Determination 2022/018

Regarding a notice to fix issued for a relocated unit

54 Willoughby Street, Halcombe

Summary

This determination considers whether a unit is a building that is subject to the Building Act. It discusses the tests of 'immovability' and 'permanent or long-term occupation' in relation to a vehicle, and the requirements for a notice to fix.

Figure 1: Photograph of the unit on the property

In this determination, unless otherwise stated, references to "sections" are to sections of the Building Act 2004 ("the Act") and references to "clauses" are to clauses in Schedule 1 ("the Building Code") of the Building Regulations 1992.

The Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (eg Acceptable Solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matter to be determined

1.1. This is a determination made under due authorisation by me, Peta Hird, Principal Advisor Determinations, Ministry of Business, Innovation and Employment ("the Ministry"), for and on behalf of the Chief Executive of the Ministry.[1]

1.2. The parties to the determination are:

- C Smith, the owner of the unit and property at 54 Willoughby Street, Halcombe, who was the recipient of the notice to fix and who applied for the determination ("the owner")
- Manawatu District Council, carrying out its duties as a territorial authority or building consent authority ("the authority").

1.3. In this determination, because the dispute concerns whether the structure in question is a building, I have used the term "the unit" to refer to it.

1.4. This determination arises from the decision of the authority to issue a notice to fix in relation to the unit on the owner's property. The authority issued the notice to fix because it considered that the unit is a building, and that building work had been undertaken without first obtaining building consent in contravention of section 40.[2] In contrast, the owner considers that the unit is a vehicle and falls outside the scope of the definition of 'building' in the Act.

1.5. Therefore, the matter to be determined (under section 177(1)(b) and 3(e)) is the authority's exercise of its power of decision in issuing the notice to fix. In deciding this matter I will consider whether the unit is a 'building' as defined by section 8. I will also consider whether the notice to fix provided the owner with sufficient information about the contravention that gave rise to the notice; at the time the authority issued the notice it did not specify what it considered to be the building work carried out without building consent.

[1] The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

[2] Section 40(1) provides that a person must not carry out any building work except in accordance with a building consent. Section 40(2) provides that a person commits an offence if the person fails to comply with the section.

Issue outside this determination

1.6. The owner is of the view that the authority has exceeded its inspection powers[3] under the Act in the way it carried out its inspection of the unit and other structures on the owner's property. The authority rejects that it has acted otherwise than lawfully and in accordance with the Act.

1.7. The exercise of the authority's inspection powers is not a determinable matter under section 177. Therefore, I have not considered this issue further in this determination. I note that there are other options available to the owner to address this issue, including provisions and procedures in the Act and in other enactments, or through the courts.

2. Background

The unit and site

2.1. The owner advises that the unit was constructed offsite and was relocated onto the owner's property in 2017. It was towed to the property and lifted into position.

2.2. Photographs taken by the authority of the unit from various angles are in Figures 1, 2 and 3.

Figure 2: Photograph from the driveway

Figure 3: Photograph from behind the unit

2.3. According to the owner, the unit is 2.4 m wide and 6 m long, and weighs "under 2 tons"[4]. It contains a lounge and kitchen area, bathroom, and a mezzanine bedroom. It is constructed on a steel chassis, with a double axle and wheels.

[3] Section 222 empowers a territorial authority to enter land to carry out inspections. Section 226 restricts entry to a household unit without consent or a court order.

[4] It is not clear whether this is two metric tonnes, which is equivalent to 2000 kg, or two US or "short" tons, which is equivalent to 1814 kg, or two imperial tons, which is equivalent to 2032 kg.

2.4. Electricity is provided by way of an extension lead to a power board. The unit has a water pump and an instantaneous water heater; the pump is connected by a hose to a water tank on the property, and the water heater is connected to a gas bottle. The owner advises that the water heater, water pump and plumbing, and a heat pump/air conditioning unit, were all installed on the unit before it was brought to the property.

2.5. When the authority's officer inspected the unit, they did not observe any waste pipes discharging onto the ground or directly connected to a sewer system, although they were not able to see all areas under the unit. The owner says that the toilet is a removable bucket, and that the unit is not attached to the ground in any way.

2.6. The unit was registered under land transport legislation on 11 October 2019 as a "Homebuilt Caravan Domestic Trailer" with a Class B exemption[5], and licenced on the same date.

2.7. As can be seen in Figures 1, 2 and 3, there are structures on one side of the unit (the side nearest the driveway) and at one end of the unit (the far end). On the other side of the unit (the side furthest from the driveway) there are trees a short distance away. At the end of the unit nearest the driveway there is a fence and garden a few metres away.

2.8. Video footage shows the unit being towed on a public road behind what appears to be a four-wheel-drive vehicle, and also shows the unit on the property.[6] According to the owner, the driveway, garden and fence are exactly as they were when the unit was moved into its current position.

2.9. The owner advises that the unit still has the same tow bar and wheels as appear in the video footage. They also note:

2.9.1. the retractable draw bar is at the street-facing end of the unit, but can go at either end

2.9.2. there is no structure between the unit and the road, and the white object between the unit and the garden that can be seen in the authority's photographs is a white tarpaulin covering temporary objects

2.9.3. a small plastic awning is attached to the unit with 4 bolts, and it is not a permanent fixture; the unit can be moved with or without its removal.

[5] "Exempt Class B (EB)" relates primarily to farm vehicles, mobile machinery and other miscellaneous types of vehicles.

[6] The date the video footage was taken is unknown, however the owner advises that the footage was taken when the unit was moved to the property (ie in 2017).

The authority's inspection and notice to fix

2.10. On 18 October 2019 the authority inspected the property. The authority identified and photographed a number of structures on the property. In respect of the unit, the authority's file note states (in summary):

2.10.1. although the unit is on wheels, it does not have brake lights or a fixed registration plate and "would take considerable effort to move off site"

2.10.2. it has a fixed awning extending approximately one metre over the door, is "hemmed in" by other structures, foliage and fences, and has a connected fixed potable water supply

2.10.3. the unit is designed as a house to live in, is likely to have cooking and personal hygiene facilities, and is occupied on a permanent basis

2.10.4. based on this assessment, "the [unit] required a building consent as it is considered a 'building' under the [Act] in accordance with section 8."

2.11. On 1 November 2019, the authority issued a notice to fix to the owner.[7] Under the heading 'Particulars of Contravention or Non compliance', the notice stated:

> Building work has been undertaken without obtaining a building consent in contravention of section 40 of the [Act]. Buildings not to be constructed, altered, demolished or removed without consent.
>
> To remedy the contravention or noncompliance, you must:
>
> (a) Remove all unconsented building work, or
>
> (b) Apply for a Certificate of Acceptance for the unconsented building work.
>
> This notice must be complied with by: Friday 7 February 2020

2.12. In the letter accompanying the notice to fix, the authority did not provide further details about the building work that the notice related to. The letter simply stated "Please find attached a Notice to Fix in regards to the dwelling on your property …".

2.13. On 6 December 2019, the Ministry received the application for a determination.[8]

[7] The notice to fix is dated "01/11/0219", which I take to be a typographical error. The letter accompanying the notice to fix was dated 1 November 2019. Therefore, I have referred to the date of issue of the notice to fix as 1 November 2019.

[8] Under section 183, the authority's decision or exercise of a power relating to the issue of the notice to fix has been suspended until I make this determination.

3. Submissions

Owner's initial submissions

3.1. The owner submits (in summary):

3.1.1. The unit is not a building under section 8. It is movable, with a chassis, double axle and wheels, a tow bar for towing, and can be lifted onto the back of a truck. The unit is also registered under land transport legislation as a vehicle. The District Court decision in *Dall v Chief Executive of the Ministry of Business, Innovation and Employment* [2020] NZDC 2612 ("*Dall"*) supports this position.

3.1.2. Because the unit is not a building, it follows that there is also no building work. In addition, there was no work done on site because the unit was prefabricated off site and moved to its current position."

3.1.3. If the garden was moved the unit could be towed "straight out onto the road".

Authority's initial submissions

3.2. In response to a query from the Ministry as to what building work it considered had been carried out, the authority advised that the notice to fix "relates to a building as defined under section 8 of the [Act] at 54 Willoughby Street. The building is used as a dwelling."

3.3. In relation to relocation, the authority submits:

> … Pursuant to section 7 of the Act, building work means work for, or in connection with, the construction, alteration, demolition, or removal of a building. The term "construct", in relation to a building, is defined within the same section of the Act as including relocation of a building.
>
> If relocation meets the definition of "building work", and that work has been carried out except in accordance with a building consent, then there has been a contravention of the Act (s 40) and the notice to fix has been appropriately issued.

3.4. In relation to the status of the unit as a building, the authority submits (in summary):

3.4.1. The owner's unit is distinguishable from the structure considered in *Dall*, in which the District Court was satisfied that the structure was not a building for the purposes of section 8. While built on a steel chassis with a double axle and wheels, the unit is immoveable as it is "hemmed in by other structures, foliage and fences", the services are not self-contained, and it

does not have any other features consistent with it being a vehicle, unlike the structure considered by the Court in *Dall*.

3.4.2. The owner's unit is occupied permanently on a long-term basis.

First draft determination and submissions in response

3.5. A draft of this determination was issued to the parties on 4 November 2020 ("the first draft"). The first draft concluded that the authority was incorrect to issue the notice to fix, on the basis that if the unit is a building relocation of the unit onto the owner's property, on its own, did not constitute building work.

Owner's further submissions

3.6. In response to the first draft, the owner provided further information relating to the unit and put forward further arguments in support of their position.

3.7. The owner submits, contrary to reasoning in the first draft, that I should determine whether the unit is a 'building'. The owner maintains that the unit is not a 'building' for the purposes of the Act, because:

3.7.1. it is a 'vehicle' and is not 'immovable' in accordance with section 8(1)(b)(iii)

3.7.2. it is not fixed to land.

3.8. To support their view that the unit is not 'immovable', the owner submits:

3.8.1. the ordinary meaning of immovable, which is "not able to be moved" should be applied

3.8.2. immovability should be determined by whether the unit can "be moved without major demolition or reconstruction of the structure and is it independent and still a vehicle"[9]

3.8.3. the same route and "method of exit" that was used to position the unit on the property is available for its removal.

3.9. To support their view that the unit cannot be a 'building' because it is not fixed to the ground, the owner submits:

3.9.1. the Resource Management Act 1991 definition of 'structure', which includes the words "fixed to land" is relevant to defining a building[10]

[9] The owner submits that when a conventional house is moved its piles and foundations are left behind, whereas the unit is self-supported on wheels upon which it moves.

[10] Section 2 of the Resource Management Act 1991 states: "Structure means any building, equipment, device, or other facility made by people and which is fixed to land; and includes any raft".

3.9.2. the legal principle *quicquid plantatur solo, solo cedit*[11] must be read into the definition of 'building' in the Act and, therefore, that which is not fixed to land is excluded from regulation under the Act.

3.10. The owner argues that the unit was designed and built to be mobile, and nothing has been put forward by the authority to show that it is immovable. The owner also says that the unit could be manoeuvred from its current position on its wheels and towed out with the owner's vehicle, without removing the existing garden or fence.[12]

3.11. The owner accepts that the unit should be considered "permanently occupied" for the purposes of this determination. However, the owner "reserve[s] the right to vacate for whatever time is required to make it not so, and seek[s] guidance from [the Ministry] on what constitutes permanent and not temporary occupation".

3.12. The owner reiterates that no 'building work' has taken place in relation to the unit, and argues that the notice to fix is defective because it does not state what the contravention is and what must be done to remedy it. The owner provided an Electrical Certificate of Compliance and Electrical Safety Certificate form dated 18 January 2018.

Authority's further submission

3.13. The Ministry received a submission from the authority in response to the first draft. In this submission, the authority accepts that:

3.13.1. there were "shortcomings in the drafting of the notice to fix"; the notice "did not fairly and fully inform the owner of the identified issues", "should have been better particularised", and "did not sufficiently specify the contravention"

3.13.2. I will apply the Court's findings in *Marlborough District Council v Bilsborough* [2020] NZDC 9962 ("*Bilsborough*") and determine that relocation of the unit does not amount to building work.

3.14. The authority submits that the first draft should have considered whether the unit is a 'building'. It argues that the unit is a 'building' for the purposes of the Act, and that 'building work' was carried out in connection with the unit. The authority:

3.14.1. maintains its position that relocation of the unit to the property amounts to building work

[11] Latin, "Whatever is affixed to the soil belongs to the soil".

[12] Phone call with the owner on 7 January 2021. I note that this statement appears to contradict the owner's initial submission (see paragraph 3.1.3) that the unit could be towed out if the garden was moved.

3.14.2. adds that relocation is not the only building work that was carried out in relation to the unit; the water pump, electrical connection, air conditioning unit and water heater are all building work[13]

3.14.3. considers it was correct to issue a notice to fix for contravention of section 40, although it did not sufficiently specify the contravention.

Second draft determination and submissions in response

3.15. A further draft of this determination was issued to the parties on 24 March 2022 ("the second draft"). The second draft concluded that the unit is a building, but that the authority was incorrect to issue the notice to fix because the notice was deficient (in that it did not meet the requirements for a notice to fix).

3.16. The Ministry received submissions from both parties in response to the second draft, as set out below.

Owner's further submission

3.17. The owner did not accept the reasoning and conclusions in the second draft as to the immovability of the unit and whether it was a building. The owner reiterated their earlier submissions, and made the following additional points relevant to the matter for determination (in summary):[14]

3.17.1. It was a "very simple, quick and easy process" to place the unit on the property, and the unit can be moved "as easily as a caravan and it can be prepared in the same time".

3.17.2. The authority has not presented any "credible evidence" to prove that the unit "cannot be towed away within an hour of choosing to do so".

3.17.3. "Immovable" suggests some "physical restraint". In the owner's view this means "… fixed to the land in some way and the vehicle no longer able to be moved perhaps by no wheels, concreted in, permanent structures obstructing its removal, decking or fencing attached … none of which are applicable to my mobile unit".

Authority's further submission

3.18. The authority agrees with the conclusion in the second draft that the unit is a building. However, it maintains that building work was carried out that required building consent and submits the notice to fix should be modified rather than reversed.

---

[13] The authority also considers the electricity connection to the unit did not comply with Clause G9 *Electricity.* However, that is not the matter the applicant sought to have determined.

[14] The owner also made submissions regarding the effect of section 378 (relating to the time limit for bringing a prosecution). However, that section is not relevant to the matter for determination.

3.19. In its submission, the authority:

3.19.1. Notes that the notice to fix did not specify which structure on the owner's property it related to, but that did not prevent me from assessing whether the unit was a building. The determination should also consider whether building work was carried out in relation to the unit, despite the notice not specifying any particular building work.

3.19.2. Reiterates its previous submissions, "which clarify the specific building work intended to be captured by the notice to fix".

3.19.3. Invites me to exercise my discretion under section 188(1)(a) to modify the authority's decision "by amending the notice to fix to sufficiently specify the nature of the contravention, so that the owner is fairly and fully informed of the issues with the building". The authority contends reversing the notice would not be "effective or efficient", and it would "simply issue a new notice to fix".

4. Discussion

4.1. The matter for determination is the authority's exercise of its power of decision in issuing the notice to fix.

4.2. The authority issued the notice to fix because it considers the unit is a 'building', and that the owner carried out 'building work' for which building consent was required without such consent, in contravention of section 40.

4.3. For the authority to issue the notice to fix for a contravention of section 40, the unit must fall within the definition of 'building' under section 8 and not be excluded under section 9. Further, 'building work' as defined by section 7 must have taken place, for which building consent was required.

4.4. The first question I must consider is whether the unit is a 'building' for the purpose of the Act. If the unit is not a building, the Act does not apply and the authority cannot issue a notice to fix in relation to it. I note that while I refer to the unit in the present tense, I am considering the unit at the time the notice to fix was issued based on the information available to me.

Is the unit a building under the Act?

4.5. The owner's view is that the unit is a vehicle, which is movable, and so it is not a building under section 8(1)(b)(iii). The authority's view is that the unit "arguably falls within the LTA[15] definition of 'vehicle'". However, the authority contends that 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).

[15] Land Transport Act 1998.

4.6. Section 8 defines what 'building' means and includes in the Act:

> **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; …

4.7. Section 9 defines what the term 'building' does not include. The unit in this case does not fall into any of the categories excluded from being a building in section 9.

Buildings need not be fixed to land

4.8. The owner submits that a building must be fixed to land, and that 'structure' in section 8(1)(a) must have the same meaning as the definition of 'structure' in the Resource Management Act 1991 – "any building, equipment, device, or other facility made by people and which is fixed to land…".

4.9. In my view, the owner's argument ignores the words "movable or immovable" in section 8(1)(a) in relation to a "structure", and would render them meaningless. It is clear from the plain words of section 8(1)(a) that a moveable structure could be a building.

4.10. In *Woodward v Astrograss Allweather Surfaces Ltd*[16] the High Court noted that while the predecessor to the Act, the Building Act 1991, was passed "more or less in conjunction" with the RMA, the word 'structure' [in the definition of 'building'] has a meaning specific to the Building Act. The court stated:

> … the definition of "building" in s 3 of the Building Act 1991 … provides "…building means any temporary or permanent movable or immovable structure…" … Thus under the Building Act the term "building" means "structure" and under the [RMA] the term "structure" includes a building. **In the circumstances the word "structure" in the Building Act must have a meaning specific to the Building Act, and indeed the introductory words of s 3(1) make this plain. Those words are "in this Act, unless the context otherwise requires"**. [my emphasis]

4.11. 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*.[17] As in that case, it is not open to me to add words that are not in the relevant section.

---

[16] *Woodward v Astrograss Allweather Surfaces Ltd* HC Auckland HC112/96, 25 November 1996 at p7.

[17] *Christchurch City Council v Smith Crane & Construction Ltd* DC Christchurch CRI-2009-009-12480, 19 February 2010 at [25]-[27].

Further, as in that case, 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".

4.12. However, whether a structure is affixed to land *is* a factor that can be considered when assessing the immovability of a structure (which is a vehicle or motor vehicle) in terms of section 8(1)(b)(iii). Whether the unit in this case is immovable is discussed below from paragraph 4.26.

The established approach for applying sections 8 and 9

4.13. The Court of Appeal set out the correct way to apply sections 8 and 9, in cases such as the present, in *Thames-Coromandel District Council v Te Puru Holiday Park Ltd* [2010] NZCA 633 ("*Te Puru* (CA)").

4.14. The Court provides a decision process that must be followed when assessing whether a particular structure or unit is a 'building' for the purposes of the Act, or a 'vehicle' which is not a building under section 8(1)(b)(iii) (and therefore not subject to the Act).[18]

4.15. Applying the decision process in *Te Puru* (CA), the first question to consider is whether the unit is a "vehicle or motor vehicle" (the "first limb"). If it is, then it is necessary to consider whether the unit 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 for the limb to be met.

4.16. If the unit meets both limbs, it is a 'building' for the purposes of the Act under section 8(1)(b)(iii). If it meets the first limb, but not the second (ie because the unit meets only one or neither of the criteria in the second limb), it is not a 'building'.

4.17. If, however, the unit does not meet the first limb (ie 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?

4.18. Turning to the first limb of the decision process, I must consider whether the unit is a 'vehicle' or a 'motor vehicle'.

4.19. Neither 'vehicle' nor 'motor vehicle' are defined terms in the Act. However, section 8(1)(b)(iii) explicitly includes the definitions of 'vehicle' and 'motor vehicle' in section 2(1) of the Land Transport Act 1998 ("LTA"):

[18] *Te Puru (CA)* at [22].

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; …

4.20. I note that the District Court in *Dall* held that the interpretation of the term 'vehicle' in Determination 2019/017 was incorrect by "preferring the Oxford definitions over the LTA definitions."[19] The Court went on to say that 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."[20] The effect of this decision is that if a unit comes within the LTA definitions, then it must be considered a 'vehicle' or 'motor vehicle' for the purposes of the Act.[21]

4.21. To be a 'vehicle' for the purposes of the LTA (and therefore section 8(1)(b)(iii)), 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.

4.22. The unit in this case has four wheels, two axles, a chassis and a retractable tow-bar. It does not have its own means of propulsion and, instead, has been designed to be towed by a vehicle with appropriate towing capacity. By attaching the tow bar to a suitable vehicle, the unit can move under tow and indeed has previously been towed.

4.23. 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).[22]

Is the unit immovable and occupied permanently or long-term?

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

---

[19] *Dall* at [28], referring to Determination 2019/017 *Regarding a notice to fix and whether a structure on a trailer is a vehicle or a building* (17 May 2019).

[20] *Dall* at [30].

[21] In *Bilsborough* at [64] to [68] the Court applied the same methodology used by the Court in *Dall* to resolve the issue of whether a unit was a building or a vehicle (that was not a building).

[22] I do not need to consider whether the unit falls within the ordinary meaning of 'vehicle' or 'motor vehicle' because, for the first limb to be met, the unit only needs to fall within the LTA definitions *or* the ordinary meaning of those terms.

4.25. In *Dall*, the District Court acknowledged that the LTA definition of 'vehicle' is "very broad", but said that the criteria in section 8(1)(b)(iii) guard against efforts to deliberately circumvent the application of the Act.[23]

Immovability – the courts

4.26. 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 Holiday Park Ltd v Thames Coromandel District Council*[24] ("*Te Puru* (HC)"), where the Court 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 come into permanent use by people for occupation, they will then qualify under s 8(1)(b)(iii). [my emphasis]

4.27. More recently, the District Court in *Dall* considered what was meant by the term 'immovable', stating:

> [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.

4.28. The District Court said that in New Zealand it is commonplace for buildings to be moved or relocated from one site to another, and that "almost every building or structure is capable of being moved in some way".[25] The Court 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.

4.29. The District Court formed the view that the vehicle in *Dall* was not immovable, therefore it was not a building under section 8(1)(b)(iii).[26] The Court's conclusion was based on several factors relating to the vehicle's features, design and purpose,

---

[23] *Dall* at [35]-[36], for example by "simply adding wheels, tracks or runners to any structure and claiming it can be moved".

[24] *Te Puru Holiday Park Ltd v Thames Coromandel District Council* HC Hamilton CRI-2008-419-25, 11 May 2009.

[25] *Dall* at [38].

[26] *Dall* at [44]-[46].

with the Court noting that the functional design of the vehicle enabled it "to be attached to a vehicle and moved or relocated with relative ease".

4.30. The District Court also considered whether a vehicle was 'immovable' under section 8(1)(b)(iii) in *Bilsborough*. In finding that the vehicle in that case was immovable, the Court noted that its "characteristics … quite clearly distinguish[ed] it from the unit in *Dall*".[27]

4.31. As in *Dall,* the Court in *Bilsborough* set out the various factors that it took into account in coming to its conclusion. The Court reiterated the comment in *Dall* that each case will turn on its own facts and will be a matter of degree.

Is the unit in this case immovable?

4.32. My starting point for considering whether the unit in this case is 'immovable' for the purposes of section 8(1)(b)(iii), is the statement by the High Court in *Te Puru* (HC), "that Parliament has used the description 'immovable' to refer to something that **cannot readily be moved**" [my emphasis].

4.33. Assessing whether the unit cannot readily be moved is a question or matter of degree, which requires me to weigh up all the relevant factors. In *Dall,* the design, functional characteristics, and purpose of the unit, were all given as examples of factors that can be considered. These are not an exhaustive list, so I can take into account any other factors I consider relevant in this case. In my view, as the unit is a vehicle by virtue of its ability to move on its wheels, it follows that the assessment must be with respect to the unit's ability to move on its wheels and not by some other means (eg transportation as a load atop a hiab truck and trailer unit[28]).

4.34. Below I discuss each factor that I consider relevant to my assessment as to whether the unit can or cannot readily be moved. In doing so, I find it appropriate to compare the unit with the design and functional characteristics of caravans, particularly those features that provide for caravans to be moved by towing.

4.35. Caravans are designed for use as accommodation and to be readily moved by towing; they are suitable for most towing situations with minimal effort. Caravans are designed to be 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.

4.36. Caravans can have an un-laden weight from about 800 kilograms, with heavier caravans being around 3000 kilograms. They can be towed by a wide range of motor vehicles (eg cars and utes) provided the towing vehicle has the appropriate towing capacity. They are capable of making frequent journeys and of travelling

[27] *Bilsborough* at [67].

[28] 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.

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 land transport legislation for such use.

4.37. Like a caravan, the unit in this case has been designed to be used for accommodation. Also, like a caravan, the unit has a chassis, axles, wheels and a tow bar. The unit is registered on the motor vehicle register as a "homebuilt caravan with a B exemption".[29] Video footage shows the unit with a number plate and a vehicle licence affixed; this footage also shows the unit being towed on a public road by a four-wheel-drive vehicle. Without the awning, the unit is within the dimension limits provided by land transport legislation for light trailers.[30] Its exact weight is unclear (see footnote 4), but it appears that it weighs around the middle of the range for caravans. If the gross laden weight is over 2000 kilograms, for safety reasons it needs to be towed by vehicle with sufficient towing capacity.[31]

4.38. However, while sharing some similarities with caravans, the unit differs in a number of ways. The unit does not appear to be fabricated using methods or materials which, among other things, provide caravans with the capability to be regularly towed on the road. The unit lacks a suspension system and, that being so, any undulations in towing surfaces would be transmitted to the unit. The unit lacks other features commonly associated with caravans, including brakes, brake lights and indicator lights. The absence of these features lessen the unit's towing performance and the towing uses it can be put to.

4.39. Further, unlike caravans, the unit is constructed in a manner which does not provide for it to be legally towed on public roads. While the unit was (at the time the notice to fix was issued) registered on the motor vehicle register (albeit incorrectly) and licenced, it did not have a warrant of fitness ("WOF") and I understand that it would need to be modified to meet the requirements for a WOF. For example, it would need brake lights and indicator lights to be installed. It may also need service brakes.[32] There appear to be no exemptions available under land transport legislation that would permit the unit, with no WOF, to be legally towed on a public road.[33] Should it be towed without meeting those requirements, the person

[29] I note that the unit does not appear to be one of the types of vehicle listed by Waka Kotahi NZ Transport Agency as being an Exempt Class B vehicle.

[30] The unit is 2.4 metres wide by 6 metres long. Under the Land Transport Rule: Vehicle Dimensions and Mass 2016, the maximum width for a light simple trailer is 2.55 metres and the maximum length (including the drawbar) is 12.5 metres.

[31] I note the owner says they purchased a Land Rover for this purpose, which the owner says has over 4000 kg towing capacity.

[32] If the laden weight of the unit is more than 2000 kg, under WOF requirements it must have service brakes and possibly breakaway brakes; it appears to have neither.

[33] According to guidance produced by Waka Kotahi NZ Transport Agency (see Factsheet 27 dated March 2018) where an Exempt Class B vehicle is not an agricultural vehicle it must still have a WOF or Certificate of Fitness (the equivalent of a WOF for vehicles over 3500 kg). The guidance states an agricultural vehicle

responsible would be subject to infringement offences or prosecution. While I accept that the unit is no less movable, in a strictly mechanical sense, simply for the fact that it is subject to certain road transport requirements, I am of the view these requirements limit the towing uses it could be put to and that I can take this into account when assessing whether the unit is immovable.

4.40. The only way for the unit to legally be on a public road is atop another vehicle (ie on a hiab truck and trailer unit), transported as a secured load. I note the owner says that the unit has been constructed with "channels at the back and front where strops are put so it can be lifted easily on to the back of a truck" and that the unit was lifted into its position on the property in this manner.

4.41. For the reasons above, I am of the view that the towing capability of the unit is lacking, particularly when compared with that of caravans. It is evident to me the unit is not capable of being towed other than to a limited extent. While the unit's design and functional characteristics might provide for it to be towed a short distance and manoeuvred into position, it is ill-suited for any other towing uses (for example, re-locating the unit from one place to another via a public road.

4.42. The unit is connected to a telephone line, a gas bottle, an onsite water tank, and mains electricity via a caravan-style electrical lead and plug. In addition, there is an awning extending approximately one metre over the door which would need to be removed before towing. While these connections have been designed so they can be disconnected with relative ease, their removal still requires a degree of effort and time. However, I accept that these connections are not dissimilar to those on a caravan.

4.43. In my view, the location or positioning of a vehicle and its surrounds, are also relevant considerations in determining whether it is immovable. Being restricted or confined to its position, whether by other structures or features of the landscape, or the nature of the land on which it is located, may mean the vehicle cannot be readily moved.

4.44. The authority submits that the unit is "hemmed in" on the owner's property. The photographs provided by the authority show the unit located alongside another structure and behind a fenced garden bed. The owner says that "if this garden was moved I could hitch my [unit] to my Land Rover and then it could be towed straight out onto the road which is a short distance away". The owner also says that the unit can be moved off the property without the need to move the garden (by lifting it); this is how the unit was placed there. I am of the view that taking either approach would add to the effort and time required to prepare the unit for towing.

4.45. I note that that the owner has subsequently said that the unit could be manoeuvred from its current position on its wheels and towed out with their vehicle, *without*

is a vehicle that is designed, constructed or completely adapted for agricultural purposes, and includes an agricultural tractor and an agricultural trailer.

removing the existing garden or fence. However, I consider it is unlikely this is possible given that the garden and fence have not changed since the unit was originally lifted into position.

4.46. The owner argues that "'immovable' suggests some physical restraint", ie "fixed to the land in some way and the vehicle no longer able to be moved". The owner provides examples of what in their view is immovable, such as something not having wheels, being concreted in, having permanent structures obstructing movement, or with decking or fencing attached. I note that some of the owner's examples are not fixed to land, but instead involve features of the particular structure and surroundings. In my view the owner's interpretation of immovable as "no longer able to be moved" goes further than the High Court in *Te Puru* (HC) ("cannot readily be moved"), and is more like "incapable of being moved" – a strict interpretation which the District Court in *Dall* said "would render the word 'immovable' meaningless". I therefore disagree with the owner's interpretation.

4.47. Based on all the considerations discussed above, I conclude that the unit cannot readily be moved; more particularly, because the unit cannot be legally towed on public roads, has limited towing capability, and is restricted from being moved on its wheels due to its position on the site.

4.48. I therefore find, as a matter of fact and degree and in the circumstances of this case, that the unit is immovable for the purposes of section 8(1)(b)(iii).

Is the unit occupied on a permanent or long-term basis?

4.49. Having determined that the unit is immovable, for the purposes of section 8(1)(b)(iii), the next question to consider is whether it is occupied on a permanent or long-term basis. If it is, then the unit is a "building" for the purposes of the Act.

4.50. 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."[34] The Court did not discuss the requirement further, as it had already decided that the structure in that case was movable.

4.51. 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".[35]

4.52. Determination 2006/72[36] considered the question of what was meant by permanent and long-term occupation, but stressed that each case will depend on its particular circumstances; what will be considered permanent or long term in one context may not be in another. The determination concluded:

[34] *Dall* at [40].
[35] *Bilsborough* at [67].
[36] Determination 2006/72 *Notice to fix in respect of certain units* (11 August 2006).

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.

4.53. The authority submits there is no doubt that the unit is occupied by the owner on a permanent or long-term basis. It says this is supported by the owner's emails to the Ministry and the authority during the course of this determination, and the observations of the authority's officers and photographs from the inspection of 18 October 2019. The owner accepts that the unit should be considered "permanently occupied" for the purposes of this determination; however, they go on to say that they "reserve the right to vacate [the unit] for whatever time is required to make it not [occupied on a permanent or long-term basis]".

4.54. In relation to this point by the owner about vacating the unit for a period of time, I consider that just because an immovable vehicle is not occupied for a period, this does not necessarily mean it is no longer "occupied on a permanent or long-term basis". It is reasonable to expect accommodation that is occupied on a permanent or long-term basis will from time to time and for a variety of reasons, be vacant for periods of time. As the court stated in *Dall,* each individual case will depend on its own facts.

4.55. In my view, the unit in this case is designed and constructed in such a way that it can be used as an abode. This is consistent with the layout of the unit which includes a living area, kitchen and sleeping facilities. Many of the other features of the unit maximise its usability as an abode. In addition, the evidence shows (and the owner accepts) that the unit was permanently occupied at the time the authority issued the notice to fix, and remains so. For these reasons, I am of the

view that the unit in question is "occupied on a permanent or long-term basis" for the purposes of section 8(1)(b)(iii).

4.56. Therefore, I conclude that the unit is both immovable and intended for permanent or long-term occupation by people. As such, I find that that it is a 'building' in terms of section 8(1)(b)(iii).

Building work not specified in the notice to fix

4.57. At this point I would ordinarily go on to consider whether 'building work' (as defined in section 7) had been carried out in relation to the unit. However, the notice to fix does not specify the building work that the authority considered had been undertaken. Instead, it states the heading of section 40: "Buildings not to be constructed, altered, demolished or removed without consent".

4.58. I also note that it is not evident from the notice to fix which structure on the owner's property the notice relates to. There were several structures identified in the authority's file note of its inspection. It is not clear that the notice to fix is in respect of the unit.

4.59. Section 164 provides for the authority to issue a notice to fix if it considers on reasonable grounds that a specified person[37] is contravening or failing to comply with the Act or the regulations. In this case, the authority considers the owner contravened section 40 by carrying out building work without first obtaining building consent.

4.60. Section 165 prescribes the form and content of a notice to fix. The prescribed form[38] for a notice to fix provides a space to insert the "particulars of contravention or non-compliance". In *Andrew Housing Ltd v Southland District Council* [1996] 1 NZLR 589 the High Court said, in relation to the particulars of a notice to fix:

> What is crucial, however, is that **the particulars must fairly tell the recipient** of the notice what provision of the Act or the [Building Code] has allegedly not been complied with. [my emphasis]

4.61. Similarly, the District Court in *Bilsborough* noted that the recipient of a notice to fix needs to be "fairly and fully informed", so they can address the identified issues. The Court said:

> [106] … failure to comply with a notice to fix can result in the imposition of a significant financial penalty. **Accordingly, the particulars of the notice assume some importance.**

[37] Section 163 defines a 'specified person' to whom a notice can be issued, and this includes the owner of the building and the person carrying out the building work if the notice relates to the building work being carried out.

[38] See Building (Forms) Regulations 2004, Form 13.

> [107] In my view, **it is appropriate that the recipient of a notice be provided with as much detail as possible, so the particular work should be identified**,… I appreciate that the recipient of a notice needs to be borne in mind, however, given the potential for monetary penalties for non-compliance **they need to be fairly and fully informed**, so they can address the identified issues, and if necessary seek specialist advice. [my emphasis]

4.62. The authority accepts that the notice to fix in this case did not fairly and fully inform the owner of the issues, should have been better particularised, and did not sufficiently specify the contravention.

4.63. In my view the notice to fix is deficient, as it does not adequately specify the "particulars of contravention or non-compliance" as required by the prescribed form. I consider a notice to fix must contain sufficient details regarding the building, building work, and alleged contravention, to fairly and fully inform the recipient about the basis for the notice.

No findings in relation to building work

4.64. The authority provided, by way of submissions during this determination, details of the building work that it considers has been undertaken in relation to the unit.

4.65. When first asked what building work it considered had been carried out, the authority advised the notice to fix related "to a building as defined in section 8 that was used as a dwelling." Subsequently the authority submitted that the building work was the relocation of the unit to the property.

4.66. The first draft of the determination concluded that relocation, on its own, is not building work in terms of the definitions of 'building work' and 'construct' in section 7; there must be work *in connection with the relocation* for it to be considered building work (eg work connecting the building to foundations or services).[39] The authority accepts that I consider relocation is not building work and, following the first draft, submitted that the building work includes connections to services. This addition to what the authority considers to be the building work carried out was raised a considerable time after the notice to fix was issued.

4.67. In any event, none of the details provided by the authority in its submissions (whether relocation or connections to services) were included in the particulars of the notice to fix when it was issued to the owner. That being so, I make no findings as to whether the alleged work amounts to 'building work' for the purposes of the Act.

4.68. The authority disagrees with this approach and says I can, and should, determine whether building work was carried out in relation to the unit. The authority points

[39] I note that the District Court in *Bilsborough* stated at [91]: "In my view, given that "building work" requires that work is "for, or in connection with, the construction, alteration and demolition, or removal of a building", there is a sound basis arguing that **the relocating of a building to a site is not "building work", where there is no work undertaken in connection with the relocation**." [my emphasis]

out that the notice did not specify which structure on the owner's property it related to, but that did not prevent me deciding whether the unit is a building. That is correct; however, in order to conclude whether the Act applies to the unit, I have to decide whether it is a building. If I had found that the unit was not a building, then that would have been the end of the matter as the Act would not apply, and the authority would not have power under the Act to issue a notice to fix.

4.69. The authority says its submissions in this determination "clarify the specific building work intended to be captured by the notice to fix". I consider that it is not appropriate for me to discern retrospectively what the authority had in mind was the building work from its submissions. I note that failure to comply with a notice to fix is a serious offence with a maximum fine not exceeding $200,000, and as discussed in paragraphs 4.57 to 4.63, the details of the alleged contravention should be apparent to the recipient of the notice from the wording of the notice itself.

Modification or reversal of the notice

4.70. Further to the authority's view that I should consider whether building work has taken place, and that work did indeed take place (which the authority submits is both the relocation and connection to services), the authority is also of the view that I should modify the notice to fix rather than reverse it. The authority says that if the notice is reversed it will simply issue a new one.

4.71. Section 188(1) provides:

> **188 Determination by chief executive**
>
> (1) A determination by the chief executive must–
>
> (a) Confirm, reverse, or modify the decision or exercise of a power to which it relates; or
>
> (b) Determine the matter to which it relates.

4.72. The authority invites me to exercise my discretion under section 188(1)(a) to modify the authority's decision "by amending the notice to fix to sufficiently specify the nature of the contravention, so that the owner is fairly and fully informed of the issues with the building".

4.73. I do not agree that it is appropriate for me to modify the notice in this case. I have not considered whether there was building work carried out by the owner without building consent, such that there is a contravention of the Act. The grounds in section 164 for a notice to fix are therefore not satisfied.

4.74. In addition, I consider it would be contrary to the High Court's comments in *Andrew Housing Ltd* and the District Court's comments in *Bilsborough* if I was to 'fill the gaps' and modify the notice to fix as the authority seeks. To do so would require substantial modification of the notice given its shortcomings, and would provide little incentive to authorities to ensure their notices to fix are sufficiently particularised.

4.75. As I have concluded the unit is a building and falls within the ambit of the Act, it is for the authority to consider whether a specified person has carried out building work, and if so whether building consent was required and whether that work is compliant with the Building Code.

Conclusions

4.76. Based on the information before me, I conclude that the unit falls within the definition of 'building' under section 8(1)(b)(iii). Any building work undertaken in relation to the unit would therefore be subject to regulation under the Act.

4.77. However, the notice to fix does not clearly identify the building work that the authority alleges was carried out in contravention of section 40. For this reason, I conclude that the notice to fix is deficient, in that it does not meet the requirements for a notice to fix.

Additional comments – duties on authorities when exercising enforcement powers

4.78. As noted above and by the District Court in *Bilsborough*, failure to comply with a notice to fix can result in the imposition of a significant financial penalty.[40] For this reason it is essential that a notice contains sufficient particulars (in the words of the District Court "as much detail as possible"), so the recipient is fairly and fully informed.

4.79. The issue of notices to fix and other enforcement powers undertaken by authorities are important powers that should not be taken lightly. In my view, authorities have a duty to exercise these powers in accordance with the law, fairly and reasonably, and not arbitrarily.

4.80. It is imperative on authorities to consider the statutory definitions of 'building' and 'building work', and if these are met, whether the building work is exempt from the requirement to obtain building consent and whether it is compliant with the Building Code. Authorities must consider the evidence that is available to them, and whether the threshold for issuing a notice to fix in section 164 is met. On deciding that it is, authorities must comply with the requirements for the form and content of a notice to fix as set out in section 165 and in the prescribed form in the Building (Forms) Regulations 2004.

[40] Section 168(2) provides that a person who commits an offence under subsection (1) is liable on conviction to a fine not exceeding $200,000. Under section 168(1) a person commits an offence if they fail to comply with a notice to fix (other than a notice to fix in respect of the means of restricting access to a residential pool, which is covered by section 168(1AA) and (1AB)).

5. Decision

5.1. In accordance with section 188 of the Building Act 2004, I determine that the authority was incorrect to issue the notice to fix dated 1 November 2019. I therefore reverse the notice to fix.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 5 October 2022.

Peta Hird

Principal Advisor, Determinations