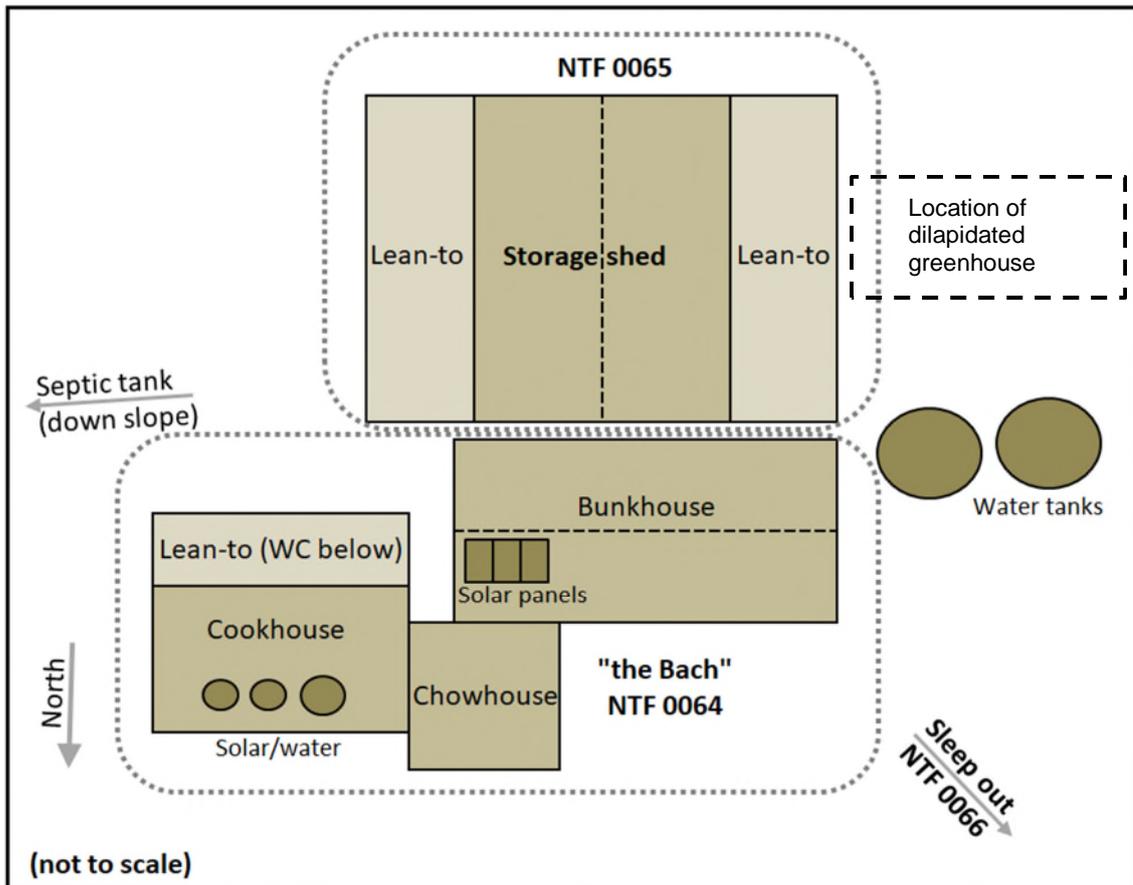


Figure 2: Upper site plan from the expert’s report and identifying the relevant notices to fix

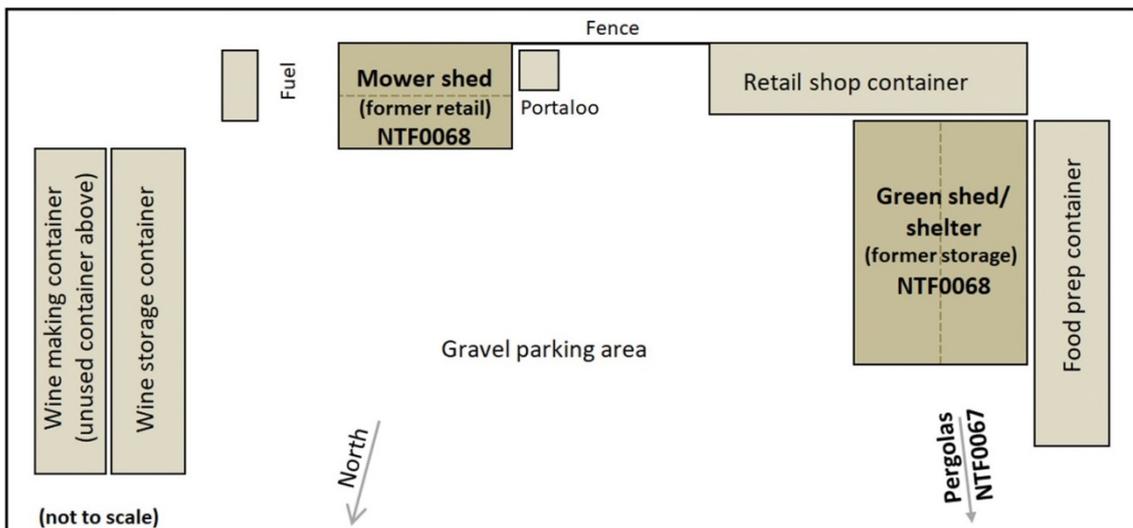


Figure 3: Lower site plan from the expert’s report and identifying the relevant notices to fix

2.6 Also on the lower site are five shipping containers. Two of these containers were at right angles behind the green shed (on its south and west sides) when the expert visited. One was being used for food preparation and the other for retail. The others were opposite the green shed: two adjacent containers were being used for wine storage and wine making; and the other container was stacked on top of these.

- 2.7 Figure 1 shows the overall site plan. Figure 2 and Figure 3 illustrates the use and location of the structures when the expert visited, and also identifies the corresponding notices to fix as described in paragraph 3.12.

3. Background

- 3.1 According to the applicant, the “cellar door” for his long-standing orchard and winery business had to be relocated onto his property at relatively short notice around May 2017.
- 3.2 On 23 May 2017, the authority received a complaint regarding earthworks on the site, and the complaint was investigated and subsequently closed.
- 3.3 On 26 July 2017, the applicant applied for a building consent to place a number of shipping containers on foundations at the property; the containers were intended to store wine. On 16 August 2017 the authority issued building consent ABA2017/603 for this building work, describing it as: “New foundations for shipping containers to be used as buildings”.
- 3.4 Possible compliance issues relating to the Act, the Sale and Supply of Alcohol Act 2012 and the Resource Management Act 1991 were then identified by authority, leading to it investigate these issues in October 2017.
- 3.5 On 10 October 2017 the applicant and the applicant’s designer (“the designer”), planning consultant and lawyer met at the authority’s offices. There is disagreement between the parties as to the purpose of this meeting. The authority says it was to discuss what it considered were breaches of the Act and of other legislation in relation to the various structures on the property and their use. The applicant says it was to discuss issues relating to the Resource Management Act, including existing use rights, and to address planning and liquor licensing issues to enable continuation of the applicant’s business. The applicant maintains the meeting was essentially a planning meeting and the matter concerning possible unconsented buildings on the site was only raised briefly.
- 3.6 The authority visited the property on 18 October 2017. It recorded the site visit in relation to a complaint lodged on 6 October, though the record also notes that staff from “other Council departments” were present. Records from that site visit include: a file note that includes photographs of various structures on site and descriptions of those structures; an inspection report dated 18 October 2017; and two hand-drawn site plans showing the location of various structures on site (labelled as “winery retail area/winery” and “upper house”).
- 3.7 The inspection record notes that notification was not left on site, but the authority recorded the following:

What have you inspected? (Describe what you have looked at)

Winery area with x5 containers (40ft), x2 unconsented buildings & x3 pergolas not built to code.

House area – house, shed, sleepout & septic without consent

What elements of the building work is cause for concern? (Describe risk)

Many buildings & septic system [serving the bach] without consent

Buildings not built to code.

What actions need to be taken (Describe actions for owner)

NTF’s (*sic*)

3.8 Annotations in the file note record:

- Pergolas not compliant with the Building Code
- Deck to sleepout not compliant with Building Code, including an under-height hand rail
- Unconsented building work

3.9 On 1 November 2017 the authority wrote to the applicant listing various regulatory concerns with the buildings and activities being carried out. This letter included what the authority considered were breaches of the Act and the required remedies for these breaches:

- pergolas not built to the standard required by the Building Code – the applicant was to upgrade these so they complied
- an unconsented house, shed and septic tank system, plus other unconsented sheds that were more than 10m² – the applicant was to remove these or apply for a certificate of acceptance
- the current position of the sleepout in relation to the unconsented house – the applicant was to remove the sleepout or locate it closer to the main dwelling at the bottom of the property, as it could be considered exempt from requiring building consent if associated with a consented dwelling where sanitary facilities were available.

3.10 The authority advised that the applicant had one month from the date of the letter to take “significant steps” in lodging the applications required to confirm compliance with the Building Act, or the authority would issue notices to fix. The authority also noted the shipping containers on site were consented for agricultural storage, so other intended uses as advised by the applicant (kitchen, retail shop, entranceway and toilet facilities) were not consented uses.

3.11 The applicant responded on 16 November 2017, advising the authority that a certificate of acceptance for most of the building work would be sought and that the applicant intended to employ a builder to upgrade the pergolas. The applicant asked the authority to allow reasonable time for the applications to be completed because of issues regarding the “unavailability of expert assistance” at that time of year “being the summer season”. It appears there was no response from the authority to this request.

3.12 On 30 November 2017 the authority arranged to visit the applicant on site to deliver five notices to fix, described in the following table. Each notice was dated 30 November 2017, and stated that it had to be complied with by 14 February 2018 (“the comply by” date) and required the applicant to contact the authority when the necessary building work had been completed.

Notice to fix (& relevant building)	Contravention or non-compliance	Remedy
2017/0064 (bach)	Breach of section 40 (buildings not to be constructed, altered, demolished or removed without consent): erecting a dwelling without first obtaining a building consent Breach of section 17 (all building work must comply with the Building Code)	Remove the building and associated plumbing, drainage and septic tank OR Apply for a certificate of acceptance for the dwelling and septic tank, and a building consent for any of the remedial works

Notice to fix (& relevant building)	Contravention or non-compliance	Remedy
2017/0065 (storage shed)	Breach of section 40: erecting a large shed and lean-to without first obtaining a building consent Breach of section 17	Remove the shed and lean-to OR Apply for a certificate of acceptance for the shed and lean-to, and/or a building consent for any work required to bring the building up to Building Code
2017/0066 (sleepout)	Breach of section 17	Remove sleepout and attached deck OR Obtain a building report to confirm the sleepout and attached deck are/are not built to the Building Code, and complete the building work required to bring them up to the Building Code
2017/0067 (pergolas)	Breach of section 17	Remove the pergolas OR Have the pergolas constructed to comply with Clause B1 Structure
2017/0068 (green shed and mower shed)	Breach of section 40 Erecting two sheds (used as a retail shop and storage shed when this notice was issued) without a building consent Breach of section 17 Breach of section 363 (regarding the safety of members of the public using premises that should have had a building consent)	Immediately cease the use of any part of the sheds that were being used by members of the public And either: Remove the sheds OR Apply for a certificate of acceptance (COA) for the sheds and a building consent for any work required to bring them up to Building Code (This notice also required the applicant to cease all building work immediately until the authority was satisfied that he was willing to resume operations in compliance with the Act and regulations.)

- 3.13 The authority sent a covering letter with these notices also dated 30 November 2017. In this letter the authority said it would require a chartered professional engineer to assess the buildings' compliance in terms of Clause B1 Structure and recommend any remedial works required.
- 3.14 On 12 February 2018 the designer wrote to the authority regarding the notices to fix, outlined the applicant's proposed actions for each structure, and suggested that some of the building work was exempt under Schedule 1 of the Act from the requirement to obtain a building consent.
- 3.15 The authority rang the designer on 21 February 2018 (i.e. a week after the 'comply by' date in the notices) to discuss these proposals. The designer undertook to confirm timelines after consulting the applicant.
- 3.16 After follow-up calls from the authority on 15 and 19 March 2018 the designer wrote to the authority on 21 March 2018 repeating the earlier proposals, suggesting timeframes, and asking for the authority's "favourable consideration" of the requests.
- 3.17 The proposals from the designer in his letters of 12 February and 21 March 2018 are summarised below.

Notice to fix (& relevant building)	The designer's response (12 February and 21 March 2018 letters)	Timeframe requested by the designer (21 March 2018 letter)
2017/0064 (bach)	To be removed/demolished; the applicant planned to construct a new dwelling to replace this; a "LU consent" [land use consent] was being formulated, and asked for additional time to complete the relevant applications and processing given the seasonal pressure on building professionals and considerable work involved	Request for "21 months elapsed time" which was broken down into time estimates for the different stages including design, processing of resource consent and building consent for the new dwelling, construction, and demolition of existing structures on completion
2017/0065 (storage shed)	Also to be demolished	As above
2017/0066 (sleepout)	Request for this to remain "for the time being" and be reassessed with the building consent application for the proposed new dwelling; suggested that after completing the above works the sleepout could be considered exempt work under Schedule 1(3) ⁸ and its non-compliance could be reasonably considered under Schedule 1(2) ⁹	Request for this to remain and be reassessed along with the building consent for the new dwelling
2017/0067 (pergolas)	These had been removed	
2017/0068 (green shed)	Shed frame had been erected to the manufacturer's instructions; asked if this could remain for the time being and be considered exempt work under Schedule 1(4) ¹⁰ as an unoccupied detached building; said this was intended to be reused in the longer term (at which point it would be upgraded "to consultant engineer's details")	Request for this to remain "for the duration of the consented building works, approximately three months"
2017/0068 (mower shed)	Had been erected to the manufacturer's instructions and would be moved in the near future and re-sited for use as a carport near the container stack; could be considered exempt under Schedule 1(18) ¹¹ and reasonably considered under Schedule 1(2).	Currently being dismantled

3.18 On 15 May 2018 the authority filed charges against the applicant in the District Court at Thames for:

- failure to comply with four of the notices to fix (NTF 2017/0064, 2017/065, 2017/066 and 2017/068) from 15 February 2017 and thereafter, under section 168¹²
- carrying out building work without a building consent (including erecting the structures described in the notices to fix and the installation of a toilet and septic tank) between 1 January 2000 and 18 October 2017, in breach of section 40

⁸ Schedule 1 exemption 3: Single-storey detached buildings not exceeding 10 square metres in floor area

⁹ Schedule 1 exemption 2: Territorial authority and regional authority discretionary exemptions

¹⁰ Schedule 1 exemption 4: Unoccupied detached buildings

¹¹ Schedule 1 exemption 18: Carports

¹² Section 168: Offence not to comply with a notice to fix

- owning and permitting the use of a building between 1 October and 10 December 2017 to which section 362W¹³ applied when this required a building consent where none had been issued in breach of section 363¹⁴.
- 3.19 On the same date the authority visited the applicant's property. During that visit it inspected the pergolas, leading to it later concluding (in a letter dated 6 July 2018) that the applicant had met the conditions of NTF 2017/0067.
- 3.20 On 4 July 2018 I received an application for determination.
- 3.21 I note that the applicant's lawyer requested an adjournment to the court proceedings, which the authority agreed to, and I understand that these proceedings are on hold pending the outcome of the determination.

4. The submissions

4.1 The applicant

4.1.1 With the application for determination, and on 12 and 23 July 2018 following the Ministry's requests for further information, the applicant provided:

- a submission and summary of events
- copies of the notices to fix and the covering letter from the authority dated 30 November 2017
- a location plan from the designer identifying each structure and the associated notice to fix, and details of the structures' current status
- a copy of the District Court summons of 15 May 2018, accompanying charging documents stamped 18 April 2018, the covering letter and summary of facts dated 14 May 2018, and correspondence between the applicant's and authority's lawyers on 11 July 2018 regarding an adjournment to those proceedings
- relevant correspondence including correspondence with the authority from 1 to 30 November 2017 and 22 February 2018, the designer's letters to the authority on 12 February and 21 March 2018, extracts from the applicant's emails to his designer on 16 June 2017 and 3 July 2018
- information relating to the test for prosecution from the Solicitor General's prosecution guidelines, and extracts from legislation regarding time limits for filing charging documents
- architectural plans labelled "Proposed container siting".

4.1.2 The applicant said:

I and my consultants and my advisers have willingly attempted to conform with all the procedural requirements under the Building Act initiated by [the authority's] decision to issue notices to fix as a consequence of the complaints. There has been no written response to [the designer's] letters.

4.1.3 The applicant also said the authority became, or ought to have become, aware of the structures now subject to the notices to fix in about May 2017 but did not issue these notices until 30 November 2017, giving him an unreasonably short period of time to comply with them considering the time of year. The applicant said the designer had

¹³ Section 362W: Premises in respect of which duty arises under section 363

¹⁴ Section 363: Protecting safety of members of public using premises open to public or intended for public use

written to the authority two days before the ‘comply by’ date in the notices requesting additional time to complete the proposed actions, but the authority had not responded to these requests, which the applicant considers is a breach of section 167¹⁵.

- 4.1.4 The applicant criticised the authority’s actions in advising him of his options and how to comply with the notice. The applicant also noted some things were “no longer an issue”, including: the mower shed, which had been moved and which the applicant considers is now an exempt carport bolted to a concrete slab, and the green shed, which had been partly dismantled and “is awaiting building consent so as to be converted into a canopy with engineering documentation”.
- 4.1.5 The applicant also said the bach and storage shed, used to temporarily store the contents of the old cellar door, were to be removed and replaced by a second dwelling and a farm implement shed/workshop. He had requested time for this process.
- 4.1.6 On 8 August 2018, in response to a letter from the Ministry regarding the matters the determination could consider, the applicant noted that he had not questioned the validity of the notices to fix: his primary matter of complaint was what he considers to be a wrongful decision to prosecute him when there had been a lack of response from the authority to the suggested timeframes as described in the designer’s letter of 21 March 2018.
- 4.1.7 On 9 August 2018, in response to a further letter from the Ministry about what a determination could and could not consider under the Act, the applicant advised he wished to proceed with the determination.
- 4.1.8 The applicant made a further submission on 21 August 2018 to say he had requested the determination in relation to the authority’s decisions with respect to a building consent (section 177(2)(a)) and notices to fix (sections 177(2)(f) and 177(3)(e)). He had also sought a determination in relation to the authority’s failure to exercise a power of decision with respect to requests made by the designer for exemptions from building consent requirements (section 177(3)(c)) and instead to prosecute him¹⁶.

4.2 The authority

- 4.2.1 The authority sent a submission and summary of events on 30 July 2018. It also provided copies of relevant information including:
- building consent ABA/2017/603 issued 16 August 2017 for new foundations for the shipping containers, the associated inspection schedule and the approved plans
 - details of the authority’s site visit on 18 October 2017, including the inspection report and associated notes and photographs
 - relevant file notes and internal communications between 23 May 2017 and 30 May 2018
 - correspondence with the applicant and the designer between 1 November 2017 and 6 July 2018
 - the charging documents relating the applicant’s failure to comply with the notices to fix and the associated summary of facts.

¹⁵ Section 167: Inspection of building work under notice to fix

¹⁶ The decision to prosecute is not a matter that is able to be determined under section 177 of the Act.

4.2.2 The authority said it considered the expiry date of the notices a reasonable time period within which the applicant could apply for a certificate of acceptance or remove the structures concerned.

4.2.3 The authority confirmed that it had not received any applications for it to consider discretionary exemptions under Schedule 1(2). It added:

The [applicant] knowingly permitted building work to occur on the above property without first obtaining the necessary building consents in breach of sections 40 and 17 of the Building Act 2004. Further, notices to fix have not been complied with.

4.2.4 The authority also said that, on its visit to the applicant's property in May 2018, it had observed that the mower shed had been relocated and the applicant was in the process of removing an end wall to turn this into a carport "to fit the exemption criteria". It said this carport was not built to the standard required in the Building Code.

4.3 The draft determination

4.3.1 A draft of this determination was issued to the parties for comment on 20 November 2018. The draft concluded the authority correctly exercised its powers of decision in issuing the notices to fix.

4.3.2 The authority accepted the draft determination without comment in a response received on 18 December 2018.

4.3.3 The applicant advised on 14 December 2018 that he did not accept the draft determination and provided a further submission.

4.3.4 The applicant's submitted (in summary):

- With respect to the matters to be determined, the application was not to have the notices to fix reversed, rather the applicant is of the view that the authority has failed to properly exercise its power of decision as it failed to properly address the applicant's responses to the notices to fix. The applicant stated:

I sought the determination as to whether [the authority's] failure to respond to my efforts to reach a workable solution was a breach of its obligations as a consent authority... and additionally ignored the intended objectives of the [Act].
- The authority may have acted correctly in issuing the notices to fix, but has not followed the correct process or met its broader obligations.
- The meeting at the authority's offices in October 2017, described in paragraph 3.5, was a planning meeting and had the purpose of exploring ways in which the authority could recognise the existing use rights and find a way through planning and liquor licensing issues.
- With respect to the process followed by the authority, the decision to go immediately to prosecution was unwarranted. It does not follow the Ministry's guidance for issuing notices to fix¹⁷. The authority did not provide written notice that it was not satisfied that the requirements of the notice had been met, and did not issue further notices to fix. The applicant contended that the authority also did not follow the guidelines under the Building Infringement Scheme, which discourage court-based prosecution.

¹⁷ <https://www.building.govt.nz/projects-and-consents/build-to-the-consent/acting-on-a-council-notice-to-fix> (2nd edition of the Building infringement scheme guidelines). The applicant also provided a copy of a flow chart which sets out an example of an infringement notice process from the 1st edition of the Building infringement scheme guidelines.

4.3.5 With respect to the timeframes for compliance, the applicant stated that:

- The notices to fix were unexpected, in that they came only four weeks after the initial letter (refer to paragraph 3.9), and two weeks after the request for “reasonable time” (refer to paragraph 3.11). The total elapsed time between the authority identifying breaches and the issue of the notices to fix is barely six weeks, which is not enough time to engage professionals, prepare documentation, obtain consents and carry out the work.
- It is extremely difficult to engage contractors from November through to January.
- The discussion between the designer and authority was general, and the authority did not reject the proposals. Time frames were subsequently provided by the designer, and a response to this was not received.

4.3.6 With respect to the various buildings on the site, the applicant submitted (in summary):

The pergolas

At the time of the expert’s visit the pergola, which was under construction when first inspected, had been dismantled and the remaining posts were able to be pushed side to side because they were no longer braced. This cannot be construed to indicate that the pergola under construction would have been unsuitable.

The green shed

This was never used for retail purposes, so has been incorrectly identified. It was erected as a temporary builder’s shed, used to facilitate the construction of the shipping containers. It has been fastened by iron pitons driven into the underlying mudstone. Notice to fix 2017/0068 is not valid as it is a proprietary steel framed kitset shed to enable storage of building supplies and equipment. It should be considered exempt under Schedule 1(4).

The mower shed

This was used as a temporary stall for one month and is exempt in the same way a stall holders canopy at a market is. It was fastened by iron pitons driven into the underlying mudstone.

The shipping containers

These should be referred to as outbuildings in the determination. The fitout of the outbuildings is subject to an application for a building consent. The references to the shipping containers are not relevant to the description of the background.

4.3.7 In relation to a discretionary exemption under Schedule 1(2), the applicant submitted that the letter sent by the designer (refer to paragraph 3.14) requested consideration of exemptions and an extension of time. The applicant also advised the notices were not complied with and no works were undertaken because no response from the authority to that request was received.

4.4 The second draft determination

4.4.1 A second draft of this determination was issued to the parties for comment on 28 February 2019. The draft concluded the authority correctly exercised its powers of decision in issuing the notices to fix.

4.4.2 The authority accepted the second draft determination without comment on 4 March 2019.

4.4.3 The applicant did not accept the second draft determination and provided a further submission dated 15 March 2019. The applicant submitted (in summary):

- The draft determinations have focussed on the building work. The drafts have excluded subsequent enforcement action relating to those notices, and the actions of the authority after issuing the notices to fix leading up to the authority's decision to prosecute. The determination has been wrongly limited to exclude the matters for which it was sought, being the subsequent enforcement actions.
- The determination wrongly excludes actions taken by the authority in its role as a territorial authority as it purports these are excluded under section 177(1)(b). The authority's actions as a building consent authority and a territorial authority in this case are covered by section 177(2)(f) (in respect of notices to fix) and 177(3)(c) (in respect of exemptions under clause 2 of Schedule 1). Both these powers are included in section 177(1)(b), which refers to "the exercise, failure or refusal to exercise, or proposed or purported exercise" by an authority of a power of decision. The authority's actions include the purported exercise of the powers of decision under sections 177(2) and 177(3) and therefore the determination must address these "without preselection".
- Given the items in the notice to fix had been accepted by the applicant, and remedies provided, the determination notes the authority failed to communicate with the applicant, and thus failed to progress the "fix", contrary to its statutory responsibilities, and has not acted in good faith. This failure was confirmed by the authority deciding to proceed with prosecutions, rather than continue the building consent authority process through communication, negotiation of timelines, and second notices to fix allowing for compliance by the applicant.
- The notice to fix process was suspended by the authority as a result of its failure to engage in the processes required by the Act. The authority intervened by filing charges despite knowing them to be invalid, because there was not a failure to fix or an intention not to fix requiring enforcement action. The filing of charges was premature and uncalled for and demonstrates bad faith.
- The notice to fix process is a process. The determination should consider more than the promulgation of the record of perceived contraventions communicated to the applicant by way of the notice to fix document. Limiting the determination to technical issues, rather than considering the notice to fix process and the actions of the authority after the notice to fix document was issued is ultra vires of the Act and the Interpretation Act 1991.
- The determination should modify the exercise of the authority's powers of decision so the authority must continue the notice to fix process, which was suspended without notice, and followed by unlawful prosecution. The authority wrongly commenced prosecution proceedings which is contrary to the principles of natural justice.

4.4.4 On 30 April 2019, in response to the applicant's submission, the Ministry sought information from the authority about whether the authority considered the applicant's time requests and proposals put to it to remedy the matters in the notice to fix, and if so, what the authority's reasons were for declining the proposals.

4.4.5 The authority provided a response to the Ministry's request on 20 May 2019. The authority stated:

The applicant's 16 November 2017 response

- Following the applicant's response (refer to paragraph 3.11), the authority arranged a site meeting with the applicant, which occurred on 30 November 2017. Five notices to fix were delivered to the applicant at this meeting, with a 'comply by' date of 14 February 2018, which the authority felt was reasonable.
- The applicant indicated he was looking at having all the buildings removed and would get further advice.

The applicant's 12 February 2018 response

- The authority considered the applicant's response (refer to paragraph 3.14), and contacted the designer on 21 February by phone to explain the authority did not accept most of the proposals and that timeframes to meet the conditions of the notices to fix were required (refer to paragraph 3.15).
- The authority followed up with the designer on 15 March 2018 and 19 March 2018 by phone.

The applicant's 21 March 2018 response

- The authority considered the applicant's response (refer to paragraph 3.16 and 3.17), and did not consider the proposed timeframe of 21 months to meet the conditions of the notices to fix to be reasonable.
- The authority made a decision on 27 March 2018 to lay charges and commence proceedings and did not consider that further communication with the applicant was necessary.

4.5 The third draft determination

4.5.1 The third draft of this determination was issued to the parties for comment on 2 July 2019. The draft concluded the authority made the correct decisions to issue the notices to fix, but it incorrectly exercised its powers of decision as the timeframes to comply with the notices to fix were not reasonable.

4.5.2 The authority responded to the third draft determination on 17 July 2019 and did not accept the draft determination. The authority submitted:

- it disagreed that inadequate time was given to the applicant to develop proposals and address the items identified in the notices to fix
- the authority carries out its actions in accordance with the authority's Compliance Code of Practice processes and timeframes and not to guidelines produced by the Ministry
- the level of risk associated with the breaches was determined to be medium severity risk. For breaches that are medium severity risks, the authority issues notices to fix to ensure compliance is achieved, with an eight week time frame being standard. Eleven weeks was allowed in this case to take account of the holiday period

- the authority requested timeframes in all discussions with the applicant. The request for an extension, which wasn't provided until 21 March 2018, requested a total of 21 months to apply for a building consent and demolish structures, which is not reasonable
- apart from the removal of the pergola structures in early 2018 there has been no progress made by the applicant in the past 18 months to provide information towards the compliance path
- the authority is bound by time limitations in terms of section 378 of the Act, and charges before the Court must be laid within six months of the authority being made aware of the offence. These building breaches were brought to the authority's Enforcement Committee and the decision was made on 27 March 2018 to lay charges and commence proceedings
- the authority decided to prosecute, rather than continue the building consent authority process through a negotiation of timelines, and once a prosecution or determination is underway it is inappropriate to communicate with the other party before a decision is made.

4.5.3 The applicant responded to the third draft determination on 17 July 2019 and did not accept the draft determination. The applicant stated that he accepted the decision but also submitted:

- the matters leading up to the notice to fix have not been addressed and the third draft determination fails to accept that the authority's decision to prosecute is subject to determination under section 177(3)(e) of the Act
- the determination arises from the authority's decision to take enforcement action, and section 1 of the determination should state that
- the determination should include consideration of matters leading up to and following the issue of the notice to fix, as distinct from any decision to prosecute, and section 1 of the determination should state that.

5. The expert's report

5.1 As mentioned in paragraph 1.7, I engaged an independent expert to assist me who is a member of the New Zealand Institute of Building Surveyors. The expert inspected the property on 24 August 2018 to identify the buildings and building work in dispute, to clarify the breaches identified in the notices to fix, and to confirm what still needed to be remedied. The expert provided a report on 2 October 2018 and copies of the report were sent to the parties on the same date.

5.2 In the expert's view:

- the bach and its amenities (NTF 2017/0064) had been very poorly constructed and did not comply with the Building Code – the expert noted that the applicant intended to demolish this and apply for building consent for a new dwelling
- the storage shed and its lean-tos (NTF 2017/0065) would need significant upgrading to comply with the Building Code – the expert noted that the applicant also intended to demolish this building
- the sleepout and attached deck (NTF 2017/0066) needed some work to make both buildings comply with the Building Code

- the pergolas (NTF 2017/ 0067) had their beams removed. The expert observed the remaining posts could be easily moved from side to side, indicating that they were not concreted into the ground, and concluded the posts were not structurally suitable to carry a pergola. The expert noted that the notice relating to these had been signed off as fully complied with
 - the green shed and mower shed (NTF 2017/0068) were both reasonably sturdy and functional for their current stated purpose (i.e. as a storage shed and carport) but needed to be adequately fixed down.
- 5.3 Regarding the bach, the expert's observations included that parts of this structure were poorly supported on bricks, blocks or other material, with no structural connections or fastenings; some of its roof was constructed from short lengths of second-hand corrugated sheet roughly installed and at an inadequate pitch; the roof was leaking and had defective or no guttering; some of the plywood and timbers used were mouldy and deteriorating; and there were interior leaks and inadequate insulation.
- 5.4 The expert also noted that an unsupported kitchen waste pipe, the shower and a laundry tub drained onto the ground. Further, the soil pipe from the toilet was laid on top of the ground and connected to a septic tank, but it was not known if the tank outlet was properly connected to a drainage field.
- 5.5 Regarding the storage shed and its lean-tos, the expert also detailed various areas of inadequate construction and insulation. There was corrosion and ponding on the roofs, and the ceiling framing had partially collapsed in one location.
- 5.6 Regarding the sleepout, the expert's observations included:
- This building was less than 10m² in plan¹⁸, and timber framed with profiled steel vertical rib wall cladding on three elevations and plywood on the west elevation. The corrugated profiled mono-pitch roofing appeared reasonably well installed.
 - The plywood cladding was poorly installed and there was a large unflushed circular window that had clearly been leaking.
 - The subfloor structure was reasonably well constructed but was not in accordance with NZS 3604¹⁹, with no structural connections.
 - The deck structure was not installed in accordance with NZS 3604, with a variety of timber framing components and no structural connections.
 - The balustrade on this deck was less than 1m high (about 830mm) and there were no balusters. The fall off the deck was greater than 1m.
- 5.7 Regarding the green shed, the expert considered this at risk of uplift in high winds. The four corner portal legs were bolted to waratah metal posts the expert assumed were driven into the ground; its steel bottom plates were sitting on pavers with no damp course separating layer; and it had a noticeable flex laterally when pushed at the corner portal legs.
- 5.8 Regarding the mower shed, the expert also considered this at risk of uplift in high winds. It was sitting on a roughly screeded concrete slab that was larger than the shed floor plate, providing no barrier to water running inside. Other observations

¹⁸ In his report the expert notes the sleepout dimensions as "about 2.4 x 4.2m" but these named dimensions give an area of 10.08m². I consider this is very marginally over the 10m² area, and parties did not dispute this position as stated in the draft determination.

¹⁹ New Zealand Standard NZS 3604:2011 Timber-framed buildings

included that the timber batten fixed behind the steel bottom plate might not be suitably treated and was exposed to water entry under the cladding.

- 5.9 The expert also included an update on the status of the various structures after speaking with the authority on 14 and 17 September 2018. The authority had confirmed that, at that stage:
- it had not received a building consent application for the proposed new dwelling
 - the applicant had applied for building consent for the containers' fitout and change of use on 19 June 2018, discussions had been held on 16 August 2018, and a request for further information was with the applicant.

6. Discussion

6.1 General

- 6.1.1 The matter to be determined concerns the exercise of the authority's powers of decision to issue the notices to fix.
- 6.1.2 An authority has the power to issue a notice to fix where the authority considers, on reasonable grounds, that an owner is contravening or failing to comply with the Act or regulations (section 164(1)(a)).
- 6.1.3 A notice to fix is an enforcement notice that requires a person to carry out work to remedy a breach of the Act or Building Code (section 164(2)(a)), and the notice must specify a "reasonable timeframe" within which it must be complied with (section 165(1)(b)). The remedies required by a notice to fix may require the owner to undertake building work to bring building work into compliance with the Building Code and to apply for a building consent in order to carry out such remedial building work, and may require an application for a certificate of acceptance in respect of building work carried out without a building consent.
- 6.1.4 A notice to fix must be in the prescribed form,²⁰ and must:
- detail the "failure or error"²¹ (to enable clear identification of the work concerned)
 - state the building work that must be carried out and whether a certificate of acceptance must be applied for
 - require the specified person to contact the authority on completing this building work.
- 6.1.5 The relevant sections of the Act for the purpose of this discussion (see Appendix A) provide:
- all building work must comply with the Building Code to the extent required by the Act, whether or not a building consent is required in respect of that building work (section 17)
 - a person must not carry out any building work except in accordance with a building consent (section 40)

²⁰ Building (Forms) Regulations 2004: Form 13

²¹ Taken from Form 13 Notice to fix as described in the Building (Forms) Regulations 2004

- despite section 40, a building consent is not required in relation to any building work described in Schedule 1 for which a building consent is not required (section 41(1)(b) and section 42A).

6.1.6 In the following paragraphs I consider the authority's decision to issue each of the five notices to fix, taking account of the stated contraventions or non-compliances and the required remedies as described in paragraph 3.12. I will then consider the compliance timeframes and the responses to the notices to fix.

6.2 NTF 2017/0064 (bach) and NTF 2017/0065 (storage shed)

6.2.1 The authority issued notices to fix 2017/0064 for the bach and 2017/0065 for the storage shed. The notices to fix were issued for construction of these buildings without building consent first being obtained (a contravention of section 40 of the Act) and for building work that did not comply with the Building Code (a contravention of section 17 of the Act).

6.2.2 Building consents were not sought or granted for the construction of the bach and associated building work to install the septic tank and drainage, or the construction of the storage shed. The building work was not exempt building work under Schedule 1, and accordingly I conclude that the authority was correct to issue the notices to fix in respect of the contraventions of section 40.

6.2.3 In regard to the compliance of the building work with the Building Code, the authority did not identify specific items of non-compliance and clauses of the Building Code with which the buildings did not comply in either of the notices to fix or the covering letter. A notice to fix should clearly describe the particulars of non-compliance to enable the recipient of the notice to respond accordingly.

6.2.4 I note the expert was of the view that the bach was very poorly constructed and the storage shed would need significant upgrading before it could meet the performance requirements of the Building Code. Accordingly, I conclude that neither the bach nor storage shed comply with the Building Code, and therefore the authority's decision to issue the notices to fix for a contravention of section 17 was correct despite the fact that the notices should have provided more particulars of the claimed non-compliances.

6.2.5 The required remedies included the option of applying for certificates of acceptance for the buildings, and building consent for any remedial work, which is in accordance with section 165(1)(c). I consider these remedies were appropriate in the circumstances.

6.3 NTF 2017/0066 (sleepout)

6.3.1 The authority issued notice to fix 2017/0066 for the sleepout and its attached deck, for building work that did not comply with the Building Code, a contravention of section 17 of the Act. The authority did not identify specific items of non-compliance and the clauses of the Building Code with which the building did not comply in the notice to fix or the covering letter. As set out in paragraph 6.2.3, a notice to fix should clearly describe the particulars of non-compliance.

6.3.2 I accept the expert's view that the sleepout needs remedial work to bring it into compliance with the requirements of the Building Code. The expert identified a lack of structural connections for the subfloor and deck and an inadequate barrier on the deck (refer paragraph 5.6). Accordingly, I conclude the sleepout does not comply with Clause B1 Structure and Clause F4 Safety from falling. On that basis I consider

the authority was correct to issue the notice to fix for the contravention of section 17, despite the fact that the notice was lacking in terms of content.

6.3.3 The required remedies were either to remove the sleepout, or to obtain a building report regarding its compliance status and complete any necessary building work to bring the building into compliance with the Building Code. In its letter accompanying this notice the authority said it would require a chartered professional engineer to assess compliance in terms of Clause B1 Structure and to recommend any remedial works necessary. I note an authority is unable to require a particular course of action to be followed to establish compliance other than seek evidence that compliance has or will be established.

6.3.4 I consider the remedies were appropriate in the circumstances.

6.4 NTF 2017/0067 (pergolas)

6.4.1 The authority issued notice to fix 2017/006 for the pergolas, for building work that did not comply with the Building Code, being a contravention of section 17 of the Act. The authority did not identify specific items of non-compliance and clauses of the Building Code with which the structures did not comply in the notice to fix or in the covering letter. As set out in paragraph 6.2.3, a notice to fix should clearly describe the particulars of non-compliance.

6.4.2 By the time of the expert's visit, the pergola beams had been removed, and the authority had reached the view the notice had been complied with.

6.4.3 However, the expert observed that the remaining posts could be easily moved from side to side, which indicated that the pergola would not have been structurally sound.

6.4.4 The applicant contends that the pergola was structurally sound when braced by the beams. I do not accept the applicant's view on this matter – it appears from the expert's observations that the posts were not concreted into the ground and I do not consider that the posts constructed in this manner were sufficient to provide the structural stability required for the pergola to meet the performance criteria in Clause B1.

6.4.5 Taking into account the expert's findings, I conclude the authority correctly exercised its powers of decision in issuing a notice to fix for non-compliance with the Building Code, despite the fact that the notice was lacking in particulars describing the non-compliance(s).

6.5 NTF 2017/0068 (green shed and mower shed)

6.5.1 The authority issued notice to fix 2017/0068 for the green shed and mower shed. I note the expert identified the green shed as having previously been used for retail purposes, however, based on the background submissions provided by both the applicant and the authority, it was the mower shed that was used for retail purposes.

6.5.2 The authority identified three breaches of the Building Act: failure to obtain a building consent (contravention of section 40 of the Act); building work that did not comply with the Building Code (contravention of section 17); and a breach of section 363 relating to the safety of members of the public using unconsented premises.

6.5.3 Given the use of the mower shed for retail purposes, I consider the authority was correct to issue the notice to fix in respect of section 363 of the Act.

6.5.4 With respect to compliance with the Building Code, the authority did not identify specific items of non-compliance and the clauses of the Building Code with which

the building did not comply in the notice to fix or the covering letter. As set out in paragraph 6.2.3, a notice to fix should clearly describe the particulars of non-compliance.

- 6.5.5 However, I accept the expert's observation that while the building's superstructures are reasonably sturdy and functional, they are not adequately fixed down. Accordingly, I consider the buildings do not comply with Clause B1 Structure. On that basis, I consider the authority was correct to issue the notice to fix for the contravention of section 17, despite the fact that the notice was lacking in terms of content.
- 6.5.6 Building consents were not sought or granted for the construction of the green shed or mower shed.
- 6.5.7 With respect to the green shed, the applicant has stated that the building was constructed to enable the storage of building supplies and equipment.
- 6.5.8 I accept that the applicant is entitled, under subclause 4 of Schedule 1 of the Act, to construct a building to be used by people engaged in building work, in relation to another building and for which a building consent is required and the applicant obtained building consent ABA2017/603 on 16 August 2017 for the construction of foundations for the shipping containers (refer to paragraph 3.3) nearby to the green shed. However, the authority's inspection notes from the site visit of 18 October 2017 note the 'kitchen prep/dining area/storage against the 9x6m building on the sketched site plan that is the green shed.
- 6.5.9 On this basis, I do not consider the green shed to be exempt under subclause 4 of Schedule 1 as it does not appear it was only being used by people engaged in building work. I note that when the expert visited the site the green shed contained furniture as well as building materials.
- 6.5.10 The mower shed is a single-storey detached building with a floor area of 3.5x6m, being 21m² in area. I do not consider the mower shed falls within the scope of exempt building described in any of the subclauses of Schedule 1; it is significantly larger than building provided for in subclause 3 (buildings not exceeding 10m²), and there is a reasonable expectation people will enter it on a regular basis so it falls outside the scope of subclause 4 (unoccupied detached dwellings).
- 6.5.11 Therefore, the building work associated with the green shed and mower shed was not exempt building work under Schedule 1, and accordingly I conclude that the authority correctly exercised its powers in respect of the contraventions of section 40.
- 6.5.12 The remedies in the notice to fix included immediately ceasing use of "any part of the sheds" by members of the public, and either removing the buildings or applying for a certificate of acceptance and building consent for any building work required. I consider the authority's remedies were appropriate in the circumstances.

6.6 The compliance timeframes and responses to the notices to fix

- 6.6.1 The applicant is of the view that the timeframes given to respond to the notices to fix were not reasonable, and that the authority did not follow the correct process after issuing the notices to fix, as it did not provide a response to the applicant's proposals.
- 6.6.2 On 1 November 2017 the authority wrote to the applicant listing various regulatory concerns with the buildings and activities being carried out (refer to paragraph 3.9) and the applicant responded on 16 November 2017 describing the actions that would

be taken and requesting further time to compile the information required for the applications.

- 6.6.3 The authority did not respond directly to the applicant's letter and issued the notices to fix. As discussed in paragraphs 6.2 to 6.5, I am of the view that the authority was correct to issue the notices to fix. While it does not change my view of the decisions to issue the notices to fix, I note that on the face of it the request for further time does not seem to be an unreasonable request. I also note the authority did not respond to this request, and I consider it would have been good practice to do so.
- 6.6.4 In respect of the timeframe to respond to the notices to fix, section 165(1)(b) of the Act requires a notice to fix must state "a reasonable timeframe within which it must be complied with". All five notices were issued on 30 November 2017 and gave the applicant until 14 February 2018 to comply.
- 6.6.5 I note that this is a time period of 10-11 weeks from date of issue of the notices to fix to the date that the applicant was required to comply with the notices to fix. I am of the view that in this particular set of circumstances for the buildings on this site, the timeframe was not reasonable, because:
- the period of time overlapped the Christmas holiday period, and it is more difficult than usual to access professional advice between mid-December and late January. It is also a very short amount of time to engage a builder, where the notices to fix provided for building work to be carried out
 - the applicant did not currently have building professionals engaged at the time of issue of the notices to fix, so the applicant needed to go through the process of finding and engaging such people to assist, as well as dealing with the issues identified in the notices to fix; as opposed to a situation where a building project is current and an owner already has the expertise available and familiar with the project
 - there were five notices to fix that covered a range of types of structures of varying complexity, each with its own set of circumstances that required consideration and proposals to be developed; as opposed to a single notice issued for a single building. The notices to fix did not adequately describe the breaches of the Act and its regulations
 - the remedies stated in notices to fix required a number of actions including applications for certificates of acceptance and/or building consents (which also required resource consent in the case of the bach) to be prepared, building work to be carried out, and building compliance reports to be prepared, all of which require time to be completed.
- 6.6.6 I note that although notice to fix 2017/006 for the pergolas was complied with because the applicant removed the structures, I consider the comments in paragraph 6.6.5 to include this notice to fix. Therefore, the timeframe was not reasonable for all stated remedies, as the applicant could have chosen to keep the structures and construct them in accordance with the Building Code.
- 6.6.7 In respect of the process after issuing the notices to fix, the designer provided proposals to the authority (refer to paragraph 3.17). I note that the designer did not provide timeframes in the first response to the authority on 12 February 2018. Timeframes were provided in the second response on 21 March 2018. The authority submits that it did not accept most of the proposals, and in particular, did not

- consider any of the buildings exempt under Schedule 1. The authority was also of the view that the timeframes to comply with the notices were reasonable.
- 6.6.8 I note the authority followed up the 12 February 2018 response with phone calls to the designer on 21 February, 15 March and 19 March 2018. The authority did not respond to the designer after the designer's 21 March 2018 response.
- 6.6.9 I note that less than a week after receiving the 21 March 2018 response, the authority started its internal processes around enforcement, having its own 'Enforcement Committee', consider the case on 27 March 2018, at which point a decision was made to prosecute. The authority subsequently laid charges on 15 May 2018.
- 6.6.10 The authority has stated that it was bound by time limitations in terms of section 378 of the Act, and charges before the Court had to be laid within six months of the authority being made aware of the offence (refer to paragraph 4.5.2, 6th bullet point).
- 6.6.11 Section 378 of the Act states:
- ... 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, ...
- 6.6.12 With respect to section 378, the matter giving rise to the charges is failing to comply with the notices to fix, and the six-month limitation period runs from the date specified in the notices to fix by which the notices must be complied with.
- 6.6.13 In this case, the six-month limitation period specified in section 378 of the Act ran from 14 February 2018 to 14 August 2018.
- 6.6.14 I also note that as part of the process of resolving the compliance issues, the authority could have issued new notices to fix at any time, with enforcement action taken against those notices if necessary, because under section 378 of the Act the offence is failing to comply with a notice to fix, with the limitation period being from the date the notice must be complied with.
- 6.6.15 The authority has stated that it made the decision to take enforcement action, rather than continue the building consent authority processes through the negotiation of timelines. I also note the authority has stated that it was not appropriate to communicate with the applicant once a decision to prosecute had been made.
- 6.6.16 However, I consider that the authority needed to clearly respond to the proposals. For almost two months after submitting the designer's 21 March 2018 response, the applicant was left without a clear view of the whether the authority accepted the proposals, which aspects of the response that should be progressed i.e. applications prepared, work planned, etc, in order to comply with the notices to fix, and which aspects of the response the authority did not agree with. The authority was not constrained by having to meet short timeframes under section 378, as the six-month limitation period began on 14 February 2018, as the date the notices had to be complied with. I am of the view that it is unreasonable that the authority did not clearly provide its view of the proposals in response to the notices to fix. The authority should have acknowledged the response to the notices to fix in writing and provided reasons why the applicant's proposals and timeframes were not accepted.
- 6.6.17 With respect to the applicant's proposals I note the intended 21-month timeframe is linked to the construction of a new house on the site which will require building consent and resource consent applications.

- 6.6.18 The authority should now provide reasonable timeframes in the relevant notices to fix for the applicant to develop remediation proposals taking into account the intended house construction (in the case of the storage shed), the present use of the buildings, the level of the noncompliance, the risks arising from the non-compliances present, and the expertise required to address the non-compliances.
- 6.6.19 With respect to the timeframes the bach and storage shed should remain in their present state, I note the following:
- the expert considers the bach is very poorly constructed and I am of the view it should be removed as soon as possible given the nature of its construction and the extent and nature of the contraventions (including structural issues, fire safety, and amenity/hygiene).
 - while it may be reasonable for the storage shed to remain for storage purposes only pending the construction of the new house, the timeframe for this can be assessed by the authority against the steps being taken by the applicant to obtain the necessary consents for the house, as noted in paragraph 6.6.17.
- 6.6.20 With respect to the sleepout, the applicant refers to the sleepout being exempt building work under subclause 3 of Schedule 1. I do not consider this to be an adequate response to the notice to fix, as the notice to fix for the sleepout was issued on the basis of non-compliance with the Building Code.
- 6.6.21 The applicant also notes the sleepout could be considered under subclause 2 of Schedule 1, which allows the authority to grant a discretionary exemption from the need to obtain building consent. I consider that an exemption under Clause 2 of Schedule 1 must be applied for before building work is carried out; the exemption is from the requirement to obtain a building consent to carry out building work and therefore cannot be granted after building work has already been completed.
- 6.6.22 Therefore, a proposal to address the aspects of the building that do not comply with the Building Code is required.
- 6.6.23 With respect to the green shed, the proposal states the green shed is exempt under subclause 4 of Schedule 1. I am of the view that is not the case (refer to paragraph 6.5.9).
- 6.6.24 With respect to the mower shed, the proposal states the mower shed was to be dismantled, re-sited, and constructed as a carport. It is not clear from the proposal whether the requirements of the exemption under subclause 18 of Schedule 1 will be met. I note however the applicant must ensure that:
- any necessary consents are obtained before building work is carried out, unless the building work is exempt from the requirement to obtain a building consent under Schedule 1
 - all building work must comply with the Building Code, regardless of whether a building consent is required or not
 - where unconsented building work is to remain, a certificate of acceptance may be applied for by the applicant to regularise the unconsented building work.

7. The decision

- 7.1 In accordance with section 188 of the Building Act 2004 I hereby determine that the authority made the correct decisions to issue the five notices to fix (2017/0064, 2017/0065, 2017/0066, 2017/0067 and 2017/0068) for contraventions of the Act and Building Code. However, the authority incorrectly exercised its powers of decision in issuing the notices to fix because the timeframes to comply were not reasonable and the notices to fix did not clearly describe the particulars of non-compliance.
- 7.2 Accordingly, I confirm the authority's decisions to issue five notices to fix, but require the authority to reissue modified notices for the four notices yet to be complied with (2017/0064, 2017/0065, 2017/0066, 2017/0068) that provide reasonable timeframes for the applicant to develop proposals to address the items in the notices to fix. The authority should also clearly describe the particulars of non-compliance in these notices.
- 7.3 I also determine that the authority incorrectly exercised its powers of decision in refusing to consider and respond to the applicant's proposals in response to the notices to fix.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 31 October 2019.

Katie Gordon
Manager Determinations

Appendix A: The legislation

A.1 Relevant sections of the Building Act 2004:

17 All building work must comply with building code

All building work must comply with the building code to the extent required by this Act, whether or not consent is required in respect of that building work

40 Buildings not to be constructed, altered, demolished, or removed without consent

- (1) A person must not carry out any building work except in accordance with a building consent.
- (2) A person commits an offence if the person fails to comply with this section.
- (3) A person who commits an offence under this section is liable on conviction to a fine not exceeding \$200,000 and, in the case of a continuing offence, to a further fine not exceeding \$10,000 for every day or part of a day during which the offence has continued.

41 Building consent not required in certain cases

- (1) Despite section 40, a building consent is not required in relation to—
 - (a) ...; or
 - (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); or
 - (b) a building warrant of fitness or dam warrant of fitness is not correct; or
 - (c) the inspection, maintenance, or reporting procedures stated in a compliance schedule are not being, or have not been, properly complied with.
- (2) A responsible authority must issue to the specified person concerned a notice (a notice to fix) requiring the person—
 - (a) to remedy the contravention of, or to comply with, this Act or the regulations; or
 - (b) to correct the warrant of fitness; or
 - (c) to properly comply with the inspection, maintenance, or reporting procedures stated in the compliance schedule.
- (3) However, if a responsible authority considers that it is more appropriate for another responsible authority to issue the notice to fix, it must—
 - (a) notify the other authority that it holds that view; and
 - (b) give the other authority the reasons for that view.
- (4) The other responsible authority referred to in subsection (3) must issue the notice to fix if it considers that this section applies.

165 Form and content of notice to fix

- (1) The following provisions apply to a notice to fix:
 - (a) it must be in the prescribed form:
 - (b) it must state a reasonable timeframe within which it must be complied with: ...

(c) if it relates to building work that is being or has been carried out without a building consent, it may require the making of an application for a certificate of acceptance for the work:

(d) if it requires building work to be carried out, it may require the making of an application for a building consent, or for an amendment to an existing building consent, for the work:

(e) if it requires building work to be carried out, it must require the territorial authority, the regional authority, or both to be contacted when the work is completed:

Section 363 Protecting safety of members of public using premises open to public or intended for public use

(1) A person who owns, occupies, or controls premises to which section 362W applies must not use, or permit the use of, any part of the premises that is affected by building work—

(a) if—

(i) a building consent is required for the work; but

(ii) no building consent has been granted for it; or

(b) if a building consent has been granted for the work, but—

(i) no code compliance certificate has been issued for the work; and

(ii) no certificate for public use has been issued under section 363A for the part; or

(c) if a building consent has been granted for the work, and a certificate for public use has been issued under section 363A for the part, but—

(i) no code compliance certificate has been issued for the work; and

(ii) the certificate for public use has been issued for the part subject to conditions that have not been complied with.

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).

Schedule 1 Building work for which building consent not required

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.

4 Unoccupied detached buildings

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

- (a) houses fixed plant or machinery and under normal circumstances is entered only on intermittent occasions for the routine inspection and maintenance of that plant or machinery; or
- (b) is a building, or is in a vicinity, that people cannot enter or do not normally enter; or
- (c) is used only by people engaged in building work—
 - (i) in relation to another building; and
 - (ii) for which a building consent is required.

(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.

18 Carports

Building work in connection with a carport that—

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