

# Determination 2024/061

**Regarding the authority's proposed decision to issue a notice to fix in relation to the construction of a cable car building, two sets of stairways, and the installation of a toilet and shower building at the property**

**589 Rocks Road, Moana, Nelson**

## Summary

This determination looks at building work to construct a cable car building, two sets of stairs, and the installation of a toilet and shower building at the property. The determination considers the authority's proposed decision to issue a notice to fix and the compliance of the stairways with Building Code Clauses D1 – *Access routes* and F4 – *Safety from falling*. It considers whether there was a requirement to obtain building consent for the work carried out as well as whether the stairways require handrails and/or a barrier.



**Figure 1: Google Street View photo of the property, May 2024**

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, Principal Advisor Determinations, 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. T Robinson on behalf of Water and Atmosphere Information Ltd, the owners of the property (“the owner”).
  - 1.2.2. New Zealand Transport Agency Waka Kotahi (“NZTA”), the owners of the road reserve located at the front of the property.
  - 1.2.3. Nelson City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority and the party who applied for this determination.
- 1.3. I have included D King (“the engineer”) as a person with an interest in this determination, as the engineer who designed and inspected the building work.
- 1.4. This determination arises from the authority’s proposed decision to issue a notice to fix. The proposed notice to fix is in relation to the construction of a cable car building, two sets of stairways, and the installation of a toilet and shower building. The proposed notice lists contraventions of sections 17 and 40.
- 1.5. The first matter to be determined, under section 177(1)(a), is whether the following building work complies with Building Code Clauses D1 – *Access Routes* (“clause D1”) and F4 – *Safety from falling* (“clause F4”):
  - 1.5.1. The external stairway which runs from Rocks Road up to the midpoint of the driveway (“the lower stairway”).
  - 1.5.2. The external stairway which runs from the proposed garage at level two up to levels three and four of the proposed dwelling (“the upper stairway”).

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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.

- 1.6. The second matter to be determined, under section 177(1)(b) and (2)(f), is the proposed decision to issue a notice to fix for contraventions of sections 17 and 40.
- 1.7. In deciding these matters, I will consider:
  - 1.7.1. For the purpose of complying with clauses D1 and F4, whether a handrail and/or barrier is required to the upper and lower stairways.
  - 1.7.2. Whether the construction of the cable car building was exempt from the requirement of a building consent.
  - 1.7.3. Whether the construction of the elevated landing, located midway along the upper stairway (“the elevated landing”), was exempt from the requirement of a building consent.
  - 1.7.4. Whether the installation of the standalone building that containing the toilet and shower, in conjunction with the associated plumbing and drainage work, was exempt from the requirement of a building consent.

## 2. The building work

### The site

- 2.1. The building work is located on a sloping site, with a fall of about 18 metres across the site.
- 2.2. The site’s primary access is from Rocks Road, at the lower end of the site, with the building work extending about 14.4 meters into the road reserve.

### The building work

- 2.3. The owner proposes and is part-way through the construction of a proposed four-level dwelling and garage split across two separate buildings. The lower building includes levels one and two of the dwelling as well as the garage, located on level two. The upper building includes levels three and four of the dwelling. Both buildings which form the dwelling will be stepped into the site, supported by retaining walls, and are a combination of concrete tilt slab construction and timber framing.
- 2.4. The proposed building work includes a range of additional buildings and site work, some of which have already been carried out, as listed in paragraph 2.11.

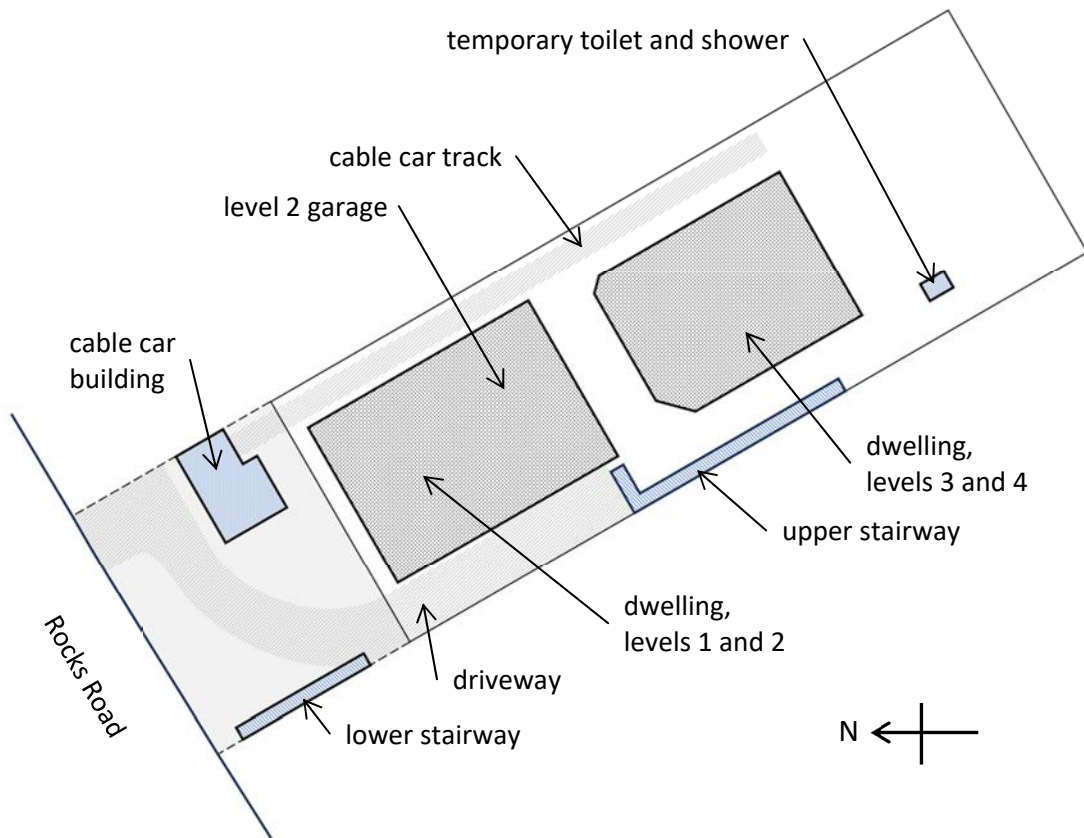


Figure 2: Site layout diagram, not to scale

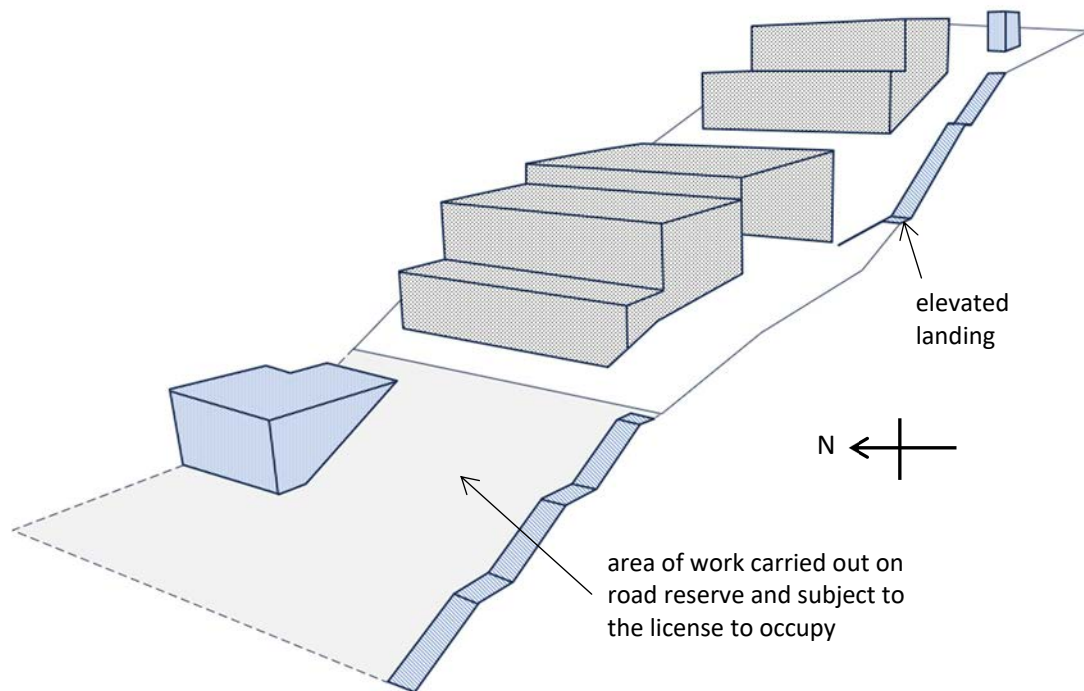


Figure 3: Perspective diagram of site, not to scale

- 2.5. Some building work is located on the road reserve for Rocks Road. The owner has a licence to occupy agreement with NZTA to carry out that work. The work located on road reserve and subject to the agreement is shown in figure 3.
- 2.6. A sloping driveway gives access from Rocks Road up to the garage. The lower end of the driveway is supported by a stepped retaining wall next to the footpath along Rocks Road, shown in figure 1.
- 2.7. A cable car runs from Rocks Road up to all levels of the proposed dwelling, running in line with the eastern boundary of the site.
- 2.8. The cable car is housed by a building which also includes a bike storage area, located 3.2 metres into the road reserve, beside the driveway access to Rocks Road. The cable car building is concrete tilt slab construction and has a floor area of 27 square metres and a maximum height of 3 metres above floor level. The cable car building is recessed into the slope and constructed so that its walls retain the ground behind.
- 2.9. Two stairways run in line with the southwestern boundary of the site.
  - 2.9.1. The lower stairway is located on road reserve and runs from Rocks Road up to the midpoint of the driveway. It runs 11.06 metres long and has three even flights of stairs, climbing 4.59 meters in height.
  - 2.9.2. The upper stairway runs from the garage up to levels three and four of the proposed dwelling. It includes a single flight of stairs leading from the top of the driveway up to an elevated landing, 1.53 metres above the driveway. The elevated landing is supported on two sides by retaining walls. The upper stairway then runs for 16.3 metres along the southwestern boundary of the site, climbing 4.59 meters across a single flight of stairs and then a further 3.06 metres across two even flights of stairs.

## **Background**

- 2.10. An engineer carried out structural calculations and drafted up plans for the proposed work in 2022. Alongside this, architectural plans were drafted.
- 2.11. The owner began work on site in early 2023. The work carried out included:
  - 2.11.1. The construction of the foundation slab and walls for the cable car building.
  - 2.11.2. Grading for the driveway and construction of the stepped retaining wall supporting the lower end of the driveway.

- 2.11.3. The two stairways running in line with the southwestern boundary, including the retaining walls supporting the elevated landing.
- 2.11.4. The installation of a temporary toilet and shower building, located towards the top of the site. It is a prefabricated unit, relocated on site to provide sanitary facilities for contractors while the building work is carried out. Installing the building included the installation of gas supply for hot water as well as connecting the building to existing water supply and foul water drainage on site.
- 2.12. The authority visited the site on 23 May 2023 and verbally informed the builder to stop work.
- 2.13. A written stop work notice was then issued by the authority on 9 June 2023.
- 2.14. On 27 June 2023 the authority issued a notice to fix to the owners and the NZTA. In the notice to fix the authority listed contraventions of section 40 in relation to the cable car building and associated retaining wall structures, a retaining wall midway up the section, and the temporary toilet and shower building. I note that this notice to fix is not the subject of this determination.
- 2.15. Across late July and into August 2023 the owner then made three separate applications for certificates of acceptance in relation to the contraventions listed in the notice to fix. They subsequently then withdrew these applications on 24 August 2023.
- 2.16. The authority then drafted an undated notice to fix, which they propose to issue to the owner, and which is the subject of this determination. The proposed notice lists the following contraventions:

Contrary to Section 40 of the Act the following building work has been carried out without a building consent and is not exempt building work pursuant to section 41 of the Act. Contrary to Section 17 of the Act [sentence ends here]

1. Construction on a building (cable car/shed) subject to a surcharge from the land above. Non-compliant with Schedule 1 [Clause] 43 & 13.2-13.3.
2. Installation of a toilet and shower with associated plumbing and drainage work, at the top of the section. Non-compliant with Schedule 1 [Clause] 3, 4, & 32.
3. Construction of stairs and platform, over 1.5m. Non-complaint with Schedule 1 [Clause] 24.

- 2.17. The notice lists the following as remedies for the above contraventions:

Pursuant to the Building Act 2004, Section 164(2)(a) – the building work carried out without a building consent is required to be made a subject of a Certificate of Acceptance. Ensuring compliance with the building code clauses B1, B2, E1, E2, G1, G10, G11, G12 & G13.

Or, remove all unauthorised building work.

- 2.18. The proposed notice gives a three-month timeframe within which it must be complied with and requires that all building work cease immediately until the authority is satisfied that works are able and willing to be completed accordance with the Act and its regulations.

### 3. Submissions

#### The owner

- 3.1. The owner submits that the cable car building does not require building consent as it is a “kitset building” which fits within the scope of Schedule 1 Clause 43 - Single-storey detached buildings exceeding 10, but not exceeding 30, square metres in floor area (where kitset or prefabricated). To support this the owner submits that:
- 3.1.1. The “kitset” concrete wall panels are constructed by a precast fabrication factory, as specified in the engineering documentation. The precast fabrication factory supplied a producer statement – construction (PS3)<sup>2</sup> in relation to the construction of the panels.
  - 3.1.2. The “construction and installation [of the panels] was carried under the supervision of [the engineer].” The engineer has provided a PS4 in relation to the installation of the panels.
  - 3.1.3. The definition of “kitset” refers to, “individual components, such as walls, roof, windows, and doors, which are prefabricated in a factory, ... known as offsite manufacturing”.<sup>3</sup> The cable car building fits within this definition.
  - 3.1.4. Given the above, and that the floor area of the cable car building is less than 30 square metres and is “not closer to a legal property boundary than its own height”, it falls within the scope of clause 43 of Schedule 1 of the Act.
- 3.2. The owner also submits that both stairways will comply with clauses D1 and F4 once work is complete, however that they are constrained from carrying out further work by the authority’s stop work notice. While the architectural plans only note that the lower stairway will have a handrail, the owner also intends to construct a handrail to the upper stairway and a barrier to the elevated landing to prevent fall, but not until later in the construction process.

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<sup>2</sup> A producer statement is a statement of professional opinion based on specialist expertise. While producer statements are well established and widely used, they have no particular status under the Act. They are used as one source of information when making decisions on compliance with the Building Code or a building consent. A PS3 refers to a statement provided for construction work. A PS4 refers to a statement provided for the review of construction work.

<sup>3</sup> The owner appears to have sourced this definition from Manor Build “*What is a kitset home?*” (6 March 2023) <https://www.manorbuild.co.nz/blog/what-is-a-kitset-home>.

- 3.3. The owner submits that the engineer's plans show the elevated landing as being 1.43 meters in height above the finished floor level of the garage. They have also submitted photos showing a measurement of less than 1 meter in height to temporary construction materials stored below the elevated landing.
- 3.4. The owner submits that the temporary toilet and shower building is intended to provide "temporary ablutions" while building work is ongoing, for a period of "four to five years". It has been installed to meet "health and safety requirements". It is intended that the temporary toilet and shower building will be relocated around the site as needed during the construction process.

### **The NZTA**

- 3.5. The NTZA did not make any submissions.

### **The authority**

- 3.6. As outlined in the proposed notice to fix, the authority submits the following regarding the building work carried out without building consent:
  - 3.6.1. The cable car building is "subject to a surcharge" from the sloping land above.
  - 3.6.2. The elevated landing is "over 1.5 meters" in height. This is supported by plans provided as part of the certificate of acceptance applications, which the authority submits show the elevated landing as being 1.53 meters high.
  - 3.6.3. The installation of the temporary toilet and shower building includes "associated plumbing and drainage work".
- 3.7. The stop work notice was issued to the owner as work was continuing without building consent. The notice was necessary to prevent further unconsented building work from occurring.

### **The engineer**

- 3.8. The engineer did not make any submissions.



## 4. Discussion

### Building Code compliance of the items identified at 1.7

- 4.1. Section 17 requires that building work comply with the Building Code to the extent required by the Act.
- 4.2. I will now consider, for the purposes of complying with clauses D1 and F4, whether the upper and lower stairways require a handrail and whether the elevated landing requires a barrier. While the proposed building work is only partially completed at this stage, I will be considering the building code requirements in the context of the applicable performance requirements once that work is complete.
- 4.3. I note that, as outlined in paragraph 3.2, the owner has submitted that they now intend to construct handrails to both stairways and a barrier to the elevated landing later in the construction process, though this was not reflected in the architectural plans that have been provided to me, nor have I been provided with communications that occurred prior to the determination reflecting this was to happen.

### Compliance of the upper and lower stairways with clause D1

- 4.4. The relevant objective requirement of clause D1.1(a) is to safeguard people from injury during movement into, within, and out of buildings.
- 4.5. The functional requirement of clause D1.2.1 states that buildings must include reasonable and adequate access to enable safe and easy movement of people.
- 4.6. The performance requirements of clause D1.3.1 then describe what access routes must enable, stating:

**D1.3.1** Access routes shall enable people to:

- (a) safely and easily approach the main entrance of buildings from the apron or construction edge of a building,
- (b) enter buildings,
- (c) move into spaces within buildings by such means as corridors, doors, stairs, ramps and lifts, ...

- 4.7. Clause D1.3.3 then goes on to outline further features that must be included on an access route, of which the relevant requirements to this discussion are:

**D1.3.3** Access routes shall: ...

- (e) include stairs to allow access to upper floors irrespective of whether an escalator or lift has been provided, ...

- (j) have smooth, reachable and graspable handrails to provide support and to assist with movement along a stair or ladder,
- (k) have handrails of adequate strength and rigidity as required by Clause B1 Structure, ...

4.8. I have previously considered the interpretation of clause D1 in determination 2019/018.<sup>4</sup> In that determination I noted that the objectives of clause D1 are expressed quite narrowly and involve the fairly confined activity of moving into, within, and out of buildings. The functional and performance requirements of clause D1 must be read in this context.

4.9. Building Code Clause A2 – *Interpretation* defines access route as:

**access route** a continuous route that permits people and goods to move between the apron or construction edge of the building to spaces within a building, and between spaces within a building.

4.10. I will first consider how clause D1 applies to the lower stairway:

4.10.1. As expanded upon in determination 2019/028, I consider that the term “apron” refers to smaller areas next to a larger one and could consist of adjacent building elements such as courtyards, patios, or decks. The term “construction edge” refers to the outer limit of the construction work associated with a building.<sup>5</sup>

4.10.2. I note that while the lower stairway is a building in and of itself, meeting the definition of section 8, it is not a building that people can move “into, within, and out of.” Instead, it must be assessed in relation to a building to which that can apply, in this case the proposed dwelling.

4.10.3. I consider that the apron, or construction edge, of the proposed dwelling extends to the cable car landings, the driveway immediately adjacent to the garage, and the upper stairway giving access between the garage and levels three and four.

4.10.4. The lower stairway is located outside the extent of this apron or construction edge. This means that it does not fall within the definition of an access route and the performance requirements of clauses D1.3.1 – D1.3.3 relating to access routes do not apply. The lower stairway therefore does not require a handrail meeting the requirements of clause D1.3.3(j) or (k).

4.11. I will now consider how clause D1 applies to the upper stairway:

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<sup>4</sup> Determination 2019/018 *Regarding the code-compliance of a proposed design for a domestic driveway at 18 Orion Drive, Welcome Bay, Tauranga* (20 May 2019).

<sup>5</sup> Determination 2019/018, at paragraphs 4.5.13-4.5.16.

- 4.11.1. The definition for access routes states that they allow for movement “between spaces within a building.”
- 4.11.2. While the proposed dwelling is split across two buildings, under section 8(1)(c) they form a single building with “a common use and common set of ownership arrangements.” Therefore, the access route for the proposed dwelling includes movement between the spaces in the lower building and those in the upper building.
- 4.11.3. This means that the upper stairway, giving access from the garage up to levels three and four, forms part of the access route for the proposed dwelling and the performance requirements of clause D1 apply. The upper stairway therefore requires a handrail that meets the performance requirements of clause D1.3.3(j) and (k).
- 4.11.4. I note that that cable car also provides for access between the lower and upper buildings. However, as noted in clause D1.3.3(e), the access route must also include the upper stairway.
- 4.11.5. Furthermore, while I have only considered the performance requirements relating to handrails, other performance requirements of D1 will apply to the upper stairway, such as D1.3.3(l), which requires that stairs have landings at appropriate intervals to prevent undue fatigue.
- 4.12. The lower stairway does not require a handrail as the performance requirements of clause D1 relating to access routes do not apply. The upper stairway, without a handrail, will not comply with clause D1.

#### **The compliance of the elevated landing with clause F4**

- 4.13. The performance requirement of F4.3.1 states:
- F4.3.1** Where people could fall 1 metre or more from an opening in the external envelope or floor of a building, or from a sudden change of level within or associated with a building, a barrier shall be provided.
- 4.14. As already noted in paragraphs 4.30 and 4.32, the potential fall from the elevated landing is 1.43 metres, greater than the 1 metre outlined in clause F4.3.1. The elevated landing therefore requires a barrier that complies with the relevant performance requirements listed in clause F4.3.4.
- 4.15. The elevated landing, without a barrier, will not comply with clause F4.

#### **The proposed notice to fix**

- 4.16. The provisions concerning notices to fix are set out in sections 163 to 168. Section 164(1)(a) provides for an authority to issue a notice to fix if it considers, on

reasonable grounds, that a specified person is contravening or failing to comply with the Act or its regulations.

### **Whether there were grounds to propose to issue the notice to fix**

- 4.17. I will first consider whether there were grounds to propose issuing a notice to fix due to contraventions of section 17 and/or 40.
- 4.18. I note that, as concluded in paragraphs 4.11.5 and 4.15, areas of the proposed building work will not comply with the Building Code. Furthermore, I have not been provided evidence that the authority was aware, or it was evident at the time of the proposed issue of the notice to fix that the owner's stated intention was to install handrails and a barrier later. Therefore, I consider there was a contravention of section 17.
- 4.19. Section 40(1) sets out that building work cannot be carried out except in accordance with a building consent.
- 4.20. Section 41(1)(b) then sets out that, despite section 40(1), building work described in Schedule 1 of the Act does not require building consent. Schedule 1 describes a range of building work for which building consent is not required, set out across 62 clauses.

### **The construction of the cable car building**

- 4.21. The cable car building is single-storey with a floor area of 27 square metres, designed and supervised by a Chartered Professional Engineer. The relevant clause of Schedule 1 which might apply is clause 3B – *Single-storey detached buildings exceeding 10, but not exceeding 30, square metres in floor area if work carried out or supervised by licensed building practitioner* ("clause 3B").
- 4.22. Clause 3B describes the following building work:
- (1) Building work in connection with any detached building if—
    - (a) any design or construction work is carried out or supervised by a licensed building practitioner; and
    - (b) the building—
      - (i) 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
      - (ii) exceeds 10 square metres in floor area, but does not exceed 30 square metres; and
      - (iii) does not contain sanitary facilities or facilities for the storage of potable water; and

- (iv) does not include sleeping accommodation, unless the building is used in connection with a dwelling and does not contain any cooking facilities; and
  - (v) if it includes sleeping accommodation, has smoke alarms installed.
- (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.

4.23. Comparing the cable car building to the building work described above:

4.23.1. It is designed and supervised by a Chartered Professional Engineer, who is a licensed building practitioner (clause 3B (1)(a)).<sup>6</sup>

4.23.2. It is one story high, with a maximum height of 3 meters above its floor level (clause 3B (1)(b)(i)).

4.23.3. Has a floor area of 27 square meters (clause 3B (1)(b)(ii)).

4.23.4. Does not contain sanitary facilities or stores potable water (clause 3B (1)(b)(iii)).

4.23.5. Does not contain sleeping facilities and so smoke alarms are not applicable (clause 3B (1)(b)(iv) and (v)).

4.23.6. Is 3.2 meters away from the closest legal boundary, the northwestern boundary of 589 Rocks Road (clause 3B (2)).

4.24. The authority has submitted that because the walls of the cable car building retain earth and are subject to a surcharge load from the sloping land above, it requires a building consent. While the authority appears to be referencing other clauses of Schedule 1 of the Act, which specifically exclude building work where that work subject to a surcharge or additional load<sup>7</sup>, this exclusion is not included in the description of building work as set out in clause 3B. Therefore, the cable car building is not excluded from the scope of clause 3B on the basis of any surcharge.

4.25. I note that the authority's proposed notice to fix lists a contravention of clause 43 - *Single-storey detached buildings exceeding 10, but not exceeding 30, square metres in floor area (where kitset or prefabricated)* of Schedule 1 of the Building Act. The owner has also made submissions on this matter. However, as I have already found that the cable car building falls within the scope of clause 3B, it is not necessary to consider whether it falls within scope any other clause of Schedule 1 of the Act.

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<sup>6</sup> As set out in section 5(1) of the *Building (Designation of Building Work Licensing Classes) Order 2010*.

<sup>7</sup> For example, Clause 20 – *Retaining walls* of Schedule 1 of the Building Act, specifically clause 20(b).

- 4.26. As the cable car building falls within the scope of the building work described in clause 3B, I therefore conclude that it does not require building consent under section 41(1)(b) and there was not a contravention of section 40.
- 4.27. I note that the cable car itself, as a new specified system, will require building consent.

#### **The construction of the elevated landing**

- 4.28. The relevant clause of Schedule 1 of the Act which might apply to the elevated landing is clause 24 – *Decks, platforms, bridges, boardwalks, etc* (“clause 24”).
- 4.29. Clause 24 describes the following building work:

Building work in connection with a deck, platform, bridge, boardwalk, or the like from which it is not possible to fall more than 1.5 metres even if it collapses.

- 4.30. The structural and architectural plans show that the distance between the top of the elevated landing and the surface of the driveway below is 1.53 meters. This means it is possible to fall more than the 1.5 meters allowed for in clause 24.
- 4.31. Section 41(1)(b) does not apply, and the construction of the elevated landing required building consent.



**Figure 4: Photo of the upper stairway and elevated landing**

- 4.32. I note that the owner has submitted the possible fall from the elevated landing is a maximum of 1.43 metres, however this measurement is to the finished floor level of the garage which sits to the northeast of this landing, not below it. It is the measurement to the surface of the driveway below which is relevant.

- 4.33. The owner has also stored construction materials below the elevated landing, to reduce the height below 1 metre while building work is ongoing. However, I am of the view that the structural and architectural plans show that the intent is for an elevated landing with a possible fall greater than 1.5 meters, and the temporary storage of construction materials does not affect the requirement to obtain a building consent for the construction of the elevated landing.
- 4.34. Therefore, the construction of the elevated landing required building consent and contravened section 40.

### **The installation of the temporary toilet and shower building**

- 4.35. I have noted in previous determinations<sup>8</sup> that the relocation of buildings onto a site is not building work in and of itself, and therefore does not require building consent as section 40 does not apply. Furthermore, as outlined in sections 41(1)(d) and 43, the gas fitting work is energy work which does not require building consent unless specifically requested by the owner or where it relates to a specified system.
- 4.36. As the relocation of the toilet and shower building is not building work, section 40 does not apply to this aspect of the installation work. I note that clauses 3 and 4 of Schedule 1 of the Act, which relate to detached buildings and are listed on the proposed notice to fix, are therefore not relevant.
- 4.37. Therefore, the building work still in question, regarding the toilet and shower building, is the connection of the toilet and shower building to existing water supply and foul water drainage on site.
- 4.38. The proposed notice to fix references Schedule 1, clause 32 – *Repair, maintenance, and replacement [of sanitary plumbing and drainage]* of Schedule 1 of the Act. I do not consider that this is an appropriate clause of Schedule 1 of the Act to assess in relation to this building work, it being a newly installed connection to the drainage system and not a repair, maintenance or replacement. Furthermore, the other clauses of Schedule 1 relating to sanitary plumbing and drainage do not cover this newly installed drainage connection, notably I do not consider connecting these plumbing fixtures new to the site to the drainage system was a minor alteration as described in Schedule 1 Clause 34.
- 4.39. Section 41(1)(b) does not apply, meaning that the building work to connect the toilet and shower building to the existing water supply and foul water drainage on site required building consent and therefore contravened section 40.

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<sup>8</sup> Determinations 2014/030 *Regarding the issue of a notice to fix for the placement of two shipping containers on a property at 236 Marsden Road, Greymouth* (22 July 2014) and 2019/043 *Regarding the issue of a notice to fix for two relocated units on a rural property at 1220A Kuaotunu-Te Rerenga Road, Kuaotunu* (9 September 2019).

## **The content of the proposed notice to fix**

4.40. Having concluded that there were some appropriate grounds to propose to issue the notice to fix, I will now consider the content of the proposed notice.

### **The specified persons**

4.41. Section 163 sets out the definition for “specified person” which includes the owner of a building. The owner of the buildings is listed on the notice and is a specified person.

### **The particulars of contraventions or non-compliance**

4.42. Section 165 sets out the requirements for the form and content of a notice to fix. The courts and previous determinations have discussed the requirement that the recipient of a notice to fix be “fairly and fully informed” by the particulars in a notice, so they can address the identified issues.<sup>9</sup>

4.43. The proposed notice to fix lists contraventions of sections 17 and 40. I am of the view that the notice to fix does not adequately specify the particulars of the contraventions and non-compliance as required by the prescribed form. In particular:

4.43.1. The notice contains no further particulars regarding the contraventions of section 17 (the requirement for building work to comply with the Building Code to the extent required by the Act). It does not list what particular building work contravenes section 17 or list what Building Code performance requirements the building work does not comply with.

4.43.2. The notice lists building work which did not require building consent as contravening section 40 (the requirement to obtain building consent before carrying out building work). It identifies the cable car building as requiring building consent when it falls within the scope of clause 3B of Schedule 1 of the Act. It also identifies the relocation of the toilet and shower building on site as requiring building consent, referencing clauses 3 and 4 of Schedule 1 of the Act, when the relocation is not building work, and so section 40 does not apply.

### **The remedy**

4.44. The proposed notice to fix gives two options to remedy the contraventions of sections 17 and 40 listed.

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<sup>9</sup> See *Andrew Housing Ltd v Southland District Council* [1996] 1 NZLR 589 (which related to a ‘notice to rectify’, the equivalent of a notice to fix in the predecessor to the Act, the Building Act 1991); *Marlborough District Council v Bilsborough* [2020] NZDC 9962 at [106]-[107]; and Determination 2024/029 *An authority’s decisions to issue a series of notices to fix* (27 May 2024) at [4.2]-[4.3].



- 4.45. The first option for remedying the contravention requires the owner to make the building work “the subject of a certificate of acceptance”. This is potentially confusing, the available remedies under s165(1)(c) state, “this may include applying for a certificate of acceptance”. The language in the act emphasises applying which is the language that would be appropriate in the notice to fix. The remedy also requires the owner to “ensure compliance” with a number of Building Code clauses without providing any further details. I consider the first remedy to be inappropriate.
- 4.46. The second option for remedying the contravention requires all ‘unauthorised building work’ to be removed. This remedy, when read with the particulars of the contravention does not provide enough detail as to what removal would resolve any contravention. I consider this to be an inappropriate remedy.
- 4.47. As the notice does not adequately specify the particulars of the contraventions and non-compliances, and the remedies provided are inappropriate, I find that it does not meet the form and content requirements of section 165.

## 5. Decision

- 5.1. In accordance with section 188, I determine, regarding compliance with the Building Code:
- 5.1.1. The upper stairway as constructed is an access route and must comply with D1.3.1 and D.1.3.3 (j) and (k). Without handrails, it does not. The lower stairway is not an access route and therefore the performance requirements of clause D1 do not apply.
- 5.1.2. The elevated landing contains a fall greater than 1 meter and does not comply with F4.3.1. A barrier must be provided which meets the performance requirements of clause F4.
- 5.2. Regarding the proposed notice to fix:
- 5.2.1. The construction of the cable car building does not require building consent as it falls within the scope of clause 3B of Schedule 1 of the Act and was not grounds to issue the proposed notice to fix.
- 5.2.2. The construction of the elevated landing and the connection of the temporary toilet and shower building to existing water supply and foul water drainage required building consent and were grounds to issue the proposed notice to fix.
- 5.2.3. The proposed notice to fix does not meet the form and content requirements of section 165.
- 5.3. Accordingly, I reverse the proposed decision to issue the notice to fix.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 13 November 2024.

**Andrew Eames**

**Principal Advisor Determinations**