



## Determination 2018/016

### Regarding the issue of a notice to fix for construction of a shed without building consent at 1903-1947 Kumara-Inchbonnie Road, Inchbonnie



#### Summary

This determination considers whether the authority correctly exercised its powers in issuing a notice to fix for building work carried out without building consent having been obtained. The matter turns on whether the building work was exempt under Schedule 1 as a repair or replacement of an outbuilding.

#### 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, Katie Gordon, Manager Determinations, 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:

- Grey District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority who applied for the determination
- the owners of the building, T and J Ryder (“the owners”).

1.3 This determination arises from the decision of the authority to issue a notice to fix for a contravention of section 40 of the Act regarding building work carried out to construct a shed without building consent having first been obtained.

1.4 The matter to be determined<sup>2</sup> is therefore the authority’s exercise of its powers of decision in issuing the notice to fix. In deciding this matter, I must consider whether the building work that has been carried out required building consent or was exempt under Schedule 1 of the Act.

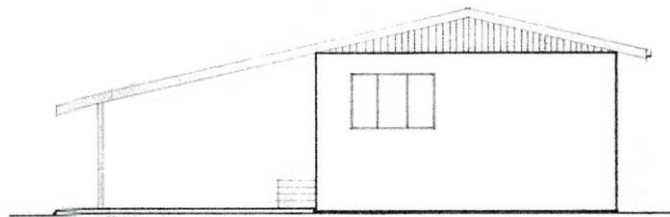
<sup>1</sup> The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at [www.building.govt.nz](http://www.building.govt.nz) or by contacting the Ministry on 0800 242 243.

<sup>2</sup> Under sections 177(1)(b) and 177(2)(f) of the Act. Unless otherwise stated, 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).

- 1.5 In making my decision I have considered the submissions of the parties and the other evidence in this matter. I have not considered the compliance of the building work or any other aspect of the Act. I note here that building work that is exempt under Schedule 1 from the requirement to obtain building consent must still comply with the performance requirements of the Building Code. See Appendix A for the relevant sections of the Act and clauses of Schedule 1 discussed in this determination.

## 2. The building work and background

- 2.1 Records held by the authority show the original building was a single-storey structure with an attached “car port” (see Figure 1 below). Construction consisted of reinforced concrete walls to the main structure, concrete slab, timber beams, rafters and trusses, and corrugated iron roofing. On the plans provided the original building was described as both a “shed” and a “new garage”.



**Figure 1: The original building**

- 2.2 At some time in or before November 2016 the building was destroyed by fire, with only the concrete structure (concrete slab and some walls) remaining.
- 2.3 On 19 July 2017 the authority visited the site and observed building work was underway to replace the building that had been destroyed. The authority took photographs of the site which show some steel beams in place and various materials on site.
- 2.4 The authority issued a notice to fix, dated 19 July 2017. The particulars of contravention or non-compliance were described as follows:

... you have carried out building works, specifically the installation of structural beams and floor joists to the existing concrete structure on this property, without obtaining a building consent as is required by Section 40 of the Building Act 2004 ...

The notice set out the remedy as being either to remove all the building work, or apply for a certificate of acceptance, with a date of 19 October 2017 to comply.

- 2.5 On 29 August 2017 the authority visited the site and observed building work had continued. The authority took photographs of the site which show some framing and flooring in place, roofing and some window joinery installed, and what appears to be plywood cladding to external walls.
- 2.6 On 31 August 2017 the authority issued a second notice to fix to replace the earlier one which the authority stated was withdrawn – it is this notice to fix that is the subject of this determination. The particulars of contravention or non-compliance were identical to the previous notice, with the addition of “walls and roof” to the list of works carried out.
- 2.7 Photos provided by the authority, date stamped on 4 September 2017 show a second storey has been added to the structure (see photo on title page.)

- 2.8 A file note dated 14 September 2017 indicates one of the owners met with the authority regarding the issue of the notice to fix, and the authority recommended an engineer be engaged ‘to assess the viability of the existing structure’.

### **3. The submissions**

- 3.1 The Ministry received an application for determination from the authority on 20 September 2017, along with copies of the following:
- a timeline of events and background summary
  - photographs date stamped 18 July, 29 August, and 4 September 2017
  - the notices to fix dated 19 July 2017 and 31 August 2017
  - a file note dated 14 September 2017.
- 3.2 On 17 October 2017 the authority advised that the building was originally constructed as a shed, and that the owner had indicated the use of the new building is a workshop/shed. The authority provided a copy of the plan of the original building.
- 3.3 On 20 October 2017 the authority responded to a request from the Ministry for further information regarding consideration of Schedule 1(7). The authority advised that it held the view the building work was not exempt under that provision as it did not satisfy sub clause (b) or (c); while the building appears to be within the same footprint and is not intended to be open to the public and based on the information the authority has on file the replacement is not comparable with the original building, and is no longer a single-storey building.
- 3.4 The authority also noted it had concerns regarding the safety of the building work carried out. The authority expressed concern that the building work may not comply with:
- Clause B1(Structure) in regards to the bracing and support of structural elements, and the durability of the concrete walls after the fire event
  - Clause E2 (External moisture) in regards to protection against moisture ingress, and
  - Clause F4 (Safety from falling) of the Building Code in regards to a ranchslider located on the first floor.
- 3.5 The owner has not acknowledged the application for determination or made any submission in response.
- 3.6 A draft determination was issued to the parties for comment on 22 November 2017.
- 3.7 The authority responded the same day, accepting the draft without further comment.
- 3.8 Despite a number of extensions of time in which to respond to the draft determination, and reminders to do so, the owners made no further submission.

## 4. Discussion

- 4.1 The authority has issued the owner a notice to fix for building work carried out without consent when building consent was required.
- 4.2 Under section 40 of the Act, a person must not carry out any building work without a building consent. However, section 42A provides that a building consent is not required for building work described in Schedule 1. The matter considered in this determination therefore turns on whether the building work was exempt under Schedule 1.
- 4.3 Under Schedule 1(7), an outbuilding can be “repaired or replaced” without building consent 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.
- 4.4 The authority has provided its view that the building appears to be within the same footprint as the original and is not intended to be open to or used by members of the public. I accept those statements.
- 4.5 However, based on the photographs provided by the authority, it is clear that the building is now more than one storey, and is no longer comparable to the original building; as such it does not meet the conditions of (b) or (c) noted above. I conclude therefore that the building work was not exempt under Schedule 1(7) and that the authority was correct in its decision to issue the notices to fix.
- 4.6 The authority has expressed concerns regarding compliance with the Building Code. While this is not part of the matter to be determined, I note that the building work must comply with the Building Code to the extent required by the Act.

## 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 31 August 2017 and I confirm that decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 30 April 2018.

Katie Gordon  
**Manager Determinations**

## Appendix A

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

#### **16 Building code: purpose**

The building code prescribes functional requirements for buildings and the performance criteria with which buildings must comply in their intended use.

#### **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. ...

#### **41 Building consent not required in certain cases**

- (1) Despite section 40, a building consent is not required in relation to— ...
- (b) any building work described in Schedule 1 for which a building consent is not required (see section 42A); ...

#### **42A Building work for which building consent is not required under Schedule 1**

- (1) Despite section 40, subject to the conditions set out in subsection (2) and whether or not a building consent would otherwise have been required, a building consent is not required for building work in the following categories:
- (a) building work described in Part 1 of Schedule 1; or
- (b) building work described in Part 2 of Schedule 1 that is carried out by an authorised person (see subsection (3)); or
- (c) building work described in Part 3 of Schedule 1 if the design of the building work has been carried out or reviewed by a chartered professional engineer and the building work has been carried out in accordance with that design.
- (2) Subsection (1) is subject to the following conditions:
- (a) the building work complies with the building code to the extent required by this Act: ...
- (c) the building work does not breach any other enactment:

#### **Schedule 1 Building work for which building consent not required**

##### **Part 1 Exempted building work**

##### **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.