

Determination 2025/033

An authority's decision to issue a notice to fix for the construction of roof flashings and external wall cladding

17C Esplanade, Warrington, Waikouaiti

Summary

This determination considers an authority's decision to issue a notice to fix regarding building work carried to construct 'roof flashings and wall cladding systems' at a new two-storey detached dwelling. The determination considers the form and content of the notice to fix including the specified persons to whom it was issued, the particulars of contravention or non-compliance, and the associated remedy.



South-east elevation



South-west elevation

Figure 1: 17C Esplanade, Warrington

The legislation discussed in this determination is contained in Appendix A. 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. 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, Andrew Eames, Principal Advisor Determinations, for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment (“the Ministry”).¹
- 1.2. The parties to the determination are:
 - 1.2.1. K Te Maiharoa, the owner of the property who applied for this determination and was a recipient of the notice to fix (“the owner”)
 - 1.2.2. Dunedin City Council, carrying out its duties as a building consent authority or territorial authority (“the authority”)
 - 1.2.3. Latitude Homes Otago and Southland, a recipient of the notice to fix (“the builder”)²
 - 1.2.4. D Johnson, a recipient of the notice to fix and licenced building practitioner concerned with the relevant building work (“the first LBP”)
 - 1.2.5. S Ruthven, Core Building Solutions Limited, a recipient of the notice to fix and licenced building practitioner concerned with the relevant building work (“the second LBP”).
- 1.3. This determination arises from a decision by the authority to issue a notice to fix NTF-2024-257³ regarding building work carried to construct a new detached two-storey dwelling, specifically, ‘roof flashings and wall cladding systems’ that were not constructed in accordance with the building consent⁴ and the manufacturer’s specifications, and do not comply with Clause E2 *External Moisture*.
- 1.4. The matter to be determined, under section 177(1)(b) and (2)(f), is the authority’s decision to issue notice to fix NTF-2024-257.

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

² In this case, I note Latitude Homes Otago and Southland is the trading name of Anchorage Construction Limited.

³ Dated 26 August 2024.

⁴ Number ABA-2021-1974.

- 1.5. In deciding this matter, I will consider the form and content of the notice to fix, specifically, the specified persons to whom the notice was issued, the particulars of contravention or non-compliance, and the associated remedy. I have also taken into consideration the information contained in a covering letter accompanying the notice to fix that was issued by the authority at the same time.

Issues outside this determination

- 1.6. The compliance of the building work with the Building Code.
- 1.7. Any contractual or financial arrangements between the parties or liabilities associated.
- 1.8. Any matters arising from other legislation including the Resource Management Act 1991, or any District Plan requirements.
- 1.9. Any additional items noted by the owner but not included in the specific notice to fix that is subject of this determination (eg issues with some windows, the building foundation, some structural steelwork, and re-painting of the whole dwelling).

2. The building work

- 2.1. The building work is the construction of a new two-storey detached dwelling which includes an attached single garage and kitchen along part of the south-west elevation of the building. Refer to figure 1.⁵
- 2.2. The external wall cladding to the north-west and south-east gable end walls is vertical rusticated profile fibre-cement weatherboards over a 20mm wide drained cavity. The north-east and south-west elevations incorporate horizontal bevel-back fibre-cement weatherboards over a 20mm wide drained cavity. The external wall cladding flashings and junction details are provided on several building consent plans titled “Cladding Details”⁶ and referred to in the building consent specifications⁷, along with copies of the manufacturer’s specifications⁸ (these include information on the installation of the two types of wall cladding). The door and window joinery are double glazed aluminium.
- 2.3. The roof cladding is trapezoidal profiled metal on a roof pitch of 25 degrees. The roof flashings are detailed on building consent plan “Roof details”⁹, and referred to

⁵ Figure 1 has been reproduced from photographs included in a draft report from a building surveyor engaged by the owner; the report is dated 21 December 2023.

⁶ Plan numbers A603 to A608 inclusive, all are revision A, dated 13 August 2021.

⁷ Section 4231HL ‘...cladding’ of the specifications.

⁸ Dated May 2020 and July 2018.

⁹ Plan number A602, revision A, dated 13 August 2021.

in the building consent specifications¹⁰, along with a copy on an installation manual¹¹ provided by the manufacturer of the external wall cladding.

3. Background

- 3.1. On 23 August 2021, the owner applied for a building consent to 'Erect [a] two storey dwelling with attached garage...'. The stated means of compliance with the Building Code for Clause E2 *External Moisture* was Acceptable Solution E2/AS1.¹²
- 3.2. On 26 October 2021, the authority granted and issued building consent ABA-2021-1974.
- 3.3. Building work commenced around January 2022. The authority conducted several inspections during construction some of which identified issues with the installation of the roof flashings and external wall cladding.¹³ However, it is the 'building completion' inspections on 8 December 2022 and 6 July 2023 that provide a record of the reported issues, with the latter inspection concluding, 'Based on the above the [authority] will be issuing a Notice to Fix'.
- 3.4. On or about 28 June 2023, a representative from the manufacturer of the external wall cladding inspected the building and recorded seven issues where the as-built construction that did not 'appear to comply with the relevant manual', and noted 'a number of roof flashings [were] not correctly formed over' the weatherboards.¹⁴
- 3.5. On 24 July 2024, the authority sent an email to the owner detailing six issues with the roofing and 15 issues with the wall cladding that required to be rectified.
- 3.6. On 26 August 2024, the authority issued Notice to Fix NTF-2024-257; it stated:

Particulars of contravention or non-compliance:

Non-compliance with section 40 of the Building Act 2004, in that the following building work was not carried out in accordance with the building consent:

Roof flashings and wall cladding systems were not installed as per the approved building consent ABA-2021-1974 and the manufacturer's specifications and does not comply with E2 (External Moisture) of the New Zealand Building Code.

To remedy the contravention or non-compliance you must:

Install the roof flashings and wall cladding systems as per the approved building consent ABA-2021-1974 and manufacturer's specifications.

¹⁰ Section 4310 'Roofing' of the specifications.

¹¹ Dated August 2017 titled 'Eaves [and] Soffits'.

¹² Acceptable Solution E2/AS1, third edition, amendment 10, effective on 5 November 2020.

¹³ During inspections conducted between April 2022 and December 2022.

¹⁴ This was further supported by an email from the manufacturer to the builder, dated 12 July 2023.

- 3.7. Also on 26 August 2024, the authority emailed the owner, and the other parties, a list of six issues with the 'roofing' and 15 issues with the 'cladding' that required "to be rectified" to "comply with the...Building Code" (refer to Appendix A). The email also confirmed further inspections were to be arranged with the authority as the "areas are being rectified".

4. Submissions

The owner

- 4.1. The owner submits (in summary):
- 4.1.1. They agree with the "Particulars of contravention or non-compliance" in the notice to fix regarding the roof flashings and external wall cladding. However, they feel the decision to issue the notice to fix should be reversed and a previous version re-issued as an appropriate remedy was to remove and reinstall the roof and wall cladding systems.
 - 4.1.2. They do not believe they should have been included in the NTF as a specified person because they are "not a specified person who carried out the non-compliant work and cannot remedy the 26 August 2024 Notice to Fix...".
 - 4.1.3. The building work does not comply with sections 17 and 40, including Clause E2 *External Moisture*.

The authority

- 4.2. The authority submits (in summary):
- 4.2.1. When issuing the notice to fix it had relied "on information received from the claddings manufacturer" to support its decision.
 - 4.2.2. The owner was issued with the notice to fix under section 163 on the basis "it is impossible for anyone else to remedy the issues without the building owner's involvement".

The builder

- 4.3. The builder "remained consistent in its commitment to finishing the work necessary to gain compliance" and had sought permission from the owner to access the property accordingly.

The first LBP

- 4.4. The first LBP referred to a decision by the Building Practitioners Board¹⁵, and confirmed he “was responsible for specific items of restricted building work” which were “still not complete”, but he had committed to returning to site to carry out or supervise “the remaining remedial work”, depending on access being made available by the owner.

The second LBP

- 4.5. The second LBP has not made a submission. Regardless, I note a decision by the Building Practitioners Board¹⁶ confirmed the second LBP was responsible for carrying out and supervising the installation of the wall cladding and associated flashings including some of the issues raised in the authority’s email dated 26 August 2024 (refer to paragraph 3.7). It appears some building work has already been completed by the second LBP, but ‘further restricted building work was needed’. The second LBP ‘stated that he would be returning to carry out or supervise that work’.

5. Discussion

- 5.1. This determination is considering the authority’s decision to issue notice to fix NTF-2024-257, specifically, as agreed with the applicant, the form and content of the notice including the specified persons to whom the notice was issued, the particulars of contravention or non-compliance, and the associated remedy.

Legislation

- 5.2. 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.
- 5.3. 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”.¹⁷ 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.¹⁸

¹⁵ Dated 9 October 2024.

¹⁶ Dated 9 October 2024.

¹⁷ Section 165(1)(a) requires a notice to fix be in the prescribed form ie Form 13 of the Building (Forms) Regulations 2004.

¹⁸ 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].

Form and content of the notice to fix

Specified person

- 5.4. Section 163 defines a 'specified person' to whom a notice can be issued¹⁹; this includes the owner of a building as well as a person carrying out or supervising the building work.
- 5.5. In this case the notice to fix was issued by the authority to the owner, the builder, and first and second LBPs. I note the builder, as well as the first and second LBPs have not disputed their inclusion as recipients of the notice to fix; indeed, they have each committed to completing the necessary building work depending on access to the property being granted by the owner.
- 5.6. The owner believes they should not have been included on the notice to fix. However, the owner is the person registered on the record of title for the property, obtained the building consent, and is responsible for ensuring the building work complies with the building consent.²⁰ Therefore, the owner does meet the test of a specified person under s163(a), and it was appropriate for the authority to include the owner in the notice to fix.
- 5.7. The builder carried out or supervised the building work on behalf of the owner, and/or engaged others to undertake the work on its behalf. This meets the test of a specified person under s163(b). However, the notice to fix refers to the trading name of the builder, and not its registered company name (ie a 'person' as defined in section 7). To comply with s163(b) it would have been more appropriate for the notice to refer to the registered company name followed by '...trading as...'. For this reason, the notice does not adequately meet the requirements of s163(b) for a specified person regarding the details of the builder.
- 5.8. The first and second LBPs did carry out or supervise the building work that gave rise to the issue of the notice to fix and are responsible (in conjunction with the builder) for the remedial building work necessary to satisfy the requirements of the notice (including the list of items detailed in the authority's email dated 26 August 2024; see Appendix A). The first and second LBPs meet the test of being specified persons for the purposes of section 163(b), and it was appropriate for the authority to include them in the notice to fix.

¹⁹ 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. Section 164(2)(a) provides that a responsible authority must issue 'to the specified person concerned' a notice requiring the person to remedy the contravention or comply with the Act or the regulations.

²⁰ Sections 3(b), 4(2)(q), and 14B(b). In this case the owner engaged the services of the builder to carry out and/or supervise the construction of the dwelling on her behalf, and regardless of any contractual arrangements, it does not absolve the owner's responsibilities under the Act. However, it is not clear to me if the first and second LBPs were engaged directly by the owner, and/or indirectly by the builder, to carry out or supervise some of the building work.

Particulars of contravention or non-compliance

- 5.9. Form 13 provides some guidance on the sort of information to include as particulars of contravention or non-compliance; it states, 'insert details of failure or error with reference to any relevant building consent'.
- 5.10. In this case, the notice to fix alleges the owner and the other recipients of the notice have contravened section 40 on the basis the building work carried out to construct the 'roof flashings and wall cladding systems' was not in accordance with the building consent ABA-2021-1974 and the manufacturer's specifications. The notice also referred to the building work not complying with Clause E2 *External Moisture*.
- 5.11. Having considered the content of the notice to fix, I am of the view it lacked sufficient information to fairly and fully inform the recipients of the particulars of contravention or non-compliance for the following reasons:
- 5.11.1. The notice infers a contravention or non-compliance with section 17, but this was not included in the particulars.
- 5.11.2. The notice refers to non-compliance with clause E2, but it did not specify which performance clause(s) was relevant, or detail why it was considered the building work did not comply with the Building Code.
- 5.11.3. The notice did not adequately describe which 'roof flashings' were non-compliant or how they did not comply with the building consent.
- 5.11.4. The notice did not adequately describe which aspects of the 'wall cladding systems' were non-compliant or how they did not comply with the building consent.
- 5.11.5. The notice provided a general reference to non-compliance with the building consent without providing further information that directs the recipients of the notice to relevant plans and specifications.
- 5.11.6. The covering letter accompanying the notice refers to the 'particulars of contravention or non-compliance of the new [notice to fix] remains the same in that during an **inspection** for building consent ABA-2021-1974' issues were identified with 'the roof flashings and wall cladding systems' [my emphasis]. Records indicate the authority conducted several building inspections during the construction, and neither the notice nor the covering letter confirm which inspection the authority was referring to.
- 5.12. I note the authority did send to the recipients of the notice to fix a separate email correspondence, which included a list of items the "authority requires to be rectified" regarding the "roofing" and "cladding" (refer to Appendix A).

- 5.13. However, the list of items was not included in, appended to, or cross-referenced in the notice. In the same way the authority's email correspondence did not refer to or cross-reference the notice to fix.
- 5.14. For the purposes of assessing the form and content of the notice to fix, the requirements of section 165(1)(a) were not met as the recipients of the notice were not fairly or fully informed of the particulars on contravention or non-compliance.

To remedy the contravention or non-compliance

- 5.15. Form 13 provides some guidance on the sort of information to be included 'to remedy the contravention or non-compliance'; it provides, 'state any building work that must be carried out and whether a certificate of acceptance must be applied for'.
- 5.16. In this case, the notice to fix directs the recipients to 'install the roof flashings and wall cladding systems as per the approved building consent ABA-2021-1974 and manufacturer's specifications'.
- 5.17. Having considered the content of the notice to fix, I am of the view it lacked sufficient information to fairly and fully inform the recipients of the notice regarding the remedy:
- 5.17.1. When read in association with the limited particulars of the contravention, the notice did not adequately describe which roof flashings were to be remedied in accordance with the building consent.
- 5.17.2. When read in association with the limited particulars of the contravention, the notice did not adequately describe which aspects of the wall cladding systems were to be remedied in accordance with the building consent.
- 5.17.3. The notice requires building work to be carried out, but it did not state the territorial authority is to be contacted when the work is completed (ie to comply with section 165(1)(e) and Form 13 'further particulars').
- 5.17.4. The notice does not state whether a certificate of acceptance must be applied for (ie to comply with section 165(1)(c) and Form 13).
- 5.18. Notwithstanding the shortcomings in the content of the notice to fix regarding the remedy, I note the parties do not dispute the list of items to be rectified or completed as recorded in the authority's email correspondence to the parties dated 26 August 2024. I will therefore leave it for the parties to resolve those items.

6. Conclusion

- 6.1. Regarding the form and content of the notice to fix NTF-2024-257:

- 6.1.1. The owner, the first and second LBPs are specified persons pursuant to section 163. However, the authority did not adequately describe the details of the builder.
- 6.1.2. The notice did not fairly or fully inform the recipients of the particulars of contravention or non-compliance or include an appropriate remedy.

7. Decision

- 7.1. In accordance with section 188 of the Building Act 2004, I reverse the authority's decision to issue notice to fix NTF-2024-257.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 17 July 2025.

Andrew Eames

Principal Advisor Determinations

APPENDIX A

Summary of 'roofing' and 'cladding' issues²¹

Roofing

1. Eave flashing is to be installed on the lean-to roof as it is located in a very high wind zone.
2. Socker flashing is required to laundry vent penetration through roofing iron.
3. New barge flashings are to be installed at the east end once the metal barges have been extended to allow the cladding to run past.
4. Apron flashing junction at the east end of the lean-to is insufficient, the weather board is too high, and the upstand is too low.
5. Roofing iron overhangs on the lean are to be checked (50 mm minimum required).
6. Apron flashing junction west end of lean-to is insufficient as...weather board internal corner is exposed and apron flashing junction is incorrectly installed.

Cladding

7. Head flashings are to be sealed to the top of the window and door, as required for a very high wind zone.
8. Stop ends on head flashings have not been installed as per approved drawings or manufacturer specifications.
9. Internal corner between main house and lean-to needs to be rectified.
10. Bargeboards to be installed in the lean-to-roof area.
11. Bargeboards to the main roof have been cutting into the cladding system and need to be extended to allow the cladding to run behind the barges.
12.flashings are required for soffits to wall junctions.
13. Soffit moulding was not installed; however, this was an optional component for the drawing owners to confirm if they wanted it installed or left off.

²¹ The list has been copied from the authority's email to the parties dated 26 August 2024.

14. [Support] bar to be installed to large window in the master bedroom (the sill of the window is sagging). Window manufacture to assess the large window frame and decide on repair or replace.
15. Gaps at bottom of windows should be closed off with cladding.
16. [The weatherboard] has less than 10 mm of cover on windows and doors.
17. It appears the...weather board has been fixed at the floor joist junction, where it's meant to be unfixed as per figure 26 on the manufacturer's specifications.
18. The edges of the cladding are still to be sealed.
19. Gaps under head flashings and penetrations are to be appropriately sealed.
20. Items on the cladding report from [the weatherboard manufacturer] are to be addressed to the point that [the weatherboard manufacturer] will issue their warranty.
21. Cladding system to be adequately re-sealed (painted) to meet the durability requirements.