

Determination 2025/056

An authority's decision to issue notices to fix relating to a change of use and building work carried out without a building consent

20 Hinekohu Street, New Lynn, Auckland

Summary

This determination considers an authority's decision to issue three successive notices to fix relating to whether a house has undergone a change of use in contravention of sections 114 and 115 of the Building Act and whether the owner has carried out building work on a garage without first obtaining a building consent in contravention of section 40.

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. 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. This determination arises from the authority’s decisions to issue the following notices to fix:
 - 1.3.1. NOT21757606 (“the change of use notice”) on 4 February 2025 for an alleged change of use of a dwelling (“the main house”) in contravention of sections 114 and 115
 - 1.3.2. NOT21758210 (“the February notice”) on 10 February 2025 for building work allegedly carried out on a converted garage (“the unit”) without a building consent in contravention of section 40
 - 1.3.3. NOT21761454 (“the March notice”) dated 7 March 2025² for building work allegedly carried out on the unit without a building consent in contravention of section 40.

The relevant parts of the notices are set out in Appendix A, B and C respectively.
- 1.4. The authority issued the notices because it is of the view that a change of use has been undertaken to the main house in contravention of sections 114 and 115, and that the owner has carried out building work to the unit without building consent in contravention of section 40.

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

² I note the February and March notices are identical in every material respect apart from the dates of issue and the dates of required compliance.

- 1.5. The owner maintains the authority should not have issued the notices and the notices are defective.
- 1.6. The matters to be determined³ are:
 - 1.6.1. the authority's decision to issue the change of use notice for contravening sections 114 and 115.
 - 1.6.2. the authority's decision to issue the February and March notices for contravening section 40.

Issues outside this determination

- 1.7. In making this determination, I have not considered:
 - 1.7.1. compliance with the Building Code of any building work undertaken at the property
 - 1.7.2. any infringement notices issued by the authority.

2. Background

- 2.1. There are two buildings at the property – the main house built in 1956 and the unit built as a detached garage in 2004. The main house has five bedrooms, a kitchen, bathroom and lounge. The unit has one main room (which contains kitchen and laundry facilities) and a bathroom.
- 2.2. A previous determination⁴ relating to 20 Hinekohu Street ("the previous determination") considered the authority's decisions to issue a notice to fix in relation to a change of use for the main house and unit⁵ and a dangerous and insanitary building notice for the unit⁶. I note the owner and authority both considered the main house and unit were operating as a boarding house at that time.
- 2.3. On 3 November 2023, the authority undertook a site inspection at the owner's property and gathered video evidence⁷; however, I understand no written site inspection evidence was recorded.
- 2.4. Site photographs dated May 2024 have been provided to me but it is unclear whether they were taken during a full inspection as they only show external elevations of the unit and no video or written inspection records were provided.

³ In terms of section 177(1)(b) and (3)(e) of the Act.

⁴ Determination 2024/038 *An authority's decisions to issue a notice to fix and a dangerous and insanitary building notice* (9 August 2024).

⁵ Notice to fix NOT21665459 dated 14 April 2023.

⁶ Dangerous and insanitary building notice NOT21665520 dated 26 April 2023.

⁷ I note that the authority's inspection on 21 March 2023 was documented in determination 2024/038.

- 2.5. In January 2025, the authority contacted the owner to arrange another inspection. The owner queried the legal basis for the proposed inspection, and in response the authority referenced sections 164⁸, 167⁹, 168¹⁰ and 222¹¹ as being applicable.
- 2.6. In a subsequent letter to the authority, the owner asked “under what section and sub-section have you [the authority] issued a request to inspect” following the reversal of both notices under the previous determination.
- 2.7. The owner then applied for this determination.

Notices to fix

- 2.8. On 4 February 2025 the authority issued NOT21757606 (“the change of use notice”) for an alleged change of use for the main house with offences under sections 114 and 115 (the operative parts of this notice are set out in Appendix A).
- 2.9. On 10 February 2025, the authority issued NOT21758210 (“the February notice”) for alleged offences for the unit under section 40 (the operative parts of this notice are set out in Appendix B).
- 2.10. In a letter dated 24 February 2025, the owner requested the authority withdraw the February notice on the basis it was “unrelated to any continuing offence that required a Fix”, and stated the February notice had been “complied with to the extent required by the [Act]” and was “issued incorrectly”.
- 2.11. In a letter dated 7 March 2025, the authority rejected the owner’s view the February notice had been complied with and stated it had issued an infringement notice¹² and was also issuing a new notice to fix to replace the February notice.
- 2.12. The same day, 7 March 2025, the authority issued NOT21761454 (“the March notice”) which is identical in all material respects to the February notice apart from a new compliance date of 14 March 2025 (the operative parts of this notice are set out in Appendix C).
- 2.13. On 14 March 2025 the owner applied for a determination.

⁸ Section 164 relates to ‘Issue of notice to fix’.

⁹ Section 167 relates to ‘Inspection of building work under notice to fix’.

¹⁰ Section 168 relates to ‘Offence not to comply with notice to fix’.

¹¹ Section 222 relates to ‘Inspections by territorial authority’.

¹² Infringement notice 61000715793 issued in relation to “Section 168 Failing to comply with a notice to fix” on 7/3/2025. As stated in paragraph 1.7, I have not considered the infringement notice in making this determination.

3. Submissions

The owner

- 3.1. For the two notices relating to the alleged section 40 offence (ie the February notice and the March notice), the owner submits (in summary):
 - 3.1.1. The authority has not established an evidential basis for issuing the notices and “has no current knowledge of and has not identified a continuing offence ... that is within time”.
 - 3.1.2. A section 40 offence can only be included in a notice to fix if work is in progress, and “[t]here is no building work being carried out at [the] address at this time”.
 - 3.1.3. If there were any offences they would be outside the time limits for filing a charging document under section 378.
 - 3.1.4. The authority has failed to consider section 167 and has not provided adequate reasons for its refusal of the “notice of compliance” provided in respect of the notices.
 - 3.1.5. Insufficient time has been provided for the notices to be complied with.
 - 3.1.6. The notices are technically deficient.
- 3.2. For the notice relating to the section 114 and section 115 offences (ie the change of use notice) the owner submits (in summary):
 - 3.2.1. While the previous determination found that a change of use occurred, an assessment of the “boarding house” is required to establish it operates as a household.
 - 3.2.2. A ‘boarding house’ is considered a detached dwelling by virtue of its inclusion in the examples of 2.0.2 Detached dwellings under Clause A1 *Classified uses* of the Building Code.
 - 3.2.3. An objective assessment of living arrangements at the property is needed to verify whether a ‘household’ is present in this case. The authority has not undertaken such an assessment or provided the owner an opportunity to demonstrate the building is operating under a household arrangement.
 - 3.2.4. “[A]ny allegation under s114 was known to the authority in at least November 2023” and, as 12 months have now elapsed, is now out of time under section 378.

The authority

- 3.3. The authority maintains it was correct to issue the notices and submits (in summary):
 - 3.3.1. The use of the main house was still in breach in that nothing had changed since the original notice to fix was issued in early 2023 and the unnotified change of use under sections 114 and 115 still applied.
 - 3.3.2. The previous determination confirmed the house “had gone through a change of use” and was being used as a boarding house.
 - 3.3.3. Regarding the section 40 breach, its records show the consented use of the unit was a garage but it had undergone extensive work with a full kitchen, shower and toilet installed. The authority had no consent approval or authorisation on file for the conversion officers sighted on previous inspections.

4. Discussion

Requirements of notices to fix

- 4.1. 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.¹³
- 4.2. 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”.¹⁴ 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.¹⁵
- 4.3. Previous determination 2024/038 confirmed there had been a change of use for the purposes of the Act in respect of the main house, and that there were grounds for issuing a notice to fix in relation to the change of use of the main house.
- 4.4. I note the authority has not undertaken a more recent inspection given the owner did not allow access. It has based its decision to issue the three notices to fix that

¹³ Section 163 defines a ‘specified person’ to whom a notice can be issued, and this includes the owner of the building.

¹⁴ Form 13 of the Building (Forms) Regulations 2004. Section 165(1)(a) requires that a notice to fix be in the prescribed form.

¹⁵ 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].

are the subject of this determination on its inspections of 22 March 2023 and 3 November 2023 in conjunction with the conclusions of the previous determination. No other information was provided by the owner that would change the conclusion on the change of use in Determination 2024/038.

- 4.5. For the change of use notice, I consider the conclusions drawn in Determination 2024/038 at paragraphs 4.17, 4.34, and 4.38 are applicable here and the building has undergone a change of use. The particulars of contravention are clearly identified, the remedies are appropriate and there were grounds to issue the notice.
- 4.6. Regarding the February notice and the March notice, these notices are identical in their particulars of contravention and remedies.
- 4.7. I have already noted in paragraph 4.4 the authority's request for access to inspect the property in relation to the change of use notice was declined by the owner, and this was also the case for the February and March notices relating to compliance with section 40. As such the authority has relied on its previous site inspection on 3 November 2023 and evidence in its property records.
- 4.8. In its submission, the authority included an independent compliance report for 20 Hinekohu Street dated 3 June 2023 ("the report")¹⁶. The report was authorised by the owner in support of an application for a certificate of acceptance, and its scope was "Residential property converted to boarding house with new plumbing, layout, joinery and new sleepout converted from old garage".
- 4.9. The report references the original consent¹⁷ for relocation of the dwelling and construction of a new garage, and a 2005 consent¹⁸ for "an addition to the rear of the property", and states:

The owner has converted [the garage] to a sleepout without consent.

...

The main dwelling has been amended to create new bedrooms to create a boarding house without consent.

- 4.10. In addition, the authority's investigation notes include evidence building work was undertaken at the property by a tenant who later became the property manager.
- 4.11. The owner has provided no specific comments to rebut the conclusions that can be drawn from the statement of the property manager and the photos identifying recent plumbing and drainage work in the unit. If the owner had in mind a specific

¹⁶ The report was based on an inspection by the report's author, the property owner and a resident on 15 May 2023.

¹⁷ Consent number ABA-2004-1138. The consent is referred to as being dated 2014 but this appears to be a typo as the consent number includes a 2004 date.

¹⁸ Consent number COM-2005-1240.

clause of Schedule 1 in relation to this work, then it should have been easy to provide this information.

- 4.12. I am of the view the particulars of contravention in both the February and March notices are clearly identified, the remedies are appropriate and there were grounds to issue the February and March notices.

Timeframes for complying with the notices

- 4.13. 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.¹⁹
- 4.14. As stated in previous determinations²⁰, 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.
- 4.15. In this case, the change of use notice had a timeframe of 16 calendar days, the February notice had a timeframe of 14 calendar days, and the March notice had a timeframe of 7 calendar days.
- 4.16. With respect to the change of use notice, I consider 16 calendar days (ie 12 working days) would not be sufficient for an owner to obtain relevant information, including professional or specialist assistance and, prepare and submit a change of use notification under sections 114 and 115.
- 4.17. Regarding the February and March notices, the owner considers the authority has not provided sufficient time for the notices to be complied with:

14 calendar days is not sufficient and [is] 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.

- 4.18. I consider 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

¹⁹ *Hauraki District Council v Pykett* DC Waihi CRI 2007-079-885, 22 January 2008 at [42].

²⁰ 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].

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.

- 4.19. In my view, the timeframes in the February and March notices did not provide sufficient time for the owner to comply with one of the options provided in the remedies. Preparing an application for certificate of acceptance or organising the removal of works required more than 7 or 14 days. Therefore, I do not consider the timeframes were ‘reasonable’, as required by section 165(1)(b).

Other points raised by the owner

- 4.20. While I have concluded the notices are defective, the owner has also raised several other points which I will address briefly.
- 4.21. The owner made a number of submissions regarding the interpretation and application of sections 40²¹ 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 and 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 issued [notice to fix]”. In relation to these submissions, I refer to Determination 2024/056²².
- 4.22. 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 220²³. 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 notice. I consider removal of building work is a lawful option to include as a remedy for a section 40 contravention.²⁴ 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.

²¹ It is noted that this external report is the only source of information relating to the original building consents for the property. The authority’s investigation notes do not include information or plans relating to the original consented use of the garage. Such information would assist in identifying what additional building work and features had been undertaken without prior approval.

²² 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].

²³ 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.

²⁴ 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.

- 4.23. The owner considers the authority has failed to properly consider section 167 and has not provided any adequate reasons for refusal of their 'notice of compliance' in respect of the notices.
- 4.24. The owner also considers any remedial action undertaken by an owner to comply with a notice to fix must be treated as building work and notified to the building consent authority, so the building consent authority can consider whether the notice to fix has been complied with. However, section 165(1)(e) only applies if the "notice to fix requires building work to be carried out". The definition of "building work" in section 7 is already very broad and will encompass a wide range of design, construction or demolition work that must be notified to a territorial authority. There is no basis for broadening the definition of "building work" in section 7, or as the term is used in section 165(1)(e), to include other types of remedial action undertaken by an owner to comply with a notice to fix.
- 4.25. In this case, I do not consider the 'section 167 report' provided by the authority, which the owner considers notified compliance with the notice, was a notification under section 167 that building work had been completed. Rather, it was disputing the grounds on which the notice had been issued. Therefore, section 167 does not apply.
- 4.26. Section 167 sets out the process regarding the inspection of building work that is required to be completed under a notice to fix. Section 167(1) states:
- If a specified person to whom a notice to fix was issued is required to notify a territorial authority ... that the relevant building work has been completed, the territorial authority ... must, on receipt of the notice from the specified person concerned, inspect ... the building work to which the notice to fix relates.
- 4.27. In this case, the notice to fix did not require any building work. Accordingly the owner had not completed any building work required by the notice to fix and subsequently notified the authority that the relevant building work had been completed. As such, section 167 does not apply.

5. Conclusion

- 5.1. Regarding the three notices to fix (ie the change of use notice, the February notice and the March notice) I conclude:
- 5.1.1. The form and content of the notices was sufficient and appropriate.
- 5.1.2. There were grounds for issuing the change of use notice in relation to the main house and the February and March notices in relation to the unit.
- 5.1.3. However, the notices did not contain reasonable timeframes as required under section 165(1)(b) and this is a critical issue which lends itself to a reversal of the notices.

6. Decision

- 6.1. In accordance with section 188 of the Building Act 2004, as a result of the conclusions I have reached, I reverse notices to fix NOT21757606, NOT21758210 and NOT21761454.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 19 November 2025.

Andrew Eames

Principal Advisor Determinations

APPENDIX A

Notice to fix. Notice No. NOT21757606

PARTICULARS OF CONTRAVENTION OR NON-COMPLIANCE

Auckland Council records for 20 Hinekohu Street, New Lynn identify it as a single 3-bedroom residential property with a separate garage. There are no consents or approvals on record authorising the use of the address as a boarding house.

During an [authority] inspection of 20 Hinekohu Street, New Lynn on 22 March 2023 and on 3 November 2023, Council officers identified:

- 5 separate bedrooms with 5 individual tenants residing in the main house.
- 10 Sleeping spaces in the main house
- The garage at the front of the house had been converted to living quarters with a kitchen, shower and toilet without consent.
- Shared bathroom, kitchen, and lounge in the main house for the occupants.
- No Building Warrant of Fitness (BWofF)

Contrary to **section 114 of the Building Act 2004**, there has been a change of use of the building (main house) from Sleeping Single Home (SH) to Sleeping Accommodation (SA) at 20 Hinekohu Street, New Lynn, without the territorial authority ... being given prior written notice of the change.

Contrary to **s.115 of the Building Act 2004** the owner must not change the use of the building unless the territorial authority is satisfied, on reasonable grounds, that it will comply (as reasonably as practicable) with the Building Code. In particular but not limited to:

C1 to C6 Protection from fire

F6 Visibility escape routes.

F7 Warning Systems.

F8 Signs.

To remedy the contravention or non-compliance you must:

Either

1. Notify Council of a change of use, demonstrating compliance with Building Code requirements of use group SA [Sleeping Accommodation] per Section 115; or

2. Revert the property to its previous consented use; or
3. Pursue any legal option to achieve compliance with the requirements of the Building Act 2004 and the New Zealand Building Code.

This notice must be complied with by: Date: 20/2/2025 Time: 12:00pm

APPENDIX B

Notice to fix. Notice No. NOT21758210

PARTICULARS OF CONTRAVENTION OR NON-COMPLIANCE

Council conducted an inspection of 20 Hinekohu Street, New Lynn on the 3 November 2023. As a result of this inspection, Council has identified that building work would have required building consent.

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), washing machine, and bathroom (a shower, a toilet, and vanity sink) with the associate plumbing and drainage within the garage.

To remedy the contravention or non-compliance you must:

Either

4. 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
5. Remove the unauthorised building work and reinstate to its previous consented use.

This notice must be complied with by: Date: 24/02/2025 Time: 12:00pm

APPENDIX C

Notice to fix. Notice No. NOT21761454

PARTICULARS OF CONTRAVENTION OR NON-COMPLIANCE

Council conducted an inspection of 20 Hinekohu Street, New Lynn on the 3 November 2023. As a result of this inspection, Council has identified that building work would have required building consent.

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), washing machine, and bathroom (a shower, a toilet, and vanity sink) with the associate plumbing and drainage within the garage.

To remedy the contravention or non-compliance you must:

Either

6. 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
7. Remove the unauthorised building work and reinstate to its previous consented use.

This notice must be complied with by: Date: 14/3/2025 Time: 12:00pm