



Determination 2016/010

Regarding the issue of a notice to fix and whether a houseboat at 2/6 Roseburn Place, Pakuranga, Auckland is a building.



Summary

This determination considers the authority's exercise of its powers of decision in issuing a notice to fix for a houseboat used as temporary accommodation. The determination turned on whether the houseboat is a building under the Building Act 2004 and provides for some guidance around when a boat falls within the building regulatory regime.

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 houseboat, Mr A Chand ("the owner") acting through the designer and builder of the houseboat as his agent, Mr C Bell ("the agent")
- Auckland 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 the owner's houseboat constructed without building consent first being obtained, on

¹ The Building Act, Building Code, Acceptable Solutions and Verification Methods, 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.

the grounds that it was building work for which building consent was required and its construction was in contravention of section 40 of the Act.²

1.4 The matter to be determined³ is therefore the authority's exercise of its powers of decision in issuing the notice to fix. In deciding this matter, I must consider whether the houseboat 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 houseboat is constructed on four rota-moulded pontoons 6m long and 450mm in diameter. A combination of timber and stainless steel strapping connect the pontoons. The "deck", or building platform on the pontoons, is constructed from tongue and groove timber, and the walls are corrugated iron attached to laminated timber beams.

2.2 Photographs provided as part of the application show the houseboat is fitted with a kitchen bench and sink, a shower unit, vanity and toilet. There is an externally fitted water heater, along with external plumbing for kitchen, toilet and bathroom supply and waste pipes. It is unclear from the photographs where drain pipes discharge to; however, the agent advised that the houseboat has a 'nil discharge wastewater system'.

3. Background

3.1 At some stage before October 2015 the agent designed and built the houseboat.

3.2 On 19 October 2015 the authority issued a notice to fix to the owner. The particulars of the notice to fix stated:

contrary to section 40 of [the Act], the following building works have been undertaken without first obtaining a building consent

- The construction of a detached building exceeding 10 sqm in floor area and closer of the measure of its own height to the boundary
- The installation and plumbing of sanitary fixtures, specifically; a shower, a vanity, a toilet and a kitchen sink with associated plumbing.

To remedy this contravention or non-compliance you must:

Remove the non-complying building works; or pursue any other option to make the building works comply with [the Act] and the Building Code

3.3 The Ministry received an application for determination on 14 December 2015.

4. The submissions

4.1 The owner

4.1.1 The agent sought the determination to verify that the houseboat is not a building. The agent provided a brief written submission with the application for determination stating that the houseboat has been designed as a floating houseboat using pontoons to float and 'boatbuilding techknowledgy (sic)' for its construction.

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.

4.1.2 The agent provided the following documentation with the application:

- An email from a boat builder dated 9 December 2015. In summary the boat builder stated:
 - the houseboat design was fit for purpose for inland sheltered waters with ample stability and flotation for its intended service use
 - the houseboat could be securely moored/anchored but easily repositioned afloat to a new location
 - there is an intended use option to provide accommodation in flood-plain areas where conventional homes are at risk in seasonal floods.
- An email from a second boat builder dated 6 December 2015 stated (in summary):
 - the houseboat has been observed and the design is ‘suitable for sheltered or estuary navigation which can be manoeuvred on the water’
 - the vessel has ‘adequate buoyancy ... in its pontoons to support the vessel and its contents while in the water, and has adequate structure to sustain the loading required to be applied to the vessel.’
 - ‘[t]he material used would sustain the harsh marine environment in the restricted area of the use it is designed for.’
 - the houseboat ‘has fixtures to adequately moor the vessel and restrain it from breaking free ...’.
- A copy of a local newspaper article (date unknown) containing a brief story on the development of the houseboats.
- Various photographs of the houseboat and the interior.

4.2 The authority

4.2.1 On 13 January 2016 the authority provided a written submission. In summary the authority stated:

- The determination application has arisen from a structure built at an address in Auckland. The authority concluded it was probably assembled on site due to access constraints.
- The structure has pontoons and may float, however, the authority considers this irrelevant as it cannot be regarded as a ‘vessel, boat...or craft used for navigation’ under section 9(d) of the Act when sited on land where it cannot be used for navigation.
- The authority considered the houseboat is a building which has been constructed without a building consent and which appears deficient in respect of other requirements of the Building Code regarding plumbing and sanitary issues. The authority therefore issued a notice to fix for the houseboat.
- The authority welcomes the Ministry’s views for possible future reference on the issue of houseboats more generally. The authority questions whether structures designed for purely residential use, not used for navigation when moored permanently to the land, can be properly be regarded as ‘a building exception under section 9(d)’ of the Act.

- The authority cited the US Supreme Court case of *Lozman v City of Riveria Beach*, which, although in a different jurisdiction, took the view that houseboats moored permanently to land were not vessels under federal maritime law.

4.2.2 The authority provided the following documentation with its submission:

- An article containing details of the Case *Lozman v City of Riveria Beach* that concluded a houseboat permanently docked to land is not a vessel and is therefore not under federal maritime jurisdiction, including the following exert:

If a reasonable observer, looking to the home's physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water

- The notice to fix.
- Various photographs of the houseboat, the interior and the sanitary fixtures and appliances.

5. The draft determination and further submissions

5.1 On 18 January 2016 I issued a draft determination to the parties. The draft determination concluded the houseboat was a building for the purposes of the Act as it was not used in navigation.

5.2 On 28 January 2016, the agent disagreed with the finding in the draft determination, requested a hearing and submitted (in summary):

- The newspaper article had nothing to do with the houseboat in question but was provided to show that the authority had set precedents with similar houseboats to gain resource consent.
- The agent provided a comparison to a motorhome 'is only a motorhome when it has a WOF and registration and is being used on the road' to illustrate that stating a houseboat is only a houseboat when it is used on water to navigate is not the correct test.
- The houseboat is 100m from the high water mark, sea levels could rise due to global warming and the agent 'believe[s] the owners have the right to prepare for such an event by owning a houseboat'.
- There are no navigational aids on board as with the technology available today a phone can be used to give your position
- The houseboat has a nil discharge waste water system.

5.3 On 4 February 2016 the authority accepted the draft without comment.

6. The hearing

6.1 On 29 February 2016 I held a hearing in Auckland. The hearing was attended by the agent and two officers of the authority. I was accompanied by a referee engaged by the Chief Executive under section 187(2) of the Act, together with an officer of the Ministry.

6.2 All the attendees spoke at the hearing to clarify various matters of law and fact and were of assistance to me preparing this determination. The views put forward at the hearing and evidential submissions provided at the hearing are summarised below.

The houseboat subject to this determination

6.3 The agent explained the houseboat was owned by a family who do not intend to use the houseboat as a permanent dwelling; however it is used by extended family for accommodation on dry land. The property is currently located around 100m from the sea level.

6.4 The agent's primary objective with the 'houseboat' is that it can be built for 'far less' than a structure that complies with the Building Code.

6.5 The agent's primary argument for the houseboat in this case being a 'boat' is that it floats on water. The agent provided photographic evidence of the houseboat floating in a pond. The agent agreed to pursue legal advice in this situation to provide a robust argument that the houseboat was not a building under the Act.

6.6 It was recognised the owners of the houseboat subject to the notice to fix need to be included as a party to this determination.

Alternative options discussed

6.7 If the determination were to conclude that the houseboat was a building for the purposes of the Act, the attendees at the hearing discussed alternative compliance pathways for the agent to consider under the building regulatory regime.

6.8 An option for the agent would be to consider a MultiProof approval for the construction of other houseboats.

6.9 For the houseboat in question, being subject to a notice to fix, the owner could apply for a Certificate of Acceptance; however the owner needs to explore the resource consent requirements prior to pursuing this option.

Further guidance

6.10 The authority indicated further guidance from the Ministry is required, in relation to houseboats that are on water.

6.11 I recognise some guidance is required as to when a boat becomes a building under the Building Act 2004. There are some situations where it is unclear what the 'trigger point' is for when something changes to being a building under the Act.

6.12 Further submissions

6.12.1 On 15 March 2016 the agent advised the Ministry that he would not pursue legal advice on the matter, and sought information and the procedure for applying for a MultiProof approval for the houseboats.

6.12.2 On 21 March 2016 the agent provided a final submission, in summary:

- The agent provided a brief summary of the matters discussed at the hearing.
- The agent advised the legal avenue to establish the houseboat definition on both land and water was explored but rejected as it would 'only cover individual cases'.
- The agent confirmed the houseboat is a houseboat when afloat and able to navigate, however a MultiProof approval was to be applied for houseboats on land.

- The agent submitted that it is understood once any structure is used ‘for human habitat on land then permission must be sought from appropriate authorities’.
- 6.12.3 On 17 March 2016 the owner was provided with a copy of the draft determination, and overview of the hearing that was held, and an opportunity to provide a submission for the determination. The Ministry recognised the owner should have been included as a party under section 176 of the Act.
- 6.12.4 On 19 March 2016 the owner responded, in summary:
- The owner stated the agent ‘wrongly advised’ the owner that a building consent from the authority was not required for the houseboat. The agent provided the owner with a brochure which stated that no building consent was required.
 - The owner needs the agent to ‘get things sorted out’ and was advised by the agent there would not be a problem with the authority. The owner is ‘looking forward to...further information’.

7. Discussion

7.1 General

- 7.1.1 The dispute is around whether the houseboat is a ‘building’ for the purposes of the Act, and therefore whether the authority was correct to issue a notice to fix for building work carried out without a building consent first being obtained, and whether the building work is required to comply with the Building Code.
- 7.1.2 A ‘building’ for the purposes of the Act is defined under section 8 as
- (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)
- 7.1.3 It is clear in this case the houseboat is a structure in the ordinary and natural meaning of the word, and is therefore a ‘building’ for the purposes of the Act unless it comes within one of the exceptions listed under section 9, which states a building does not include:
- (d) any description of vessel, boat, ferry or craft used in navigation –
 - (i) whether or not it has a means of propulsion; and
 - (ii) regardless of what that means of propulsion is
- 7.1.4 Determination 1995/008⁴ held that under the Building Act 1991 (“the former Act”) (which had a similarly worded exception) an underwater viewing chamber consisting of five floating steel and concrete structures was not ‘used in navigation’ as it was permanently moored.
- 7.1.5 The leading case in New Zealand that considers the definition of “building” in relation to a vessel, boat, ferry or craft is *Burkett v Queenstown Lakes District Council*⁵ which related to a floating restaurant; it was held that under the former Act, the words ‘used in navigation’ qualify not only ‘craft’ but also the preceding words ‘vessel, boat, ferry’. I consider this is still good law, and the question of whether a houseboat is a vessel, craft or boat will in part depend on whether it is moved from

⁴ Determination 1995/008 Access for people with disabilities to an underwater viewing chamber (*Building Industry Authority*) 22 December 1995

⁵ ENC Christchurch C202/2001

anchorage or mooring on a reasonably frequent basis (how often is a question of fact and degree).

7.1.6 I note that depending on the situation there could be other aspects to consider to determine whether a vessel, boat, ferry or craft is a building, for example whether the permanently moored vessel falls under any other regulations

7.1.7 In addition, it is important to note under section 5 of the Interpretation Act 1999 the meaning of an enactment must be ascertained from its text and in light of its purpose.

7.2 Is the houseboat a building?

7.2.1 The terms ‘vessel’, ‘boat’, ‘ferry’ or ‘craft’ are not defined under the Act. I consider their ordinary and natural meaning would apply. The houseboat could be described as either a vessel or boat under the following definitions⁶:

Boat: a small vessel for travelling over water, propelled by oars, sails, or an engine

Vessel: a ship or large boat.

7.2.2 I note the Act does not require a means of propulsion for the houseboat to be considered a ‘vessel’ or ‘boat’.

7.2.3 The evidence provided by the agent is that the houseboat can travel across sheltered water like an estuary. The houseboat is built on pontoons (refer paragraph 2.1) and can float on water. I accept the houseboat can float.

7.2.4 However, the test for whether a houseboat is not a building requires a further requirement than floating; the requirement to be ‘used in navigation’. The phrase ‘used in navigation’ is not defined under the Act. The ordinary and natural meaning of ‘navigate’ is⁷:

Plan and direct the course of a ship, aircraft, or other form of transport, especially by using instruments or maps

7.2.5 I consider the users of the houseboat are not likely to be travelling across water nor changing the site of the houseboat to be in the water on a frequent basis (if at all). The evidence provided by the agent at the hearing (refer paragraph 6.3) is that the houseboat is being used as temporary accommodation for family members and is currently located on dry land. It is clear the primary use of the houseboat is for residential purposes on dry land as opposed to being used in navigation on a water body.

7.2.6 In addition, I note that the houseboat does not have any equipment to assist navigation across water and is not covered by any other enactment. While this will not always be a requirement, I consider a ‘boat’ or ‘vessel’ frequently used in navigation would likely contain nautical instruments⁸ to plan and direct the ‘boat’ or ‘vessel’ over water, including equipment to determine the speed, direction and position of the ‘vessel’ or ‘boat’. There is no evidence of any nautical instruments or equipment in the houseboat, nor would such equipment be required in the event of a short manoeuvre of the houseboat to a new berth. I accept the agent’s statement (refer paragraph 5.2) that with advancements in technology a smart phone can, at times, provide the necessary navigation tools for a boat.

7.2.7 I consider that although there is evidence the houseboat can be repositioned to a new location across sheltered water, the intended use of the houseboat is for long term

⁶ www.oxforddictionaries.com accessed 15 January 2016

⁷ www.oxforddictionaries.com accessed 18 January 2016

⁸ Defined under section 2 of the Maritime Transport Act 1994 as ‘those instruments...used or intended to be used in the navigation of a ship’

residential purposes on dry land. I consider even if the houseboat was in a moored or anchored position (and thus floating on water) it is not intended to be 'used in navigation' and this will only occur infrequently, and is not sufficient for the houseboat to be included within the exception to the definition of building under section 9 of the Act.

8. Further guidance

- 8.1 The authority requested guidance on other situations where a houseboat needs to be determined whether it is a building or not under the Act. I consider the above analysis to be applicable to general situations, referring to whether the houseboat is able to be use in navigation, the frequency it will be manoeuvred across water and taking account of any relevant purposes and principles of the Act.
- 8.2 I consider further guidance is required to explore different scenarios and when a boat, vehicle or aircraft changes to being a 'building' for the purposes of the Act. The Ministry will undertake further work in this area to assist the authority.

9. The next steps

- 9.1 The agent has decided to pursue a MultiProof Approval application for the design of the houseboats. I consider the agent should continue to work with the Ministry in relation to this application.
- 9.2 For the owner of the houseboat subject to this determination, it needs to be determined whether resource consent can be granted for the houseboat on land. If this is successful I consider the owner should consider applying for a certificate of acceptance.

10. The decision

- 10.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority was correct to issue a notice to fix for the houseboat, which I consider is a building for the purposes of the Building Act 2004.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 24 March 2016.



John Gardiner
Manager Determinations and Assurance