MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HIKINA WHAKATUTUKI

Determination 2022/001

The authority's proposal to issue a notice to fix and whether a unit at 108 Butchers Road, Kaiapoi is a vehicle or a building

Summary

This determination considers whether a structure that has some features of a vehicle is a "building" under section 8 of the Building Act, and therefore whether the authority can issue a notice to fix for construction of the unit without building consent. The determination discusses factors to consider when deciding if the unit is a "vehicle", and if it is "immovable" and "occupied on a permanent or long-term basis".

1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Act[1] ("the Act") made under due authorisation by me, Katie Gordon, National Manager Building Resolution, Ministry of Business, Innovation and Employment ("the Ministry"), for and on behalf of the Chief Executive of the Ministry.

1.2 The legislation which is discussed in this determination is contained in Appendix A. In this determination, unless otherwise stated, references to "sections" are to sections of the Building Act 2004 and references to "Clauses" are to Clauses in Schedule 1 ("the Building Code") of the Building Regulations 1992.

1.3 The parties to the determination are:

- Waimakariri District Council ("the authority"), carrying out its duties as a territorial authority or building consent authority; the authority is the applicant in this determination
- Mindspace Solutions Ltd, trading as Cosy Homes ("the owner"), who was the owner of the unit at the time the application for determination was made.

1.4 In this determination, because the dispute turns on whether or not the work carried out was the construction of a building or a vehicle, I have used the term "the unit" to refer to the construction as a whole.

[1] The Building Act and Building Code (Schedule 1 of the Building Regulations 1992) are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents and guidance issued by the Ministry, is available at www.building.govt.nz.

1.5 This determination arises from the authority's proposal to issue a notice to fix to the owner of the unit, on the grounds that the unit – as it presented – is a "building" as that term is defined in the Act, and the work to construct the unit was "building work" that required a building consent under section 40 of the Act and no consent was applied for or has been issued.

1.6 In the owner's view, the unit is a vehicle and falls outside of the scope of the definition of "building" in the Act, meaning, in the owner's view no building work was carried out and the authority is unable to issue a notice to fix in respect of it.

1.7 The matter to be determined[2] is whether the authority correctly proposed to issue a notice to fix for building work carried out without first obtaining a building consent. In deciding this matter, I must consider whether the unit as it presented at the time the authority proposed to issue the notice to fix is a "building" as defined by section 8 of the Act.

1.8 In the time since the application for determination was made, the unit has been relocated to a different site. In order to determine the matter, as described above, I have considered the unit as it presented at the time the authority applied for this determination. The owner has provided information about the relocation of the unit, which I have taken into account in considering whether the unit as it presented when the authority proposed to issue the notice to fix was immovable.

2. The unit

2.1 Information about the unit that is the subject of this determination has been sourced from:

- the authority's application, including a submission and a report dated 2 August 2019 by an infrastructure and construction consultancy company engaged by the authority ("the authority's consultant")
- the authority's further submissions
- the owner's submissions, including a producer statement[3] for a similar unit, prepared by a certified engineer who was engaged by the owner ("the owner's engineer")
- the owner's website[4].

2.2 At the time the authority proposed to issue a notice to fix, the unit was located on the owner's property, which is a rural property on the outskirts of Kaiapoi in Canterbury district.[5] The property is the location of the owner's business, which manufactures various models of transportable units (the "transportable units"), similar to the one that is the subject of this determination. The property contains several other buildings, including a house and a large hangar-style building where these transportable units are initially constructed before being moved into the open.

[2] Under sections 177(1)(b) and 177(2)(f) of the Act.
[3] A Producer Statement is a professional opinion based on sound judgement and specialist expertise. They are used as one source of information which an authority may rely on to determine whether there are reasonable grounds to conclude that the work complies with the Building Code.
[4] http://www.cosyhomes.co.nz/ 22 August 2019 (accessed by the authority), and 5 November 2019, 3 February 2020 and 12 January 2021 (accessed by the Ministry).
[5] The unit has subsequently been moved to another location.

2.3 The unit as it presented was positioned against the western boundary of the property. The parties have not advised when the unit was placed there, although based on satellite images provided in the application, the unit appears to have been in place for at least two years before the application for determination was made.

2.4 The owner's website shows that it manufactures three models of transportable units, described as: standard/basic, premium, and deluxe. All of these models are described on the website as "portable accommodation". The website also states that the transportable units:

- have been designed to provide a home
- "have the added flexibility of being transportable, with stand-alone adjustable concrete feet removing the need for concrete foundations"
- are "ideal for first home buyers, retired couples, holiday homes, guest accommodation or rental investment"
- are "built to [the standard of the] Building Code by licensed builders".

2.5 The three models on the website are given to show the different features the transportable units might have, at different price brackets, and that the specifications of the transportable units can be customised.

2.6 Some aspects of the unit's construction are common for all of the transportable unit types[6]. These include the sizes (12.1 m x 4.2 m for a two-bedroom unit[7], or 9.1 m x 4.2 m for a one-bedroom unit) and the construction of steel chassis the transportable units are built on.

2.7 The owner has confirmed the unit that is the subject of this determination was built in 2016. It is constructed in largely the same manner as the "premium" model as described on the owner's website (see Appendix B), except the unit's axles are welded to the chassis (instead of bolted), it has windows which differ to those in the premium model and it does not have exterior skirting, a veranda or deck. It is a two-bedroom variant which is 12.1 m x 4.2 m[8] (which equates to roughly 50 m^2). Based on the information provided by the owner's engineer, it is approximately 2.4 m high.

2.8 The chassis is formed from two 150 mm high PFC[9] beams running longitudinally, with 75 mm x 50 mm x 3 mm RHS[10] joists laid transversely on top of them. The edge of the chassis is enclosed by a folded metal flashing. The subfloor is formed from the joists, which are overlaid with an insulated panel, then sheet flooring, which are fixed by screws to the joists.

2.9 The walls and roof of the unit are constructed using structural insulated panels. The wall panels are laid horizontally on the chassis flashing, and on top of each other - joined together with adhesive and sealant. The ends of the panels are riveted into aluminium channels, as well as at door and window frames. The roof cladding of the unit is profiled metal.

[6] http://www.cosyhomes.co.nz/pricing/ accessed 5 November 2019 and 3 February 2020.
[7] The owner's website refers to this size as a "Mega Tiny Home".
[8] The unit is wider than this when you take into account the heat pump unit installed on one side of the unit.
[9] Parallel Flange Channel or PFC is a C-shaped steel beam.
[10] Rectangular Hollow Sections or RHS are sections of rectangular steel with a hollow core.

2.10 The unit has a kitchen[11], bathroom, wardrobe, cupboards, wall linings, flooring, lighting and electrical[12], plumbing, and gas hot water. Additional features include a heat pump, heat recovery ventilation system, steps and eight adjustable reinforced concrete feet.

2.11 The unit, as it presented, sat on eight concrete feet. The owner's website says these:

> …cradle the home and do not attach to the ground – the home can be lifted off the feet with no detaching required whatsoever, or the feet can also be removed while the home is still in place.

2.12 The authority's consultant describes the feet as "steel U-brackets freely sitting on concrete blocks"; however, a drawing provided by the owner contradicts this description. In the drawing, the feet each consist of a 135 mm long scaffolding tube that runs vertically through the centre of two stacked concrete pads, with a scaffolding U-head jack sitting inside the scaffolding tube. The U-bracket jacks are height adjustable. They are used to cradle the chassis, and lift and support the unit. As it presented, the owner says the chassis was not secured to the U-bracket jacks (although I note it has been designed so it can be), but there is a layer of rubber in-between them to prevent the chassis sliding on the feet.

2.13 The unit has four wheels and two axles and a retractable towbar. As it presented, the wheels on the unit had been removed by the owner "both for safekeeping… and to prevent them from perishing over time due to direct sunlight". The wheels were later reattached, and the owner has made a submission about preparing the unit for its relocation (see paragraph 4.35).

2.14 The owner's website also states, "anything over 2.55m wide cannot be legally towed or driven on [public roads], so the [transportable units] have to be transported on the back of a truck."[13] There is a photo on the website showing a transportable unit being transported as a load on a hiab truck and trailer unit[14]. Because the transportable units cannot be legally towed on public roads, the website goes on to say "…our wheels and towbar are only for moving the home off-road (e.g. some movement around the site)." The website states (in its FAQ section) that the transportable units are "designed to be towed with a tractor". The owner has stated by submission that they can be towed with a tractor on the road at up to 25 km/h "with constraints" (e.g. visibility markings, pilot vehicle, etc). There is a photo on the website which shows a transportable unit being towed by a tractor out of the hanger where the transportable units are constructed. The owner has also provided video footage of this and of another transportable unit being towed by a tractor in a paddock.

2.15 As it presented, the wastewater and sewage drainage from the unit was connected to the mains sewage disposal; the connection is made with a rubber flexible boot coupling. The stormwater drained from the unit via downpipes and was diverted away to an open paddock. The unit has an outdoor gas bottle and heat pump unit and, as it presented, a black polyethylene water pipe for the supply of potable water

[11] The owner submits the unit has a caravan-style oven but does not say whether it was installed in the unit at the time the authority proposed to issue the notice to fix or whether it was installed subsequently.
[12] The owner has submitted a photograph which indicates the unit had a valid Warrant of Electrical Fitness at the time the authority proposed to issue a notice to fix.
[13] The owner submits that "[this statement] is an oversimplification for visitors to [their] website".
[14] A hiab truck and trailer unit consists of a truck mounted with a crane, which is used for the loading and unloading of freight, and a trailer, on which freight is loaded and transported.

and a caravan electricity lead plugged into a mains electricity box located behind the unit. According to the owner, these services can be easily and quickly disconnected by a layperson.

3. The background

3.1 The authority advises it first became aware of construction activities on the owner's property in April 2018, and the authority had received a complaint[15] that units on the site were being occupied as accommodation "without the necessary building or resource consents". The authority met with the owner at the property on 12 November 2018 and was shown around one of the transportable units then under construction.

3.2 According to the authority's submission that accompanied the application for determination, the authority sent an advisory letter and notice to fix to the owner in respect of a transportable unit under construction at the property. The owner responded in an email dated 1 March 2019 that the transportable unit had been moved off the site. The authority advises that the owner also asserted in the email that the transportable units it constructed did not require building consents as they were vehicles. I have not seen a copy of the notice to fix or the correspondence relating to it. On 4 March 2019, the authority again visited the owner's property and observed the unit that is the subject of this determination. The authority used aerial photography to determine that the unit had been placed on the site sometime between 2016 and 2018. No building consent had been granted in relation to its construction.

3.3 The authority's consultant was commissioned to examine and report on the transportable units. They carried out a site visit at the owner's property on 2 April 2019, at which the owner was present. During the site visit, the authority's consultant inspected one nearly completed unit and the chassis of another unit (I note these units are not the unit that is the subject of this determination). The authority's consultant provided the authority with a report, in which they described the construction of the transportable units, the method of transporting them, and their opinion as to the transportable units' compliance with Clause B1 Structure of the Building Code.

3.4 The authority applied for a determination about whether the unit is a "building" for the purposes of the Act, and this was received by the Ministry on 28 August 2019. The application also sought a determination about another proposed notice to fix that the authority intended to issue with respect to the ongoing construction of transportable units by the owner. After discussions with the Ministry, this determination was limited to the unit currently on site at the owner's property and a separate determination considers the construction of other transportable units.

[15] The authority's submission with its application for determination does not indicate a date when this complaint was received.

4. The submissions

The authority's initial submission

4.1 The authority made a submission with its application for a determination. In this submission the authority stated it was seeking a determination to resolve the status of the unit, and whether it is a "building" for the purpose of section 8 of the Act. The authority's ability to issue a notice to fix for the unit depends on whether the unit comes within the section 8 definition of "building" and, that being so, the work carried out to construct the unit being "building work" as defined in section 7 of the Act.

4.2 The authority described the background to the matter and elements of the unit's construction, and confirmed it understood the unit was permanently located at the site, but it had not received an application for a building consent or a certificate of acceptance for its construction.

4.3 The authority also confirmed it had seen a video of a transportable unit being towed at walking pace by a tractor. The authority stated its opinion that the unit in question does not appear to have the ability to be towed on any road or moved any further than around a flat building site, and there is no suggestion the unit is "capable of any transport purpose" and it "would not fit within a lane on a road".

4.4 The authority's submission goes on to provide:

- the definition of "building" in section 8 of the Act,
- the Court of Appeal's approach for interpreting section 8(1)(b)(iii) in *Thames-Coromandel District Council v Te Puru Holiday Park Ltd* [2010] NZCA 663 ("*TCDC v Te Puru*"), and
- a list of determinations which considered the application of section 8(1)(b)(iii).

4.5 The authority then states its position that the unit does not constitute a "vehicle or motor vehicle" for the purposes of section 8(1)(b)(iii), but instead comes within the definition of "building" under section 8(1)(a). However, if the unit is found to be a "vehicle", the authority submits, alternatively, it nonetheless comes within the definition of a "building" by being a vehicle that is both "immovable and occupied on a permanent or long-term basis" under section 8(1)(b)(iii).

4.6 With respect to the question of whether the unit is a "vehicle", the authority referred to Determination 2017/058 and discussed the features of the unit that, in its opinion, meant it could not be a "vehicle". The authority concluded the unit was not a "vehicle or motor vehicle" as it was not:

> …used to transport people or goods, nor [is it] capable of doing so. In any event, the durability of its construction makes the structure insufficient for use as a "vehicle" for anything more than short distances.

4.7 With respect to the question of whether the unit is "immovable", the authority referred to Determinations 2006/072, 2015/044 and 2015/067. The authority then discussed the features of the unit in question that, in its view, made it immovable. The authority concluded the transportable units manufactured by the owner were "designed to become immovable" when "used for their intended purpose". The basic unit was not capable of being towed at all, and for the other models, "it is not

clear that [they] are capable of being towed at any substantial speed or over any substantial distance". The authority concludes:

> moving [the unit] off the property is likely to prove extremely difficult due to the particular features of the [unit], which effectively render it "immovable".

4.8 The authority also referred to Determination 2006/072 regarding what was meant by "permanent or long-term occupancy". The authority then concluded the transportable units manufactured by the owner were "designed and intended to be lived in on a permanent or long-term basis". The authority based this opinion on how the transportable units were marketed, their fit out, sanitation and sleeping facilities. With respect to the unit that is the subject of this determination, the authority stated it understood the unit was permanently occupied but did not give any details of by whom and in what capacity.

4.9 With its initial submission, the authority provided copies of:

- a screenshot and photos of transportable units from the owner's website[16]
- photos of the unit that is the subject of this determination taken during the authority's March 2019 site visit
- a report by the authority's consultant dated 2 August 2019, and its attachments including the owner's riveting specification for its transportable units.

The owner's initial submission

4.10 The owner emailed the Ministry in response to the application, setting out the view that the application for determination should be declined under section 179(2)(c) on the basis that other determinations had considered similar sorts of construction where the determination turned on the interpretation of "building" under section 8. The Ministry advised the owner the application would not be declined on that basis because, while a question of interpretation may be common to several applications, the facts of each case must be considered on a case-by-case basis.

4.11 The owner made no further submissions at that time in response to the application for determination or in support of the view that the construction of the unit was not building work.

4.12 On their website the owner has written two articles[17] dealing with the issue of whether the transportable units it manufactures require a building consent, and the interpretation of various aspects of section 8, including whether the transportable units are buildings, vehicles, immovable or permanently occupied. The owner's comments in their further submissions indicates these articles still represent their views on these matters.

4.13 In the article entitled *Do portable buildings need a Building Consent?*, the owner refers to case law[18] and previous determinations[19], and provides conclusions as to how they should be taken into account when assessing whether building legislation

[16] http://www.cosyhomes.co.nz accessed on 22 August 2019.
[17] Articles are entitled '*What council consents or permits might I need?*' (posted 17 April 2018) and '*Do portable buildings require a Building Consent?*' (posted 27 May 2018), sourced from the Cosy Homes website on 8 March 2021: http://www.cosyhomes.co.nz/faq/
[18] That being, a Court of Appeal decision in *TCDC v Te* Puru, and a High Court decision in Te *Puru Holiday Park Ltd and Ors v Thames Coromandel District Council* CRI-2008-419-000025.
[19] Determinations 2017/065; 2016/019; 2015/044; 2014/025.

applies to structures such as the transportable units. In the article the owner asserts, by way of a summary, that a structure does not need a building consent if:

> It is a vehicle (i.e. has wheels, a towbar, and is movable), and **one** of the following is true:
>
> a. The vehicle is not fixed to the ground in any way that needs a professional tradesperson to detach it, OR
>
> b. The vehicle is not permanently occupied.

4.14 In the other article entitled *What Council Consents or Permits Might I Need?*, the owner discusses consents that are relevant to structures such as the transportable units, which include building consents under the Act and resource consents under the Resource Management Act 1991 ("the RMA"). In this article the owner reiterates their view about circumstances where they believe a building consent is not required. In addition, the owner summarises the laws in the RMA as they believe apply to supplying of services (e.g. electricity and sewerage). The article says the owner can provide solutions so building consent and resource consent may not be needed for their transportable units.

The first draft and submissions in response

4.15 A first draft of this determination was issued to the parties on 14 February 2020 to give the parties an opportunity to comment and to identify any errors or omissions. The draft concluded the unit fell within the general definition of a "building" under section 8(1)(a) as a movable structure intended for occupation by people.

4.16 On 19 February 2020, the District Court issued its decision on the appeal of Determination 2019/017, *Alan Dall v The Chief Executive of the Ministry of Business, Innovation and Employment* [2020] NZDC 2612 ("*Dall*"). The issue involved a tiny house constructed on a trailer with wheels, and the matters considered by the court are relevant to this case.

4.17 The Ministry gave the parties an opportunity to consider this decision, seek advice and make further submissions.

The authority's submission following the first draft

4.18 The authority made a submission on 7 April 2020, restating its view that the unit which is the subject of this determination is a "building" for the purposes of the Act, and went on to say it is "an example of a building that is designed to be able to be equipped with wheels solely in an attempt to circumvent the provisions of the Building Act".

4.19 The submission provides a summary of the District Court decision in *Dall*. In particular, the authority discusses the approach taken by the court to decide whether the Ministry was correct in that case to find that a structure was not a "vehicle or motor vehicle" under section 8(1)(b)(iii) but, rather, a "building" under section 8(1)(a). The authority observed that the District Court concluded the Ministry had erred in finding the unit considered in that case was not a "vehicle" for the purposes of the Act. This was because the Ministry had earlier found it was a vehicle under the definition in the Land Transport Act 1998 ("the LTA") and then "incorrectly discounted the weight to be given to the LTA definition".

4.20 The submission goes on to compare the approach taken by the District Court in *Dall* with that in the first draft of this determination. The authority submits that, unlike

the determination before the court in *Dall*, the first draft of this determination "does not find that the natural and ordinary meaning [of 'vehicle'] should be preferred over the LTA definition".

4.21 The authority submits to determine whether the unit in question is a "vehicle":

> …the decision-maker must consider both the natural and ordinary meaning *and* the LTA definition. If the decision-maker finds the unit is a vehicle (under either definition), the second consideration is whether the unit is immovable and occupied on permanent or long-term basis. If both those elements are satisfied, then the unit is a building. If not, then the decision-maker must go on to consider whether the general definition under section 8(1)(a) is satisfied.

The owner's submissions following the first draft

4.22 The Ministry received further submissions from the owner on 28 February 2020, 4 and 20 March 2020.

4.23 The submission of 28 February 2020 discusses the first draft determination, the report by the authority's consultant and the authority's various references to previous determinations.

4.24 This submission clarifies aspects of the unit's construction, the various connections to services, and how the transportable units are typically transported or towed – I have included details in the description of the unit in this determination. The submission also provides commentary, largely based on earlier determinations, as to how the relevant provisions should be applied in this case. The owner maintains the unit is not immovable and gives reasons for this relating to its construction, the ease with which services can be disconnected, and the features that enable it to be towed.

4.25 More particularly, the owner submits:

- in their view, they "obeyed the Act as [they] interpreted [it] at the time"
- they thoroughly researched prior determinations[20] when they designed the transportable units so that they would not fall with the definition of "building" in the Act
- in reference to section 8(1)(b)(iii), the unit is a "vehicle" that is not "immovable" because they have designed it so it is "capable of being towed" or has "the capacity to be used as a vehicle"[21]; therefore, the owner says the unit is not a "building"
- the unit is towable by a tractor; they deliberately incorporated towing into the production process for their transportable units, and "[they] have videos of [transportable units] being towed by a tractor at walking pace and faster"
- there is no legal precedent which requires the unit must be capable of being towed either:

[20] To support their view, the owner refers to determinations 2014/025, 2015/044, and 2017/058.
[21] The owner says the first draft of this determination "unfairly narrows the scope of vehicle, with no legal justification" by incorrectly quoting Determination 2017/058 as saying "used as a vehicle" when the determination in fact says "capacity to be used as a vehicle".

  - at any substantial speed or over any substantial distance;[22] on the contrary, the owner says in Determination 2015/044 "slow tractor transport is accepted as qualifying"
  - on a public road; rather, the owner says is it sufficient if the unit is capable of being towed on the property where it is situated[23]
- in any event, the transportable units can be towed on public roads according to road transport legislation as long as certain precautions are taken (e.g. visibility markings, pilot vehicle, etc) and they say this is supported by reasoning in an earlier determination[24]
- the need for a suspension is removed because the transportable units are "limited to under 25 kmph"
- the unit has "a very strong steel chassis" and floors, walls, and roof consisting of structural insulated panel "which is also very strong"; the owner says "the same design routinely gets PS1[25] and PS4[26] from structural engineers"
- there is "no known established precedent that wheels need to remain attached"; but there is precedent[27] "that the unit has to have the 'capacity to be used as a vehicle' – and it does with the simple task of re-attaching the wheels"
- the unit is designed so it has no features that would make it immovable for the purposes of section 8(1)(b)(iii)
  - "wastewater and sewage drainage from the unit is connected to the mains sewage disposal", and "the connection is made with a rubber 'flexible boot coupling' that is… easily removed by a layperson by loosening a single screw"
  - the gas bottles, potable water and electricity are "easily disconnected by a layperson by loosening a single knob"
  - "the feet used to support [the transportable units] do not fix [the unit] to the ground"
  - none of the connections for the transportable units need to be removed by a qualified tradesperson[28]
- the authority has provided no evidence that the unit is immovable
- their objection to the authority's view that the unit is designed to become immovable when it is used for its intended purpose
- "just because a unit is designed or capable of being used on a long term basis does not mean it is used on a long term basis" and "even it is [in this case], this is irrelevant if [the unit] remains movable"

[22] In any event, the owner says the authority does not have any evidence the unit is not capable of being towed at any substantial speed or over any substantial distance.
[23] To support this view the owner gives examples of vehicles that are used off-road such as cherry pickers, scissor lifts and mining vehicles.
[24] Determination 2015/044, paragraph 4.3.
[25] Producer Statement – Design (PS1)
[26] Producer Statement – Construction Review (PS4)
[27] Determination 2017/058, paragraph 4.1.7.
[28] The owner says a unit must be considered not immovable if "none of the connections need to be removed by a qualified tradesman"; the owner says reasoning in Determination 2014/025, paragraph 4.3.3 supports this view.

- the authority's consultant "made numerous incorrect assumptions and therefore incorrect conclusions…", including their conclusion that the unit is a relocatable building that requires building consent[29]

4.26 The submission of 4 March 2020 contains a Producer Statement – Design ("the PS1") issued by the owner's engineer for a transportable unit being connected to foundations at a different address. The owner says the unit the PS1 was issued for shares the same core design as the unit that is the subject of this determination.

4.27 The submission of 21 March 2020 discusses the relevance of the PS1 issued by the owner's engineer to the assessment of whether the unit in this case is a "building" under the Act. More particularly, the owner says the PS1 shows the unit:

- "[has] been carefully designed and analysed and reviewed by multiple certified engineers to exceed Building Code standards"
- "can safely be lifted by their 4x lifting points. This therefore shows the [transportable units] are equally capable of being moved on their wheels…"

The second draft and submissions in response

4.28 On 28 October 2020, the District Court issued its decision on the appeal of Determination 2019/036, *Marlborough District Council v Molina Carolin Bilsborough and Glynn James Bilsborough* [2020] NZDC 9962 ("*Bilsborough*").

4.29 A second draft of this determination was issued to the parties on 19 March 2021, and I gave the parties an opportunity to consider the *Bilsborough* decision, seek advice and make further submissions. The second draft concluded the unit is a "building" under the definition in section 8(1)(b)(iii) and, therefore, subject to regulation under the Act and the authority was correct in proposing to issue a notice to fix.

4.30 The authority accepted the findings of the second draft without further comment. The owner responded and made further submissions on the matter.

The owner's submissions following the second draft

4.31 The Ministry received further submissions from the owner on 2 and 18 August 2021 and 17 September 2021.[30]

4.32 The submission of 2 August 2021 discusses the second draft determination, provides further information relating to the unit, which has been incorporated into the description of the unit, and puts forward further arguments in support of their position.

4.33 More particularly, the owner says:

- "the unit had been standing unoccupied for a significant period of time (numerous months)" while the second draft determination was being prepared
- the "unit was not occupied at the time the determination application was made, and it remained unoccupied for many months"; for this reason, the

[29] By submission, the owner highlights observations and findings of the authority's consultant that the owner considered to be incorrect; the owner provides information about the unit to support their critique of those observations and findings.
[30] I note these submissions to some extent reiterate information and arguments made in earlier submissions by the owner.

unit should not be considered to be occupied on a permanent or a long-term basis for the purposes of section 8(1)(b)(iii)

- "it is not appropriate to judge occupation on what type of occupation [the unit] is designed for – occupation must be judged on actual use"
- it "is a huge assumption" to say the unit is designed to take standard household furnishings and appliances, and not furnishings and appliances which are purpose made for caravans; the unit has an oven that came out of a caravan
- a flowchart attached to Determination 2019/017 should be used to determine whether the unit is a "building"; the owner provides in this submission their reasoning as to how the flowchart applies to the facts in this determination and why this establishes that the unit is not a building
- the purpose of the Act not to endanger health should be taken into account (e.g. when considering whether to grant a discretionary exemption under clause 2 in Schedule 1 of the Act)

4.34 The owner provided a photograph of a Warrant of Electrical Fitness[31] ("WOEF") which they say was obtained for the unit. As it expired on 1 December 2020, it is likely that this WOEF would have been valid at the time the authority proposed to issue the notice to fix.[32]

4.35 The owner says that – sometime after the authority proposed to issue the notice to fix – the unit:

- has had "some improvements to increase its interpretation as a movable vehicle (e.g. re-attached the wheels)"[33] and "this changes the interpretation of 'immovable'"
- it takes a layperson "a total of five minutes" to disconnect the unit from the services and it was disconnected from all services in a matter of minutes without a qualified professional
- was moved to a new location[34]

The owner provided photographs in support these statements, but did not provide a complete account about what they did or the time it took to prepare the unit for relocation or any information as to how the unit was moved to the new location (e.g. whether it was towed or/and transported on a hiab truck and trailer unit).

4.36 The owner says, "Once [they] made the improvements mentioned earlier, the move was quite simple…" and by moving the unit to the new location, they have demonstrated the unit can be readily moved.

4.37 The owner also provides further commentary as to the RMA and how, in their view, it applies to the unit and how the authority should exercise its powers in relation to the RMA and the Act.

[31] A current WOEF is required under the Electricity (Safety) Regulations 2010 before a vehicle, relocatable building or pleasure vessel can be connected to mains electricity.
[32] A WOEF is typically valid for a period of four years from the date of issue.
[33] In addition to re-attaching the wheels, the owner says the unit was subsequently registered and licenced as a trailer under road transport legislation and they have modified the adjustable feet so they can be chained to the unit above to provide additional wind stability (but that this step will not be taken until the authority agrees it does not "compromise the unit's vehicle status").
[34] The owner says the unit has subsequently moved from 108 Butchers Road, Kaiapoi to a property in Oxford.

4.38 The submission of 18 August 2021 particularises reasoning in the second draft determination that the owner disagrees with and puts forward an alternative way to apply the law to the circumstances. In the owner's view:

- I have incorrectly applied the principles of statutory interpretation in this case.
- There are statutory interpretation errors in the Court of Appeal, High Court and District Court decisions in *TCDC v Te Puru* (CA), *Te Puru Holiday Park Ltd and Ors v Thames Coromandel District Council* CRI-2008-419-000025 ("*Te Puru and Ors v TCDC*"), *Dall*, and *Bilsborough*.
- There is a way to interpret the Act "more clearly and consistently, based on over a century of case law".[35] In doing so, the owner also refers to the Interpretation Act 1999, various texts on legislative drafting, a Law Commission report[36], a Parliamentary Library research brief[37] and legislation (including the Act, the RMA, Land Transport Act 1998, Land Transfer Act 2017, Camping Ground Regulations 1985, Human Rights Act 1993, Heritage New Zealand Pouhere Taonga Act 2014).
- In any event, the unit is not "immovable" when considered in light of the facts and findings in *Dall*, *Bilsborough* and Determinations 2014/025, 2014/030, 2015/044, and 2017/065; for example, the owner says the "unit in question is identical to [the unit in *Dall*[38]] in every metric, except in a couple of places…".
- I have not complied with the principles of natural justice. More particularly, the owner says I have made "decisions based on speculation" and have "[failed] to provide evidence to support claims and decisions", and my decision is not impartial.
- I am determining this matter retrospectively, "in violation of the fundamental constitutional principles and values on New Zealand law and New Zealand Bill of Rights Act".

4.39 The owner raised other matters about the Ministry's role in the regulatory system that are outside the ambit of this determination.

4.40 In this submission the owner also says, "the unit at [another location] is the exact same unit as the unit [that is the subject of this determination]" and the "only significant difference is that the wheels have now been attached". I note this statement appears to be at odds with an earlier submission made by the owner.[39] The owner also says "[the unit] was easy to move", and this "is largely because it was designed to be moved - with a steel chassis, wheels and towbar etc and even welded-in lifting points". Again, the owner did not provide a complete account

[35] I address the owner's proposed statutory interpretation method in paragraph 5.7. In short, the owner says the correct way to interpret sections 8 and 9 is by focusing first on whether the unit comes within section 8(1)(a) – not section 8(1)(b)(iii) – and the term "structure" in section 8(1)(a) must be interpreted according to the definition of "structure" in the RMA.
[36] The Commission's Report, *Legislation Manual: Structure and Style* (R35), 29 March 1996.
[37] Parliamentary Library, *Tiny Houses in New Zealand*, October 2020.
[38] The unit in Dall was held to be a "vehicle" and not "immovable" and, therefore, not a "building" for the purposes of the Act.
[39] In their submission of 2 August 2020, the owner says: the unit has had "some improvements to increase its interpretation as a movable vehicle (e.g, re-attached the wheels)"; that "this changes the interpretation of 'immovable'"; and, "once [they] made the improvements mentioned earlier, the move was quite simple".

about what they did or the time it took to prepare the unit for the relocation or provide any information as to how the unit was actually moved to the new location.

4.41 The submission of 17 September 2021 included video footage of two transportable units being towed slowly on their wheels behind a tractor. It was unclear whether either of the units in the video footage was the unit which is the subject of this determination or whether the video footage was provided as an example of moving other similar units.

4.42 The owner also asks that I provide "a full analysis of the associated issues" including:

- Whether a unit like [the unit in question] is immovable.
- That the RMA definition of "structure" should be assessed in Building Act (8)(1)(a).
- As RMA definition of "structure" includes "fixed to ground", a thorough analysis of the extensive case law regarding "fixed to ground".
- Whether a unit like [the unit in question] is "fixed to ground".
- Consideration of the impacts of the above on other Legislation, as required in the Interpretations Act (sic).

5. Discussion: Is the unit a building?

5.1 The matter for determination is the authority's proposal to issue a notice to fix for the unit in question because, in the authority's view, its construction constitutes building work and required building consent. For the authority to issue the proposed notice to fix under the Act, the unit must fall within the definition of "building" under section 8 and not be excluded under section 9[40], and, if it is a building, the work to construct it[41] must not be exempt from the requirement to obtain building consent under Schedule 1 of the Act.

5.2 Therefore, I must turn my mind to whether the unit – as it presented – is a "building" for the purposes of the Act. If the unit is not a building, the Act does not apply and the authority cannot issue a notice to fix under the Act in relation to the unit.

5.3 The majority of the authority's initial submission revolved around the question of whether the unit was a "vehicle or motor vehicle". The authority contends the unit is not a "vehicle or motor vehicle", but asserts that even if it is, the unit would still be a "building" for the purposes of the Act as it is both immovable and permanently occupied under section 8(1)(b)(iii).

5.4 The Court of Appeal, the High Court, the District Courts and previous determinations have considered whether or not various structures with vehicular characteristics are "buildings" for the purposes of the Act.

What is a building under the Act?

5.5 Section 8 defines what a "building" means and includes in the Act.

[40] Section 9 Building: what it does not include
[41] Section 7 Interpretation: building work— (a) means work— (i) for, or in connection with, the construction, alteration, demolition, or removal of a building; …

8 Building: what it means and includes:

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

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

(b) includes – …

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

…

(4) This section is subject to section 9.

5.6 Section 9 defines what the term "building" does not include. I note for completeness the unit does not fall into any of the categories excluded from being a building in section 9.

5.7 One line of argument put forward by the owner is that the correct way to interpret sections 8 and 9 is by focusing first on whether the unit comes within the meaning of "building" according to section 8(1)(a). I note the proper approach has been established by the Court of Appeal, which is set out in paragraphs 5.11 to 5.15.

5.8 The owner also goes on to argue that for the unit to be a "building" it must be fixed to the ground, and that this aligns with the definition of "structure" in the Resource Management Act which provides "any building, equipment, device, or other facility made by people **and which is fixed to land**…" [my emphasis].

5.9 The argument that a building must be fixed to the ground was rejected by the District Court in *Christchurch City Council v Smith Crane & Construction Ltd* CIV-2009-009-12480, 19 February 2010 ("*Smith Crane*").[42] As in that case, it is not open to me to add words that are not in the relevant section. Further, as in *Smith Crane*, the approach proposed by the owner would "give rise to significant policy consequences, particularly in relation to the purpose of section 3 and the principles [in section 4] that are to be applied when performing functions or duties or exercising powers under the Act". On this basis I do not accept the owner's argument that for unit to be a "building" it must be fixed to the ground.

5.10 However, whether a unit is affixed to land is a factor that can be taken into account when determining whether a unit is immovable for the purposes of considering the criteria in section 8(1)(b)(iii). Whether the unit is immovable is discussed in paragraphs 5.24 to 5.56.

The Court of Appeal approach for applying sections 8 and 9

5.11 The Court of Appeal in *TCDC v Te Puru* provides a decision process that I must follow when determining whether a particular structure or unit is a "building" for the purposes of the Act or, otherwise, a "vehicle" which is not a building under section 8(1)(b)(iii) (and that being so, not subject to the Act).[43]

[42] See paragraphs [25] to [27].
[43] *TCDC v Te Puru* at [22].

5.12 Following *TCDC v Te Puru*, sections 8 and 9 are interpreted by focusing first on whether the unit comes within the meaning of "building" according to section 8(1)(b)(iii) and not, as submitted by the owner, section 8(1)(a).[44]

5.13 That being so, the first matter that must be considered is whether the unit is a "vehicle or a motor vehicle" ("the first limb"). If it is, then it is necessary to consider whether it is "immovable" and "occupied by people on a permanent or long-term basis" (together, "the second limb"). The unit must satisfy both criteria in the second limb, in order for that limb to be met.

5.14 If the unit meets both limbs, it is a "building" for the purposes of the Act. If it meets the first limb, but not the second (i.e., because the unit meets only one or neither of the criteria in the second limb), it is not a building.

5.15 If the unit does not meet the first limb (i.e. it is not a vehicle or motor vehicle), then section 8(1)(b)(iii) is to be put aside, and I must then consider whether the unit comes within the general definition of "building" in section 8(1)(a).

Is the unit a vehicle?

5.16 Neither "vehicle" nor "motor vehicle" are defined terms in the Act; that being so it is appropriate to consider the dictionary meaning:[45]

> vehicle –
>
> A conveyance, a form of transport.
>
> a. A general term for: anything by means of which people or goods may be conveyed, carried, or transported; a receptacle in which something is or may be placed in order to be moved.[46]
>
> b. Specifically a means of conveyance or transport on land, having wheels, runners, or the like; a car, cart, truck, carriage, sledge, etc.
>
> motor vehicle –
>
> A road vehicle powered by an engine (usually an internal combustion engine).

5.17 However, section 8(1)(b)(iii) of the Act explicitly includes the definitions of "vehicle" and "motor vehicle" in section 2(1) of the LTA.

> 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; …

5.18 In *Dall*, the District Court held that my interpretation of the term "vehicle" in Determination 2019/017 was incorrect by "preferring the Oxford definitions over the LTA definitions."[47] The court in that case went on to say the term "includes" in section 8(1)(b)(iii) "does not authorise excluding [the LTA definitions] entirely or replacing that definition with a definition from the Oxford dictionary."[48] The effect

[44] See *TCDC v Te Puru*, paragraphs [5] to [22], for the Court's reasoning as to why this is the correct interpretative approach.
[45] *Oxford English Dictionary Online.* Third Edition, June 2017; latest version published online March 2021.
[46] The owner submits that the unit will transport goods because when it is moved it will contains the owner's personal belongings.
[47] *Dall* at [28].
[48] *Dall* at [30].

of this decision is that, if something comes within the LTA definitions, then it must be considered a vehicle or motor vehicle for the purposes of the Act.[49]

5.19 In light of the *Dall* decision, I must apply section 8(1)(b)(iii) in a way which differs to that in the first draft of this determination.

5.20 I turn now to the question of whether the unit as it presented falls within the LTA definitions of "vehicle" or "motor vehicle".

5.21 To be a "vehicle" for the purposes of the LTA, the unit must be a contrivance equipped with wheels, tracks, or revolving runners on which it moves or is moved. To be a "motor vehicle" for the purposes of the LTA, the unit must be a vehicle drawn or propelled by mechanical power.

5.22 The unit has four wheels, two axles, a chassis, and a retractable towbar. It does not have its own means of propulsion and, instead, is able to be towed by a tractor. The unit's retractable towbar can be attached to a tractor and the unit moved under tow. I understand the unit as it presented sat on concrete feet and its wheels were detached but could be reattached[50] and the concrete feet removed.[51] It could be argued the unit with its wheels detached was not "equipped with wheels" and, therefore, is not a vehicle or motor vehicle according to the LTA definitions. However, in some circumstances it may be reasonable to find that a unit or structure is 'equipped' with wheels despite the wheels being detached, for example, when undertaking maintenance or repairs. In this case the owner submits that the wheels were detached for security reasons and to prevent them perishing, and that they were able to be reattached with ease. I am satisfied, therefore, that the unit falls within the LTA definitions of "vehicle" and "motor vehicle" and, as such, the unit is a vehicle and a motor vehicle for the purposes of section 8(1)(b)(iii).[52]

5.23 As I have established that the unit as it presented is a vehicle (and a motor vehicle) for the purposes of the Act, the next question becomes whether it is immovable and occupied on a permanent or long-term basis. Where both criteria in section 8(1)(b)(iii) are satisfied, the unit – as it presented – will be a "building" for the purposes of the Act.

Is it immovable?

5.24 The question of what would constitute an "immovable vehicle" for the purposes of section 8(1)(b)(iii) was discussed by the High Court in *Te Puru and Ors v TCDC*, where Duffy J stated:

> [17]…I consider that Parliament has used the description "immovable" to refer to something that **cannot readily be moved**. In this sense, **the movable character of an item is a question of degree**. Many structures that would ordinarily be regarded as permanent structures affixed to the land on which they are sited will also be capable of being moved. Many conventional houses, which no one would dispute are buildings, are capable of being moved to different sites. I do not consider, therefore, that when Parliament used the word immovable in s 8(1)(b)(iii), it meant to refer only to structures that were almost, if not impossible to move. It follows that derelict vehicles will meet the definition of a vehicle that is immovable. Should such vehicles

[49] In *Bilsborough* at [64] to [68] the court applied the same methodology used by the District Court in *Dall* to resolve the issue of whether a unit was a building.
[50] The wheels were reattached during the process of relocating the unit.
[51] These facts are relevant considerations in determining whether the unit was immovable.
[52] I do not need to consider whether the unit in this case falls within the ordinary meaning of vehicle or motor vehicle because, for the first limb to be met, the unit only need to fall within the LTA definitions of vehicle or motor vehicle *or* the ordinary meaning of those terms.

> come into permanent use by people for occupation, they will then qualify under s 8(1)(b)(iii).
>
> [emphasis added]

5.25 More recently in *Dall*[53], the District Court acknowledged that the LTA definitions of "vehicle" and "motor vehicle" are "very broad", but it considered the criteria in section 8(1)(b)(iii) guard against efforts to avoid the application of the Act.

5.26 The District Court in *Dall* considered what was meant by the term "immovable":

> [37] The term "immovable vehicle" appears to be a contradiction in terms. If something is a vehicle, it must necessarily be movable. Accordingly, I am of the view that, in this context, the term "immovable" must not be strictly interpreted as "incapable of being moved". Such an interpretation would render the word "immovable" meaningless.

5.27 The District Court in *Dall* acknowledged that in New Zealand it is commonplace for even quite large and multi-storey buildings to be moved or relocated from one site to another; and "almost every building or structure is capable of being moved in some way"[54]. It concluded:

> [39] Whether a structure is "immovable" in terms of s 8(1)(b)(iii) is therefore a matter of degree and will require consideration of, for example, the design, functional characteristics, and purpose of the structure. Ultimately, each case will turn on its own facts.

5.28 Therefore, just because a vehicle is capable of being moved, does not mean it cannot be "immovable" for the purposes of the Act. Put another way, to be considered not immovable, something more is required than simply the ability to be moved.

5.29 Assessing the movable character of the unit is far from straightforward; the assessment is "a matter of degree"[55] which requires me to weigh up all the relevant factors. In *Dall,* the design, functional characteristics and purpose of the unit, which was considered in that case, were all given as examples of factors that can be considered. These are not an exhaustive list so I can, therefore, consider any other factors I consider relevant in this case.

5.30 The District Court in *Dall* gave the following reasons for forming its view that the unit in that case was not immovable[56]:

- it possessed "wheels, chassis, axles, brakes, lights, drawbar and a trailer hitch"
- its design enabled it to be "attached to a vehicle and moved or relocated with relative ease"
- it had a "valid registration and warrant of fitness"
- it was "incapable of being fixed to the ground" and "incapable of being removed from its trailer"
- it was "self-contained in terms of all services…"

[53] *Dall* at [35]
[54] *Dall* at [38]
[55] *Dall* at [39]
[56] *Dall* at [44]

- there was evidence the unit has "previously been moved and relocated…" and although it was "not regularly moved from site to site, its design and purpose enabled relocation with relative ease"
- it was "indistinguishable in any way from a caravan", and in particular, like a caravan was:
  - "designed to be towed by another vehicle"
  - provided "the sort of living accommodation one might expect of a caravan"
  - "was capable of simply being parked and remaining attached to its towing vehicle", or "capable of being detached from that vehicle" and "supported by some form of props or foundation".

5.31 A factor the District Court in *Dall* did not consider relevant to the unit's movability was that, due to its dimensions, it had to comply with certain road safety requirements when it was moved.

5.32 Based on the factors in paragraph 5.30, the District Court in *Dall* concluded the unit in that case was "not immovable". However, the court stated that its finding would have been different if it had been "designed so that it could be moved off the wheels and fixed to the land".

5.33 The District Court in *Bilsborough* has also considered whether a structure was 'immovable' under section 8(1)(b)(iii). In making this assessment, the court concluded the characteristics of the structure in question "quite clearly distinguish it from the unit in *Dall"* for the following reasons:[57]

- "…the units have no suspension, shocks, springs, brakes, brake lights, turn signals, or number plates"
- "The units are not designed or intended to be towed any distance on a public road, and the units are required to be transported to the property by way of hiab truck and trailer, rather being towed"
- "…the axles, wheels and tow bars were more likely provided for the purposes of repositioning the structure on site", than for the relocation of the units
- "The units have no warrant of fitness, or certificate of fitness"
- "The drawbars have been removed, and would need to be reinstated if the units are to be towed"
- The units require "stabilisation on timber blocks", unlike the structure in Dall "which rested on wheels alone"
- "The units have been joined via a walkway which is bolted to one unit and riveted to the other, and would need to be deconstructed if the units were to be moved"
- "The units' superstructures are comparable to that of a building, and are not designed to transport goods or people"

[57] *Bilsborough* at [67].

- "…the units are not self-contained in terms of the services", with the kitchen and bathroom plumbing fittings needing to be "connected to the [authority's] drainage and sewage system."

5.34 A number of previous determinations have discussed whether or not structures that are vehicles for the purposes of section 8(1)(b)(iii) are immovable. In doing so, each of these determinations discuss factors they considered relevant to their particular assessment whether the unit or units in each case was or were immovable. I note I am not required to follow previous determinations, unlike a court which is bound by the decisions of a higher court in some circumstances.

5.35 I now consider whether the unit is "immovable" for the purposes of section 8(1)(b)(iii). My starting point is the statement by the High Court in *Te Puru & Ors v TCDC*, "that Parliament has used the description 'immovable' to refer to something that **cannot readily be moved**" [my emphasis added].

5.36 As the unit is a vehicle by virtue of its ability to move on its wheels, then it stands to reason the assessment as to whether the unit is "immovable" must be with respect to its ability to move on its wheels and not by some other means (e.g. transportation as a load atop a hiab truck and trailer unit).

5.37 Further, my assessment is of the unit as it presented at the time the authority proposed to issue the notice to fix.[58] That said, the fact the unit was subsequently moved from where it presented to another location (a distance of approx. 40 km by public roads) is a relevant consideration in terms of assessing the unit's towing capability and the preparations required before the unit could move under tow. However, as discussed in paragraphs 5.26 to 5.28, the simple fact the unit has been relocated does not establish in-of-itself the unit was readily moved or it is not "immovable" for the purposes of section 8(1)(b)(iii).

5.38 The unit as it presented had many characteristics in common with those considered relevant in *Bilsborough*, where the District Court held that unit was immovable:

- It had no suspension, shocks, springs, brakes, brake lights, indicators, or number plate.
- It is not designed to be towed on a public road.
- The features that allow it to be moved were likely provided for the purposes of repositioning the structure on site.
- It had no warrant of fitness or certificate of fitness.
- The wheels had been removed and would have needed to be reinstated if the unit was to be towed.
- The unit sat on feet, rather than on its wheels alone.
- The unit's design and construction are largely comparable to that of a building, and it is not designed to transport goods or people.
- It is not self-contained in terms of services, and was connected to mains sewage disposal.

[58] Being on or about 28 August 2019.

5.39 Below I discuss in more detail various factors that I consider relevant to my assessment whether the unit is "immovable". In doing so, I find it appropriate to make comparisons between the unit and caravans,[59] particularly how their design and functional characteristics provide for each to be moved by towing.

5.40 Caravans are designed for use as accommodation and to be readily moved by towing; they are suitable for most towing situations with minimal effort. They are made of lightweight materials and have aerodynamic features in their design. Caravans typically contain specialist furnishings and appliances which are built-in or permanently installed inside; this removes or reduces the need to secure these items before a caravan is towed. Caravans are designed to be used self-contained, although, many also have fittings to connect them to services (most commonly, mains electricity). When in situ, most caravans make use of stabilising legs which work in conjunction with their wheels. In some instances, these legs are affixed to the caravan and are retractable. Caravans can have an un-laden weight from about 800 kg, with heavier caravans being around 3000 kg. They can be towed by a wide range of motor vehicles including cars and utes, as long as the towing vehicle has sufficient towing capacity. They are capable of making frequent journeys and of travelling long distances. They typically have brakes (such as service, breakaway and/or parking brakes), lights (such as brake and indicator lights), and suspension systems. They are designed to be towable on public roads at or near the speed of other road traffic and must be registered, licenced and warranted under the land transport legislation for such use.

5.41 Like a caravan, the unit has been designed to be used for accommodation. Also, like a caravan, the unit has wheels (although these were not attached at the time the authority proposed to issue a notice to fix), axles, a chassis and towbar. The unit – as it presented – was connected to mains electricity via a caravan electricity lead and plug, and the owner says it has been fitted with a caravan-style oven. I understand the unit was also connected to the town water supply, and a reticulated sewerage system, with connections designed so they can be disconnected with relative ease[60].

5.42 However, the unit has significantly less towing capability than a caravan.

5.43 The unit is significantly heavier than the heaviest of caravans, weighing approximately 7500 kg un-laden, and must be by towed by tractor or similar. It does not appear to be fabricated using contemporary caravan manufacturing methods or materials which, among other things, provide caravans with the capability to be regularly towed on the road. The owner submits the unit has a "very strong steel chassis" with floors, walls, and roof consisting of structural insulated panel "which is also very strong". The owner says that "the same design routinely gets PS1 and PS4 from structural engineers"; however, I note the submitted PS1 (which was signed off for a similar unit) references AS/NZS1170:2002[61] and NZS3404:1997[62] which are not drafted for the construction of vehicles and do not take into account towing forces. The unit lacks a suspension system and, that being so, any undulations in towing surfaces would be transmitted to the unit. In the absence of

[59] In *TCDC v Te Puru* at [41] the Court of Appeal makes a distinction between a caravan and a small house.
[60] I also note the unit as it presented was not connected to a veranda, deck, steps or the like.
[61] Standards New Zealand & Standards Australia, *Australian/New Zealand Standard - Structural Design Actions*. This standard specifies general procedures and criteria for the structural design of a building or structure in limit states format.
[62] Standards New Zealand, *New Zealand Standard - Steel Structures*. This standard sets out minimum requirements for the design, fabrication, erection, and modification of steelwork in structures in accordance with the limit state design method.

information that addresses the durability of the unit under towing conditions, I am not satisfied the unit is designed and constructed to withstand towing forces in the manner of something akin to a caravan.

5.44 The unit – as it presented – also lacks other features commonly associated with caravans, including brakes, indicator and brake lights, number plates/registration, vehicle licence and a warrant of fitness ("WOF") or certificate of fitness ("COF"). The absence of these features significantly lessens the unit's towing performance and the towing uses it can be put to.

5.45 Further, unlike caravans, the unit is not designed or constructed to be legally used as a trailer on public roads. As it presented, the unit was not registered on the motor vehicle register and was not licenced or warranted for use on public roads. Even though the owner has subsequently registered and licenced the unit,[63] they would not be able to obtain a warrant or certificate of fitness for the unit because it exceeds the maximum dimensions under land transport legislation for a trailer. Under the *Land Transport Rule: Vehicle Dimensions and Mass 2016* the maximum legal width of a trailer is 2.55 m; the unit is at least 4.2 m wide (or wider if the heat pump unit which is permanently installed on the side of the unit is taken into account). Also, under road transport rules, trailers weighing over 2000 kg are required to be braked; I note the unit is not braked despite weighing approximately 7500 kg. There appear to be no defences or exemptions available under land transport legislation which would permit the unit, with no WOF or COF, to be towed on a public road whether by tractor or any other vehicle.[64] While I accept the unit – in a strictly mechanical sense – is no less movable simply for the fact it is subject to certain road transport requirements, I am of the view these requirements significantly limit the towing uses it can be put to in reality and that I can take this into account when assessing whether the unit is immovable.

5.46 Further, the unit is wider than most vehicle lanes and is claimed to travel at speeds no more than 25 km/h which is significantly slower than most road traffic. In simple terms, the unit is not designed and constructed in a manner for it to be towed any distance on a public road.

5.47 It is clear from guidance[65] published by Waka Kotahi NZ Transport Agency, the only way for the unit to legally be on a public road is atop another vehicle, transported as a secured over-dimension load. I understand the unit has been designed with this form of transportation in mind; the owner's website shows a transportable unit loaded on a hiab truck and trailer unit. The owner's website also provides pricing for transporting their transportable units throughout New Zealand in this manner, as long as there is a viable route.

5.48 For the reasons above, I am of the view the towing capability of the unit as it presented is exceedingly limited, particularly when compared with that of caravans. While the unit's design and functional characteristics might provide for it to be towed onsite behind a tractor and manoeuvred into position, and I understand the unit had been moved a short distance onsite from a workshop where it was initially constructed to the position it was in when the authority proposed to issue a notice to

[63] I note the registration and licencing of a trailer does not involve any assessment by Waka Kotahi NZ Transport Agency as to whether it can legally be driven or towed on public roads.
[64] For example, there does not appear to be any way for the unit to be legally towed on public roads under land transport legislation either as a permitted over-dimension trailer or as a specialist over-dimension trailer.
[65] https://www.nzta.govt.nz/vehicles/vehicle-types/vehicle-classes-and-standards/vehicle-dimensions-and-mass/tiny-homes/

fix, the unit is wholly inadequate for any other towing uses (e.g. re-location via public roads). It is evident to me the unit is not capable of being towed other than to a very limited extent, and it is intended to be transported as a load atop a hiab truck and trailer unit.

5.49 The owner says the unit has subsequently had its wheels re-attached and moved to a new location – approximately 40 km by public roads. However, the owner has not provided a complete account as to how this was achieved (e.g. whether the unit was relocated by towing or otherwise), despite having the opportunity to do so. That being so, the fact the unit has been relocated does not alter my view that the towing capability of the unit is exceedingly limited.

5.50 At this point, I would be satisfied that the unit – as it presented – is immovable. There are other factors that, in my opinion, lend further weight to this conclusion.

5.51 The unit is designed to sit on eight concrete feet when in situ. They are height adjustable which allows for the feet to be lowered and removed from the unit. I understand the unit's feet were not affixed to the ground below or the unit above in the way foundations are. I note that not being fixed to the land does not establish in-of-itself that a unit can be readily moved or that it is not "immovable" for the purposes of section 8(1)(b)(iii).

5.52 In this case the feet largely perform the same function as foundation in that they support the structure above and transmit its entire load directly to the ground below. In contrast, the stabilising legs of caravans work in conjunction with their wheels, with the wheels carrying most of the load.

5.53 I understand the unit – as it presented – sat on the feet with its wheels removed and stored separately, which the owner states was "both for safekeeping… and to prevent [the wheels] from perishing over time due to direct sunlight". In such a state, towing cannot take place; to do so, at the very least, its wheels needed to be reinstated and the unit lifted off its feet or the feet uninstalled.

5.54 In my opinion the location of a vehicle and its environment are also relevant considerations in determining whether it is immovable. Being hemmed in, whether by other structures or features of the landscape, and the nature of the land on which it is located may mean the vehicle cannot be readily moved.

5.55 The photos provided by the authority show the unit – as it presented – located close to other structures and the western boundary of the property and the unit appeared to be hemmed-in by these features. However, I understand the unit was towed and manoeuvred into this position and has since been removed from the site. In this case I have placed no weight on the location of the unit as a factor in considering whether it was immovable.

5.56 Finally, I note the owner has not said whether the unit was towed on its wheels during the relocation process from where it presented to its new location in Oxford. Even if the unit was towed on its wheels, the owner has provided little information about what was done, or the length of the time it took, to put the unit – as it presented – into a state and position which enabled it to be connected to a tractor and towed away. For example, with respect to these preparations, the owner has not said:

- whether any items inside or outside the unit had to be removed or secured

- how the unit was detached from its concrete feet (e.g. whether the unit was hoisted off its feet by a crane or the like, or whether the concrete feet, which are height-adjustable, were lowered and removed from underneath the unit, following the re-attachment of the wheels)
- how the unit was manoeuvred out of the position it was observed to be in when the authority proposed to issue a notice to fix (i.e. while the owner says that they re-attached the unit's wheels before moving the unit, they do not say whether they were able on to tow it out of its "as it presented" position or whether it was moved from this position by some other means).

5.57 For the reasons given in paragraphs 5.51 to 5.56, I am of view that the unit – as it presented – was not in a state which enabled it to be readily moved by being towed away on its wheels, particularly given the preparation that was likely required prior to doing so.

5.58 In conclusion, I am satisfied the unit as presented could not readily be moved and, as such, I find it is, as a matter of degree, "immovable" for the purposes of section 8(1)(b)(iii).

Is it occupied on a permanent or long-term basis?

5.59 Having determined the unit as it presented was immovable, for the purposes of section 8(1)(b)(iii) the next question becomes whether it was "occupied by people on a permanent or long-term basis". If it was, then the unit is a "building" for the purposes of the Act.

5.60 The District Court in *Dall* stated that "whether a structure is occupied by people on a permanent or long-term basis will depend on the facts of each individual case"[66]. It did not discuss what was meant by the criterion, though, as it had already decided the structure was movable.

5.61 The District Court in *Bilsborough* found that the units in that case were "being used as an abode intended to be occupied on a permanent or long-term basis, with one containing sleeping facilities, and the other containing bathroom and kitchen facilities"[67].

5.62 For me to be satisfied that the unit in this case is "occupied by people on a permanent or long-term basis" it must be reasonable to draw that conclusion in the circumstances. To this end I need to be satisfied that it is more likely than not; I make this assessment by considering the parties' submissions about the occupation of the unit as well as the circumstances in this case more broadly.

5.63 The unit in this case is clearly designed and constructed in such a way that it can be used as an abode. The fit-out of the unit includes a kitchen, sanitation, and sleeping facilities. Many of the other features of the unit are geared towards maximising its usability as an abode. Further, the marketing of these types of units on the owner's website has been very clear that the intended use of the transportable units is as homes.

[66] *Dall* at [40]
[67] *Bilsborough* at [67]

5.64 Because the unit is of the type that the owner manufactures on the same site for sale and relocation, I have considered whether this unit was completed in its construction and was on site unoccupied, awaiting sale and relocation.

5.65 The owner's submission (refer paragraph 4.33) is clear that the unit was occupied for a period of time. This is also supported by the fact that the unit was connected to services on site. Therefore, the remaining question for me to consider is whether the occupation was either "permanent" or "long term".

5.66 Determination 2006/072 considered the question of what was meant by "permanent or long-term occupation" in some length but stressed that each case will depend on its particular circumstances; what will be considered "permanent or long-term" in some contexts may not be in another. The determination concluded:

> 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

5.67 The authority states by submission their understanding that the unit was, in fact, permanently occupied at the time they proposed to issue the owner with a notice to fix. The authority had received a complaint about occupation of units on the site, though it is not clear from the authority's submission that the complaint concerned this particular unit. Photographs included in the authority's submission show the unit with curtains drawn, though there is no evidence of whether the unit contained personal items that would indicate it was occupied as accommodation.

5.68 The owner's submissions have largely taken the view that the question of occupancy is irrelevant because the unit (in their view) is already not a building under section 8(1)(b)(iii) by virtue of it being a movable vehicle. However, in response to the second draft of this determination the owner says, "at the time of writing [this submission], the unit had been standing unoccupied for…numerous months", and then in a further submission they say "while the unit was occupied earlier, the unit was not occupied at the time the determination application was made, and it remained unoccupied for many months".

5.69 The owner's submissions are inconsistent about whether the occupation ended before the application for determination was made in August 2019 or "numerous months" before the second draft determination was issued in March 2021.

5.70 I note that just because a unit is not occupied for a period, does not mean it cannot be considered to be "occupied on a permanent or long-term basis". It is reasonable to expect accommodation which is occupied on a permanent or long-term basis will from time to time be vacant for periods of time. Obviously in this case the unit was unoccupied prior to being relocated; what remains unclear is the exact duration of occupation of the unit.

5.71 I understand the unit had been in the location as it presented for at least two years prior to the authority applying for this determination. It was clearly connected to services, including electricity, mains water, and reticulated sewerage at the time the authority carried out the site visit. The unit was also connected to an outdoor gas bottle and an outdoor unit for a heat pump. This indicates to me the unit was indeed occupied at the time or some time before the authority proposed to issue a notice to fix.

5.72 Having considered the information available to me, albeit limited, I am satisfied the unit as it presented was "occupied on a permanent or long-term basis" for the purposes of section 8(1)(b)(iii) because, in my view, it is more likely than not that the unit was being occupied on a permanent or long-term basis at the time the authority proposed to issue the notice to fix.

Other matters

5.73 The owner argues that I am required to follow the flowchart appended to Determination 2019/017 when determining whether the unit is a "building". I note this flowchart is oversimplified and no longer in use. I have given consideration to earlier determinations where the facts are similar, however, I am not required to determine this case or any other case in the same way as earlier determinations. That said, I must – and do – follow the decisions of higher courts (i.e. the District Courts, High Court, Court of Appeal and Supreme Court) where the facts are materially the same.[68]

5.74 In their submissions, the owner referred to human rights law and the human right to adequate housing, which includes the right to affordable housing. It is not, however, within the scope of the Act for me to determine human rights matters. I note, however, that human rights law recognises few rights are absolute and reasonable limits may be placed on most rights and freedoms. Also, I note the Act contributes to upholding New Zealanders' rights to adequate housing by ensuring dwellings (and other buildings) are safe, functional, and fit for their intended purpose.

5.75 In their submissions, the owner discusses two types of property, being personal property (or chattels) and real property. As I understand the owner's submission, the terms the owner refers to are derived from common law concepts of property law. The Act does not make use of these concepts. While these terms may be relevant for identifying who is legally responsible for the unit, they do not determine whether the unit is subject to regulation under the Act.

[68] I am required to do so by the principle of *stare decisis*. Decisions of courts higher in the judicial hierarchy bind the lower courts. A lower court must follow a higher court decision if it cannot distinguish the decision on the facts.

6. Discussion: The notice to fix

6.1 Having found the unit as it presented is a "building" and, therefore, the authority is able to exercise its powers under the Act, the next matter I must consider is the authority's proposal to issue a notice to fix.

6.2 Section 164 of the Act provides for the authority to issue a notice to fix if it considers on reasonable grounds that a specified person is contravening or failing to comply with the Act or the regulations. Under section 164(2) the authority "must issue to the specified person concerned a notice to fix" requiring the person to remedy the contravention, or to comply with the Act or the regulations.

6.3 Section 163 of the Act defines a specified person to whom a notice can be issued:

> specified person means—
>
> (a) the owner of a building; and
>
> (b) if the 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.

6.4 The contravention the authority proposed to issue a notice to fix for is carrying out building work without building consent first being obtained when consent was required under section 40.

6.5 The construction of the unit and its connection to drainage on site is building work[69]. I note building work described in Schedule 1 of the Act ("the Schedule") is exempt from the requirement to obtain building consent. From the information provided it appears the construction of the unit does not fall within any of the work provided for in the Schedule. The owner notes the authority has the discretion to exempt any building work from requiring a building consent under clause 2 in the Schedule. However, it appears the owner did not apply to the authority for such an exemption for the unit. Therefore, I conclude the authority's proposal to issue a notice to fix for contravention of section 40 is correct.

7. Conclusion

7.1 Based on the information before me, I conclude:

- the unit – as it presented – falls within the definition of "building" by way of section 8(1)(b)(iii), and therefore building work to construct the unit is subject to regulation under the Act and the authority is able to exercise its powers under the Act;
- the authority is correct in its proposal to issue a notice to fix on the basis the building work was carried out without building consent when building consent was required.

[69] As defined in section 7. I note also conveyance of foul water from the plumbing system (i.e. discharge from sanitary fixtures or sanitary appliances in the unit) to an outfall connection is sanitary plumbing work and is also subject to regulation under the *Plumbers, Gasfitters and Drainlayers Act 2006*.

8. Decision

8.1 In accordance with section 188(1)(b) of the Building Act 2004, I determine the authority correctly proposed to issue a notice to fix for building work that was carried out without building consent.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 1 March 2022.

Katie Gordon
National Manager, Building Resolution

Appendix A: – Legislation

A.1 Relevant sections of the Building Act 2004

7 Interpretation

building work—

(a) means work—

(i) for, or in connection with, the construction, alteration, demolition, or removal of a building; and

(ii) on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code; and

(b) includes sitework; and

(c) includes design work (relating to building work) that is design work of a kind declared by the Governor-General by Order in Council to be restricted building work for the purposes of this Act (see subsection (2)); and

(d) in Part 4, and the definition in this section of supervise, also includes design work (relating to building work) of a kind declared by the Governor-General by Order in Council to be building work for the purposes of Part 4 (see subsection (2))

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—

(i) …

(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.

(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.

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); or

(b)…

(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; or

(b) …

A.2 Relevant sections of the Land Transport Act 1998

2 Interpretation

motor vehicle—

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

(b) includes a trailer; but

(c) does not include— …

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—…

Appendix B: – Premium model of Cosy Homes[70]

- Thermal envelope with no thermal bridges
- Double-glazed European uPVC windows and French doors with coloured frames, tilt-and-turn, lowE glass, thermal spacers, head flashings, wood reveals with architrave detailing
- Steps, veranda and wood deck
- Exterior skirting (horizontal decking)
- Full-sized European foil-wrapped kitchen with tile splashback, in-bench gas hob and electric oven
- Fully fitted out bathroom with gas water heating
- Oakfield contoured internal doors with architraves
- 3m wide x 2.2m high wardrobe (2 towers, 4 rails) with three mirror doors and 2 other large cupboards
- Extra heavy duty, solution dyed nylon carpet, wood-look laminate flooring and vinyl
- LED lighting throughout and three 10-year battery smoke alarms
- Wallpaper on all walls, with coving on ceilings and wall-to-wall joins

[70] Extract sourced from http://www.cosyhomes.co.nz/pricing/ on 2 February 2021

- Heat pump and true Heat Recovery Ventilation system
- 8 adjustable height, concrete feet
- 4 wheels (2 removable axles) and a retractable towbar
- Transport within 50 km of Kaiapoi.