Determination 2013/055

Regarding the issue of notices to fix in respect of two units and a deck at 35 Charles Street, Takapau, and whether the two units are buildings or vehicles.

1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004[1] ("the Act") made under due authorisation by me, John Gardiner, Manager Determination and Assurance, Ministry of Business, Innovation and Employment ("the Ministry"), for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to this determination are:

- Triple R Lifestyles Ltd ("the applicant") as the owner of the property
- the Central Hawkes Bay District Council, carrying out its duties and functions as a territorial authority and a building consent authority ("the authority").

1.3 The determination arises from the authority's decision to issue two notices to fix for units and a deck located on the applicant's property, on the grounds that they did not comply with Clauses B1 Structure and B2 Durability of the Building Code and that building consent had not been obtained as required under section 40 of the Act[2]. The applicant contends that the units are vehicles rather than buildings and therefore the Building Act and Building Code do not apply.

1.4 Therefore, the matter to be determined[3] is whether the authority correctly exercised its powers of decision in issuing the notices to fix. In considering this matter, I must also consider whether the units come within the definition of a building in section 8 of the Act, and whether the deck complies with the Building Code (First Schedule, Building Regulations 1992).

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

1.6 The relevant sections of the Act and Building Code are set out in Appendix A.

2. The building work

2.1 The site on which the units and deck are installed is flat and approximately 485m^2 of a larger rural section that the applicant had originally intended to subdivide. At the time the authority issued the notices to fix the site contained three units arranged around a wooden deck: a single axle wheeled unit, a tandem axle wheeled unit and a 'portable building without wheels' along with two small sheds. One unit and two

[1] The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Ministry are all available at ww.dbh.govt.nz or by contacting the Ministry on 0800 242 243.
[2] In this determination, unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.
[3] Under sections 177(1)(b), 177(3)(e) of the Act

small sheds were subsequently removed. This determination considers only the remaining two units and deck.

2.2 The units and deck are located roughly in the middle of the site; they are freestanding and not structurally connected.

2.3 The units

2.3.1 The larger unit ("Unit 1") measures 7.1m (L) by 2.4m (W) by 2.7m (H), and is estimated to weigh around 1800kg. It has a tandem axle with two sets of single wheels, a tow bar fitted with a ring-feed towing eye, a wooden floor, and a steel chassis. It was registered as a caravan when it was built in 1983, and as at June 2011 had a current vehicle registration and warrant of electrical fitness. The applicant advises that this registration was put 'on hold' until September 2013. It is fitted out with a basic kitchen unit and a shower, hand basin, and toilet.

2.3.2 The sub-frame consists of welded steel longitudinal and cross beams that support the floor. The axles are rectangular hollow steel that are rigidly fastened to the sub-frame longitudinal beams. The axles carry a stub axle at each end on which the wheel hub and wheels are mounted. The tow bar is formed of steel extensions welded to the longitudinal beams; tapering inward to the front to meet under the towing eye. The tow bar certification plate records a maximum allowable towed mass of 3000kg and a rated vertical load of 950kg. There is no provision for braking, either under the unit or its tow bar. The unit does not currently have position lamps, stop lamps, rear reflectors or rear indicator lamps.

2.3.3 Unit1 is partially supported by its wheels, with jacks beneath its sub-frame longitudinal beams to the rear axles and at the rear corners, and wooden chocks under its tow bar. Unit 1 is currently unoccupied.

2.3.4 The smaller unit ("Unit 2") measures 4.8m (L) by 2.5m (W) by 2.7m (H) and is estimated by the applicant to weigh around 800kg. It has a wooden floor and poly-panel walls and roof; a single axle rigidly fastened to the frame and with one set of wheels; a galvanised steel chassis (similar to Unit 1); a retractable tow bar with a standard coupling, and retractable balancing supports for when it is stationary. It is not currently registered as a vehicle and does not have a warrant of fitness. The unit does not currently have position lamps, stop lamps, rear reflectors or rear indicator lamps.

2.3.5 The unit is partially supported by its wheels, with wooden chocks beneath its corners and under its tow bar. Unit 2 is currently unoccupied.

2.3.6 The units are supplied with power through a mains supply stanchion at the northern corner of the site. There are no permanent services connections, such as water or waste. The roofs to both units are slightly gabled with surface water run off discharged onto the ground via guttering and downpipes at the front and rear of the units.

2.4 The deck

2.4.1 The deck is constructed of 100 x 200mm macrocarpa sleepers that rest on the ground, with 100 x 50mm H3 rough sawn joists on top of them at a maximum of 600mm spacing. The decking is fixed to the joists and is 90 x 30mm H3 treated pine. The finished deck is 300mm off the ground, and has a 150 x 25 skirt over the exposed joist ends to prevent wind entering under the deck. The deck was designed to be

'totally freestanding and moveable', but since the applicant bought it off the previous owners at the end of 2012 it has been secured to the ground using 900mm waratahs in each corner secured to the deck with galvanised coach screws.

2.4.2 The deck supports a 'porch' structure that acts as the entrance to Unit 1. The porch structure overhangs the deck and is supported by chocks to align it with the adjacent unit. The floor of the deck is supported on deck planks, wooden beams and packers.

3. The background

3.1 The applicant purchased the property sometime after June 2010. On 11 July 2011, the applicant applied to the authority for resource consent to subdivide Lots 1 to 4 and 16 to 12 of DP 16624 on Charles Street into 18 smaller lots. Approximately five Lots are presently occupied by caravans or house buses; some Lots also have outbuildings.

3.2 The previous owners of the units ("the previous owners") had entered into an agreement with the applicant on 13 May 2011 to buy proposed Lot 8 once the subdivision was complete and a separate title for the Lot had been issued. The terms of agreement between the previous owners and the applicant entitled the previous owners to occupy Lot 8 in the interim. They then installed the units and began construction of the deck.

3.3 On 22 June 2011 the authority visited the property, and observed two sheds, three portable units and a partially constructed deck on Lot 8 (refer paragraph 2.1).

3.4 The previous owners met with the authority on 24 June 2011 to discuss the compliance of the structures; the authority held the view that the units and deck needed to be placed on foundations. The authority requested a site plan at the meeting, which was duly provided. The plan showed the placement of the three portable units relative to the proposed boundaries of Lot 8, but did not contain any construction or foundation details.

3.5 The authority made a further site visit to the property on 6 July 2011, noting that work on the deck had finished. The need for the deck and units to be placed on and secured to foundations was again discussed between the previous owners, the authority, and the applicant.

3.6 On 6 July 2011, the authority issued a notice to fix (No. 110001). The notice was issued to the applicant rather than the then owners of the units and deck. The notice was in respect of 'Habitable cabins/deck', and stated the particulars of contravention or non-compliance as 'Buildings & deck are required to be anchoured *(sic)* to ground as per NZ Building Code.' The notice further stated that the applicant must:

> Provide compliant piled foundations for habitable buildings and associated decks using appropriate treated timber and relevant stainless steel fixings…by 7th October 2011.

The habitable cabins referred to in the notice to fix were Unit 2 and the portable building without wheels. Unit 1 was not included in the notice as it was registered as a vehicle at the time.

3.7 Further correspondence then passed between the applicant and the authority as to the requirements of the notice to fix. Correspondence from the authority also stated the need for building work to comply with the Building Code regardless of whether building consent was required.

3.8 On 4 August 2011, the applicant advised the authority by email that there was no intention to comply with the notice to fix. The authority instigated legal proceedings to enforce the notice later that day.

3.9 On 24 August 2011, the authority issued a second notice to fix (No. 110003) to the applicant in respect of Unit 2: the notice was also not issued to the previous owners. The notice stated that the unit 'constitutes a building in excess of 10 sq m and therefore requires a building consent'. The notice required the applicant to:

> Remove the building/cabin unit from the property; or,
>
> Apply to [the authority] for a building consent, with the required details, to position this unit on site…

3.10 The applicant withdrew its application for resource consent for subdivision in August 2011.

3.11 Further correspondence passed between the parties. In a letter dated 3 October 2011 to the applicant's legal adviser, the authority stated its view that:

> A caravan is defined as being a vehicle where it is registered and able to be moved from site. A caravan and/or portacom is deemed to be a dwelling where it is greater than 10m2 in area and is not registered as a vehicle.

3.12 The authority made another site visit on 10 October 2011 to determine if the notices to fix had been complied with. The authority then initiated proceedings against the applicant under section 168(1) of the Building Act 2004 'for failure to comply with Notice to Fix 110001'.

3.13 The engineer's and mechanic's reports

3.13.1 In support of the proceedings, the authority commissioned a report on the units by a consulting engineer. The consulting engineer inspected the site and structures and provided a report dated 31 July 2012 ("the engineer's report"). In particular, the engineer focussed on whether the units were roadworthy and could be used as caravans or trailers, and what would be required to bring them to a state where they could be.

3.13.2 The consulting engineer concluded that:

- the widths of the units do not exceed the allowable vehicle width of 2.5 metres and thus would not have to meet special conditions to be towed on public roads
- both of the units required work before they could be towed legally on public roads, including being fitted with lamps, reflectors and indicators and current Warrant of Fitness labels; Unit 2 also would require registration
- the absence of axle sprung suspension 'is a concern' that would require further investigation and analysis along with the adequacy of the structures to accept expected loads when being towed on public roads
- further investigation into whether the axles and wheels were designed or specified for use as towed vehicles would also be required
- the supporting jacks and chocks would provide no resistance to upward loading from winds and would provide limited resistance to lateral and overturn loading from earthquakes and wind.

3.13.3 In February 2012, the previous owners sought advice from a local mechanic about what would be required to bring Unit 2 up to the standard required for a Warrant of Fitness. The mechanic advised that if the unit was fitted with lights, a safety chain and mud flaps 'the vehicle would be able to be registered and I could issue a WOF' following a 'proper warrant of fitness inspection'. The mechanic also noted that the tyres fitted to the trailer are compliant for road use in New Zealand and meet Warrant of Fitness standards, and that the structure was in 'sound condition'.

3.14 On 6 August 2012, the authority withdrew its charge against the applicant under section 168(1) Building Act 2004 in response to evidence about the ownership of the land that the units and deck were located on.

3.15 The consultant's report

3.15.1 The applicant sought expert advice from a building compliance consultant ("the consultant") about the notices to fix; the consultant furnished a report on 18 August 2012. The report considered the validity of the notices to fix, the code-compliance of the deck, and whether the units were buildings for the purpose of the Act.

3.15.2 In respect of the units, the consultant noted that 'the primary purpose of [the units] is for them to be mobile and they have been designed that way' and that the wheel elements are integral to the structure. The consultant considered the units to be 'caravans or certainly nearer to being caravans than to being houses.'

3.15.3 In respect of the deck the consultant noted that the work was exempt from the requirement for building consent (under Schedule 1(g)) and commented on the authority's apparent concerns relating to it not being anchored on a typical pile-like foundation. The consultant considered that 'if a force occurs on the site sufficient to either lift the deck off the ground or move it sideways, an event like that would cause significantly more damage and even a building that complied with the Acceptable Solutions would most likely be damaged.'

3.16 On 15 September 2012 the previous owners wrote to the authority to advise it that the applicant had purchased the units. On 5 November 2012, the applicant wrote to the authority confirming that it was the owner of both the land and the two remaining units. The units have been unoccupied since September 2012.

3.17 The authority conducted a further site inspection on 15 January 2013. Photos taken at this site visit show that the sheds and the portable building without wheels had been removed, but that the structures that form the basis for this determination, namely Units 1 and 2 and the deck, remain.

3.18 In a letter dated 17 January 2013, addressed to the applicant, the authority repeated its position that:

> the structures that were on-site during my site visit …by definition, are considered "buildings" – these being temporary or permanent movable or immovable structures (including a structure/s intended for occupation by people, animals, machinery, or chattels).
>
> Furthermore, the structures that were on-site during my visit referred to above, again by definition, are considered to be "household units"…
>
> As a consequence…the buildings that were on-site during my site visit referred to above are required to be secured in the ground and to approved sub floor construction that meets the requirements of the…Building Code clauses B1 – Structure and B2 – Durability.

3.19 The letter went on to say that the applicant would have to make an application for a building consent for the two remaining units 'for the connection of the structures…to the ground' in compliance with the Building Code. The authority also confirmed that both notices to fix (11001 and 11003) remained in place as 'no evidence [had been] produced or action taken that would lead us to lift [them]'.

3.20 With respect to the deck, the authority repeated its position that, although it did not require a building consent for its construction, it must still comply with the Building Code, and that 'what has been constructed does not demonstrate compliance'.

3.21 The applicant made an application for a determination which was received by the Ministry on 22 April 2013.

3.22 On 21 May 2013, a representative from the Ministry visited the applicant's property and viewed the units and deck.

4. The submissions

4.1 The applicant has sought a determination about the authority's decisions to issue the notices to fix and requesting the 'technical argument (what is the status in law of the structures)' be resolved. The applicant also asked several specific questions, of which some are not determinable matters under section 177 of the Act.

4.2 The applicant provided copies of:

- the sale and purchase agreement for proposed Lot 8 between the previous owners and the applicant
- plans for the applicant's property and the proposed subdivision
- correspondence between the parties, and between the previous owners and the authority
- site plans for Lot 8 showing the placement of the units and deck
- notices to fix 110001 and 110003
- photos of Lot 8, the units and deck
- the consultant's and the mechanic's reports
- an undated letter from a builder relating to the construction of the deck.

4.3 The authority made a submission dated 28 May 2013 in response to the application. The authority outlined the background to the dispute and clarified its position that the units should be considered as buildings under the Building Act. The reasons given were:

- the units' use as a permanent residence 'including sleeping quarters' by the previous owners
- the previous owners had two registered vehicles (namely Unit 1 and a campervan), but neither Unit 2 nor the portable building without wheels was registered as a vehicle
- Unit 1, Unit 2, and the building without wheels were all 'brought on site by a truck and trailer unit, and placed by hi-ab…Neither [the owners] nor [the applicant] had the personal vehicular means by which to move [Unit 1] if there was immediate cause to do so'

- photos taken in October 2011 'evidence further development and permanency of the [units] in that guttering and spouting had been attached to units, and landscaping features, gardens, edging, and fences, had been erected so as to prevent removal of units without demolishing fixed features.'

4.4 With its submission the authority provided copies of:

- plans for the applicant's property and the proposed subdivision
- correspondence between the parties, and between the owners and the authority
- the authority's file notes, internal correspondence and correspondence from third parties
- site plans for the proposed Lot 8 showing the placement of the units and deck
- notices to fix 110001 and 110003
- photos of Lot 8, the units and deck
- evidence of vehicles registered in the owners' name
- the consulting engineer's report dated 31 July 2012
- legal proceeding between the parties relating to costs for the withdrawn charge under section 168(1) of the Building Act 2004.

4.5 The applicant made a further submission in response to the authority's submission. The applicant noted that:

- the deck has never been joined or connected to the units
- the notices to fix were incorrectly served on the applicant when ownership of the units and decks was then with the previous owners
- the authority has variously referred to the units as 'portacoms on wheels', 'caravans', and with the deck as a 'duplex'
- the tow bar has never been removed – it is retractable; both units were able to be removed from site by the previous owners at any time
- Unit 2 is 'unfitted'; it does not contain sinks or toilets; neither unit had ever been connected to services
- the units were not being used as a permanent residence; the previous owners 'had a self-contained motor-home and were using the site to come and go from, as a base for their travels'.

4.6 On 2 July 2013 I sought further information from the applicant in respect of the towed weight of Unit 1 (in reference to a point raised by the engineer). The applicant responded by email on 6 July 2013 that the applicant understood the weight of Unit 1 to be around 1800kg and noted that the unit is a registered vehicle and that the registration was 'on hold'. The applicant noted that the previous owners used the units 'as ancillary to a motorhome that they primarily occupied and drove on a regular basis. Unit 2 was never occupied rather used as temporary storage.'

4.7 A draft determination was issued to the parties for comment on 30 July 2013. The authority and the owner accepted the draft without further comment in responses received on 13 August and 25 August 2013 respectively.

5. Discussion

5.1 General

5.1.1 The dispute centres on: whether the units are 'buildings' for the purposes of the Building Act; the compliance of the deck; and hence whether the authority was correct to issue notices to fix.

5.1.2 I note here that some of the structures that have previously been in dispute between the parties have been removed and that what remains are the two units and deck, as described in paragraphs 2.3 and 2.4. I have limited my consideration to these structures.

5.1.3 I note also that the notices to fix were not issued in respect of Unit 1. Notice to fix 110001, which concerns non-compliance with the Building Code, relates to Unit 2, the deck, and the portable building without wheels (which has subsequently been removed). Notice to fix 110003, concerning the requirement for building consent, relates only to Unit 2.

5.1.4 However, in this determination I have considered both Units 1 and 2, as I understand that the authority's concerns and the applicant's wish for clarity relate to both units.

5.2 Are the units buildings?

5.2.1 In the case of the two units, whether the authority was correct to issue the notices to fix turns on whether they can be considered buildings under the Act. The applicant asserts that the units are vehicles, rather than buildings. However, this in itself does not preclude the Act applying, as in certain circumstances vehicles are considered to be buildings for the purposes of the Act and Building Code.

5.2.2 A "building" for the purposes of the Act is defined in section 8(1)(a), and

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

5.2.3 Section 8(1)(b) the provides that several matters are expressly included in the definition of a building and one of these matters concerns vehicles:

> (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; …

5.2.4 These provisions have been the considered by the Court of Appeal recently in *Thames-Coromandel District Council* v *Te Puru Holiday Park Ltd*.[4] The Court of Appeal agreed with the approach of the High Court stating:

> [10] In the High Court, Duffy J held that Judge Thomas had misinterpreted s 8. She held that if a defendant contended that the alleged building was a vehicle, then the first thing the court needed to assess was whether it was. If it was, then the court had to assess whether it was a vehicle with s 8(1)(b)(iii) characteristics. If it had such characteristics, it was a building. If it did not have them, it was not a building. In those circumstances, it was irrelevant whether the vehicle might come within the general definition (by which we mean the definition in s 8(1)(a)). If, however, the court concluded that the alleged building was not a vehicle at all, then it had to assess whether the thing came within the general definition. …
>
> [22] Our conclusion is therefore that Duffy J approached the interpretation of ss 8 and 9 in the correct way by focusing first on whether the units came within s

[4] [2010] NZCA 663

> 8(1)(b)(iii). What she had to determine was whether the units were vehicles and, if so, whether they were immovable and occupied by people on a permanent or longterm basis. If they were, they were buildings. If they were vehicles but did not have those characteristics, they were not buildings. If they were not vehicles at all, then s 8(1)(b)(iii) fell to the side; what one then needed to look at was whether they came within the general definition.

5.2.5 Therefore, the first step in deciding when a vehicle will be required to be treated as a building under the Act is the meaning of the terms 'vehicle' and 'motor vehicle'. Neither of these terms is defined in the Act, so their natural and ordinary meaning applies: [5]

> vehicle – a thing used for transporting people or goods, especially on land, such as a car, lorry, or cart
>
> motor vehicle – a road vehicle powered by an internal combustion engine.

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

> vehicle—
>
> (a) means a contrivance equipped with wheels, tracks, or revolving runners on which it moves or is moved; …
>
> motor vehicle—
>
> (a) means a vehicle drawn or propelled by mechanical power; and
>
> (b) includes a trailer; …

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

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

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

5.2.9 The authority engaged a consulting engineer to advise on the nature of the units for the purposes of a prosecution under section 168, although those proceedings were subsequently withdrawn (refer paragraph 3.13.1). The consulting engineer's report (refer paragraph 3.13.2) is useful for considering the features of the units and whether or not they can be considered vehicles.

5.2.10 The applicant also sought expert advice from a building compliance consultant as to whether the units could be considered to be vehicles (refer paragraph 3.15), and the previous owners engaged the services of a mechanic to establish what work would be

[5] *Oxford Dictionary of English*, 3rd ed., Oxford University Press, 2010.

required to bring Unit 2 up to standard for a Warrant of Fitness (see paragraph 3.13.3).

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

5.2.12 Both units have wheels, axles and tow bars, and are clearly designed to be capable of being towed as a trailer and of carrying goods.

5.2.13 Unit 1 is legally registered as a vehicle and has a current registration (albeit on hold), and in the opinion of the mechanic consulted by the owners, the work required to bring Unit 2 up to a standard where it could be registered and warranted would not be significant. In my view, whether the units can be considered vehicles, does not turn on whether they are registered and having a current warrant of fitness.

5.2.14 I consider that both units are vehicles, both within the natural meaning of that term, and as defined by the Land Transport Act 1998.

5.2.15 Having decided that the units are vehicles, the question then becomes whether they should be treated as buildings under section 8(1)(b)(iii) of the Building Act 2004. This requires me to consider whether they have the characteristics specified in that section, namely whether they are immovable and occupied by people on a permanent or long-term basis.

5.2.16 It is my opinion that at the time the authority issued the notices to fix Unit 1 was clearly intended to be occupied by people as accommodation with kitchen and full sanitary facilities. Unit 2 had no such facilities and was intended not to be occupied but used as storage. I have no reason to doubt the applicant's statement that the previous owners had a self-contained mobile home and that the units formed a 'base' for their travels. It would appear therefore that the units use by the previous owners at the time the notices to fix were issued was intermittent and not permanent: it is open to debate whether the use could be considered long-term or not.

5.2.17 The question then becomes whether the units are immovable, and in my opinion they are not. The consulting engineer inspected the sub-floor structures of both units, and found that they had affixed axle beams with wheels mounted. Although, the axle beams of Unit 1 are 'moderately rusted', there is no suggestion that are incapable of functioning.

5.2.18 The authority has placed weight on the fact that the units were delivered to the applicant's property on the back of a truck and lifted onto site. However, this does not mean that the units are not capable of being towed. Both have been designed and built to be towed, with tow bars and associated fittings.

5.2.19 Likewise, the consulting engineer's finding that the units cannot currently be legally towed on a public road is not the same as being 'immovable'. The engineer acknowledges that the units are legal in terms of size and need no special permits to be on the road.

5.2.20 The units are designed to be freestanding, with jacks to keep them level while stationary, and no permanent services connections. The owners and applicant have maintained this capacity by not affixing the units to other structures or building in the bottom of the units, and keeping them wheel-mounted. The applicants note that the

units have been towed to their current positions onsite from their original configuration. In my opinion, the units are designed to be capable of being towed and still have this capacity, and are therefore moveable.

5.3 The Units: Conclusion

5.3.1 Having found that the units are vehicles, and that they do not have the characteristics listed in section 8(1)(b)(iii) of the Building Act 2004, it follows that they are not buildings for the purposes of the Act or the Building Code. Applying the approach established by the Court of Appeal in *Thames-Coromandel District Council* v *Te Puru Holiday Park Ltd*[6], it is not now necessary for me to consider whether they would fall within the broader definition in section 8(1)(a): if they are vehicles and are movable, then they are not buildings.

5.3.2 It follows that there is no obligation for the units to comply with the Building Act or the Building Code, and that the authority was incorrect to issue notices to fix with regards to the units.

5.4 The deck

5.4.1 Notice to fix No. 110001 concerns non-compliance with the Building Code in respect of Unit 2 and the deck. The notice to fix said that the deck was 'required to be anchoured (*sic*) to the ground …': no other matter of non-compliance was raised by the authority in respect of the deck.

5.4.2 The authority has correctly stated that although the deck does not require building consent (it is exempt under Schedule 1(g) of the Act) it must still comply with the Building Code. This is a requirement of section 17 of the Act.

5.4.3 The top of the deck is only 300mm above the ground and appears to have been built to a reasonable standard. According to the applicant, the estimated weight of the deck is 1.83 tonnes. The deck, by virtue of its open construction, weight, and configuration must be considered to be inherently stable; this is consistent with the position I have taken in previous determinations[7] with respect to the likely stability of shipping containers. In this case the deck is also considered a low risk structure and its failure is unlikely to endanger people or other property.

5.4.4 The authority has no concerns about the structure (i.e. member sizes and span) and these aspects of the deck's construction do not appear to be at issue.

5.4.5 I note that the deck members are required to sufficiently durable for the life of the structure assuming normal maintenance. The deck is located on Macrocarpa timbers that rest directly on the ground. Macrocarpa is not a species that is sufficiently durable to withstand this level of exposure to moisture for any period past the short to medium term, and will not satisfy the minimum 50 year period for structural elements given in Clause B1.3.2. The remaining timbers are described as 'H3' treated: Acceptable Solution B2/AS1 specifies exterior timber treated to H3.2 for exposed timber other than in ground contact.

5.4.6 As noted above, the deck is exempt from the need for a building consent: if a consent had been sought and issued the deck could have had a 'specified and intended life' arrived at by the lesser durability period likely to be achieved.

[6] [2010] NZCA 663
[7] Determination 2011/104: The exercise of an authority's powers to issue a notice to fix for a commercial storage facility made up of shipping containers

5.4.7 In respect of the deck I do not consider the notice to fix correctly identified the breach of the Act of its regulations. However, it seems reasonable that any further enforcement action that might be contemplated by the authority with respect to the compliance of the deck should take account of the owner's intentions, as it is unclear how long the deck will remain in use and on the site (the owners have advised that the units have remained unoccupied since September 2012 and it is my understanding that the units are now for sale). I suggest that this is a matter that can be agreed between the parties.

6. Decision

6.1 In accordance with section 188 of the Act, I hereby determine that the authority incorrectly exercised its powers of decision in issuing the notices to fix, and I accordingly reverse that decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 23 September 2013.

John Gardiner
Manager Determinations and Assurance

Appendix A

A.1 The relevant sections of the Building Act 2004 include:

8 Building: what it means and includes

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

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

(b) includes—

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

17 All building work must comply with building code

All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.

A.2 The relevant clause of the Building Code include:

Clause B1

B1.3.1 Buildings, building elements and sitework shall have a low probability of rupturing, becoming unstable, losing equilibrium, or collapsing during construction or alteration and throughout their lives.

B1.3.2 Buildings, building elements and sitework shall have a low probability of causing loss of amenity through undue deformation, vibratory response, degradation, or other physical characteristics throughout their lives, or during construction or alteration when the building is in use.

B1.3.3 Account shall be taken of all physical conditions likely to affect the stability of buildings, building elements and sitework, including:

…

(h) wind,

…

B1.3.4 Due allowance shall be made for:

(a) the consequences of failure,

(b) the intended use of the building,

…