



Determination 2018/031¹

Regarding the issue of a notice to fix and whether a structure is a building at 53 Moana Street, Aramoana, Port Chalmers



Summary

This determination considers the authority's decision to issue a notice to fix for work carried out without building consent. The determination turns on whether the structure is a 'building' under section 8 of the Building Act or is excluded from that definition by section 9 because it is a 'boat ... used in navigation'.

1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004² ("the Act") made under due authorisation by me, Katie Gordon, Manager Determinations, Ministry of Business, Innovation and Employment ("the Ministry"), for and on behalf of the Chief Executive of the Ministry. The decision under section 184³ of the Act to make this determination was made by the previous Manager Determinations.

1.2 The parties to the determination are:

- the owner of the structure, J Doi, who applied for this determination ("the applicant")
- the owner of the land on which the structure is located, O Simpson ("the landowner") who was issued with the notice to fix
- Dunedin City Council ("the authority"), carrying out its duties as a territorial authority or building consent authority.

¹ This determination is subject to a clarification under section 189 of the Building Act 2004. The determination originally issued on 10 July 2018 incorrectly included the air-intake for the wood burner in paragraph 2.1 as being a penetration through the hull and in 5.2.16 as a feature that is incompatible with a boat used in navigation and not necessary for the construction of a boat.

² 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.

³ In this determination, references to sections are to sections of the Act.

- 1.3 The matter arises from the authority's decision to issue a notice to fix on the grounds the structure falls within the definition of a building under section 8 of the Act and is not excluded under section 9, and building work had been carried out that required building consent. The applicant maintains the view that the structure is a boat and not a building, and that the authority was incorrect to issue the notice to fix.
- 1.4 The matter to be determined⁴ is the authority's exercise of its powers of decision in issuing the notice to fix. In deciding this matter, I must consider whether the structure described in the notice to fix is a building for the purposes of the Act. As the matter turns on whether the structure is a "building" or a "boat", I have used the term "structure" throughout unless context requires otherwise.
- 1.5 Whether or not there is a breach of other legislation, such as the Resource Management Act 1991, falls outside the matters that I can determine.
- 1.6 In making my decision, I have considered the submissions of the parties; the report of the independent expert engaged to assist in this matter ("the expert"); and the other evidence in this matter.

2. The building work

- 2.1 The timber structure is constructed with the lower part of the structure in the shape of a deep canoe hull. For simplicity I refer to this lower part of the structure as "the hull". The hull is constructed with timber framing and clad in plywood, with timber spacers and a butynol rubber membrane. The hull has a number of aluminium windows installed in it. The structure is bolted to stilts that rest on concrete foundations in the ground (together referred to in this determination as "the cradle".)
- 2.2 The structure has a small cabin on the upper level which houses a bedroom and a helm station. Within the hull on the lower level are living spaces, consisting of a bathroom and storeroom, and an open plan kitchen and living area.
- 2.3 The applicant accesses the interior of the structure via an entrance that consists of:
- a pivoting section of the hull that forms a structure that performs similar to a porch roof,
 - a double leaf door set back from the hull, which in this determination I refer to as the "door"
 - and a set of wooden steps leading to the door.
- 2.4 LPG bottles supply gas used for cooking, heating water, and refrigeration. Power is supplied via solar panels located on the ground that charge batteries located under the lower level. Photographs provided as part of the application show the structure is fitted with a log burner, and many of the internal features include fittings used to secure objects and to provide secure handholds.
- 2.5 The structure is currently fitted with a waste water system that includes filtration and a grey water holding tank 'which can be pumped out when necessary' (together I refer to this as "the grey water system"). The current holding tank is a temporary one until construction of the hull is completed and a holding tank of the proper shape can be fitted. Waste water is currently being disposed of from the grey water system directly to the ground. During the site visit the applicant confirmed that a composting toilet had been installed on the site.

⁴ Under sections 177(1)(b) and 177(2)(f) of the Act.

2.6 The applicant described the life safety and navigational equipment on board, and noted that navigational lights are displayed, but advised that construction is not complete, with the following items yet to be installed:

- Framing of the lower hull section.
- Steel mesh and concrete layers to the hull.
- Back-up generator for power supply.
- Motor for propulsion, seacocks and associated through-hull fittings.
- Anchors.
- Wiring and control systems.
- Waste holding tanks and fuel tanks.
- Mid-hull windows to be filled in and pivoting section of hull to be secured.

3. Background

3.1 The structure has been under construction since 2009. At some time in 2011 or 2012 the applicant had the cradle designed and constructed for the structure to be relocated to the current site. The cradle was the subject of building consent ABA-2012-18/A.

3.2 On 19 January 2017 the structure was moved onto the current site.

3.3 The authority carried out a site visit on 22 June 2017 in response to a complaint from a member of public. The authority observed the door and window joinery in “the hull”, stormwater run-off discharging into buckets, and a solar collection system installed. The authority has stated that during the site visit the applicant described the hot and cold water supply, and that there was a grey water system that ‘went to ground’.

3.4 On 31 July 2017 the authority issued a notice to fix to the landowner. The covering letter described the building work the authority considered required building consent as follows:

- The installation of a log burner without Building Consent
- Disposal of grey water to a disposal field without Building Consent
- The relocation of a building onto site ... without building consent.

3.5 The particulars of the notice to fix stated:

Non-compliance with section 40 of the Building Act 2004, ‘buildings not to be constructed, altered, demolished or removed without consent’ specifically:

- (1) Construction work associated with the relocation of a building from [the previous site] onto foundations constructed at 53 Moana Street Aramoana under building consent ABA-2012-18 which stated “***A separate building consent application is required to place a building on this foundation***” without first obtaining a building consent.
- (2) Undertaking plumbing work without first obtaining a building consent.
- (3) Installing a log burner without first obtaining a building consent.

The date for compliance with the notice was 1 September 2017.

3.6 On 2 August 2017 the authority provided a copy of the notice to fix to the applicant as the owner of the structure.

3.7 The Ministry received an application for determination on 11 August 2017. The Ministry requested a copy of the notice to fix from the authority, which was provided on 7 September 2017.

4. The submissions, expert's report and drafts

4.1 Over the course of the determination, I have issued three drafts, held a hearing on the matter, undertaken a site visit, and received various submissions from the parties⁵. I have recorded the submissions received in Appendix B and included a summary of those submissions in Table 1 (see paragraph 4.7).

4.2 A first draft of this determination was issued to the parties for comment on 15 September 2017. The first draft concluded that the structure fell within the definition of a building under section 8 of the Act, on the basis that the structure was not currently capable of being used on the water and was therefore not able to be 'used in navigation'. The draft also concluded:

- that the authority was incorrect to issue the notice to fix to the landowner instead of the applicant, and
- relocation of the structure onto the site did not require building consent.

4.3 After issuing the first draft and considering the submissions in response, I engaged an expert, who is a qualified naval architect, to assist in this matter. I asked the expert to review the construction, outfitting and configuration of the structure and to provide advice about:

- whether there are features of the structure that are incompatible with its construction as a boat to be used in navigation, and if so whether they can be altered in a way that would allow the construction as a boat to be completed and used in navigation; and
- whether the applicant's intended construction methods for altering the structure are achievable, and whether there are any reasons related to its construction that mean it would not be able to be completed as a boat to be used on the water; and
- the potential stability and displacement for flotation and seaworthiness.

4.4 The expert's report

4.4.1 The expert carried out an assessment of the structure on site on 14 December 2017 and provided a report on 14 February 2018. The expert's report was forwarded to the parties on 20 February 2018.

4.4.2 The expert assessed the current state of the structure as-built, and the planned works to complete the structure as described by the applicant. The expert identified the remaining works, gear, and systems that would be required to complete construction of a boat that can be used on the water, and commented on some existing work that would need alteration.

⁵ No submissions were received from the landowner regarding the matter to be determined.

4.4.3 The expert made the following general comments (in summary):

- The internal wooden structure is well built to a high standard.
- The method of construction from the top down is unconventional and will prove difficult to complete, with crucial connections requiring careful consideration.
- The use of ferro-cement to complete the hull is a method well known and well documented for hobbyist construction.
- The desired waterline is reasonable, and the vessel would have considerable freeboard and large reserve buoyancy; however there would be a high centre of gravity and the vessel would present a large hull area above the waterline to wind forces. (I note here that the applicant has submitted the waterline used by the expert was an error – refer Table 1 paragraph 4.7.1.)

4.4.4 The expert concluded that in its current state there are several features of the structure that are incompatible with construction toward completion as a boat and which would require alteration, namely the large openings in the hull where the door, windows, and air intake for the wood burning stove have been installed, as well as additional windows required to what would be the starboard bulkhead. The expert also commented on the work that would need to be completed, such as: the lower hull section and its connections with the existing structure; plastering of the hull; and installation of the engine, shaft, propeller, bilge pump, deck fittings, navigation lights etc.

4.4.5 The expert observed that while the construction method is unorthodox, it does not preclude the applicant completing the construction, and:

Although the design of the vessel is flawed and will require retrospective changes ... I do not believe that there is any reason why the [applicant] may not be able to complete the construction of the boat and subsequently use it on the water.

4.5 The second draft, hearing and site visit

4.5.1 A second draft of this determination was issued on 26 February 2018 to the parties for comment. The second draft took into account the submissions received and the findings of the expert, and reconsidered the test under section 9. The second draft concluded that the structure is a boat under construction, on the basis that on completion of the proposed works the structure will be able to be used in navigation; however the determination also noted that if construction were to cease the structure would cease to be a boat and would become a building subject to the Act.

4.5.2 The parties made further submissions in response to the second draft determination, and the authority requested a hearing be held. The landowner made no submission.

4.5.3 On 12 April 2018, a hearing was held in Dunedin. This was attended by:

- the applicant
- two officers of the authority and the authority's solicitor
- myself accompanied by one officer of the Ministry and a Determination Referee, and a legal advisor to the Ministry.

4.5.4 A site visit to the structure was undertaken at the conclusion of the hearing. The invitation to visit the site was extended to all attendees at the hearing, and all chose to attend.

- 4.5.5 The site visit included a walk around the outside of the structure and viewing the underside of the structure, as well as viewing internal spaces. During the site visit, the applicant explained the plans for completing the lower section (the hull and keel), the current set up for discharge of grey water, and particular matters where he considered the expert had reached incorrect conclusions.
- 4.5.6 All attendees spoke at the hearing and subsequently provided written copies of their submissions, which has been of assistance to me in preparing this determination.

4.6 The third draft determination

- 4.6.1 A third draft of this determination was issued on 1 June 2018 to the parties for comment. The third draft took into account the submissions received during and after the hearing, and my observations of the structure. The third draft concluded that the structure is not a boat used in navigation, on the basis that the structure incorporates features that are incompatible with its use as a boat and not necessary for construction of a boat and those features would need to be removed or altered before it could be used in navigation. As the determination concluded the structure is a building and was a building at the time the work was carried out without consent, the decision was reached that the authority correctly exercised its powers in issuing the notice to fix in relation to installation of the log burner and disposal of grey water, but not for the relocation.
- 4.6.2 Submissions were received from both the authority and the applicant in response to the third draft of this determination. The landowner made no submission.

4.7 Submissions

- 4.7.1 I have summarised the relevant submissions made by the parties during the determination in the following table under general topics. I have taken the parties' submissions into account in making my decision.

Table 1: Summary of submissions

General
Authority
The structure is not a boat; or alternatively if it is a boat it is not <i>capable</i> of being used in navigation and does not fall within exemption section 9(d).
The approach taken in the second draft determination may set a precedent, with the consequence of people avoiding the Act by claiming a relocatable structure could be retrospectively fitted to float and become capable of being used in navigation.
Weight placed on the advice received from the expert in the conclusion reached in the second draft determination was to the exclusion of the evidence of the authority's officers.
The authority accepts the notices to fix as issued to the owner or the land rather than the owner of the structure cannot be enforced.
Applicant
In a 'resource management complaint form' dated 11 February 2009 the authority noted 'visit site with building control 'Ark' not attached to ground (or runners) so not a structure'.
Advised that although he currently lives in the structure he has since applied for and been granted building consent for relocation of a container onto the site and intends to live in that while completing construction of the boat. After the boat is launched he will spend some time living on the boat and sometime living in the container.

The applicant rejected the authority's statement on the weight the determination should give the earlier Court judgment ⁶ , noting that he disputed the evidence put to the Court by the authority in that case. He also confirmed the works that had occurred since that judgment was made.
Interpretation of definition – section 8 “building”
Authority
The structure is a building albeit with various nautical features.
Whether the structure was a boat or ship had been considered by the Court in relation to the Plumbers Gasfitters and Drainlayers Act 2006; on this matter the Court concluded: [45] ... the structure appeared for all intents and purposes to be a land dwelling with nautical-style design features. However, the matters raised by the [board] concerning the ability of the structure to float and be propelled are the reasons which also cause me concern and led me to the conclusion that the defendant has not satisfied me on the balance of probabilities that the structure is a ship or boat.
The determination must consider the purposes of the Act and features that distinguish the structure as a building rather than a boat in construction stage: its use as the principal residence of the applicant, with water, wastewater, heating etc.
The structure is currently connected to a grey water system which requires consent under the Act. The structure sits on, and is bolted to, consented foundations and therefore forms part of an existing building under the Act.
Applicant
Although it is not yet completed, the structure has been constructed and fitted out with the intention that it be used as a boat at a date in the future - it is not a building for the purpose of the Act. The applicant had informed the authority of his intention to build a boat before starting construction.
The Court judgment referred to above noted that the authority failed to follow up for two years, which lead the applicant to believe the authority had accepted the applicant's explanation. The authority has now allowed over five years to lapse without contact until issuing the latest notice to fix.
The determination places unjustified weight on the previous Court judgment.
Interpretation of definitions – section 9 “boat ... used in navigation”
Authority
It is the issue of the structures capability to be used in navigation which is the crux of the matter.
The structure is incomplete and cannot be used in navigation, therefore it does not meet the test in section 9. The structure is not watertight, does not have a keel or ballast, and does not have a means of propulsion. Work required is not insignificant; it is merely feasible that the applicant may be able to complete construction and use it on the water and this is not sufficient to meet the test.
The term “used in navigation” should be interpreted narrowly.
The test for whether the structure is “capable” of being used in navigation requires some immediacy or at least a tentative date. The authority questioned what a “reasonable” timeframe for construction of a boat is. Construction started in 2009 and the expert considered construction is approximately half way.
The structure must be assessed in its current form, not in any future hypothetical state. With no evidence of how and when the structure may be completed, it cannot be said the structure is capable of being used in navigation.
If construction work were to cease it would clearly be a building.
There is no evidence of the “likelihood” it will be used as a boat in the foreseeable future.
The authority accepted the applicant intended to construct a boat, and the authority's view on whether the structure was a boat under construction would be different if he was not occupying it as a dwelling.
The authority had concern regarding the scope of the expert's engagement and lack of weight given to the expert's findings that there were a number of features incompatible with its use in navigation.
There are applicable features between the structure and a houseboat considered in Determination

⁶ *Plumbers Gasfitters and Drainlayers Board v Just Doi*, [2012] Dunedin District Court, CRI 2011-012-004448

2016/010 ⁷ , in which the Ministry concluded the houseboat was not a boat as it was not likely to be travelling across the water nor changing the site to be in the water on a frequent basis. The houseboat did not have navigational equipment, but this could have been fitted retrospectively. In both cases the primary purpose is for residential dwelling.
In reliance on <i>Lozman v City of Riveria Beach</i> , a reasonable observer's view of the structure is relevant ⁸ .
The determination should be clear about whether the applicant is required to cease occupation of the structure as a residence in order for it to come within the exclusion in section 9(d) and whether if incompatible features are removed but there is no further progress in construction it would still meet the test in section 9(d).
Applicant
The applicant intends to use the vessel in navigation. The vessel will have the ability to float on water and be propelled once it is completed. The applicant also noted the Act does not require a means of propulsion.
The intention from the beginning has been to construct a boat that he would use and not simply live in on dry land; in this regard the applicant disputes the authority's comparison to the structure considered in Determination 2016/010.
Boats are incapable of being used when undergoing repairs, and the legal test set out by the authority is problematic.
If the test turned on the time taken to completion, who would have the authority to decide what a "reasonable timeframe" was for construction of a boat?
There is nothing in its construction that is incompatible with its use as a boat. The expert had confirmed completion of the boat was realistically achievable, and in the applicant's view this meant the boat was capable of being used in navigation. The weight of reliable evidence supports the applicant's contention that the structure is a boat.
Though he cannot offer a specific timeframe for completion, the applicant maintains the intention to complete construction and has continued to purchase more equipment and materials to do so.
The applicant has the financial means and competency to complete construction.
There is no loan against the boat and no insurance policy that would support the authority's submission regarding "third party perception".
Boats have working water systems (fresh and grey) even during times of repair on dry land, and many inshore fishing boats have log burners.
Boat under construction
Authority
A boat in construction, whether in a dock or on land, is a building site where the mechanics of construction take place.
Based on the analysis in the second draft determination, if this structure is a boat under construction but work was to cease it would become a building – this would require monitoring which is not within the authority's role.
The authority has concerns about whether work could or would continue to completion, and whether it would even be possible to launch.
Applicant
Neither construction of a boat nor construction of a house occurs in a single day, but that does not alter the intended use of either.
When does a boat under construction become a boat and not just an assembly of parts?
The length of time taken in construction does not alter the fact that the structure is a boat.
A deadline for construction was not reasonable. Though in the opinion of the expert construction was half-way, this was in no way indicative of the timeframe for completing construction.
Work is not progressing because the notice to fix required the applicant cease work.

⁷ Determination 2016/010 Regarding the issue of a notice to fix and whether a houseboat is a building (24 March 2016)

⁸ Supreme Court of United States, No 11-626, 15 January 2013

<p>The applicant provided a general description of the planned work to complete construction, including:</p> <ul style="list-style-type: none"> - alteration of existing “temporary” features (such as the windows) necessary to complete construction - changes to the cradle to allow for continued support during later construction stages and construction of a “break out” system for launch.
<p>Many boats under construction have temporary structures and enclosures, and the decision that the features on this structure are incompatible with its use as a boat is uninformed.</p>
<p>The hinged section of the hull is not incompatible with the design and construction of the boat; it is substantially built of the same materials as the rest of the hull and was designed to allow access during construction for insertion of the motor etc. It will be lowered and fixed in place before steel work and concrete work is carried out to the hull.</p>
<p>The authority’s statement regarding launching the boat was indicative of its lack of knowledge or expertise in this field – a slipway is not required as the intention is to move the boat overland to the water using pneumatic rollers and cranes/diggers.</p>
<p>Restricting occupation during construction is not logical when a house can be constructed and occupied before the code compliance certificate is issued.</p>
<p>The notice to fix</p>
<p>Authority</p>
<p>The definition of construct includes “to relocate”. The transportation and relocation of the structure, as well as the fixing of that structure to the ground and the installation of the grey water system, is more than simply moving a container around and placing it on the ground as in the case of Determination 2011/104⁹, or onto timber sleepers as in Determination 2014/030¹⁰. The authority maintains the view it was correct to include the relocation as requiring consent because building work was required to be carried out to secure the structure to the foundations and to add services.</p>
<p>The authority’s practice is to require either an engineer’s certificate or code compliance certificate be obtained when any building is relocated.</p>
<p>When the structure was relocated it had to be fixed to the foundations (or cradle) by brackets and bolts. Work was carried out to the structure and this constitutes an alteration to an existing building, therefore section 112 applies.</p>
<p>Compliance issues</p>
<p>Authority</p>
<p>The grey water disposal to ground and installation of log burner are compliance issues that relate to the health and safety not only of the applicant but also neighbours.</p>
<p>Applicant</p>
<p>Grey water disposal: a temporary tank had been installed in the hull, though connections were not yet complete. The permanent tank could not be installed until after the shape of the hull is confirmed.</p>
<p>The septic system is fully compliant and flood proof, and the grey water filtration system has operated for 9 years without any problems. This is in contrast to a number of other local properties where there are no septic systems or inadequate systems and greywater and sewerage is being discharged in frequent rain events.</p>
<p>Expert’s report</p>
<p>Authority</p>
<p>Expressed concern with the scope of the expert’s engagement and lack of weight given to the expert’s findings that there were a number of features incompatible with its use in navigation.</p>
<p>Applicant</p>
<p>The expert has erred in regards to the perceived “difficulty” in completing the hull and lacks</p>

⁹ 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)

¹⁰ Determination 2014/030 Regarding the issue of a notice to fix for the placement of two shipping containers on a property (22 July 2014)

understanding of the reasons for constructing the vessel in parts in this manner.

Some aspects of the expert's report were in error, specifically:

- "the representation of the draught, which underestimates the plimsoll level, the wetted surface and buoyancy calculations and therefore also over-estimates the lateral wind resistance factor"
- the expert correctly states the waterline is above the turn of the bilge, however figure 6 of the expert's report appears to show a waterline below this level
- the expert mistook a bolt hole in the stern post for the rudder shaft and the large dowels referred to in the expert's report are for locating the next keel section
- regarding the feasibility of the location of the engine; the applicant intends to install both an inboard and outboard motor.

5. Discussion

5.1 General

5.1.1 The matter for determination is whether the authority's exercise of its powers of decision in issuing a notice to fix for building work carried out without a building consent first being obtained. The matter turns on whether the structure is a building for the purposes of the Act and the work carried out is therefore building work that is required to comply with the Building Code.

5.1.2 For the authority to exercise its powers under the Building Act, it must first be established that the structure falls under the definition of a building in section 8 and is not excluded under section 9. The determination therefore turns on whether the structure is a 'building' for the purpose of the Act.

5.1.3 A 'building' is defined in section 8 of the Act:

(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)

5.1.4 The structure falls under the definition of a building under section 1(a) and is therefore a building for the purposes of the Act unless it comes within one of the exclusions listed under section 9. That section provides 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

5.1.5 It follows then that I must consider whether the structure in this case is a "vessel, boat, ferry or craft used in navigation".

5.2 Is the structure a vessel, boat, ferry, or craft used in navigation?

5.2.1 In order to establish whether the structure is excluded under section 9(d) from the definition of a building, I must first consider whether the structure would meet the definition of a vessel, boat, ferry, or craft. In the absence of a statutory definition, I can look at the ordinary and natural meanings of those terms.

- 5.2.2 The definitions of vessel and boat¹¹ are as follows:
- | | |
|--------|--|
| Vessel | Any structure designed to float upon and traverse the water for the carriage of persons or goods; a craft or ship of any kind, now usually one larger than a rowing-boat and often restricted to sea-going craft or those plying upon the larger rivers or lakes |
| Boat | A small, typically open vessel for travelling over water, propelled by oars, sail, an engine, etc. Usually contrasted with <i>ship</i> . |
- 5.2.3 The applicant is of the view that the structure has been designed and constructed as a boat that will be used on the water, and therefore that it falls within section 9(d).
- 5.2.4 The test for whether a boat is excluded from the definition of ‘building’ by virtue of section 9(d) is whether it is a “boat ... used in navigation”, which applies whether or not it has a means of propulsion and regardless of what the means of propulsion is. The term “vessel, boat, ferry or craft used in navigation” has been considered in the Environment Court¹², and the same approach was taken in a previous determination¹³ where it was considered that for a structure to be a boat not only must the structure be “capable” of being used on the water but also that it is moved from anchorage or mooring on a reasonably frequent basis.
- 5.2.5 The first draft of this determination concluded the structure failed the test in section 9(d) on the basis that it is incomplete in its construction and has a number of features that if left in their current state would be incompatible with its use as a boat, and so it cannot at this time be said to be a “boat ... used in navigation”.
- 5.2.6 The applicant contends the structure is simply a boat that is under construction and submitted the approach taken in the first draft was flawed as all boats during construction are “incapable” of being used in navigation.
- 5.2.7 I accept that boats used in navigation will have periods of time when they are not capable of being used on water: during construction or manufacture, and during periods of maintenance and repairs. I do not consider the construction or manufacture of a boat that is to be used in navigation would be considered building work under the Act. A boat that is under construction and incomplete has the features and characteristics of a boat but is incapable of being used in navigation simply because its construction has not been completed.
- 5.2.8 Likewise, when a boat is in dry dock for maintenance or repairs, it is simply the completion of the maintenance or repairs that is required for the boat to return to use. In my opinion boats that are located on land during construction or maintenance are not buildings under the Building Act – the construction of a boat and activities such as maintenance or refitting carried out on dry land are part of the ordinary use of a boat.
- 5.2.9 I have considered whether the extended period of time taken for construction and the fact that the applicant has been living in the structure during this time would prevent me from reaching the conclusion that the structure meets the test under section 9(d).
- 5.2.10 It is not unusual for hobbyists or owner/builders to take an extended period of time in construction, and I do not consider that this alone means the structure does not fit the definition of a boat. A boat under construction will remain a boat regardless of the time taken and the duration of periods when little or no progress is made in its construction. Likewise, while it may be uncommon for a boat to be occupied during

¹¹ “vessel, n.4.”, “boat, n.1.” *OED Online*. Oxford University Press, June 2017. Web. 4 October 2017.

¹² ENC Christchurch C202/2001 *Burkett v Queenstown Lakes District Council*

¹³ Determination 2016/010 Regarding the issue of a notice to fix and whether a houseboat is a building (24 March 2016)

its construction, I do not consider the occupation of the structure is determinative of whether the structure meets the test under section 9(d).

- 5.2.11 The question for the purpose of the application of the Building Act is whether the structure is a boat under construction that once completed will be a boat used in navigation or whether the structure is simply a building that has nautical-style design features.
- 5.2.12 There are a number of features such as the open section of the hull and windows in the hull that if left in their current position or not altered would prevent the structure from being used on the water. The applicant proposes to carry out alterations to those features and complete construction in order to use the structure as a boat. Based on the expert's findings, those planned alterations and the proposed work required to complete construction are indeed feasible, and once done the structure could be used in navigation.
- 5.2.13 I accept that it is achievable for the applicant to complete construction to a stage that the structure is capable of being a boat used in navigation. However, in order to achieve that outcome, the applicant will need to alter features that have already been incorporated into the structure that are incompatible with a boat used in navigation. In this respect I consider that the inclusion of those features in the structure and the need to remove those features for the structure to become a boat used in navigation means that the structure currently does not meet the test under section 9.
- 5.2.14 In reaching this conclusion I note a boat on dry land that is under construction or repair may have temporary supports and the like that are used for purposes relating to the construction or repair of the boat, and if these are not altered or removed those supports and the like would prevent the boat from being used in navigation. I do not consider that the existence of those temporary supports and the like that are used for purposes relating to the construction or repair of a boat would mean the boat no longer meets the test under section 9(d) – as noted in paragraph 5.2.7, the construction of a boat and activities such as maintenance or refitting carried out on dry land is part of the ordinary use of a boat.
- 5.2.15 In this case a number of features incorporated in the structure (the door and windows) while convenient for security, access and light, are not a requirement for the construction of a boat and are incompatible with a boat used in navigation. In addition these features are more akin to those found in a building and serve a purpose relating to the occupation of the structure as a dwelling.
- 5.2.16 The structure could only be considered a boat under construction if alterations are carried out to the features that are not necessary for construction of a boat and are incompatible with a boat used in navigation. These features are:
- the door and non-nautical windows in the hull, which are incompatible with a boat used in navigation and not necessary for construction of a boat;
 - the greywater system discharging to ground¹⁴.

In this case, given the unorthodox method of construction and confirmation from the expert that the pivoting section of the hull can be permanently secured to form part of the hull, I accept the pivoting section of hull currently functioning similar to a porch roof also provides a means of access for construction.

¹⁴ The discharge of sewage (including greywater) by boats is governed by the Resource Management (Marine Pollution) Regulations 1998.

- 5.2.17 The combination of features that are not a required for the construction of a boat and that are incompatible with a boat used in navigation, leads me to conclude that the structure in its current state is not a boat under construction.
- 5.2.18 I conclude that the structure in its current state fails to meet the test of a ‘vessel, boat, ferry or craft used in navigation’ in section 9(d) of the Act and is therefore not excluded from the definition of a building in section 8.

5.3 The notice to fix

- 5.3.1 Section 164(1)(a) of the Act provides for the issue of a notice to fix when the authority considers on reasonable grounds that ‘a specified person is contravening or failing to comply with this Act or the regulations ...’ Section 163 defines a specified person as:
- specified person means—
- (a) the owner of a building:
- (b) if a notice to fix relates to building work being carried out,—
- (i) the person carrying out the building work; or
- (ii) if applicable, any other person supervising the building work:
- 5.3.2 In this case the authority issued the notice to fix to the landowner rather than to the owner of the building. The authority submitted that although the notice was addressed to the landowner, a copy of the notice was delivered to the applicant and is enforceable. I note for completeness that in responding to the second draft determination, the authority accepted the decision in respect of issuing of the notice to fix to a specified person.
- 5.3.3 I disagree with the authority’s initial view that delivering or distributing a copy of the notice to fix to the applicant is the same as issuing the notice to fix to the applicant.
- 5.3.4 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)) which 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 purpose of provisions in section 164 is to ensure that notice is served on the person responsible for the non-compliant building work and responsible for remedying the non-compliance, which in this case is the applicant not the landowner.
- 5.3.5 The notice to fix was issued in respect of three breaches:
- the installation of a log burner without building consent
 - disposal of grey water to a disposal field without building consent
 - the relocation of a building onto site ... without building consent.
- 5.3.6 I have concluded that the structure is a building, and based on the information provided by the parties it was a building at the time the log burner and grey water system were installed. Therefore it follows that the installation of the log burner and work associated with the grey water system was building work subject to the requirements of the Act. I therefore consider the authority was correct to include these items in the notice to fix.
- 5.3.7 I acknowledge a log burner and a grey water system are not incompatible with a boat used in navigation and this would not be building work subject to the requirements of the Act if the structure was a boat under construction at the time those works were

carried out. The fact that the structure did not meet the test of a boat used in navigation under section 9(d) means this work falls under the ambit of the Building Act. I note also that this finding does not mean that the log burner and grey water system must be removed; what is required is that the work is compliant with the Building Code and, if so, regularised by way of a certificate of acceptance.

- 5.3.8 In previous determinations I have considered the relocation of buildings and whether this constitutes “building work” under section 7 of the Act (see for example 2011/104 and 2014/030¹⁵). I maintain the view set out in those determinations, that the act of moving or relocating a building and placing it on site is not “building work”. Where there is work carried out to the relocated building, such as tying the relocated building to its foundations, that is building work under section 7 that is subject to the requirements of the Act.

6. Next steps

- 6.1 I have reached the conclusion that the structure is a building and is subject to the Building Act. However, I also acknowledge it is feasible that work could be carried out that would allow the structure to become a boat used in navigation which would then not be subject to the requirements of the Act.
- 6.2 In my opinion the applicant has two courses of action available:
- If the structure continues to have features that are incompatible with a boat used in navigation and features that are not necessary for construction of a boat (as described in paragraph 5.2.16) the structure will remain a building as defined in section 8 of the Act. Any building work carried out must comply with the Building Code, and the applicant will need to regularise the building work carried out without building consent by way of a certificate of acceptance and seek building consent for any further work that is not exempt under Schedule 1 of the Act.
 - If the applicant removes all of the features that are incompatible with a boat used in navigation and that are not necessary for construction of a boat (refer paragraph 5.2.16) the structure will meet the test under section 9(d) and no longer fall under the ambit of the Act. In undertaking the building work to remove or alter those features the applicant may require building consent and should confirm this with the authority.
- 6.3 The authority has queried whether the applicant can continue to occupy the structure. As noted in paragraph 5.2.10, in this case I do not consider the occupation of the structure is determinative in establishing whether the structure falls under the ambit of the Building Act, nor do I consider the period of time taken for construction is determinative.

¹⁵ 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), and Determination 2014/030 Regarding the issue of a notice to fix for the placement of two shipping containers on a property (22 July 2014).

7. The decision

7.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:

- the structure is a building under section 8 of the Act and therefore the authority correctly exercised its powers in its decision to issue the notice to fix; and
- the notice to fix is to be modified:
 - amending the specified person to which it is issued, and
 - removing reference to the relocation of the structure as one of the particulars of contravention or non-compliance.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 7 August 2018.

Katie Gordon
Manager Determinations

Appendix A: The legislation

A.1 The relevant sections of the Building Act 2004 discussed in this determination:

Meaning of building

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; ...

9 Building: what it does not include

In this Act, 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; ...

163 Definitions for this subpart

In this subpart, unless the context otherwise requires,—

...

specified person means—

(a) the owner of a building:

(b) if a notice to fix relates to building work being carried out,—

(i) the person carrying out the building work; or

(ii) if applicable, any other person supervising the building work: ...

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); ...

(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; ...

Appendix B: Submissions received

Date	Party	
2017		
11 August	Applicant	Application for determination Photographs of the structure and its equipment Background to the dispute and history of the build
1 September	Authority	Advised it would be making a submission in response to the application for a determination
7 September		Copy of the notice to fix and covering letter Advised it would be making a submission
15 September ¹⁶		Set out some of the background to the dispute, submission on the matter Photographs taken during the site visit on 22 June 2017 Copy of the building consent documentation relating to the construction of the "boat cradle" or foundation The District Court judgment, along with sections of the Plumbers, Gasfitters, and Drainlayers Act 2006, and a copy of a brief of evidence from an officer of the authority
15 September	First draft issued to the parties for comment	
27 September	Authority	Submission in response to the first draft determination Copy of notice to fix NTF-2011-11 issued to the applicant ¹⁷ on 24 January 2011 for 'construction of a house without a building consent in contravention of section 40 ...' This notice to fix is not the subject of this determination, but I have included this information as background
20 September	Applicant	Submission in response to the first draft determination
29 September		Submission in response to the authority's submission above
2 October		A statement from a heavy haulage contractor who specialises in transporting boats, reviewing the structure and concluding its use is as a vessel and not a terrestrial building A submission from the landowner setting out background to the applicant's experience with the use of, design, and construction of boats, and setting out his view that the structure is a boat under construction The resource management complaint form, dated 11 February 2009 A schematic cross section of typical detail through the hull A photograph showing the height of a window from the ground A statement from an individual that the applicant had contacted the authority to clarify the regulations as they applied to the construction of a boat because it was at that time going to be constructed on her land
26 February 2018	Second draft issued to parties	
6 March 2018	Applicant	Accepted the second draft determination
12 March 2018	Authority	Did not accept the findings of the second draft determination Submission and copies of case law cited

¹⁶ The submission was not taken into account in the first draft that was issued to the parties for comment as it was received on the same day the first draft was sent.

¹⁷ The notice to fix was also addressed to the owner of the land on which the structure that is the subject of this determination was then located. The remedy provided for in the notice was 'either demolish or remove the house from the site or apply for a Certificate of Acceptance', and compliance was required by 21 February 2011.

		Requested a hearing
16 March	Authority	Clarification regarding hearing request
16 March	Applicant	Responding to authority's submission
20 March	Authority	Submission regarding hearing and site visit process
4 April	Authority	Submission regarding process
12 April 2018	Hearing & site visit	
18 April	Applicant	Copy of submission made during hearing Cross-section showing waterline
19 April	Authority	Copy of submission made during hearing
1 June 2018	Third draft determination issued to parties	
15 June	Authority	Accepted third draft in principal Submission requesting further clarification
17 June	Applicant	Did not accept findings of third draft Submission in response draft