

# Determination 2024/022

## Regarding a notice to fix for alterations to a commercial building

**4/49 Gloucester Street, Nelson**

### **Summary**

This determination considers the authority's decision to issue a notice to fix for contravention of section 40 in respect of the installation of sanitary fixtures and a hot water cylinder in a commercial building. The determination discusses whether the works carried out are exempt from requiring a building consent under Schedule 1 of the Building Act.

In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”) and references to “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

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

## 1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Andrew Eames, Manager Advisory, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.<sup>1</sup>
- 1.2. The parties to the determination are:
  - 1.2.1. Nelson City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority, who applied for the determination.
  - 1.2.2. Frivin Limited (“the owner”), the owner of the property at 49 Gloucester Street, who was the recipient of the notice to fix.
- 1.3. This determination arises from the decision of the authority to issue a notice to fix under section 164 in relation to the owner’s commercial premises. The authority issued the notice to fix because it considered, the building work was in contravention of section 40 and required a building consent.<sup>2</sup> The owner considers that the works carried out were in fact exempt under Schedule 1 of the Act.
- 1.4. Therefore, the matter to be determined, under section 177(1)(b) and (2)(f), is the authority’s decision to issue the notice to fix for a contravention of section 40 for building work carried out without a building consent. In making this determination, I consider whether there were grounds to believe that the building works were not exempt under Schedule 1 and required a building consent.

### Issues outside this determination

- 1.5. I have not considered:
  - 1.5.1. the form and content of the notice to fix under section 165, only whether there were grounds to issue it.
  - 1.5.2. Building Code compliance.

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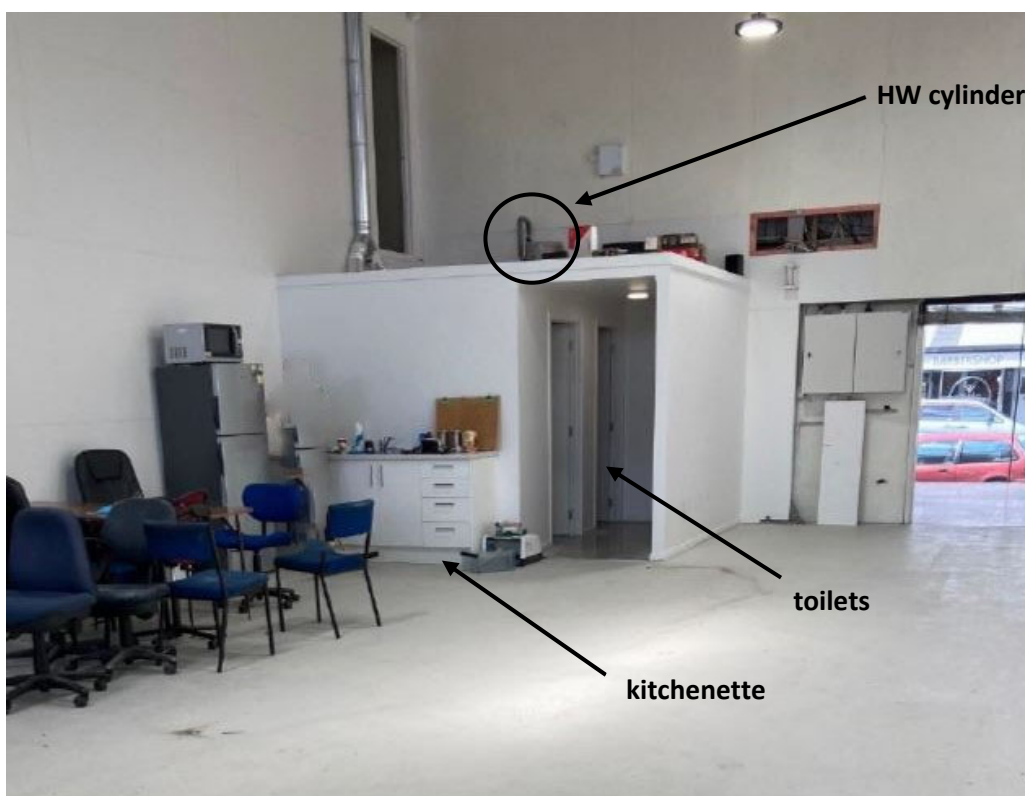
<sup>1</sup> The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

<sup>2</sup> Section 40(1) provides that a person must not carry out any building work except in accordance with a building consent.

- 1.5.3. The building consent applied for or the building consent process.
- 1.5.4. The dispute raised regarding payment of fees.
- 1.6. The owner argued that the authority should have granted an exemption under clause 2 of Schedule 1. However, as this proposal was not put before the authority before carrying out the building work, I do not consider it here.

## 2. The building work

- 2.1. The building at 49 Gloucester Street, Nelson (Part Lot 1 DP 2680) is currently classified as being for commercial use and services several commercial tenancies.
- 2.2. The proposed building work was to “relocate existing toilets and kitchenette from first floor to ground floor”.
- 2.3. The building work consisted of the construction of internal partition walls to the ground floor for the toilets, associated plumbing, as well as a kitchen sink unit and cabinetry. Additionally, a 20-litre hot water cylinder was installed (see Figure 1).



**Figure 1: The toilet area and kitchenette**

- 2.4. The walls of the new toilet area are timber framed and lined with plasterboard. The flooring was proposed to be 2mm commercial vinyl flooring.

### 3. Background

- 3.1. On 17 February 2021, building consent plans for alteration of a commercial building were submitted to the authority (see Figure 2).

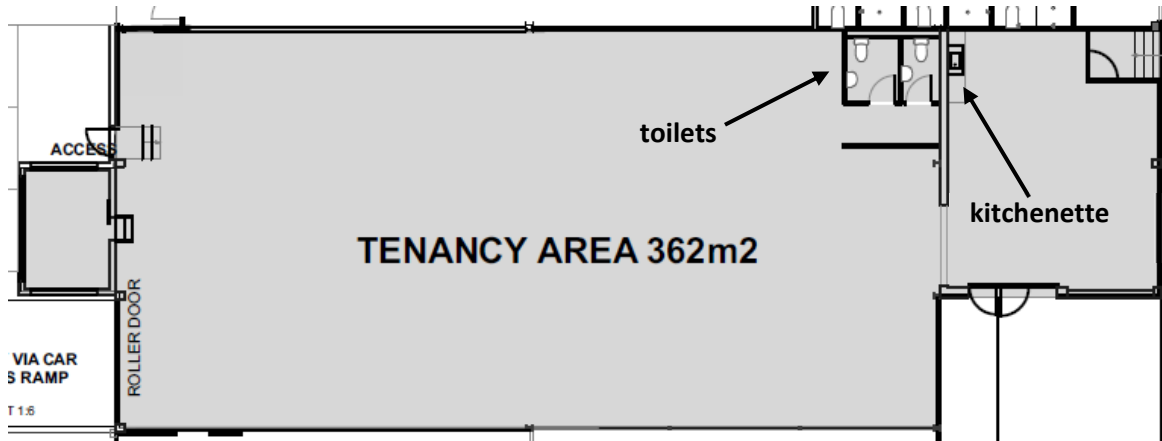


Figure 2: the proposed alterations

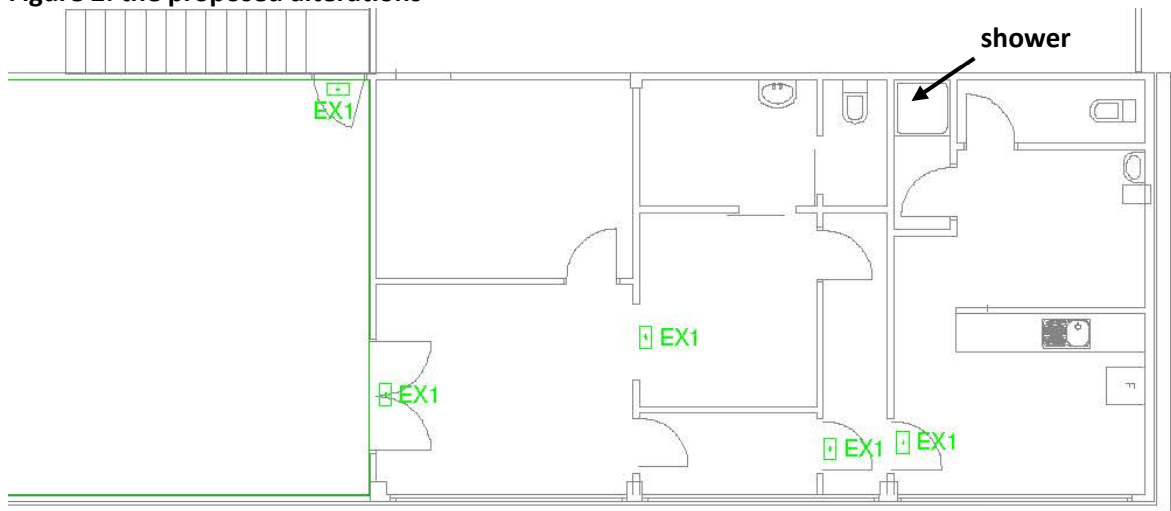


Figure 3: The mezzanine/first floor layout

- 3.2. During the building consent process, the owner provided a diagram of the existing mezzanine level, which shows two toilets, two handbasins, a shower and a kitchenette (see Figure 3). A hot water cylinder does not appear to be indicated on the plans.
- 3.3. On 16 August 2021, building works commenced.
- 3.4. An officer of the authority visited the site 6 September 2021.

- 3.5. The authority issued a notice to fix (NF0329) on 22 September 2021. The particulars of contravention stated in the notice are:

**Contrary to Building Act 2004 Section 40 - Buildings not to be constructed, altered, demolished, or removed without [consent] pursuant to Section 164 of the Building Act 2004**

- [The authority] considers on reasonable grounds that the specified persons named in this notice to fix are contravening or failing to comply with the Act or the Regulations under the Act. In particular contrary to Section 40 of the Act - Buildings not to be constructed, altered, demolished or removed without consent. Unconsented building work including plumbing and drainage work for kitchen and bathroom facilities.<sup>3</sup>

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

- Apply for a Certificate of Acceptance for the building work carried out with[ ]out the required Building Consent OR remove the unconsented building work, providing evidence to Council and proceed under a Building Consent.

- 3.6. The authority subsequently applied to the Ministry for a determination.

## 4. Submissions

### The authority

- 4.1. The authority submitted (in summary):

4.1.1. The Ministry's guidance<sup>4</sup> provides examples of exempt building work under clause 35. However, in contrast to those examples, new kitchen and bathroom facilities were built in a separate location on a different floor. Although some sanitary fixtures were removed and re-installed in that new location, this required new plumbing and drainage connections, which constitutes new sanitary plumbing.

4.1.2. The building work was not exempt under Schedule 1 and should not have been carried out without a building consent. Clause 10 of Schedule 1 did not apply because it expressly excluded sanitary plumbing and drainage work.

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<sup>3</sup> I note that the notice to fix does not explicitly refer to the hot water cylinder.

<sup>4</sup> MBIE *Building work that does not require a building consent- Exemptions Guidance for Schedule 1 of the Building Act 2004* (Fifth edition, August 2020)

- 4.1.3. A similar situation to the present case was addressed in Determination 2017/001<sup>5</sup> which found that building work to install sanitary fixtures with associated plumbing, to install a hot water cylinder, and to construct partition walls to create a new bathroom, was not exempt under Schedule 1 of the Building Act.
- 4.1.4. The sanitary facilities on the first floor were removed or disconnected, and the area blocked off under a building consent in 2013.
- 4.1.5. Because the new sanitary fixtures may have been relocated, it is unable to confirm whether the number of sanitary fixtures in the building as a whole has increased.<sup>6</sup>
- 4.1.6. the hot water cylinder cannot have been a replacement or repositioning as the water heater was not in the building to begin with.

## **The owner**

- 4.2. The owner submitted (in summary) that:
  - 4.2.1. they consider the proposed works were exempt from requiring consent under the Building Act.
  - 4.2.2. the suggestion that clause 10 of Schedule 1 did not apply to the building work because it contained plumbing work is illogical. If this were the case, “all sanitary plumbing work would require a building consent in circumstances where there is any building work undertaken to the interior of the building – this cannot have been the intention”.
  - 4.2.3. With regards to Determination 2017/001, it is considerably different because that case involved installing sanitary fixtures on a newly constructed mezzanine floor that increased the total number of sanitary fixtures.
  - 4.2.4. There has been no increase in the number of sanitary fixtures, and the relocated fixtures used the existing pipework that had served the previous sanitary fixtures, and the existing plumbing was capped.
  - 4.2.5. With regards to the hot water cylinder, this was located in the roof space (see Figure 4). As it was a replacement of an existing water heater connected to a controlled heat source, it is exempt as per the Ministry’s guidance.

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<sup>5</sup> This determination found alterations to an existing building, including building work to install sanitary fixtures and associated plumbing, to install a hot water cylinder, and to construct partition walls to create a new bathroom was not exempt under Schedule 1 of the Building Act.

<sup>6</sup> Clause 35 states that alteration to existing sanitary plumbing in a building is exempt as long as the total number of sanitary fixtures in the building is not increased by the alteration.



**Figure 4: The existing hot water cylinder**

4.3. The owner also provided the following in support of its position:

- (1) A plan showing the existing layout of the first floor, which showed two toilets with hand basins, a kitchen as well as a shower and a urinal.
- (2) Photos of the fixtures on the first floor
- (3) A list of the number of sanitary fixtures according to previous building consents.

## 5. Discussion

5.1. In making this determination, I will consider whether there were grounds to consider that the building works were not exempt under Schedule 1.

### Legislation

5.2. A notice to fix is an enforcement notice that requires a person to remedy a contravention of the Act or its regulations. The legislation regulating notices to fix can be found in sections 163 to 168 of the Act.

5.3. Section 164 states if an authority considers on reasonable grounds that a specified person<sup>7</sup> is contravening or failing to comply with the Act or its regulations, then the authority must issue the specified person a notice to fix requiring them to remedy the contravention to comply with the Act or regulations.

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<sup>7</sup> Section 163 defines “specified person”.

5.4. The contravention identified by the authority in the notice to fix was that building work had been carried out without first obtaining a building consent where one was required under section 40.

5.5. Section 40 states:

**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...

5.6. Section 40 is subject to section 41 and section 42A. Section 41 sets out exceptions to section 40 and states building consent is not required for certain building work in certain circumstances. Section 42A sets out that a building consent is not required for building work described in Schedule 1 of the Act.

### **The sanitary fixtures**

5.7. The dispute here is whether the plumbing work meets the requirements of Clause 35 of Schedule 1.

5.8. The authority has referred to the Ministry's guidance, quoting examples of what is considered to be exempt work (ie repositioning sanitary fixtures within an existing bathroom in a dwelling, or remodelling a kitchen in a dwelling) and considered the current situation contrasted those examples.

5.9. I consider that while the Ministry's guidance is extremely helpful, it is only intended to serve as a guide. The guidance will not anticipate or inform every case, and I must refer back to the wording in clause 35.

**Clause 35 –Alteration to existing sanitary plumbing (excluding water heaters)**

(1) Alteration to existing sanitary plumbing in a building, provided that—

(a) the total number of sanitary fixtures in the building is not increased by the alteration; and

(b) the alteration does not modify or affect any specified system

(2) Subclause (1) does not include an alteration to a water heater

5.10. I note this clause only applies when carried out by person authorised under Plumbers, Gasfitters, and Drainlayers Act 2006. The parties do not dispute the fact that this work was completed by a person so authorised.

5.11. There is nothing in the current circumstances to suggest that the alteration modifies or affects any specified system, therefore the only issue is whether there has been an increase in the total number of sanitary fixtures in the building.



- 5.12. The authority states that it believes the alterations to the sanitary plumbing is outside this exemption due to the facilities being built in another location on a different floor, which required new drainage and plumbing connections. However, clause 35 is only concerned with the number of sanitary fixtures that exist in the building, not where they are located.<sup>8</sup>
- 5.13. The owner submitted that the sanitary fixtures servicing the first floor were disconnected and removed in 2021 and are no longer accessible to the ground floor. The authority's submissions support this but stated that these were removed or disconnected in 2013 under a building consent.
- 5.14. In this case, when considering whether an 'increase' has occurred, it is appropriate to take a practical approach to assessing whether an existing fixture is no longer to be counted as a sanitary fixture. The original fixture is usually capped off at the wall so that it can no longer be used, and a new fixture is added in another location. I consider the intention behind the wording of the exemption is to ensure that the additional risk of the overall plumbing and drainage load from an increase of fixtures can be considered and the system can cope with any increase.
- 5.15. The authority stated that it could not confirm that the number of sanitary fixtures in the building has increased because the new sanitary fixtures were relocated. However, as I have stated earlier, clause 35 is not concerned with the location of alterations to sanitary fixtures, but the number of fixtures. Overall, the evidence provided does not suggest to me that there has been an increase to the number of sanitary fixtures to the building as a whole.

## The hot water cylinder

- 5.16. Clauses 36 to 38 of Schedule 1 pertain to exemptions for water heaters. The owners stated that this was a replacement of an existing water heater connected to a controlled heat source. This clause also only applies when carried out by person authorised under Plumbers, Gasfitters, and Drainlayers Act 2006. The parties do not dispute the fact that this work was completed by a person so authorised.
- 5.17. The appropriate clause to apply is clause 38:

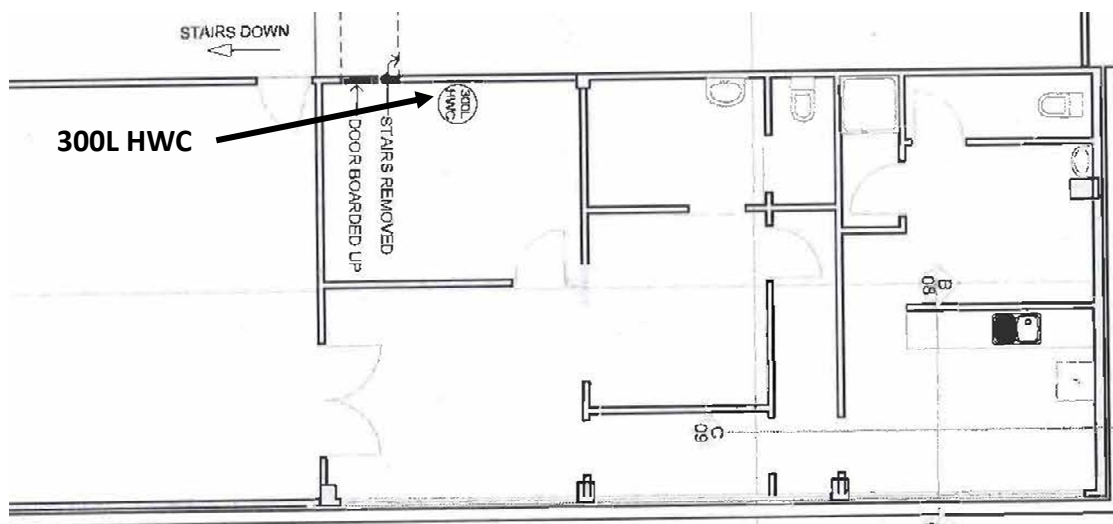
**Clause 38 –Replacement or repositioning of water heater that is connected to, or incorporates, controlled heat source**

The replacement of any water heater (including the repositioning of an existing water heater) if the replacement water heater is connected to, or incorporates, a controlled heat source or, if connected to or incorporating more than 1 heat source, 2 or more heat sources all of which are controlled.

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<sup>8</sup> I note the building consent states that the building work will "connect new plumbing into existing wastewater system through floor of adjacent tenant", rather than "relocating" from the first floor.

- 5.18. The owners and the authority disagree on whether the hot water cylinder is new, or a relocation and replacement of an existing system.
- 5.19. Based on the photos and plans provided by the owner (see Figures 3 and 4), there appears to have been an existing hot water cylinder servicing the previous shower facility. Further, I note that a hot water cylinder is indicated on a previous building consent (see Figure 5).



**Figure 5: First floor layout dated 13 September 2013**

- 5.20. I consider that the water heater is installed in a new position which is different from the original position and note that there is no specific distance stated in Schedule 1 or the guidance.
- 5.21. However, in my view, clause 38 can be read in this case to allow a water heater to be 'repositioned' while replacing it, considering the similarity of risk with repositioning an existing water heater and the relatively low risk overall present when this work is carried out by authorised personnel.
- 5.22. Given that there was an existing water cylinder in the roof space (and which appears to have been disconnected and is no longer in use) I consider that the installation of the 20-litre hot water cylinder to service the ground floor alterations is a replacement and repositioning of an existing unit and is exempt under clause 38.

### **The authority's decision to issue the Notice to Fix**

- 5.23. In deciding to issue a notice to fix under section 164, the authority must have considered that a specified person is contravening or failing to comply with section 40.

5.24. There needed to be sufficient grounds to support the view that the works carried out were not covered by the exemptions set out in Schedule 1. However, as I have noted above:

5.24.1. The authority could not confirm that as per clause 35, the total number of sanitary fixtures is increased by the alteration, and;

5.24.2. The installation of the hot water cylinder was a replacement and repositioning of an existing water heater under clause 38.

## **6. Decision**

6.1. In accordance with section 188 of the Building Act 2004, I determine that there were not grounds to issue a notice to fix for contravention of section 40. Accordingly, I reverse that notice to fix.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 8 May 2024.

**Andrew Eames**  
**Manager Advisory**