



Determination 2017/065

Regarding the issue of a notice to fix for building work carried out without building consent in relation to relocated structures at 4 Iveagh Bay Drive, Moana



Summary

This determination considers the definition of building under section 8 and whether the relocated structures together are a building for the purposes of the Building Act, and if the authority was correct to issue the notice to fix. The determination discusses the particulars of contravention/ non-compliance described in the notice to fix with regard to building work carried out without building consent.

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 and Assurance, 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, C & C Rogers and Rogers Asset Management Limited, (“the owners”)
- Grey District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority. The authority applied for this determination.

1.3 This determination arises from the decision of the authority to issue a notice to fix for building work carried out at the owners’ property in relation to a structure that had been relocated onto the property. The authority holds the view that building consent was required for the works carried out on site.

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

- 1.4 The matter to be determined² is the exercise of the authority's powers of decision in issuing the notice to fix in respect of building work carried out on the site. In making my decision I have considered whether the cabin is a "building" as defined in section 8 of the Act³.
- 1.5 In making my decision I have taken into account the submissions of the parties and the other evidence in this matter. The relevant sections of the Act discussed in this determination are set out in Appendix A.

2. The building work and background

- 2.1 The determination concerns the construction on site of timber piles and connections to services for two structures that have been relocated onto the site. Building work was carried out off site to construct/modify the structures before they were relocated. While the building work carried out off site was not the subject of the notice to fix, and so does not form part of the matters to be determined, I provide some comment on the regulatory status of this building work in paragraph 4.9.
- 2.2 In the photographs provided by the authority, the larger of the two structures (approximately 7.8m x 2.4m) appears to be a shipping container or similar structure that has been modified, with one long side removed and replaced with windows and sliding doors, and a kitchen and bathroom installed. Three of the external walls of the smaller structure (approximately 5.4m x 2.7m) appear to have rough sawn timber cladding, with at least one window installed. It is my understanding that the smaller structure houses the bedroom and when the two structures are connected one side of it is open to provide a walk-through to the larger structure; the open side is currently boarded up with plywood sheet. In this determination I refer to the two structures together as "the cabin".
- 2.3 The authority has provided an undated photograph showing timber piles at the site on which the cabin had been located. I have received no information regarding the construction of the timber piles or how the cabin was attached. The cabin has subsequently been removed and relocated on the site, and is currently sitting on timber packers. The photograph also shows a small timber deck that would have sat adjacent to the entrance to the cabin, along with some site work carried out to create a platform for the cabin, a damp proof membrane laid out in the area where the small structure would have been located, and what appears to be in-ground drainage for either (or both) foul water/storm water. I have received no details from the authority regarding the connections to services, plumbing or drainage works.
- 2.4 The authority set out the circumstances resulting in the issue of the notice to fix as follows:
- An existing structure has been relocated to the property (without [a code compliance certificate]) erected on piles and connected to services – without a building consent application. [The authority] has issued a Notice to Fix, and as a result the building was removed from the piles, services, and relocated on site [reference to photographs].
- 2.5 On 12 May 2016 the authority issued a notice to fix to the owners. The particulars of contravention or non-compliance were described on the notice as follows:

² Under sections 177(1)(b) and 177(2)(f) of the Act

³ In this determination, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code (First Schedule, Building Regulations 1992).

Between 5 November 2015 and 4 February 2016 you have carried out building, and plumbing and drainage works without obtaining a building consent as is required by Section 40 of the Building Act 2004 ...

- 2.6 The remedy provided for in the notice was to either remove the works or obtain a certificate of acceptance for the work that required building consent. The notice was to be complied with by 12 August 2016.
- 2.7 On 1 March 2017 the authority emailed the owners, noting that the notice to fix had not been complied with and extending the date for compliance to 22 March 2017.
- 2.8 On 20 March 2017 the owners advised the authority of their intention to remove the cabin. The authority then extended the time for the notice to be complied with until 5 April 2017.
- 2.9 Based on the correspondence in April and June 2017, it appears that the owners then disputed the issue of the notice to fix and advised the authority that they would apply for a determination or lay a formal complaint. The authority maintained the view that the building work was not exempt from the requirement to obtain building consent.
- 2.10 On 7 July 2017 the authority issued an infringement notice under section 372 of the Act to one of the owners for failure to comply with the notice to fix.
- 2.11 Correspondence from the authority to one of the owners on 10 July 2017 states ‘the notice to fix must be complied with by 7 August 2017’. This statement indicates that either a second notice to fix was issued or the compliance date of the first was extended; I have not seen a copy of a second notice to fix.
- 2.12 My understanding is that the owners then engaged an architectural designer (“the designer”) to assist them in obtaining a certificate of acceptance. The designer had concerns regarding steel framing and weathertightness of windows, and raised the matter of a specified intended life of 5 years. The authority subsequently stated that a specified intended life is a condition of a building consent, and as no building consent had been granted, a specified intended life could not now be applied. It appears that no application was made for a certificate of acceptance.
- 2.13 The Ministry received an application for a determination on 11 July 2017, and in response to a request for clarification of the matters the authority provided further information on 13 July 2017 regarding the building work referred to in the notice to fix (refer paragraph 2.3).

3. The submissions

- 3.1 The authority sought the determination in order to establish whether relocating the cabin to the site and connecting it to services would have required building consent, and whether the cabin now not sitting on the piles and not connected to services is still a “building” under section 8 of the Act. The authority is of the view the cabin is a building and that it does not comply with the Building Code.
- 3.2 The authority provided some correspondence between the parties, including from the designer, and undated photographs of two structures located on site sitting on packers.
- 3.3 The owners provided a submission in response to the determination application on 21 July 2017, noting their intention to remove the cabin from the site and questioning whether a determination was necessary. The owners described the cabin as a “truck

body”, noting that it had been ‘converted’ and then relocated to the site in December 2016 with the intention to use it for temporary accommodation until a house was built on the site.

- 3.4 The owners advised that the cabin had been disconnected from all services and they had ‘boarded it up’ to the point the owners considered it was no longer a building for the purpose of the Act.
- 3.5 A draft of this determination was issued to the parties on 4 August 2017.
- 3.6 On 7 August 2017 the owners accepted the draft determination and advised that the cabin had been moved off the section.
- 3.7 On 14 August 2017 the authority accepted the draft determination without further comment.

4. Discussion

- 4.1 The Building Act provides for the regulation of building work and sets the performance standards for buildings (section 3(a)). Section 164 provides for the authority to issue a notice to fix if a specified person is contravening or failing to comply with this Act or the regulations. In order for me to consider whether the authority correctly exercised its powers of decision in issuing the notice to fix, I must first consider whether the cabin is a “building” under the Act.
- 4.2 A “building” for the purposes of the Act is defined in section 8(1)(a):
means a temporary or permanent movable or immovable structure (including a structure intended for occupation by people, animals, machinery, or chattels); ...
- 4.3 The cabin has been described by the owners variously as a “truck body” and “cabin”, and the owners have stated its intended use as providing temporary accommodation. The cabin contains sanitary fixtures and is used for sleeping accommodation. Based on the information before me, I consider that the structure is a “building” for the purposes of the Act, irrespective of whether it is connected to services or the timber piles.
- 4.4 The authority has issued the notice to fix for building work carried out without building consent in breach of section 40 of the Act. I note here that the building work was simply described in the notice to fix as ‘building, and plumbing and drainage works’, but that in correspondence the authority has also referred to relocating the cabin onto the site.
- 4.5 In previous determinations I have considered the relocation of buildings and whether this constitutes “building work” under section 7 of the Act (see for example 2011/104 and 2014/030⁴). I maintain the view set out in those determinations, that the act of moving or relocating a building and placing it on site is not “building work”.
- 4.6 In clarifying the circumstances that have given rise to the notice to fix, the authority stated that the building work for which the notice to fix was issued included the cabin being ‘erected on piles and connected to services’. The authority subsequently provided a photograph of the piles in place, but provided no further information in regards to connection to services (refer paragraph 2.3).

⁴ *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* (16 December 2011), and *Determination 2014/030 Regarding the issue of a notice to fix for the placement of two shipping containers on a property* (22 July 2014).

- 4.7 “Building work” is defined in section 7 of the Act as:
- (a) means work—
 - (i) for, or in connection with, the construction, alteration, demolition, or removal of a building; and
 - (ii) on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code; and
 - (b) includes sitework; ...
- 4.8 The building work that has been carried out includes the site works, construction of the timber piles and decking, and drainage (based on the photograph provided by the authority), and possibly works carried out to join the two structures to form the cabin. While the construction of the deck would not require building consent because it is exempt as provided for in Schedule 1 of the Act, the remaining building work did require building consent. Accordingly I conclude that the authority correctly exercised its powers in issuing the notice to fix. I note however that it is important that either the notice or the covering letter clearly specify the building work to which the notice to fix applies.
- 4.9 I also note that the modification of the structure is building work under the Act; however, it is not clear to me when this building work was carried out, or who carried out or supervised the building work or who the owner was at that time. If the building work associated with the construction or modification of the two structures was carried out in another district, section 164(3) of the Act provides for the authority to notify another responsible authority that it holds the view a notice to fix should be issued for that work and to provide reasons for its view.
- 4.10 Concerns have also been raised about the compliance of the construction / modification of the two structures, in particular in relation to Clause B1 for the steel frame and Clause E2 for the weathertightness of windows. The requirement to comply with the Building Code is set out in section 17 of the Act which 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’. I note that the owners have since removed the structures from the site, and I accordingly leave the compliance of the two structures for the owners to resolve in due course with the relevant authority.

5. The decision

- 5.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority correctly exercised its powers of decision in issuing the notice to fix dated 12 May 2016, and accordingly, I confirm the authority’s decision to issue that notice to fix.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 15 August 2017.

John Gardiner
Manager Determinations and Assurance

Appendix A: The relevant legislation

A.1 The relevant sections of the Act discussed in this determination

7 Interpretation

building work—

(a) means work—

(i) for, or in connection with, the construction, alteration, demolition, or removal of a building; and

(ii) on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code; and

(b) includes sitework; ...

40 Buildings not to be constructed, altered, demolished, or removed without consent

(1) A person must not carry out any building work except in accordance with a building consent.

113 Buildings with specified intended lives

(1) This section applies if a proposed building, or an existing building proposed to be altered, is intended to have a life of less than 50 years.

(2) A territorial authority may grant a building consent only if the consent is subject to—

(a) the condition that the building must be altered, removed, or demolished on or before the end of the specified intended life; and

(b) any other conditions that the territorial authority considers necessary.

(3) In subsection (2), specified intended life, in relation to a building, means the period of time, as stated in an application for a building consent or in the consent itself, for which the building is proposed to be used for its intended use.

163 Definitions for this subpart

In this subpart, unless the context otherwise requires,—

specified person means—

(b) if a notice to fix relates to building work being carried out,—

(i) the person carrying out the building work; or

(ii) if applicable, any other person supervising the building work:

164 Issue of notice to fix

(1) This section applies if a responsible authority considers on reasonable grounds that—

(a) a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent);...

(2) A responsible authority must issue to the specified person concerned a notice (a notice to fix) requiring the person—

(a) to remedy the contravention of, or to comply with, this Act or the regulations; ...

(3) However, if a responsible authority considers that it is more appropriate for another responsible authority to issue the notice to fix, it must—

(a) notify the other authority that it holds that view; and

(b) give the other authority the reasons for that view.