



## Determination 2017/067

# Regarding a notice to fix issued for three shipping containers transported to site and joined together for use as a shed at 14 Summerfield Way, Whangarei



### Summary

This determination considers whether the authority was correct to issue a notice to fix for three modified shipping containers transported to site and joined together to form a shed. The determination considers the definition of "building" and "building work", and discusses the content of the notice to fix.

### 1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> ("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, B May and D May ("the owners")
  - Whangarei District Council ("the authority"), carrying out its duties as a territorial authority or building consent authority. The authority applied for the determination.
- 1.3 The authority has sought the determination in order to confirm whether or not the three containers that have been modified and joined together are a building under section 8 of the Act<sup>2</sup> and whether the notice to fix was correctly issued.
- 1.4 The matter to be determined<sup>3</sup> is therefore the authority's exercise of its power of decision in issuing the notice to fix. In deciding this matter, I have considered whether the containers as modified and joined together come within the definition of a "building" under the Act, and whether "building work" was carried out without a

<sup>1</sup> The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at [www.building.govt.nz](http://www.building.govt.nz) or by contacting the Ministry on 0800 242 243.

<sup>2</sup> In this determination unless otherwise stated references to sections are to sections of the Building Act 2004

<sup>3</sup> Under sections 177(1)(b) and 177(2)(f) of the Act

building consent first being obtained when consent was required. For the purpose of this determination I refer to the modified containers joined together as “the shed”.

- 1.5 In making my decision, I have considered 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 shed is made from three 40-foot (12.2m long, 2.68m high) shipping containers that have been modified and joined together. The rear container has had one long side removed allowing access to the centre of the structure, and the centre container has had both its long sides removed allowing access to front and rear. The front container has had one long side removed allowing access to the centre and two roller doors and a door/window joinery unit installed.



**Figure 1: The shed as assembled onsite**

- 2.2 Flat pieces of steel have been welded onsite, lapping across the joins between the containers, vertically on the sides of the containers and horizontally where the roofs of the containers meet.
- 2.3 The owner has advised that the work to modify the containers took place off site, with the windows then removed for transportation and subsequently refitted on site.
- 2.4 It is not known whether there have been any further modifications to the interior; for example: how or if the floors have been joined together or if there are any structural members to replace the support previously provided by the walls that have been removed.
- 2.5 The shed is supported on timber packers, and in photographs supplied by the authority it appears that power is being or has been supplied via a long extension cord.
- 2.6 The owners have stated that the intention is to use the shed for storage.

### 2.7 The notice to fix

- 2.7.1 On 23 February 2017 the authority issued a notice to fix. The relevant particulars of non-compliance/contravention were described as ‘Construction of a Building, consisting of modified containers’ in contravention of section 40 of the Act. The notice also included contravention of section 17 of the Act for building work that

does not comply with the Building Code, but the notice did not describe in which respects the shed did not comply.

- 2.7.2 The notice to fix stated that in order to remedy the contravention of the Act, the owners must:
1. Contract the services of a structural engineer to assess the integrity of the building/Modified containers and their compliance with the Building Code.
  2. Apply for and obtain a Certificate of Acceptance for the non-consented works.
- 2.7.3 The timeframe given to comply with the notice was 24 March 2017, and it is my understanding that the owners have not yet addressed the contraventions in the notice to fix.

### **3. The submissions**

- 3.1 On 18 April 2017 the Ministry received an application for a determination from the authority. The authority attached a letter to its application outlining the events that led to the notice to fix being issued, and included copies of the following documents:
- Photographs of the shed on site, including one showing the rear and centre containers before being joined.
  - The notice to fix dated 23 February 2017.
- 3.2 In an email on 26 April 2017 the authority provided additional information on the modifications and joining of the containers.
- 3.3 The owners acknowledged the determination application in a letter dated 27 May 2017 that stated (in summary):
- the shipping containers were moved from another site to the current site ‘in reliance on paragraph (g) of section 9 of the Act’
  - the containers were modified at another location, with ‘holes cut, doors and windows fitted’ and windows were removed for transporting and refitted on site
  - the shed was to be used for storage while a house is built on the site.
- 3.4 The owners supplied a letter dated 8 May 2017 that they had sent to the authority regarding the site visit conducted by its officers.
- 3.5 A draft determination was issued to the parties for comment on 13 July 2017. The draft concluded that the shed did not meet the definition of a “container” under the relevant legislation and therefore did not fall under section 9 of the Act.
- 3.6 In a letter dated 20 July 2017, the owners stated they did not accept the draft determination decision and submitted:
- they disagree that for a container not to be a building the intended use must be to store hazardous substances, as they consider an owner’s intentions regarding its use could change at any particular time and “move in and out of being defined as a building”
  - they intended to use the containers for “storage of hazardous substances” such as “petrol, weed-killers and all the usual chemicals and substances used on a semi-rural property, among other such general storage uses.”

- 3.7 The authority accepted the draft determination on 24 July 2017 with no further comments.

## 4. Discussion

### 4.1 Is the shed a building under section 8 of the Act?

- 4.1.1 For a territorial authority or building consent authority to be able to exercise its powers under the Act, the shed must fall under the definition of a building under section 8 and not be excluded under section 9.
- 4.1.2 A “building” is defined in section 8 of the Act as “a temporary or permanent, movable or immovable structure” and includes structures intended for occupation by people, animals, machinery, or chattels. A container can fit into this definition and so can be a building.
- 4.1.3 The owners have relied on section 9(g) of the Act which provides a building under the Act does not include “containers as defined in regulations made under the Health and Safety at Work Act 2015” (“the HSW Act”)<sup>4</sup>.
- 4.1.4 Section 3(1) of the Health and Safety at Work (Hazardous Substances) Regulations 2017 sets out the definition as:
- Container**
- (a) means any receptacle, whether movable or fixed, in which hazardous substances or gases under pressure may be encased, covered, enclosed, contained, or packaged; ...
- 4.1.5 In Determination 2011/104<sup>5</sup> I considered that for a container to be excluded as building under section 9(g) the intended use must be to store hazardous substances not just that the container is capable of doing so. I remain of that view.
- 4.1.6 While the owners have identified some hazardous substances being stored in the container, the items identified are normal substances that could be expected to be found in any household garage or the like, and personal effects are also being stored in the shed alongside those items. The shed is not a specialist storage facility and has not been proposed as complying with the requirements of the HSW Act or Clause F3 of the Building Code that concerns hazardous substances and processes.
- 4.1.7 In this instance the three modified shipping containers are components that have been joined together to construct the shed.
- 4.1.8 I consider that the shed does not fall under the jurisdiction of the HSW Act and therefore is not excluded from the definition of building under section 9(g) and is a building as defined in section 8 of the Act.
- 4.1.9 I am of the view that the shed, as it currently stands and in its intended use as storage for the owners’ personal belongings is an outbuilding as defined in Clause A1 and must meet the relevant performance requirements in the Building Code.

<sup>4</sup> Although section 9 of the Act was replaced on 4 April 2016, the Health and Safety at Work (Hazardous Substances) Regulations 2017 were made on 26 June 2017 and do not come into force until 1 September 2017. I consider that for the purpose of establishing whether a container is excluded under section 9(g) from the definition of a building there is little material difference in the definition provided for in the Health and Safety at Work (Hazardous Substances) Regulations 2017 when compared to the Hazard Substances and New Organisms Act 1996 that was previously cited in section 9(g).

<sup>5</sup> *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* (Department of Building and Housing) 16 December 2011.

## 4.2 Was building work carried out without consent?

4.2.1 “Building work” is defined in section 7 of the Act as work “for, or in connection with, the construction, alteration, demolition or removal of a building...” I have previously concluded, in Determination 2011/104, that the act of moving a container around and placing a container on site is not building work and I maintain that view.

4.2.2 In this instance a number of alterations have been made. From the photographs provided by the authority and the comments from the owners, it is clear that the following work has been carried out:

### **Offsite**

- Four full-length walls were removed from the containers (Clause B1)
- Cut outs made and two roller doors and a door/window joinery unit fitted to one container – the door/window joinery unit was removed before transport to site (Clause B1, B2, and E2)

### **On site**

- Welding the containers together (Clause B1)
- Adding strip flashing and sealant to the roofs of the shed (Clause E2)
- Refitting the door/window joinery unit (Clause E2).

(It appears the shed is sitting on timber packers – this of itself is not building work.)

4.2.3 The containers are large components that once assembled, installed or incorporated, constitute a building (the shed). I have stated in previous determinations<sup>6</sup> that the offsite prefabrication of components intended for use in a particular building will be “building work”. I consider the prefabrication of the components, which is the work carried out to modify the shipping containers for the purpose of using them as components to construct the shed, is building work as defined in the Act, as was the work carried out to join the component parts together.

4.2.4 I consider the building work identified in paragraph 4.2.2 was not exempt under Schedule 1 of the Act and building consent was required under section 40 of the Act.

4.2.5 Given that the building work required building consent I have addressed this matter in relation to the notice to fix in paragraph 4.3.

## 4.3 The notice to fix

4.3.1 A notice to fix is issued when a “specified person is contravening or failing to comply with [the Act] or the regulations”. The particulars of contravention or non-compliance are listed in the notice were (in summary) construction of a building without a building consent in contravention of section 40, and building work not complying with the Building Code in contravention of section 17.

4.3.2 The act of moving containers onto a site is not considered building work, however, the alterations carried out to modify the containers and join them together to form the shed is building work, and that building work was not exempt under Schedule 1. It is my understanding that a building consent was not sought to carry out modifications

<sup>6</sup> See *Determination 2016/039 Regarding the grant of a building consent for a modular house at 57 Hauraki Road, Waiheke Island, and the use of modules designed locally but prefabricated offshore* (Ministry of Business, Innovation and Employment) 25 August 2016, and *Determination 2016/040 Regarding the grant of a building consent for a modular house at 8 Crosby Road, Auckland and the use of modules designed locally but prefabricated offshore* (Ministry of Business, Innovation and Employment) 26 August 2016.

- to the containers at their previous location or for the building work undertaken on site to join them together.
- 4.3.3 The authority has not specified that the modifications to the containers required building consent, and instead issued the notice to fix in respect of the act of constructing the shed as that which needed building consent. I consider the authority correctly exercised its powers of decision when it issued the notice to fix for the building work carried out onsite without consent.
- 4.3.4 It is unclear who carried out the offsite building work to modify the containers, but if the owners engaged someone else to carry out the modifications without a building consent then the authority could have issued a notice to fix to both the owners and the person carrying out those building work modifications without a building consent. An owner cannot avoid liability for carrying out building work without a building consent just because they engage a third party to carry out that work.
- 4.3.5 I also note here that if the modifications to the containers were carried out in the district of another authority section 164(3) provides for the authority to notify the other responsible authority that the building work associated with the modification of the containers has occurred in their district and the authority is of the view that a notice to fix should be issued for that work.
- 4.3.6 In regard to the contravention of section 17, the notice to fix identified non-compliance with the Building Code but no further reference to particular clauses or particular building elements that contravened the Building Code was identified in the notice. The reference in the remedies to contracting a structural engineer suggests that the authority is of the view that either the shed does not comply with Clause B1 Structure or that there is insufficient information to establish on reasonable grounds that it does comply with Clause B1. If the authority is of the view that building work does not comply with the Building Code and there has been a contravention of section 17, this should be clearly identified in the notice or in correspondence accompanying the notice.
- 4.3.7 The remedies set out in the notice to fix required the applicant to contract the services of a structural engineer to assess the “integrity” of the shed and compliance with the Building Code, and to apply for and “obtain” a certificate of acceptance for the non-consented works.
- 4.3.8 As I have said in previous determinations, if a notice to fix is issued for non-compliance with the Building Code, the notice should require the owner to bring the building work into compliance with the Building Code. A notice to fix is not the means by which authorities seek additional information to establish compliance, nor should the notice specify how any defects are to be fixed as this is a matter for the owner to propose and for the authority to accept or reject.
- 4.3.9 I consider that the reference to contracting a structural engineer and information on applying for a certificate of acceptance as a means of regularising compliant building work that was carried out without building consent should have been included in an accompanying letter, not the notice to fix. I note that while the authority may offer an option to the person receiving the notice to fix, in this case by providing an opinion from a structural engineer as to the compliance of the shed, it must be careful that this is not presented as the only feasible option available.

## **4.4 Conclusion**

4.4.1 I conclude that:

- the shed is a “building” as defined in section 8 of the Act, and the performance requirements under the Act and its regulations are applicable
- building work was undertaken by the owners that required a building consent without consent first being obtained.
- The authority was correct to issue the notice to fix; however the authority should modify and reissue the notice taking account of the findings of this determination.

## **5. The decision**

5.1 In accordance with section 188 of the Building Act 2004, I hereby confirm the authority was correct in exercising its power of decision by issuing the notice to fix in respect of the containers. 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 Ministry of Business, Innovation and Employment on 21 August 2017.

John Gardiner  
**Manager Determinations and Assurance**

## Appendix A: The legislation

### A.1 The relevant sections of the Building Act 2004

#### **8 Building: what it means and includes**

(1) In this Act, unless the context otherwise requires, building—

- (a) means a temporary or permanent movable or immovable structure (including a structure intended for occupation by people, animals, machinery, or chattels); ...

#### **9 Building: what it does not include**

In this Act, building does not include—

... (g) containers as defined in regulations made under the Health and Safety at Work Act 2015; ...

*Section 9(g): replaced, on 4 April 2016, by section 232 of the Health and Safety at Work Act 2015*

#### **17 All building work must comply with building code**

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

#### **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.
- (2) A person commits an offence if the person fails to comply with this section.
- (3) A person who commits an offence under this section is liable on conviction to a fine not exceeding \$200,000 and, in the case of a continuing offence, to a further fine not exceeding \$10,000 for every day or part of a day during which the offence has continued.

#### **163 Definitions for this subpart**

In this subpart, unless the context otherwise requires,—

**specified person** means—

- (a) the owner of a building;
- (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.
- (4) The other responsible authority referred to in subsection (3) must issue the notice to fix if it considers that this section applies.