



Determination 2019/047

Regarding the issue of a notice to fix for the relocation of two buildings at Ruataniwha Place, Okiwi Bay



Summary

This determination considers a building consent authority's exercise of its power of decision in issuing a notice to fix for the relocation of two buildings and the installation of a wastewater system. The determination discusses the contraventions for which the notice was issued, who the notice was issued to, and how the provisions of the Building Act apply when a building is relocated.

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, 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:
 - the owner of the buildings, McCaa Contracting Limited, ("the applicant"), represented by an agent, ("the agent")
 - the landowner, Okiwi Bay Limited, ("the landowner")
 - Marlborough District Council ("the authority"), carrying out its duties as a territorial authority or building consent authority.

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.

1.3 The matter to be determined² is whether the authority correctly exercised its powers of decision in issuing a notice to fix dated 22 January 2019 (“the first notice to fix”) for the relocation of two buildings and the installation of a wastewater system. In deciding this matter, I must consider the contraventions identified in the notice, whether any building work was carried out on site, and if so whether this work required a building consent, and who the notice was issued to.

1.4 In making my decision, I have considered the submissions of the parties, and the other evidence in this matter.

1.5 Matters outside this determination

1.5.1 The authority advised that the first notice to fix incorrectly included items 4 to 7 as contraventions of section 40 and incorrectly included item 2 as a contravention of section 17 (refer paragraph 2.4) and that this notice to fix had been withdrawn. As the authority considers these were incorrectly included I have not discussed those items in any detail, but I have included them in the description of the first notice to fix.

1.5.2 The authority issued a second notice to fix on 22 May 2019, which contained fewer contraventions of sections 17 and 40. The applicant has requested the scope of this determination be limited to considering the authority’s decision to issue the first notice to fix. Accordingly, although I have recorded the authority’s decision to issue the second notice to provide context, I have not considered that notice in this determination.

1.5.3 I have not considered any other aspects of the Act or Building Code, beyond those required to decide on the matter.

2. The building work and background

2.1 Two buildings have been placed onto a flat area of land and are supported by wooden blocks. One building is a converted shipping container that includes a toilet, shower and hand basin, and a storage area (“Building A”). The other building is a relocatable building that is 13m x 4m wide, which contains a kitchenette, two rooms, and a bathroom with a toilet, shower and hand basin (“Building B”). This building is clad with plywood sheets over a cavity and has metal roof cladding.

2.2 Each of the buildings has the following:

- a plumbed in gas water heater
- PVC pipes connecting the sanitary fixtures to an in-ground 5000 litre tank
- water supplied through a plastic pipe that is connected to a fire hydrant³.

2.3 The applicant relocated the two buildings onto the site sometime in 2018.

2.4 On 21 January 2019 the authority visited the site and the next day issued the first notice to fix to the landowner, identifying the following particulars of contravention or non-compliance (numbering added):

Contrary to section 17 of the Building Act 2004, the following building works undertaken do not comply with Schedule 1 of Building Regulations 1992...to the extent required by the Act:

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

³ While the connection of this water supply is not administered by the authority, the water supply must still meet the requirements of Clause G12 Water supplies. I also note fire hydrants are for firefighting and Fire and Emergency New Zealand operational purposes, and not generally intended as a private water supply.

1. **Clauses B1 Structure and B2 Durability** – [Building A] and [Building B] are not founded on compliant foundations
2. **Clauses B1 Structure, B2 Durability and E2 External Moisture** – [Building B] is not constructed to a recognisable standard.
3. **Clause G13 Foul Water** – The drainage system from [Building A] and [Building B] including the in ground waste water system; have not been installed to a recognised standard.

Contrary to section 40 of the Building Act 2004, the following building works have been carried out without first obtaining a building consent:

4. The construction of [Building B] of approximately 48m² on site, clad using ply wood with a tin roof.
5. The installation of a sanitary fixture that services a kitchen sink, with the associated plumbing and drainage.
6. The installation of a single leaf door into [Building A's] wall.
7. The installation of sanitary fixtures that service a toilet, hand basin and shower installed into [Building A], including the associated plumbing and drainage.
8. The installation of an in ground waste water system that services [Building B] and [Building A].

2.5 The first notice to fix identified the required remedy for the contravention or non-compliance:

Remove the unauthorised building works; Or

Pursue any other option/s required to make the building works comply with the Building Act and regulations.

2.6 On 22 January 2019 the landowner responded to the authority that the applicant had placed the two transportable and temporary buildings onto site for use as their living and storage area. The toilet is connected to a 5000 litre tank that will be pumped out by a certified operator. The landowner noted the applicant's view that the transportable and temporary buildings do not require a building consent.

2.7 On 29 January 2019 the authority asked the applicant to clarify when and where Building A was converted into an ablution building, and where Building B was constructed, and whether building consent was obtained. The authority also stated it believed the buildings are not exempt from requiring a building consent under Clause 4 of Schedule 1 of the Act⁴.

2.8 The parties continued to communicate during February – April 2019. I have summarised their respective views in the following table:

Table 1: Summary of the parties' correspondence

Agent	
	<ul style="list-style-type: none"> • Building A is used for storage, toilet facility, and site office .The container is non-habitable and of a temporary nature. Building B should be treated as a relocated building. • A building consent was not required for the placement of the two buildings onto site. • There has been no building work carried out onsite.

⁴ Schedule 1 of the Act prescribes the types of building work for which building consent is not required.

Authority	<ul style="list-style-type: none"> • The two buildings and in-ground waste water system are not exempt from the requirements of obtaining a building consent under Schedule 1. • The buildings placed on site are not typical site offices. • A certificate of acceptance will be required for the two buildings and waste water system. A building consent will be required for the foundations.
Landowner	<ul style="list-style-type: none"> • The buildings are temporary and have been placed there for use by the applicant while carrying out civil works to the site. • The applicant and agent are of the view the first notice to fix does not apply to the current situation on site. Building A is a site storage shed with sanitary fixtures added. Building B is used as the site office, toilet, and accommodation. Both of these buildings are common on construction sites. The tank is emptied by a septic removal truck, which is no different to a portable toilet. • The buildings are transportable and intended to be temporary, so applying for a building consent for foundations would be unnecessary.

2.9 The Ministry received an application for a determination on 23 April 2019.

3. The submissions

3.1 The agent provided a submission with the application that included a summary of the background that led to the determination application. The submission also included the agent's views as follows (in summary):

- The buildings are second hand and in the same configuration as they were when purchased. They are buildings intended as site offices and therefore unlikely to have ever been granted a building consent or certificate of acceptance.
- The buildings were not constructed onsite, rather they were only placed onsite and that is not considered building work.
- The cladding on Building B is of a reasonable standard to meet Clause E2, and is likely able to be issued a certificate of acceptance if required.
- The drainage system connects only to a tank that is emptied as required.
- There has not been any building work onsite, and water is the only service currently available.
- The buildings are exempt from requiring a building consent under Clause 4 of Schedule 1.⁵

3.2 On 29 April 2019 the authority acknowledged the application for determination and made a submission (in summary):

- Building B is a dwelling with a kitchen, bathroom, and sleeping quarters. Building A has been converted into an ablution block. All sanitary fixtures

⁵ The parties held different views on whether the buildings were exempt under Clause 4 of Schedule 1. This is not relevant in this case because the buildings were not constructed by the applicant; however, if they had been, the buildings would not have met the criteria for this exemption. Building B is used for accommodation and the people using both buildings are engaged in civil construction rather than building work that requires a building consent.

have been connected and the unconsented waste water system services both buildings.

- The first notice to fix incorrectly included items 4 - 7 as contravening section 40, and incorrectly included item 2 as a breach of section 17.
- 3.3 The authority maintains that the first notice to fix correctly identified that the drainage system required a building consent prior to being installed and that the buildings do not have compliant foundations.
- 3.4 A draft determination was issued to the parties for comment on 18 July 2019.
- 3.5 The authority made a submission which was received on 9 August 2019. The authority noted its concerns with relocated buildings generally and with reference to expectations of the purchasers or end users and their likely lack of knowledge regarding the construction. With regard to the draft determination, the authority submitted that the threshold for a building being dangerous or insanitary under the Act is high and the authority expressed concern that relocated buildings constructed in other districts without building consent remain unregulated in terms of code-compliance if there is no change of use or alteration that would trigger an assessment of compliance by the authority. The authority considers that not being able to issue a notice to fix for relocated buildings of this type, if no building work has occurred or there is no change of use, is contrary to the purpose of the Act. The authority also described what it takes into account when considering whether a building has undergone a change of use, and in the authority's view the subject buildings were always "habitable buildings" (as opposed to a site office).
- 3.6 The authority also commented on the degree of evidence that the draft determination indicates is required before issuing a notice to fix and how detailed the identification of non-compliance and options for remedy should be. The authority considers it reasonable for the contravention to be stated in broad terms and that "these may become more detailed and properly aligned with the [Building] Code specifics during the course of the building consent or certificate of acceptance process", and if as a result of further information it is established there is no non-compliance the notice can be withdrawn. With regard to a lack of information on compliance of building work, the authority considers the certificate of acceptance process is not appropriate because the authority cannot compel an owner to make an application unless it issues a notice to fix. The authority also disagreed that the certificate of acceptance should be referenced as an option to remedy a contravention of section 40.
- 3.7 On 28 August 2019 the landowner advised they did not wish to comment.
- 3.8 The applicant responded on 30 August 2019, accepting the draft without further comment.

4. Discussion

4.1 The notice to fix

- 4.1.1 Section 164 provides for the authority to issue a notice to fix if it considers on reasonable grounds that a specified person is contravening or failing to comply with the Act or the regulations. The notice must require the person to remedy the contravention of, or to comply with, the Act or the regulations.

4.1.2 Section 163 of the Act defines a specified person to whom a notice can be issued:

specified person means—

- (a) the owner of a building; and
- (b) if the 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.

4.1.3 The particulars of contravention or non-compliance listed in the first notice considered in this determination are, in summary:

- the installation of the in-ground waste water system that services the buildings, which was carried out without obtaining a building consent, and
- non-compliance with the Building Code, in relation to the waste water system and the buildings not being on compliant foundations.

4.2 Building work without consent

4.2.1 In respect of the section 40 contraventions listed on the notice, only item 8 is in dispute, which was the installation of the in-ground waste water system. I take this to include the installation of the drainage system to both buildings as well as the installation of the tank.

4.2.2 The authority was correct in identifying the work to install the tank as requiring a building consent. Clause 23 of Schedule 1 exempts building work in connection with a tank, and any structure in support of a tank, provided it meets the requirements listed in one of subclauses (a) to (g). However, the subclauses refer only to the height of the tank's support system above or directly on the ground. There is no reference to installing the tank below ground, and subsequently the exemption is limited to tanks that are supported above ground.

4.2.3 There is also no exemption in Schedule 1 for the installation of the drainage system carrying waste water from the buildings to the tank. The authority was correct to identify this as building work that required a building consent.

4.3 Compliance

4.3.1 I now turn to the contraventions of section 17 identified in the first notice. This section of the Act provides all building work⁶ must comply with the Building Code to the extent required by the Act, whether or not consent is required in respect of that building work.

4.3.2 The authority is of the view the buildings are not founded on compliant foundations (item 1). However, I do not agree with the authority's view that the relocation of the buildings onto the site required the construction and connection of foundations to the buildings.

4.3.3 There are no provisions in the Act that require a relocated structure to be affixed to foundations. The provisions in the Act for the authority to consider in relation to the relocated units are limited to whether:

⁶ The term "building work" is defined in section 7 of the Act and includes "work— (i) for, or in connection with, the construction, alteration, demolition, or removal of a building; ..."

- the relocated buildings are dangerous, affected or insanitary⁷ (sections 121, 121A and 123 respectively)
- the buildings have undergone a change of use (sections 114 and 115)
- building work has occurred and whether this work required building consent (section 40) and is compliant with the Building Code (section 17), and compliance required under section 112 if the building work is an alteration.

- 4.3.4 I note also that the performance criteria of the Building Code do not apply in respect of a building that is simply relocated without building work being carried out. The Building Code comes into effect in those circumstances prescribed in the Act, for example: when the authority is considering the grant of a building consent (section 49(1)), or building work has been carried out and the authority is considering grant of a certificate of acceptance or issue of a notice to fix (sections 96(2) and 164(1)(a) respectively).
- 4.3.5 I acknowledge the authority's concerns raised in its submission with regard to regulatory oversight of building work that is carried out to construct buildings in one district when those buildings are then relocated to another district. I note that this issue was raised in another recent determination⁸ that the authority is a party to, and I refer the parties to the comments offered in that determination about the authority's powers under section 164(3) if it considers that is it appropriate for another responsible authority to issue a notice to fix.
- 4.3.6 The authority also identified the installation of the associated plumbing and drainage system as breaching section 17 (item 3) on the basis that it has 'not been installed to a recognisable standard'. The first notice to fix did not identify the specific performance criteria in Clause G13 that the drainage system did not meet, meaning it was not clear to the recipients of the notice what is required to bring the building work into compliance in order to satisfy the notice. In this matter, I consider the authority incorrectly exercised its powers in relation to its decision to issue the notice to fix.
- 4.3.7 The authority has submitted that the non-compliance with this clause can be stated broadly and then be refined at a later date when the authority has further information.
- 4.3.8 While I acknowledge the difficulties present for the authority with regard to assessing compliance when it has not had oversight of the work, I do not consider that issuing the notice to fix (for contravention of section 17 of the Act) is the appropriate mechanism when there is a lack of evidence of compliance or non-compliance.
- 4.3.9 The authority's concerns appear to relate to a lack of information to establish compliance, as opposed to evidence of a failure to meet the performance criteria. I do not consider that a notice to fix is the appropriate mechanism where there is a lack of evidence of whether building work is compliant or not compliant. A notice to fix is an enforcement notice that requires a person to carry out work to remedy a breach of the Act or Building Code (section 164(2)(a)), specifies a time period for doing so (section 165(1)(b)) and may be enforced by a prosecution for failing to comply with the notice (section 168). For an authority to issue a notice to fix it must consider on reasonable grounds that a person is contravening or failing to comply with the Act or regulations. The authority's belief that the Act or regulations are being contravened

⁷ I note for completeness the provisions relating to earthquake prone buildings under Subpart 6 A of the Act do not apply to the units or structure in this case (refer section 133AA).

⁸ Determination 2019/036 Regarding a notice to fix and whether a structure on trailers is a vehicle or a building (25 July 2019).

will require some specific evidence in support of that belief before a notice to fix can be issued.

- 4.3.10 Given that the building work to install the drainage and tank is subject to the Act but was not granted building consent, the appropriate avenue for regularising that work is by way of the certificate of acceptance process. This will provide the opportunity for the compliance or otherwise of the building work to be assessed, and is the appropriate avenue for the authority to consider relevant information and for the authority to reach an informed view on whether the building work complies.

4.4 Specified person

- 4.4.1 Section 163 of the Act defines a specified person to whom a notice can be issued, and this includes the owner of the building and the person carrying out the building work if the notice relates to the building work being carried out. The first notice to fix was issued in respect of the building work carried out by the applicant.
- 4.4.2 In this case, I consider the authority was incorrect in its decision to issue the first notice to fix to the landowner as the specified person. The landowner is not the owner of the buildings and I have received no information that indicates the landowner carried out the building work.

4.5 Remedies

- 4.5.1 The notice gives the parties the option of either removing the building work or pursuing “any other option/s required to make the building works comply with the Building Act and regulations”.
- 4.5.2 It is not now possible for the parties to remedy a breach of section 40 by retrospectively applying for a building consent; however an application could be made for a certificate of acceptance⁹ once it has been demonstrated that the building work complies with the Building Code. I am of the opinion the option to seek a certificate of acceptance should have been presented in the notice as one of the remedies available to the applicant.

4.6 Conclusion

- 4.6.1 The authority correctly identified that building consent was required for the installation of the tank and the drains to the buildings (item 8).
- 4.6.2 However, the authority incorrectly issued the first notice to fix with reference to items 1 – 2 and 4 – 7. In addition, the notice does not adequately describe the contraventions (item 3) and was also incorrectly issued to the landowner.
- 4.6.3 In regards to my decision under section 188 to confirm, reverse or modify the authority’s decision to issue the first notice, the deficiencies in the notice described above would lead me to reversing the authority’s decision. However, reversing that decision now would have no consequence because the authority has withdrawn that notice and it is no longer in effect.

⁹ More information about applying for a Certificate of Acceptance can be found on the Ministry’s website at <https://www.building.govt.nz/projects-and-consents/sign-off-and-maintenance/completing-your-project/certificate-of-acceptance/>.

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 in deciding to issue the notice to fix dated 22 January 2019 because building work was carried out without building consent when consent was required, but the notice was incorrectly issued with reference to items 1 – 2 and 4 – 7 and the description of item 3, and it was incorrectly issued to the landowner.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 30 September 2019.

Katie Gordon
Manager Determinations