



Determination 2019/057

Regarding the issue of a notice to fix for building work carried out without a building consent and over a property boundary at 61 Lawcocks Road, Amberley, Hurunui



Summary

This determination considers the decision to issue a notice to fix for the construction of a storage building made up of relocated shipping containers and a roof. The authority is of the view that building work has been carried out which required building consent and therefore there has been a contravention of Section 40. As the building crosses a boundary into an adjacent allotment, the authority is also of the view there has been a contravention of section 75. This determination also discusses whether the containers have undergone a change of use.

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 property, A Clyne, as the applicant (“the applicant”)
 - Hurunui District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 This determination arises from the authority’s decision to issue a notice to fix for the construction of a storage building (“the building”) made up of shipping containers (“the containers”) and a roof (“the roof”). The containers have been relocated onto the applicant’s property but have been located partly on adjacent land.

¹ The Building Act and Building Code are available at www.legislation.govt.nz. The Building Code is contained in Schedule 1 of the Building Regulations 1992. Compliance and guidance documents issued by the Ministry, as well as past determinations, are available at www.building.govt.nz.

- 1.4 The matter to be determined² is whether the authority was correct to issue the notice to fix in respect of the construction of the storage building without building consent in contravention of section 40³ and, as the building crosses a boundary onto an adjacent allotment, in contravention of section 75.
- 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 any other aspects of the Act or Building Code beyond that required to decide on the matter to be determined.
- 1.6 Refer to the Appendices for relevant extracts from the legislation.

2. The building

- 2.1 The applicants' property is a large rural block of land which is leased to a tenant. The property contains two buildings being used for a commercial motorcycle repair business as well as the building that is the subject of this determination.
- 2.2 The building is made up of five standard 40ft shipping containers⁴ which have been relocated onto the property and are sitting on tyres filled with concrete. The containers are spaced approximately two to three metres apart and covered by a roof; making the size of the building as a whole 12.2m long by approximate 22.15m wide, covering an area of approximately 270m². The applicant's tenant constructed the roof over the containers. The roof appears to be constructed from lightweight timber framing with corrugated metal sheet roof cladding, and with a flat or near-flat pitch.
- 2.3 The building crosses the applicants' boundary, meaning parts of the building are sitting on adjacent land that is not owned by the applicant. This fact is not in dispute between the parties.
- 2.4 Except for the construction of the roof there is no indication of other building work being carried out to the containers.

3. Background

- 3.1 On 14 June 2019 the authority issued notice to fix NF0235 ("the notice to fix"). The notice to fix described the building as "Storage Building (main structure shipping containers)" and stated the "Particulars of contravention or non-compliance" as:

Construction of a storage building without consent on 2 allotments in contravention of Section 40 and Section 75 of the Building Act 2004, and the Buildings Regulations 1992.

- 3.2 The notice to fix states "to remove the contravention or non-compliance you must":

Remove the storage buildings from the property

- 3.3 The applicant has submitted that the notice to fix initially stated a possible remedy was to apply for a certificate of acceptance; however this option was apparently removed because the building crosses a boundary onto adjacent land.

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.

⁴ Standard ISO shipping containers are 2.43m wide, 2.59m high and come in two lengths; 6.06m (20ft) and 12.2m (40ft). Source: Seacontainers.co.nz

- 3.4 On the same day the notice to fix was issued, the applicant wrote to the authority requesting clarification on the particulars of the notice, specifically whether the notice to fix was for the construction of the roof or the containers themselves. The authority responded confirming the notice to fix related to ‘the building made from shipping containers’.
- 3.5 The applicant also asked if the roof was removed from the containers would a building consent be required for placing containers on the property. The authority responded, confirming a building consent would still be required, noting however that this would not be possible to issue as the applicant did not own the adjoining land.
- 3.6 The Ministry received an application for determination on 24 July 2019.
- 3.7 On 1 August 2019 the Ministry wrote to the parties, noting some similarities between the current case and a previous determination⁵ that confirmed that the act of moving a container around and placing a container on a site is not building work. That determination also considered the use of the containers and whether there had been a change of use under Schedule 2 of the Building (Specified systems, change the use, and earthquake-prone) Regulations 2005 (“the Regulations”). The Ministry noted in this case the installation of the roof doesn’t appear to be exempt building work under Section 41 and Schedule 1⁶ of the Act and would likely have required a building consent, but that the matter could be resolved without the need for a determination.
- 3.8 On 4 August 2019 the applicant responded to the Ministry, advising that the applicant disputed the containers had undergone a change of use and requesting the determination clarify whether the relocation of containers that are to be used for storage requires building consent.
- 3.9 On 5 August 2019 the authority responded to the email from the Ministry, noting:
- We have issued a notice to fix requiring the removal of the unconsented storage building (constructed out of second hand shipping containers, with a sloped or flat roof). The entire building is to be removed ([a certificate of acceptance] may not be possible due to boundary issue)...
- 3.10 The application for determination was accepted by the Ministry on the 7 August 2019.
- 3.11 On 9 August 2019 the Ministry wrote to the parties to clarify the dispute.

4. The submissions

4.1 The applicant’s submissions

4.1.1 The applicant sent copies of the following with the application:

- a copy of the notice to fix (refer paragraph 3.1)
- a covering letter
- correspondence with the authority
- photos of the building.

4.1.2 In a covering letter the applicant stated the following (in summary):

⁵ 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 (16 December 2011)

⁶ Schedule 1: Building work for which building consent not required

- Containers have been placed on site to be used for storage and a roof has been constructed over the containers.
- Determination 2014/030 states the placing of a container on land is not building work therefore does not require building consent.

4.1.3 In correspondence with the Ministry (refer paragraph 3.7) dated 14 August 2019 the applicant stated the following (in summary):

- The applicant seeks clarification on whether placing a container on a site requires building consent. In the applicant's opinion, containers' being placed on a site is comparable to placing building materials on a site. The containers are used intermittently by the tenant to store motorcycles, parts, etc. until they are sold, as well as storage of personal belongings.
- Determination 2011/104 discusses changing the use of containers from IA (Intermittent Activity) to storage activities as per schedule 2 of the Regulations.
- It could be possible to class containers as WL (Working Low) use because goods are stored in them.

4.2 The authority's submission

4.2.1 The authority acknowledged the application for determination but did not make an initial submission. In correspondence with the Ministry dated 12 August 2019 (refer paragraph 3.9), the authority stated the following (in summary):

- The storage building should be removed from the applicant's site as well as from the neighbouring site.
- The authority seeks clarification from the determination on whether these containers require building consent to be relocated elsewhere on the site, and "is there a change of use from Shipping container (technically building materials) to commercial storage?" and, "if so, is any building work or building consent required for the change of use to occur?"
- The containers are used for commercial storage.

4.3 Draft determination

4.3.1 The draft determination was issued to the parties for comment on 18 September 2019.

4.3.2 The applicant responded on 1 October 2019 accepting the draft determination without comment.

4.3.3 The authority responded on 9 October 2019 accepting the conclusion in the draft determination that the notice was incorrectly issued with regard to section 75, but submitting the following (in summary):

- The authority disagrees with the IA classification of shipping containers; containers are not constructed as a building, but are used as building materials similar to other components or building materials used to construct a building and 'should not be given a label used for a building'.
- Section 17 of the Act requires the building work carried out to construct this building to comply with the Building Code to the extent required by the Act. As this is a new building it should comply fully, but building across a legal

boundary without fire rated construction would not comply with Clauses C3.3 and C3.7⁷.

- If the use has changed from IA to WL, the authority would carry out an assessment of compliance to the extent required by section 115, and is of the view the building as constructed is unlikely to comply.

4.3.4 I have considered the authority's submission and amended the determination as I consider appropriate.

5. Discussion

5.1 The matter to be determined is whether the authority was correct to issue the notice to fix. The authority is of the view that building work has been carried out which required building consent and therefore there has been a contravention of Section 40. As the building crosses a boundary into an adjacent allotment, the authority is also of the view there has been a contravention of section 75.

5.2 An authority has the power to issue a notice to fix where the authority considers on reasonable grounds that an owner is contravening or failing to comply with the Act or Building Code (section 164(1)(a)). A notice to fix is most commonly issued in respect of building work that does not comply with the Building Code or building work carried out without a building consent when a building consent was required.

5.3 The notice to fix issued by the authority lists the particulars of contravention or non-compliance as:

'Construction of a storage building without consent on 2 allotments in contravention of Section 40 and Section 75 of the Building Act 2004, and the Buildings Regulations 1992'.

5.4 The notice to fix states 'to remedy the contravention or non-compliance you must':
Remove the storage buildings from the property

5.5 To determine this matter, I have considered the provisions of the Act that apply. This determination therefore turns on the following:

- Whether building work has been carried out that required building consent (paragraph 5.7).
- Whether the provisions in section 75 of the Act apply in this case with regard to construction of a building on 2 or more allotments (paragraph 5.8).

5.6 Although the notice to fix does not refer to a change of use, the parties have also sought clarification on whether the containers have undergone a change of use. I discuss this in paragraph 5.10.

5.7 Has building work been carried out that required building consent?

5.7.1 As discussed in paragraph 2.2, the building is comprised of five shipping containers and a roof. The containers are placed on tyres filled with concrete which reduces damage to the underlying ground and allows the container doors to move freely. The roof was constructed after the containers were placed on site.

Relocating containers

5.7.2 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 ...'. Section 40 of

⁷ Clause C3 – Fire affecting areas beyond the fire source

the Act requires building work must not be carried out except in accordance with a building consent, although under section 41 there are certain circumstances in which a building consent is not required.

- 5.7.3 The definition of ‘construct’ under section 7 of the Act includes to ‘relocate’. Previous determinations have considered the relocation of containers and whether this constitutes “building work” under section 7 of the Act (see for example 2011/104⁸, 2014/030⁹ and 2017/065¹⁰).
- 5.7.4 I concur with the view set out in those determinations, that the act of simply moving a container around is not ‘building work’ for, or in connection with the building itself, as nothing is being done to the container other than moving it. On that basis building consent is not required to move a container and there is no contravention of section 40. Placement of the containers on the applicant’s site does not constitute building work and no building consent was required for the relocation of the containers onto the site.

Construction on site

- 5.7.5 Sometime after the placement of the containers, the applicant's tenant constructed a roof that spans the containers.
- 5.7.6 There is no dispute that the construction of the roof is building work as defined in the Act, and a building consent was not sought to carry out that building work. I consider the building work associated with the construction of the roof is not exempt building work and accordingly the authority was correct to issue a notice to fix for a contravention of section 40 of the Act.
- 5.7.7 In constructing the roof spanning the containers, the tenant has formed a larger structure (the building) of which the containers are a component part. I note that if building consent had been sought at the time or a certificate of acceptance applied for after the work was done, the authority would have had to consider the compliance of the building as a whole.

5.8 Construction of a building on 2 or more allotments

- 5.8.1 As stated in paragraph 2.3, part of the building crosses the boundary into another property.
- 5.8.2 The authority is of the view that as the building crosses a boundary into an adjacent allotment, there has been a contravention of section 75.

When does section 75 apply?

- 5.8.3 Section 75 provides:

75 Construction of building on 2 or more allotments

- (1) This section applies if—
- (a) an application for a project information memorandum or for a building consent relates to the construction of a building on land that is comprised, or partly comprised, of 2 or more allotments of 1 or more existing subdivisions (whether comprised in the same certificate of title or not); and
- (b) those allotments are held by the applicant in fee simple.

⁸ 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)

⁹ Determination 2014/030 Regarding the issue of a notice to fix for the placement of two shipping containers on a property (22 July 2014)

¹⁰ Determination 2017/065 Regarding the issue of a notice to fix for building work carried out without building consent in relation to relocated structures (15 August 2017)

- 5.8.4 Section 75 will apply when an authority issues a building consent for a building to be constructed over two or more allotments **and** where those allotments are held by the **same** owner in fee simple. In such situations, territorial authorities must issue a certificate under section 75(2) as a condition of the building consent; this is recorded against the titles of the affected allotments and prevents their transfer or lease except in conjunction with each other.
- 5.8.5 In this case the adjacent property on which the building is partially sited is not an allotment owned by the applicant, therefore section 75 is not applicable and the authority was incorrect to include a contravention of section 75 in the contraventions set out in the notice to fix.
- 5.8.6 In its submission responding to the draft of this determination the authority referred to the requirement under section 17 of the Act for the building work carried out to construct this building to comply with the Building Code, specifically in relation to Clauses C3.3 and C3.7.
- 5.8.7 There are performance criteria in the Building Code that concern the protection of other property, and these clauses are relevant when considering the relationship between building work and property boundaries. However, in this case, the compliance of the building was not identified in the particulars of the notice to fix. I have not considered the compliance of the building work in this determination because the applicant did not have the legal right to place the containers or construct the roof over the boundary, and he has indicated his intention to remove the roof and reposition the containers within his allotment (refer paragraph 5.10.2).

5.9 Conclusion

- 5.9.1 In conclusion, the authority correctly exercised its powers in issuing the notice to fix for a contravention of section 40 because the construction of the roof was building work that needed a building consent; however the notice to fix is incorrect in stating there is a contravention of section 75.

5.10 Additional comment

- 5.10.1 While not a part of the determination, which concerns the issue of the notice to fix, the question of whether the applicant must obtain a consent to reposition the containers and the matter of whether the containers have undergone a change of use has been raised by the parties and there is a difference of views (refer paragraph 3.7). I offer the following comment to assist the parties in resolving these issues.

Removing the roof and relocating the containers

- 5.10.2 The applicant has indicated his intention to remove the roof and reposition the containers within his allotment. In the draft of this determination I suggested the applicant discuss whether the removal of the roof is exempt from the requirement to obtain building consent under Schedule 1 of the Act (including with reference to the discretionary exemption provided for under Clause 2 of that Schedule). In responding to the draft, the authority recommended that the applicant seek an exemption under Schedule 1 of the Act for the demolition of the roof.
- 5.10.3 As discussed in paragraph 5.7.4, the act of simply relocating containers does not require building consent. Building consent is only required if building work (which is not exempt under Section 41) is proposed to the containers; this would include building work where the containers are used as component parts in the construction of a larger structure.

Are containers buildings?

- 5.10.4 The authority disagrees that a container is a building. The authority considers containers are not constructed as a building but are building materials similar to other components or building materials used to construct a building.
- 5.10.5 Whether containers are ‘buildings’ for the purposes of the Act has been discussed in previous determinations¹¹. Those determinations concluded a container can fit into the definition of a ‘building’ as defined in section 8 of the Act, but this will depend on whether hazardous substances are stored within them. For the benefit of the parties I reiterate the following relevant points reached in the previous determinations:
- 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.
 - Under section 9(g), a building does not include containers as defined in Regulations made under the Health and Safety at Work Act 2015 (“the HSW Act”).
 - For a container to be excluded as building under section 9(g) the intended use must be to store hazardous substances, i.e. a container is not excluded under section 9(g) on the basis that the container is capable of storing hazardous substances.
- 5.10.6 The applicant has not identified any hazardous substances that are being stored nor is the applicant suggesting the containers are excluded from the definition of a building under section 9(g). I concur with the views expressed in previous determinations that a container can be a building, and in the present instance the containers are not used for the storage of hazardous substances and are therefore not excluded from the definition of a building.
- 5.10.7 Shipping containers are designed and fabricated for the transportation of freight and are typically fabricated offshore. As I have seen no evidence to suggest otherwise, I conclude the shipping containers on the applicant’s property were not designed and fabricated specifically as a component intended for a larger assembly used to construct a building, but rather were fabricated as a container for the transportation of freight and have subsequently been used for another purpose. The containers, prior to the construction of the roof, were buildings in their own right. However, when the building work was carried out to construct the roof spanning the containers this constituted an alteration under the Act, and the containers, which had been buildings in their own right prior to this alteration, then became component parts of a larger structure.

Change of use

- 5.10.8 Establishing how to assess whether there is a change of use has been discussed in previous determinations¹²; however for the benefit of the parties I repeat the following key points below.

¹¹ Determination 2017/067 Regarding a notice to fix issued for three shipping containers transported to site and joined together for use as a shed (21 August 2017) at paragraph 4.1 and 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) at paragraph 5.2

¹² 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)
 Determination 2015/070 Regarding the refusal to issue a building consent for the change of use from commercial to residential of one level in a multi-level building (6 November 2015)

- 5.10.9 Regulation 5 of the Regulations defines the term “change the use” specifically for the purposes of sections 114 and 115 of the Act as follows:
- ... in relation to a building means to change the use (determined in accordance with regulation 6) of all or a part of the building from one use (the old use) to another (the new use) and with the result that the requirements for compliance with the building code in relation to the new use are additional to, or more onerous than, the requirements for compliance with the building code in relation to the old use.
- 5.10.10 To establish whether there has been a change of use, there are two criteria that must be satisfied. Firstly the old use and the new use as described in Schedule 2 of the Regulations have to be appropriately assigned. If the use has changed the first criteria is satisfied.
- 5.10.11 I note here that previous determinations¹³ have assigned containers as IA – Intermittent Low i.e. a space of intermittent occupation. The use IA is appropriate for shipping containers constructed for and in use as a container for the movement of goods. When a container is no longer being used for the movement of goods, and is put to some other purpose, consideration must be given to whether its use category under Schedule 2 has changed. For example: a container that is used to store goods may fall within one of the uses relating to working, business, or storage activities, such as WL – Working Low; whereas the use category of a container used as a café would likely be CL – Crowd Large, and one used as a detached “sleep out” or “granny flat” would likely be SH – Sleeping Single Home.
- 5.10.12 The second criteria that must be met to determine if there is a change of use is to establish whether the Building Code requirements for the building in its new use are additional to, or more onerous than, the Building Code requirements for the building in its old use.
- 5.10.13 To establish whether there are more onerous or additional performance requirements, the building’s classified use (both old and new) under Clause A1 must also be established. If the new classified use has more onerous or additional performance requirements when compared to the old classified use, the second part of the change of use test will be satisfied.
- 5.10.14 An example of a change in use under the Regulations would be a maintenance workshop with a classified use “industrial” and use under the Regulations ID (Intermittent Medium) that is changed to a storage facility. The classified use of a storage facility is “commercial” and the new use under the Regulations would be WL (Working Low). There are Building Code obligations such as Clause D1 Access routes and Clause G1 Personal hygiene for a commercial building which are additional to or more onerous than an industrial building. In that example the building has changed its use under the Regulations.
- 5.10.15 Where an owner proposes to change the use of a building and both criteria described under regulation 5 of the Regulations are satisfied, section 114 requires the owner to give written notice to the territorial authority. The owner must not change the use of the building unless the authority has given written notice that the compliance requirements under section 115 are met. I leave this for the parties to resolve in due course.

¹³ For example Determination 2014/030 Regarding the issue of a notice to fix for the placement of two shipping containers (22 July 2014)

6. The decision

- 6.1 In accordance with section 188 of the Act, I hereby determine the authority was correct to issue the notice to fix for building work carried out without building consent in contravention of section 40, but was incorrect to include a contravention of section 75. I therefore reverse that decision, requiring the authority to make a new decision taking into account the findings of this determination.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 20 November 2019.

Katie Gordon
Manager Determinations

Appendix A: The legislation

A.1 The relevant sections of the Building Act 2004 referred to in this determination:

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.

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); or
 - (b) a building warrant of fitness or dam warrant of fitness is not correct; or
 - (c) the inspection, maintenance, or reporting procedures stated in a compliance schedule are not being, or have not been, properly complied with.
- (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; or
 - (b) to correct the warrant of fitness; or
 - (c) to properly comply with the inspection, maintenance, or reporting procedures stated in the compliance schedule.
- (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

114 Owner must give notice of change of use, extension of life, or subdivision of buildings

- (1) In this section and section 115, change the use, in relation to a building, means to change the use of the building in a manner described in the regulations.
- (2) An owner of a building must give written notice to the territorial authority if the applicant proposes—
 - (a) to change the use of a building;

115 Code compliance requirements: change of use

An owner of a building must not change the use of the building,—

- (a) in a case where the change involves the incorporation in the building of 1 or more household units where household units did not exist before, unless the territorial authority gives the applicant written notice that the territorial authority is satisfied, on reasonable grounds, that the building, in its new use, will comply, as nearly as is reasonably practicable, with the building code in all respects; and
- (b) in any other case, unless the territorial authority gives the applicant written notice that the territorial authority is satisfied, on reasonable grounds, that the building, in its new use,—
 - (i) will comply, as nearly as is reasonably practicable, with every provision of the building code that relates to the following:
 - (A) means of escape from fire, protection of other property, sanitary facilities, structural performance, and fire-rating performance;
 - (B) access and facilities for people with disabilities (if this is a requirement under section 118); and
 - (ii) will,—
 - (A) if it complied with the other provisions of the Building Code immediately before the change of use, continue to comply with those provisions; or
 - (B) if it did not comply with the other provisions of the building code immediately before the change of use, continue to comply at least to the same extent as it did then comply.

A.2 The relevant sections of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 referred to in this determination:

5 Change the use: what it means

For the purposes of sections 114 and 115 of the Act, change the use, in relation to a building, means to change the use (determined in accordance with regulation 6) of all or a part of the building from one use (the old use) to another (the new use) and with the result that the requirements for compliance with the building code in relation to the new use are additional to, or more onerous than, the requirements for compliance with the building code in relation to the old use.

Schedule 2 of the regulations

Uses related to working, business, or storage activities

<i>Use</i>	<i>Spaces or dwellings</i>	<i>Examples</i>
WL (Working Low)	spaces used for working, business, or storage—low fire load	places for manufacturing, processing, or storage of non-combustible materials or materials having a slow heat release rate, cool stores, covered cattle yards, wineries, places for grading, storage, or packing of horticultural products, places for wet meat processing, banks, hairdressing shops, beauty parlours, places for provision of personal or professional services, dental offices, laundries (self-service), medical offices, business or other offices, Police stations (without detention quarters), radio stations, television studios (no audience), places for small tool and appliance rental and service, telephone exchanges, places for dry meat processing

Uses related to intermittent activities

<i>Use</i>	<i>Spaces or dwellings</i>	<i>Examples</i>
IA (Intermittent Low)	spaces for intermittent occupation or providing intermittently used support functions—low fire load	car parks, garages, carports, enclosed corridors, unstaffed kitchens or laundries, lift shafts, locker rooms, linen rooms, open balconies, stairways (within the open path), toilets and amenities, and service rooms incorporating machinery or equipment not using solid-fuel, gas, or petroleum products as an energy source