Determination 2022/022

Regarding the decision to issue a notice to fix and whether a unit constructed on a 'skid' formed from beams and the floor is a building

47 Ara Lane, Kerikeri

Summary
This determination considers whether the authority was correct in the exercise of its power of decision to issue a notice to fix for what the authority considers is building work that required a building consent. In order to make this determination, I have considered whether a unit is a 'building' under section 8 of the Building Act 2004. The determination also considers whether the notice to fix sufficiently specifies the contravention.

The legislation 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 ("the Act") and references to "clauses" are to clauses in Schedule 1 of the Act.

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 under Part 3 Subpart 1 of the Building Act 2004 ("the Act") 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:

1.2.1. L and C Bourdin ("the owners") who are the owners of the property at 47 Ara Lane, Kerikeri and owners of the unit that is the subject of this determination. I refer to their unit as "unit B", and it is described in more detail in paragraph 2.2.2 below. The owners who are in receipt of a notice to fix are the party that applied for the determination.

1.2.2. Far North District Council acting in its capacity as a territorial authority or building consent authority ("the authority").

1.3. Another unit which was originally located on the above property belongs to the owners' friend, and I refer to their unit as "unit A". It is described in more detail in paragraph 2.2.1.

1.4. In this determination, I have used the term "unit" because the dispute concerns whether the unit is a building or a vehicle.

1.5. This determination arises from the authority's decision to issue a notice to fix to the owners for two units located on their land, one of which had been relocated there (unit A) and one that was under construction (unit B). The authority issued the notice to fix on the basis that building consents were required under section 40 of the Act, and none had been applied for or issued. The owners consider that the notice to fix was issued in error. They contend that unit A is an 'unoccupied detached building' and is therefore exempt from the requirement to obtain building consent, while unit B is a vehicle that does not come within the definition of a "building" under the Act.

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

1.6. The application initially related to both units A and B. Although unit A was previously on the owners' land, the owners do not own that unit. The owners have also advised that unit A was removed from their property on 22 January 2021. The removal of unit A has satisfied the remedy in the NTF in relation to that unit. This determination is limited to considering the issue of the notice to fix only in respect of unit B.

1.7. The matter to be determined[2] is whether the authority was correct in the exercise of its power of decision to issue notice to fix NTF-2020-7154/0 to the owners in respect of unit B. In deciding this matter, I must consider whether unit B is a 'building' as defined by section 8, and whether building work was carried out without a building consent when one was required.

1.8. The owners advised that some of the work to construct unit B was carried out by a licensed building practitioner. I have not considered whether the work carried out to construct unit B complies with the Building Code, as this falls outside the scope of the matter to be determined.

1.9. In the time since the application for determination was made, the owners modified the unit to demonstrate that it could be moved on the property. In determining whether the authority was correct to issue the notice to fix I have considered the unit as it presented when the authority issued the notice to fix, that is prior to the modifications.

1.10. Section 188 allows for the Chief Executive to either confirm, reverse, or modify the authority's decision to issue the notice to fix. In making that decision I can consider the status of the unit as it now presents.

2. The building work and background

2.1. The owners' property is a lifestyle block in a rural area on the outskirts of Kerikeri.

2.2. On 3 June 2020, the authority carried out a site visit at the owners' property and observed three structures on the land. For ease of reference, I refer to these structures as units A, B and C.

2.2.1. Unit A is a finished cabin measuring approximately 6m x 2.5m and is under 3m in height. The unit contains sanitary fittings, including a self-contained composting toilet. The owners advise that the unit was not constructed onsite but was moved onto their property by the owners of Unit A using a hiab truck and trailer unit[3] on 1 October 2018. The unit was connected to an

[2] Under sections 177(1)(b) and 177(3)(e) of the Act.

[3] 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.

onsite water supply using an alkathene pipe and was fitted with a solar panel for electricity supply.

2.2.2. Unit B was still under construction at the time of the authority's site visit. It has the following features:

- It measures approximately 12m x 3.1m, with a height under 3m.
- It is built on twin 300mm x 50mm beams that run the length of the unit. One of the beams was not continuous, it had a gap of approximately 1m at the mid section. These beams were bolted onto 10 wooden piles, embedded to a depth of 500mm.
- The floor has been constructed on top of the beams. It is made of 200mm x 45mm joists positioned at 600mm intervals, with 12mm structural treated plywood underneath and 18mm untreated plywood on the top, with insulation in between.
- The walls are timber framed, with building paper wrap and insulation installed. Externally, the unit is clad with corrugated metal on its walls and roof.
- At the time of the authority's site visit, the interior of the unit had not been finished, although several internal walls were under construction. It had been fitted with a gas hot water system and plumbed with sanitary and gas fittings.
- Electricity is supplied via a caravan-type plug and lead. At the time of the authority's inspection, the unit was connected to the builder's trailer which was providing a power supply.
- Once completed, water would be provided via a 20mm alkathene pipe.
- The owners advised that the wastewater is proposed to be disposed of via detachable 110mm and 40mm pipes, but I have not been provided with information about where these pipes discharge to.
- The unit also has a storm-water downpipe to dispose of water from the roof, which at the time of the authority's visit was ready to be connected to an in-ground storm-water line. I have been provided with no information about where this line will lead or connect to.
- The owners advise the unit is to be fitted with a composting toilet.

2.2.3. Unit C is a small cabin built on a trailer, with a bed and sink, but no toilet. The grey water from the sink is collected in a bucket.

2.3. A detached deck has been constructed adjacent to unit B. The deck runs the full length of one side of the unit, and there is a pergola above the entrance to the unit. The height of the deck from the ground level varies between 1m to 1.5m. The deck is reached by a wide flight of wooden steps.

2.4. It is unclear from the description in the notice to fix whether the authority was including the detached deck as part of unit B, but in submissions the authority stated it considered that the building work for units A and B required a building consent. There does not appear to be any dispute that the deck is a building[4], and that the construction of the deck is building work and it must comply with the Building Code[5]. The authority has confirmed the deck is less than 1.5m high, and I note this would mean it is exempt from the requirement to obtain building consent, under Schedule 1 of the Act.[6] Accordingly, in this determination, I have only considered whether the construction of unit B itself (excluding the deck) was building work.

2.5. As no building consents had been obtained in relation to the units, the authority issued the owners with a notice to fix, dated 26 June 2020.

2.6. The particulars of contravention or non-compliance in the notice to fix were:

> **Contrary to s.40 of the Building Act, the following building works have been undertaken without first obtaining a building consent:**
>
> - The placement 2 buildings exceeding 10m^2 in size. (Contravenes exemption 3 of schedule 1 of the Building Act – single storey buildings not exceeding 10m^2 in floor size)
>
> **To remedy the contravention or non-compliance you must:**
>
> **Choose one of the following options:**
>
> - Pursue legal options to make the building works compliant with the Building Act 2004 and the Building Code. This may include a Certificate of Acceptance (COA) from Council;
>
> **OR**
>
> - Remove the unauthorised building works.

2.7. The letter accompanying the notice to fix confirmed that it was issued because no building consent had been granted for the building work, and the authority considers that the building work did not fall within an exemption in Schedule 1 of the Act.

[4] Section 8(1)(a)

[5] Section 17

[6] Clause F4.3.1 applies where people could fall 1 metre of more from a sudden change in level. The authority noted that a handrail is required around the deck to comply with the Building Code, which applies whether or not building consent was required for the construction of the deck.

2.8. Neither the letter nor the notice to fix defined the building work beyond: "The placement 2 buildings exceeding 10m^2 in size". The authority subsequently confirmed in its submissions the two buildings referred to in the notice to fix are units A and B, but not unit C.

2.9. The owners responded to the notice to fix, stating that in their view, neither of the units required a building consent for the following reasons:

2.9.1 Unit A came within the exemption in clause 4(1)(b) of Schedule 1 of the Act, as an unoccupied detached building; and

2.9.2 Unit B is a vehicle because it is movable and will not be permanently occupied, and therefore it does not come within the definition of a building in section 8.

2.10. The owners asked the authority to reconsider its decision to issue the notice to fix. However, the authority did not accept the owners' arguments that the work was exempt from requiring a building consent, noting that both structures had sanitary fittings, power and plumbing connected to them. The authority rejected the owners' claim that unit B was a vehicle, noted that and both units could "be considered immovable" and confirmed its decision to issue the notice to fix.

3. The submissions

The owners' submission

3.1. The owners' submission described the construction and features of unit B, and with reference to section 8(1)(b)(iii) explained why they believe the unit is a vehicle and not a building. The main points of this submission, as they relate to unit B, can be summarised as follows.

3.1.1. The unit is a "self-supported cabin, built on a skid" formed from the beams and floor. The owners believe this "would be more than enough to be used as a skid if we wanted to drag the structure within the farm" and meant "the structure could be lifted onto a trailer like a container".

3.1.2. The owners submitted that the unit is intended to be used "on a short-term basis" and that "people will not occupy it permanently".

3.1.3. The unit has been positioned on piles, as this was the easiest way to level it and minimise the impact on the soil. To keep the unit "safe" it is bolted to the piles using 14 bolts.

3.1.4. These measures (constructing it with skids and the ability to easily detach it from the piles) were taken to ensure the unit complied with the definition of 'vehicle' in section 2 of the Land Transport Act 1998 ("the LTA").

3.1.5. Other measures taken to "ease the displacement"[7] of the unit included:

- electricity is supplied through a caravan plug, and water through an alkathene pipe; both of which are easily detached
- wastewater is removed via detachable pipes that do not interfere with the "runners" under the unit
- a composting toilet will be used with no attachment to the ground
- the gas bottle is easy to disconnect, and the hot water system can be dismounted
- the deck is self-supporting with no connection to the unit.

The authority's submission

3.2. The authority's submission described the features of unit B that the authority considered made the unit a building and not exempt under Schedule 1. The main points of this submission, as they relate to unit B, can be summarised as follows:

3.2.1. Contrary to Schedule 1 clause 3, building work has taken place to construct unit B which is over 10m^2 in size and is plumbed in with sanitary fittings.

3.2.2. The unit is not associated with another dwelling.[8]

3.2.3. The unit is "not moveable" because it is bolted to foundations.

Draft determination and submissions in response

3.3. A draft of this determination was sent to the parties on 28 July 2021, to give them the opportunity to comment and to identify any errors or omissions.

3.4. The authority accepted the draft determination without any further comment.

3.5. The owners did not accept the draft determination and made further submissions. In summary:

3.5.1 The owners' understanding of the draft determination was that actions could be taken to make unit B a vehicle, such as the addition of a set of wheels and a tow bar, with the unit's 'chassis' already being formed by the subfloor and two "runners".

[7] The owners have used the term "displacement" to explain how the unit may be moveable.

[8] Schedule 1 clauses 3, 3A and 3B provide exemptions for some detached buildings subject to certain criteria, one being they do not include sleeping accommodation unless used in connection with a dwelling.

3.5.2 Further actions which the owners understood could be taken to make unit B into a vehicle (under its ordinary meaning) included having a "strong connection between the runners and subfloor", having a coupling mechanism and filling in the gap in a section of timber which was missing from the mid-section of one of the "runners".

3.5.3 To demonstrate that unit B could be "moved like a sledge", and "that the unit is 'suitably engineered' to support deplacement (sic)", the owners:

- put an upturned end on both runners and a pulling/lifting hook on each end
- added an additional piece of runner to fill in a gap
- shifted the unit from its original position to about 50m away and returned the unit back onto its original position
- put the unit on wooden blocks, so it is no longer connected to the piles by bolts.

3.5.4 The owners believe that because they were able to move it along the ground the unit falls within the broader definition of a "vehicle" in the Oxford English Dictionary.

3.6 The authority responded to the owners' submissions on 17 August 2021, stating that the unit would need to be registered and have a warrant of fitness to be able to be towed on the road, and that the definition of "vehicle" in the Oxford English Dictionary is irrelevant to the Building Act.

4. Discussion

4.1 The matter for determination is the authority's exercise of its powers of decision to issue the notice to fix for unit B.

4.2 With regard to unit B, the authority has issued the notice to fix because it considers the unit is a building, and the work to construct it is building work for which a building consent was required.

4.3 The owners contend that unit B fits within the definition of a vehicle and that it is not immovable. The owners also contend the unit is not occupied on a permanent or long-term basis, but rather intended to be used "on a short-term basis", and so does not fall within the definition of a building under section 8(1)(b)(iii). The owners did not provide specific details about the periods or nature of occupation of the unit beyond these general statements.

4.4 The question I must consider is whether unit B is a building for the purposes of the Act. If the unit is not a building, then the Act does not apply, and the authority cannot issue a notice to fix in relation to it.

Is the unit a building under the Act?

4.5 The Court of Appeal, High Court, district courts and previous determinations have all considered the question of whether various structures with vehicular characteristics are "buildings" for the purposes of the Act.

4.6 Section 8 of the Act, which defines what a building means and includes, states:

> (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.

4.7 Section 9 defines what the term 'building' does not include. The unit does not fall into any of the categories in section 9 that would exclude it from being a building.

The established approach for applying sections 8 and 9

4.8 The Court of Appeal in *Thames-Coromandel District Council v Te Puru Holiday Park Ltd* [2010] NZCA 633 ("*Te Puru*") sets out how to apply sections 8 and 9.

4.9 Te Puru provides a decision process that must be followed when ascertaining whether a particular structure or unit is a building for the purposes of the Act or a vehicle that is not subject to the Act.[9]

4.10 Applying the decision process in *Te Puru*, the first matter to 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, for the second limb to be met.

[9] *Te Puru* at [22].

4.11 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.

4.12 If 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 or motor vehicle?

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

4.14 Neither 'vehicle' nor 'motor vehicle' are defined terms in the Act. However, the Act explicitly includes the definitions of 'vehicle' and 'motor vehicle' as they appear in the LTA[10], outlined below.

> 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; …

4.15 The District Court in *Dall v The Chief Executive of the Ministry of Business, Innovation and Employment* [2020] NZDC 2612 ("*Dall*"), held 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".[11] The effect of the Dall 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.[12]

4.16 I also note the District Court in *Dall* observed that "the term 'includes' [in section 8(1)(b)(iii)] permits an expansion of the LTA definition when appropriate". Put another way, in some circumstances it may be appropriate for the terms 'vehicle' and 'motor vehicle' in section 8(1)(b)(iii) to be interpreted more broadly than simply according to the LTA definition. Therefore, I am of the view that if the unit does not fall within the LTA definition, it is appropriate to go on to consider whether it is a 'vehicle or 'motor vehicle' according to the ordinary meaning of these terms.

[10] See LTA, section 2(1).
[11] *Dall* at [30].
[12] In *Marlborough District Council v Molina Carolin Bilsborough and Glynn James Bilsborough* [2020] NZDC 9962 [28 October 2020] at [64] to [68] the court applied the same methodology used by the court in *Dall.*

LTA definitions

4.17 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. In my view, unit B is neither a vehicle nor a motor vehicle.

4.18 Unit B is not equipped with wheels, tracks, or revolving runners. The owners have consistently referred to the two structural beams supporting the floor of the unit as "runners" and stated that should the owners need to move the unit in future, they intend to drag it on these "runners"[13]. However, these "runners" do not revolve, and so the unit does not meet the LTA definition.

4.19 The unit does not have the means of affixing wheels, tracks or revolving runners, nor any design features that enable other vehicle features such as axles and wheels to be easily added. At the time the application for determination was made, the means to move unit B was by lifting and transporting it on the back of another vehicle.

4.20 As it presents, I am satisfied that unit B does not fall within the LTA definition of 'vehicle'. And because the unit is not a 'vehicle', it cannot be a '**vehicle** drawn or propelled by mechanical power' (my emphasis). Nor is the unit a trailer. The unit is therefore not a 'motor vehicle'.

Ordinary meaning

4.21 In order to understand the meaning of the terms 'vehicle' or 'motor vehicle' as they appear in section 8(1)(b)(iii), it is helpful to consider the definitions of 'vehicle' and 'motor vehicle' in the Oxford English Dictionary.[14]

4.22 The dictionary defines 'vehicle' as "a conveyance, a form of transport". This definition goes on to say that the term is generally used to describe "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".

4.23 The definition goes further, however, saying the term 'vehicle' is "specifically a means of conveyance or transport on land, having wheels, **runners** or the like; a car, cart, truck, carriage, **sledge**, etc" [my emphasis]. The dictionary provides a number of different meanings for the terms 'runners' and 'sledge', including the following which seem most relevant to this determination:

[13] The owners advised the unit was moved by tractor for about 50m and back.
[14] *Oxford English Dictionary Online.* Third Edition, June 2017; published online March 2021.

> runners –
>
> Each of a pair of long pieces of wood or metal fixed to the underside of a sledge or the like, forming the means by which it slides along the ground…
>
> sledge[15] –
>
> A simple form of conveyance, having runners instead of wheels, employed in the transport of goods over ice or snow or in heavy traffic unsuited to wheeled vehicles…

4.24 In my view, the facts do not indicate unit B being is form of conveyance or transport. The owners have stated that unit B was to be used as accommodation for people on a short-term basis, rather than as a means of conveyance or transport. However, the owners contend that the unit is a 'vehicle' because it can be dragged along the ground on "runners" should the need arise.[16]

4.25 I understand that at the time the authority issued the notice to fix, the unit had not moved on its "runners". No evidence had been provided to support the owners' view that the unit was suitably engineered to do so, and the unit has features that suggest it was not designed for such a purpose. For example, its "runners":

4.26.1 appear to be fastened to the subfloor above by wooden corner braces and nails, and

4.26.2 did not have upturned ends as are generally found on a sledge or the like.

4.26 Following the issue of the draft determination, the owners stated that they had shifted unit B, towing it behind a tractor for about 50m and returning it to its original position, as discussed in paragraph 3.5.3. However, significant modifications would have been required to prepare the unit to be moved, given that:

4.26.1 its "runners" were bolted to piles,

4.26.2 a section of timber (approximately 1 metre) was missing from the mid-section of one of the "runners", and

4.26.3 the unit lacked a mechanism for coupling it to a towing vehicle.

4.27 Further, as considered by the court in *Te Puru*, I note that the unit is constructed with components and features commonly found on dwellings. For example, the unit has bi-fold doors (which open onto a detached large wooden deck); the unit has roof guttering and downpipes; corrugated iron on the external walls and roof;

[15] I note that there are other forms of conveyance, such as a sled or a skid, which may be considered to be similar to a sledge.

[16] The LTA definition limits the meaning of 'vehicle' to those with "wheels, tracks or revolving runners". By comparison, the Oxford English Dictionary definition of 'vehicle' is broader as it includes those with "wheels, **runners or the like**" [my emphasis].

timber framing; insulation (underfloor, ceiling and wall); and separate rooms including a plumbed kitchen.

4.28 I am not satisfied that any of the modifications made by the owners, as described in paragraph 3.5.3, make the unit sufficiently mobile or moveable to be considered a vehicle in terms of the ordinary meaning of that term. The facts are not indicative of unit B as a 'vehicle, a means of conveyance or form of transport'; they are indicative of unit B being a small dwelling and somewhere to live, similar to that in the case of *Te Puru*.

4.29 The dictionary defines 'motor vehicle' as a road vehicle powered by an engine (usually an internal combustion engine). In my view and as discussed above, unit B does not fall within the ordinary meaning of the word 'vehicle' and therefore cannot be a 'motor vehicle'.

4.30 As such, I find that unit B does not fall within the meaning of the term 'vehicle' or 'motor vehicle' either under the LTA definition or the ordinary meaning. Because it does not meet the criteria of the "first limb" in the decision process, it is not necessary to consider the "second limb" of whether the unit is "immovable" and "occupied by people on a permanent or long-term basis".

Is the unit a building under section 8(1)(a)?

4.31 Having decided that unit B is not a 'vehicle' or a 'motor vehicle', section 8(1)(b)(iii) is to be put aside, and I must now consider whether the unit comes within the general definition of building in section 8(1)(a). In this section, 'building' means:

> …a temporary or permanent movable or immovable structure (including a structure intended for occupation by people, animals, machinery, or chattels)…

4.32 The owners advised that unit B is intended for occupation by people. However, I still need to consider whether the unit is a "structure". Previous determinations have considered the meaning of "structure" as it appears in section 8(1)(a) of the Act. Determination 2016/002[17] states:

> "4.2.4 "Structure" is not defined in the Act and must be taken to have its usual or ordinary meaning: 'A building or other object constructed from several parts' [18], 'Something constructed or having organization – a building, an edifice' [19], and further 'Any framework or fabric of assembled material parts; a (typically large) man-made construction' [20]."

[17] Regarding the issue of a dangerous building notice in respect of a damaged shared driveway. Issued 20 January 2016.
[18] "Structure", n: *Oxford Dictionary*. Web Oct. 2015.
[19] "Structure", n: *Oxford English Dictionary*. Web. 25 Oct. 2015.
[20] "Structure", n: *Oxford English Dictionary*. Web. 25 Oct. 2015.

> "4.2.5 For something to be a "structure" for the purposes of the Act, it must have some elements or constituent parts and/or be of some complexity. This is consistent with the content of sections 8 and 9 of the Act. The items included in the definition of "building" in section 8 or expressly excluded from the definition of "building" in section 9 are all objects composed of different parts and/or of some complexity."

4.33 Unit B consists of elements commonly used to construct dwellings and using methods which are similar or the same as those used when constructing dwellings. Further, the unit has a layout which is typical of a small dwelling like those considered in *Te Puru*. That being so, I am of the view that the unit is a 'structure' and therefore a 'building' by way of section 8(1)(a). I note it makes no difference whether the unit is movable or immovable because both types of structure are included in the definition.

4.34 I note that in previous determinations, parties have submitted that for a unit to be a building it must be fixed to the ground. However, that argument is rejected by the District Court in *Christchurch City Council v Smith Crane & Construction Ltd* CIV-2009-009-12480, 19 February 2010.[21] 'Building' in section 8(1)(a) includes movable structures, which by definition will not be fixed to land. Therefore, as an example, the removal of the bolted connections that affix unit B to its piles would not mean the unit was no longer a building.

Is the work on unit B building work?

4.35 Under the Act, building work is defined in section 7 as work "for, or in connection with, the construction, alteration, demolition, or removal of a building…". "Construct" in relation to a building, includes to design, build, erect, prefabricate, and relocate the building.

4.36 As unit B is a 'building', it follows that the work carried out to construct the unit at the property, and work to modify the unit, is 'building work' for the purposes of the Act.

Is the unit exempt from requiring a building consent?

4.37 As a final step, I must also consider whether the building work in relation to unit B is exempt from requiring a building consent by coming within one of the categories of exempt work in Schedule 1 of the Act.

4.38 As provided in section 40 of the Act, building work must not be carried out except in accordance with a building consent, except in certain cases as outlined in sections 41 and 42A..

[21] At paragraphs [25] to [27].

4.39 Sections 41 and 42A of the Act provide as follows:

> **41 Building consent not required in certain cases**
>
> (1) Despite section 40, a building consent is not required in relation to—
>
> (a) …
>
> (b) any building work described in Schedule 1 for which a building consent is not required (see section 42A);
>
> …
>
> **42A Building work for which building consent is not required under Schedule 1**
>
> (1) Despite section 40, subject to the conditions set out in subsection (2) and whether or not a building consent would otherwise have been required, a building consent is not required for building work in the following categories:
>
> (a) building work described in Part 1 of Schedule 1; or
>
> …

4.40 The purpose of Schedule 1 is to exempt low-risk building work from requiring a building consent.

4.41 The most likely exemptions that would be relevant in this case are in clauses 3, 3A and 3B relating to single storey detached buildings. However, with a floor area of around 37 square metres, unit B exceeds the floor area limits specified in all three of those clauses. It also has sanitary facilities, sleeping accommodation and will have cooking facilities; these features also mean the unit does not meet the criteria in clauses 3, 3A and 3B.

4.42 In their submission, the owners also argued (with respect to unit A) that the exemption in clause 4 applied, as they claimed that unit A is a building that people cannot enter or do not normally enter. The owners have not proposed that this exemption should apply to unit B, and I think rightly so. The facts demonstrate that unit B is constructed with occupation by people in mind.

4.43 Accordingly, I conclude that the construction of unit B is not exempt (by way of Schedule 1 of the Act) from the requirement under section 40 to obtain a building consent.

The notice to fix

4.44 Section 164 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.

4.45 As I have concluded that unit B is a building and therefore building work was carried out, and this was not exempt from the requirement to obtain a building consent, I consider the authority had grounds for issuing the notice to fix.

4.46 Section 163 defines a "specified person" to whom a notice to fix 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. The owners of unit B are the specified person to whom this notice was issued.

4.47 The next matter I must consider is the content of the notice, ie whether sufficient particulars were given by the authority for issuing the notice to fix.

4.48 Section 165 prescribes the form and content of a notice to fix.

4.49 The prescribed form[22] 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 stated:

> 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]

4.50 Similarly, the District Court in *Marlborough District Council v Bilsborough* [2020] NZDC 9962, 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.**
>
> [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]

4.51 In this case, the authority has stated in the prescribed form that building work has been undertaken without first obtaining building consent, contrary to section 40. This is correct with respect to unit B because, as I have established above, it is a 'building' and the work carried out to construct it is 'building work' that required building consent.

[22] See Building (Forms) Regulations 2004, Form 13 (see Appendix A3).

4.52 However, the notice to fix falls short where it goes on to specify the particular buildings and associated building work that gave rise to the contravention of section 40. The buildings and building work are described in the notice to fix as follows:

> The placement 2 buildings exceeding 10m² in size. (Contravenes exemption 3 of schedule 1 of the Building Act – single storey building not exceeding 10m² in floor size).

4.53 Firstly, the notice to fix does not provide sufficient information to identify or differentiate between the "2 buildings". At the time the notice to fix was issued, there were three units on the owners' property, one of which was under construction. Later correspondence from the authority then identified and differentiated between the units.

4.54 Secondly, it is unclear what the authority meant by "placement". For example, this could be construed as relocating the units from another location to the property, locating the units within the property in a way that does not meet the criteria for exempt building work,[23] or alternatively, construction of the unit on the property. I am of the opinion language used in the provisions in the Act and associated regulations is preferable to avoid ambiguity, particularly the use of words defined in the Act. For example, with respect to unit B, where the contravention is in relation to the construction of the unit without first obtaining building consent, the defined term "construct" (instead of "placement") is appropriate.

4.55 Thirdly, the notice to fix goes on to say that the owners "[contravened] exemption 3 of schedule 1 of the Building Act". I agree that this exemption does not apply to unit B and is a relevant consideration in deciding whether section 40 has been contravened. However, exemptions provide relief from legal requirements (for example, section 40 which was the requirement that was contravened in this case). Instead, the specific building work that led to the contravention of section 40 should be detailed.

5. Conclusion

5.1 Based on the information before me, I conclude that unit B, as it presented at the time the authority issued the notice to fix, falls within the definition of 'building' under section 8 of the Act. The building work to construct the unit is therefore subject to regulation under the Act. While not relevant to the authority's decision to issue the notice to fix, I have concluded that the unit remained a building even after it was modified.

5.2 The authority was correct in the exercise of its power of decision to issue a notice to fix in relation to unit B for contravention of section 40, on the basis that the building

[23] Closer than the measure of its own height to any residential building or to any legal boundary.

work to construct unit B was carried out without a building consent when one was required.

5.3 However, the notice to fix in relation to unit B is deficient because it does not clearly identify the building work carried out in contravention of section 40.

5.4 Although the grounds in section 164(1)(a) of the Act for a notice to fix to be issued are satisfied, I do not think it is appropriate for me to modify[24] the notice to fix. Given its flaws, the notice would require substantial modification.

5.5 The issue of notices to fix and other enforcement provisions undertaken by authorities are important powers that should not be taken lightly. It is my view that, following *Andrew Housing Ltd,* authorities have a duty to exercise these powers in accordance with the law. It is essential that a notice contains sufficient particulars of the building work and the contraventions or non-compliance, so the recipient is fairly and fully informed of the issues with the building. Making substantial modifications to the particulars of a notice to fix by way of a determination would provide little incentive to authorities to ensure notices are adequately drafted.

5.6 In this case, I am exercising the discretionary powers in section 188 to reverse the notice to fix. This does not prevent the authority from issuing a new notice to fix with sufficient particulars that clearly identify the building work carried out in contravention of section 40 or any other section of the Act which the authority considers has been contravened.

5.7 If the authority does decide to issue a new notice to fix in relation to unit B, it will need to assess whether there are reasonable grounds to do so under section 164(1)(a) of the Act. The authority will need to consider any new evidence available regarding the status of unit B as a building; including how the unit presents at the time and any modifications that have been made since the notice to fix (NTF-2020-7154/0) was issued. Any new notice to fix must comply with the requirements for the form and content as set out in section 165 of the Act and in the prescribed form.

6. Decision

6.1 In accordance with section 188 of the Building Act 2004, I determine that the authority was correct in the exercise of its power of decision to issue the notice to fix in respect of unit B for building work carried out without building consent. However, I reverse the notice to fix because the contravention is not adequately specified within the notice.

[24] under section 188(a)(a) of the Act

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

Peta Hird
Principal Advisor, Determinations

Appendix A: Legislation

A.1 Relevant sections of the Building Act 2004

8 Building: what it means and includes

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.

163 Definitions for this subpart

In this subpart, unless the context otherwise requires, —

…

specified person means—
(a) the owner of a building:
(b) if a notice to fix relates to building work being carried out,—
(i) the person carrying out the building work; or
(ii) if applicable, any other person supervising the building work:
….

164 Issue of notice to fix

(1) This section applies if a responsible authority considers on reasonable grounds that—

(a) a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent); 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) …

Schedule 1 Building work for which building consent not required

Part 1 – Exempted building work

3 Single-storey detached buildings not exceeding 10 square metres in floor area

(1) Building work in connection with any detached building that—

(a) is not more than 1 storey (being a floor level of up to 1 metre above the supporting ground and a height of up to 3.5 metres above the floor level); and

(b) does not exceed 10 square metres in floor area; and

(c) does not contain sanitary facilities or facilities for the storage of potable water; and

(d) does not include sleeping accommodation, unless the building is used in connection with a dwelling and does not contain any cooking facilities.

(2) However, subclause (1) does not include building work in connection with a building that is closer than the measure of its own height to any residential building or to any legal boundary.

3A Single-storey detached buildings exceeding 10, but not exceeding 30, square metres in floor area and constructed of lightweight material

(1) Building work in connection with any detached building that—

(a) is not more than 1 storey (being a floor level of up to 1 metre above the supporting ground and a height of up to 3.5 metres above the floor level); and

(b) exceeds 10 square metres in floor area, but does not exceed 30 square metres; and

(c) is built using lightweight wall and roof materials, and in accordance with Acceptable Solution B1/AS1 for timber or steel buildings; and

(d) does not contain sanitary facilities or facilities for the storage of potable water; and

(e) does not include sleeping accommodation, unless the building is used in connection with a dwelling and does not contain any cooking facilities; and

(f) if it includes sleeping accommodation, has smoke alarms installed.

(2) However, subclause (1) does not include building work in connection with a building that is closer than the measure of its own height to any residential building or to any legal boundary.

3B Single-storey detached buildings exceeding 10, but not exceeding 30, square metres in floor area if work carried out or supervised by licensed building practitioner

(1) Building work in connection with any detached building if—

(a) any design or construction work is carried out or supervised by a licensed building practitioner; and

(b) the building—

(i) is not more than 1 storey (being a floor level of up to 1 metre above the supporting ground and a height of up to 3.5 metres above the floor level); and

(ii) exceeds 10 square metres in floor area, but does not exceed 30 square metres; and

(iii) does not contain sanitary facilities or facilities for the storage of potable water; and

(iv) does not include sleeping accommodation, unless the building is used in connection with a dwelling and does not contain any cooking facilities; and

(v) if it includes sleeping accommodation, has smoke alarms installed.

(2) However, subclause (1) does not include building work in connection with a building that is closer than the measure of its own height to any residential building or to any legal boundary.

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—…

A.3 Building (Forms) Regulations 2004 – Schedule 2 Forms

Form 13

The building

Street address of building:

Legal description of land where building is located:

Building name:

Location of building within site/block number:

Level/unit number:

Particulars of contravention or non-compliance

[Insert details of failure or error with reference to any relevant building consent]

To remedy the contravention or non-compliance you must: *[state any building work that must be carried out and whether a certificate of acceptance must be applied for]*

This notice must be complied with by: *[date or time frame]*