



Determination 2016/011

Regarding the issue of a notice to fix for a pit latrine, showering shed, water supply system, and two Shepherd's huts at 216 Rows Road, Hunterville



Summary

This determination involves a number of small structures constructed on a rural property without building consent first being obtained; it was the owners' understanding that the building work was exempt under Schedule 1. The determination discusses whether the two shepherd's huts are buildings, and the clauses of the Building Code that apply in respect of the pit latrine, a latrine with a chemical toilet, the showering shed and the water supply system.

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 this determination are:
 - the owners of the property, M and J Diprose ("the applicants")
 - Rangitikei District Council, carrying out its duties as a territorial authority or building consent authority ("the authority").
- 1.3 The determination arises from a notice to fix issued by the authority for the construction of a number of structures on the applicant's property without building consent first being obtained. The applicants are of the view that two of the structures

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

are vehicles and not buildings under the Act², and that the remaining structures were exempt under Schedule 1 of the Act³ from the requirement to obtain building consent. The notice to fix was also issued in respect of non-compliance with the Building Code (First Schedule, Building Regulations 1992).

1.4 In correspondence between the parties there is reference to the requirements of the District Plan under the Resource Management Act. I note here that I have no jurisdiction under any other enactments and this determination is limited to those matters set out in paragraph 1.5 below.

1.5 The matter to be determined⁴ is the exercise of the authority's power of decision in issuing the notice to fix. In determining this matter I have considered:

- whether two of the structures, referred to in this determination as the large and small shepherd's huts, are buildings under section 8 of the Act
- whether building consent was required for any of the structures
- whether those structures that are buildings comply with the Building Code.

I have also discussed the form and content of the notice to fix.

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

2. The building work and background

2.1 The applicants purchased the property on 18 February 2010, and have submitted that the intention was to use it for camping holidays.

2.2 While the notice to fix did not describe the number or type of structures for which it was issued, the applicants have provided the following details of the structures on site:

Date of construction	Description of structure
2011 September	Pit latrine (1.0m ²)
2012	"large shed" (8.6m ²)
2012 January	"small shepherd's hut" – towed onto the property
2014 January	"large shepherd's hut" – constructed on site
2014 November	"small shed" (4.5m ²) – housing a camp shower
2015 January	Deck beside large shepherd's hut – 300mm high

2.3 At the time the notice to fix was issued on 28 October 2015, the pit latrine was of a type that would typically be described as being a "long-drop", being a hole dug into the earth with a superstructure and platform. The small shed housed a shower consisting of a shower rose, piping, shower tray, shower wall linings, shower curtain and a hose tap.

2.4 The applicants have submitted that the two shepherd's huts are of traditional design and are designed to be able to be towed around the property. They have two axles, cast iron wheels, and a tow bar fitted with a standard light vehicle tow coupling. The

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 Schedule 1 was replaced, on 28 November 2013. The applicants' submissions have been recorded in this determination with references to the current version of Schedule 1 as they appeared in the submissions.

⁴ Under section 177(2)(b) and 177(2)(f) of the Act

- front axles are steering axles and the weights are less than one tonne for the small hut and less than three tonne for the large hut. The huts are not attached to the ground.
- 2.5 Both huts are connected to an electrical supply with a caravan-type plug and socket connection, and both have a current electrical warrant of fitness. The large shepherd's hut has a water connection by way of a flexible garden hose-type connector, and a drain pipe from the kitchen sink that drains to a bucket.
- 2.6 The wooden deck sits adjacent to the large shepherd's hut but is not physically connected to the hut. A set of wooden steps from the deck to the hut are connected by two gudgeon and strap fittings; allowing the steps to be lifted off.
- 2.7 On 18 June 2015 the authority wrote to the applicants, stating that unconsented building work had been carried out in contravention of the Building Act and asking the applicants to contact the authority.
- 2.8 The applicants responded by letter on 21 June 2015, asking that the authority clarify the reference to unconsented building work. The applicants stated that there were two shepherd's huts on the property that they considered were vehicles and not buildings, and that it was their understanding the deck did not require consent. The applicants also noted that they had previously discussed the construction of the other sheds with officers of the authority in 2011 and were of the understanding that building consent was not required.
- 2.9 On 17 July 2015 the authority wrote to the applicants, clarifying that
- ... in terms of the sheds these are only exempt if they are less than 10 square metres in floor area and does (*sic*) not contain any sanitary facilities or facilities for the storage of potable water and does (*sic*) not include sleeping accommodation, unless the building is used in connection with a dwelling and does not contain any cooking facilities.
- 2.10 The authority further advised that:
- it did not consider the shepherd's huts to be vehicles as they were not defined as a motor vehicle or vehicle under the *Land Transport Act 1998*
 - while water storage tanks are exempt from the requirement to obtain building consent under Schedule 1(23), any plumbing that supplies water from the tanks would require consent, including any sanitary services or disposal of waste water or provision of hot water
 - the deck 'may be' exempt under Schedule 1(24)
 - any exempt building work was still required to comply with the Building Code.
- 2.11 In a letter dated 20 September 2015 the applicants responded to the authority and requested a meeting, noting that they would be out of the country in November and December.
- 2.12 On 29 October 2015 the authority wrote to the applicants, enclosing a notice to fix dated 28 October 2015. The particulars of contravention or non-compliance were stated as follows:
- Non compliance: Sections 17 and Sections 40 of the Building Act 2004.
- Erecting buildings on site with out (*sic*) any building consents
- To remedy the contravention or non-compliance, you must:
- Remove all buildings from the site and return the site to a vacant section.
- This notice must be complied with by: 18/12/2015

- 2.13 The applicants contacted the authority regarding the notice to fix, requesting a meeting and reiterating they would be out of the country for most of the time in which the notice was to be complied with. The parties met on 8 December 2015.
- 2.14 In a letter dated 16 December 2015 the applicants noted a site meeting had been held with the authority, and that an agreement had been reached to extend the deadline for compliance with the notice to fix to February 2016. The applicants advised that they had removed the pit latrine and all sanitary services from the small shed, but they disagreed with the authority's views and would be seeking a determination.
- 2.15 The Ministry received the application for determination on 21 December 2015.
- 2.16 In a later submission (refer paragraph 3.1.3) the applicants advised that the pit latrine had been moved 1.5m, and the original hole filled in. The applicants now locate a chemical toilet in the latrine whenever they visit the property. The applicants also described the fittings that made up the camp shower, noting that these had all been removed and the plumbing and drainage disconnected.

3. The submissions

3.1 The applicants' submissions

- 3.1.1 Along with the application for determination the applicants provided copies of:
- correspondence between the parties
 - the notice to fix
 - a site plan indicating the location of the structures on the site
 - a certificate of title
 - photographs of the pit latrine, the large and small sheds, both the shepherd's huts, the deck and steps, water and electrical connections
 - a graph showing power usage from 16 December 2013 to 15 December 2015 (I note there is nothing on the graph that identifies the property, however I accept the applicant's statement that it is for power use at the subject property)
 - Determinations 2013/055 and 2014/025.
- 3.1.2 In a covering letter, the applicants set out the background to the events, described the structures and their uses, concluding that the authority was incorrect to issue the notice to fix. The applicants submitted the following (in summary):
- Verbal approval was given by an officer of the authority in 2012 for the construction of the large shed without building consent.
 - The following items are 'excluded from Determination' as they are exempt from the requirement to obtain building consent:
 - the large shed: Schedule 1(3)
 - the pump in the large shed, as it is not a sanitary facility or a facility for the storage of potable water
 - water tanks: Schedule 1(23)
 - the small shed, with sanitary facilities now removed: Schedule 1(3)
 - water supply piping, which is for cold water only but is now not supplying any building

- former pit latrine, with sanitary facilities now removed: Schedule 1(3)
- waste water disposal, no longer relevant with the removal of the sanitary facilities from the pit latrine
- 300mm high deck: Schedule 1(24).
- The two shepherd's huts:
 - satisfy the test in section 2(1) of the Land Transport Act and also satisfy the test in section 8(1)(b)(iii) of the Building Act because they have wheels and have drawbars for towing
 - are designed to be movable and can be towed by a car, four wheel drive vehicle or tractor
 - are not attached to the ground in any way, and have no permanent connections. The water and electrical connections can easily be disconnected by hand
 - are only occupied for holidays and have never been occupied for more than two weeks at a time – most visits are single nights or weekends
 - the limited use is evidenced by the capacity of the water supply (2000 litres) and the consumption of electricity over the last two years.

3.1.3 On 31 January 2016 the applicants made a further submission in response to the authority's submission of 27 January 2016 (see paragraph 3.2). The applicants hold the view that changes made to the pit latrine and the small shed mean that the notice to fix has been satisfied in respect of those buildings and they should be excluded from the matters being determined.

The large shed and water supply

3.1.4 The applicants maintain that the large shed housing the water pump is exempt from the requirement for building consent and that the large shed does not contain either a sanitary facility or a facility for the storage of potable water. The applicants suggested a possible resolution by shifting the pump from the inside of the building to underneath the building.

3.1.5 In regards to the water supply, the applicants noted that paragraph 2.1.2 of Acceptable Solution G12/AS1 allows for the use of polyethylene pipes and fittings complying with AS/NZS 4020⁵, and that the pipe and fittings used for the plumbing to and from the pump complies with that standard.

The large and small shepherd's huts

3.1.6 The applicants submitted that the huts did not require any of the features identified by the authority to fall within the definition of vehicle as defined in section 2(1) of the Land Transport Act; that definition states a contrivance is a vehicle if it is 'equipped with wheels, tracks, or revolving runners on which it moves or is moved'.

3.1.7 The applicants compared the features such as materials and connections, and the lack of brakes and suspension to the likes of caravans, house trucks, trailers, forklifts and agricultural machines. The applicants acknowledged the huts are not designed for use on the road, but stated that they are designed to be moved and have been moved within the property a number of times.

⁵ Australian/New Zealand Standard AS/NZS 4020:2005 Testing of products for use in contact with drinking water

- 3.1.8 The applicants also acknowledged that at the time the notice to fix was issued the wheels of the large shepherd's hut were surrounded by the deck, but noted that the deck had since been altered to ensure the hut was still moveable and photographic evidence of this alteration had been provided in the application.
- 3.1.9 The applicants also submitted that the legislation does not define the terms "permanent" or "long term", but that this issue fell away as the shepherd's huts are not immovable and so do not fall within the definition of a building under section 8(1)(b)(iii).

3.2 The authority's submissions

- 3.2.1 The authority acknowledged the application for determination in a completed form received on 22 December 2015 and indicated it would make a submission on the matter.
- 3.2.2 The authority's submission was received on 27 January 2016 and confirmed that the notice to fix was issued on 28 October 2015 for the large and small shepherd's huts, the pit latrine shed, and the large and small sheds. The notice to fix does not include the deck or the two water tanks behind the large shed.
- 3.2.3 The authority also provided copies of the following
- Photographs of the large shepherd's hut showing:
 - the hut built into the deck at the time
 - some of the plumbing evident
 - power connection and potable water supply
 - discharge of grey water
 - no brakes or suspension.
 - Photographs of the small shepherd's hut showing:
 - electrical connection
 - no brakes, suspension, or other typical features that would be found on a vehicle.
 - A photograph of the exterior of the pit latrine.
 - Photographs of the large shed showing plumbing work feeding water to the large and small shepherd's huts), and plumbing going into the small shed.
 - Excerpt from a manufacturer's website that makes similar shepherd's huts.
 - Copy of an article "When is a vehicle a building?"⁶
- 3.2.4 The authority made the following submission (in summary):
- Large and small shepherd's huts***
- 3.2.5 The authority is of the view both shepherd's huts fall within section 8(1)(a) of the Act and are buildings. The authority stated that intent and design of the structures is for people to use as a movable building and not a vehicle. They are constructed out of materials commonly used on prefabricated buildings and have a power supply.
- 3.2.6 They have wheels and a tow bar, but no brakes or suspension, or any other features one would normally find on a vehicle such as indicator lights, vehicle identification number or plate. The tow bar and wheels are, in the authority's opinion, for aesthetic

⁶ Shaw, K. (2011, April/May). "When is a vehicle a building?" *Build*, 123, p62.

value only to give visual effect to the building giving it the character of an historic shepherd's hut. They cannot be towed on any road, and would not be able to obtain a warrant of fitness for use on the road due to the nature of construction. The website of the manufacturer that makes similar huts⁷ states:

They are not designed to be towed along the road – but can be moved by HIAB truck to other properties if desired.

3.2.7 The large shepherd's hut:

- is laid out to be used as a dining/lounge/scullery
- is used by people on a long term basis
- was immovable at the time the notice was issued as the wheels went through the deck and rested on concrete pads
- was constructed on site.

3.2.8 The small shepherd's hut:

- is used as sleeping accommodation
- was transported to the site on a vehicle.

3.2.9 In regards to the use of the shepherd's huts, the authority considered the applicants were occupying the building on a long term basis, noting that

If a structure is used for short periods of time during a year but is used in this manner year in and out then this is considered [to be use] on a long term basis.

Pit Latrine Shed

3.2.10 The authority submitted that as the pit latrine remains locked and the authority is unable to confirm that the sanitary fixture has been removed, it considers the pit latrine remains non-compliant.

The Large and Small Sheds

3.2.11 The large shed contains a water pump that supplies water to the large shepherd hut and the small hut; the supply is for sanitary and potable water. The small shed has sanitary fixtures and potable water plumbed into the unit and the grey water is discharged to the ground. The plumbing is not exempt work under Schedule 1 and there is no evidence the plumbing work was undertaken by a registered or authorised person as required under the *Plumbers, Gasfitters and Drainlayers Act 2006*.

3.2.12 The plumbing does not meet the requirements of Clause G12 – Water Supplies (both sheds) nor G13 – Foul Water (small shed), and the conveyance pipe for potable water is not of suitable material for its use.

3.2.13 The authority suggested that the photographs supplied indicate that the plumbing and sanitary fixtures have not been removed.

3.3 Submissions on the current compliance

3.3.1 By email on 1 February 2016, I suggested the parties arrange for an inspection to be carried out to ascertain the compliance of the buildings in light of the removal of sanitary fixtures from the small shed and the change of the pit latrine to a chemical toilet.

⁷ I note that the manufacturer referred to is not the same as the one that supplied the applicants' shepherd's huts.

- 3.3.2 The authority responded on the same day, noting that it had inspected the property twice since meeting with the applicants on 8 December 2015. The authority is of the view the small shed is not compliant with the Building Code as it is still supplied with potable water, and that the work carried out to the plumbing was not exempt and needed to be undertaken by a registered plumber under a building consent. The authority also considers the latrine contains a sanitary fixture and so does not fall within the exempt work set out in Schedule 1.
- 3.3.3 Given the authority's reluctance to carry out an inspection to address the compliance of the structures subsequent to the applicants undertaking work to address the notice to fix, I asked the applicants if they wished to expand the determination application to include compliance with the Building Code.
- 3.3.4 The applicants made a further submission on 1 February 2016, agreeing to expand the application and expressing surprise at the approach taken by the authority in regards to establishing whether or not the notice to fix had been complied with in respect of the stated contravention of section 17. The applicants also submitted that the use of a chemical toilet in the former pit latrine was equivalent to a builder's portable toilet (commonly referred to as a "portaloo") in terms of the compliance obligations.
- 3.3.5 The applicants also suggested that in order to settle the matter they could:
1. Remove all potable water pipework and grey water piping from under the Small Shed ...
 2. Remove the water pump from inside the Large Shed and reinstall it under the shed ...
 3. Remove the 'sanitary fixture' (i.e. the chemical toilet) from the Former Pit Latrine.

3.4 The draft determination and submissions in response

- 3.4.1 On 4 March 2016 I sent a draft determination to the parties for comment.
- 3.4.2 By email on 13 March 2016 the applicants accepted the draft subject to minor amendment correcting references to the manufacturer; the supplier of the applicants' shepherd's huts was not the same one that was included in the information from the authority (refer paragraph 3.2.3). I have amended the determination accordingly. The applicants also noted they wished to resolve the outstanding issues with the authority along the lines of those suggested in this determination.
- 3.4.3 By email on 16 March 2016 the authority accepted the draft without further comment.

4. Discussion: The shepherd's huts

- 4.1 This determination arises from a difference in views between the parties as to whether the two shepherd's huts fall within the definition of a building in section 8 of the Act, and whether the remaining building work, including the water supply system, required building consent and is compliant with the Building Code.

4.2 What is meant by a building

4.2.1 I have considered this issue in numerous previous determinations⁸, and the process to follow in establishing whether or not a particular structure is a building is now well-established.

4.2.2 The first step in deciding when a vehicle will be required to be treated as a building under the Act is to decide whether it comes within the meaning of the terms ‘vehicle’ and ‘motor vehicle’. Neither of these terms is defined in the Act, so their natural and ordinary meaning applies:⁹

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

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

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

vehicle—

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

motor vehicle—

(a) means a vehicle drawn or propelled by mechanical power; and

(b) includes a trailer; ...

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

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

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

4.3 Are the shepherd’s huts vehicles?

4.3.1 The first issue I need to consider is whether the shepherd’s huts are vehicles or motor vehicles. The relevant requirements of those definitions, as noted above, are that the structure in question is used for transporting people or goods, is a contrivance equipped with wheels (or similar) on which it moves, or is a trailer.

⁸ See for example Determinations 2015/044 and 2015/067

⁹ Oxford Dictionary of English, 3rd ed., Oxford University Press, 2010.

4.3.2 The website of the manufacturer that makes similar shepherd's huts describes the huts and the designer's intent as follows:

"The Hut can be delivered in sections and assembled on site which enables the huts to be placed in situations with limited access. Assembly takes one day. Alternatively the huts can be pre-assembled and delivered on site by truck.

[The huts] are constructed from traditional, durable materials and are fully insulated. The huts are delivered pre-painted to customers choice and are ready for immediate use. All huts are pre-wired with plugs and lights and come with electrical certificate.

Shepherd Huts are designed to be moved about the farm and are fitted with old fashion farm wheels - so once sighted (sic) it is relatively easy to have the hut moved to another aspect or view. They are not designed to be towed along the road - but can be moved by HIAB Truck to other properties if desired.

While it is not the same supplier as that of the applicants' shepherd's huts, it appears that the construction and limitations are similar in nature.

4.3.3 In this case the shepherd's huts are not used for transporting people or goods, nor are they road vehicles powered by an internal combustion engine. The huts do have wheels and tow bars, and the applicants state they have been moved on the site; however I am of the view that the fact that they can be moved around on site does not necessarily mean that they are vehicles.

4.3.4 Section 8(1)(a) states that, unless the context otherwise requires, the term "building" 'means a temporary or permanent moveable or immovable structure ...' (my emphasis). The inclusion of a moveable structure within the definition of a building in section 8(1)(a) means that a vehicle (which is excluded from the definition of a building under section 8(1)(b)(iii)) cannot include a moveable structure. The terms "moveable structure" and "vehicle" must be given different meanings.

4.3.5 Caravan or mobile homes are clearly vehicles; while they perform a similar function as a dwelling in that they are used for sleeping accommodation and may contain sanitary facilities, they are designed to move on roads and are typically relocated from site to site. A vehicle such as a caravan or mobile home would therefore only fall within the Building Act if it met the test under section 8(1)(b)(iii), being that it was both immovable and occupied on a permanent or long-term basis.

4.3.6 In recent times there has been an increase in small abodes that owners have claimed are vehicles and are not buildings under the Act, and I have considered a number of these in previous determinations¹⁰. In some circumstances, though the structures were on wheels they were not in fact able to be moved (see determinations 2015/067 and 2015/026) and I concluded that they were not vehicles. In others the structures were designed to be towed on the road, and some also were legally registered (see 2015/044, 2014/025, and 2013/055); as they were vehicles the question then turned to whether they met the test under section 8(1)(b)(iii).

4.3.7 In this case, while the shepherd's huts are "moveable" in that they can be shifted on the site on their wheels and using the tow bar, the manufacture of the huts are such that they are limited in this respect. Given the nature of the construction and their intended use, I consider that the shepherd's huts are relocatable buildings rather than vehicles.

¹⁰ See for example 2013/055, 2014/025, 2015/026, 2015/044 and 2015/067

- 4.3.8 I conclude that the shepherd's huts are not vehicles, and that they fall within the definition of a building under section 8(1)(a) of the Act.

5. Discussion: The remaining structures

- 5.1 In considering whether the remaining structures were exempt under Schedule 1 from the requirement to obtain a building consent, I must consider the exemptions that were provided for at the time of their construction. I note however that Schedule 1 was replaced on 28 November 2013. As the notice to fix was issued after Schedule 1 was replaced, I am of the view that in deciding whether or not to issue a notice to fix the authority can take into account whether the structures are of a type that would have been exempt under Schedule 1 as amended if they had been built after 28 November 2013.

5.2 Pit latrine (1.0m²) 2011 September

- 5.2.1 The description of the structure as a 'pit latrine' brings to mind a simple toilet system consisting of a hole in the ground over which a small structure (temporary or permanent) is erected. Permanent latrines may include the likes of a concrete slab with a hole, or the construction of a "bench seat" such as the type used in latrines associated with backcountry huts, with a superstructure providing privacy and protection from the weather. At the other end of the scale, temporary latrines may be simply a hole that is covered after use, with or without the addition of a seating system and a tent or tarpaulin or similar to provide privacy and some weather protection. I am of the view that the Building Act does not apply to the latter.

- 5.2.2 Schedule 1(i) that was current at the time the latrine was constructed provided for:

building work in connection with any detached building (except a building that is ... closer than its own height to any residential accommodation or to any legal boundary) that—

...

(iv) does not exceed 1 storey, does not exceed 10 square metres in floor area, and does not contain sanitary facilities or facilities for the storage of potable water, but may contain sleeping accommodation (without cooking facilities) if the detached building is used in connection with a dwelling:

(I note this provision has been carried through to Schedule 1(3)(1)(c))

- 5.2.3 The first question I must consider is whether the structure described as a 'pit latrine', at the time of its construction was a building containing sanitary facilities. Taking into account the description provided by the applicants regarding the changes made, I understand the pit latrine to have originally been the type of structure typically referred to as a "long drop" or "pit toilet", being a small timber shed with a wooden floor that was located over a hole dug in the earth.
- 5.2.4 The term "sanitary facility" is not defined in the Act or the Building Code; however the Building Code has obligations that apply in respect of sanitary appliances and sanitary fixtures (Clauses G12 and G13) and materials used on the walls and floors adjacent to those appliances or fixtures (E3.3.2 to E3.3.4).
- 5.2.5 There are also obligations raised in the Building Code in respect of personal hygiene when a building is constructed: Clause G1.1 of the Building Code states the objective of Clause G1 as to '...b) safeguard people from loss of amenity arising from the absence of appropriate personal hygiene facilities...', with the functional requirement under Clause G1.2 requiring 'Buildings shall be provided with

appropriate spaces and facilities for personal hygiene' (my emphasis). While the term "sanitary facility" is not defined in the Act or Building Code, I am of the view that "sanitary facilities" includes those spaces and facilities used for personal hygiene as referred to in Clause G1.2.

- 5.2.6 In this case the pit latrine was constructed as a facility for sanitation in association with the use of the shepherds' huts used as accommodation for short-term occasional stays. While there were no sanitary appliances or sanitary fixtures in the building at the time of construction, the pit latrine was a space used for the purpose of sanitation¹¹.
- 5.2.7 Given that the pit latrine super-structure constitutes a building under section 8 of the Act, and the building's use for the purpose of sanitation, I am of the view that at the time of construction the pit latrine was a building containing "sanitary facilities" and was not exempt under Schedule 1(i).
- 5.2.8 I note that when considering pit latrines in general, it is important to keep in mind that the Building Act would not apply to a pit latrine that either has no superstructure or has a superstructure that does not fall within section 8 of the Act.

5.3 The latrine as it currently stands with a chemical toilet

- 5.3.1 Subsequent to the notice to fix, the applicants moved the latrine superstructure, made some minor internal changes, and now use a chemical toilet when they are staying at the property. It is the applicants' view that this has satisfied the notice to fix in respect of the contravention of section 40 as the building is no longer one containing a sanitary facility.
- 5.3.2 I note that the contravention of section 40 relates to the applicants not obtaining a building consent prior to the construction of the building when building consent was required. While the applicant's may have subsequently undertaken remedial action to, in their view, make the building one to which Schedule 1(3)(1)(c) would apply, this does not alter the fact that building consent was not sought for the original construction.
- 5.3.3 However, when considering whether to pursue the contravention of section 40 as an offence, authorities should also take into account any remedial actions taken by the owner. For example, when an owner relies on their own interpretation of Schedule 1 and unwittingly contravenes section 40, if the building work is made compliant with the Building Code and the owner applies for a certificate of acceptance there would be little point in the authority pursuing the contravention of section 40 further.
- 5.3.4 In this instance the applicants are of the view that the use of a chemical toilet means the building is no longer one containing a sanitary facility, particularly as the toilet is able to be removed.
- 5.3.5 I disagree with the applicants' view in this respect. The intended use¹² of the building remains a facility used for personal hygiene and for the purpose of sanitation. I therefore consider that it is a building containing a sanitary facility.

¹¹ Sanitation is interpreted in Clause A2 of the Building Code as "the term used to describe the activities of washing and/or excretion carried out in a manner or condition such that the effect on health is minimised, with regard to dirt and infection"

¹² Section 7 of the Act defines "intended use" in relation to a building as including "any reasonably foreseeable occasional use that is not incompatible with the intended use."

5.4 “Large shed” (8.6m²) 2012 and water distribution system

- 5.4.1 There has been little information forthcoming about the use of the large shed other than it houses the water pump and was originally intended to be used as a storage facility. From the photographs it appears to have no windows and I believe it is continuing to be used as a storage facility and not as a habitable space. I have received no information that indicates there are any sanitary facilities or stored potable water within the large shed. I take the view that the term “stored potable” does not include water that may be sitting in the pump system. In conclusion, I am of the view that at the time of construction, the large shed fell within Schedule 1(i)(iv).
- 5.4.2 The authority has confirmed that the notice to fix was not issued in respect of the water tank, and I do not consider the tank further. However the authority is of the view that the installation of the water supply system was building work that was not exempt under Schedule 1 and needed to be undertaken by a registered plumber under a building consent.
- 5.4.3 The installation of the water supply system, being the connections and plumbing from the tank to the pump and on to the buildings, is not exempt building work under Schedule 1 and building consent was required for this work.
- 5.4.4 I note that the *Plumbers, Gasfitters and Drainlayers Act 2006* provides an exemption for any person to do sanitary plumbing in designated areas in rural districts (section 16(1)). I am not aware of whether the applicant’s property is within a designated area, and this falls outside the matters for this determination.

5.5 “Small shed” (4.5m²) with camp shower, November 2014

- 5.5.1 The applicants have described the shed as containing a “camping shower”. I consider that, in much the same way as pit latrines, a “camp shower” may be of a permanent nature, with the likes of plumbing and drainage, or a more temporary nature such as a bag hung from a support and with or without a tent, tarpaulin or similar to provide privacy. Rudimentary portable systems are not uncommon in places like camp grounds and typically use a bag or other container with a tap or detachable hose/shower rose connection. In line with my views on pit latrines (see paragraph 5.2.8), where a camp shower is erected that does not involve a structure that would fall within the definition of a building under section 8 of the Act, the Building Act would not apply.
- 5.5.2 Given that the small shed was constructed after 28 November 2013 it is the later version of Schedule 1 that applies. Schedule 1(3)(1)(c) provides for the following:
- Building work in connection with any detached building that—
- (c) does not contain sanitary facilities or facilities for the storage of potable water; ...
- 5.5.3 The question I must consider is whether the structure described as a small shed housing a “camp shower” is a building that contains sanitary facilities. At the time the notice to fix was issued, the shed was fitted out with a shower base and wall linings, piping for water and a shower rose, and shower curtain. I am of the view that the shed contained “sanitary fixtures” and, at the time the notice to fix was issued, the building contained a sanitary facility and was not exempt.
- 5.5.4 The applicants have subsequently removed the fixtures from the shed and are of the view that this has satisfied the notice to fix in that the building can no longer be described as containing a sanitary facility. However, in light of my conclusion

regarding the latrine, if the intended use of the small shed remains for personal hygiene then it continues to be a building containing a sanitary facility.

6. Discussion: The compliance of the building work

6.1 Under section 17 of the Act, all building work must comply with the Building Code to the extent required by the Act, whether or not a building consent is required in respect of that building work. Section 7 defines building work as work ‘for, or in connection with, the construction, alteration, demolition, or removal of a building ...’. As I have found that the shepherds’ huts are buildings under the Act they, along with the remaining structures, are required to comply with the Building Code.

6.2 In regards to building work carried out in association with the structures on site, I note:

- A kitchen sink is a sanitary fixture and there are obligations in respect of compliance with, for example, Clauses G3.3.2, G12.3.5, G13.3.2.
- G1 includes the requirement for sanitary fixtures to discharge to a plumbing and drainage system as required by Clause G13 Foul water when water-borne disposal is used, or a healthy safe disposal system when non-water-borne disposal is used.
- The water supply system must comply with Clause G12.
- Adherence with the Acceptable Solution BCH/AS1¹³ is one means of establishing compliance with the Building Code for pit latrines.

6.3 The authority has stated in its submission that:

- the potable water supply to the large shepherd’s hut does not meet the requirements of Clause G12
- the discharge of grey water from the large shepherd’s hut does not comply with Clause G13
- ‘the conveyance pipe for potable water is not of suitable material for its use’
- the small shed ‘is non-compliant with G12 and G13’ (the authority has provided no further explanation as to why it considers this is the case).

Potable water

6.4 The authority has not been clear as to which performance clauses in G12 and G13 it considers are not being met. Clause G12.3.1 requires ‘water intended for human consumption, food preparation, utensil washing, or oral hygiene must be potable.’ Evidence that water is potable may be provided by way of testing for example, or use of a suitable filter system. It is for the applicants to provide sufficient information on the water collected onsite if it is being used as potable water.

6.5 Given the intended use of the large shepherd’s hut, which contains the kitchen sink, it is not unreasonable to assume that the water supply to the large shepherd’s hut is intended to be used as potable water. However, given the occasional and intermittent use, it is also open to the applicants to establish another means of making the water supply potable, for example by treating the water.

¹³ BCH/AS1 Acceptable Solution for Backcountry Huts, *Ministry of Business, Innovation and Employment*, 1 July 2014

- 6.6 Likewise, Clause G12.3.5 requires sanitary fixtures and appliances be provided with hot water when intended to be used for utensil washing and personal washing, showering or bathing. It is my understanding that the water supply to the large shepherd's hut is only cold water; however given the occasional and intermittent use it would not be unreasonable to heat water when required.
- 6.7 I note also that if the applicants had sought building consent, given the occasional and intermittent use the applicants may have applied for a waiver under section 67 in respect of the relevant performance clauses under G12 and G13.
- The discharge of grey water
- 6.8 Clause 13.3.1 requires plumbing systems be constructed to convey foul water from buildings to a drainage system, and G13.3.2 that the drainage system shall convey foul water to an appropriate outfall.
- 6.9 The objective of Clause G13 is to '(a) safeguard people from illness due to infection or contamination resulting from personal hygiene activities, and (b) safeguard people from loss of amenity due to the presence of unpleasant odours or the accumulation of offensive matter resulting from foul water disposal'.
- 6.10 The applicants have stated that the kitchen sink drains into a bucket.
- 6.11 I note that in rural settings it would not be uncommon for foul water to be discharged to disposal fields, and that this method would meet the performance requirements and the objective of Clause G13. In this case, given the intended use of the large shepherds' hut and the likely limited quantities of foul water, I am of the view that provided food scraps are appropriately managed, disposal of the foul water to land would comply with Clause G13.3.1 and G13.3.2.
- The conveyance pipe
- 6.12 The photographs provided to this determination show the water supply to the large shepherds' hut to be by way of a flexible hose of the type typically used for water supply to gardens. There is a dispute between the parties as to whether the hose complies with Clause G12.3.2, i.e. whether it will contaminate the potable water supply system.
- 6.13 The applicants have stated that the hose pipe complies with the Acceptable Solution G12/AS1 2.1.2 by way of AS/NZS 4020; however the applicants have not provided any information that would establish compliance.
- 6.14 I also refer the parties to the discussion in this determination at paragraphs 6.5 and 6.6 in regards to potable water. It is for the applicants to establish a compliant means of supply of potable water.

7. The notice to fix

- 7.1 An authority has the power to issue a notice to fix where the authority considers on reasonable grounds an owner is contravening or failing to comply with the Act or Building Code (section 164(1)(a)). A notice to fix is most commonly issued in respect of building work that does not comply with the Building Code or building work carried out without a building consent when a building consent was required.
- 7.2 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)), specifies a time period for doing so (section 165(1)(b)). The remedies required by a notice to fix would typically require the owner to undertake building work to bring building work into

compliance with the Building Code (and may require the owner to apply for a building consent in order to carry out such remedial building work), and require the owner to apply for a certificate of acceptance in respect of building work carried out without a building consent. A failure to comply with a notice to fix is a serious offence under section 168 with a maximum fine not exceeding \$200,000 and reflects the main purpose of a notice to fix, which is to ensure compliance and provide effective penalties for those that do not comply.

7.3 Given the seriousness of the consequences of not complying with a notice to fix I am concerned that the issue of this notice does not appear to have gone through any peer review or management oversight before being issued. The notice to fix as issued was poorly detailed; it did not identify the building work that the authority considered had been carried out in contravention of section 40, nor did it identify the building work that the authority considered did not comply with the Building Code or the relevant clauses of the Building Code.

7.4 The notice to fix also provided for only one remedy, namely the removal of the unconsented building work. I have addressed this issue in previous determinations. The following view was held in Determination 2000/1:

The [Ministry] recognises that if building work that was done unlawfully is not demolished then the owner would appear to benefit from its unlawful actions. Nevertheless, if that building work, although done unlawfully, complies with the Building Code, then the [Ministry] considers that it is unreasonable to require it to be demolished so that it can be constructed again. ...

Demolition of building work which is neither dangerous nor insanitary is a drastic step which should only be taken for compelling reasons. Based on the information provided to me, I do not believe that such compelling reasons exist in this case.

7.5 The Building Act also provides for an owner to seek a certificate of acceptance where building work has been carried out without building consent when consent was required. Not including a specific reference to seeking a certificate of acceptance in either the notice to fix or the covering letter means the applicants may not have been aware of the options available to them under the Act. The options available to owners to remedy a contravention should be clearly set out in a notice to fix.

7.6 When making a determination, under section 188 I must confirm, reverse, or modify the decision made by the authority. While I have concluded that there was building work carried out for which building consent was required, and accordingly the authority was correct to issue a notice to fix for the breach of section 40, I have also found the notice to fix was deficient in terms of its wording and content. Modification of the notice to fix to include the relevant details, such as a description of the relevant building work and performance clauses of the Building Code, and to remove references to demolition and provide for the application of a certificate of acceptance as a remedy is one means of determining this matter. However, I am of the view that the notice to fix is so poorly considered in terms of the wording and content that it should be reversed.

7.7 It is my opinion that, subsequent to the issue of this determination clarifying the building work that is or is not exempt and that setting out the requirements under the Building Code that must be met, the parties may be able to resolve the outstanding matters without recourse to enforcement by way of the authority issuing a new notice to fix.

7.8 I suggest the parties take the following steps in order to conclude this matter:

- The authority to notify the applicants of a reasonable timeframe in which it considers outstanding matters can be addressed by way of bringing any non-compliant building work into compliance and submitting an application for a certificate of acceptance for the building work that required consent before the authority would consider issuing a notice to fix.
- The authority make available to the applicants information on how to apply for a certificate of acceptance and the information that will be required from the applicants. (In making these suggestions I note also that if compliance with other legislation needs to be addressed this should be communicated to the applicants as it may impact on the applicants' choices with respect to regularising the building work under the Act.)
- The applicants address any areas of the building work that do not comply with the Building Code, and prepare documentation in support of the application for a certificate of acceptance to be submitted to the authority.
- The authority to carry out an inspection of the building work with regard to compliance with the Building Code to inform its decision on the application for a certificate of acceptance and whether building work exempt under Schedule 1 complies.

8. The decision

8.1 In accordance with section 188 of the Act, I hereby determine that:

- the shepherd's huts are buildings under section 8 of the Act, and
- the construction of the latrine, the small shed, and the large shepherds' hut was carried out without building consent when consent was required;
- however, the notice to fix did not adequately identify the buildings for which it was issued, nor did it identify the building work that was not compliant with the Building Code or the relevant clauses of the Building Code, accordingly I reverse the authority's decision to issue notice to fix no. NF0181.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 30 March 2016.



John Gardiner
Manager Determinations and Assurance

Appendix A: Legislation

A.1 Relevant sections of the Building Act 2004 discussed in this determination

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

...

A.2 The relevant paragraphs of the Acceptable Solution discussed in this determination

2.1.2 Water supply materials and components shall comply with:

a) BS 6920 if non-metallic, or

b) AS/NZS 4020 if metallic or non-metallic

Table 1: Pipe Materials for Hot and Cold Water Paragraphs 2.1.2, 2.2.1 and 6.7.2	
Material	Relevant Standard
Hot and Cold	
Copper	NZS 3501
Galvanised steel	NZS/BS 1387
Polybutylene	AS/NZS 2642: Parts 1, 2 and 3
Cold Only	
PVC-U	AS/NZS 1477
Polyethylene	NZS 7601 for pressures up to 0.9 MPa (Type 3) NZS 7602 for pressures up to 1.2 MPa (Type 5) NZS 7610 for pressures up to 1.2 MPa AS/NZS 4129 for fittings
	AS/NZS 4130 for pressures up to 2.5 MPa

A.3 Relevant sections of the Land Transport Act 1998 discussed in this determination

2 Interpretation

motor vehicle—

(a) means a vehicle drawn or propelled by mechanical power; and

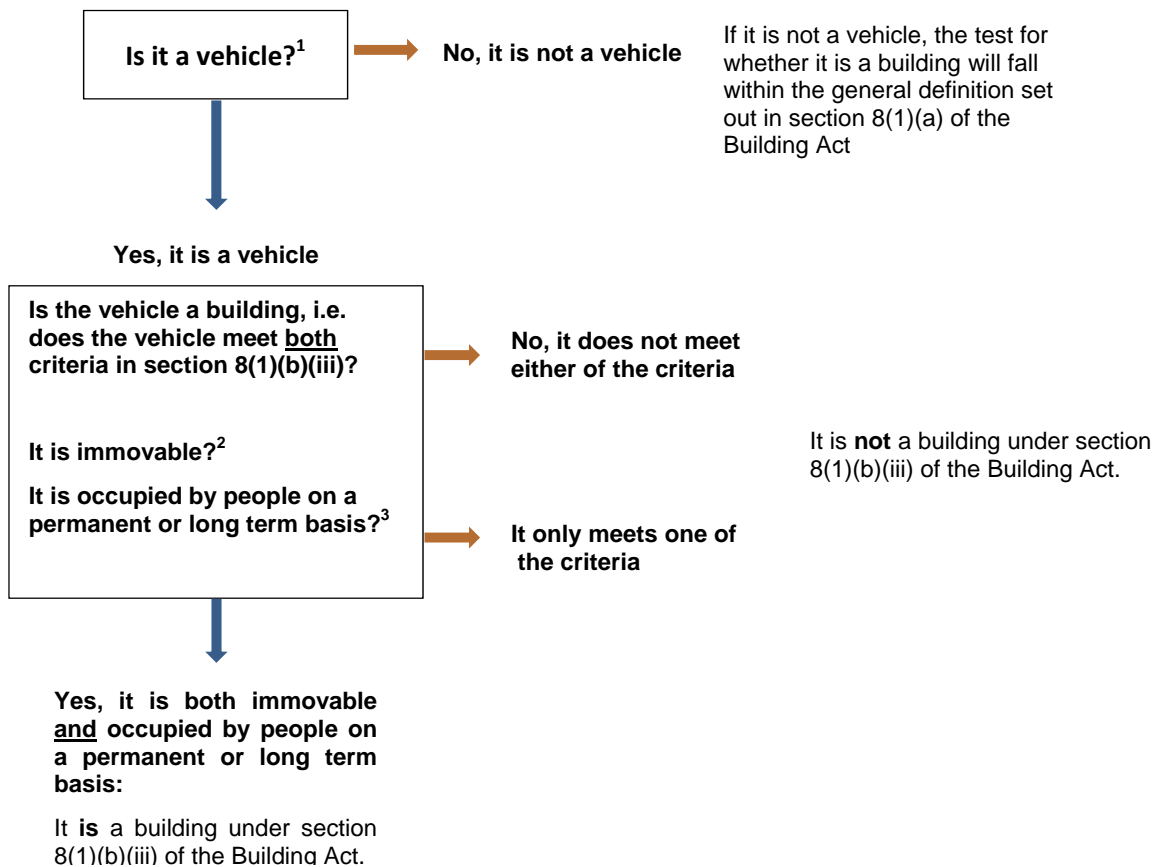
(b) includes a trailer; ...

vehicle—

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

Appendix B

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



Notes:

- In establishing whether something is a vehicle, consider the following definitions:
 - The natural and ordinary meaning:
 - a thing used for transporting people or goods, especially on land, such as a car, lorry, or cart
 - a road vehicle powered by an internal combustion engine.
 - “vehicle or motor vehicle” as defined in section 2(1) of the Land Transport Act 1998.
 - vehicle— (a) means a contrivance equipped with wheels, tracks, or revolving runners on which it moves or is moved; ...
 - motor vehicle— (a) means a vehicle drawn or propelled by mechanical power; and (b) includes a trailer; ...

Consider also how it is currently presented, that is in its entirety and not the constituent parts e.g. two or more vehicles located onto site that are then connected and would require disconnection in order to be moved (refer *Thames-Coromandel District Council v Te Puru Holiday Park Ltd* [2010] NZCA 633)
- Whether a vehicle is immovable is a question of degree that will turn on a range of factors, for example:
 - Whether it is attached to the ground and how easily those attachments can be removed;
 - Whether it has been connected to services and how easily those can be removed;
 - Whether it has retained its wheels and the ability to be towed or to move itself;
 - Whether structures have been attached, such as decks, verandahs, or additional rooms.

(See determination 2014/025 for example)
- Whether a vehicle is considered to be occupied on a permanent or long term basis will turn on a range of factors, for example:
 - Is the intended period of occupancy known;
 - Is there a definite requirement as to the length of occupancy;
 - Is occupation intermittent/occasional (such as holidays/weekends only)
 - Is occupation continuous or cyclical

(See Determinations 2006/72 and 2013/055 for example)