

# Determination 2025/030

**An authority's decisions to issue notices to fix for building work carried out without a building consent**

**16 Hinekohu Street, New Lynn, Auckland**

## **Summary**

This determination considers two successive notices to fix alleging the owner has carried out building work in a sleepout without first obtaining a building consent in contravention of section 40 of the Building Act. The determination discusses the form and content of the notices, including whether the details were correct and the timeframes were reasonable.

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 (Schedule 1 of the Building Regulations 1992) 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, Peta Hird, for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment (“the Ministry”).<sup>1</sup>
- 1.2. The parties to the determination are:
  - 1.2.1. S Singh, the owner of the property and recipient of the notices to fix, who applied for this determination (“the owner”)
  - 1.2.2. Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. The matters to be determined, under section 177(1)(b) and 3(e), are the authority’s decisions to issue the owner with the following notices to fix (together “the notices”):
  - 1.3.1. NOT21758233 dated 10 February 2025
  - 1.3.2. NOT21761482 dated 7 March 2025.
- 1.4. The authority issued the notices because it is of the view the owner has carried out building work in relation to a “sleepout” at the property without building consent, in contravention of section 40. The owner maintains the authority should not have issued the notices, and that the notices are also defective.

## 2. Background

- 2.1. The main house at the property was the subject of a previous notice to fix issued to the owner, which was considered in Determination 2024/047 (“the first determination”).<sup>2</sup> That notice to fix was for a change of use of the house; while it mentioned the sleepout (referred to as a “shed” in the notice, and the “unit” in the first determination) the notice did not allege a change of use in relation to the sleepout.

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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> Determination 2024/047 *Regarding an authority’s decision to issue a notice to fix for a change of use of a house* (20 September 2024). This determination has been appealed to the District Court.

- 2.2. The first determination records that at the time of the authority's inspection in November 2022, the unit/sleepout was undergoing renovations that appeared to be a conversion from a storage shed to accommodation, and that the owner advised in January 2024 that the unit/sleepout was intended for up to two occupants.
- 2.3. On 3 November 2023, the authority undertook another inspection at the property; in an email to the owner on 22 November 2023, the authority stated "we found that you now have people staying in the sleepout at this address. Unconsented building works were carried out in that sleepout/shed". The authority did not inspect the interior of the sleepout, though I note there was a vent and uPVC pipes observable from outside the sleepout, and a person onsite confirmed the sleepout contained a bedroom and a bathroom.
- 2.4. In January 2025, the authority contacted the owner to arrange a further inspection at the property. The owner queried the legal basis for an inspection given that the first determination had been appealed.<sup>3</sup> No further inspection took place.

### Notices to fix

- 2.5. On 10 February 2025, the authority issued NOT21758233 to the owner ("the February notice").
- 2.6. 'The building' section of the February notice specified the 'Street address of building' as "16 Hinekohu Street New Lynn". The 'Particulars of contravention or non-compliance' section of the notice stated:
- [The authority] conducted an inspection of 16 Hinekohu Street, New Lynn on the 23 November 2022. As a result of this inspection, [the authority] has identified that building work appeared to be underway that would have required building consent. At a subsequent inspection carried out on 3/11/2023 it was confirmed by the owner's son that the work had been completed.
- Contrary to **s.40 of the Building Act 2004** (the Act), the following building works have been undertaken at 20 Hinekohu Street, without first obtaining a building consent:
- The installation of a kitchen (kitchen sink), and bathroom (a shower, a toilet, and vanity sink) with the associated plumbing and drainage within the sleepout.
- 2.7. The February notice specified the following remedies, and had a compliance date of 24 February 2025:

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<sup>3</sup> The parties exchanged correspondence. I have not been provided with a response from the authority to the owner's email of 28 January 2025 and it appears the next communication from the authority was the notice to fix on 10 February 2025.

Either:

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 a Certificate of Acceptance (COA) in accordance with s.96 of the Act; or
  2. Remove the unauthorised building work and reinstate to its previous consented use.
- 2.8. On 24 February 2025, the owner wrote to the authority responding to the February notice. The owner asked the authority to withdraw the February notice on the basis that it was “unrelated to any continuing offence that requires a Fix”, it had been “complied with to the extent required by the [Act]” and had been “issued incorrectly”.
- 2.9. By letter dated 7 March 2025, the authority rejected the owner’s view that the February notice had been complied with. The authority said it was issuing a new notice to fix to replace the February notice. On the same date, the authority issued NOT21761482 (“the March notice”) to the owner. This notice was identical to the February notice in all material respects. The March notice had a compliance date of 14 March 2025.
- 2.10. On 14 March 2025, the owner applied for this determination.

### 3. Discussion

#### Requirements of notices to fix

- 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.<sup>4</sup>
- 3.2. Section 165 sets out the requirements for the form and content of a notice to fix. The prescribed form provides a space to insert the “particulars of contravention or non-compliance”.<sup>5</sup> 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>6</sup>

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<sup>4</sup> Section 163 defines a ‘specified person’ to whom a notice can be issued, and this includes the owner of the building.

<sup>5</sup> Form 13 of the Building (Forms) Regulations 2004. Section 165(1)(a) requires that a notice to fix be in the prescribed form.

<sup>6</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].

- 3.3. In this case, 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.<sup>7</sup>
- 3.4. However, the notices allege that the building work carried out without a building consent was undertaken at **20** Hinekohu Street, rather than **16** Hinekohu Street.
- 3.5. In response to a query from the Ministry about the reference to 20 Hinekohu Street in the notices, the parties advised:

**Authority:**

... It looks like an error has occurred and the notice for 20 Hinekohu St has been copied for 16 Hinekohu St and the address has not been changed.

**Owner:**

The NTFs are defective and should be set aside because:

- ... Section 164(3) empowers the authority to issue a notice requiring a specified person "*to remedy the contravention of, or to comply with, this Act or the regulations.*" For the recipient to fulfil this obligation, they must know what contravention is being alleged and *where* it occurred. By referencing an incorrect address, the notices fail to meet this statutory requirement.
  - Section 164 must be read alongside the Building (Forms) Regulations 2004, which operationalize the notice through Form 13. The form mandates fields for the "*street address of building*" and detailed particulars, including the location of the contravention. The current NTFs do not comply given the wrong address is recorded.
- 3.6. I agree with the owner that the recipient of a notice to fix must know what contravention is being alleged and where it occurred. These details are fundamental to the recipient being fairly and fully informed about the basis for the notice. I note that the correct address was set out in 'The Building' section of the notice, and it is not necessary to restate the address in the 'Particulars of contravention or non-compliance' section. However, where an address **is** specified in this section, it must be correct.
- 3.7. A notice to fix is an enforcement notice that 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. Given these serious consequences, it is important that notices to fix contain the correct details. As the details were not correct in this case, I consider that the notices did not fairly and fully inform the owner about the basis for the notices, and do not satisfy the requirements for a notice to fix.

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<sup>7</sup> Section 41(1)(b) states that a building consent is not required if the building work falls within the exemptions under Schedule 1 of the Act. Schedule 1 prescribes building work for which building consent is not required. However, the owner in this case does not rely on a Schedule 1 exemption.

## Timeframe for complying with the notices

- 3.8. Section 165(1)(b) provides that a notice to fix must state a “reasonable timeframe” within which the notice must be complied with. What is “reasonable” will depend on the circumstances of the case.<sup>8</sup>
- 3.9. As stated in previous determinations,<sup>9</sup> this requires an authority, on a case-by-case basis, to consider the practicalities of the specified person(s) carrying out the necessary steps to resolve the contravention or non-compliance within a given timeframe. In some circumstances the necessary work may be simple and able to be completed easily without requiring specialised tools, experience or knowledge. Other circumstances may be more complex and require more time. For example, where the scope of work is extensive or is particularly complex, where there is a need for technical specialists to be involved or for further investigation, or where there are circumstances outside the person’s control (such as holiday periods for example) that impact on the ability to remedy the situation.
- 3.10. The February notice had a timeframe of two weeks, and the March notice had a timeframe of one week. The owner says the remedies were “impossible” within those timeframes, and that 14 calendar days “is not sufficient and inadequate for the complex issues involved that require expert assessment legal advise [sic] and time to act”. The authority did not make any submissions on this point.
- 3.11. I consider that each notice to fix must have its own, reasonable, timeframe. If an authority elects to issue a new notice to fix rather than take enforcement action in relation to a notice that has not been complied with, the timeframe from the earlier notice is not taken into account in the “reasonable timeframe” for the new notice.
- 3.12. In my view, the timeframes did not provide sufficient time for the owner to comply with one of the options provided in the remedies. Therefore, I do not consider the timeframes were ‘reasonable’, as required by section 165(1)(b).

## Other points raised by the owner

- 3.13. While I have concluded the notices are defective, the owner has raised several other points which I address briefly.
- 3.14. The owner made a number of submissions regarding the interpretation and application of sections 40 and 378 and the notice to fix provisions. These include that the authority’s inspections were unlawful, that there is no current or continuing offence under section 40, any offence (if there is one) is “out of time” under section 378, that the remedies are misstated and a certificate of acceptance is voluntary, and that section 167 “must be available to an owner to refute a poorly

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<sup>8</sup> *Hauraki District Council v Pykett* DC Waihi CRI 2007-079-885, 22 January 2008 at [42].

<sup>9</sup> See, for example, Determination 2022/024 *The issue of two notices to fix for a pool barrier subject to a code compliance certificate* (9 November 2022) at [5.53].

issued [notice to fix]”. In relation to these submissions, I refer to Determination 2024/056.<sup>10</sup>

- 3.15. Regarding the second remedy in the notices, the owner also says that “removal is not a legal requirement” and refers to removal orders under section 220<sup>11</sup>. However, the notices did not state that the owner must remove the building work; it was given as an option available to the owner to comply with the notices. I consider removal of building work is a lawful option to include as a remedy for a section 40 contravention.<sup>12</sup> However, the requirement to “reinstate to its previous consented 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 requisite notification under the Act, which is not the contravention identified in these notices.

## Conclusion

- 3.16. The particulars of contravention in the notices are incorrect because they allege the building work carried out in contravention of section 40 occurred at another property. Therefore, the notices did not fairly and fully inform the owner about the basis for the notices, and do not satisfy the requirements for a notice to fix.
- 3.17. Further, the notices did not contain reasonable timeframes, as required under section 165(1)(b).

## 4. Decision

- 4.1. In accordance with section 188 of the Building Act 2004, I reverse the authority’s decisions to issue notices to fix NOT21758233 and NOT21761482.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 1 July 2025.

**Peta Hird**

**Lead Determinations Specialist**

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<sup>10</sup> Determination 2024/056 *An authority’s decision to issue a notice to fix in relation to building work at a residential property* (4 October 2024), at [1.6] and [4.7]-[4.33].

<sup>11</sup> Where a person fails to comply with a statutory requirement to undertake building work under the Act, a territorial authority may apply to the District Court under section 220 for an order authorising the territorial authority to carry out that work.

<sup>12</sup> As removal of building work is building work, it may require a building consent if it is not exempt under Schedule 1 of the Act. Section 165(1)(d) provides that if a notice to fix requires building work to be carried out, the notice may require the making of an application for a building consent for the work.