



## **Determination 2015/044**

# **Regarding the issue of a notice to fix for a unit at 582 Josephville-St Patricks Road, Balfour, and whether the unit 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 2004<sup>1</sup> (“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 this determination are:

- Southland District Council, carrying out its duties as a territorial authority or building consent authority (“the authority”): the authority is the applicant in this determination
- the owners of the site: J Hopcroft, W L Hopcroft, and W D Hopcroft (“the owners”)
- the manufacturer of the cabin, Classic Affordable Cabins Ltd (“the manufacturer”), who is the current owner of the unit.

1.3 The determination arises from the authority’s decision to issue a notice to fix for the unit, on the grounds that it was building work and that building consent had not been obtained for it, as required under section 40 of the Act<sup>2</sup>.

1.4 The matter to be determined<sup>3</sup> is therefore the authority’s exercised of its powers of decision in issuing the notice to fix. In deciding this matter, I must consider whether the unit described in the notice to fix is a 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.

### **2. The building work**

2.1 The unit is being constructed on a flat site on the owners’ farm at Balfour. The farm already has three residential dwellings on it, and the unit is being constructed on-site, adjacent to one of these dwellings to be used to house staff working on the farm.

2.2 At the time the determination was applied for, only the sub-floor of the unit had been constructed. As far as I am aware, no further building work has been carried out on the unit since that time.

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<sup>1</sup> The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at [www.building.govt.nz](http://www.building.govt.nz) or by contacting the Ministry on 0800 242 243.

<sup>2</sup> 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)

<sup>3</sup> Under sections 177(1)(b) and 177(2)(f) of the Act

- 2.3 The subfloor of the unit is 40m<sup>2</sup>. It consists of a metal sub-frame of 150mm u-channel steel, four axles and springs. Wheels with balloon tyres are fitted to the axles. A timber sub-floor has been built on top of the sub-frame. Insulation has been installed between the joists of the sub-floor and sheet flooring installed over this. The wall framing and rafters for the unit have been constructed but not yet erected. Grade 2, 75x500mm, H3.2 treated timber has been used for the framing, with studs at 600mm intervals, and an eventual stud height of 2.1m at the unit's sides.
- 2.4 From the parties' submissions I understand that once completed the unit will have aluminium joinery, wall insulation, building paper and corrugated iron external wall cladding. The interior will be lined with glued and nailed custom-wood. It will have a corrugated iron skillion roof, which will also be insulated.
- 2.5 Inside, the unit will be partitioned to provide separate sleeping, bathroom, and living areas. The latter will include kitchen facilities. Grey water and sewerage from the unit will be put into a holding tank, from which it can be mulched and pumped out and disposed of, or connected to onsite disposal systems. Power is provided via a standard caravan lead, and water is supplied from a hose to an external tap. LPG is used to heat water and for cooking.
- 2.6 At present, the partially constructed unit is resting on eight levelling blocks. These will be removed once it is complete, at which point the unit will rest on eight wheels, and will be levelled by four adjustable stays; one at each corner of the unit.

### 3. The background

- 3.1 At some point during 2015, the authority became aware that the unit was being constructed on the owners' property without building consent having first been obtained. An officer of the authority visited the property on 27 May 2015, and inspected the partially constructed unit. I understand that the builder and at least one of the owners were present at the visit and discussed the building work with the officer. The officer asked to see the plans for the building work, but these were not available.
- 3.2 The officer produced a report dated 5 June 2015, after the site visit ("the site visit report"). The report outlines the building work inspected by the officer during the site visit, and his discussions with the builder and owner during the site visit. In the report, the officer considered the relevant sections of the Act, and concluded that:
- I believe this residential unit falls within the definition of a building under Section 8(b)iii of the Building Act in that it is designed nor could be easily movable and is intended for the purposed of long term accommodation.
- As a result, the officer recommended that notice to fix should be issued requiring all building work on the unit to stop until such time as a building consent had been applied for and granted. He also highlighted several areas where he did not consider that the building work complied, or when finished would comply, with the Building Code.
- 3.3 On 3 June 2015, the authority issued a notice to fix for the building work, on the grounds that it was a breach of section 40(1) of the Act. The reason given in the notice was that '...building work by way of construction of the residential unit is being undertaken other than in accordance with a building consent.' The notice to fix stated that in order to remedy the non-compliance:

Building work must stop immediately and an application be made to [the authority] for a "Building Consent" for the building work necessary to complete the works, including all necessary supporting plans and specification etc.

Building work is not to progress until a building consent for the new building has been granted by [the authority]. Please note that as current framing sizes do not meet the acceptable solution NZS 3604 of the Building Code, specific design will be necessary to cover the structural elements of the design.

- 3.4 On 3 June 2015, the authority also applied for a determination on whether the unit was a building under section 8 of the Act and if so whether it complied with the Building Code, and whether the authority had been correct to issue a notice to fix.
- 3.5 On 4 June 2015, the authority sent an email to the owners and the manufacturer attaching a copy of the notice to fix and its application for a determination. In the email, the authority stated that '[the unit] currently under construction on site falls within the definition of a building under section 8 of the building Act and therefore a building consent should have been obtained before commencing construction'.

#### **4. The submissions**

- 4.1 With its application for a determination, the authority provided a copy of the notice to fix, as well as the manufacturer's advertising brochure outlining the specifications for the unit. On 10 June 2015, the authority also provided a copy of the site visit report dated 5 June 2015.
- 4.2 The owners made a submission in response to the authority's application, which I received on 16 June 2015. In it they state that:
- they decided to have the unit built 'so as it could be easily transportable to either one of our two support blocks or possibly removed when we vacate the farm'
  - the unit was intended for staff use, as they required additional staff accommodation, but did not want to build another house, as there were already three other dwellings on the property
  - the authority had advised them verbally before the building work started that 'a caravan on wheels did not require a permit or consent'
  - after they received the notice to fix, the authority had advised them that 'the caravan was a house because we are building onsite'. In response, the owners offered to remove the unit and complete its construction off-site, but this offer was rejected by the authority.
- 4.3 The manufacturer also made a submission (undated but received on 16 June 2015) in response to the application. In its submission, the manufacturer outlined how its units were constructed, and I have included that information in the description at paragraph 2. The manufacturer stated that it routinely constructed these units 'for holiday parks and tow them in with no problem at all'.

The caravans can be registered under a farm registration and towed within 20kms of the farm, only requiring a pilot vehicle to be towed down the road. It takes approximately 10 minutes to remove the Levelling stays/Power/Water and the caravan can be towed away.

The caravans are designed to be towed with a tractor, not requiring brakes and a light board. A light board can be fitted when towing down the road, when needed.

- 4.4 The manufacturer also explained that the reason the unit was being constructed on site was ‘to save the cost of transporting the caravan...to make it more cost effective for [the owners]’.
- 4.5 A draft determination was issued to the parties and the manufacturer for comment on 29 June 2015.
- 4.6 The manufacturer and the owners both responded by email on 30 June 2015, accepting the draft determination. The owners reiterated their view that the ‘transportable caravan is definitely movable and transportable’.
- 4.7 The authority also responded on 30 June 2015 but did not accept the draft and queried the analysis set out in the discussion. The authority submitted that although the determination concluded the unit was movable, it also refers to the occupancy and that this is not intended as shorter term accommodation. On that basis the authority considered that the unit falls within the definition of a building. The authority also set out the view that it did not ‘believe the unit in all practicality is that movable and in reality will probably never be moved once established’.
- 4.8 On 1 July 2015 I responded to the authority’s query regarding the analysis of whether the unit falls within the definition of a building under section 8(1)(b)(iii), noting that the criteria under that section are that the vehicle is immovable *and* occupied on a long term basis. In order to provide some guidelines to authorities when they are considering similar situations in the future, I have included a decision tree in Appendix A.

## 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.*<sup>4</sup> 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

<sup>4</sup> [2010] NZCA 663

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 to decide whether it comes within 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:<sup>5</sup>

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

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 a 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.

<sup>5</sup> *Oxford Dictionary of English*, 3<sup>rd</sup> ed., Oxford University Press, 2010.

- 5.2.2 The unit, although only partially constructed, has wheels and axles, and in my opinion is clearly designed to be capable of being towed. This is reinforced by the information provided by the parties in their submissions about the standard construction for this type of unit (notably the manufacturer's brochure and its submission), which clearly show that once completed the unit will also be fixed with a tow bar.
- 5.2.3 I also accept the manufacturer's submission about the circumstances in which the unit can be towed, and that the unit's construction is sufficiently robust to enable this to happen.
- 5.2.4 As a result, I consider that the unit is a vehicle, both within the natural meaning of that term, and as defined by the Land Transport Act 1998.

### **5.3 Is the unit a building?**

- 5.3.1 Having decided that the unit is a vehicle, the question then becomes whether it should be treated as a building under section 8(1)(b)(iii) of the Building Act 2004. This requires me to consider whether it has the characteristics specified in that section, namely whether it is immovable and occupied by people on a permanent or long-term basis.
- 5.3.2 The owners have clearly stated in their submission that the intended use of the unit, once finished, is as staff accommodation. There is nothing to suggest that this use will be intermittent or short-term, and I consider that the second criteria in section 8(1)(b)(iii) is satisfied.
- 5.3.3 However, in my opinion the first criteria, that the unit is immovable, is not. Whether a vehicle is immovable is a question of degree that will turn on a range of factors such as:
- 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, verandahs, or additional rooms, and how easily these can be detached.
- 5.3.4 As stated in paragraph 5.2.2, the unit is clearly designed to be capable of being towed, and I accept the owners' submission that this is why they have chosen to construct this type of unit – so it can be moved around their property, or taken off it, if required. There are no attachments to the in-ground plumbing or drainage, and no connections to foundations or other structures.
- 5.3.5 I do not consider it relevant that the unit is being constructed on-site, rather than remotely, as it is the nature of the finished unit and its intended use that will determine whether it falls within the definition in Section 8. The fact that the unit is being constructed on-site does not mean that, once finished, it will not be capable of being moved.
- 5.3.6 I mention here that, in the site visit report, the authority suggested that the owners were considering attaching the waste outflow from the unit to their existing sewage system. This building work does not form part of this determination. If the owners do

intend to go ahead with this work, then they may well have to apply for building consent for it, and how easily that attachment can be removed may impact on whether the unit can still be considered immovable.

## 5.4 Conclusion

- 5.4.1 Having found that the unit is a vehicle and does not have the characteristics listed in section 8(1)(b)(iii) of the Building Act 2004, it follows that it is not a building for the purposes of the Act or the Building Code.
- 5.4.2 Applying the approach established by the Court of Appeal in *Thames-Coromandel District Council v Te Puru Holiday Park Ltd*<sup>6</sup>, it is not now necessary for me to consider whether the unit would fall within the broader definition in section 8(1)(a): if it is a vehicle and is movable, then it is not a building.
- 5.4.3 It follows that there is no obligation for the unit to comply with the Building Act or the Building Code, and that the authority was incorrect to issue a notice to fix.

## 6. The decision

- 6.1 In accordance with section 188 of the Act, I hereby determine that the authority incorrectly exercised its powers of decision in issuing the notice to fix, and accordingly I reverse that decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 8 July 2015.

John Gardiner  
**Manager Determinations and Assurance**

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<sup>6</sup> [2010] NZCA 663

## APPENDIX A

### Decision tree: section 8(1)(b)(iii)

