

# Determination 2025/018

**The authority's decision to issue a notice to fix for several container and canopy structures that were constructed without building consent**

**19 Roger Kauhi Place, Burbush, Hamilton**

## **Summary**

This determination considers the authority's decision to issue a notice to fix for several container and canopy structures that were constructed without building consent. The determination considers whether the building work was exempt from requiring a building consent under clause 4 of Schedule 1, which applies to unoccupied detached buildings. The determination also considers the form and content of the notice.



**Figure 1. One of the container and canopy structures (structure 3).**

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 of the Building Act.

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, for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment (“the Ministry”).<sup>1</sup>
- 1.2. The parties to the determination are:
  - 1.2.1. the owners of the property, R Ratcliffe, C Ratcliffe, and JW Trustees (Ratcliffe) Limited (“the owners”), who applied for the determination
  - 1.2.2. Hamilton City 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 building work undertaken without a building consent. The building work consists of five structures, each with multiple shipping containers and an attached arch canopy spanning between to form sheltered areas (see Figure 1).<sup>2</sup>
- 1.4. The matter to be determined, under section 177(1)(b) and (3)(e), is the authority’s decision to issue Notice to Fix 2024/1882 (“the notice”) for a contravention of section 40.
- 1.5. In deciding this matter, I consider whether the five container and canopy structures are exempt from requiring a building consent under clause 4 of Schedule 1. I also consider the form and content of the notice, including the specified person and remedies.
- 1.6. The determination does not consider the compliance of the container and canopy structures 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.

<sup>2</sup> Three of the container and canopy structures identified in the notice to fix are connected with timber supports and box gutters. To be consistent with terminology used by the parties I refer to this as structures 1 to 3 rather than a single building.

## 2. The building work

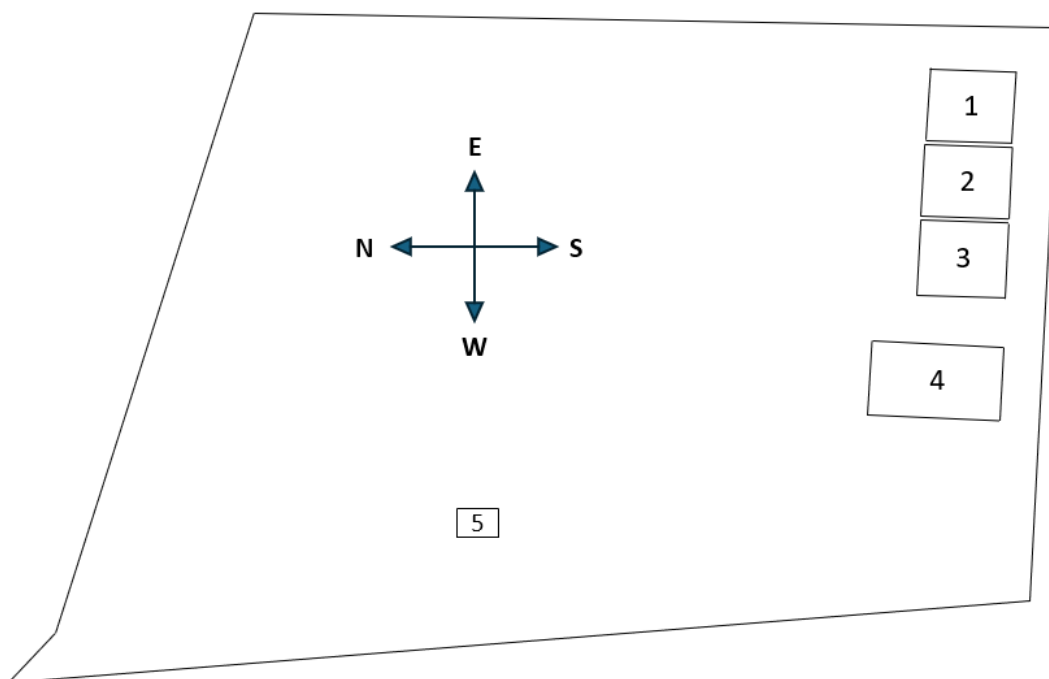
- 2.1. The five container and canopy structures ("structures 1-5") were built between 2019 and 2024 on the owners' 4.69-hectare commercial site (see Figure 2).
- 2.2. The structures consist of shipping containers along each length which are connected to a metal frame, covered by a uPVC tarpaulin, that forms an arched roof. The majority of the structures have a vertical tarpaulin connected to a frame system at the rear. The structures are all open fronted, with structures 1-4 sited on a concrete base which extends around their perimeter. It is unclear how the frame systems are connected to the shipping containers or whether the containers are fixed to the ground.
- 2.3. Structures 1-3 have box spouting to collect surface water supported by timber members spanning between containers. Each of these structures has two large water storage tanks at the rear with overflows to the external concrete base. In addition, the rear shipping containers extend out from the roof plan of these structures. From the plans and submissions provided, structures 1-3 each measure 21m x 24.5m with the apex of the arch being 9.2m in height and a floor area of 514.5m<sup>2</sup>. These measurements are taken from a plan view of the canopy areas and exclude the rear water storage tanks and rear shipping containers.
- 2.4. Structure 4 measures 21m x 37m with an apex height of 9.2m and a floor area of 777m<sup>2</sup>. It does not have spouting or water storage tanks.
- 2.5. According to the owners' submissions, structures 1-4 are each 18m away from the southern boundary. Structure 1 is 14.5m from the eastern boundary (see Figure 2).
- 2.6. Structure 5 is smaller than structures 1-4, measuring 8.3m x 12.3m with the apex of the arch 5.8m in height and an internal floor area of 102m<sup>2</sup>.<sup>3</sup> It does not have spouting or water storage tanks. According to the owners' submissions, it is approximately 30m from the western boundary (see Figure 2) and was constructed in 2019. It is situated on a gravel base, with shipping containers to enclose the rear and no tarpaulin wall.

## 3. Background

- 3.1. Between November 2023 and August 2024, the authority visited the site on several occasions to undertake inspections in relation to a relocatable dwelling. Structures 1-3 were existing at the time of the authority's first visit to the site.
- 3.2. On 1 August 2024, during an inspection of the relocatable dwelling, the authority identified a new container structure (structure 4) had been constructed. Structure 5 was also identified at this time.

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<sup>3</sup> The measurements provided do not appear to include the containers either side of the structure.



**Figure 2. Site plan with approximate positions of structures 1 to 5 (not to scale).**

- 3.3. Following this site visit, the authority checked its records and established that structures 1-5 had been constructed without building consent.
- 3.4. On 23 August 2024, the authority contacted the owners to advise that, at a minimum, structures 4 and 5 would require a certificate of acceptance to ensure that the building work complies with the Building Code.
- 3.5. On 8 October 2024, in response to contact by the authority, the owners stated that they believed the structures were exempt works under Schedule 1.
- 3.6. On 18 October 2024, the authority issued the notice for a contravention of section 40(1) for the construction of structures 1-5 without building consent.
- 3.7. Under 'Particulars of contravention or non-compliance', the notice stated:

On 1 August 2024, a Hamilton City Council Compliance Officer and Building Inspector visited the above-mentioned property and witnessed 5 x container shelter structures (4 larger structures and 1 smaller container shelter structure) on the premises during a CoA inspection on a relocatable dwelling. The 1 structure was newly constructed. After investigating it was discovered that the structures were installed between 2019 and 2024 in the absence of a building

consent. The size of each structure is estimated at about 375 square meters and 12m high<sup>4</sup>. These structures are not covered under schedule 1 exemption.

**The New Zealand Building Act 2004, Section 40, Clause 1 States:**

Building work not to be carried out without consent.  
A person must not carry out any building work except in accordance with a building consent.

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

- Remove the mentioned unconsented structures and revert the property back to its consented state, or
- Uplift a Certificate of Acceptance (COA) from Hamilton City Council that would address the mentioned unconsented structures

- 3.8. The notice was issued to R Ratcliffe & C Ratcliffe “& others”.
- 3.9. On 27 November 2024, the authority visited the site to measure the structures and take additional photographs. The authority did not record distances to boundaries.
- 3.10. On 23 December 2024, the owners applied for a determination.

## 4. Submissions

### The owners

- 4.1. The owners made the following points in their submissions (in summary):
- 4.1.1. Structures 1-5 are exempt from requiring a building consent under clause 4(1)(b) of Schedule 1.
- 4.1.2. Structures 1-5 are unoccupied detached buildings in a vicinity that people cannot enter or do not normally enter, and they are not closer than the measure of their own height to any residential building or to any legal boundary.
- 4.1.3. Structures 1-5 comply with the Building Code. Furthermore, structures 1-3 have withstood several extreme weather events, including cyclone Gabrielle in February 2023, demonstrating that they are structurally sound and well built.
- 4.1.4. The four-hectare site is fully fenced, and access is restricted by an electronic security gate. In addition, round-the-clock video surveillance cameras

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<sup>4</sup> The owner submissions states structures 1-4 are maximum 9.2m in height. The authority did not verify height of structures during its site visit on 27 November 2024.

further secure the site, and two company staff members live in an adjoining property providing added security.

- 4.2. Structures 1-4 are used to store plant, equipment and inventory and other slow-moving stock such as truck and trailer parts, tyres and ramps. Access to these structures is infrequent and controlled. The parts manager accesses the site and structures once every two to three weeks for short durations of approximately 15 to 30 minutes. Entry to the structures is recorded via a site register.
- 4.3. Structure 5 is used to store timber for the construction of canoes. This timber is taken occasionally from the structure to another site.
- 4.4. The owners advised that other than structures 1-5, the site is used to store trucks, trailers and earthmoving equipment. This transport equipment is only accessed sporadically. Anyone taking trucks and trailers from the property do not, and are not permitted to, access the structures.

### **The authority**

- 4.5. The authority believes that structures 1-5 do not fall within clause 4 of Schedule 1 and that building consent was required for their construction.
- 4.6. The authority has submitted that workers enter the structures for moving and storing machinery and that they are accessible to people moving around the site and neighbouring properties.

## **5. Discussion**

- 5.1. In making a determination about the authority's decision to issue the notice, I have considered:
  - (1) whether there was a contravention of section 40, which turns on whether the work carried out to form the container and canopy structures was exempt from requiring a building consent under clause 4 of Schedule 1
  - (2) the form and content of the notice.

### **Whether there was a contravention of section 40**

#### **Legislation**

- 5.2. The term 'building' is defined in section 8(1)(a) as "...a temporary or permanent movable or immovable structure (including a structure intended for occupation by people, animals, machinery, or chattels)...". As per section 7, 'building work' includes work that is "for, or in connection with, the construction, alteration, demolition, or removal of a building".

- 5.3. In this case, there is no dispute between the parties that the container and canopy structures are buildings, and that building work has been undertaken.
- 5.4. Section 40(1) provides that a person must not carry out any building work except in accordance with a building consent. Section 41(1)(b) states that a building consent is not required if the building work falls within the exemptions under Schedule 1.
- 5.5. Therefore, whether there has been a contravention of section 40 turns on whether the building work to construct the container and canopy structures was exempt under Schedule 1.
- 5.6. The owner has relied on the exemption in clause 4(1)(b) of Schedule 1, which states:

**4 Unoccupied detached buildings**

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

...

(b) is a building, or is in a vicinity, that people cannot enter or do not normally enter; ...

...

(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.

**Was the construction exempt under clause 4(1)(b)?**

- 5.7. The structures are detached buildings,<sup>5</sup> which means they meet the first criterion in clause 4(1).
- 5.8. Clause 4(2) excludes buildings from this exemption if they are closer than the measure of their own height to any residential building or any legal boundary.
- 5.9. Structures 1-3 include rear water storage tanks as part of the building in addition to the containers and canopies, and these combined components form a single structure that falls within the general definition of a 'building' under section 8(1)(a). The rear shipping containers of these structures extend outside of roof plan. These structures (and possibly structure 4) may be closer than their own height to the legal boundary.
- 5.10. It is not clear whether the distances to legal boundaries provided in the owners' submissions are accurate; the measurement to the east boundary appears to be to the portion of the boundary furthest from structure 1, and the measurement to the south does not show the legal boundary. As I do not have reliable evidence regarding the distances to the legal boundaries, I make no findings as to whether structures 1-4 are excluded from the exemption by way of clause 4(2).

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<sup>5</sup> While "structures 1-3" are joined by a box-gutter system, the building as a whole is a detached building.

- 5.11. Therefore, my decision on whether the structures are exempt under clause 4 turns on whether the structures are "...a building, or in a vicinity, that people **cannot enter or do not normally enter...**" [my emphasis].
- 5.12. In order to assess this, I must consider the evidence about the use of the structures.
- 5.13. Although access to the site is controlled with an electronic entry gate, the structures are open at the front with no physical features to restrict access to the area within the structures. As such, the structures can be easily entered by people working within the site, and people can and do enter the structures. Once under the canopy or in the containers, a person is within the building.
- 5.14. Therefore, the structures are not buildings, or in a vicinity, that people **cannot enter**.
- 5.15. Given this, the next relevant consideration is whether people **do not normally enter** the structures.
- 5.16. The Oxford English Dictionary definition of 'normally' is: "in a regular manner; regularly" and "under normal or ordinary conditions; as a rule, ordinarily".<sup>6</sup>
- 5.17. Structures 1 to 4 are used to store plant, equipment, inventory and other slow-moving items associated with the company. The company that uses structures 1-4 operates a business that specialises in transport and house trailers, and sells equipment such as trucks, trailers, forklifts and generators.
- 5.18. Numerous submission photos show these structures with various goods and equipment stored within them. The company website shows stock for sale stored within these structures.<sup>7</sup> Aerial photographs dated 22 February 2022 show stock and vehicles stored within structures 1-3.<sup>8</sup> Furthermore, one of the submission photographs shows two outdoor chairs in one of the structures.
- 5.19. When the company sells goods and equipment that is stored within structures 1 to 4, workers are required to enter the buildings to retrieve it. As such, it is reasonable to conclude that these structures are normally entered for the ordinary purposes of the business, regardless of the fact that it is slow moving stock.
- 5.20. I note the company's parts manager states they enter the structures once every two to three weeks. In my opinion, this is not so infrequent that the structures could be considered 'not normally entered' and fall within the requirements of the exemption. Therefore, the criteria in clause 4(1)(b) is not met for structures 1 to 4.

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<sup>6</sup> Oxford English Dictionary (online), accessed 28 March 2025.

<sup>7</sup> <https://www.modtrans.co.nz/used-equipment/cummins-generator>, accessed 28 March 2025.

<sup>8</sup> Google Earth Pro and Google Maps (online), accessed 29 March 2025.



- 5.21. Structure 5 is used to store timber which one of the owners is using to build canoes. Photographs show timber in various sizes and there is sawdust evident on the ground. This indicates that the structure is being entered by a person (or people) to cut and size timber within this structure, as well as to store/remove the timber.
- 5.22. In my view, the function and use of structure 5 is not something that it could be considered a building that “people ... do not normally enter”, and therefore the criteria in clause 4(1)(b) is not met.
- 5.23. In summary, the building work to construction structures 1 to 5 was not exempt under clause 4(1)(b) of Schedule 1 because the structures are not “...a building, or in a vicinity, that people cannot enter or do not normally enter...”.
- 5.24. Accordingly, building work was undertaken without consent when consent was required, in contravention of section 40.

### **Form and content of the notice to fix**

- 5.25. Having established that there was a contravention of section 40, I will now address the form and content of the notice.
- 5.26. I consider the contravention has been adequately described in terms of the building work carried out and the consideration of exemptions under Schedule 1. However, there are issues with the ‘specified persons’ set out in the notice, and the remedy.
- 5.27. Section 163 defines a ‘specified person’ to whom a notice can be issued,<sup>9</sup> 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.
- 5.28. The record of title for the property lists two owners by name and a registered company name as the third owner. The authority’s notice identified two of the owners as specified persons but also included “& others”. This creates uncertainty about all specified persons that the notice has been issued to. A notice to fix carries offences under section 168 for failure to comply with the notice, and a specified person who fails to comply may be liable upon conviction to significant fines. Therefore, it is important that it is clear who the ‘specified persons’ are that a notice to fix is issued to.
- 5.29. Section 165(1)(c)-(g) sets out remedies that may be prescribed in particular situations. Section 165(1)(c) states that if a notice to fix “relates to building work that is being or has been carried out without a building consent, it may require the **making of an application** for a certificate of acceptance for the work” [my

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<sup>9</sup> Section 164(1)(a) provides for an 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 its regulations. Section 164(2)(a) provides that a responsible authority must issue ‘to the specified person concerned’ a notice requiring the person to remedy the contravention or comply with the Act or the regulations.

emphasis]. The authority's notice incorrectly referred to the "uplift" of a certificate of acceptance to address the unconsented structures, rather than simply 'applying' for one.

## 6. Conclusion

- 6.1. The construction of structures 1 to 5 is not exempt building work under Schedule 1, and therefore building work was carried out without a building consent when consent was required in contravention of section 40.
- 6.2. The notice to fix was not sufficiently clear in identifying the specified persons who the notice was issued to. Furthermore, it exceeded the provisions of section 165(1)(c) by requiring that the specified persons "uplift" a certificate of acceptance rather than requiring the making of an application for one.

## 7. Decision

- 7.1. In accordance with section 188 of the Building Act 2004, I determine that there were grounds to issue the notice to fix for a contravention of section 40. However, for the reasons detailed above, the notice to fix did not meet the provisions of section 164 and section 165(1)(c) and the authority's decision is reversed.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 4 April 2025.

**Peta Hird**

**Lead Determinations Specialist**