

Determination 2026/009

An authority's decision to issue a notice to fix for building work at a residential property

226 Triangle Road, Massey, Auckland 0614

Summary

This determination considers an authority's decision to issue a notice to fix for a contravention of section 40 in relation to several items of building work. It considers whether a notice to fix can be issued for work which has been completed at the time the notice is issued, and whether an authority must know when the building work occurred. The determination also considers the remedies in the notice to fix.

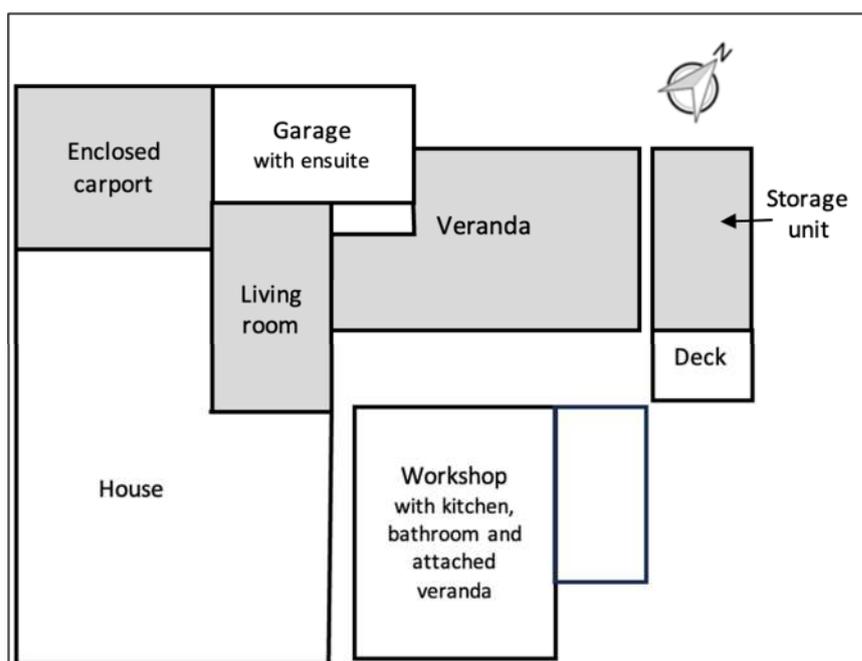


Figure 1: Plan showing approximate locations of the building work¹

¹ Not to scale. Relative positions and sizes are based on the site plan provided by the authority (in Determination 2024/056) and Map Data ©2024 Google. Structures referred to in this determination are shaded. The figure outline does not reflect the property boundaries.

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, Rebecca Mackie, 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. J and P Paul, the owners of the property (“the owners”) and recipients of the notice to fix, who applied for the determination
 - 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 decision to issue a notice to fix to the owners in relation to building work carried out at their property. The owners dispute that there was sufficient evidence to issue the notice, the basis to issue the notice under section 164(1)(a), and the remedies contained in the notice.
- 1.4. The building work discussed in this determination was the subject of an earlier notice to fix (NOT21630062) issued 3 August 2022 (“the previous notice”). The previous notice was considered in Determination 2024/056 *An authority’s decision to issue a notice to fix in relation to building work at a residential property*, issued 4 October 2024 (“the previous determination”).
- 1.5. The matter to be determined³ is the authority’s decision to issue a new notice to fix (NOT21785147) dated 27 August 2025 (“the notice”), for alleged contravention of section 40 of the Act.

Issues outside this determination

- 1.6. The determination does not revisit any decisions made in Determination 2024/056.

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

³ Under sections 177(1)(b) and (3)(e).

- 1.7. The determination does not consider the Building Code compliance of the building work.

2. Background

- 2.1. The determination relates to a residential property, which the owners purchased in 2017. On 8 July 2022, the authority inspected the property. On 3 August 2022, the authority issued the previous notice to the owners, for building work in relation to seven structures at the property which had been undertaken without building consent. The owners subsequently applied for a determination regarding that notice.
- 2.2. On 4 October 2024, the previous determination was issued. The previous determination confirmed that building work had been carried out in contravention of section 40 in relation to several structures⁴, including those which are relevant to this determination (being the carport, living room, veranda and storage unit).
- 2.3. In July 2025, the authority wrote to the owners to arrange an inspection to confirm whether the unconsented building work was still in place. The owners advised the authority that a District Court order (under section 227) would be required.
- 2.4. On 20 August 2025, the authority visited a neighbouring property and from there took photos of several of the structures at the owners' property.
- 2.5. On 27 August 2025, the new notice to fix (NOT21785147) was issued to the owners. This is the notice which is the subject of this determination. The notice alleges a contravention of section 40 in relation to the enclosure of the existing carport, the living room, the veranda, and the installation of the storage unit on a raised foundation (see Figure 1).
- 2.6. The particulars of contravention or non-compliance as given in the notice are:

Council conducted a site inspection in relation to unauthorised building works on 20/08/2025

As a result of this inspection, Council has identified that building work undertaken would have required building consent.

Contrary to **s.40 of the Building Act 2004** (the Act), the following building works have been undertaken... without first obtaining a building consent:

- The existing, carport, measuring approximately 22.4 square meters in area, attached the north-western side of the existing garage has been enclosed to form a storage room.

⁴ Previous Determination 2024/056 considered other structures additional to the relevant structures in this determination, such as a deck and workshop. The additional structures are not included in the new notice to fix.

- The existing veranda attached to the north-eastern side of the existing garage has been removed and replaced with a living room, measuring approximately 22.8 square metres in area.
- Construction of a veranda measuring approximately 42.86 square metres in area in the courtyard area between the existing dwelling and the existing 1975 garage.
- A prefabricated storage unit, measuring approximately 17.61 square metres in area, has been installed on a foundation system on the north-eastern side of the existing retaining wall with a floor level approximately 1.9m above the existing ground level.

3. Discussion

Section 40

3.1. Section 40(1) provides that a person must not carry out any building work except in accordance with a building consent. Despite section 40(1), Schedule 1 of the Act prescribes building work which is exempt from requiring building consent.

3.2. The previous determination found:

The building work in relation to... [the carport, living room, veranda, storage unit, deck, and workshop] was not exempt under Schedule 1 from the requirement to obtain a building consent. Therefore, there were grounds to issue the [previous] notice under section 164 for a contravention of section 40 regarding this building work.⁵

3.3. I am unable to revisit any decisions made in the previous determination, including the conclusions above. I have received no information to suggest that the owners have remedied the contravention of section 40 (work undertaken without the required building consent), such as through applying for a certificate of acceptance⁶ for any of the building work. Therefore, the question to consider in this determination, regarding the contravention of section 40 and whether there were grounds for the authority to issue the new notice, is whether the relevant structures were still in situ and had not been materially changed. If the relevant structures are in situ and materially the same, the previous finding that this work was carried out in contravention of section 40 remains valid.

The information/evidence relied on by the authority

3.4. The owners have argued that the evidence relied on by the authority in its decision to issue the notice was insufficient. They state that the photos taken from the neighbouring property indicate that the authority did not conduct a site visit at the

⁵ Determination 2024/056 *An authority's decision to issue a notice to fix in relation to building work at a residential property*, at [4.34].

⁶ An owner can apply for a certificate of acceptance for work carried out without a building consent. It provides some verification that the building work complies with the Building Code.

owners' property on 20 August 2025. They consider the authority has made assumptions based on the three photos attached to the notice, ie that the relevant structures remained in situ and unchanged.

- 3.5. The owners argue that the authority's reliance on the proposition that the building works are exactly the same as the building work described in the previous notice is problematic because:
 - 3.5.1. There is no evidence that the issuing officer turned their mind to the evidence relied upon for the previous notice and previous determination.
 - 3.5.2. Even if the issuing officer had turned their mind to that evidence, the passage of three years would make it unreliable, and fresh evidence of the alleged works should be required.
 - 3.5.3. The three photographs attached to the notice are not sufficient evidence to provide 'reasonable grounds' that the building works required consent.
- 3.6. I note that the authority had requested access to the owners' property but was advised by the owners that an order (under section 227) would be required. As a result, the authority took photos of the relevant structures from a neighbouring property, which were appended to the notice. The authority states that it did not need to enter the property to confirm the unconsented work as it had previously undertaken a site inspection, the work had been thoroughly assessed in the previous determination, and it was apparent without needing to go onto the property that the structures remained in situ and unchanged.
- 3.7. Previous determinations have confirmed that in issuing a notice to fix, an authority can consider any sources of information available, such as a property listing website, or other publicly available information.⁷ I consider that through viewing and/or photographing the structures from a neighbouring property, the authority established that the facts were the same or materially the same as when the previous notice was issued. Although the living room is not visible in the photos appended to the notice, the owners have not provided any evidence to indicate that any of the structures have been removed or modified in any material way.
- 3.8. I consider the authority confirmed that the structures remained in situ and not materially changed, and no certificate of acceptance had been applied for. This was sufficient to establish that the section 40 contravention (which were confirmed in the previous determination) remained and had not been addressed by the owners. I have not been provided with any evidence from the owners to dispute the authority's confirmation or any evidence that would change the conclusions in Determination 2024/056 that the building work (in relation to the relevant structures of this determination) was carried out in contravention of section 40.

⁷ Determination 2024/029 *An authority's decisions to issue a series of notices to fix* (7 June 2024), at [4.12].

The test in section 164(1)(a)

- 3.9. 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.
- 3.10. 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.⁸
- 3.11. Section 163 defines a ‘specified person’ to whom a notice can be issued, and this includes the owner(s) of a building. The previous determination established that the relevant work was carried out by (or on behalf of) the owners after they purchased the property in 2017. There has been no change in ownership since that time, and the owners are still specified persons to whom a notice can be issued.
- 3.12. The owners have put forward two separate arguments in relation to the test in section 164(1)(a), which I will address in turn.

Whether a notice can be issued for work which has already been carried out

- 3.13. In their submission provided on 10 November 2025, the owners stated:

The words in s164(1)(a) were carefully used in the Act, the plain meaning of these words require an active on-going contrivance or failure to comply, e.g., building work is being done without a building consent.

It is not for the Council to read into a section something that is not clearly there, e.g., building work has been done without a building consent.

The photos clearly indicate that there is no building work being done with or without a consent, it is not a building site and there is no ongoing contrivance or failure.

- 3.14. The meaning of the provisions must be ascertained from its text and in the light of its purpose and its context⁹. As set out in previous determinations, there is no requirement for building work to be ongoing or being carried out (in the present) for a notice to fix to be issued for a contravention of section 40(1). This is supported, for example, by the wording in section 165. In this respect, previous Determination 2024/026 noted:

[4.9] ...section 165 (which sets out the form and content of a notice to fix), refers to building work that “...is being **or has been** carried out...” [my emphasis].

⁸ 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].

⁹ Section 10 of the Legislation Act 2019

Therefore, there is no requirement for the building work to be ongoing for there to be grounds to issue a notice to fix under section 164.¹⁰

Section 165, in reference to both the present and past tense, supports that a notice to fix may relate to both work being carried out in the present and work that has been carried out.¹¹

- 3.15. This view was also supported by the District Court in *Waikato District Council v Poseidon Holdings Ltd*, which in regard to the test in section 164(1)(a), explicitly referred to actions which had *already been undertaken* in the past tense (as well as currently undertaken) as being relevant:

[74] In my opinion the phrase “contravening or failing to comply” is meant to encompass the acts and omissions of a “specified person”. The first part of the phrase “contravening”, which is a verb, connotes a sense of action/s undertaken on the part of the “specified person”. A relevant question to be asked is: “**have they undertaken any action/s** or are they currently undertaking any action/s, which violate, infringe, are contrary to, or in conflict with the Act and Building Code?” [my emphasis]¹²

- 3.16. Further, I note, the effect of applying the owner’s view would be a very narrow interpretation of section 164(1)(a), ie that building work must be being carried out (in the present) for a notice to fix to be issued for a contravention of section 40(1), which is not consistent with the purposes of the Act.
- 3.17. Practically speaking, it is simply not possible for an authority to always be aware of building work being carried out without consent at the time it is carried out. Following the owners’ interpretation, if an authority becomes aware that building work was carried out in contravention of section 40, once that work has ceased or has been completed and no longer ongoing, the authority would then be unable to issue a notice to fix for that contravention. An authority would only be able to issue a notice to fix for work being carried out in the present. This interpretation results in a very a narrow timeframe for an authority to address the contravention, which is not intended by the Act.
- 3.18. The Act provides for the regulation of building work and the setting of performance standards for buildings, as well as the accountability of owners, designers, builders and building consent authorities who have responsibilities under the Act, including ensuring that the building work complies with the Building Code.¹³ The Act requires that a consent is obtained before carrying out building work¹⁴ in order to ensure Building Code compliance.

¹⁰ Determination 2024/026 *The authority’s decision to issue a notice to fix in relation to a retaining wall* (issued 27 May 2024).

¹¹ Provided the building work is governed by the Act and the other parts of the notice to fix provisions are met, such as for example, the notice is issued to a ‘specified person’.

¹² [2021] NZDC 6951.

¹³ Section 3.

¹⁴ Unless section 41(1) applies. Section 42A(2) is also relevant to building work described in Schedule 1.

3.19. Section 14B states:

An owner is responsible for—

- (a) obtaining any necessary consents, approvals, and certificates;
- (b) ensuring that building work carried out by the owner complies with the building consent or, if there is no building consent, with the building code;
- (c) ensuring compliance with any notices to fix.

3.20. Notices to fix are an enforcement tool that make an important contribution to the achieving the purposes of the Act – including that buildings are safe and have attributes that contribute appropriately to the health, physical independence and wellbeing of the people who use them.¹⁵ To restrict the issue of a notice to fix to circumstances where the authority was aware of the section 40 contravention at the time it was carried out would not support the purposes of the Act, such as ensuring building work complies with the Building Code.

3.21. Other provisions in the Act clearly provide for an authority to take action after the work has ceased or is completed, eg there is a 12 month timeframe (under section 378) for filing a charging document in respect of an offence against the Act.

3.22. Further, previous determinations have also discussed the distinction between a contravention of the Act and an offence against the Act, noting that there is no legislated time limit for issuing a notice to fix for a contravention, including of section 40(1), unlike a charging document for an offence, which does have a legislated time limit.¹⁶

3.23. I confirm that a notice to fix can be issued for building work which has been carried out in contravention of section 40(1), and there is no requirement that the building work be ongoing at the time the notice is issued.

Whether an authority must know when the building work occurred

3.24. In their submission provided on 16 January 2026, the owners argued that to have ‘reasonable grounds’ to issue a notice for a section 40 contravention, an authority needs to establish when the building works occurred, in order to establish whether the alleged building works required a building consent when they were carried out.

3.25. The owners also state there is a clear requirement in Schedule 2 of the Building (Infringement Offences, Fees, and Forms) Regulations 2007 for the authority to provide a date of the alleged breach of section 40 on any infringement notice.

3.26. I agree that an authority would need to have an idea of when building work was carried out in order to establish that there was a contravention of the Act at that time, and to establish that the intended recipient of the notice to fix is a specified

¹⁵ Section 3.

¹⁶ For example Determination 2024/026 *The authority’s decision to issue a notice to fix in relation to a retaining wall* (27 May 2024), at [4.8].

person under section 163. However, there is no requirement in the notice to fix provisions of the Act that an authority must establish the exact date that the building work was carried out.

3.27. In this case, the work in question was carried out following the owners' purchase of the property in 2017. The previous determination assessed the building work against the relevant Schedule 1 exemptions in force at the time and confirmed that the building work required building consent when it was carried out, and that building consent was not obtained.

3.28. I also note that the infringement process is separate to the notice to fix process. The relevant form for issuing a notice to fix, Form 13,¹⁷ does not require a date that the contravention occurred. The infringement process is only relevant to the notice to fix process if an owner does not comply with a notice to fix, and the authority decides to issue an infringement notice for failure to comply with the notice to fix (which is an offence under section 168(1)). In that case, the relevant date would be the compliance date of the notice to fix, rather than the date when the building work occurred.

3.29. I am satisfied that there were grounds for the authority to issue the notice to fix, under section 164(1)(a), for the contravention of section 40 in relation to the relevant structures and that the notice fairly and fully informed the owners regarding the particulars of contravention.

The remedies

3.30. The notice contained the following remedies:

Choose one of the following options to achieve compliance:

- (1) Remove the unauthorised Building Works. Please note that a Building Consent may be required to undertake this work.
- (2) 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.

3.31. The owners consider:

3.31.1. The remedies in the notice are not clearly provided for in the Act or Form 13, and are ambiguous and uncertain. In order to make sure the remedies are clear, concise and enforceable, the authority should strictly adhere to Form 13 and section 165.

3.31.2. The remedies in the notice do not comply with Form 13 which provides "To remedy the contravention or non-compliance you must: *[state any building work that must be carried out and whether a certificate of acceptance must*

¹⁷ As set out in Schedule 2 of the Building (Forms) Regulations (2004).

be applied for]. The remedy to apply for a certificate of acceptance is either “a must apply for” or not included as a possible remedy in the notice to fix.

- 3.31.3. It makes little sense to include a requirement to apply for a certificate of acceptance if there is no evidence of work being done, as a recipient could simply apply for a certificate of acceptance, not receive the certificate of acceptance, and consider they have complied with the notice.
- 3.31.4. The remedy to ‘pursue any legal option to achieve compliance with the Building Act and code’ does not have any legislative backing and is ambiguous.
- 3.31.5. There is no power in section 165 or any other corresponding power in the Act or regulations to include the remedy of removing all unauthorised building works.
- 3.32. Section 164(2)(a) provides that “A responsible authority must issue to the specified person concerned a notice (a notice to fix) requiring the person to remedy the contravention of, or to comply with, this Act or the regulations”. This is the overarching purpose of the notice to fix process - that the contravention (or non-compliance with the Act or regulations) is remedied. The notice to fix process helps to achieve the purposes of the Act, through promoting the accountability of owners, who have responsibilities for ensuring that building work complies with the Building Code and for obtaining any necessary consents, approvals and certificates (under section 14B).
- 3.33. Form 13 is the prescribed form for a notice to fix for a contravention or non-compliance of the Act and its regulations and is not a specific form for a contravention of section 40. There are a wide range of potential contraventions/non-compliances a notice to fix could be issued for, and the remedies in a notice will differ depending on what the contravention is. As such, Form 13 and section 165 do not provide an exhaustive list of remedies that are available.
- 3.34. Although removing the unauthorised building works is not explicitly provided for in section 165 or Form 13, it would address the contravention (in respect of the purpose of a notice to fix) and is therefore an appropriate remedy. Applying for a certificate of acceptance (which is explicitly provided for in section 165(c)) is also an appropriate remedy.
- 3.35. As to the owners’ view that an owner could simply apply for a certificate of acceptance but not receive it, and consider that they have complied with the notice – I note that if the certificate of acceptance is not issued and the contravention is not otherwise addressed or remedied (ie by removing the work), it is an enforcement matter at the discretion of the authority, which, among other things, may include the issuing of a further notice to fix. If the reason the certificate of acceptance is not issued is due to the building work being non-compliant with the

Building Code, the owner has the option to bring the work into compliance and reapply for a certificate of acceptance, or remove the work.¹⁸

- 3.36. While the remedy of 'pursue any legal option' is vague, a specific option of how to pursue a legal option was given, ie applying for a certificate of acceptance.
- 3.37. I consider the remedies provided in the new notice are appropriate for a contravention of section 40 and are lawful.

4. Conclusion

- 4.1. The authority confirmed that the building work set out in the new notice to fix remained in situ and not materially changed, and no certificate of acceptance had been applied for. This was sufficient to establish that the section 40 contraventions (which were confirmed in the previous determination) had not been addressed by the owners.
- 4.2. The test in section 164(1)(a) was met, I consider there were grounds for the authority to issue the new notice to fix for the contravention of section 40 in relation to the relevant structures. Building work does not need to be ongoing at the time of the issue of a notice to fix, and while an authority should have an idea of when building work was carried out, it does not need to specify the exact date the work was carried out.
- 4.3. The remedies in the notice are lawful and appropriate.

5. Decision

- 5.1. In accordance with section 188 of the Building Act 2004, as a result of the conclusions I have reached, I confirm notice to fix NOT21785147.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 24 March 2026.

Rebecca Mackie

Principal Advisor Determinations

¹⁸ Noting that if the building work (including removal) requires a building consent, this must be obtained before carrying out the building work.