

Determination 2025/029

An authority's decision to issue three notices to fix for building work done without a building consent

8-12 Wren St, Taihape, Rangitikei

Summary

This determination considers three notices to fix for building work that was carried out without building consent. The determination considers whether the building work was exempt under Schedule 1 of the Act. It also considers the form and content of the notices to fix, including the particulars of the contraventions and who the notices were issued to.



Figure 1: Photo showing the building work

In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”).

The Act and the Building Code 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, Lead Determinations Specialist, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.¹
- 1.2. The parties to the determination are:
 - 1.2.1. AS and CM Mackintosh (“the owners”), who applied for this determination, are the owners of the property and recipients of the notices to fix
 - 1.2.2. ANZ Bank New Zealand Limited (“ANZ”), a second recipient of the notices to fix
 - 1.2.3. Rangitikei District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. The matter to be determined, in terms of section 177(1)(b) and 3(e) of the Act, is the authority’s decision to issue notices to fix NTF0426, NTF0432 and NTF0439 (“the notices”) in regard to the stated contravention of section 40.
- 1.4. In deciding the matter, I will consider whether the building work referred to in the notices was exempt under Schedule 1 of the Act (“Schedule 1”) from the requirement in section 40 to obtain building consent prior to commencing the work. I will also consider the form and content of the notices to fix, including the stated particulars and the specified persons to whom the notices were issued.
- 1.5. At the request of the applicants this determination does not consider the contravention of section 17 set out in the notices, ie those elements of building work identified by the authority as not being compliant with the Building Code.

2. Background and building work

- 2.1. The property is a 10-acre block located on the southern edge of Taihape township in the Rangitikei District within an area zoned ‘residential’ (in part) and ‘rural’ (in part) according to the district plan.

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

- 2.2. On 27 October 2022, an inspection (“the first inspection”) was carried out by the authority. Further inspections were carried out on 9 November 2023, 4 March 2024 and 11 June 2024.
- 2.3. During these inspections, building work was observed near the southern boundary of the property and within the rural zone of the district plan.
- 2.4. This building work, which I refer to collectively as “the structures,” includes:
 - 2.4.1. an approximately 30m² building with an adjoining shower room (“the main building”)
 - 2.4.2. a stand-alone toilet outhouse (“the toilet outhouse”)
 - 2.4.3. a plumbed open-air bath (“the outdoor bath”).
- 2.5. The main building is a single-level, detached structure constructed with timber piles concreted into the ground, a timber frame, aluminium joinery, and a mixture of wall claddings. The roof is clad with corrugated iron. Gutters and a downpipe are attached to one edge of the roof; these provide rainwater to a plastic water storage tank beside the main building.
- 2.6. The main building features decks on the front and rear, both covered with a veranda with corrugated plastic roofing. The deck at the front is at ground level, while the deck at the rear is elevated and at its highest point is approximately two metres above the ground.
- 2.7. The main building has a glazed sliding door at the front, several windows, and a standard door providing access to the rear deck. The interior is partially carpeted, walls are lined with painted plasterboard, and there is a wall mounted electrical socket.² There is a stainless-steel kitchen countertop with a sink and cupboards. The sink is plumbed with hot and cold water and connected to a wastewater pipe which I understand discharges into a nearby stream.
- 2.8. The main building has an adjoining shower room which is an approximately 1m x 2m and is accessed from outside. It has a shower and a hand basin, both plumbed with hot and cold water. Wastewater from these plumbing fixtures and stormwater from the shower room roof are discharged into the same wastewater system as the kitchen sink.
- 2.9. The toilet outhouse is an approximately 1m x 1m standalone structure, which appears to be constructed with timber piles concreted into the ground. It has a timber frame, and corrugated iron on the roof and exterior walls. Inside it has a waterless compostable toilet. On the exterior of this structure there is a plumbed hand basin. It is not clear where the basin wastewater is discharged to.

² The owners say that there is no electricity supplied to any of the structures.

- 2.10. The outdoor bath is not contained within any structure. It is plumbed with hot and cold water and the bath water is discharged onto the ground beneath.
- 2.11. The water tank supplies cold water by pipe to each of the structures. Water from the tank is heated by a gas water heater, installed at the front of the shower room, and piped to the shower, kitchen sink, both hand basins and the outdoor bath.
- 2.12. On 4 March 2024, the authority issued a notice to fix (“the first notice”) to the recipients and identified the following, in its particulars, as being a contravention of section 40:
- ...an unconsented detached dwelling has been erected on site which was occupied.
- 2.13. The remedies set out in the first notice were for the owners to “Remove the building in its entirety Or Apply for a Certificate of Acceptance”.
- 2.14. A second notice to fix (“the second notice”) was issued on 30 April 2024 which referred to the same “unconsented detached dwelling” as the first notice but went on to say, “Building consent is required for any sanitary fixtures” and “A building consent is required for any deck 1500mm from the ground”.
- 2.15. The second notice restated the remedies given in the first but also provided for the removal of the “shower, toilet, and open-air bath”, and included a further remedy being “Apply to MBIE for a Determination”.
- 2.16. A third notice to fix (“the third notice”) was issued on 19 July 2024 which contained the similar particulars and remedies to the second notice.
- 2.17. Following the issuing of the third notice, the owners applied for this determination.

3. Submissions

The authority

- 3.1. The following is a summary of the authority’s views that were set out in its submission and in its correspondence with the owners:
- 3.1.1. The main building is an “unconsented detached dwelling” and
- [it] is clear from the [main building’s] construction that it does not meet the criteria to fall under Schedule 1...
- ...while the [main building] may never have been intended to be used as a dwelling, there is clear evidence that habitation is able to occur.
- 3.1.2. The authority’s officers recorded people living onsite during inspections on 27 October 2022 and 9 November 2023.

- 3.1.3. Specific elements of building work carried out in relation to the structures requires a building consent. These include the rear deck with a height exceeding 1.5 metres from the ground, the installation of new sanitary fixtures (such as a kitchen sink, shower, and basins), an associated water supply, and the gas water heating system.
- 3.1.4. The rear deck is built over the southern property boundary, which the authority identifies as a road parcel.
- 3.2. The authority questions whether the sanitary plumbing was undertaken by an "authorized person" as required by the Act and notes the owners have provided no certified documentation to prove this.
- 3.3. The authority did not make any submissions on the form or content of the notices to fix.

The owners

- 3.4. The following is a summary of the owners' submissions:
 - 3.4.1. The structures come under the exemption for single-storey pole sheds in rural zones (Clause 4A of Schedule 1). They were built by licensed building practitioners, are not for public use, and contain no cooking facilities or mains power.
 - 3.4.2. The main building is under 30m² and was constructed for storing farm equipment, providing shelter and lunch facilities for farm workers, and for occasional camping facilities for the owners.
 - 3.4.3. The main building is "farm shed/shelter..." and that it was "never built as a domestic dwelling".
 - 3.4.4. A person stayed in the main building for approximately six weeks, and the building was later used as an art studio by another person who was staying in a house bus at the property.
 - 3.4.5. The toilet outhouse is not connected to the main building and contains a compostable unit; the shower room is "designed for farm workers to use as required."
 - 3.4.6. The owners say, before installing the compostable toilet, they checked with the authority who "said they had no interest as nothing was going into the land."
 - 3.4.7. They say "[t]here are no sewerage issues" in relation to the structures.

- 3.4.8. The owners say that they own the land to the midline of a nearby creek, which means the structures are at least 20 metres away from the legal boundary of the property.
- 3.4.9. The owners question the inclusion of ANZ Bank as a recipient of the notices to fix, and state the bank has no interest in the matter. They did not make any further submissions regarding the form or content of the notices to fix.

4. Discussion

- 4.1. The matter to be determined is the authority's decision to issue three notices to fix. In deciding the matter, I will consider whether the building work concerned was exempt under Schedule 1. I will also consider the form and content of the notices, including the specified persons and remedies.
- 4.2. 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.
- 4.3. 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 there was a contravention of section 40

- 4.4. The notices allege 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.
- 4.5. Section 41(1)(b) provides that a building consent is not required if the building work falls within any of the exemptions set out in Schedule 1. Section 42A goes on to describe the categories of building work that are exempt under Schedule 1 and sets out conditions for exemptions to apply.
- 4.6. Schedule 1 exempts minor and low-risk building work from the requirements of the building consent process.³ The exemptions in Schedule 1 enable building consent authorities to focus their time and resources on reviewing the design and construction of building work which presents a higher risk to people and property.⁴

³ MBIE, Regulatory Impact Statement, *Impact Summary: Building Consent Exemptions: Possible amendments to Schedule 1 of the Building Act 2004* (21 April 2020) at page 3: www.regulation.govt.nz/assets/RIS-Documents/ria-mbie-bcep-jun20.pdf

⁴ Ibid, page 5.

- 4.7. The Ministry has also published guidance to support the current list of exemptions in Schedule 1 ("the Ministry's guidance").⁵

Whether the exemption in clause 4A applies

- 4.8. The owners consider the structures are exempt from the requirement to obtain a building consent by way of Clause 4A of Schedule 1.⁶ Clause 4A provides:

4A Single-storey pole sheds and hay barns in rural zones

- (1) Building work in connection with a pole shed or hay barn in a rural zone 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 4 metres above the floor level); and
 - (ii) does not exceed 110 square metres in floor area; and
 - (iii) is not accessible by the public; and
 - (iv) is not used to store hazardous substances within the meaning of that term in regulation 4 of the Health and Safety at Work (Hazardous Substances) Regulations 2017; and
 - (c) the maximum unsupported roof span in any direction does not exceed 6 metres; and
 - (d) either—
 - (i) the design wind speeds do not exceed 44 metres per second (calculated using Verification Method B1/VM1); or
 - (ii) the building is located in a wind zone no greater than high (as defined in Acceptable Solution B1/AS1).
- (2) However, subclause (1) does not include any building work in connection with a building that is closer than the measure of its own height to any residential building, public road, railway, or legal boundary.

- 4.9. Clause 4A provides an exemption for building work in connection with a pole shed or hay barn in a rural zone.⁷ In addition being in a rural zone, the exemption contains a series of other conditions which restricts its application. For example, the building work must be carried out or supervised by a licensed building practitioner.

- 4.10. The structures in this case were constructed in an area zoned as 'rural' under the relevant district plan. However, I must also consider whether the structures fall

⁵ MBIE (Building Performance), *Exemption Guidance for Schedule 1 of the Building Act*, Fifth edition, August 2020.

⁶ Clause 4A was inserted into Schedule 1, together with a number of other exemptions, on 31 August 2020.

⁷ In relation to building work, a 'rural zone' "means any zone or area (other than a rural residential area) that, in the district plan of the territorial authority in whose district the building work is to be undertaken, is described as a rural zone, rural resource area, or rural environment, or by words of similar meaning." (Clause 1AA of Schedule 1)

under the category of buildings that could be described as “pole sheds and haybarns”.

4.11. The Ministry’s guidance on Clause 4A says:

Pole sheds and hay barns can be enclosed, semi-enclosed or open structures which are used for farming activities in rural zones. They commonly house livestock, such as cattle and horses, as well as equipment and fodder, and often grain. Pole sheds and hay barns covered in this exemption are expected to be classified as Importance level 1^[8] in accordance with Clause A3 of the Building Code.

4.12. The Ministry’s guidance suggests that an exemption under Clause 4A applies to buildings constructed or used for a purpose related to primary production activities, and, in regard to fire safety, present a low risk to occupants and property.

4.13. A pole shed is typically constructed with timber poles that extend the full height of the structure, providing support and bracing to the walls and roof. The construction allows for wide openings and height for the movement of equipment, stock and fodder into and within the building.

4.14. Based on the photographs provided, the main building has timber pile foundations that do not extend above the subfloor. It has covered decks, windows, a glazed sliding door, carpet, a kitchen bench with a sink, and a shower room with a shower, hand basin and a gas water heater.

4.15. In addition to these features, the owners confirm that during the first inspection the main building was occupied as accommodation and that during a subsequent inspection it was being used as an art studio by a person living nearby in a house bus. The toilet outhouse and bath were clearly constructed for use by people for hygiene purposes, whether that be for farm workers or others.

4.16. The features of the outdoor bath, toilet outhouse and main dwelling are not indicative of buildings that could properly be described as pole sheds or haybarns. Rather the features indicate these were constructed for normal occupation or use by people

4.17. Additionally, I note each has elements of building work, namely sanitary facilities, that are excluded in other clauses of Schedule 1 (for example those clauses that provide for the construction of single story detached buildings⁹). To find that Clause

⁸ I note this classification applies only to Clause C of the Building Code. According to Clause A3, Importance level 1 buildings are those “posing low risk to human life or the environment, or a low economic cost, should the building fail. These are typically small non-habitable buildings, such as sheds, barns, and the like, that are not normally occupied, though they may have occupants from time to time.”

⁹ Clauses 3, 3A and 3B of Schedule 1.

4A could apply in the circumstances would be inconsistent with the purpose of Schedule 1 and, more broadly, the purposes of the Act.¹⁰

- 4.18. Even if I was wrong on this point and the main building could be categorised as a pole shed or haybarn, one of the conditions in clause 4A is not met. The rear deck at its highest point is approximately 2 metres above the ground; clause 4A(1)(b)(i) provides that the floor level of the building must not be more than 1 metre above the supporting ground.
- 4.19. I consider the plumbing work associated with the outdoor bath (ie the supply of hot and cold water) is building work for the purposes of the Act. The bath does not have any superstructure and is neither a pole shed or a hay barn for the purposes of Clause 4A. Therefore, this building work cannot be exempt by way of Clause 4A.
- 4.20. Based on the reasoning above, I find the exemption in Clause 4A does not apply to the building work carried out in association with the outdoor bath, toilet outhouse or the main building.
- 4.21. As an aside, I note the parties disagree about the location of the legal boundary in relation to the structures, which is relevant in relation to the condition set out in clause 4A(2). However, it is not necessary for me to determine this because I have already determined that Clause 4A does not apply to either the outdoor bath, toilet outhouse or main building.

Whether any of the exemptions in Clauses 3, 3A and 3B apply

- 4.22. I have also considered whether any of the exemptions provided by Clauses 3, 3A or 3B of Schedule 1 apply. These clauses provide for the construction of single storey detached buildings, subject to several conditions. One condition common in each of these clauses is that the buildings cannot contain sanitary facilities.
- 4.23. The presence of the sanitary facilities is contrary to conditions in Clauses 3, 3A and 3B and, therefore the building work carried out to the outdoor bath, toilet outhouse and main building was not exempt under these clauses.

Whether any of the exemptions in Part 2 of Schedule 1 apply

- 4.24. The second and third notices say that plumbing work has been undertaken for which building consent was required. That being so, I have considered whether any of the exemptions for plumbing work in Part 2 of Schedule 1 apply. Part 2 of the Schedule provides for certain categories of sanitary plumbing and drainlaying to be carried out without building consent.
- 4.25. The building work includes the installation of sanitary fixtures, water supply pipes (from a separate water tank), wastewater discharge pipes, and stormwater drains.

¹⁰ Section 3 sets out the purposes of the Act, which includes the regulation of building work to ensure that “people who use buildings can do so safely and without endangering their health...”

None of the exemptions in Part 2 of Schedule 1 apply to these categories of plumbing work.

The owners were required by section 40 to obtain building consent

4.26. In summary, I conclude none of the exemptions in Schedule 1 apply to the building work carried out in association with the outdoor bath, the toilet outhouse or the main building. That being so, I find that the owners were required to obtain building consent before they carried out the building work. For that reason, the authority had grounds to issue the owners with the notices to fix for contravening section 40 (ie, for carrying out building work without first obtaining a building consent).

The notices to fix

4.27. I now turn to the form and content of the three notices to fix.

4.28. Section 164 provides for a ‘specified person’ to be issued with a notice to fix for a contravention of the Act, such as section 40. Section 163 provides the meaning of ‘specified person’, ie those people who may be issued with a notice.

4.29. I have received no evidence which satisfies me that ANZ is a ‘specified person’ for the purposes of section 163 and, as such, there are no grounds for the authority to issue any of the notices to fix to ANZ.

4.30. Section 165 sets out the requirements for the form and content of a notice to fix. This section requires, among other things, that a notice must be in the prescribed form.¹¹ The prescribed form provides a space to insert the “particulars of contravention or non-compliance”.

4.31. The High Court and the District Court 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.¹² Those decisions say the particulars in a notice to fix should fairly tell the recipient what provision has been contravened or not complied with, and provide as much detail as necessary so the recipient can identify each fact which has given rise to the contravention or non-compliance.¹³ This information enables the recipient to make decisions about how to respond to the notice to fix.

¹¹ Form 13 of the Building (Forms) Regulations 2004. Section 165(1)(a) requires that a notice to fix be in the prescribed form.

¹² *Andrew Housing Ltd v Southland District Council* [1996] 1 NZLR 589 (HC); *Seymour v Auckland Council* [2015] NZHC 743; *Marlborough District Council v Bilsborough* [2020] NZDC 9962.

¹³ For example, where an authority issues a notice to fix for a contravention of section 40, the notice should describe elements of building work which gives rise to the contravention and, where appropriate, set out why that work is not exempt from the consenting requirements in the Act.

- 4.32. In the first notice, the particulars do not fairly tell the owners what provisions have been contravened or not complied with. The notice refers to non-compliance with sections 17 and 40 but does not describe the requirements of those sections. Further, the particulars lack specificity about the facts which give rise to the failure to comply with the Building Code (in contravention of section 17) or the building work that the authority considered required a building consent (in contravention of section 40). The notice refers to “an unconsented detached dwelling”, but it is unclear whether the authority considered this to be the main building on its own or including the water tank, toilet outhouse and the outdoor bath.
- 4.33. The second and third notices, that together I refer to as “the subsequent notices”, differ from the first notice in several ways.¹⁴ In these notices the authority says, “building consent is required for any sanitary fixtures.” I consider the notice should have set out specific elements of building work which give rise to the contravention of section 40; for example, the construction in the main building of a kitchen sink which is plumbed with hot and cold-water supply and with wastewater disposal.
- 4.34. I note also the subsequent notices contain references to the “Horizon’s One Plan” which is a District Plan created under the Resource Management Act 1991.¹⁵ It is not appropriate to include matters unrelated to the Building Act in a notice to fix.
- 4.35. Further, the subsequent notices give rise to ambiguity by conflating code compliance requirements with consenting requirements. For example, item (g) in these notices describes “water supply to kitchen in building” as non-compliant building work, and the relevant Building Code clause as G12 [Water supplies].¹⁶ However, rather than set out the relevant requirements of Clause G12, under the heading “what is required” the notices say “Building consent is required for any sanitary fixtures”.
- 4.36. Section 165(2) requires a notice to fix to specify any steps the person must take to remedy the contravention. The first notice sets out two ways to remedy the contravention.¹⁷ While these remedies are in themselves appropriate for contraventions of sections 17 and 40, they cannot be applied if the recipient does not know what they need to be applied to (ie, the building work concerned).
- 4.37. The subsequent notices contained a further remedy; that being “Apply to MBIE for a determination.” It is not appropriate to include applying for a determination as an alternative to remedying non-compliant building work in the remedies provided for in a notice to fix. An application for a determination is not a means by which non-compliant building work can be brought into compliance, but rather a determination can be applied for if the recipient of a notice to fix disputes the

¹⁴ See paragraphs 2.14 to 2.16 above.

¹⁵ I have no jurisdiction under other legislation and this determination does not consider the Resource Management Act 1991 or any District Plan requirements.

¹⁶ These notices do not identify the performance clauses in G12 that the authority considered had not been complied with.

¹⁷ See paragraph 2.13 above for these remedies.

authority's decision to issue the notice. It is more appropriate that this is explained in a covering letter attached to notices to fix.

5. Conclusions

- 5.1. The work carried out in association with the outdoor bath, toilet outhouse and main building is building work for the purposes of the Act. That building work was not exempt under Schedule 1 from the requirement to obtain a building consent. The commencement of the building work without a building consent gave rise to the contravention of section 40 and, as such, the authority had grounds to issue each of the notices to fix to the owners.
- 5.2. I have identified a number of deficiencies in relation to each of the notices. All were issued to ANZ, who is not a specified person for the purposes of the 163. Further, the particulars in each notice did not provide adequate details for the recipients to identify the building work which had given rise to the contravention of section 40 and non-compliances with the Building Code. Additionally, the second and third notices should not have included applying for a determination as a remedy. In these circumstances, I consider it appropriate to reverse each of the notices.
- 5.3. It remains for the owners to consider the options available to bring the building work into compliance with the Act. For building work carried out without building consent, the owners can apply to the authority for a certificate of acceptance to regularise the completed building work.

6. Decision

- 6.1 In accordance with section 188 of the Building Act 2004, I determine that the authority had grounds to issue notice to fix NTF0426 in relation to the main building and notices to fix NTF0432 and NTF0439 in relation to the main building, the toilet outhouse and the outdoor bath. The particulars in each of these notices to fix are deficient, and I reverse all three notices.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 30 June 2025.

Peta Hird

Lead Determinations Specialist