

Determination 2025/014

An authority's decision to issue a notice to fix for a detached toilet building

130 Jonkers Road, Waitākere, Auckland

Summary

This determination considers a notice to fix alleging the owner has carried out building work without building consent in contravention of section 40 of the Building Act. The determination considers the exemption contained in clause 7 of Schedule 1 of the Act, the evidential threshold required for a notice to fix to be issued, and the remedies in the notice.



Figure 1: The building the subject of the notice to fix¹

¹ Image reproduced from a photograph provided by the authority from its inspection on 7 March 2022.

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 of the Act.

The Act and the Building Code (Schedule 1 of the Building Regulations 1992) are available at 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.

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Peta Hird, for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment (“the Ministry”).²
- 1.2. The parties to the determination are:
 - 1.2.1. Jonkers Farmlands Limited, the owner of the property and the applicant for this determination (“the owner”)
 - 1.2.2. Auckland Council, carrying out its duties as a territorial authority or building consent authority (“the authority”).
- 1.3. The matter to be determined, under section 177(1)(b) and 3(e), is the authority’s decision to issue the owner with notice to fix NOT21689269 dated 21 August 2023 (“the notice”).
- 1.4. The authority issued the notice because it is of the view the owner has carried out building work associated with a “toilet facility” without building consent, in contravention of section 40. The owner maintains the building work was exempt under Schedule 1 of the Act, specifically clause 7 (Repair or replacement of outbuilding). The matter turns on whether there were grounds to issue the notice for a contravention of section 40.
- 1.5. There were two earlier notices to fix issued to the owner, on 8 March 2022 and 19 August 2022. However, this determination only considers the notice dated 21 August 2023.

2. Background and building work

- 2.1. The owner’s property is a large working farm, which is also used for functions and other events. The building that is the subject of this determination (see Figure 1) is located near the road entrance to the property, close to a barn and dwelling.

² The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

- 2.2. The building has been referred to by the authority in the notice as a “toilet facility”, and in its submissions as a “toilet block”. The owner has referred to the building as an “outhouse”. I will refer to it as “the building”, except where it is clear I am referring to the original outbuilding or quoting the parties.
- 2.3. The owner advises that the original outbuilding was constructed in the 1940s and in 2017 it was “repaired like for like”. I have not been provided details of the building’s construction, but photographs indicate it is constructed of timber framing and clad in corrugated steel. There are no measurements in the authority’s inspection record, but the notice states the building is approximately 34m². It contains four toilets, four handbasins, and one urinal and a small storage room. It is connected to the existing on-site wastewater system servicing the dwelling.
- 2.4. On 7 March 2022, the authority inspected the building and formed the view, among other issues, that the building work had required a building consent. There followed a period of correspondence between the parties, and two notices to fix issued by the authority which are outside the scope of this determination.

Notice to fix

- 2.5. On 21 August 2023, the authority issued a third notice to fix, which is the subject of this determination. The ‘Particulars of Contravention or Non-compliance’ section of the notice states:

Contrary to **s.40 of the Building Act 2004** (the Act), the following building works have been undertaken at [the property] without first obtaining a building consent:

- A toilet facility, approximately 34m² has been established approximately 34m to the west of the existing dwelling house including 4 toilets, 1 urinal, 4 handbasin[s] and associated plumbing and drainage works.

To remedy the contravention or non-compliance you must:

Choose one of the following options to achieve compliance:

1. Pursue any legal option to achieve compliance with the requirements of the Building Act 2004 and the New Zealand Building Code. This may include applying for and obtaining a Certificate of Acceptance (COA) in accordance with s.96 of the Act; or
2. Remove the unauthorised building works and return the building back to its authorised use.

This notice must be complied with by: Date: 21.11.2023

- 2.6. Communication about whether the building work required building consent continued between the parties, and a meeting was held in December 2023. They were unable to resolve their differing views, and the owner applied for this determination.

3. Discussion

- 3.1. Notices to fix are governed by 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.
- 3.2. An authority's belief that the Act or regulations are being contravened requires sufficient specific evidence in support of that belief before a notice to fix can be issued.
- 3.3. A notice to fix is an enforcement notice and may be enforced by a prosecution for failing to comply with the notice. A person commits an offence if they fail to comply with a notice to fix, and is liable on conviction to a fine of up to \$200,000.

Whether section 40 has been contravened

- 3.4. The notice alleges the owner has contravened section 40. Section 40(1) provides that a person must not carry out any building work except in accordance with a building consent.
- 3.5. Section 41(1)(b) states that a building consent is not required if the building work falls within the exemptions under Schedule 1. Schedule 1 prescribes building work for which building consent is not required. In this case, whether there has been a contravention of section 40 turns on whether the building work was exempt under Schedule 1.
- 3.6. The owner considers the building work is exempt from the requirement to obtain a building consent under clause 7 of Schedule 1, which provides:

7 Repair or replacement of outbuilding

The repair or replacement of all or part of an outbuilding if—

- (a) the repair or replacement is made within the same footprint area that the outbuilding or the original outbuilding (as the case may be) occupied; and
 - (b) in the case of any replacement, the replacement is made with a comparable outbuilding or part of an outbuilding; and
 - (c) the outbuilding is a detached building that is not more than 1 storey; and
 - (d) the outbuilding is not intended to be open to, or used by, members of the public.
- 3.7. The exemption in clause 7 applies to outbuildings. This term is not defined in the Act, but Clause A1 of the Building Code states the classified use 'Outbuildings' applies to "a *building* or use which may be included within each classified use but are not intended for human habitation, and are accessory to the principal use of associated *buildings*". There is no dispute between the parties that the building in this case is an outbuilding.

- 3.8. I accept that the building work in this case was a “repair or replacement”. The authority has referred to the outbuilding as being “rebuilt”, but that “It was decided that it wasn’t built like for like and required a consent”.
- 3.9. The parties’ views on each of the four criteria in clause 7, and my assessment of whether there were grounds to issue the notice for a contravention of section 40, are set out below.

Paragraph (a) of clause 7 – the same footprint area

- 3.10. The first requirement of clause 7 is that “the repair or replacement is made within the same footprint area that the ... original outbuilding ... occupied”.
- 3.11. The owner says the building “was repaired, part at a time, on the original footprint”, and provided to the Ministry a black and white “photo of the original out house” that had previously been provided to the authority.³
- 3.12. In support of its view that this requirement is not met, the authority states:

“The [owner] has supplied an old photo of a building behind family trucks that is possibly an old toilet block as evidence that one has existed on the farm for many years. Accepting it is a toilet block at face value, it is still unclear as to where exactly that block was sited to be confident it is on the same footprint or even in the same vicinity. I refer you to the 2000 and 2022 aerial photos in our folder of documents which shows the addition of a new barn in the intervening period between photos but can see no evidence the toilet block existed in the relevant location in the older photo.”

- 3.13. I have considered the aerial photographs from 2000 and 2022 provided by the authority. However, due to the low resolution of the photograph taken in 2000 it is not possible to conclude the building is not present in that photograph. Consequently, in my opinion the authority had insufficient evidence to conclude the replacement building was *not* made within the same footprint that the original outbuilding occupied.

Paragraph (b) of clause 7 – comparable outbuilding

- 3.14. The second requirement of clause 7 is that “in the case of any replacement, the replacement is made with a comparable outbuilding ...”.
- 3.15. This requirement was considered in a previous determination, which discussed the factors to consider when assessing whether an outbuilding is comparable to the

³ The owner says the authority interviewed a relative “who was around when the original out house was built. [They] also helped with the later repairs.” In response to a request by the Ministry for the notes of any interview or discussion with this relative, the authority replied “none”.

original.⁴ I have not been provided information about all of these factors. However, the owner says the repairs were “like for like”, and the authority “accept the differences are not so substantial in terms of the actual building”, so I have not considered this requirement further.

Paragraph (c) of clause 7 – not more than one storey

3.16. The third requirement of clause 7 is that “the outbuilding is a detached building that is not more than 1 storey”. The building satisfies this requirement.

Paragraph (d) of clause 7 – not used by the public

3.17. The fourth requirement is that “the outbuilding is not intended to be open to, or used by, members of the public”.

3.18. In support of its view that the building is “an outbuilding open to members of the public”, the authority refers to information from the property’s website, saying the property is “used as a destination for weddings, making movies and other events”, and that the building is “sited next to the new barn used for weddings and other events”. The authority states:

It is the only toilet facility available and while we accept farm workers may also access the facility from time to time, it is axiomatic that it supports the significant entertainment venue.

3.19. However, the owner states the barn “is consented for and used as a Hay/implement shed” rather than as a wedding venue (the wedding venue being some distance away).⁵ The owner also says that event suppliers and film companies bring in toilet trailers, and that they “don’t allow the public to use our toilets”.

3.20. In the information the authority has provided to the Ministry, it relies on general information obtained from the property’s website about the types of functions and events that the property caters for. However, the overall property size is 540 acres,⁶ and based on the owner’s submissions, events are held throughout the property. Without identifying where these events are held on the property and whether the building is used for these functions or events, I am of the view the authority had insufficient evidence to conclude the building was open to or used by members of the public.

⁴ Determination 2022/021 *Regarding the notice to fix issued for the construction of a replacement garage without first obtaining a building consent* (31 October 2022), from para 5.2, refers to the factors to consider whether an outbuilding is comparable to the original. These factors are function and intended use, structure and design, and materials.

⁵ The owner states the “new barn” the authority refers to is over ten years old over one km away. The as-built drainage plans provided by the authority to the Ministry relating to the building consent for the barn are date stamped 9 September 2013 and 17 October 2013.

⁶ According to the property’s website, <https://jonkersfarm.co.nz/>, accessed 19 February 2025.

Conclusion

3.21. To reach a view that section 40 has been contravened I must be satisfied that the exemption in clause 7 does not apply. However, there is insufficient evidence that the building work does not meet the criteria in clause 7(a) or (d), ie that the repair or replacement was not within the same footprint area or that the building is used by members of the public. On that basis I consider the evidential threshold for the issue of the notice (that there be grounds in terms of section 164) is not met.

Remedies in the notice

3.22. Given my conclusion above, it is not necessary to consider the remedies in the notice and the following is comment only.

3.23. The first remedy states “Pursue any legal option ... This may include applying for and **obtaining** a Certificate of Acceptance ...” (my emphasis). It is well established that a notice to fix cannot require a certificate of acceptance be obtained, only that one be applied for (in accordance with section 165(1)(c)).⁷

3.24. Regarding the second remedy, removal of building work is a lawful option to include as a remedy for a section 40 contravention. However, the requirement to “return the building back to its authorised use” is unrelated to the particulars of contravention. This requirement would be relevant where it is alleged the use of a building has been changed without the required notification under the Act, which is not the contravention identified in this notice.

4. Decision

4.1. In accordance with section 188 of the Building Act 2004, as the evidential threshold for issuing a notice to fix has not been met, I reverse the authority’s decision to issue notice to fix NOT21689269.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 12 March 2025.

Peta Hird

Lead Determinations Specialist

⁷ Section 165(1)(c) states that if a notice to fix “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”.