

Determination 2025/059¹

The decision to issue two notices to fix for contraventions of section 40

200 Lakeside Road, Orewa, Auckland

Summary

This determination considers the authority's decision to issue two notices to fix for building work to enclose an existing deck and whether the building work required building consent.



Figure 1: The enclosed deck, with a rollable plastic covering over one window

¹ This determination is subject to a clarification under section 189 of the Building Act 2004. The determination was originally issued on 4 December 2025. The clarification amended paragraphs 2.3 and 4.11.

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, Peta Hird, for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment (“the Ministry”).²
- 1.2. The parties to the determination are:
 - 1.2.1. Sunflowers ECE Ltd, represented by the director, as the lessee of the property who was the recipient of the notices to fix and the applicant of this determination (“the applicant”).
 - 1.2.2. Orewa Kindergarten Ltd, the owner of the property (“the owner”).
 - 1.2.3. Auckland Council, carrying out its duties as a territorial authority or building consent authority (“the authority”).
- 1.3. This determination arises from the authority issuing two notices to fix in relation to building work to enclose a deck area at an early childhood centre. The authority issued the notices to fix because it considered the building work was carried out without a building consent when a building consent was required.
- 1.4. Therefore, the matters to be determined, under section 177(1)(b) and (3)(e) of the Act, are the authority’s decisions to issue notices to fix NOT21763707 dated 21 March 2025 (“the first notice”) and NOT21778696 dated 11 July 2025 (“the second notice”) for a contravention of section 40.

2. The background and building work

- 2.1. In 2024, building work was carried out by the applicant to enclose an existing timber deck (approximately 24m²) on the west elevation of the early childhood centre. Prior to the building work, a deck projected from this elevation with a veranda roof above (partially formed by clear corrugate). Two sides of the deck were open (north and west), while the south side had a full height wall clad with clear corrugate. The deck level was similar to that of the adjacent internal finished floor level.

² The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

- 2.2. The building work undertaken was to enclose the existing deck by the construction of three new external walls on the north, west, and south elevations to create approximately 20m² of internal floor area used as a play area for the early childhood centre.
- 2.3. The new walls include internal fibre-cement wall linings and external horizontal weatherboard cladding. The north elevation included a window unit, and the west elevation includes a sliding external door unit onto a new deck and a new window unit. The existing door and window units in the original external wall have been retained. The construction also included a new internal fibre-cement ceiling, new roof cladding, and linoleum floor coverings.
- 2.4. I have not received information about the wall framing, insulation, or changes made to the existing deck structure.
- 2.5. On 18 March 2025, the authority carried out an inspection at the property and on 21 March 2025 issued the first notice to fix to the applicant. The notice stated:

Particulars of Contravention or Non-compliance

[The authority] conducted a site inspection in relation to unauthorised building works.

As a result of this inspection, [the authority] has identified that building work undertaken would have required building consent.

The Schedule 1 exemptions that the [authority] has considered as being potentially relevant in reaching this conclusion are listed below (with numbers corresponding to Schedule clause numbers).

Clause 15 -Closing in existing veranda or patio

Building work in connection with the closing in of an existing veranda, patio, or the like so as to provide an enclosed porch, conservatory, or the like with a floor area not exceeding 5 square metres.

Contrary to [section] 40 of the Building Act 2004 (the Act), the following building works have been undertaken at 200 Lakeside Drive, Orewa Auckland 0931 without first obtaining a building consent:

The enclosure of an existing deck at the rear (western boundary) of the property to create a conservatory with a floor area exceeding 5 square metres.

To remedy the contravention or non-compliance you must:

Choose one of the following options to achieve compliance:

- (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
- (2) Remove the unauthorised building work and reinstate to its previously consented use

This notice must be complied with by: 26/06/2025 at 4:00 PM.

- 2.6. Following the issuing of the first notice the applicant and authority corresponded, with the applicant stating on 11 April 2025 “we will be removing the window panes and placing [a rollable plastic covering] on the windows to resist the weather. In this way the deck will no longer be enclosed” (see Figure 1). The applicant confirmed to the authority on 23 June 2025 that this had been done and provided photos. The applicant stated, “we consider this building work... satisfies the notice to fix remedy”.
- 2.7. On 25 June 2025, the authority stated that the photos had been reviewed, and it considered the changes did not satisfy the notice. The authority said, “The works you have carried out required consent and by opening a window does not make the works compliant.”
- 2.8. Correspondence continued between the applicant and the authority, with discussions about Schedule 1 exemptions and the relative size of the deck that was subject to the building work.
- 2.9. The authority carried out another inspection of the building work on 11 July 2025, and in a subsequent email stated:

I am writing to formally inform you that the building work you carried out is not compliant. The issued Notice to Fix pertains to the deck, which exceeds 5 m² and has been fully enclosed. As discussed during the site visit, this alteration has changed the building's envelope, and the work requires building consent.

The notice instructed you to either remove the unauthorized building work or apply for a Certificate of Acceptance (COA). Our records show no application has been submitted, nor has the unconsented building work been removed.
- 2.10. On the same day, the second notice to fix was issued to the applicant. The ‘Particulars of Contravention or Non-compliance’ and remedy were identical to the first notice to fix, and the date given for the notice to be complied with was 11 September 2025.
- 2.11. The applicant subsequently applied for this determination.

3. Submissions

The applicant

- 3.1. The applicant submitted that they believe the building work is exempt under clause 17 of Schedule 1 from the requirement to obtain building consent and therefore the notices to fix should not have been issued. They also consider that the removal of the windowpanes and installation of the rollable plastic covering satisfied the first notice to fix and that “in any event, the verandah [sic] is not enclosed fully and openings provide for openness.” They submitted:

- 3.1.1. the authority failed to provide adequate reasons for refusing the applicant's attempt at compliance, being the removal of the windowpanes. The applicant stated that they also offered remedial steps, including removal of windows and walls, but received no assurance that these would achieve compliance.
- 3.1.2. "the NTF is effectively defective..." in that:
 - (1) The applicant is an occupier of the building, not an owner or licensed building practitioner who carried out the work and is therefore not a specified person under section 163.
 - (2) "The reference to section 40 [is] not supported with particulars and appropriate remedies. There is no building work being carried out; building work was not being undertaken at the time of the notices being issued, rather "...the allegation was historical".
 - (3) The remedies are not appropriate, in that section 96 "does not require a [certificate of acceptance] to be applied for" and that the timeframe to comply with the notices are not reasonable. In relation to the second notice, they consider it "does not give sufficient time to consider and apply for a [certificate of acceptance]".

The authority

- 3.2. The authority considers the notices to fix have been properly issued because a building consent is required to fully enclose a deck over 5 square metres, and in its view, the work undertaken did not fall within any exemption covered by Schedule 1.
- 3.3. The authority submitted that it considers the applicant met the definition of a specified person under section 163(b)(ii), as they were supervising the building work. Accordingly, the authority maintains that service of the notices on the applicant was appropriate and consistent with the Act.
- 3.4. Regarding the timeframes for compliance on the notices, the authority stated that "the date of compliance of three months is in line with other [notices to fix] and in the officers' view, [provided] adequate time to seek a [certificate of acceptance] or undertake other action to comply. Where a person is taking steps to comply with a [notice to fix] and encounters issues, an extension to the time for compliance is usually granted. It is submitted that a longer period than three months is likely to result in a period of inaction".

The owner

- 3.5. The owner has submitted that permission was granted to the applicant to carry out alterations to the building. The requirements of this permission were that the

building work “...shall comply with all statutory requirements including the obtaining of building consent and code compliance certificates...”.

- 3.6. The owner made no comment about the notices to fix that were issued by the authority.

4. Discussion

Legislation

- 4.1. The matters to be determined, under section 177(1)(b) and (3)(e) of the Act, are the authority’s decisions to issue two notices to fix on 21 March 2025 and 11 July 2025 for contraventions of section 40, being building work carried out without a building consent.
- 4.2. Notices to fix are governed by sections 163 to 168. Section 164(1)(a) provides for an authority to issue a notice to fix if it considers, on reasonable grounds, that a specified person is contravening or failing to comply with the Act or its regulations.
- 4.3. 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”.³ 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.⁴
- 4.4. 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. However, 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 and the applicant believes the building work is exempt under Schedule 1.

The particulars of the notices and whether the building work was exempt

- 4.5. In both notices to fix, the authority has compared the building work to enclose the deck to clause 15 of Schedule 1, which exempts the closing in of porches or verandas of no more than 5m² from needing a building consent.

³ Form 13 of the Building (Forms) Regulations 2004. Section 165(1)(a) requires that a notice to fix be in the prescribed form.

⁴ 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.

- 4.6. The deck area subject to the building work is clearly larger than 5m², at approximately 24m²,⁵ and therefore I agree the building work does not meet the criteria for exemption under clause 15 of Schedule 1.
- 4.7. In their submissions, the applicant has referred to clause 17 of Schedule 1, which exempts building work in connection with a porch or veranda not exceeding 20 m². Clause 17 provides for “building work in connection with a porch or a veranda”. I consider this must be read in the context of the clauses that provide for additions and alterations to existing buildings. I am of the view that clause 17 does not permit the closing in of a porch or veranda, as this is provided for in clause 15 and is subject to limitations and conditions. The wording of clause also indicates that following the building work, the structure should remain a porch or veranda.
- 4.8. Neither the Act nor clause A2 *Interpretation* defines “porch” or “veranda.” However, the Ministry’s guidance on Schedule 1 exemptions describes porches and verandas as structures usually made from permanent materials, often extending over raised decks or patios.⁶

Porches are roofed structures projecting from the face of a building. They may have sides but they are open at the front. Porches are generally used to protect a building entrance and to provide shelter.

A veranda is typically a long porch and can extend along the full length, or even around more than one side of a building.

- 4.9. Based on this guidance document, porches and verandas are structures that remain open to the weather while providing some shelter. Activities in these spaces typically reflect this, such as storing damp jackets and shoes or providing outdoor seating for use in favourable weather.
- 4.10. In this case, the building work has resulted in all three previously open sides being enclosed with walls and glazing. I consider that, as a result, the area is no longer functioning as a porch or veranda. Therefore, clause 17 does not apply to this building work.
- 4.11. After the first notice was issued, the recipient removed glass panes from the window in the west elevation and installed a rollable plastic covering to keep out the weather. I do not consider that removing panes from a window means the space is no longer “enclosed”. The space functions as an expansion of the internal area of the building and does not align with the characteristics of a porch or veranda.

⁵ This approximate measurement was obtained from measurements taken of the roof area, accounting for eaves, on the authority’s aerial mapping system.

⁶ Ministry Guidance *Building work that does not require a building consent: Exemptions Guidance for Schedule 1 of the Building Act 2004*, sixth edition, version 1, October 2025

- 4.12. I conclude the building work required building consent and therefore there was a contravention of section 40.
- 4.13. Section 165 requires that a notice to fix identify the contravention and the building work concerned. The notices in this case indicate the relevant section of the Act, sufficiently identify the building work, and demonstrate that the authority considered Schedule 1 exemptions and found them not applicable. I consider the notices fairly and fully inform the recipient of the issues requiring rectification.
- 4.14. The applicant has also made similar statements to those considered in Determination 2024/026⁷, in that there was no building work being carried out at the time of the notices being issued and therefore “the reference to [section] 40 is inappropriate”. 2024/026 notes there is a distinction between section 40(1) and 40(2), in that section 40(1) prohibits carrying out building work without consent, and section 40(2) makes failure to comply an offence. While contravening subsection (1) is an offence that may be prosecuted, an authority may alternatively issue a notice to fix under section 164(1)(a) for a contravention of the Act. Section 165 refers to building work that “is being or has been carried out,” meaning there is no requirement for the building work to be ongoing for a notice to fix to be issued.

Whether the applicant is a specified person

- 4.15. Section 163 defines a ‘specified person’ to whom a notice to fix can be issued, as either the owner of the building or a person carrying out or supervising the building work.
- 4.16. Determination 2025/038⁸ clarified that ‘supervising’ building work involves ensuring that the work is carried out correctly and competently, which requires the person to have an understanding of the work being undertaken. The applicant in this case is the director and operator of the early childcare centre, and there is no indication that they have relevant experience to supervise the building work. Therefore, this part of the definition of a ‘specified person’ does not apply to the applicant in this case.
- 4.17. Regarding whether the applicant is a ‘specified person’ as an ‘owner’, section 7 provides that, for the purposes of section 44, an ‘owner’ includes any person who has agreed in writing to take a lease of the land and who is bound by the agreement because the agreement is still in force.
- 4.18. Section 44 relates to the requirement to apply for a building consent, and places responsibility for doing so on the owner.

⁷ Determination 2024/026 *The authority’s decision to issue a notice to fix in relation to a retaining wall* (27 May 2024), at 4.7 – 4.9.

⁸ Determination 2025/038 *Whether parties identified in a notice to fix were specified persons, the adequacy of the remedies in the notice and the timeframe provided for in the notice* (6 August 2025), at 4.7 – 4.9.

- 4.19. The owner of the property has confirmed that the applicant has a current lease agreement for the property. On this basis, I consider that the applicant meets the definition of 'owner' under section 7 for the purpose of section 44 and is therefore a specified person for the purposes of section 163.
- 4.20. While the notices identify the applicant as "Sunflowers ECE" rather than the full legal name of the company "Sunflowers ECE Ltd", the authority has also included the name of the company director. I consider that the naming of the specified person in the notices is sufficient to identify the party to whom the notices were issued.

Remedies and timeframe for compliance

- 4.21. Section 165(1)(b) of the Act provides that a notice to fix must state a 'reasonable timeframe' within which the notice must be complied with. The applicant has submitted that they consider the timeframe on the second notice is not reasonable.
- 4.22. What is reasonable will depend on the circumstances of the case. This requires authorities, on a case-by-case basis, to consider the practicalities of the specified person carrying out the necessary steps to resolve the non-compliance or contravention within the given timeframe. In some circumstances, the necessary work may be simple and able to be completed easily without requiring specialised tools or knowledge. Other circumstances may be more complex and thus require more time. Contributing factors may include, for example, that the scope of work is extensive or particularly complex, technical specialists are required, or other circumstances outside the person's control (such as holiday periods) that impact the ability to remedy the situation.
- 4.23. In this case, there is no apparent reason why the authority reduced the timeframe from three months in the first notice to two months in the second notice.
- 4.24. In the second notice, the authority has provided two possible remedies that the applicant can consider to remedy the contravention or non-compliance:
- (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.
- 4.25. I note, the requirement to "reinstate to [the buildings] previous consented use" is unrelated to the particulars of the contravention. This requirement would be relevant where it is alleged that the use of a building has changed without the required notification under the Act, which is not the contravention identified in this case.
- 4.26. Should the applicant choose to remove the building work and reinstate the covered deck, I consider that two months is sufficient for this remedy. Removal of the

building work is a lawful option to include as a remedy for a section 40 contravention.

- 4.27. Alternative to removing the building work, the authority has suggested the option of applying for a certificate of acceptance, which as previously confirmed in Determination 2024/026⁹ is a lawful option to remedy for a contravention of section 40.
- 4.28. Given the commercial nature of the building, in contrast to a standalone dwelling, there is an increase in the complexity of Building Code compliance requirements should the applicant wish to apply for a certificate of acceptance.
- 4.29. While a designer is usually a sufficient technical person to assist in collating a certificate of acceptance application, because this building is used as an early childhood centre there are requirements in relation to fire protection and accessibility for people with disabilities to be addressed as part of the application that may require input from other professionals.
- 4.30. It is unknown whether the applicant already had design professionals available to them. However, as it has been more than 12 months since the work was carried out, I consider it likely that the applicant would need to engage professionals to assist them in making an application to the authority for a certificate of acceptance.
- 4.31. Therefore, I consider the timeframe in the second notice to fix is not reasonable for the applicant to apply for a certificate of acceptance should they opt for this remedy.
- 4.32. The applicant has raised concerns that the authority “re-issued” the second notice two weeks after the initial issue but did not alter the timeframe for compliance. The update pertained to the cover letter accompanying the notice, where the address in the body of the letter was incorrect, not to the notice itself.
- 4.33. I consider that the edit to the cover letter was administrative in nature and did not alter the decision made by the authority to issue the notice to fix, and therefore I do not consider that a revised timeframe was required.

5. Conclusion

- 5.1. The building work was not exempt from the requirement to obtain building consent, and so there is a contravention of section 40.
- 5.2. The applicant is a specified person as defined in section 163, and the particulars of the contravention in the two notices to fix are sufficient to fairly and fully inform the recipient of the nature of the contravention.

⁹ Determination 2024/026 at 4.21.

- 5.3. Under section 188 of the Act, I have the power to confirm, reverse, or modify the authority's decision to issue the notices. In relation to the second notice to fix, I have found that the remedy requiring reinstatement of the previous use was not relevant to the contravention and the timeframe for compliance, which expired on 11 September 2025, was not reasonable.
- 5.4. As this determination has been before me from 11 August 2025, I consider it appropriate to modify the timeframe in second notice to fix, taking into account the undisputed timeframe of three months on the first notice, the time the determination has been before me, and the upcoming holiday period over late December to early January.
- 5.5. I therefore modify the decision to issue the second notice to fix to remove the reference to reinstating the previous use and update the date by which the second notice to fix must be complied with to 11 March 2026.

6. Decision

- 6.1. In accordance with section 188:
- 6.1.1. I confirm the authority's decision to issue the first notice to fix NOT21763707 and
- 6.1.2. I modify the decision to issue the second notice to fix NOT21778696 in respect of the remedy and the timeframe for compliance as set out paragraph 5.5 of this determination.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 6 January 2026.

Peta Hird

Lead Determinations Specialist