



Determination 2014/030

Regarding the issue of a notice to fix for the placement of two shipping containers on a property at 236 Marsden Road, Greymouth



1. The matters to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the current 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, J Lee and E Rochwalski, (“the applicants”)
 - Grey District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority
- 1.3 This determination arises from the decision of the authority to issue a notice to fix for the placement of two shipping containers (“the containers”) on the property. The authority was of the view that building consent was required and was not satisfied that the containers complied with Clause B1 and Clause C3.3.5² of the Building Code (First Schedule, Building Regulations 1992). The authority’s concerns about compliance relate to the lack of anchoring of the containers and the placement of the containers closer than their own height to the boundary of the property.
- 1.4 The matter to be determined³ is the exercise of the authority’s powers of decision in issuing the notice to fix in respect of the containers.
- 1.5 In making my decision I have considered the submissions of the parties and the other evidence in this matter.

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 In this determination, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code that was in effect at the time the containers were placed on the site.

³ Under sections 177(1)(b) and 177(2)(f) of the Act

2. The background

- 2.1 The applicants purchased the property in 2005 and moved two shipping containers storing personal effects onto the property on 9 May 2006; the containers had previously been placed on road reserve were moved onto the applicant's property on this date. The containers are commonly known as 20-foot dry goods containers (being approximately 6m x 2.4m x 2.4m); they have an empty weight of approximately 2,200kg and maximum weight when fully loaded of between 24-30,000kg.
- 2.2 The containers were initially placed on road reserve and then were relocated approximately 1.5m inside the east boundary adjacent to a footpath and public road and were placed on timber sleepers. (I note here that the relevant boundary in terms of the Acceptable Solution C/AS1 current at that time would be the opposite side of the road).
- 2.3 On 21 February 2012 the authority received a complaint from a member of the public regarding a number of issues to do with the property, including the containers remaining on the site. The authority responded to the complainant that the applicants would be asked if the containers were to be permanent 'then a consent will be required immediately or a date given to [the applicants] for removal [of the containers]'.
- 2.4 On 13 March 2012, the authority issued a notice to fix in relation to other building work on the property. The notice to fix did not refer to the containers, however they were referred to in the covering letter as follows:
1. Shipping containers on your property. These require building consent for the foundations if they are to be used as anything more than temporary storage.
- Please either;
- Confirm in writing by 24 April 2012 that the containers are a temporary storage solution and will be removed by 13 June 2012, or
 - Obtain a building consent for the foundations by 13 June 2012 with Code Compliance Certificate to be obtained as soon as practicable thereafter.
- 2.5 On 19 March 2012 the applicants met with the authority regarding other building work carried out on the property at which time the authority confirmed its view regarding the containers. It appears that the authority held the view that the containers must be anchored in some way on the site and that consent would be required for work to construct the foundations.
- 2.6 On 23 March 2012 the applicants wrote to the authority noting their intention was for the containers to be removed once immigration issues were resolved and they could unpack their belongings. On 27 March 2012 and again on 17 April 2012 the applicant wrote to the authority seeking clarification as to the regulatory requirements in respect of the containers.
- 2.7 On 8 May 2012 the authority responded to the applicants, noting that 'shipping containers are defined as buildings (including for storage purposes)' under the Act.
- 2.8 On 9 October 2012 the authority issued a notice to fix in respect of the containers. The particulars of contravention or non-compliance and remedy were described as follows
- On 8 October 2012 it was noted that the building work you carried in (*sic*) contravention of section 40(1) of the Building Act 2004 had not been removed as per your assurance in the letter dated 23 March 2012.

...

This building work consists of containers located on your property without an appropriate building consent for the foundations.

To remedy the contravention or non-compliance you must either:

1. Remove the containers; or
2. Provide a fully completed and acceptable application for building consent to the Grey District Council, which includes all plans, details, drawings, specifications and producer statements for all building construction which requires consent.

- 2.9 On 30 October 2012 the authority wrote to the applicants regarding a number of issues and noted that the authority had not yet received ‘a design solution, and associated Building Consent application, for the foundations required for the storage containers’.
- 2.10 On 5 November 2012 the applicants advised the authority that they were taking legal advice regarding the containers.
- 2.11 It appears there was a meeting between the parties on 8 November 2012, at which point the authority expressed its view that the containers required foundations and some form of attachment to ensure that they wouldn’t move in high winds.
- 2.12 On 14 November 2012 the authority wrote to the applicants setting out what the authority considered to be the options available to the applicants in respect of the containers (as follows):
- Remove the storage containers from site, or
 - Apply for a Resource Consent AND Building Consent to retain the storage containers on site, or
 - Any other option you may wish to propose to [the authority] for [its] consideration.
- The authority requested the applicants confirm their intention by 16 January 2013, and stated that the notice to fix remained current.
- 2.13 On 13 January 2013 the applicants wrote to the authority to confirm their intention to remove the contents of the containers and then sell and remove the containers once a garage had been constructed. The applicants noted this was in line with their original intention but was held up by immigration issues that had subsequently been resolved.
- 2.14 On 25 March 2013 the applicants advised the authority that the containers had been removed from the property. The applicants continued to correspond with the authority regarding the actions taken by the authority in respect of the containers.
- 2.15 On 10 May 2013 the applicants laid a formal complaint with the authority and which included the matter concerning the containers. The applicants had also approached the Member of Parliament for West Coast/Tasman, who in turn wrote to the authority noting that his interpretation of information on the Ministry’s website was that consent would be required if there was building work carried out but that placement of the containers was unlikely to be considered building work. The Member of Parliament went on to query the grounds on which the authority required compliance, and requested an overview of the authority’s views regarding the containers and applicable legislation.
- 2.16 In a letter to the applicants on 20 May 2013 the authority’s Chief Executive Officer set out the authority’s views regarding the application of the Act and its regulations in respect of the containers. I have summarised the points made by the authority as follows:

A shipping container is a building under the Building Act. For that reason, it has been [the authority's] policy to insist that such structures be deployed under an approved Building Consent.

[The containers were placed] closer than their own height to the boundary which in terms of the Building Act required a building consent ...

- 2.17 In a further letter to the applicants, dated 21 February 2014, the authority referred to the following:

Amenity value

Please find attached New Zealand Building Code Clause B1 Structure that refers to Amenity.

Fire Risk

Please find attached New Zealand Building Code Clause C3.3.5 that refers to fire risk of a structure.

- 2.18 The applicants also laid a complaint with the Ministry under section 200 of the Act. In an email to the Ministry on 24 February 2014 in respect of the complaint, the authority noted that the containers were supported on timber sleepers and that whether this was building work for the purposes of the Act could be addressed through determination. The authority also noted the containers were unsecured and located closer to the boundary than their own height. The authority was of the view that the containers were ancillary buildings that were required to comply with the Building Code and the authority could not be satisfied that the containers complied with Clause B1, C3 and C4.
- 2.19 Subsequent to reviewing the information in respect of the complaint, the Ministry wrote to the authority on 24 March 2014, concluding (in part) that it was questionable whether any building work had been carried out which would have been grounds to issue the notice to fix, and noting that the parties could apply for a determination on the matter.
- 2.20 The Ministry received an application for a determination on 22 April 2014.

3. The submissions

- 3.1 The applicants did not make a separate submission in respect of the matters to be determined and noted that the Ministry had already received copies of relevant documentation as part of the complaint application.
- 3.2 Copies of the following were included in the complaint file and have been considered in this determination:
- The notice to fix issued on 9 October 2012
 - Correspondence between the parties.
 - A summary of events from the applicants.
 - BCA Update issued by the Ministry in June 2012 which notes that if the only activity involved is to place the container(s) onto the land and use them for storage, for example, then this is unlikely to be considered building work.

- A previous determination⁴ that considered the application of the Act in respect of containers used in a storage facility.
- 3.3 The authority did not acknowledge the application for determination by returning a completed D2 form and made no submission in response to the application.
- 3.4 A draft determination was issued to the parties for comment on 12 May 2014.
- 3.5 The authority responded by email on 23 May 2014. The authority made the following points in its submission (in summary):
- The notice to fix was issued in good faith based on the information available to it at the time.
 - The containers had been on the road reserve. The Road Controlling Authority requested they be moved onto the applicants' property (I note here that the notice to fix was issued after the containers were moved onto the applicants' property.)
 - Placement of the containers took place without any consultation with the authority; the containers were placed in an area that was not flat.
 - The authority considered the containers to be buildings and required them to be secured via foundations due to the weather event history in the district and in particular because the property is in a high wind zone.
 - The containers were a building hazard as they were not secured.
- 3.6 The authority also submitted that it has placed a container in its own yard 'to act as storage' and that a concrete footing was constructed to secure the container and the authority obtained building consent for the work. I note that the construction of the concrete footing was building work and the authority was correct to obtain building consent for that work. I have commented on the issue of securing containers and whether the placement of a container is building work in paragraph 4.4.
- 3.7 The authority also sought further guidance from the Ministry regarding containers and 'their purpose' under the Building Act. I refer the authority to the following:
- BCA Update⁵, dated June 2012, notes the following (in summary):
 - shipping containers can be considered buildings for the purposes of the Act
 - if, for example, the only activity involved is to place the container(s) onto the land and use them for storage, then this is unlikely to be considered building work. Conversely if the container(s) were to be placed onto foundations, had large openings put in, and were to contain sanitary facilities or facilities for the storage of potable water, then that would be considered building work requiring consent
 - where building work in association with containers requires consent, Schedule 1 allows the authority to make a discretionary decision to exempt the work from requiring consent
 - using containers for other than what they are designed for may trigger a change of use⁶

⁴ Determination 2011/104 regarding the exercise of an authority's powers to issue a notice to fix for a commercial storage facility made up of shipping containers

⁵ Building consent authority accreditation and registration scheme update ("BCA Update") was a newsletter offered by the predecessor of the Ministry but is no longer published.

- Codewords⁷ Issue 51, dated March 2012, provided a summary of Determination 2011/104 which noted that:
 - the act of moving a container around and placing a container on site is not building work as it cannot be said to involve work on the building itself, just as the act of moving a relocatable house is not building work in itself; if building work was carried out to the container itself, then this would constitute an alteration to an existing building and the requirements of section 112 would apply
 - under Clause A1 of the Code the containers in their use as shipping containers would be classified as an ‘ancillary building’; as a storage facility the containers would be classified as having a use of ‘commercial’

3.8 The authority also raised the fact that the determination did not address ... the aesthetic impact of two containers in the front yard of a residential property in an area where property owners take pride in appearance of their properties and the responsibilities of [the authority] as Building Consent Authority having acted upon a formal complaint.

3.9 In response I note that aesthetics do not fall within the scope of the Act or the Building Code, and that a notice to fix issued under the Act is not the appropriate regulatory mechanism to deal with a complaint of this nature.

3.10 The applicant responded by email on 24 May 2014, accepting the draft and noting two errors.

3.11 I have carefully considered the submissions and amended the draft as appropriate.

4. Discussion

4.1 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). It is my view that a container can fit into this definition and so can be a building.

4.2 In Determination 2011/104 (refer paragraph 3.2) regarding containers used at a commercial storage facility, I discussed the different requirements that buildings and building work must comply with in particular situations, for example where the use of a building is proposed to be changed (section 115) or undergoes an alteration (section 112). In Determination 2011/104 I considered 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).

4.3 The notice to fix issued on 9 October 2012 referred to a breach of section 40(1) of the Act for building consent not having been obtained for the foundations on which the containers were located (refer paragraph 2.8). I take the reference to “foundations” to be the timber sleepers later referred to by the authority in correspondence to the Ministry (refer paragraph 2.18).

4.4 Generally sleepers, or something similar, are used under containers to reduce damage to the underlying ground and to allow the doors to the container to move freely. The sleepers in this case are not intended to secure the containers. I do not consider that the placement of sleepers on which to position the containers is building work for the

⁶ In terms of Schedule 2 of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005.

⁷ A building controls email newsletter published by the Ministry and its predecessors.

purposes of the Act, nor do I consider the placement of the containers on the site to be building work. Accordingly I consider the authority was incorrect to issue the notice to fix.

- 4.5 Though not included in the notice to fix, the authority later raised concerns regarding compliance of the containers with Clauses B1, C3 and C4 of the Building Code.
- 4.6 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 reiterate that the placement of the containers on the applicant’s property was not building work and accordingly the performance requirements of the Building Code are unable to be applied.
- 4.7 The authority’s concerns regarding foundations to the containers appears in its letter of 13 March 2012 (refer paragraph 2.4) in which it notes that foundations would be required if the containers are to be used ‘as anything more than temporary storage’. The containers did not undergo a change of use, nor were they altered.
- 4.8 The authority raised concerns regarding the stability of the containers due to the site not being ‘flat’, and fire safety in relation to other property. The authority may only take action under the Building Act where it considers the container, as a building, meets the test of dangerous under section 121, in that:
- (a) in the ordinary course of events (excluding the occurrence of an earthquake), the building is likely to cause—
 - (i) injury or death (whether by collapse or otherwise) to any persons in it or to persons on other property; or
 - (ii) damage to other property; or
 - (b) in the event of fire, injury or death to any persons in the building or to persons on other property is likely.
- 4.9 I am of the view that:
- Shipping containers are inherently stable even when empty when placed on a suitably flat site provided they are not multiple-stacked. I do not consider that foundations are required for a shipping container simply placed in a site where the container is being used to send or receive goods: the latter being the case here.
 - The containers are Importance Level 1 (IL1) as described in AS/NZS 1170⁸. The consequences of failure for IL1 buildings are low with ‘low consequence for loss of human life, or small or moderate economic, social or environmental consequences’.
- 4.10 In this particular case I consider that:
- The containers were removed from site once they were emptied. The self-weight of the containers (2200Kg) would have been sufficient to maintain stability (against overturning and/or sliding) in all likely wind conditions at the site in the limited time in which the containers would have been empty.
 - From the photographic evidence available to me (refer title page of this determination) the land on which the containers were located is essentially flat and unlikely to affect the stability of the containers.

⁸ AS/NZS 1170: Structural Design Actions – Part 0: 2002 General Principles

- The containers as they were used in this case presented a low risk of failure, and the consequences arising from the containers failing, in relation to this and other property, was also low.
- It is likely that the containers were placed a sufficient distance from the relevant boundaries to prevent fire spread.

5. The decision

5.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority incorrectly exercised its powers of decision in issuing the notice to fix dated 9 October 2012, and accordingly, I reverse 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 22 July 2014.

John Gardiner
Manager Determinations and Assurance

Appendix A: The relevant legislation

A.1 The relevant sections of the Act

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; and

...