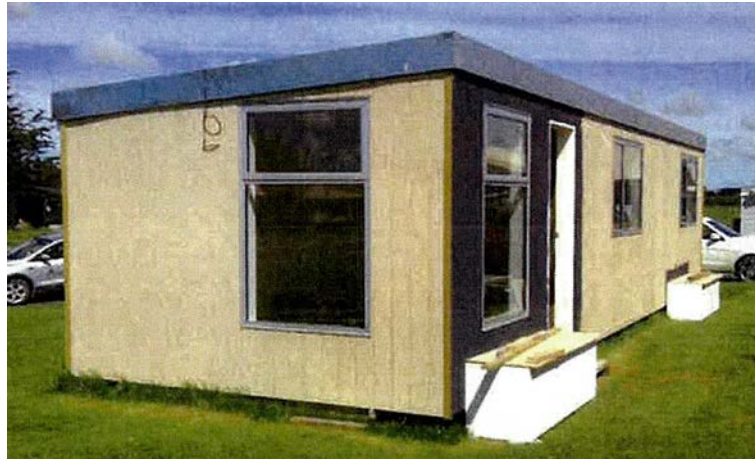




Determination 2017/058

Regarding a notice to fix and whether a structure on wheels at 50 Church Street, Winton, is a building



Summary

This determination considers the definitions of building and vehicle under section 8, and whether a structure modified to attach wheels and a drawbar is a building for the purposes of the Building Act. The determination also discusses the particulars of contravention/non-compliance described in the notice to fix.

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The parties to the determination are:
 - the owner of the property, C Kidd (“the owner”)
 - Southland District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority. The authority applied for the determination.
- 1.3 The authority issued a notice to fix for the building work carried out without building consent. The owner subsequently affixed the wheels and drawbar, and is of the view that the structure does not fall within the definition of a building under the Act. This determination centres on whether the structure as modified with wheels and a drawbar (“the structure”) is a building as defined by sections 8 and 9 of the Act.

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.

1.4 The matter to be determined² is whether the authority was correct in its decision to issue the notice to fix. In deciding whether the notice is to be confirmed, reversed, or modified I have also considered whether the structure as it now presents with wheels and a drawbar is a building as defined by sections 8 and 9 of the Act (refer Appendix A).

2. The structure and background

2.1 There has been little information provided to the determination regarding the construction of the structure. From the photographs provided it appears to be light weight timber frame and timber sub frame, with plywood cladding, aluminium joinery and a monopitch corrugated steel clad roof. Rainwater is collected from the roof and discharged directly onto the ground adjacent to the structure via a downpipe.

2.2 The structure is supported on timber packers and is not connected to any services. The owner has advised that the intention is to install a dump station on the site and supply water and power in a similar manner to a campsite.

2.3 The structure is over 10 square metres and contains sanitary fixtures, sleeping accommodation and cooking facilities. The owner has advised that the building is not intended to be used in support of another dwelling but rather as a standalone dwelling or single household unit.

2.4 In response to a draft of this determination, the owner provided the following additional information about the construction:

- The “cabin” was constructed at one location and transported to the site without wheels fitted.
- The axles are rated to three tonne; the drawbar was constructed by a registered engineer.
- The insulation is ‘90mm poly with a rating of R3 and the 2/18mm [proprietary named] sheets³ that are glued together’ (*sic*).

2.5 The notice to fix

2.5.1 On 23 September 2016 the authority issued a notice to fix. The particulars of non-compliance/contravention were set out as follows:

Section 17 of the Building Act 2004 requires that 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 work.

The building work described in the attached “Notice to Fix” does not satisfy the following section of the Building Act 2004.

Section 40 (1) in that building work by way of the relocation of a residential building has been undertaken other than in accordance with a building consent.

2.5.2 The remedy was set out in the notice as:

Application needs to be made to [the authority] for a “Certificate of Acceptance” for the building work associated with constructing the residential unit.

Application needs to be made for a building consent to locate the building on appropriate foundations and secure it to them in accordance with the Building Code.

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

³ The sheet product is 3-layered panel with a wood strand core sandwiched between an MDF outer “skin”.

Connection to a potable water supply, stormwater and sanitary drainage pipework and their connection to network services will also need a building consent.

2.5.3 The deadline provided for in the notice was 28 October 2016.

2.6 The addition of wheels and drawbar

2.6.1 It is my understanding that the owner did not follow the remedies set out in the notice, and instead installed a set of wheels and drawbar in the belief that the structure would no longer meet the definition of a building under the Act.

2.6.2 In a file note dated 10 November 2016, the authority noted that the structure was in the same location as it had been on 23 September, and described the additions as follows:

The building has four car trailer wheels installed 1.5m in from each end. Galvanised steel boxed section with a 5 stud hub is connected to the steel sub frame, extending some 600mm back from the outside of the building, with this being connected to the building via M10 bolts to the angle steel at the timber sub frame. Looking underneath [the structure], the hubs can be removed via a light gauge quick release pin.

There is no tow bar on-site, but has two hitch eyes at the east elevation, with this flat steel connected back to the wheel hub construction. The flat bar is connected to a right angle which is bolted to the timber sub frame with M10 bolts @ 0.2m centres.

[The owner] has installed tri board covers with shadow clad ply lid to the wheels. These have a slot to the back of them, to be removed and are screw fixed to the [structure].

The [structure] is still sitting on timber packers at regular intervals, same as per the first site visit, in turn the trailer wheels and hubs installed are dug into the ground 0.150 for these to be installed. ...

... [The owner] explained on site that there are two layers of strang floor flooring with polystyrene insulation sandwiched in-between.

2.6.3 The file note stated that the officer did not believe the flooring structure would be strong enough to fully support the weight of the building on the additional steel hubs installed once raised from the timber sub frame it was sitting on.

3. The submissions

3.1 The Ministry received an application for a determination on 20 April 2017. The authority stated that it 'did not include the construction of the building in the notice to fix as it was unclear where the [structure] was constructed.' The authority also noted that the owner had stated his intention to construct similar structures 'on an industrial scale', and that the authority was seeking a determination on 'whether the structure in its current state is exempt building work under the Building Act'.

3.2 The owner did not acknowledge the determination application and did not provide a submission in response.

3.3 A draft determination was issued to the parties for comment on 29 May 2017.

3.4 By email on 26 June 2017, the authority advised it did not intend to make a further submission on the matter.

3.5 The owner responded to the draft determination with a submission on 3 July 2017, providing a background to the events, and further information on the construction – I have incorporated relevant information into paragraph 2.4.

- 3.6 It was the owner’s belief that a “moveable hut” with wheels on it would not meet the definition of a building under the Act, and the owner stated this belief was based on discussions with the authority and the Ministry. The owner advised he had now ‘set up a factory to build houses and also these units’.

4. Discussion

4.1 Whether the structure is a building

- 4.1.1 For a territorial authority or building consent authority to be able to exercise its powers under the Act the structure must fall under the definition of a building under section 8 and not be excluded under section 9.

- 4.1.2 The definition of “building” in section 8 includes both permanent and temporary structures, as well as moveable and immovable structures:

(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; ...

- 4.1.3 Based on the approach taken in the High Court⁴ and upheld in the Court of Appeal⁵, the first test in this case is to establish whether the structure is a vehicle. I have also considered this issue in previous determinations⁶, and the process to follow is now well-established.

- 4.1.4 I must first consider whether the structure 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:⁷

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.

- 4.1.5 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 *Te Puru Holiday Park Ltd v Thames Coromandel District Council*, HC Hamilton CRI-2008-419-25, 11 May 2009, Duffy J

⁵ *Thames-Coromandel District Council v Te Puru Holiday Park Ltd*, [2010] NZCA 663

⁶ See for example Determinations 2016/011 and 2016/019.

⁷ Oxford Dictionary of English, 3rd ed., Oxford University Press, 2010.

- 4.1.6 The relevant requirements of the definitions of a vehicle, 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. It may be a motor vehicle powered by combustion engine or other self-propulsion, or is a trailer.
- 4.1.7 For a structure to be a vehicle it must have characteristics of a vehicle and durability of construction in terms of its capacity to be used as a vehicle.
- 4.1.8 I consider that just because a structure has some features of a vehicle, such as wheels, it does not necessarily make it a vehicle for the purposes of the Act. The distinction between a building that is moveable and a vehicle is that a vehicle is used for transporting people or goods or must be powered by some form of combustion engine or self-propulsion. Simply because a structure is capable of being moved does not mean that it falls to be considered a vehicle under the Act.
- 4.1.9 While caravans and mobile homes perform a similar function as a dwelling, in that they are used for sleeping accommodation and may contain sanitary facilities, they have all the characteristics of a vehicle and are relocated from site to site, meaning they only fall within the Building Act if they meet the test under section 8(1)(b)(iii) by being both immovable and occupied on a permanent or long-term basis.
- 4.1.10 In this case, while the structure has been fitted with wheels and a drawbar, and it may be “moveable” in that it may be able to be moved on its wheels, it has very few other characteristics which are indicative of it being a vehicle; it has no suspension, chassis, brakes, lights etc. It is not a motor vehicle powered by an internal combustion engine or self-propelled, and the owner has provided no evidence of it being used a vehicle, rather the owner has confirmed that its primary use is as a dwelling. I conclude therefore that the structure is not a vehicle in the context of section 8 of the Act.
- 4.1.11 If something is not a vehicle, the question of whether it is to be treated as a building falls to be considered under the main definition of building in section 8(1)(a) of the Act. Given the nature of the construction and its use, I consider that the structure falls under the definition of a building under the Act as a “moveable structure”.

4.2 The notice to fix

- 4.2.1 At the time the authority issued the notice to fix, the structure did not have wheels attached and it more naturally met the definition of a building. In the discussion above, I have concluded that even with the wheels etc. now attached, the structure has remained a building as defined in section 8 of the Act.
- 4.2.2 However, the authority has not identified the building work it believes does not comply with the Building Code and has incorrectly referred to the relocation of the building as a contravention of section 40(1). Accordingly, I conclude the authority has incorrectly exercised its powers in issuing the notice to fix for the particulars of non-compliance/contravention listed.
- 4.2.3 I make the following comments with regard to the wording and content in the notice to fix:
- There is reference in the notice to fix to the requirements under section 17 for all building work to comply with the Building Code; however the notice does not identify those building elements that the authority considers do not comply with the Building Code or the clauses of the Building Code that have been breached.

- The contravention of section 40 references only the relocation of the structure being done without building consent. The relocation of a building onto a site does not constitute building work and this reference should not be included as a breach in the notice to fix⁸.
- The construction of the structure, whether it was carried out in the district or elsewhere, was not exempt⁹ from the requirement to obtain building consent as it is over 10 square metres, and contains sanitary fixtures, sleeping accommodation and cooking facilities. If no building consent was sought, the owner should now apply for a certificate of acceptance to regularise the building work.

4.2.4 In order for the authority to be able to issue a notice to fix to the owner for building work, the authority must be satisfied that the owner is a specified person under section 163 of the Act – meaning that the authority must be satisfied that the owner carried out the building work or supervised the building work and that the building work does not comply with the Act or its regulations.

4.2.5 If the authority is of the belief that the building work that has been carried out by the owner does not comply with the Building Code, the authority should identify those building elements it considers do not comply and the relevant clauses of the Building Code.

4.2.6 Likewise, if the authority is of the belief that the construction of the structure was carried out by the owner without a building consent, and given that I have concluded the building work was not exempt under Schedule 1, the notice to fix can be issued for a contravention of section 40(1) of the Act.

4.2.7 I leave the matter of modifying and reissuing the notice to fix to the authority to attend to in due course.

5. The decision

5.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the structure is a building as defined by section 8 of the Act and I confirm the authority's decision to issue the notice to fix. However, the authority incorrectly exercised its powers of decision in issuing the notice to fix for the particulars of non-compliance/contravention as described in the notice.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 25 July 2017.

John Gardiner
Manager Determinations and Assurance

⁸ See for example Determinations 2015/026 and 2014/030

⁹ Clause 3 of Schedule 1 to the Act sets parameters for small detached buildings which may be exempt from the requirement for a building consent

Appendix A: The legislation

A.1 The 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; ...

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.

(2) A person commits an offence if the person fails to comply with this section.

(3) A person who commits an offence under this section is liable on conviction to a fine not exceeding \$200,000 and, in the case of a continuing offence, to a further fine not exceeding \$10,000 for every day or part of a day during which the offence has continued.

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;

...

(3) However, if a responsible authority considers that it is more appropriate for another responsible authority to issue the notice to fix, it must—

(a) notify the other authority that it holds that view; and

(b) give the other authority the reasons for that view.

(4) The other responsible authority referred to in subsection (3) must issue the notice to fix if it considers that this section applies.