Determination 2006/72

Notice to fix in respect of certain units at Oakura Beach Camp, New Plymouth

1 The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004[1] ("the Act") made under due authorisation by me, John Gardiner, Determinations Manager, Department of Building and Housing, for and on behalf of the Chief Executive of that Department.

1.2 The application arises out of a dispute about a notice to fix issued by the New Plymouth District Council ("the territorial authority"), in its capacity as a building consent authority. The notice was in respect of the certain building work alleged to have been done, or permitted to be done, by the lessee of the Oakura Beach Camp ("the camping ground") vested in the territorial authority in its capacity as landowner. The alleged building work was the installation of three Leisurebuilt Chalet series units ("the units"), which the territorial authority as building consent authority considered to be buildings in terms of section 8 of the Act. However, the lessee (and presumably the territorial authority as owner) considered that the units were vehicles not coming within section 8(b)(iii), a view supported by Leisurebuilt Ltd, the manufacturer of the units ("the manufacturer").The notice alleged that the units were buildings that had been erected without building consent and said:

> **To remedy the contravention or non-compliance you must:**
> Remove the buildings, or alter the installation of the building so that it becomes a vehicle; or
> Make application to [the territorial authority] for a 'certificate or acceptance of each building . . .

[1] The Building Act 2004 is available from the Department's website at www.dbh.govt.nz

1.3 The application for this determination was made by the territorial authority, presumably in its capacity of owner, disputing the notice that it had issued in its capacity as building consent authority. I took the view that the only other party in terms of section 176 of the Act was the lessee. I also took the view that, under section 27 of the New Zealand Bill of Rights Act 1990, the manufacturer was a person whose rights, obligations, or interests would be affected by the determination and who was therefore entitled, as a matter of natural justice, to make submissions and generally participate in the determination process.

1.4 I take the view that, in terms of section 177 of the Act, the matter for determination is the territorial authority's decision to issue the notice to fix, and in particular whether the units are buildings for the purposes of the Act and if so whether I should confirm, reverse, or modify the notice to fix.

1.5 Unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

2. The units

2.1 The three units are positioned on the beach front within 100 metres of the sea. The external breadth and length dimensions of the units are 4.550m by 7.240m in the case of the units numbered 1 and 3, 3.640 by 6.140m in the case of unit 2. They are simple structures with a single ridge gable end roof with no eaves. The envelope consisting of trapezoidal section colour steel roofing and aluminium faced weatherboards. The units feature lean-to verandas covering to a deck. The deck and hand rails are secured with bolted connections. The deck roofs are secured to the framing with screwed connections. Figures 1 and 2 are photographs from the manufacturer's literature showing a typical unit being manoeuvred into position and the end result.

Figure 1: A unit being manoeuvred into position

Figure 2: A unit in its final position

2.2 The method of construction of the units is basically the same. Plywood floors are fixed to 50 x 50 mm steel box section joists which are spaced at 400 mm centres and span the width of the units. The wall framing is indicated as 50 x 50 mm timber or steel framing with polystyrene slab infill but it is not clear how this is fixed to the floor framing. The decks are constructed of 50 mm x 50 mm galvanised box section frame to the perimeter with 40 x 40 mm steel joists at approximately 400 mm centres. The frame of the deck is hinged and connected to the floor framing to allow the deck structure top be folded up against the unit wall for transportation. All decks are fitted with adjustable legs of a type typically seen on caravans.

2.3 Each unit is equipped with wheels and an extending towbar. The floor joists are supported by the chassis. The axle units appear to be attached to the chassis directly without the use of springs or shock absorbers. No over-rider or other braking systems are installed.

2.4 The manufacturer's literature says: "Trailerisation *(sic)* provides for easy installation and positioning on site and for any subsequent variation or removal." As installed the units are supported on concrete blocks and timber packers. Not all wheels remain in contact with the ground. On unit 1 the deck is also supported on a bearer to accommodate the slope of the ground. The units are connected to the camping ground's electrical, water and sewerage systems, the latter with quick release type proprietary sewer connections. LPG bottles are located outside the units and are connected with dry break couplings. The under floor areas have been enclosed around the perimeter with 50 mm wide battens fixed horizontally and spaced approximately 12 mm apart. These would need to be removed for the units to be relocated. The same applies to the veranda roofs and posts.

2.5 All units have current vehicle registration as "chalet trailers", a category of registration for "Exempt Class A vehicles" such as trailers that are not towed on public highways.

2.6 I engaged a building surveyor ("the expert") to inspect the installation of these units and report on:

- Whether the units have tow-bars
- The nature of the construction of the units
- The nature of the foundation and if the wheels are still in place
- How the water, power, gas and sewer connections are made and to what extent they are permanent or temporary and how easily they could be disconnected
- The manner in which the decks and steps are attached
- Any features which may make the units easy or difficult to move.

2.7 I sent a copy of the expert's report to the territorial authority and the manufacturer for comment.

3 The submissions

3.1 The territorial authority's submissions

3.1.1 The territorial authority, in its capacity of building consent authority, made detailed submissions and provided information on the manufacturer's products.

3.2 The manufacturer's submission

3.2.1 The manufacturer also made detailed submissions, both directly and through its counsel, Susan Hughes, barrister.

3.2.2 The manufacturer submitted that its units had been developed to meet the changing needs to meet leisure expectations associated with societal changes, fuel crises and the like, and the current use of camping grounds and other holiday facilities in New Zealand.

3.2.3 Counsel for the manufacturer addressed the interpretation of section 8(1)(b)(iii) and concluded that the units were not "buildings" in terms of that section.

3.2.4 Counsel did not dispute that the units could properly be referred to as "structures", but argued that a structure that was once a vehicle could be or become a building.

3.3 The draft determination and the hearing

3.3.1 I prepared a draft determination ("the draft") and sent it to those concerned, asking them to indicate whether they accepted the draft subject to non-contentious amendments, if any, or did not accept the draft and requested a hearing.

3.3.2 The draft was to the effect that the units were buildings for the purposes of the Act, but that the notice to fix was to be modified. The territorial authority accepted that draft in its capacity of building consent authority, but the others concerned did not. Accordingly, I held a hearing at which those concerned gave evidence and made submissions either directly or through counsel.

3.3.3 The hearing included a visit to the camping ground to view the units.

3.3.4 The evidence called at the hearing included records as to the actual periods during which the units had been occupied by particular people, and it was not disputed that the units could not properly be described as having been "occupied by people on a permanent or long-term".

3.3.5 The submissions made at the hearing effectively enlarged on and refined the submissions I had received previously. The evidence and submissions also addressed the provisions of legislation other than the Act, in particular the Reserves Act 1977 and the Camping Ground Regulations 1985.

3.3.6 A number of people other than those concerned in the determination were present at the hearing, including occupants of similar units, managers of other camping grounds, and others involved in the relevant sector of the leisure industry.

4 Discussion

4.1 The legislation

4.1.1 The relevant legislative provisions are:

(a) The Building Act 2004:

8 Building: what it means and includes

(1) In this Act, unless the context otherwise requires, building—

(a) means a temporary or permanent movable or immovable structure (including a structure intended for occupation by people, animals, machinery, or chattels); and

(b) includes—

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

40 Buildings not to be constructed, altered, demolished, or removed without consent

(1) A person must not carry out any building work except in accordance with a building consent.

164 Issue of notice to fix

(1) This section applies if a [territorial 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

177 Application for determination

A party may apply to the chief executive for a determination in relation to 1 or more of the following matters:

(a) whether particular matters comply with the building code:

(b) a building consent authority's decision to—

(iv) issue a notice to fix.

(b) The Land Transport Act 1998:

2 Interpretation

(1) In this Act, unless the context otherwise requires,—

Vehicle—

(a) Means a contrivance equipped with wheels, tracks, or revolving runners on which it moves or is moved; and

(b) Includes a hovercraft, a skateboard, in-line skates, and roller skates; but

(c) Does not include—

(i) A perambulator or pushchair . . .

(ix) Any other contrivance specified by the rules not to be a vehicle for the purposes of this definition:

(x) any rail vehicle:

(c) The Camping Grounds Regulations 1985:

Temporary living-place means a cabin, caravan, vehicle, tent, or other building or structure intended for human habitation for periods not exceeding 50 days in any continuous term of occupancy.

4.2 General

4.2.1 It became clear at the hearing that there was considerable interest in the matter, and that many people were looking to the determination to clarify the legislative requirements for camping grounds and regulations in respect of privately-owned buildings located on public reserves, “relocatable homes”, “temporary living places”, and more generally what was to be treated as a vehicle or caravan and what was to be treated as a building. That affected administrative and contractual considerations related to the leasing and management of camping grounds and financial considerations such as rates of depreciation.

4.2.2 I recognise the importance of such matters to territorial authorities and to the leisure industry and its clients. However, I take the view that my power to make determinations is strictly limited by sections 176 to 190, so that this determination must be confined to the application of the Building Act to the three Leisurebuilt Chalet units at the Oakura Beach Camp.

4.3 Questions of law

4.3.1 In making determinations I usually have to make decisions on questions of building technology although it is sometimes necessary for me to take a view on related questions of law. It is common ground that this determination turns solely on a question of law, namely the interpretation of section 8 of the Act. I am not aware of any relevant judicial decisions on that section.

4.4 The definitions of "building" and "vehicle"

4.4.1 The definition of "building" includes any "structure" not specifically excluded under section 9, and also includes things that might not usually be described as structures, including certain vehicles.

4.4.2 The relevant definition of "vehicle" includes any contrivance equipped with wheels "on which it moves or is moved" subject to certain exclusions. I take the view that the word "contrivance" is wide enough to include a building.

4.4.3 The definition of "building" includes a vehicle that is immovable and occupied on a permanent or long-term basis. An immovable vehicle appears to be a contradiction in terms. However, the contradiction can be resolved if it is recognised that something can be a vehicle when it moves or is moved but a building when it does not.

4.4.4 Accordingly, I take the view that the words "moves or is moved" are not to be read as meaning "is capable of moving or being moved". In other words, the phrase is to be read literally as applying to a particular time and not as applying at all times while the contrivance is equipped with wheels.

4.4.5 It follows that while a building equipped with wheels is being put to a use in which it moves or is moved then it is a vehicle, but while it is put to a use in which it does not move then it is a building.

4.4.6 That approach is consistent with the fact that both definitions apply "unless the context otherwise requires". In the Land Transport Act, the context may be broadly described as "road safety", see the long title, whereas in the Building Act the context may be broadly described as the safe and healthy use of buildings, see section 3.

4.5 Conclusions

4.5.1 It would be simplistic to conclude that a structure equipped with wheels is a "vehicle" while it is moving and a "building" while it is stationary. Vehicles are not all in a constant state of movement, while buildings, at least in New Zealand, do not all remain in one place throughout their lives but may well be moved ("relocated") on occasion. Accordingly, I take the view that a structure with wheels is a vehicle while it is being used as a vehicle and a building while it is being used as a building.

4.5.2 I conclude therefore that the units currently come within the definition of "building" because they are being used as buildings. They ceased to be vehicles when they had been manoeuvred into the positions in which they were to be used as buildings. As the units are not vehicles, they come within section 8(1)(a) and not section 8(1)(b)(iii). It therefore makes no difference whether or not they are "immovable" or "occupied by people on a permanent or long-term basis".

4.5.3 As each of the units became a building when it was placed in position on its current site, I take the view that the placement itself cannot properly be called the construction of a building for which a building consent was required. However, once it became a building, any alteration to it would be building work for which a building consent is required (unless the work is specifically exempted). Attaching the building to foundations and utilities amount to alterations, and therefore the installation of such foundations and utilities was itself building work for which a building consent was required. I understand that building consent was in fact obtained for the installation of utilities but not for the installation of foundations, and observe that the foundations appear to have little if any capacity to resist lateral loads as required by the Building Code.

4.5.4 That disposes of the question of whether the units are buildings. However, I cannot ignore section 8(1)(b)(iii), and certainly do not wish to give the impression that I consider it to have no application to other situations, and have therefore included guidance information on its provisions in 4.6 below.

4.6 Section 8(1)(b)(iii)

4.6.1 In my view section 8(1)(b)(iii) applies only to a structure used both as a vehicle and as a building. That is the case with what would colloquially be referred to as caravans, campervans, house-buses, and the like. A caravan, for example, could move from place to place and be parked as a vehicle in one location but used as a building in another. Under section 8(1)(b)(iii), such caravans etc are to be treated as buildings when they are both:

(a) "immovable", and

(b) "occupied by people on a permanent or long-term basis".

4.6.2 I take the view that the word "immovable" in the Act must be given its ordinary and natural meaning in the New Zealand context.

4.6.3 The *Concise Oxford Dictionary* defines "immovable" as:

> **1** that cannot be moved. **2** steadfast, unyielding. **3** emotionless. **4** not subject to change. **5** motionless. **6** *Law* (of property) consisting of land, houses etc.

4.6.4 I consider that the appropriate meaning of "immovable" is "that cannot be moved". Counsel for the manufacturer argued that the units were not immovable because they could be, and were, moved. However, in New Zealand it is commonplace for buildings, sometimes quite large houses and even multi-story steel or concrete buildings, to be constructed at one site and then moved or "relocated" to another site. It is easy to move some buildings, difficult to move others, and impracticable or economically not feasible to move the rest.

4.6.5 I therefore take the view that whether a caravan can properly be called "immovable" is a matter of degree. A caravan might simply be parked and remain attached to its towing vehicle, it might be detached from that vehicle, it might be jacked up off its wheels and be supported by some form of props or foundation, it might be attached to utilities such as drains or electricity, and so on. In all cases, the caravan would remain capable of being moved with a greater or lesser degree of difficulty. I conclude that for the purposes of section 8(1)(b)(iii), a vehicle such as a caravan can properly be described as "immovable" if it is either:

(a) No longer supported solely by its wheels, or

(b) Attached to the ground or to utility services or the like.

4.6.6 The fact that a caravan is immovable does not mean that it is a building for the purposes of the Act, it must also be "occupied by people on a permanent or long-term basis". As to that, the territorial authority said:

> Our assessment is that if a caravan or mobile home on a site is inhabited or intended to be inhabited more or less continuously or cyclically, long term by persons, be it in the manner of a household or casual rental accommodation then the test ["occupied . . . on a permanent or long-term basis"] is met. Long term is set at more than 12 calendar months.

4.6.7 Counsel for the manufacturer disputed the territorial authority's statement, saying:

> 9. The Oxford Dictionary defines "permanent" as *lasting, or intended to last or function, indefinitely*. "Long-term" is defined as *occurring in or relating to a long period of time*. . . ;
>
> 11. . . . Either, the caravan/mobile home is occupied, or it is not. The definition should not extend to situations where there is an "intention" to occupy but no actual occupation. Nor should it apply to circumstances where there is only intermittent occupation . . .
>
> 16. The meaning of "permanent" . . . is clear; it contemplates an indefinite period.
>
> 17. . . . "longterm" is something less than indefinite and should be treated as spanning a number of years, rather than months.

4.6.8 Counsel also referred to the definition of "temporary living-place" in the Camping Grounds Regulations. I take that definition to establish that, for the purposes of those Regulations (but not necessarily for the purposes of the Act), temporary occupancy means occupancy for continuous periods not exceeding 50 days.

4.6.9 As to the territorial authority's statement that "long-term" means more than 12 months, I consider that to be a valid guideline, but only a guideline. Each case must

be treated on its merits. In particular, the reference to 12 months is too rigid and might not be applicable in all circumstances.

4.6.10 At the hearing, the territorial authority said that requiring things to be treated on their merits was unhelpful. Nevertheless, I consider that each case will depend on its particular circumstances so that I cannot be more precise. For example, if the decision is to be made in the context of the Camping Ground Regulations, occupancy for a continuous period exceeding 50 days must be regarded as permanent, or at least not temporary. On the other hand, if the decision is to be made in another context then 12 months might not be long enough.

4.6.11 I accept counsel's submission that "permanent . . . contemplates an indefinite period". However, I note that the *Concise Oxford Dictionary* defines "indefinite" as "**1** vague, undefined. **2** unlimited" and "indefinitely as "**1** for an unlimited time"**.** Accordingly, I take the view that a unit is occupied on a permanent basis if there is no definite requirement or intention as to the length of occupancy, so that in the event it might be for many years or it might be for a much shorter time. That is the case, for example, with most family houses.

4.6.12 I also accept the submission that "long-term" is something less than "permanent", and take the view that "long-term" applies when the intended period of occupancy is known and can properly be regarded as "long". However, I repeat that the decision must be considered in context and do not accept that it must always "be treated as spanning a number of years, rather than months".

4.6.13 In other words, as currently advised, I take the view that:

(a) Permanent occupancy is when there is an intention that the occupancy will be for an indefinite period, which could in the event be comparatively short.

(b) Long-term occupancy is when the occupancy will be for a definite period that can properly be described as "long" in the particular circumstances.

5 The notice to fix

5.1 Wording

5.1.1 The notice to fix, see 1.2 above, referred to each of the units concerned as a building and identified the fact that it had been erected without building consent as amounting to non-compliance with the Act. The notice then required the owner to:

(a) Remove each unit, or

(b) Alter it so that it became a vehicle, or

(c) Apply to the territorial authority for a certificate of acceptance.

5.1.2 As discussed in 5.6.3 above, I consider that a building consent was not required for the placement of a unit but was required for the work of connecting the unit to foundations and utilities, and for the installation of the foundations (building consent had been obtained for the installation of the utilities). Accordingly, the contravention or non-compliance to which the notice relates is the failure to obtain building consents for installing the foundations and for connecting the unit to the foundations and the utilities. That being so, removing the unit, or altering it so that it becomes a vehicle, would not remedy the contravention or non-compliance.

5.1.3 Applying for a certificate of acceptance in respect of the foundations and the connections between the unit and the foundations and utilities would be a legitimate way of remedying the non-compliance.

5.1.4 I therefore conclude that those requirements of the notice to fix should be modified to read:

> **To remedy the contravention or non-compliance you must:**
> Make application to [the territorial authority] for a certificate of acceptance for each building in respect of that building's foundations and that building's connections to its foundations and to utilities.

6 Decision

6.1 In accordance with section 188(1), I hereby modify the notice to fix by:

(a) Deleting the words:

> Remove the buildings, or alter the installation of the building so that it becomes a vehicle; or
>
> Make application to the New Plymouth District Council for a certificate of acceptance of each building"

and

(b) Substituting the words:

> Apply to the New Plymouth District Council for a certificate of acceptance for each building in respect of that building's foundations and that building's connections to its foundations and to utilities.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 11 August 2006.

John Gardiner
Determinations Manager