

# Determination 2023/005

**Date: 24 February 2023**

**Regarding the decision to issue a notice to fix for modifications to a shipping container.**

**240 Ōhiwa Harbour Road, Ōhiwa, Bay of Plenty**

## **Summary**

This determination considers the authority's decision to issue a notice to fix. The determination considers whether the structure is a building, whether building consent was required for the modifications to the container, and whether it complies with Building Code clause B1.



The legislation discussed in this determination is contained in Appendix A. In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”) and references to “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

The Act and the Building Code are available at [www.legislation.govt.nz](http://www.legislation.govt.nz). Information about the legislation, as well as past determinations, compliance documents (eg Acceptable Solutions) and guidance issued by the Ministry, is available at [www.building.govt.nz](http://www.building.govt.nz).

## 1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Peta Hird, Principal Advisor, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.<sup>1</sup>
- 1.2. The parties to the determination are:
  - 1.2.1. the owners of the structure, M Verhagen and A Hegedus (“the owners”)
  - 1.2.2. Opotiki 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 modifications to a structure on the owners’ property. The structure was built using a shipping container. The authority issued the notice because:
  - 1.3.1 it did not consider the building work in relation to the structure was exempt under clause 3A of Schedule 1 of the Act, due to the location of the structure close to the boundary of the owners’ property
  - 1.3.2 no building consent had been applied for or obtained for the building work
  - 1.3.3 it was not satisfied that the structure complied with Building Code Clause B1 Structure, due to the degree of modification made to the shipping container during the building work.
- 1.4. The matter to be determined, under section 177(1)(b) and (2)(f), is the authority’s decision to issue a notice to fix for the owners’ structure. In deciding this matter, I must consider whether the building work was exempt from requiring a building consent under Schedule 1 of the Act, and whether there is sufficient evidence that the building work did not comply with the Building Code.

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<sup>1</sup> The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

## **Matters outside this determination**

- 1.5. The owners' submissions and application raised issues related to the Resource Management Act 1991 and traffic management plans. These matters are outside my jurisdiction and are not covered by this determination.

## **2. The building work**

- 2.1. The building work consists of modifications made to a shipping container. The parties dispute the intended use of the structure, with the owners stating it is intended to be used as a carport, and the authority believing it is intended to be used as a garden seating area or for storage.
- 2.2. The structure is made from a 3.2m high, 2.4m wide and 6m long Corten steel shipping container. The container has been tipped on its side, so that the floor area of the structure is now 19.2 m<sup>2</sup>. The original wooden floor and several steel beams that the floor was attached to have been removed so that the eastern side of the structure is completely open, other than a steel beam retained in the middle of the structure's open wall.
- 2.3. In terms of foundations, the structure sits on six 150mm H5 treated round posts. The posts have been concreted into holes and sit a couple of centimetres above ground level. The holes are 1m deep by 600mm wide, with the posts suspended to a depth of 700mm and surrounded by concrete; providing approximately 300mm of concrete below them and approximately 225mm on all sides. There is one post at each corner of the structure, and one in the middle of each of the structure's longer sides. Drainage metal has been placed under the structure to aid stormwater drainage. Corten steel plates have been welded to the structure's four corners and these in turn have been screwed onto the 150mm corner posts.
- 2.4. The south-eastern end of the structure is formed from the end of the container that originally housed its doors, which are now positioned sideways. The remaining two walls are formed from the original container, but have been modified by having panels cut out: three panels of 1510mm x 1110mm have been cut out of the long south-western side, which fronts the property's road boundary; and one panel of 2250mm x 1110mm has been cut out of the short north-western end. These panels have had hinges added to their tops and can be propped open using metal rods. The openings in the wall where the panels have been cut have been reinforced using 90mm x 90mm square timber posts connected to the sides of the structure with galvanised coach bolts. The bottoms of the posts have been concreted into the concrete floor of the structure.

- 2.5. What was a side of the original container now forms the ceiling of the structure and a 'green roof' has been constructed on top of it. The roof has been constructed from three double beams that run the length of the container. The beams have been fixed to the container using 57 x 70mm screws at 300mm intervals. 50mm x 100mm timber joists have been placed at right angles on top of the beams, spaced at 400mm intervals and extending the width of the roof. Sheets of 18mm structural marine ply have been placed on top of these joists, and have in turn been covered with thick plastic sheets. The edges of the roof have been framed with fascia boards that stand above the level of the ply and plastic, creating an enclosed roof area. This area has been filled with a mixture of topsoil and pumice. The entire roof slants to one corner to enable the soil to drain, with drainage metal placed along the entire lower front end of the roof. The lowest corner of the roof has a hole, with a chain to a drainpipe at ground level to take away any excess water. The owners state that the overall height of the structure is now 2.8m.
- 2.6. Another side of the original container now forms the floor of the structure. Nine pipes have been welded through the floor and it sits on pavers underneath to stabilise it. Sand and steel mesh have then been added to the floor, and concrete poured over this to create an 80mm concrete pad.
- 2.7. Two sides of the structure have been sandblasted, then coated with a clear polymer resin protective coating to prevent the steel from rusting.
- 2.8. The structure is located in the southern corner of the owners' property, parallel to the road. At its closest, the corners of the structure are 0.6m away from the road boundary and 1.6m from the side boundary, which is shared with a neighbouring property.

### **3. Background**

- 3.1. The owners' property is a flat section on the edge of the Ōhiwa Harbour. The property is separated from the harbour by a public road and road reserve. There is an existing dwelling on the property.
- 3.2. The owners advise that the shipping container which was used to build the structure was first placed on their property, for this purpose, in April 2015.
- 3.3. The owners undertook the work to convert the shipping container between February and June 2020.
- 3.4. On 23 July 2020, the authority visited the owners' property to inspect the structure following a complaint. On 27 July 2020, the authority sent a letter to the owners raising concerns about the structure breaching the Proposed Ōpōtiki District Plan. The letter also stated that the structure was 'classed as a building' under the district plan.

- 3.5. The authority subsequently emailed the owners and visited their property to discuss these issues. During these visits, the authority formed the opinion that the shipping container had been 'so significantly modified' that the authority had 'reasonable grounds to believe' the structure did not comply with clause B1 of the Building Code. The authority also considered that due to its location close to the boundary, the structure did not qualify for any of the exemptions from building consent under Schedule 1 of the Act.
- 3.6. On 11 January 2021, the authority issued the owners with a notice to fix in respect of the structure. The notice stated:

**Particulars of contravention or non-compliance**

Details of failure or error

- The shipping container structure has been placed closer than a measure of its own height to the properties side and front legal boundary as is stated under the Building Act 2004 Schedule 1, Part 1, Exempted building works.
- The shipping container has been modified to such a degree so as to fail to meet the building code standard B1 Structure.

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

- Provide the [authority] with a suitably qualified engineers report proving the structure meets the B1 Structure clause of the building code and
- Move the structure into a location so as to be compliant with the Building Act 2004 Schedule 1, Part 1, Exempted building works once an engineer's report has been provided proving its structural integrity meets the building code or
- Remove the structure from the property

The notice gave a compliance date of 8 March 2021.

- 3.7. On 14 January 2021, the owners emailed the authority seeking clarification.
- 3.8. The authority responded on 28 January 2021, restating the content of the notice to fix.
- 3.9. The owners did not consider this correspondence adequately explained the rules and regulations they were purportedly breaching, and on 12 February 2021, they emailed the authority stating that the notice to fix had no legal basis.
- 3.10. The authority replied on 19 February 2021, stating that it was the owners' responsibility to establish that the building work complied with the Act and advising that the notice to fix still stood.

- 3.11. On 21 February 2021, the owners requested that the deadline for the notice to fix be extended. The authority declined to allow this extension.
- 3.12. The Ministry received an application for a determination from the owners on 23 February 2021.

## 4. Submissions

### The owners

- 4.1. The main points of the owners' submissions can be summarised as follows:
  - 4.1.1. The main use of the structure will be as a carport for light vehicles and storage, and nothing else. The authority is incorrect in reporting that it will be used as a seating area or coffee shop. The owners have always said it will be used as a carport.
  - 4.1.2. The carport is not a building, as defined in sections 8 and 9 the Act, as it does not have electrical, mechanical or other systems, and does not have a mast, telecommunications pole or cable car attached to it. The carport is a structure and comes within the exemption in clause 18 of Schedule 1 of the Act.
  - 4.1.3. The carport has been constructed well and is structurally sound. The container is far stronger than normal carports. The owners noted:

Each corner post of a standard shipping container is tested to withstand a load of 86,400 kg, no matter the orientation of the container. This is the load applied to the posts of the bottom container in an 8-on-1 stack of 24,000 kg containers, multiplied by a factor of 1.8 to allow for adverse transport conditions on a ship. On land, this means you can stack up to 14 containers on top of each other without overloading the corner posts. The green roof we have constructed on top of the container rests on these corner post. There is absolutely no way the roof will ever put 86,400 kg of load on any one of the four corner posts, let alone totalling a load of 4 x 86,400, or 345,600 kg. As far as sheer resistance goes; we have cut out four panels and put 90x90 square Kwila posts around the panel cut-outs, fully from side to side and from bottom to top. Even without these Kwila posts it is easy to see the container is more than strong enough to withstand any sheering (sic), even in a large earthquake.
  - 4.1.4. There are no concerns about uplift of the structure as it is mounted on concrete piles. The carport has so far survived a "50+ weather event and 7.2M earthquake" and was not damaged. It is unnecessary to get an engineer's report for the carport and questioning its structural integrity is

“ridiculous”. The owners are confident a licensed building practitioner would sign off the building work.

- 4.1.5. The carport is at ground level and the floor area is under 20m<sup>2</sup>. The Building Act and the Ministry’s *Building Consent Exemptions FAQ*<sup>2</sup> make clear that a carport does not require a building consent. The Ministry’s *Building Consent Exemptions FAQ* also states that a carport can be located anywhere within a property’s legal boundary provided the Building Code requirements for protection from fire are met. The owners have considered the issue of fire, but as the structure is steel it will not catch fire. The owners also referred to Determination 2014/030<sup>3</sup> in support of their assertion that they were legally allowed to place the carport anywhere on their property, including on the actual boundary.
- 4.1.6. The carport does not require a building consent, but the authority has issued the owners with a notice to fix. All the alleged breaches raised in the authority’s letter of 27 July 2020 relate to the district plan, not the Building Act.
- 4.1.7. The authority is relying on clause 3A of Schedule 1 of the Act, which relates to exemption for single-storey detached buildings of between 10sqm and 30sqm made of lightweight materials. This clause does not apply to the structure. The structure is exempt under clause 18 of Schedule 1, which relates to carports not exceeding 20sqm in floor area. If a carport was meant to be dealt with under clause 3A there would not be a separate exemption for carports.

## The authority

- 4.2. The main points of the authority’s submissions can be summarised as follows:
  - 4.2.1. The owners’ container has been ‘significantly modified’ and because of this the authority is not satisfied that the structure complies with clause B1. In particular, the authority is concerned that the container:
    - (1) has been laid on its side, so it is “now being used in a manner it was not designed for”
    - (2) has had one whole side (the bottom) removed, and cuts made in two of the sides, and that “These large modifications appear to have removed significant amounts of the structural integrity of the container”

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<sup>2</sup> Building Performance. (n.d.). *Building consent exemptions FAQ*. Wellington: Ministry of Business, Innovation and Employment.

<sup>3</sup> Determination 2014/030: Regarding the issue of a notice to fix for the placement of two shipping containers on a property (22 July 2014).

- (3) has had a roof structure and green roof added, which are “fully supported by the now altered container. The added weight of the green roof along with any subsequent water loadings from weather events would be adding significant forces to the now modified container”.
- 4.2.2. The owners have referred to Determination 2014/030, which found that two shipping containers placed on a property were “inherently stable even when empty when placed on a flat site”. However, these containers were not modified in any way, were standing upright, and were “being used in a way that they were designed to be used” to store goods. This differs from the owners’ container.
- 4.2.3. The authority believes that an engineer’s report is required to establish the container’s compliance with clause B1.
- 4.2.4. The authority does not accept that the structure is being used as a carport. The officer who visited the property saw no evidence that vehicles were being stored inside it. The officer also observed that the owners’ driveway was new but did not extend to the structure, which the authority would expect if the structure was being used for vehicle storage.
- 4.2.5. The authority concluded that:

As a result [the authority] contend that the shipping container has not been constructed as a carport but to be used predominantly as a seating come socialising area and does not fall within the scope of Section 18 of Schedule 1 of the Building Act 2004.

It is just under 20 square meters (sic) in area and falls within Sections 3A and 3B of Schedule 1 of the Building Act 2004.

If built under Section 3A then it is built to (sic) close to the boundaries and in [the authority’s] opinion is constructed of steel and is therefore not light weight. If built under 3B [the owners have] not identified the [licenced building practitioner they] used to construct it and it is still too close to the boundary.

- 4.2.6. In response to the Ministry’s request for information about the performance clauses of the Building Code that the authority considered were not being complied with, the authority highlighted the objective in clause B1.1 and stated:
- (1) A shipping container is designed to store and transport goods when in an upright position. Containers are “specifically engineered designed boxes” and use the trapezoidal profile of their steel walls and roof to provide structural bracing and stability.



- (2) If the walls and top are altered this will change the structural resistance values of the container, and any imposed loads placed on the walls and roof “in a direction for which the design did not allow”, for example because the container is on its side, would “result in an unknown outcome”.
- (3) The strength of the container’s components comes from their “manufactured wholeness”. Using the container “in anyway other than that for which it was designed would very likely result in structural failure”. This would contravene clause B1.3.1.
- (4) The modifications made to the owners’ container are “likely to affect the stability” and this would contravene clauses B1.3.3 (a), (b), (d), (e), (f), (h), (m) and (r). In addition, the change of use from a container to a carport, coffee shop or storage shed is “highly likely” to cause “premature failure”, which may result in injury to people using the building and surrounding area.

## 5. Draft determination

- 5.1. A draft determination was issued to parties 16 December 2022.
- 5.2. The owner responded accepting the draft with minor corrections and comments which have been considered and incorporated where appropriate.
- 5.3. The authority did not respond to the draft.

## 6. Discussion

- 6.1. The matter for determination is the authority’s decision to issue a notice to fix for building work carried out on the structure.
- 6.2. This turns on whether there is sufficient evidence to conclude that the owners were contravening or failing to comply with the Act or its regulations.
- 6.3. Accordingly, I must consider both the nature of the contravention or non-compliance cited in the notice to fix, and the evidence provided in deciding whether such a contravention or non-compliance has occurred.

### Legislation

- 6.4. The provisions in the Building Act 2004 that regulate notices to fix are found in subpart 8, sections 163 to 168.
- 6.5. Section 163 defines certain terms that relate to notices to fix.

- 6.6. Section 164 enables notices to fix to be issued in certain circumstances. Section 164(1) provides the grounds on which an authority can issue a notice to fix, while Section 164(2) sets out what an authority must do when those grounds exist.

**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 ...

(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 ...

- 6.7. There does not appear to be any dispute between the parties that the owners are a “specified person” for the purpose of these sections, as that term is defined in section 163.
- 6.8. However, there is dispute as to whether the owners were contravening or failing to comply with the Act or its regulations in building their structure.
- 6.9. The authority gave two particulars of contravention or non-compliance in the notice to fix, namely:
- 6.9.1. the structure is placed too close to the property boundaries for the building work to be treated as exempt under Schedule 1 of the Act
- 6.9.2. the shipping container that the structure is made from has been modified to such a degree that it does not comply with clause B1 Structure.
- 6.10. The first particular of contravention relates to section 40 of the Act, as the authority is not satisfied that the building work is exempt from requiring a building consent. Section 40 states:

**40 Building work not to be carried out without consent**

(1) A person must not carry out any building work except in accordance with a building consent.

- 6.11. Section 41 modifies this by allowing that in certain circumstances building work can be carried out without a consent.
- 6.12. Section 42A specifies categories of building work for which a building consent is not required, including building work described in Part 1 of Schedule 1.

- 6.13. The second particular of contravention is stated to be the structure's non-compliance with clause B1 of the Building Code. This would be a contravention of section 17 of the Act, which states:

**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.

- 6.14. Accordingly, in order to make this determination I must consider whether there has been a contravention of section 40 and section 17 of the Act. To this end, I must also consider whether the owners' structure is a 'building' under the Act.

**Preliminary matter: is the structure a building?**

- 6.15. In their submissions, the owners stated that their structure is not a building. If the structure is not a building, then the work to erect and modify it is not building work, and the Act and its regulations do not apply.
- 6.16. Section 8 of the Act defines what a building is and includes:

**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); and

(b) includes—

(i) a mechanical, electrical, or other system; and...

(iv) a mast pole or a telecommunication aerial that is on, or forms part of, a building and that is more than 7 m in height above the point of its attachment or base support (except a dish aerial that is less than 2 m wide); and

...

(d) includes the non-moving parts of a cable car attached to or services a building; and

(e) after 30 March 2008, includes the moving parts of a cable car attached to or servicing a building.

...

- 6.17. I consider the owners' structure falls within the definition in section 8(1)(a) as a permanent immovable structure. Even if the structure had not been connected to the ground, I would consider that it came within this definition of a building. This is the interpretation taken in previous determinations that have involved shipping containers<sup>4</sup>.
- 6.18. It appears that the owners' assertion that the container is not a building arises from a misreading of section 8. Section 8(1)(b) sets out some specific types of structures that fall within the definition of a building. The subsection adds clarity as to the status of certain structures but does not exclude all other types of structures not mentioned from the general meaning of 'building' in section 8(1)(a).
- 6.19. The owners state that their structure is a carport. A carport comes within the definition of a building in section 8. Carports are clearly intended to come within the remit of the Act, as Schedule 1 of the Act specifically exempts certain carports (but not all) from requiring a building consent.

### **Contravention or non-compliance with section 40**

- 6.20. Having clarified that the owners' structure is a building, I now consider whether there has been a contravention of section 40 of the Act, as inferred in the notice to fix.
- 6.21. Section 40 provides that building work must not be carried out except in accordance with a building consent. Building work is defined in section 7 of the Act as:
- building work—
- (a) means work that is either of the following:
- (i) for, or in connection with, the construction, alteration, demolition, or removal of a building: ...
- 6.22. I consider the modifications undertaken to the container, including creating openings and the installation of foundations, additional supports, a roof and a floor, are work to construct and alter a building, and therefore building work.
- 6.23. Accordingly, section 40 applies unless the building work is covered by an exception in Sections 41 and 42A.
- 6.24. Both parties have referred to the application of the exemption clauses in Schedule 1 of the Act, albeit referencing different clauses.

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<sup>4</sup> 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 [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 [5.2].

6.25. The owners believe that their structure is a carport which comes within the exemption in Clause 18 of Schedule 1, and therefore did not require a building consent. Clause 18 states:

**18 Carports not exceeding 20 square metres in floor area**

Building work in connection with a carport that—

(a) is on the ground level; and

(b) does not exceed 20 square metres in floor area.<sup>5</sup>

6.26. The authority believes that the structure is not a carport, but is intended for use as a seating and socialising area. As such, the authority considered whether it was within the exemption in clause 3A of Schedule 1. However, the criteria in clause 3A are not fulfilled because the structure is not built using lightweight building materials and is located closer than the measure of its own height to two of the legal boundaries of the owners' property. The authority therefore believes the building work on the structure was not exempt and a building consent was required.

6.27. The relevant parts of Clause 3A are:

**3A Single-storey detached buildings exceeding 10, but not exceeding 30, square metres in floor area and constructed of lightweight building products**

(1) Building work in connection with any detached building that—

(a) is not more than 1 storey (being a floor level of up to 1 metre above the supporting ground and a height of up to 3.5 metres above the floor level); and

(b) exceeds 10 square metres in floor area, but does not exceed 30 square metres; and

(c) is built using lightweight building products for the walls and roof, and in accordance with Acceptable Solution B1/AS1 for timber or steel buildings; and

(d) ...

(2) However, subclause (1) does not include building work in connection with a building that is closer than the measure of its own height to any residential building or to any legal boundary.

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<sup>5</sup> Clause 18 was amended on 31 August 2020. The amendment related only to the heading of the clause and did not affect its content.

- 6.28. I note for completeness that the authority also mentioned the possibility that the exemption in Clause 3B may apply. However, this clause relates to building work carried out or supervised by a licensed building practitioner. As the owners have stated that they carried out the work themselves and there is no suggestion that a licensed building practitioner was involved, I have not considered this clause further.
- 6.29. The floor area of the owners' structure is 19.2 m<sup>2</sup>, so falls within the floor area limits of both clause 18 and 3A.
- 6.30. I agree with the authority that due to its location in relation to the property boundaries, the structure is unable to be considered exempt under clause 3A. Clause 3A(2) clearly states that the structure needs be located at least 2.8m from any legal boundary in order to be exempt under this clause, which it is not.
- 6.31. That leaves the question of whether the structure is a carport and therefore exempt from the need for a building consent under clause 18.
- 6.32. The term carport is not defined in either the Act or the Building Code. Where the term is defined is in a guidance document issued by the Ministry under section 175 of the Act: *Building Work that Does Not Require a Building Consent: Exemptions guidance for Schedule 1 of the Building Act 2004*.<sup>6</sup> The glossary to this guidance defines a carport as:
- Carport** A roofed structure for motor vehicle storage with at least one side fully open to the outdoors.
- 6.33. This document is only guidance and does not provide a definitive or binding definition of what a carport is. Nonetheless, I consider this definition generally aligns with a common sense understanding of the term.
- 6.34. Applying this definition, it is evident that the owners' structure is a simple roofed structure, with at least one side fully open to the outdoors. The structure has been erected in such a way, and at an orientation, that facilitates the storage of motor vehicles. The fact that there were no motor vehicles in the structure on the day that the authority visited does not mean that the structure is not designed and intended for this purpose.
- 6.35. I acknowledge the hinged, opening windows facing the road are unusual for this type of construction, but this on its own does not dissuade me that it is used for vehicle storage. I have been provided photographic evidence showing how vehicles are stored in the structure. I also note that it is not unusual for people to use a carport for storing other items.

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<sup>6</sup> Building Performance. (2014). *Building Work that Does Not Require a Building Consent: Exemptions guidance for Schedule 1 of the Building Act 2004*. Wellington: Ministry of Business, Innovation and Employment.

- 6.36. This particular structure, based on its location, appearance and internal layout, would commonly be understood to be a carport. Given its location at the front of the property, proximity to the driveway and access, the owner's stated use and the evidence of its use, I consider it is a building used for vehicle storage.
- 6.37. The authority is concerned that the structure is capable of being used for other uses, such as a coffee bar. Most buildings are capable of being adapted for alternative uses, but this does not mean they do not fulfil their intended use. Should evidence come to light that the structure is being used for a purpose incompatible with the uses of a carport, this can be regulated under the change of use provisions in the Act.<sup>7</sup>
- 6.38. As I have concluded that the structure is a carport, and it is evident that the other requirements in clause 18 are met (the structure is on ground level and its floor area does not exceed 20m<sup>2</sup>), the building work on the owners' structure meets the criteria in clause 18, and therefore did not require a building consent.
- 6.39. Accordingly, there has been no contravention of section 40, and this is incorrectly included as a ground in the notice to fix.

### **Contravention or non-compliance with section 17**

- 6.40. The owner argues that the authority was incorrect in assessing the structure as non-compliant with the Building Code.
- 6.41. In the notice to fix, the authority gives the particulars of non-compliance regarding the Building Code as:

the shipping container that the structure is made of has been modified to such a degree that it does not comply with Clause B1 Structure of the Building Code.

- 6.42. Notices to fix must contain clear and particular detail to enable the specified person to understand the contravention.
- 6.43. Section 165 prescribes the form and content of a notice to fix. The prescribed form<sup>8</sup> for a notice to fix provides a section to insert "particulars of contravention or non-compliance." In *Andrew Housing Ltd v Southland District Council* [1996] 1 NZLR 589, the High Court stated:

What is crucial, however, is that the particulars must fairly tell the recipient of the notice what provision of the Act or the [Building Code] has allegedly not been complied with.

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<sup>7</sup> For further information on this, refer to sections 114 and 115 of the Act and to the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005.

<sup>8</sup> See Building (Forms) Regulations 2004, Form 13.

- 6.44. Similarly, the District Court in *Marlborough District Council v Bilsborough* [2020] NZDC 9962, noted that the recipient of a notice to fix needs to be “fairly and fully informed”, so they can address the identified issues
- 6.45. This emphasises the importance of a notice to fix containing clear particulars detailing any contravention or non-compliance with the Act or Code. In this case, the notice to fix did not identify the performance clauses of B1 that the authority considered were not being met. It is not enough to make a blanket statement that the building work does not comply with clause B1.
- 6.46. Despite this deficiency in the notice, I consider it useful to offer comment on the alleged contravention of section 17. The authority provided additional information in its submissions about the clauses it considers relevant:
- 6.46.1. B1.3.1 – whether the structure has a low probability of rupturing, becoming unstable, losing equilibrium or collapsing
- 6.46.2. B1.3.3 – whether account has been taken of all physical conditions likely to affect the stability of the structure, such as self-weight and wind
- 6.46.3. B1.3.4 – whether due allowance has been made for the consequences of failure, the intended use, uncertainties, variations and accuracy limitations.<sup>9</sup>
- 6.47. The question I must consider is whether there is sufficient evidence to conclude that the building work did not comply with one or more of the structural performance clauses of the Building Code.
- 6.48. Section 17 states that all building work must comply with the Building Code whether or not a building consent is required. Where building work is exempt from requiring a building consent, responsibility for assessing whether the building work complies, and ensuring that it does, rests with the owner.
- 6.49. For the authority to issue a notice to fix for non-compliance in respect of exempt building work, I would expect it to have before it some tangible evidence that compliance was not being achieved.
- 6.50. A notice to fix is an enforcement notice that requires a person to carry out work to remedy a breach of the Act or 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). The offence is a serious one involving a fine of up to \$200,000.
- 6.51. The authority’s belief that the Act or regulations are being contravened requires specific evidence in support of that belief before a notice to fix can be issued.

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<sup>9</sup> See Appendix A for the full text of Clause B1 Structure.



- 6.52. The authority's reports from the visit to the property did not contain any assessment of the structural performance of the structure; nor did they identify any defects with it or indicate any items that would suggest the structure might fail in future. In response to a request from the Ministry for further information, the authority advised that the officers' report notes were "generic in nature and do not make specific reference to Building Act & Code Clause contraventions".
- 6.53. The authority provided additional information in submissions to this determination. The main concern noted in the submissions appears to be the degree to which the original shipping container, which forms the basis for the structure, has been modified, the imposition of additional loads from the roof garden and the positioning of the container on its side.
- 6.54. A shipping container is inherently robust and capable of being subjected to loads beyond the minimum performance requirements of the Building Code even when it is placed on its side. Provision for drainage has been provided at the roof garden level and the additional imposed load of the soil across the roof, even when wet, is not significant. I also consider the modifications that have been made, which include the cutting of the container's wall, and the addition of a form of foundation, concrete floor and roof support columns, are unlikely to have significantly reduced its stability.
- 6.55. To conclude that clause B1 was not being complied with, there would need to be at least some specific identifiable issues or critical design flaws that might cause the structure to fail or collapse. This might take the form of observable signs, such as cracking, sagging, leaning or other undue movement, or evidence that the structure had shifted off its foundation. Alternatively, it could be established through calculations that show the expected loads would exceed the strength of the structure. In the information I have been provided, there is no such evidence. The structure appears stable and well-maintained.
- 6.56. In conclusion, I consider there is insufficient evidence to reach a view that the owners' structure did not comply with clause B1 of the Building Code.

## **7. Conclusion**

- 7.1. Based on the information before me, I conclude there was no contravention of section 40 and there is insufficient evidence of a contravention of section 17. Therefore, the authority's decision to issue the notice to fix is reversed.

## **8. Decision**

- 8.1. In accordance with section 188 of the Building Act 2004, I reverse the authority's decision to issue the notice to fix dated 11 January 2021.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 24 February 2023.

Peta Hird

**Principal Advisor Determinations**

## APPENDIX A

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### Building Regulations 1992 - Schedule 1 The building code

#### Clause B1—Structure

##### Objective

**B1.1** The objective of this provision is to:

- (a) safeguard people from injury caused by structural failure,
- (b) safeguard people from loss of amenity caused by structural behaviour, and
- (c) protect other property from physical damage caused by structural failure.

##### Functional requirement

**B1.2** Buildings, building elements and sitework shall withstand the combination of loads that they are likely to experience during construction or alteration and throughout their lives.

##### Performance

**B1.3.1** Buildings, building elements and sitework shall have a low probability of rupturing, becoming unstable, losing equilibrium, or collapsing during construction or alteration and throughout their lives.

**B1.3.2** Buildings, building elements and sitework shall have a low probability of causing loss of amenity through undue deformation, vibratory response, degradation, or other physical characteristics throughout their lives, or during construction or alteration when the building is in use.

**B1.3.3** Account shall be taken of all physical conditions likely to affect the stability of buildings, building elements and sitework, including:

- (a) self-weight,
- (b) imposed gravity loads arising from use,
- (c) temperature,
- (d) earth pressure,
- (e) water and other liquids,
- (f) earthquake,
- (g) snow,
- (h) wind,
- (i) fire,
- (j) impact,
- (k) explosion,
- (l) reversing or fluctuating effects,
- (m) differential movement,
- (n) vegetation,
- (o) adverse effects due to insufficient separation from other buildings,
- (p) influence of equipment, services, non-structural elements and contents,
- (q) time dependent effects including creep and shrinkage, and

(r) removal of support.

**B1.3.4** Due allowance shall be made for:

- (a) the consequences of failure,
- (b) the intended use of the building,
- (c) effects of uncertainties resulting from construction activities, or the sequence in which construction activities occur,
- (d) variation in the properties of materials and the characteristics of the site, and
- (e) accuracy limitations inherent in the methods used to predict the stability of buildings.

## **The Building Act 2004**

### **Section 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); ...

### **Section 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; ...
- (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: ...