

Determination 2025/054

**The authority's decision to issue a notice to fix for
replacing cladding without building consent**

2/86 Coronation Road, Hillcrest, Auckland

Summary

This determination considers the authority's decision to issue a notice to fix for a contravention of section 40, for building work to replace external cladding without building consent. The determination discusses whether the building work to replace the cladding is exempt from building consent under clause 1 of Schedule 1 of the Act, in particular, whether the cladding is 'comparable'.

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 (“Schedule 1”) of the Act ‘Building work for which building consent not required’.

The Act and Schedule 1 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, Rebecca Mackie, 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. J Hanlon (also known as J Owst, “the owner”), owner of the building and recipient of the notice to fix, who applied for this determination.
 - 1.2.2. P Troake (“the builder”), a Licenced Building Practitioner², concerned with the relevant building work.
 - 1.2.3. Auckland 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 sections 177(1)(b) and (3)(e) of the Act, is the authority’s decision to issue a notice to fix dated 14 October 2024 (NOT21744089) to the owner for a contravention of section 40 of the Building Act 2004.
- 1.4. In determining the matter, I will consider whether the building work was carried out without building consent in contravention of section 40, including whether the building work is exempt from requiring a building consent under clause 1 of Schedule 1. This determination will also consider the form and content of the notice to fix.
- 1.5. This determination is limited to the matters as set out in paragraph 1.3 and 1.4.

2. The background and building work

- 2.1. The building is an existing 2-storey dwelling, measuring an area approximately 195m². The upper storey of the building is clad in some form of cladding with a weatherboard look, with the lower ground floor clad in a mixture of flat sheet cladding or masonry block.

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

² Licenced Building Practitioner (LBP) number BP121116

2.2. The owner engaged the builder to carry out building work to reclad some areas on the ground and upper storey of the dwelling.

2.3. I have conflicting information from the each of the parties about the nature and extent of the building work carried out:

2.3.1. According to the owner, the building work to the owner's residential dwelling is as follows:

- a) "the upper level was not entirely reclad, only parts were replaced with a comparable product" from "weatherboard to weatherboard, like for like";
- b) "the only part of the dwelling where cladding was altered and changed to weatherboard is at the entrance, which is approximately 11m², which we do not consider substantial given the entire property is 190m²."
- c) "the lower level has remained unaltered from when the building was constructed in 1997, only fresh paint".

2.3.2. According to the builder, the building work involved "replacing some existing cladding with new [proprietary uPVC sheets that have a rusticated weatherboard profile] to match the existing [proprietary uPVC cladding] already installed to the dwelling".

2.3.3. According to the authority, the building work:

- a) the "house has been completely re-clad. This is considered as substantial work which is not exempt under the Schedule 1 of the Building Act 2004.";
- b) that "all of the cladding on the upper levels have been replaced" with a "product that is like for like and is in the same position, but the work that has been completed is substantial";
- c) the work is a "complete re-clad of a specified system, in that the upper level of the house has had the cladding replaced" and "more than 75% of the house has had new cladding";
- d) the "house has two levels, with new cladding on all four external walls of the second floor".

2.4. The authority conducted a site visit inspection on 2 October 2024.

- 2.5. On 14 October 2024 the authority issued a notice to fix (NOT21744089) to the owner³ (“the notice to fix”). The particulars of contravention or non-compliance identified in the notice to fix follows:

Contrary to section 40 ... you have undertaken the following building work ...without first obtaining a building consent:

- Building work in connection to complete or substantial replacement of the external wall cladding of the building.

- 2.6. The notice to fix stated the following remedy for the contravention or non-compliance:

Choose one of the following options to achieve compliance:

- (1) Pursue any legal option to achieve compliance with the requirements [of the Act and Building Code]. This may include applying for and obtaining a Certificate Of Acceptance... or
- (2) Remove the unauthorised building works and return the building back to its authorised use.

- 2.7. The authority’s accompanying letter with the notice, of the same date, stated that the building work undertaken is “not exempt under schedule 1 of the Act” and that the authority “has no consented building records” for the works.

3. Submissions

The owner

- 3.1. The owner submits, in summary:

- 3.1.1. the building work which was carried out by the builder is “not considered as substantial” as it is only in relation to partially replacing the weatherboard at the front of the dwelling on the upper floor, and at the entrance of the dwelling on the lower floor;
- 3.1.2. there was no aluminium cladding used and the cladding was replaced with a comparable product with the “front entrance reclad to match the upper storey of the house due to a leaky wall, now repaired by a qualified builder”;
- 3.1.3. the gutters were replaced as the “old gutters leaked and were beyond repair” and the “old windows have been repaired/replaced”;

³ I note that the notice to fix issued by the authority referenced the correct address when describing the building but elsewhere in the notice stated the work had been carried out at different erroneous address in the ‘Particulars of Contravention or Non-compliance’ section of the notice. When the owner raised the error with the authority (on 1 November 2024), the notice to fix was rectified by the authority to amend the address to the owner’s property in the notice to fix (on 6 November 2024).

- 3.1.4. All existing cladding were cleaned as regular maintenance and they were painted using approximately 20 litres of exterior house paint;

The Builder

- 3.2. The builder submits, in summary:

- 3.2.1. [they were] engaged by the owner to do the remedial work for the cladding;
- 3.2.2. [the work involved] replacing some existing cladding with new proprietary uPVC cladding weatherboard to match the existing proprietary uPVC cladding weatherboard already installed to the dwelling;
- 3.2.3. “in our view the work was not substantial” and was carried out “under Schedule 1” taking about 3 weeks to complete with the cost of about \$30,000.00.

The Authority

- 3.3. The authority submits, in summary:

- 3.3.1. the house had been “completely re-clad from wooden weather board to aluminium cladding”;
- 3.3.2. the “entire second floor of the dwelling has new cladding” and “while it may be “like for like” the work is considered substantial which is not exempt under Schedule 1”;
- 3.3.3. the “second level of the house, more than half appears to have new cladding” with the “capping on the corners of each wall, with the material appearing uniform and polished, showing no signs of wear and tear”;
- 3.3.4. the concern with the building work is that the “external walls of a house are crucial for preventing external moisture from entering. Replacing or repairing a substantial part of this system can affect its function”;
- 3.3.5. the concern with the building work is that the “product is not like for like” and as the “product used is fixed differently to the house there is no way to confirm if the product has been installed correctly, including allowing the appropriate cavity spaces etc.”;
- 3.3.6. the “installation of new insulation is also a consideration, again unable to confirm that this has taken place, but given the cladding has been replaced, has the insulation been correctly installed” with the “weather tightness to prevent moisture getting into the building is the main concern”;

- 3.3.7. observed that “all external cladding appeared to be the same, shiny / plastic material” and the “cladding do not appear to be made of wood” with “no obvious signs that the cladding had been painted, no brush marks, drops on existing cladding (lower level) or evidence of cladding being spray painted”;
- 3.3.8. the house was “viewed in two parts, the lower floor contributed to 50% of the building, with the upper floor contributing to 50%. All the cladding (or 100% of the cladding), on the upper level (floor) of building had been replaced”;
- 3.3.9. that the “original photographs shows the house was made of timber weatherboards and timber joinery” and the new claddings “would not be considered comparable and it is a substantial replacement” as the “sheen/shine on the cladding shows that it is relatively new” with the “flashings such as the corners and scribes are completely different”;
- 3.3.10. the “replacement of the old cladding with the new cladding creates concerns of possible water ingress” as “PVC claddings are not common and there are limited installers, normally sourced directly from the supplier who also supply a list of recommended installers, with specific installation methods and requirements”.

4. Discussion

- 4.1. The matter for determination is the authority’s decision to issue the notice to fix, for a contravention of section 40, that is, carrying out building work without building consent when one was required, in relation to the replacement of the external wall cladding on the owner’s dwelling.
- 4.2. In determining this matter, I will consider whether there were grounds to issue the notice to fix for a contravention of section 40 and the form and content of the notice.

The discrepancy with the details of the building work

- 4.3. I have been provided conflicting information about the extent of the building work and the previous cladding type.
- 4.4. From photos provided by the authority, I consider that the cladding of the entire upper floor has been replaced and is now proprietary uPVC cladding. The sheen on the cladding supports the owner and builder’s view that the installed cladding is a proprietary uPVC cladding. It is clear from the photos that this cladding, with a sheen, has been installed on all elevations of the upper floor.

- 4.5. The owner and builder state the previous cladding was also a proprietary uPVC cladding, conversely the authority have relied upon a photo of the building showing timber weatherboards and joinery, however, I have not been provided this photo.

Legislation

- 4.6. Section 164(1)(a) of the Act 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. This can include carrying out building work without a building consent when one is required, in contravention of section 40 of the Act.
- 4.7. Section 163 defines a specified person, among other things, as the owner of a building. I consider the owner in this case is a specified person in respect of section 163.
- 4.8. Section 165 of the Act sets out the form and content requirements of a notice to fix.
- 4.9. The notice to fix has been issued for a contravention of section 40. In respect of this contravention, the following is relevant in this case:
- 4.9.1. Section 40(1) requires a person must not carry out any building work except in accordance with a building consent.
 - 4.9.2. Section 41(1) sets out, despite section 40, building consent is not required in certain cases, most relevant is section 41(1)(b), that is, consent is not required for building work set out in Schedule 1 of the Act.
 - 4.9.3. Schedule 1 of the Act prescribes the building work for which a building consent is not required.
 - 4.9.4. In summary, building consent is required for building work, unless that work is prescribed in Schedule 1 of the Act as exempt from building consent.
- 4.10. The notice to fix in this case, describes the contravening building work as the “complete or substantial replacement” of the external wall cladding.
- 4.11. The term “complete or substantial replacement” does not appear anywhere in the Act, except for clauses 1 and 32 of Schedule 1 of the Act.
- 4.12. It is not necessary that I consider clause 32 of Schedule 1 as that clause relates to repairs and maintenance of sanitary plumbing and drainage, which is not relevant to the building work in relation to external wall claddings set out in the notice to fix considered in this Determination.

4.13. Clause 1⁴ of Schedule 1 of the Act states:

- Schedule 1**
- Building work for which building consent not required**
- ...
- 1 General repair, maintenance, and replacement**
- (1) The repair and maintenance of a building product or an assembly incorporated in or associated with a building, provided that a comparable building product or assembly is used.
- (2) Replacement of a building product or an assembly incorporated in or associated with a building, provided that—
- (a) a comparable building product or assembly is used; and
 - (b) the replacement is in the same position.
- (3) However, subclauses (1) and (2) do not include the following building work:
- (a) complete or substantial replacement of a specified system; or
 - (b) complete or substantial replacement of a building product or an assembly contributing to the building's structural behaviour or fire-safety properties; or
- ...

4.14. In summary, clause 1 of Schedule 1 exempts the work set out in subclauses (1) and (2) from building consent. However, subclause (3) sets out certain limitations or exclusions to exemption from building consent, that is, work under subclauses (1) and (2) must not include; the complete or substantial replacement of a specified system or building product or an assembly that contributes to the building's structural behaviour or fire-safety properties.

Has there been a contravention of section 40 and therefore grounds to issue the notice to fix?

4.15. The authority, in its notice to fix, considers that “building work in connection to complete or substantial replacement of the external wall cladding of the building” had been undertaken at the owner's property without first obtaining a building consent when one was required, in contravention of section 40.

4.16. The authority's letter accompanying the notice stated that the building work undertaken is “not exempt under schedule 1 of the Act”.

4.17. The authority, in deciding the work is not exempt from building consent and was carried out in contravention of section 40, stated that the work is “complete or substantial replacement”, suggesting the work is excluded from subclauses (1) and

⁴ I consider clauses 1(3)(c) and 1(3)(d) of Schedule 1 are not relevant in this case.

(2) of Clause 1 of Schedule 1 via the exceptions in subclauses 1(3)(a) or 1(3)(b) and therefore not exempt from building consent.

4.18. However, Clause 1(3)(a) of Schedule 1 only relates to “a specified system”. Specified system is defined in section 7 of the Act:

specified system—

- (a) means a system or feature that—
 - (i) is contained in, or attached to, a building; and
 - (ii) contributes to the proper functioning of the building (for example, an automatic sprinkler system); and
 - (iii) is declared by the Governor-General, by Order in Council, to be a specified system for the purposes of this Act (see subsection (2)); and
- (b) includes a cable car

4.19. Cladding does not fall within that definition of “specified system”, nor has cladding been declared to be a specified system.⁵ Accordingly, the cladding is not a specified system, and, on this basis, I consider is not excluded from Clause 1 of Schedule 1 via subclause (3)(a).

4.20. Clause 1(3)(b) of schedule 1 only relates to “a building product or an assembly contributing to the building’s structural behaviour or fire-safety properties”. I am not aware the cladding forms a structural element, such as bracing, and the building is more than 1m from the relevant boundaries and therefore is not required to be fire rated or have any other fire-safety properties. Accordingly, the cladding does not contribute to the building’s structural behaviour or fire-safety properties and on this basis, I consider is not excluded from Clause 1 of Schedule 1 via subclause (3)(b).

4.21. The particulars of the building work in reference to “complete or substantial replacement” as stated in the notice to fix, is not the same building work described in either exclusions set out in subclause (3)(a) or (3)(b) of Clause 1 of Schedule 1 of the Act, as the replacement of the external wall cladding of the building is not a specified system nor does it contribute to a building’s structural behaviour or fire-safety properties. The reference by the authority to the words “complete or substantial” in the notice to fix, in reference to either 1(3)(a) or clause 1(3)(b), is therefore erroneous.

4.22. In my view, none of the exclusions in subclause (3) of clause 1 of Schedule 1 are applicable to the cladding. As a result, the reliance of “complete or substantial replacement” stated in the notice is the incorrect basis for deciding that the replacement of the cladding is not exempt under Schedule 1 and is therefore in contravention of section 40.

⁵ Refer to Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005

- 4.23. Despite this, I must consider whether the work falls within subclauses (1) and (2) of Clause 1 of Schedule 1 to establish whether the work is exempt from building consent, or if not, was therefore carried out in contravention of section 40.
- 4.24. I consider subclause (1) of clause 1 not relevant as the work in this case is not 'repair and maintenance' but rather is 'replacement' as set out in subclause (2) of Clause 1.
- 4.25. There appears no dispute from the parties that the new cladding is in the same position as the previous cladding, satisfying the requirements of subclause (2)(b) of schedule 1. Accordingly, the relevant assessment whether the work is exempt from building consent under clause 1(2)(a) of schedule 1 is whether the new cladding is 'comparable' with the previous cladding⁶.
- 4.26. Previous determinations, for example Determination 2017/086 which considered the replacement of timber weatherboards with vinyl weatherboard cladding,⁷ considered the term 'comparable' used in clause 1 of Schedule 1. Several factors can be used to determine whether building product or assembly is comparable, acknowledging a new product or assembly could be made of a different material but in every other factor is similar. Factors include;
- 4.26.1. whether the replacement is in the same position
 - 4.26.2. whether the replacement performs a similar function
 - 4.26.3. the compatibility between materials
 - 4.26.4. complexity of the finished assembly.
- 4.27. In order to decide whether the new and previous cladding are comparable I must compare the two claddings; but I have been provided contradictory information about the previous cladding. The owner and builder consider the previous cladding was proprietary uPVC sheet. The authority has relied upon a photo (which I have not been provided, refer to paragraph 4.5) showing the previous cladding was timber weatherboards with timber joinery.
- 4.28. Considering the above factors in this instance, whether the previous cladding was proprietary uPVC sheet or timber weatherboards, the new cladding is in the same position⁸ as previous and the cladding performs the same function in terms of providing weather protection to the building envelope.

⁶ I note the authority, in their email dated 18 November 2024, accepted that the cladding have been "replaced with a product that is like for like and it is in the same position".

⁷ Determination 2017/086 *Refusal to grant exemption from the requirement to obtain a building consent for recladding a house* (issued 1 December 2017)

⁸ It is likely the new and previous installations in this case are direct-fixed claddings, as opposed to the new cladding being cavity-fixed when the previous cladding was not.

- 4.29. However, this is not the case in respect of the compatibility and complexity factors. Where the previous cladding is timber weatherboards being replaced with a proprietary uPVC sheet there will be differences between the two claddings, such as the size, profile and thickness of the cladding and the components of each system resulting in different installation details and incompatibility between materials and junctions (for example the junctions where the cladding abuts existing building elements having different dimensions, gaps and/or flashings). Further, the manner of installation of the proprietary uPVC sheet requires persons with specific experience of the proprietary system and its components to install it to be weathertight. In this respect I would not consider a proprietary uPVC sheet comparable with timber weatherboards.
- 4.30. Despite this, the authority has not provided information that the previous cladding was timber weatherboards. In the absence of information about the previous cladding, I have insufficient information to decide whether the new proprietary uPVC sheet cladding is 'comparable' with the previous cladding, as it is not clear what the previous cladding was. Accordingly, I am unable to establish whether the new cladding satisfies the requirements of Clause 1(2)(a) of Schedule 1 of the Act and therefore exempt from building consent.
- 4.31. As a result, I have not been provided information confirming that the work was carried out in breach of section 40 and therefore grounds to issue a notice.
- 4.32. It is not sufficient that the authority merely thinks there may be a contravention, or that it appears there may be a contravention – there must be information obtained that there is in fact a contravention or non-compliance.⁹ Such information, where relied upon, should be shared with the recipient of the notice so that they are 'fairly and fully informed' by the notice, so they can address the identified issues.
- 4.33. I note previous determinations¹⁰ have found that there is no provision in schedule 1 'that prevents an entire cladding system from being replaced' provided it meets the requirements of subclauses (1) and (2) of clause 1 of Schedule 1 and that the exceptions in subclause (3) do not apply.

The form, content, particulars and remedies in the notice to fix

- 4.34. Section 165 sets out the requirements and provisions for the form and content of a notice to fix. Previous determinations¹¹ have discussed the requirements that a recipient of a notice to fix must be "fairly and fully informed" by the particulars in a notice to fix, so they can address and remedy the identified issues.

⁹ Determination 2024/049 *An authority's decision to issue a notice to fix for a small detached building* (issued 24 September 2024) [at paragraphs 4.14 and 4.17]

¹⁰ Determination 2017/004 *Regarding the issue of a notice to fix in respect of building work undertaken without building consent* (issued 20 January 2017) [at paragraphs 5.3.5]

¹¹ Determination 2024/029 (issued 24 September 2024) [at paragraphs 4.14]

- 4.35. I am of the view that the authority, in the notice to fix issued to the owner, has incorrectly set out the basis for the building work failing outside Schedule 1 resulting in the contravention of section 40. This is because they referred to “complete or substantial”, referring to the exclusions in subclause (3), when that doesn’t apply to the work (refer to paragraphs 4.17 to 4.22). The term “complete or substantial replacement” cannot be a basis for which the building work was carried out in contravention of section 40 as it doesn’t apply to the work, therefore there were no grounds to issue the notice in that respect.
- 4.36. In addition, the remedies given in the notice to fix are inappropriate:
- 4.36.1. The authority has stated that this may include “applying for and obtaining a Certificate of Acceptance”. The authority may not impose the requirement for a certificate of acceptance to be obtained - the notice to fix may only require a certificate of acceptance to be applied for (which is an available remedy under section 165(1)(c) of the Act for building work carried out without a building consent);
- 4.36.2. The notice further stated the owner must “remove the unauthorised building works and return the building back to its authorised use”. The use of the building is not relevant to cladding.
- 4.37. I have found the notice to fix is deficient in terms of the wording of the contravention which cannot be a basis for which the building work was carried out in contravention of section 40 as it doesn’t apply to the work and the remedies given in the notice. Accordingly, I reverse the notice to fix due to the deficiencies in the description of the contravention in notice itself, and a lack of evidence about the previous cladding in order to establish whether the new claddings is ‘comparable’ and permitted to be carried out without building consent by way of clause 1(2)(a) of schedule 1.
- 4.38. I note, this does not prevent the authority from issuing a new notice to fix with sufficient particulars that clearly identify the building work and why that building work required building consent, including providing information about the previous cladding.
- 4.39. It is for the owner to provide the relevant information to the authority to support the owner’s contention that the building work is exempt from building consent by way of Schedule 1.

5. Decision

- 5.1. In accordance with section 188 of the Building Act 2004, I determine that the authority described the incorrect basis to issue the notice to fix (NOT21744089) dated 14 October 2024, for a contravention of section 40, accordingly the notice was deficient in its particulars and remedies, and I hereby reverse the notice to fix on this basis.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 31 October 2025.

Rebecca Mackie

Principal Advisor Determination