

Determination 2026/038

An authority's decision to issue a notice to fix for building work to an apartment deck

Unit 506, 28 College Hill, Freemans Bay, Auckland

Summary

This determination relates to a notice to fix where the authority considered that work on a Unit's existing deck and door threshold, and the installation of a new rainwater head and downpipe from the deck, undertaken without a building consent, was building work regulated under the Building Act. The determination also considers the content of the notice to fix.



**Figure 1: view of deck looking east
(prior to the building work)**

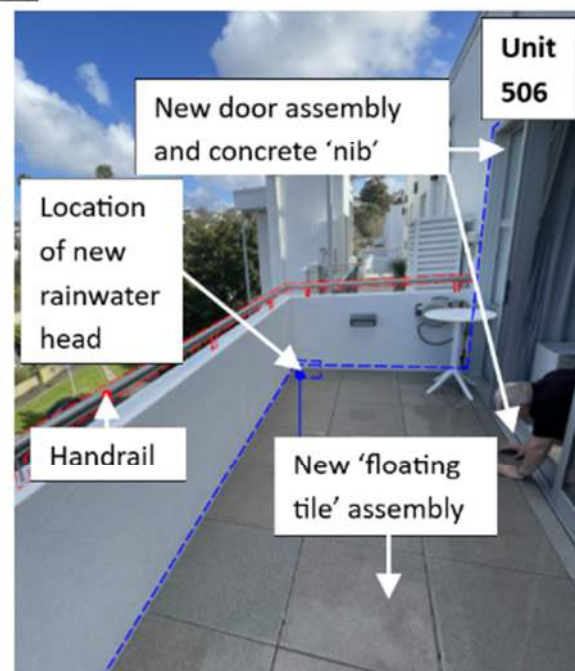


**Figure 2: view of deck looking west
(after the building work)**

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 and J Bower, the owners and recipients of the notice to fix (“the owners”), who applied for this determination.
 - 1.2.2. The Body Corporate for the building, the owners of common property (“the Body Corporate”).
 - 1.2.3. Auckland Council, the authority carrying out its duties as a territorial authority or building consent authority, (“the authority”).
- 1.3. This determination arises from a notice to fix issued for building work undertaken by the Body Corporate on the owners’ existing deck and door threshold, and the installation of a new rainwater head and downpipe from the deck. The authority believes the work was required to be carried out in accordance with a building consent. However, the owners and Body Corporate believe the work was exempt under Schedule 1 of the Act.
- 1.4. The matter to be determined, under section 177(1)(b) and (3)(e) of the Act, is the authority’s decision to issue a notice to fix to the owners dated 5 May 2026 (reference number NOT21816898).
- 1.5. In deciding this matter, I will consider:
 - 1.5.1. The particulars of contravention alleged in the notice to fix, specifically the undertaking of building work to alter an existing deck² and door threshold, and installation of a new rainwater head and downpipe, contrary to section 40, without first obtaining a building consent.
 - 1.5.2. The form and content of the notice to fix.

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

² The notice to fix refers to a ‘balcony’.

Issues outside this determination

1.6. The determination will not consider:

- 1.6.1. The Building Code compliance of the completed building work in accordance with section 17.
- 1.6.2. Any civil, contractual or financial arrangements between the parties and the builder.
- 1.6.3. Any separate requirements of the Body Corporate.
- 1.6.4. Any other notices to fix issued by the authority to the Body Corporate and builder.
- 1.6.5. Any application for a certificate of acceptance for some of the work.

2. The building work and background

- 2.1. The property is a Unit (number 506) on level five of a multi-storey apartment complex, with a deck on the southern side (refer to figure 1). This deck also serves as the roof to part of the Unit below (number 409). The common property is owned and managed by the Body Corporate.
- 2.2. The work to construct the original building was carried out under a staged building consent and a code compliance certificate (“CCC”) was issued by the authority on 12 December 2005.
- 2.3. In April / May 2025 building work was carried to the owners’ deck, door threshold, rainwater head and downpipe (refer to figure 2).
- 2.4. On 11 June 2025 the authority conducted a site inspection.
- 2.5. On 5 May 2026, the authority issued a notice to fix (number NOT21816898) to the owners.
- 2.6. The “particulars of contravention or non-compliance” in the notice to fix stated (in summary) work had been carried out at the Unit without a building consent, contrary to section 40; in particular the installation of a concrete ‘nib’ to replace a wooden ‘nib’ to support a new double glazed door assembly, the replacement of a previous direct fixed tiled deck with a new floating tile assembly, and the installation of an additional rainwater head and downpipe, discharging onto an adjacent part of the building.
- 2.7. The notice to fix stated the authority had concluded that there were no exemptions specified in Schedule 1 of the Building Act that covered this work as “comparable products and assembly have not been used, some parts of the replacement are not

in the same position, and new work (the new rain-head and downpipe) has been undertaken”.

2.8. The remedies provided in the notice to fix were to either:

(1) Pursue any legal options open to [the owners] to make the unconsented building work compliant with the Act and the Regulations. This may involve the making of an application for a certificate of acceptance (COA) in accordance with [section] 96 of the Act.

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

2.9. The notice stated it must be complied with by 5 May 2026.

3. Submissions

The owners

3.1. The owners submit the work was carried out by the Body Corporate, and believe the work was exempt from requiring building consent under Schedule 1.

The Body Corporate

3.2. The Body Corporate submits it believes the work was exempt under Schedule 1, specifically clause 1, which allows for general repair, maintenance and replacement, and clause 34, which provides for alteration to drains for a dwelling if the alteration is of a minor nature.

The authority

3.3. The authority submits that it was appropriate to issue the notice to fix as it believes the work to construct the concrete nib, reconstruct the deck, and install the rainwater head and downpipe required a building consent. The authority submits there was no exemption to carry out the building work under any clauses in Schedule 1.

4. Discussion

Legislation

4.1. 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 person³ is contravening or failing to comply with the Act or the regulations.

- 4.2. The notice to fix issued in this case alleges the owners have contravened section 40. Section 40 provides that “A person must not carry out any building work except in accordance with a building consent”.
- 4.3. Section 41(1)(b) states that, despite section 40, building consent is not required if the building work falls within the work described in Schedule 1 of the Act. Items listed in Schedule 1 are often described as being ‘exempt’ from requiring a building consent.

The installation of a new concrete ‘nib’

- 4.4. The first contravention in the notice to fix is concerned with the installation of a new 155mm high concrete ‘nib’ (incorporating D10 vertical starter bars at 900mm centres fixed by epoxy into the existing floor slab and a single D10 horizontal steel fixed to the starter bars and into the end walls), to replace a previous 90mm high timber ‘nib’. The ‘nib’ provides support for a new double-glazed door assembly which separates the external deck from the internal space of the owners’ Unit.⁴
- 4.5. The owners and Body Corporate have relied on carrying out the building work in accordance with Schedule 1, clause 1.
- 4.6. Schedule 1, clause 1(1) is concerned with the repair and maintenance of a building product or assembly.
- 4.7. A repair can include new work because “repair” is included in the definition of “alter”, and “alteration” is included in the definition of “building work” (section 7).⁵
- 4.8. Further, in determination 2024/002 it stated, ““repair and maintenance” does not necessarily exclude the addition of new building elements, as long as the new building elements are comparable to the existing building product or assembly”.⁶
- 4.9. Regarding a ‘comparable building product or assembly’, I have relied on previous determination 2013/071, which stated it was appropriate to “examine a number of aspects of the building work including the similarity in function, the compatibility between the materials, the complexity of the finished assembly (typically a

³ Section 163 defines a ‘specified person’ to whom a notice can be issued, and this includes the owner of the building.

⁴ The notice to fix states the new “slightly smaller” (sic) door assembly, to replace the previous single-glazed assembly, “falls within the scope of Clause 1 of Schedule 1”; therefore, since the replacement door assembly is not disputed by the parties, I have not considered this further in this determination.

⁵ See previous determination 2013/058 *Regarding the authority’s exercise of its powers of decision in respect a notice to fix issued for work done under Schedule 1(a)* (23 September 2013) at paragraph 5.2.4.

⁶ Determination 2024/002 *The issue of a notice to fix for building work on an existing building’s foundation* (31 January 2024) at paragraph 4.6.

comparison of construction details), and whether the new work employs commonly available products or systems”.⁷

- 4.10. Schedule 1, clause 1(2) is concerned with the replacement of a building product or an assembly in or associated with a building, provided a comparable building product or assembly is used and the replacement is in the same position.
- 4.11. Before considering if the building work was exempt from requiring a building consent under Schedule 1, clause 1(1) or clause 1(2), I have first considered whether the work was not exempt due to any of the criteria in clause 1(3) which excludes certain types of building work:
 - 4.11.1. Sub-clauses (a), (b) and (d) of clause 1(3) do not apply as the work to construct the new concrete ‘nib’ does not affect a specified system, the building’s structural behaviour or fire-safety properties, and is not sanitary plumbing or drainlaying.
 - 4.11.2. Likewise, sub-clause (c) does not apply; a building consultant stated in a report⁸ “the timber threshold packer was wet but with no signs of decay when exposed after the removal of the joinery, suggesting that the 20-year-old membrane may have recently failed or the joinery mitre seals had failed”. Although it is not clear what caused the ingress of external moisture, this does not indicate the previous timber ‘nib’ had failed to satisfy the provisions of the Building Code for durability.
- 4.12. Considering the factors discussed in determination 2013/071 as noted above, I have reached the following view on a ‘comparable building product or assembly’ (noting the same criteria applies for both Schedule 1 clauses (1) and (2)(a)):
 - 4.12.1. Regarding the **similarity in function**, both the previous timber ‘nib’ and the replacement concrete ‘nib’ perform the same function. They both provide support for the door assembly and form part of the separation between the internal and external spaces, including a means of contributing towards preventing the ingress of external moisture.
 - 4.12.2. Regarding the **compatibility between materials**, the new concrete ‘nib’ is compatible with the existing concrete wall, floor and deck construction as well as the new screed on the deck. Regarding the new aluminium door joinery and sill flashing, these are separated by a proprietary “waterproofing membrane”.⁹ The materials are compatible.

⁷ Determination 2013/071 *The compliance of proposed repairs to an earthquake-damaged foundation including partial replacement of a concrete perimeter foundation wall* (15 November 2013) at paragraph 4.6.2.

⁸ Dated 17 April 2026, version 3. It appears the building consultant was engaged by the Body Corporate to review and provide advice on the completed work.

⁹ Refer to certificate of acceptance plans A307 and A305. I note the manufacturer’s ‘system data sheet’ states its product can be used in combination with various substrates, including concrete and aluminium.

- 4.12.3. Regarding the **complexity of the finished assembly**, the parties have not provided construction details for the previous timber 'nib' other than stating it was 90mm high. For example, it is not clear how it was fixed in position. By contrast Certification of Acceptance plan A305 details the new concrete 'nib' has been fixed in position with D10 vertical steel rods at 900mm centres and a single horizontal D10 bar tied to the rods and fixed into the wall construction at either end. The nature of the construction of the finished assembly is not complex.
- 4.12.4. Regarding whether the new work employs **commonly available products or systems**, the new concrete 'nib' was formed using timber formwork, and uses a combination of concrete, steel bars, epoxy resin, and a proprietary waterproofing membrane. All are commonly available products or systems.
- 4.13. For completeness, the notice to fix stated the authority was of the view "A timber nib and a concrete nib are not a comparable building product as the material properties and their structural characteristics are different". I agree the material properties of timber and concrete are not the same, but I do not believe that is a sole deciding factor. Further, I have already considered neither the previous timber 'nib' or the new current 'nib' affect the structural characteristics of the building, and both were only intended to support the load from the door assembly, and I have received no information to suggest either the previous timber 'nib' did not, or the new concrete will not, support such a load.
- 4.14. Taken together, I am of the view the construction of the new concrete 'nib' in lieu of the previous timber 'nib' was exempt from requiring a building consent under Schedule 1, clause 1(1).

Reconstruction of the deck

- 4.15. The second contravention relates to the reconstruction of the deck (above the level of the existing concrete substrate).¹⁰ The owners and Body Corporate have relied on carrying out the work in accordance with Schedule 1, clause 1.
- 4.16. The previous deck construction relied on direct-fixed tiles and grout on a screed (laid to a fall extending from a high point at the north-west corner of the deck towards the south-east corner leading to a single rainwater head) on proprietary waterproof and acoustic membranes.

¹⁰ The contravention regarding the rainwater head and downpipe is discussed separately below.

- 4.17. The reconstructed deck relies on ‘floating tiles’ on proprietary adjustable pedestals and acoustic separation pads¹¹, over a proprietary liquid applied membrane roof waterproofing system, over a screed laid to a fall from a high point mid-way across the deck close to the door threshold then extending in opposite directions to low points adjacent to the south-west and south-east corners of the deck.
- 4.18. I have adopted the same approach here that was considered above regarding the concrete ‘nib’.
- 4.19. I have first considered whether the work was not exempt due to any of the criteria in clause 1(3):
- 4.19.1. Sub-clauses (a), (b) and (d) do not apply as the work does not affect a specified system, the building’s structural behaviour or fire-safety properties, and is not sanitary plumbing or drainlaying.
- 4.19.2. As noted above (refer to paragraph 4.11.2), a building consultant stated, “the timber threshold packer was wet but with no signs of decay when exposed after the removal of the joinery, suggesting that the 20-year-old membrane may have recently failed or the joinery mitre seals had failed”. It is not clear what caused the ingress of external moisture or when it first became apparent; for example, it is not clear if the ingress was a result of failure of the previous waterproofing membrane (and/or another part of the construction) or if it occurred within 15-years from when the code compliance certificate was issued in 2005 (ie clause B2.3.1(b)). In the absence of any clear information to the contrary, I am of the view clause 1(3)(c) does not apply.
- 4.20. I have reached the following view on a ‘comparable building product or assembly’ (noting the same criteria applies for both Schedule 1 clauses (1) and (2)(a)):
- 4.20.1. Regarding the **similarity in function**, the construction of both the previous deck and new deck are intended to provide an open space external to the Unit so a person(s) could walk, stand or sit on that surface, including (but not limited to) a means to prevent the ingress of external moisture and to dispose of surface water collected and concentrated by the deck (which also acts as a roof to Unit 409 on level 4). There is a similarity in function.
- 4.20.2. Regarding the **compatibility between materials**, the new deck construction is supported on the existing in-situ concrete slab. A review of the product manufacturers’ technical data referenced in the certificate of acceptance plans would suggest the various components (being the proprietary screed, waterproof membrane, acoustic pads, pedestals and tiles) are compatible

¹¹ On 6 August 2026, the owners and the Body Corporate confirmed to the Ministry the acoustic pads had not yet been installed despite being included in the certificate of acceptance plans.

with the other materials in which they are in contact with (including from rainwater runoff). The new materials are compatible.

- 4.20.3. Regarding the **complexity of the finished assembly**, the previous deck comprised a screed laid to a dual fall, from a single high point at the north-west corner of the deck to low point adjacent to the south-east corner. The previous tiles were direct fixed to the screed and the joints grouted. However, the new deck assembly involved forming a new screed finish to fall in multiple different directions, and the tiles are supported on proprietary pedestals (intended to be used in combination with the acoustic pads) that would have required levelling to provide a flat tiled surface while also taking into account the multiple combination of falls of the screed below. I do not consider the installation of the new proprietary waterproof membrane was complex, but there was a different level of complexity in constructing the new screed and 'floating tiles' compared to what was there before that does not meet this test.
- 4.20.4. Regarding whether the new work employs **commonly available products or systems**, based on the manufacturer's specifications for the various building products and systems referred to in the certificate of acceptance plans, it appears they are commonly available.
- 4.21. I am of the view the construction of the new deck did not meet the test where a comparable building product or assembly was used (due to the complexity of the finished assembly). Therefore, the owners could not rely on carrying out the building work under Schedule 1, clause 1(1).
- 4.22. The same test is also not met under Schedule 1, clause (2)(a) as that is also dependant on a comparable building product or assembly is used. Regardless, for completeness, I have also considered if the replacement of the building product or assembly is in the same position. In my view, it is not. This is evident because the finished external (upper) surface of the deck is now higher than the previous deck and required the installation of a new rainwater head to dispose of surface water due to the multiple falls created by the new screed. Therefore, the owners could not rely on carrying out the building work under Schedule 1, clause 1(2).
- 4.23. In conclusion, the building work to construct the new deck was not exempt under Schedule 1, clause 1.
- 4.24. I have also considered if the work was exempt under clauses in Schedule 1. I have reviewed and discounted clauses 17 and 17A since the deck is neither a porch or veranda on the ground or first floor level of the building, and clause 24 since it is possible to fall more than 1.5m if it collapses.
- 4.25. Therefore, I conclude the building work to reconstruct the deck was not exempt under Schedule 1 and was required to be carried out under a building consent. As no such building consent was obtained, there was a contravention of section 40.

Installation of new rainwater head and downpipe

- 4.26. The third contravention is the installation of a new rainwater head and downpipe to the south-west corner of the deck located on ‘common property’ owned by the Body Corporate.¹² An existing rainwater head and downpipe is located towards the south-east corner of the deck.
- 4.27. As noted above, the owners’ deck also serves as a roof to part of Unit 409 on level 4.
- 4.28. The Body Corporate has stated reliance on carrying out the work in accordance with Schedule 1, part 2, clause 34.
- 4.29. Schedule 1, part 2, relies on the sanitary plumbing and drainlaying being carried out by a person authorised under the Plumbers, Gasfitters and Drainlayers Act 2006 [“PGDA”]. In this case the Body Corporate has provided a Producer Statement – Construction (PS3)¹³ ‘Plumbing’ from a certifying plumber to ‘Install rain-head [and] downpipe to [second] ou[t]let [sic] / overflow on enclosed balcony’.
- 4.30. Schedule 1, clause 34, is concerned with ‘minor alterations to **drains**’ [my emphasis], and subclause (1) provides for an ‘alteration to **drains** for a dwelling if the alteration is of a minor nature’.
- 4.31. Schedule 1, clause 34, subclause (2) does not include making any new connection to a service provided by a network utility operator. The new downpipe discharges to a lower-level roof as part of the same building so the new work is not subject to subclause (2).
- 4.32. Section 4 of the PGDA provides ‘**drain** - (a) means a pipe or series of pipes constructed or laid for the conveyance of...stormwater...; but (b) does **not** include – (ii)...a **downpipe for the conveyance of water from the roof a building**’ [my emphasis].
- 4.33. Clause A2 defines ‘drain’ as ‘a pipe normally laid below ground level including fittings and equipment and intended to convey...surface water to an outfall’. The same definition is used in Acceptable Solution E1/AS1 Surface Water.¹⁴
- 4.34. The term ‘normally’ could infer something other than an installation below ground, but if Schedule 1, clause 34 was intended to include installations (such as rainwater heads and downpipes) above ground then I believe it would have been expressed as such.

¹² Although the notice to fix combined contraventions regarding the reconstructed deck and the new rainwater head and downpipe, I have elected to consider the issues separately since the latter elements are constructed on property owned by the Body Corporate.

¹³ Dated 15 July 2026.

¹⁴ Acceptable Solution E1/AS1 Surface Water, first edition, amendment 12, effective on 2 November 2023.

- 4.35. I have also considered the 'glossary of terms' in AS/NZS 3500.0:2021¹⁵; this defines a '**stormwater drain**' as a 'conduit of a stormwater drainage installation normally laid underground for the conveyance of stormwater from a property to the stormwater system'. It defines (separately) '**downpipe**' as a 'pipe to carry roof water from gutters and roof catchments to drains or storage tanks'. It also defines '**rainhead**' as a 'collector of rainwater, generally of rectangle shape at the end of a box gutter and external to a building, connected to an external downpipe'.
- 4.36. I have also considered guidance issued by the Ministry under section 175 regarding 'minor alteration to drains'.¹⁶ The guidance does not refer to any above ground surface water disposal system (ie rainwater head or downpipe).
- 4.37. Taken together, I am of the view the Body Corporate could not rely on compliance with Schedule 1, clause 34, to carry out the building work to install the additional (new) rainwater head and downpipe. The work was not an 'alteration to **drains**'.
- 4.38. I have also considered if the work could have been undertaken under other clauses in Schedule 1. Clause 32 includes the repair, maintenance or replacement of 'drainage'. Drainage is not defined in the Act or the Regulations; however, as noted above, 'drain' is defined in clause A2 and the PGDA and this does not include a downpipe for the conveyance of water from the roof of a building (in this case the roof of the Unit on level 4). Therefore, the Body Corporate could not rely on carrying out the work under Schedule 1, clause 32.
- 4.39. In conclusion, the building work to construct the new rainwater head and downpipe was not exempt under Schedule 1 and was required to be carried out under a building consent. As no such building consent was obtained, there was a contravention of section 40.

Whether the contents of the notice to fix met the requirements of section 165

- 4.40. The provisions for notices to fix are in 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 provisions of the Act or the regulations.
- 4.41. Regarding section 163, the notice to fix in this case was issued to the owners as the specified person, as they were responsible for the building carried out to the concrete 'nib' and reconstruction of the deck even if they did not carry out the work. However, they were not the specified person responsible for the installation of the new rainwater head and downpipe installed on 'common property' owned by the Body Corporate, and they did not carry out that work.

¹⁵ Australian / New Zealand Standard AS/NZS 3500, Part 0, 2021.

¹⁶ [4.6 Minor alteration to drains | Building Performance](#) accessed 17 August 2026.

- 4.42. For the purposes of section 164(1)(a), the notice to fix appropriately identifies the specified person (ie the owners) failed to comply with the Act by not obtaining a building consent before carrying out the building work to reconstruct the deck contrary to section 40.
- 4.43. However, the owners were not required to obtain a building consent for the construction of the concrete 'nib', as the work was exempt under Schedule 1; therefore, it was not open to the authority to issue the notice to fix to the owners for that work.
- 4.44. Section 165 provides for the form and content of a notice to fix, which must be in a prescribed form.¹⁷ This includes spaces to describe the building and the particulars of contravention or non-compliance.
- 4.45. For the purposes of section 165(1)(b), the notice to fix required the owners to comply with it by 5 May 2026; however, this is the same date the notice was issued. This was not a reasonable timeframe for the owners to comply with the notice.
- 4.46. For the purposes of section 165(1)(c), the notice to fix includes a remedy for the making of an application for a certificate of acceptance, in accordance with section 96. However, this remedy was only open to the owners for the reconstruction of the deck. The owners were not the specified person for the installation of the new rainwater head and downpipe. In accordance with section 96, an authority may, on application, issue a certificate of acceptance for building work done by the owner. Section 7 defines 'owner'¹⁸; in this case it is the Body Corporate that owns the common property on which the new rainwater head and downpipe were installed. Therefore, it was not open to the owners to apply for a certificate of acceptance for that work (or the work to construct the concrete 'nib' as this was exempt under Schedule 1).
- 4.47. In conclusion, the notice to fix did not meet the requirements of section 165.

5. Conclusion

- 5.1. The recipients of the notice to fix (the owners of Unit 506) were the specified person for the purposes of section 163(a) regarding the building work to construct the new concrete 'nib' and reconstruction of the deck.
- 5.2. However, the owners were not the specified person regarding the building work to construct the new rainwater head and downpipe as it is located on 'common property' owned by the Body Corporate.

¹⁷ Form 13 of the Building (Forms) Regulations 2004.

¹⁸ Owner, in relation to land and any buildings on the land, (a) means the person who – (i) is entitled to the rack rent from the land; or (ii) would be so entitled in the land were let to a tenant at a rack rent; and (b) includes – (i) the owner of the fee simple of the land...

- 5.3. The building work to reconstruct the deck and install the new rainwater head and downpipe was not exempt under Schedule 1, so construction of those elements without a building consent was a contravention of section 40.
- 5.4. However, the building work to construct the new concrete nib was exempt from requiring a building consent under Schedule 1, clause 1(1).
- 5.5. Regarding the form and content of the notice to fix:
 - 5.5.1. It did not identify the specified person responsible for the construction of the rainwater head and downpipe, contrary to section 164(1)(a).
 - 5.5.2. It did not state a reasonable timeframe within which it must be complied with, contrary to section 165(1)(b).
 - 5.5.3. It did include an appropriate remedy that the specified person may require the making of an application for a certificate of acceptance, in accordance with section 165(1)(c); but only in respect of the work carried out contrary to section 40 for the reconstruction of the deck. The specified person could not apply for a certificate of acceptance for the work carried out to construct the new rainwater head and downpipe as those building elements are not located on the owners' property.

6. Decision

- 6.1. In accordance with section 188 of the Building Act 2004, I reverse the authority's decision to issue the notice to fix (NOT21816898).

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 15 October 2026.

Andrew Eames

Principal Advisor Determinations