



Determination 2015/026

Regarding the issue of a notice to fix and whether a prefabricated unit at Hargreaves Road, Karamea, is a building or a vehicle



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, John Gardiner, Manager Determinations and Assurance, 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, Break Creek Farm Limited (“the applicant”)
- Buller 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 work it considered was building work carried out without building consent first being obtained, when consent was required under section 40 of the Act².

1.4 The matter to be determined³ is therefore whether the authority correctly exercised its powers of decision in issuing the notice to fix. In deciding this matter, I must consider whether the relocated unit described in the notice to fix is building for the purposes of the Act.

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

¹ The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.building.govt.nz or by contacting the Ministry on 0800 242 243.

² In this determination, unless otherwise stated, references to sections are to sections of the Act, and references to clauses are to clauses of the Building Code (First Schedule, Building Regulations 1992)

³ Under sections 177(1)(b) and 177(2)(f) of the Act

2. The building work

- 2.1 The building work consists of a 12m x 3.6m prefabricated unit that has been relocated onto the applicant's property. The unit had been towed to the site on a trailer and was lifted off the trailer and placed on temporary foundations.
- 2.2 The unit contains a kitchen/living area and bunkroom. Hot water is supplied by way of a gas califont, with water supplies from a nearby water tank. Waste water is piped to an in-ground septic tank.
- 2.3 A landing and steps has been constructed to one entrance door to the unit. The landing and steps appear to be structurally independent of the unit.

3. Background

- 3.1 On 4 July 2014, the applicant relocated the prefabricated unit onto the property.
- 3.2 The authority became aware of the unit on 24 October 2014, and carried out a site visit on 9 December 2014. The authority noted from its site visit that the unit was on temporary foundations, had a foul sewerage disposal pipe from the building going into the ground, and had various features that indicated it was a dwelling.
- 3.3 On 19 December 2014, the authority issued a notice to fix (NF0175) to the applicant, noting the 'particulars of contravention or non-compliance' as:
- Unauthorised building work contrary to section 40 of the Building Act 2004:
relocation of dwelling onto site and installation of sewage disposal system.
- 3.4 The covering letter noted that the authority assumed that a consent and code compliance certificate had been issued for the construction of the unit, and that this documentation should be provided to the authority. The letter went on to note that as a building consent could not be issued retrospectively the applicant would need to apply for a certificate of acceptance for the work already carried out.
- 3.5 On 22 January 2015 the applicant emailed the authority and queried the authority's determination that the unit is a dwelling. The authority responded on 26 January 2015, noting that 'the building is a self-contained household unit capable of being a residential unit'. There was further correspondence between the parties in regards to what the authority's views were.
- 3.6 The applicant emailed the authority on 29 January 2015, stating that the relocation of the unit had been undertaken with the applicant's view that it would be classified as a caravan. The applicant noted that 'it is not intended to be used for permanent or long term occupation nor is intended that it stay in one location'.
- 3.7 The applicant then set out a proposal in the email that the applicant considered would be sufficient to have the unit considered as a vehicle rather than as a building. The proposal included:
1. Rectify the disposal of sewage at Hargreaves Road ... by installing a portable toilet designed for caravans thus creating a closed sewage system. I will disconnect the existing septic tank that was not permitted.
 2. Rectify the disposal grey water at Hargreaves Road, ... by attaching a grey water tank to the chassis to collect all grey water and drain this tank manually for disposal in accordance to use of a caravan.
 3. I will attach a potable water tank to the chassis that I will fill manually to be used as the sole water source in accordance with use on a caravan.
 4. The wiring for the project is 240V which was done by a certified electrician. The inlet for electricity is an approved outdoor plug in accordance with use on a

caravan. There is no intention, nor is the project designed to attach to the main grid directly.

- 3.8 In a letter dated 28 January 2015 from the authority (which references the applicant's email of 29 January so appears to be dated incorrectly), the authority referred to the applicant's view that the unit could be classified as a caravan, but stated that it continued to hold the view that the unit was a building under the definition set out in section 8(1)(a) and 8(1)(b)(iii) of the Act. The authority set out its reasons as follows:

...the building is intended as a permanent structure, although currently moveable (at present sits on skids and is not fixed to the ground apart from the drainage and plumbing connections) and even if classified as a caravan by a legal opinion, it is still intended to be occupied by people on a long term basis.

However the structure is not a caravan as it has no wheels or means of towing ever fitted and is and has not been registered or warranted for this purpose.

- 3.9 The authority referred to a recent determination (2014/025⁴) that the authority had considered which centred on whether a relocated unit was a building for the purposes of the Building Act. The authority stated that it considered the notice to fix was still outstanding and must be complied with. The authority attached to the letter an article which set out when building consent is required under the Act⁵.

- 3.10 The applicant wrote to the authority on 5 February 2015 and also referenced Determination 2014/025, noting that because the unit in that determination was intended to be occupied for 'occasional/holiday/weekend' use that it was not considered a building. The applicant went on to state that

... we will therefore place our unit on wheels, provide a tow bar and register it so that it meets the definition of a vehicle.

The vehicle will not be connected to services and accordingly it will be movable ...

The unit is not intended for permanent or long term occupation [permanent residence is elsewhere].

- 3.11 The applicant sought confirmation from the authority that the actions proposed (set out in paragraphs 3.7 and 3.10 above) would mean that the notice to fix could be withdrawn.
- 3.12 It appears from the authority's records that it carried out a second site visit on 5 February 2015. Photographs taken show some further work had been carried out, including the addition of a porch structure at the front door to the unit. On the same day the authority wrote to the applicant and separately sought advice from the Ministry.
- 3.13 On 12 February 2015 the authority again wrote to the applicant (refer paragraph 3.10 above), stating that it considered that building work had been completed without building consent approval; that the structure is a building; and that use of the building is intended for permanent and long term accommodation. The authority also stated that the proposed actions by the applicant did not 'negate the fact that building work has been carried out without a consent'.

⁴ Determination 2014/025: Regarding the proposal to issue a notice to fix in respect of a portable unit, and whether the unit is a building or vehicle (*Ministry of Business, Innovation and Employment*) 5 May 2014.

⁵ New Zealand Motor Caravan Association (NZMCA): "Motorhomes as Temporary Accommodation." *NZMCA News*. Web. 19 Apr. 2015. <http://www.nzmc.org.nz/motorhomes-as-temporary-accommodation/>

- 3.14 It appears there was a meeting between the parties, and on 26 February 2015 the authority wrote to the applicant, setting out the actions required if the application wished to ‘make the building permanent’, which the authority understood the applicant’s intention to be, and extending the date specified on the notice to fix.
- 3.15 By email on 18 March 2015, the applicant advised the authority that their position had changed and that a determination would be sought on the matter. The issue remained unresolved between the parties and the Ministry received an application for determination on 2 April 2015.

4. The submissions

- 4.1 In a covering letter to the application, the applicant set out the background to the dispute and views on the interpretation of section 8(1)(b)(iii). The applicant sought confirmation on whether the following actions would deem the unit be considered as a vehicle and not a building for the purposes of the Act:
- Conversion to a trailer, consisting of construction of a trailer frame with a tow bar
 - Registered as a vehicle
 - Not connected to services
 - Installation of a portable toilet (designed for caravans)
 - Attachment of a grey water tank to collect grey water (drained manually for disposal similar to use in caravan)
 - Attachment of a portable water tank as the sole water source, to be filled manually
- 4.2 The applicant acknowledged that ‘the unit has previously been connected to an un-consented sewerage disposal system’ but stated this has been disconnected. The applicant noted that the wiring in the unit was installed by a certified electrician, and the inlet was by way of an approved outdoor plug as is used for caravans. The applicant also stated that the intended use of the unit was for occasional school holiday or weekend use, and that although it has all the facilities of a dwelling capable of permanent occupation, it was not intended to use it in that manner.
- 4.3 The authority responded to the application with a submission received on 17 April 2015. The authority provided copies of the following:
- A summary sheet containing a record of the background.
 - Notes and photographs from a site visit carried out by the authority.
 - The notice to fix, dated 19 December 2014, and photographs
 - Various items of correspondence between the parties, and between the authority and the Ministry.
- 4.4 A draft determination was issued to the parties for comment on 4 May 2015.
- 4.5 The authority accepted the draft without further comment in a response received on 7 May 2015.
- 4.6 The applicant accepted the draft in principle in a response received on 18 May 2015, but requested further comment in the determination as to whether the changes

proposed by the applicant, if completed, would mean the unit was then a vehicle and not a building under the Act. The applicant noted this would not form part of the matter for the determination.

- 4.7 In response to the applicant, I note that paragraph 5.1.8 provides a summary that the applicant can use to test his proposal against. It is for the applicant, not this determination, to establish the unit is a vehicle; only at that point does the test under section 8(1)(b)(iii) of the Act come into effect.

5. Discussion

5.1 General

- 5.1.1 The dispute centres on whether the unit is a ‘building’ for the purposes of the Building Act, and whether the authority was correct to issue a notice to fix for building work carried out without consent first being obtained.

- 5.1.2 A “building” for the purposes of the Act is defined in section 8(1)(a), and
means a temporary or permanent movable or immovable structure (including a structure intended for occupation by people, animals, machinery, or chattels); ...

- 5.1.3 Section 8(1)(b) provides that several matters are expressly included in the definition of a building and one of these matters concerns vehicles:

(iii) a vehicle or motor vehicle (including a vehicle or motor vehicle as defined in section 2(1) of the Land Transport Act 1998) that is immovable and is occupied by people on a permanent or long-term basis; ...

- 5.1.4 These provisions have been considered by the Court of Appeal in *Thames-Coromandel District Council v Te Puru Holiday Park Ltd.*⁶ The Court of Appeal agreed with the approach of the High Court stating:

[10] In the High Court, Duffy J held that Judge Thomas had misinterpreted s 8. She held that if a defendant contended that the alleged building was a vehicle, then the first thing the court needed to assess was whether it was. If it was, then the court had to assess whether it was a vehicle with s 8(1)(b)(iii) characteristics. If it had such characteristics, it was a building. If it did not have them, it was not a building. In those circumstances, it was irrelevant whether the vehicle might come within the general definition (by which we mean the definition in s 8(1)(a)). If, however, the court concluded that the alleged building was not a vehicle at all, then it had to assess whether the thing came within the general definition. ...

[22] Our conclusion is therefore that Duffy J approached the interpretation of ss 8 and 9 in the correct way by focusing first on whether the units came within s 8(1)(b)(iii). What she had to determine was whether the units were vehicles and, if so, whether they were immovable and occupied by people on a permanent or longterm basis. If they were, they were buildings. If they were vehicles but did not have those characteristics, they were not buildings. If they were not vehicles at all, then s 8(1)(b)(iii) fell to the side; what one then needed to look at was whether they came within the general definition.

- 5.1.5 Therefore, the first step in deciding when a vehicle will be required to be treated as a building under the Act is the meaning of the terms ‘vehicle’ and ‘motor vehicle’. Neither of these terms is defined in the Act, so their natural and ordinary meaning applies:⁷

vehicle – a thing used for transporting people or goods, especially on land, such as a car, lorry, or cart

⁶ [2010] NZCA 663

⁷ *Oxford Dictionary of English*, 3rd ed., Oxford University Press, 2010.

motor vehicle – a road vehicle powered by an internal combustion engine.

5.1.6 The reference to vehicle in section 8(1)(b)(iii) also includes a “vehicle or motor vehicle” as defined in section 2(1) of the Land Transport Act 1998. The relevant parts of those definitions provide:

vehicle—

- (a) means a contrivance equipped with wheels, tracks, or revolving runners on which it moves or is moved; ...

motor vehicle—

- (a) means a vehicle drawn or propelled by mechanical power; and
 (b) includes a trailer; ...

5.1.7 If a particular structure is a vehicle, it will then only be treated as a building for the purposes of the Act if it also satisfies the two further requirements in section 8(1)(b)(iii) of the Act. These are that the vehicle must be ‘immovable’ and ‘occupied by people on a permanent or long-term basis’.

5.1.8 To summarise the position as to when vehicles will be treated as buildings:

- if something is a vehicle, and it is immovable and occupied by people on a permanent or long-term basis, it will be treated as a building
- if something is not a vehicle, the question of whether it is to be treated as a building will fall to be considered under the main definition of building in section 8(1)(a) of the Act
- if a person claims something is not subject to the Building Act because it is a vehicle, they must establish the thing is a vehicle or motor vehicle, and that it is movable or that it is not occupied by people on a permanent or long-term basis.

5.2 Is the unit a vehicle?

5.2.1 The first issue I need to consider is whether, at the time the authority made its decision to issue the notice to fix, the unit was vehicle or motor vehicle. The relevant requirements of those definitions, as noted above, are that the structure in question is used for transporting people or goods, is a contrivance equipped with wheels (or similar) on which it moves, or is a trailer.

5.2.2 At the time the authority issued the notice to fix the unit was on temporary foundations, was not moveable, and had the foul water plumbed to an in-ground septic tank. Given those attributes I consider the unit, at the time the authority issued the notice to fix, was not a vehicle and fell within the definition of a building under section 8 of the Act. I note here also that since the issue of the notice to fix the applicant has also attached a porch structure to the unit.

5.2.3 Having decided that the unit is not a vehicle, I do not need to consider section 8(1)(b)(iii) of the Act and whether it is immovable and occupied by people on a permanent or long-term basis.

5.3 The notice to fix

5.3.1 Section 40 states that buildings are not to be constructed, altered, demolished or removed without consent. I note here that for a prefabricated or relocated building being installed on site, building consent would be required for connections to services and the building would be required to comply with the Building Code.

- 5.3.2 In this case the building work undertaken without building consent first being obtained when consent was required was the installation of a septic tank and connection of foul water, and connection of water supplies to the unit. I have no information as to whether the construction of the prefabricated unit was carried out under a building consent prior to its relocation onto the applicant's property.
- 5.3.3 As I have concluded that the unit was not a vehicle, and the applicant has carried out building work without first obtaining building consent, I consider the authority was correct in its decision to issue a notice to fix in respect of building work carried out in contravention of section 40.
- 5.3.4 The relocation of the unit onto the site does not constitute building work and this reference should not be included as a breach in the notice to fix. I have considered this matter previously in Determination 2014/030⁸. That determination considered the relocation of two containers onto a property, which the determination found did not amount to building work: in my view that position applies here. The construction of foundations and securing a unit to the foundations is building work however.
- 5.3.5 I note here that the construction of the porch structure would fall within Schedule 1(17) as exempt building work not requiring consent.

5.4 The applicant's proposal

- 5.4.1 The applicant has proposed a number of actions in order that the unit could be considered to be a vehicle and not a building under section 8(1)(b)(iii).
- 5.4.2 While the proposal is not a matter that I can determine under section 177 of the Act, I make the following comments:
- It is for the applicant to establish that the unit can be considered a vehicle; this may include consideration of the following:
 - Equipping the unit with wheels in order that it falls within the definition of vehicle or motor vehicle under the Land Transport Act 1998
 - Having the unit registered and with a current warrant of fitness
 - If the unit is altered in order that it becomes a vehicle, it is then for the applicant to establish that the vehicle falls within section 8(1)(b)(iii) of the Act, namely that the unit remains moveable and is not occupied on a permanent or long term basis. This may include consideration of the following
 - Whether the vehicle is attached to the ground and how easily those attachments can be removed;
 - Whether the vehicle has been connected to services and how easily those can be removed;
 - Whether the vehicle has retained its wheels and the ability to be towed or to move itself;
 - Whether structures have been attached to the vehicle, such as decks, verandas, or additional rooms, and how easily these can be detached.
- 5.4.3 I note that while the unit has been designed and fitted out for habitation, the applicant has stated the intention that the unit be used for visiting the property for the purposes of oversight of the farm and vacations and not on a permanent or long term basis.

⁸ Determination 2014/030: Regarding the issue of a notice to fix for the placement of two shipping containers on a property

6. The decision

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority correctly exercised its powers of decision in issuing the notice to fix NF0175 dated 19 December 2014, but the authority is to modify the notice to fix to remove the reference to the relocation as this was not work that required building consent.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 29 May 2015.

John Gardiner
Manager Determinations and Assurance

Appendix

A.1 The relevant sections of the Act:

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—

...

(iii) a vehicle or motor vehicle (including a vehicle or motor vehicle as defined in [section 2\(1\)](#) of the Land Transport Act 1998) that is immovable and is occupied by people on a permanent or long-term basis; and

...

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

...