

Determination 2026/022

The authority's decision to withdraw a notice to fix relating to the compliance of a shed built along the property boundary

456 Muritai Road, Eastbourne

Summary

This determination considers the authority's decision to withdraw a notice to fix for a contravention of section 17. The matter relates to construction of a shed in 2019 and compliance with the clause C3.7 of Building Code.



Figure 1: 2021 aerial view from authority's GIS showing shed structures with translucent roofing along the property boundary wall.

The legislation discussed in this determination is contained in Appendix A. In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”) and references to “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

The Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (eg, Acceptable Solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Andrew Eames, Principal Advisor Determinations, for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment (“the Ministry”).¹
- 1.2. The parties to the determination are:
 - 1.2.1. J McLachlan & D Cornford – owners of ‘other property’ and applicant (“the applicants”)
 - 1.2.2. Albinoni Trustees Limited – owner of 456 Muritai Road (“the owner”)
 - 1.2.3. Hutt City Council - the territorial or building consent authority (“the authority”)
- 1.3. The matter to be determined, in terms of section 177(1)(b), is the authority’s decision to withdraw notice to fix #17 issued to the owners of 456 Muritai Road for a contravention of section 17 of the Building Act. This will include whether the building work carried out to a shed in 2019 complied at that time with Building Code C3 to the extent required by the Act.
- 1.4. The notice to fix referred to “fire risk to the neighbouring building,” the central issue in dispute between the parties is the protection of other property² and I consider the applicant is a party in this respect and to the matter to be determined. We note for the assistance of the parties that the protection of other property from this building would primarily be addressed by clause C3.6, which seeks to limit the level of heat radiation emitted from the building on to other property. By contrast, clause C3.7 applies in situations where a building is proposed to be constructed within 1 metre of the relevant boundary and the requirement focuses on the need for the building to protect its external wall from heat radiation being emitted from other property. These clauses do work together at times in relation to other property but have their own distinct requirements.

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

² As defined in Section 7 of the Act.

2. The building work and background

- 2.1. The owner's property is a 491m² section with a residential dwelling and several outbuildings.
- 2.2. The site contained a concrete block outbuilding/shed [existing shed] which was built prior to the current building legislation. It was approximately 9m² and utilised boundary blockwork for its rear wall. The second and third top row of the blockwork was open lattice blockwork.
- 2.3. In 2019 a second shed adjoining the original was constructed [new shed]. The new shed is approximately 2.7m x 2.2m (6m²) and is adjacent to the boundary wall³ and the existing outbuilding. It was constructed using a timber frame on concrete slab foundation, with a plywood-lined interior, vertical timber plywood shiplap cladding (extending above the blockwork boundary wall) and translucent PVC roofing.
- 2.4. Aerial site photos indicate that the roofing of the existing shed was replaced with translucent PVC sheeting around this time. In addition, translucent roofing was added over an area between the existing shed and dwelling housing rubbish bins. A timber strutting beam connecting the existing shed to the dwelling was used to support this section of roofing.
- 2.5. On 23 August 2023 the authority approved a building consent for the rebuild of 454 Muritai Road, the property belonging to the applicant, next door to the owner's property.
- 2.6. As part of this redevelopment, a boundary survey was undertaken on 21 February 2024, which identified both sheds and the boundary wall encroached onto the applicant's property by 80-170mm.
- 2.7. During construction, the applicants removed the blockwork boundary wall. The owners removed the portion of the existing shed roof that extended over the boundary wall to allow for safe removal. Following removal of the existing shed roof the owners replaced it with a tarpaulin cover.
- 2.8. Following complaints by the applicants, the authority issued the first notice to fix (ID #12) to the owner on 12 April 2024. The particulars of the contravention or non-compliance given in the notice was:

Section 40 of The New Zealand Building Act 2004 - Building not to be constructed, altered, demolished or removed without consent.

- 2.9. While this part of the notice does not state what building this refers to, the notice states that the owner must, to remedy the contravention or non-compliance:

³ While no exact measurement was provided, photographic evidence indicates the shed was positioned against the boundary block work wall

Remove the sheds.

Relocate the sheds

Apply for building consent for approval to rebuild the sheds in accordance with Section 17 of The New Zealand Building Act 2004 - All building work must comply with building code.

2.10. The 'further particulars' section of the notice reads:

Un-consented sheds erected within 1 metre of boundary.

You must contact the Territorial Authority on completion of the required building work.

If you do not comply with this notice, you commit an offence under section 168 of the Building Act 2004 and may be liable to a fine of up to \$200,000 and a further fine of up to \$20,000 for each day or part of a day that you fail to comply with this notice.

2.11. The authority issued a second notice to fix, identical to the first in terms of the particulars and further particulars. (Although this notice contained the same issue date & ID number, authority records indicate this was issued on 25 June 2024).

2.12. Following this second notice to fix, the owner elected to apply for a building consent to rebuild the sheds.

2.13. The authority carried out a 'dangerous building inspection' on 6 September 2024 in relation to the existing shed. At the time, its roof and rear wall were removed, leaving only blockwork walls and strutting beam. A dangerous building notice was not issued as the authority believed the building in question did not meet the definition of 'building' under section 8 of the Act.

2.14. The authority issued a third notice to fix (ID #17) on 16 October 2024. The details of the contravention or non-compliance given were:

Failure to comply with Section 17 under the Building Act 2004:

17 All building work must comply with building code

All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.

The shed extension⁴ constructed in 2019 is located closer than 1 metre to a relevant boundary⁵ and non-fire rated, and therefore does not comply with building code clause C3.7. This creates a fire risk to the neighbouring building currently being constructed at 454 Muritai Road.

2.15. The remedy given by the authority in the notice for the contravention or non-compliance was that the owner must:

Move the shed extension at least 1m away from the neighbouring boundary at 454 Muritai Road so it no longer poses a fire risk.

2.16. The notice to fix states it must be complied with by 24 October 2024.

2.17. The authority explained in a November 2024 letter to the applicants, that this notice to fix was issued as an interim measure to move the 2019 new shed at least 1m from the boundary. As additional building work had been completed on the applicants' site, this increased the concern about the boundary wall to the new shed and the fire risk it posed.

2.18. The owner's building consent application to rebuild the sheds (BC240671) was refused by the authority on 10 March 2025.

2.19. The authority issued an infringement notice to owners on 21 March 2025 and filed enforcement proceedings in the District Court in respect of the contravention.

2.20. On 24 November 2025, the authority emailed the owners to advise the proceedings had been withdrawn.

3. Submissions

The Applicants

3.1. The applicants submitted (in summary) that:

3.1.1. the building work undertaken in 2019 required compliance with clause C3.7 of the Building Code.

3.1.2. the new building work was an extension to the existing shed and replacement of existing shed roof. As such, both should be assessed together as a single 15m² structure (or combined fire source) under section 112 in regard to clause C3.7 of the Building Code.

⁴ The authority refers to a "shed extension" here and elsewhere, but I have preferred to simply refer to the new 2019 work as a "shed".

⁵ The definition states, "**relevant boundary** means the *boundary* of an *allotment* that is *other property* in relation to the *building* in question and from which is measured the separation between the *building* and that *other property*; and for the external wall of any *building*, the *relevant boundary* is the nearest of—
(a) a *boundary* of a freehold *allotment*, ..."

- 3.1.3. the existing shed and new building work are structurally integrated. The roofing change of both structures in 2019 represents a material change in fire performance and creates a continuous fire spread path.
- 3.1.4. the roof structures of the sheds were connected to the main dwelling, which further increases the potential fire load and fire spread between the house and the combined sheds.
- 3.1.5. given the proximity of the sheds to the new dwelling, the applicants are concerned about the potential spread of fire between properties.
- 3.1.6. the authority was incorrect to withdraw the notice to fix and in deciding not to pursue enforcement and court proceedings without reassessment of Building Code compliance.
- 3.1.7. while they acknowledge that civil proceedings currently underway in relation to the boundary encroachment, they argue that Building Code compliance is a separate matter.

The owner

- 3.2. The owner submitted (in summary) that:
 - 3.2.1. the blockwork boundary wall, erected late 1910s/early 1920s, served as rear wall and fire separation for the existing shed, constructed in the 1950s, and the new 2019 building work.
 - 3.2.2. Rule 4F 4.2.4 'Setbacks' in the City of Lower Hutt District Plan, states that a setback is not required where an existing wall exists between buildings on adjacent sites.
 - 3.2.3. the existing shed did not require building consent as it was constructed prior to Building Act 1991 and the new shed, constructed in 2019, was pursuant to the Building and Construction (Small Stand-alone Dwellings) Amendment Bill which came into force on 15 January 2026.
 - 3.2.4. the new building work was an extension, which was physically connected to an existing lawful structure, did not create a new stand-alone building, and remained part of a single, longstanding composite structure, consistent with the site's history.
 - 3.2.5. the physical attachment of the new shed to the existing shed does not convert a historic composite structure into a new "combined structure" for Building Code purposes.
 - 3.2.6. any Building Code issues arise only because of the removal of the historic boundary wall by the applicants. Any violation was not created by the owners' actions.

3.2.7. the authority acted reasonably in assessing the situation.

The authority

3.3. The authority made no submission in relation to this determination, but relevant points from the authority within communications to owner and applicants are:

3.3.1. amendments to the Building Act (effective from 28 October 2025⁶), meant building consent is not required for certain sheds, including those with a maximum floor area of 10m², even where they are closer than 1m to the boundary.

3.3.2. it considered it was no longer appropriate to pursue further enforcement following legislative changes. The authority stated that it has spent an “extraordinary” amount of staff time responding to this matter and several informal and formal actions have been taken. As such, it believed that the matter is best resolved through civil proceedings, given the boundary dispute.

3.3.3. the authority has discretion to make enforcement decisions, such as the withdrawal of notices to fix.

3.3.4. the responsibility for ensuring compliance with the Building Code rests with owner of the shed. In its email of 24 November 2025, the authority stated to the owner ‘Please note that although building consent is not required, the shed does still have to comply with the Building Code’.

3.3.5. boundary disputes between owners are a civil matter outside of the authority’s jurisdiction.

4. Fire and Emergency New Zealand’s opinion

4.1. I consulted with FENZ under section 170(a) about the fire safety aspects of the determination.

4.2. FENZ reviewed the information supplied by the parties and provided the following comments.

4.2.1. If the rear of the new shed was constructed directly against a continuous solid concrete brick wall, and that wall extended for the full width and height of the rear wall of the new shed, then that wall is likely to have been able to achieve the extent of fire rating required to meet the performance requirements of the Building Code (clause C3.7).

⁶ I believe the authority is referring to Schedule 1 clause 3(2): repealed, on 23 October 2025, by clause 4(1) of the Building (Exempt Roof-mounted Solar Panel Arrays and Building Work) Order 2025.

- 4.2.2. However, if the wall contained openings, holes, gaps, or any other discontinuities, those areas would compromise the wall's integrity and ability to act as a fire-separating barrier.
- 4.2.3. If any part of the rear wall of the shed extended above the height of the brick wall, then the wall would not protect those exposed parts of the shed from contributing to horizontal fire spread to the neighbouring property.

5. Discussion

Notice to Fix

- 5.1. Notices to fix are governed by sections 163 to 168 of the Act. Section 164(1)(a) provides for an authority to issue a notice to fix if it considers, on reasonable grounds, that a specified person is contravening or failing to comply with the Act or its regulations.
- 5.2. In this case, the October 2024 notice to fix stated that the 2019 'shed extension' was built in contravention of section 17 because it was closer than 1m to a relevant boundary and does not comply with clause C3.7 of the Building Code.

Was there a contravention of section 17?

- 5.3. All building work is required to comply with the Building Code. Section 17 states

All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.
- 5.4. I must first consider the compliance of the 2019 shed with clause C3 *Fire affecting areas beyond the source* of the Building Code. Clause C3.7 was the performance requirement indicated in the notice to fix., the functional requirements of which include that buildings must be designed and constructed so that there is a low probability of *fire* spread to *other property* vertically or horizontally across a *relevant boundary* (C3.3).
- 5.5. Clause 3.7 requires:

External walls of *buildings* that are located closer than 1 m to the *relevant boundary* of the property on which the building stands must either:

 - (a) be constructed from materials which are not combustible building materials, or [...]
 - (c) for buildings in Importance Levels 1 and 2, be constructed from materials that, when subjected to a radiant flux of 30 kW/m², do not ignite for 15 minutes.

- 5.6. Clause A3 sets out building importance levels for the purposes of clause C. The sheds, as 'small non-habitable buildings' are importance level 1 buildings.
- 5.7. It follows that the external walls of the new shed, which are within 1m of the relevant boundary, must be either constructed from materials which are not combustible, or from materials that, when subjected to a radiant flux of 30 kW/m², do not ignite for 15 minutes.
- 5.8. The timber cladding of the new shed constitutes a combustible material. There is no evidence provided that timber is treated in any way to protect against the risk of combustion, and the authority's notice to fix of 16 October 2024 confirms the construction is non-fire rated. Unprotected timber, such as the plywood and weatherboards, subject to radiant flux of 30 kW/m², typically ignites in less than 2 minutes⁷.
- 5.9. Consequently, the new shed does not meet requirements of either clause C3.7(a) or C3.7(c).
- 5.10. The owner states that the sheds complied prior to boundary wall removal and it was the removal of the wall that was the cause of the non-compliance. However, as noted above, the construction of the new shed extended above the blockwork wall, with timber construction adjacent to the position of the boundary.
- 5.11. Therefore, the building work for the new shed, at time of construction in 2019, did not meet the performance requirements of clause C3.7(a) and (c) of the Building Code, for the reasons set out in paragraphs 5.5-5.9 above.

Section 112

- 5.12. The applicants have stated that as the building work in 2019 was a replacement roof and extension to an existing shed, section 112 of the Act (which deals with alterations to existing buildings) applies. They believe that the sheds should be considered as a single structure in respect to compliance with clause C3.7 of the Building Code.
- 5.13. However, section 112 only applies to the granting of a building consent. As no building consent was sought for the building works, section 112 does not apply in this instance.

Building Act amendment and update to Schedule 1

- 5.14. At the time of construction in 2019, the more recent changes to Schedule 1 of the Building Act (via The Building (Exempt Roof-mounted Solar Panel Arrays and

⁷ BRANZ Study Report SR474 (2024). Fire-safe use of timber construction II – partial timber linings. Hare, G., Frank, K., Walsh, A., Li, K., Baker, G. & Wade, C. Page 8 Table 1: Average ignition time of plywood at 30 kW/m² = 76 seconds.

Building Work) Order 2025, and the Building and Construction (Small Stand-alone Dwellings) Amendment Act 2025, were not in effect.

- 5.15. The authority has cited these 2025 changes to Schedule 1 as its primary reason not to pursue enforcement.
- 5.16. Schedule 1 of the Building Act provides a series of exemptions for building work which do not require building consent. 3(1) of that Schedule provides that single-storey detached buildings not exceeding 10 square metres in floor area do not require a building consent providing that building work:
- (a) is not more than 1 storey (being a floor level of up to 1 metre above the supporting ground and a height of up to 3.5 metres above the floor level); and
 - (b) does not exceed 10 square metres in floor area; and
 - (c) does not contain sanitary facilities or facilities for the storage of potable water; and
 - (d) does not include sleeping accommodation, unless the building is used in connection with a dwelling and does not contain any cooking facilities.
- 5.17. The Building (Exempt Roof-mounted Solar Panel Arrays and Building Work) Order 2025 included repealing Schedule 1 clause 3(2), which stated “*However, subclause (1) does not include building work in connection with a building that is closer than the measure of its own height to any residential building or to any legal boundary*”.
- 5.18. While this amendment allows for single-storey detached buildings, not exceeding 10m², to be positioned closer to boundaries without building consent, section 17 is still applicable, that is, the building work must comply with the building code.
- 5.19. As such, building work in connection with these single-storey detached buildings, not exceeding 10m², constructed closer than 1.0m to the relevant boundary still requires compliance with clause C3.7⁸ (and clause C3.6).
- 5.20. The authority’s November 2025 communication to the owner clearly identifies that, while not pursuing the matter further, building work still needs to comply with the Building Code.
- 5.21. The owner’s submissions cite both the district plan rule (Rule 4F 4.2.4 ‘Setbacks’) and the Building and Construction (Small Stand-alone Dwellings) Amendment Act 2025 as evidence of compliance.
- 5.22. However, district plan rules relate to the powers under the Resource Management Act 1991 not to the Building Act or Building Code compliance. Furthermore, the Building and Construction (Small Stand-alone Dwellings) Amendment Act 2025 does

not exempt work from having to comply with the Building Code and would not apply to this particular building.

Authority's decision to withdraw the notice to fix

5.23. Section 164(2) states that if specified person is contravening then 'authority **must** issue to the specified person concerned a notice' [my emphasis].

5.24. I am reluctant to conclude that an authority always has to issue a notice to fix in such a situation. Authorities do have discretion on compliance and enforcement activities. In relation to notices to fix, previous determinations have taken the approach that there is discretion in the exercise of that power.⁹ I offer the below commentary to assist.

5.25. In exercising that discretion, it is for the authority to consider the purposes and principles of the Act, which include:

s3(b) to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.

s4(2)(i) the need to provide protection to limit the extent and effects of the spread of fire, particularly with regard to—

(i) household units (whether on the same land or on other property); and

(ii) other property

s4(2)(q) the need to ensure that owners, designers, builders, and building consent authorities are each accountable for their role in ensuring that— [...]

(iv) building work for which a building consent is not required complies with the building code.

5.26. The authority cited the Solicitor-General's *Prosecution Guidelines*¹⁰ as a reason not to pursue ('the public interest test', that is 'Does the public interest require a prosecution to be brought'), given how time consuming and expensive it is to prosecute.

5.27. It is noted that evidence of the non-compliance, the authority's actions and the current situation are recorded on the property file for current and future owners of the property.

⁹ See for example Determination 2026/007 *The issue of a building consent, an alleged failure to issue a notice to fix, and compliance of proposed building work with Clause B1* (13 March 2026) [3.27]

¹⁰ Te Tari Ture o te Karauna Crown Law, 'The Solicitor-General's Prosecution Guidelines', 2025, <https://www.crownlaw.govt.nz/assets/Uploads/Prosecution-Guidelines/Solicitor-Generals-Prosecution-Guidelines-2025.pdf>

5.28. Beyond the removal of the boundary wall, which was undertaken by the applicants, the construction has not been altered, and the new shed has not been moved so the contravention continues to exist.

5.29. Regarding the authority's decision, at the date the authority notified the owner that the October 2024 notice to fix was 'withdrawn', the compliance deadline given in the notice to fix had already expired. As such, the notice was no longer in effect – meaning there was nothing to withdraw.

6. Decision

6.1. In accordance with section 188 of the Building Act 2004, I determine that there were grounds to issue the notice to fix. However, as the notice to fix had expired and could not be 'withdrawn' because it was no longer in effect, I elect to neither confirm, reverse nor modify the decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 25 June 2026.

Andrew Eames

Principal Advisor Determinations