



Determination 2011/104

The exercise of an authority's powers to issue a notice to fix for a commercial storage facility made up of shipping containers at 485 High Street, Motueka

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department.
- 1.2 The parties to this determination are:
 - the owner Mr L Wood (“the applicant”), represented by an agent;
 - the Tasman District Council, carrying out its duties and functions as a territorial authority or building consent authority (“the authority”).
- 1.3 This determination arises from the decision of the authority to issue a notice to fix under section 164 of the Act² in respect of a storage facility comprising shipping containers (“the containers”).
- 1.4 The matter for determination³ is therefore whether the authority correctly exercised its powers under section 164 of the Act in issuing the notice to fix.
- 1.5 In making my decision I have considered the application and submissions of the parties, and the other evidence in this matter.
- 1.6 In this determination, I also refer to the Hazardous Substances and New Organisms Act 1996 (“the HSNO Act”).

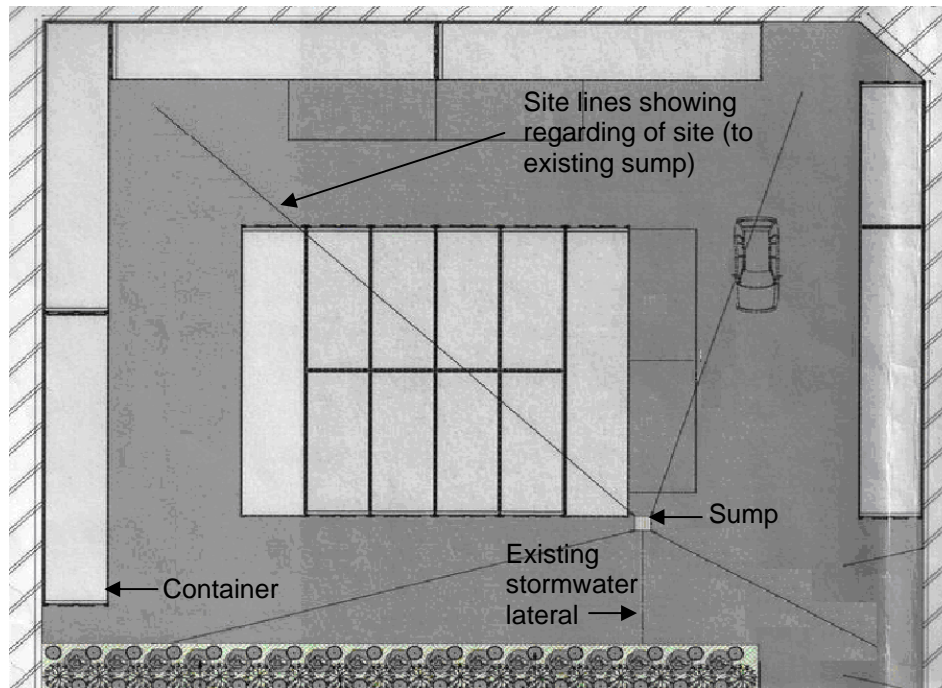
¹ The Building Act, Building Code, Compliance Documents, past determinations and Guidance Documents issued by the Department are all available at www.dbh.govt.nz or by contacting the Department on 0800 242 243

² In this determination, unless otherwise stated, references to ‘sections’ are to sections of the Building Act 2004, and references to ‘clauses’ are to clauses of the Building Code (Schedule 1, Building Regulations 1992).

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

2. The site

- 2.1 The site is a commercial storage facility providing secure storage services for private customers, and consisting of about 16 containers that provide the units. The plans for the site show the containers arranged in the following configuration:



3. Background

- 3.1 On the 16th of April 2010 the authority informed the applicant of a requirement for a building consent for the placement of the containers on the site. The authority's file note states it 'explained the need for seismic restraints, the controlling of stormwater etc.' The authority also advised the applicant the options in response were to remove the containers, obtain a building consent, or apply for a certificate of acceptance. The authority's note records that the applicant would seek a building consent.
- 3.2 On the 13th of August 2010 the applicant applied and paid for a building consent (BC100958). A Project Information Memorandum ("PIM") was issued on 25 August 2010. The authority attached a certificate to the PIM under section 37 of the Act, stating that 'no building work may proceed' until the required resource consent was obtained. Further requests for information were issued by the authority to the applicant between 7 September 2010 and 20 May 2011.
- 3.3 A notice to fix was issued by the authority on the 16th of June 2011, arising from the authority considering the placement of the containers and their use as a storage facility required a building consent. As no building consent had been applied for or issued the notice required that the applicant either:
- remove the containers from the site, or
 - apply for a certificate of acceptance to allow the containers to remain.
- 3.4 An application for a determination was received by the Department on the 23rd of August 2011.

3.5 The authority provided a submission dated 1 September 2011.

4. The submissions

4.1 The applicant sought a determination with respect to the exercise of the authority's powers under section 164 and submitted the following arguments:

- the containers are not buildings as defined under the Act
 - under section 9(g), a building does not include containers as defined in section 2(1) of the HSNO Act and the definition of container in the HSNO Act relates to the potential to store hazardous substances by the use of the word "may", not the actual storage of hazardous substances
 - as a container under the HSNO Act is not a building, it cannot be classified as a building under another Act based on what is stored inside it, and a container being used for the purpose of hazardous goods is the worst possible situation, so using the container for storing non hazardous goods can only be a less onerous situation
- no building work, as defined in the Act, has been carried out as the containers were trucked in and simply placed on site, therefore no consent can be required
- a container meets or surpasses all objective, functional requirements and performances of the Building Code, technical information has been provided about containers including details about the weathering steel that containers are made from
- containers are commonly used for storage for longer than three months without building consents being required.

4.2 The authority submitted documentation that covered the full history of the matter, including correspondence between the parties, the building consent, and the notice to fix documentation.

4.3 A draft determination was sent to the parties for comment on 25 November 2011.

4.4 The authority accepted the draft without comment on 1 December 2011 and the applicant accepted the draft without comment on 12 December 2011.

5. Discussion

5.1 General framework for considering the matter to be determined

5.1.1 The applicant has requested a determination about the issue of the notice to fix, with respect to the use of containers as a storage facility undertaken without a building consent being obtained as per section 40 of the Act.

5.1.2 In order to inform this matter, I must consider the provisions of the Act that apply. This determination therefore turns on the following:

- Are these containers buildings (section 5.2)?
- Has building work been undertaken (section 5.3)?
- Has the use of the containers changed (section 5.4)?

- Did the authority correctly issue the notice to fix (section 5.5)?

5.2 Are these containers buildings?

- 5.2.1 A 'building' is defined in section 8 of the Act as meaning 'a temporary or permanent, movable or immovable structure' (including a structure intended for occupation by people, animals, machinery, or chattels).
- 5.2.2 It is my view that a container can fit into this definition and so can be a building.
- 5.2.3 I note that the applicant has argued that as, under section 9(g), the definition of building excludes 'containers as defined in the [HSNO Act], you could say that any container that is *capable* of holding a hazardous substance is excluded from the definition of building.
- 5.2.4 The definition in section 9 of the Act excludes 'containers as defined in section 2(1) of the [HSNO Act] ...' from the definition of a 'building' for the purpose of the Act. The HSNO Act defines a container as 'any vessel or structure, whether moveable or fixed, in which hazardous substances may be cased, covered, enclosed, contained, or packed ...'
- 5.2.5 On the basis of the definition of building under the Act and the definition of container under the HSNO Act, it is clear that a container that contains hazardous substances does not constitute a building under the Act, but falls under the requirements of the HSNO Act. If a container was to come within the requirements of the HSNO Act then it would have to comply with the provisions of that Act and its regulations.
- 5.2.6 I am of the view that whether the containers are or are not buildings turns on whether hazardous substances are stored within them. I am supported in this view by the findings in two District Court cases on the matter⁴. The key fact is whether a container is intended to be used to store hazardous substances not whether it is capable of doing so. This was also the finding in a previous case⁵ relating to an interpretation of the Dangerous Good Act 1974 (which was repealed by the HSNO Act) in relation to containers in similar circumstances.
- 5.2.7 In the present instance the applicant has not identified any hazardous substances that are being stored and the storage facility is being hired out to members of the public for general storage. It is not a specialist storage facility and is not being held out as complying with the requirements of the HSNO Act.
- 5.2.8 I therefore consider that a container can be a building, and in the present instance, the containers do not fall under the jurisdiction of the HSNO Act, and therefore the containers are buildings under the Act.

5.3 Has building work has been undertaken?

- 5.3.1 Under the Act, building work is defined in section 7 as work 'for, or in connection with, the construction, alteration, demolition, or removal of a building ...'. Building work must not be undertaken except in accordance with a building consent, although there are certain circumstances for which a building consent is not required.

⁴ *Christchurch City Council v Smith Crane & Construction Ltd* (District Court, Christchurch, Judge Borthwick, 19 February 2010, CIV-2009-009-12480) and *Hauraki District Council v Pykett* (District Court, Waihi, Judge Bidios, 22 January 2008, CRI-2007-079-885).

⁵ *Waikato District Council v Fulcher* (District Court, Wellington, Judge Treadwell, 6 November 1996, W160/96).

- 5.3.2 The applicant has stated that as the containers were trucked in and placed on site no building work as defined in the Act was carried out and as such a building consent was not required. I note that there is an existing surface water sump, with the site graded to fall towards this sump, no foundations have been constructed, and no services connections made to the containers. I also note that no alterations or modifications have been made to the containers by way elements such as of doors, windows, roof, or internal fittings.
- 5.3.3 The definition of building work refers to building work 'for or in connection with the construction ... of a building'. While the section 7 definition of 'construct' includes to 'relocate', the act of simply moving a container around is work relating to the moving or relocation of the building. It is not 'building work' for, or in connection with the building itself, as nothing is being done to the container other than moving it.
- 5.3.4 With respect to the definition of building work, it is therefore my view that the act of moving a container around and placing a container on a site is not building work, as it cannot be said to involve work on the building, just as the act of moving a relocatable house, in itself, is not building work.
- 5.3.5 I note that if building work, for or in connection with the container itself, was carried out, this would constitute an alteration to an existing building, and the requirements of section 112 of the Act would apply.
- 5.3.6 I therefore consider that, in this case, no building work has been undertaken.

5.4 Has the use of the containers changed?

- 5.4.1 There are a range of provisions in the Building Act that expressly set out different requirements that buildings and building work must comply with in particular situations. For example, there are particular requirements in the Building Act where there is building work proposed that alters an existing building (section 112), building work proposed in respect of a building with a specified intended life less than 50 years (section 113), where the use of a building is proposed to be changed (section 115), where a subdivision affecting a building or part of a building is proposed (section 116A), and where there is building work proposed in respect of certain public buildings (section 118).
- 5.4.2 In respect of buildings for which an owner is intending to change the use of the building, section 114 of the Building Act requires that an owner of a building must give written notice to the authority if the owner proposes to change the use of a building. Section 115 requires that an owner of a building must not change the use of the building:
- (b) unless the authority gives the owner written notice that the authority, is satisfied, on reasonable grounds, that the building, in its new use, will-
 - (i) comply, as nearly as is reasonably practicable, with every provision of the building code that relates to either or both of the following matters:
 - (A) means of escape from fire, protection of other property, sanitary facilities, structural performance, and fire-rating performance:
 - (B) access and facilities for people with disabilities (if this is a requirement under section 118); and

- (ii) continue to comply with the other provisions of the building code to at least the same extent as before the change of use.

- 5.4.3 The Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 (“the Regulations”) define change the use as:
- ... in relation to a building means to change the use (determined in accordance with regulation 6) of all or a part of the building from one use (the old use) to another (the new use) and with the result that the requirements for compliance with the building code in relation to the new use are additional to, or more onerous than, the requirements for compliance with the building code in relation to the old use.
- 5.4.4 I have considered the use the containers at the commercial storage facility in terms of Schedule 2 of the Regulations, which categorise uses of buildings as uses related to:
- crowd activities
 - sleeping activities
 - working, business, or storage activities
 - intermittent activities.
- 5.4.5 It is my view that containers, in their use for which they are built (as shipping containers) have a use related to intermittent activities, and the appropriate classification is IA (Intermittent Low). I note that while none of the use categories appear to contemplate containers in this use, however, I consider IA to be the most appropriate use category.
- 5.4.6 I am of the view that the containers that make up the storage facility come under the use category of working, business, or storage activities, and the appropriate classification is WL (Working Low), which are ‘spaces used for working, business, or storage’.
- 5.4.7 Therefore the old use of the building was IA and the new use is WL.
- 5.4.8 In addition to forming a view as to whether the use category for the buildings have changed, it is also necessary to consider whether there are requirements for compliance with the Building Code that are additional to and more onerous in relation to the new use.
- 5.4.9 To do this I must consider the categories of classified uses of a building in Clause A1 of the Building Code. Unfortunately, these classified uses of a building in the Building Code do not match the categories of use in the Regulations and therefore I must undertake a further analysis of the correct classified uses for the containers as set out in Clause A1 of the Building Code.
- 5.4.10 Under Clause A1, a container, in its use as a shipping container, would be classified as an ancillary building, which ‘Applies to a building or use not for human habitation and which may be exempted from some amenity provisions, but which are required to comply with structural and safety-related aspects of the building code’. I note that this is comparable to the treatment of a container under Schedule 2 of the Regulations as IA.
- 5.4.11 Under Clause A1 of the Building Code, a commercial storage facility would be classified as having a use of ‘commercial’. The category of commercial ‘Applies to a building or use in which any natural resources, good, services or money are

either developed, sold, exchanged or stored'. I note that this is comparable to the treatment of a storage facility under Schedule 2 of the Regulations as WL.

- 5.4.12 There are Building Code obligations such as Clause B1 Structure and Clause D1 Access relating the containers that make up the storage facility, given classification of the storage facility as 'commercial under Clause A1 of the Building Code (and with its use of WL under the Regulations) that are more onerous than for containers in their use as shipping containers, given the classification of the containers as ancillary buildings under Clause A1 of the Building Code (with the use of IA under the Regulations).
- 5.4.13 Therefore I consider the change from IA to WL constituted a change of use under the Act as the requirements for compliance with the Building Code are additional to and more onerous in relation to the new use of the containers.
- 5.4.14 The applicant was therefore required to comply with sections 114 and 115 of the Act, including giving written notice to the authority of the proposed change of use.

5.5 Did the authority correctly issue the notice to fix?

- 5.5.1 A notice to fix may be issued when a 'specified person is contravening or failing to comply with [the Act] or the regulations'. The notice to fix issued by the authority lists the particulars of contravention or non compliance as 'use of a storage facility using containers without a building consent being issued as per section 40 of the [Act]'.
- 5.5.2 As discussed in section 5.4, the applicant was required to comply with sections 114 and 115 of the Act. The applicant did not notify the authority of the change of use and changed the use without the approval of the authority. I am therefore of the view that the authority was correct to issue a notice to fix.
- 5.5.3 However, in taking account of the particulars listed on the notice by the authority, I am of the view that the authority has not appropriately expressed the contravention.
- 5.5.4 I note that section 115 does not, of itself, trigger the need for building work to be undertaken, but that the relevant requirements of the Building Code are to be considered to the extent specified by that section. In order to assist the parties, I have commented further on the Building Code requirements of section 115 in section 5.6.
- 5.5.5 If building work is required in order to meet section 115, the applicant may need to obtain a building consent. However, I note that building work arising from a change of use may be exempt from the need to obtain a building consent under Schedule 1 of the Act.
- 5.5.6 I note that the authority issued the PIM with a notice issued under section 37 of the Act (refer to paragraph 3.2). I note that this determination only covers issues under the Act, and there may be matters under the Resource Management Act that also require resolution.

5.6 Compliance to the extent required by section 115

- 5.6.1 The containers in their new use are required to comply as nearly as is reasonably practicable with the provisions specified and comply to the same extent as before with all other Building Code clauses.

5.6.2 In order to assist the parties, I note the following in terms of my view of the way to consider the requirements of section 115.

Means of escape from fire

- Given the size and configuration of the containers, the storage facility would appear to have adequate means of escape, although this should be substantiated.

Protection of other property

- Clause E1.3.1 requires that surface water that is collected or concentrated by buildings be disposed of in a way that avoids the likelihood of damage or nuisance to other property. The cross falls and existing sump would appear to be adequate, although this should be substantiated.

Sanitary facilities

- Clause G1.2 requires that buildings shall be provided with appropriate spaces and facilities. If G1/AS1 was used as a means of compliance, it would require appropriate sanitary facilities in buildings that are occupied i.e. where people live, work, eat, or assemble. It does not appear that this requirement is applicable to this facility.

Structural performance

- The placement and fixing of the containers must ensure structural stability.
- The site is graded to falls to enable drainage to the sump. This will mean that the containers, to remain level and not to impede surface water flows, may need to be on elevated and discrete supports. If required, the adequacy of those supports and the tie downs necessary, to prevent containers moving under self load or imposed loads should be considered.
- It is likely that the containers are inherently stable, however, this should be substantiated.

Fire rating performance

- Fire rating performance requires the protection of neighbouring properties to be considered. It is likely that the containers provide adequate fire resistant construction, however, this should be substantiated in the areas where the containers are located close to the boundary.

Access

- The storage facility is a facility to which section 118 applies and therefore the requirement for the provision of access for people with disabilities is required to be substantiated, including vehicle spaces and circulation routes.

Other code clauses

- The containers are required to comply to the same extent as before the change of use with the other Building Code clauses.
- It appears the key requirement that may need to be addressed is the durability of the containers. I note that the durability of the containers is not required to be upgraded, but must comply to the same extent as before.

6. What is to be done next?

- 6.1 The authority should reissue the notice to fix, taking account of the findings of this determination.
- 6.2 The applicant should provide notification to the authority and demonstrate how the requirements of section 115 are to be met, with the building in its new use required to comply to as nearly as is reasonably practicable for the provisions specified, and to the same extent as before for all other Building Code clauses.

7. Decision

- 7.1 In accordance with section 188 of the Act, I hereby confirm the authority's decision to issue the notice to fix, however, the authority should modify the notice to fix to take account on the findings of this determination.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 16 December 2011.

John Gardiner
Manager Determinations

A1 Appendix

A1.1 Clause A1 of the Building Code – Classified uses

5.0 Commercial

5.01 Applies to a building or use in which any natural resources, goods, services or money are either developed, sold, exchanged or stored. Examples: an amusement park, auction room, bank, car-park, catering facility, coffee bar, computer centre, fire station, funeral parlour, hairdresser, library, office (commercial or government), police station, post office, public laundry, radio station, restaurant, service station, shop, showroom, storage facility, television station or transport terminal.

8.0 Ancillary

8.01 Applies to a building or use not for human habitation and which may be exempted from some amenity provisions, but which are required to comply with structural and safety-related aspects of the building code. Examples: a bridge, derrick, fence, free standing outdoor fireplace, jetty, mast, path, platform, pylon, retaining wall, tank, tunnel or dam.

A1.2 Schedule 2 of the Regulations

Uses related to working, business, or storage activities

Use	Spaces or dwellings	Examples
WL (Working Low)	spaces used for working, business, or storage – low fire load	places for manufacturing, processing, or storage of non-combustible materials or materials having a slow heat release rate, cool stores, covered cattle yards, wineries, places for grading storage, or packing of horticultural products, places for wet meat processing, banks, hairdressing shops, beauty parlours, places for provision of personal or professional services, dental offices, laundries (self-service), medical offices, business or other offices, police stations (without detention quarters), radio stations, television studios (no audience), places for small tool and appliance rental and service, telephone exchanges, places for dry meat processing

Uses related to intermittent activities

Use	Spaces or dwellings	Examples
IA (Intermittent Low)	spaces for intermittent occupation or providing intermittently used support functions – low fire load	car parks, garages, carports, enclosed corridors, unstaffed kitchens or laundries, lift shafts, locker rooms, linen rooms, open balconies, stairways (within the open path), toilets and amenities, and service rooms incorporating machinery or equipment not using solid-fuel gas, or petroleum products as an energy source