



Determination 2014/023

The proposal to issue a notice to fix for building work carried out without consent under Schedule 1(m) for a replacement outbuilding at 281 Tekapo-Fairlie Highway, Fairlie



1. The matters 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, Tony Marshall, Manager Determinations and Assurance (Acting), Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The parties to the determination are
- the owners of the property, G and P Heslip (“the applicants”)
 - the Mackenzie District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority
- 1.3 This determination arises from a dispute between the parties as to whether building work to erect an outbuilding requires building consent or is exempt under Schedule 1(m)². The authority notified the owner that if the building work continued the authority would issue a notice to fix.
- 1.4 The matter to be determined³ is therefore the proposed exercise by the authority of its powers of decision to issue a notice to fix in respect of building work carried out without consent. In making this decision I have considered whether the proposed building work is exempt under Schedule 1(m).

¹ The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.dbh.govt.nz or by contacting the Ministry on 0800 242 243.

² References to paragraphs of Schedule 1 are to those that were current at the time of the proposed exercise of the authority’s power of decision. Schedule 1 was amended on 28 November 2013.

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

- 1.5 In making my decision, I have considered the submissions of the parties, the report of the expert commissioned by the Ministry to advise on this dispute (“the expert”) and the other evidence in this matter.
- 1.6 I have considered the proposed decision of the authority against the provision of Schedule 1 that were in effect at the time the building work was carried out.

2. The building work

2.1 The original outbuildings consisted of three sheds located on a rural site in a very high wind zone arranged generally as shown in Figure 1.

- Shed 1 was a timber framed shed with horizontal timber weatherboard cladding and timber windows and doors with a mono pitch roof. The shed was about four metres from the original house.
- Shed 2 was a lean-to located between sheds 1 and 3. This shed was built under building consent No. 970021 issued in February 1997 to build one utility storage shed on the side of an existing building. The roof was mono-pitched. The applicants state that the cladding was fibrolite; however from photographic evidence it appears more likely to be galvanised steel. From the photographic evidence it also appears that Shed 2 was not connected to Shed 1.
- There is no record of a building consent for Shed 3, but is shown as an existing building in the drawings for consent No. 970021. Shed 3 appeared to be a timber framed structure clad with corrugated galvanised steel.
- I note the information gathered by the expert includes a drawing for a fourth shed adjacent an existing shed but it is unclear if or when this shed was built and where it was located.

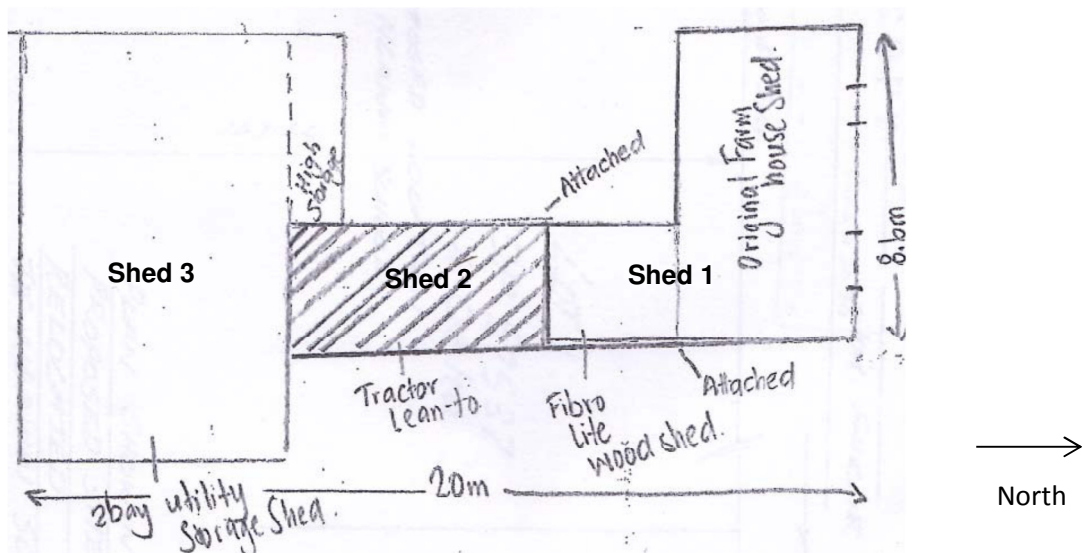


Figure 1: Approximate site plan provided by previous owner

2.2 The proposed new outbuilding (“the proposed outbuilding”) is a steel framed 102m² single storey farm shed with pitched gable end roofs on two ridges and one internal gutter, clad with profiled metal and unlined. A concrete slab is proposed to be poured

for the floor once the shed is complete. The building is rectangular measuring 12.3x8.3m and 5.2m from ground level to the apex of the roof.

- 2.3 Currently the proposed outbuilding is partially constructed, with three rows of four posts set into concrete bases. One truss has been erected on the southeast corner.

3. Background

- 3.1 The previous owner of the premises has stated that the original outbuildings were in place in 1993.

- 3.2 The applicants purchased the property (dwelling and original outbuildings) in 2001.

- 3.3 On 28 March 2004 the New Zealand Fire Service (“NZFS”) records show that a fire broke out on the property. The dwelling was damaged and according to the applicants the original outbuildings were damaged beyond economic repair and were demolished.

- 3.4 There is no record of damage to any outbuilding during the fire from the information obtained from the NZFS.

- 3.5 The applicants are in the process of building a new replacement dwelling under building consent No. 040137 at the time of this determination.

- 3.6 At some time in early 2013 the applicants started constructing the proposed outbuilding to replace the original outbuildings.

- 3.7 On April 2013 the authority phoned the applicants advising that they needed to cease construction otherwise they would be issued with a notice to fix. A letter dated 22 May 2013 from the authority to the applicants confirms this conversation stating:

...regarding building a shed under Schedule 1 (m) Building Act 2004. I have given your enquiry extended consideration and I believe that this does not fit under any Schedule 1 Building Activity. As discussed previously the erection of the shed behind your dwelling will require Building Consent. If you proceed further with any building work, without an issued Building Consent, the [authority] will have no choice but to issue a Notice to Fix.

- 3.8 In May 2013 the applicants and the authority met to discuss the applicants’ intention to build the proposed outbuilding under Schedule 1(m) of the Act.

- 3.9 On 4 June 2013 the applicants requested further information from the authority as to how the authority came to its decision and restated their view that the building work was exempt under Schedule 1(m).

- 3.10 On 12 June 2013 the authority responded with a detailed letter explaining the basis of their decision for the letter in paragraph 3.7. In summary:

- schedule 1(m) is not a retrospective clause and can only be applied in respect of buildings requiring repair or replacement post 23 December 2010
- the authority has a duty to inform the applicants if it believes a building consent is required for the work and to ensure that no further work occurs until a building consent is obtained

- 3.11 On 15 June 2013 the applicants sought advice from a Ministry official. The recommendation was that a determination should be applied for on the matter.

- 3.12 The Ministry received an application for determination on 5 November 2013.

4. The submissions

- 4.1 The applicants made a submission in the form of a letter to the Ministry dated 31 October 2013 requesting a determination in regards to rebuilding the proposed outbuilding “within the same footprint” of the damaged original outbuildings. The applicants do not believe they were required to obtain a building consent due to the exemption in Schedule 1(m) of the Act.
- 4.2 The applicants submit that they were always of the understanding they could rebuild on the original site of the damaged or destroyed buildings and that Schedule 1(m) supported this. In relation to the fire the applicants state the original outbuildings were damaged by fire and removed in 2005.
- 4.3 The applicants note:
- Although similar in area to that of the previous sheds, the height, design and cladding of the shed have been made to compliment the replaced house, which has very prominent high gables. We believe it is reasonable for replacement buildings to be of a standard and style of the current day.
- 4.4 The applicants’ submission included:
- photographs and sketches of the original outbuildings from the previous owner
 - sketches of the proposed outbuilding
 - correspondence between the applicants and the authority dated from May to June 2013
 - correspondence between the applicants and an officer of the Ministry
 - initial sketch/plan of proposed outbuilding
- 4.5 The authority submits that the replacement of the original outbuildings with the proposed outbuilding is not exempt under Schedule 1(m) of the Act and that the exemption cannot be applied retrospectively.
- 4.6 The authority stated that ‘the original outbuildings were a series of consented and non-consented buildings that were not all consented to be attached; therefore this was not “within the same area” that the outbuilding or original outbuilding occupied.’
- 4.7 The authority submits that the original outbuildings were a series of timber framed/pole construction, fibrolite and weatherboard timber framed construction. The proposed outbuilding is a second hand steel barn structure that is not considered “a comparable outbuilding or part of an outbuilding”. The authority also notes that the proposed outbuilding is somewhat larger and significantly different in shape from the original outbuildings.
- 4.8 In relation to the fire the authority disputes the applicants’ submission:
- the authority’s aerial photos show an empty section from approximately 2003
 - Google earth photo [date undeterminable] show “the two consented buildings still in place, with the two original outbuildings removed.”
- 4.9 The authority concludes that it is ‘unsure if the original outbuildings were damaged by fire or if they have surpassed their durability; and the time frame between their removal and the proposed construction is at least 9 years.’
- 4.10 A draft determination was issued to the parties for comment on 31 March 2014.

- 4.11 The applicant accepted the draft without comment.
- 4.12 The authority accepted the draft with minor factual errors and the following comment:
- the intention behind Schedule 1(m) is to allow for outbuildings in need of repair or replacement after 23 December 2010. As there is no building to be repaired or replaced, we do not believe that this can be applied retrospectively.
- 4.13 I have considered the comments from the authority and amended the determination where appropriate.

5. The expert's report

- 5.1 As noted in paragraph 1.5, I engaged an independent expert to assist me. The expert is a member of the New Zealand Institute of Building Surveyors. The expert inspected the house on 11 December 2013, providing a report dated 4 March 2014, which was provided to the parties on 4 March 2014.

5.2 The replacement of the original outbuildings

- 5.2.1 The expert noted that there was a gap of approximately 1m between sheds 1 and 2, and that the footprint can therefore only be taken as that of sheds 2 and 3 or that of Shed 1 alone.
- 5.2.2 The sketch provided by the applicants show the second shed is less than the width of the Shed 1; therefore the expert concluded that the Shed 2 was under the 8m width of the proposed outbuilding.
- 5.2.3 From the photographic evidence provided the expert considered that the elevation of the Shed 1 was approximately 5m wide (not 8.6m as labelled in Figure 1). Therefore the elevation of the proposed outbuilding is much closer to the dwelling than the original outbuilding.
- 5.2.4 The consented documents for Shed 2 show the shed to be 4m from front to back.
- 5.2.5 The expert concluded that the proposed outbuilding is larger than the original group of sheds and is not located in the same position. The expert considered therefore the proposed outbuilding is not within the footprint of the original sheds.

5.3 The compliance of the building work

- 5.3.1 The expert also commented on the compliance of the building work completed so far. The expert observed the foundations are steel posts set into concrete, with steel trusses. The support for the intermediate trusses and the purlins proposed to support the roof and wall cladding appeared to the expert to be inadequate to resist the wind and snow loads expected for the region, however, the expert noted that these decisions would need to be made by an appropriately qualified engineer.
- 5.3.2 The expert also observed that the steel posts had not been protected against corrosion before setting into the concrete bases and would not, in his opinion, comply with durability Clause B2 relating to B1 of the Building Code.

6. Discussion

6.1 Does Schedule 1(m) apply?

6.1.1 The authority is of the opinion that the Schedule 1(m) of the Act does not apply as the fire is alleged to have occurred sometime in late 2004 or 2005, and therefore the outbuildings were damaged or destroyed prior to 23 December 2010 when Schedule 1(m) took effect. The applicants are of the opinion that in the absence of a transitional provision Schedule 1(m) can apply retrospectively to the repair or replacement of an outbuilding.

6.1.2 In my opinion Schedule 1(m) will apply in this situation. The clause allows for the “repair or replacement of all or part” of a damaged outbuilding. I consider that provided there is sufficient information about the outbuilding that is being replaced (in order to determine whether the proposed outbuilding is in the same area and comparable) then for the purposes of this determination I can consider the matter under Schedule 1(m) regardless of the issue regarding retrospective application.

6.1.3 However, I note that the length of time between the damage occurring and the replacement of the outbuilding may go beyond the scope of Schedule 1(m) in that the outbuilding ceases to be a replacement and should be classified as a new building.

6.2 Is the building work exempt under Schedule 1(m)?

6.2.1 There are three requirements for Schedule 1(m) to be satisfied:

- the proposed outbuilding is a repair or replacement of all or part of a damaged outbuilding;
- the proposed outbuilding is within the same area as the original outbuildings; and
- the proposed outbuilding is comparable to the original outbuildings.

6.2.2 The first requirement is that the proposed outbuilding must replace the damaged original outbuilding. There is information provided by the NZFS and the authority to indicate that the original outbuildings were not damaged in the fire. If no damage occurred to the original outbuildings and they were demolished by the applicants due to wear and tear, Schedule 1(m) will not apply to this situation.

6.2.3 I note that the original plans and photographic evidence are limited in describing the exact size and locations of the outbuildings accurately. The original dwelling was damaged in the fire and a new dwelling is being constructed which could also limit the accuracy of the original photographs.

6.3 Within the same area

6.3.1 In relation to the replacement being “within the same area” this could be interpreted in a broad or narrow meaning of the word ‘area’. In a narrow interpretation, “within same area” can be read as “within the same footprint”. In the current version of the Act, Schedule 1, Exemption 7(a) states that the replacement “is in the same footprint” that the original outbuilding occupied.⁴ The purpose behind Schedule 1, where work should be exempt if the risks of non-compliance are low, would support a narrow interpretation.

⁴ Schedule 1(7) came into effect 28 November 2013 and effectively replaced Schedule 1(m)

- 6.3.2 The expert concluded that the proposed outbuilding is not within the same footprint as the original outbuildings and I agree with this conclusion. There are three or possibly four original outbuildings that are being replaced with a single larger structure that does not fall within the same footprint as the original outbuildings.
- 6.3.3 However in a broader meaning of the phrase there is no statutory requirement for the proposed outbuilding to fit the exact specifications of the original outbuildings. The foundation of an outbuilding is not normally a significant structure in comparison to a residential dwelling for example. The proposed outbuilding can be said to be in the same location and reasonably proximate to the original outbuildings.
- 6.3.4 I consider that “the same area” falls somewhere in between “the same location” and “the same footprint”. I conclude that the proposed outbuilding is not within the same area as the original outbuildings for the purpose of Schedule 1(m) due to the significant difference in the footprint.

6.4 Comparable outbuilding

- 6.4.1 The second requirement is for the replacement to be “comparable”. This also could be a broad or narrow interpretation. I would consider the following as factors to consider when determining whether the proposed outbuilding is comparable to the original outbuildings:
- function and intended use
 - structure and design
 - materials
- 6.4.2 According to the applicants, the function and intended use of the proposed outbuilding is to be a carport/tractor shelter. The original outbuildings appeared to have a similar use and there is no intention for the proposed outbuilding to be habitable.
- 6.4.3 The design of the original outbuildings is significantly different to the proposed outbuilding and this has been acknowledged by the applicants (refer paragraph 4.3). The most notable differences are:
- there were three and possibly four original outbuildings whereas the new design is for a single outbuilding.
 - the original outbuildings were significantly smaller than the proposed outbuilding. From the photographic evidence provided the tallest, Shed 3, looks to be a little over 3m high; the proposed outbuilding is to be 5.2m high.
- 6.4.4 The materials used are also significantly different. The original outbuildings were constructed from weatherboard timber, either fibrolite or galvanised steel, corrugated steel and timber-framed construction. The proposed outbuilding uses second hand (and modified) steel framing trusses clad with profiled metal, and unlined with gable end roofs.
- 6.4.5 In conclusion, the structure, materials and design are not comparable, and accordingly the proposed outbuilding would not be exempt under Schedule 1(m) if it were to be applied.

7. What happens next?

- 7.1 The applicant should apply for a certificate of acceptance for the building work that has already been completed, and apply for a building consent from the authority for the building work not yet completed.
- 7.2 I note the expert's concerns regarding compliance of the building work in paragraph 5.3 need to be addressed within these processes.

8. The decision

- 8.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the proposed outbuilding is not exempt under Schedule 1(m) of the Act, and therefore the authority would be correct to issue a notice to fix in respect of building work carried out without consent when one was required.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 28 April 2014.

Tony Marshall
Manager Determinations and Assurance (Acting)

Appendix A: The Legislation

A1 Schedule 1(m) clause added 23 December 2010:

...1 A building consent is not required for the following building work:

- (m) the repair or replacement of all or part of a damaged outbuilding, if—
 - (i) the repair or replacement is made within the same area that the outbuilding or the original outbuilding (as the case may require) occupied; and
 - (ii) in the case of any replacement, the replacement is made with a comparable outbuilding or part of an outbuilding:

A2 Schedule 1 replaced Schedule 1(m) and came into effect on 28 November 2013:

...7 Repair or replacement of outbuilding

The repair or replacement of all or part of an outbuilding if—

- (a) the repair or replacement is made within the same footprint area that the outbuilding or the original outbuilding (as the case may be) occupied; and
- (b) in the case of any replacement, the replacement is made with a comparable outbuilding or part of an outbuilding; and
- (c) the outbuilding is a detached building that is not more than 1 storey; and
- (d) the outbuilding is not intended to be open to, or used by, members of the public.