Determination 2012/075

Regarding the issue of a notice to fix and the amendment of a building consent for a 4-storey commercial building at 160 Grafton Road, Grafton, Auckland

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 Determinations and Assurance, Ministry of Business, Innovation and Employment ("the Ministry")[2], for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to the determination are:

- the applicant, Auckland Council (including in its previous capacity as Auckland City Council) ("the authority")[3], carrying out its duties and functions as a territorial authority or building consent authority
- Form Property Group Ltd, the owner of Units[4] 3B5 and 3A3 and a share of assigned Accessory Units, and all the associated common areas, and who is the developer ("the developer")
- KB Trust ("KBT"), owner of Units 3A1, 3A7, and 3A2 and a share of assigned Accessory Units, and all the associated common areas, acting through its legal advisors
- Alderman Property Ltd ("APL"), owner of Unit 3B2 and mortgagee of Units 3B3 and 3B4, and share of assigned Accessory Units, and all the associated common areas
- TEA Custodians (Bluestone) Ltd ("TEA") the owners of Units 3B3 and 3B4 and a share of assigned Accessory Units acting through an agent
- The Grafton Road Trust ("GRT"), the owners of Units 3B1 and 3A4, a share of assigned Accessory Units, and all the associated common areas

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[1] The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.dbh.govt.nz or by contacting the Ministry on 0800 242 243

[2] After the application was made, and before the determination was completed, the Department of Building and Housing was transitioned into the Ministry of Business, Innovation and Employment. The term "the Ministry" is used for both.

[3] The location in which the building work is located was formerly under the jurisdiction of the Auckland City Council. The reference to "the authority" refers to both.

[4] The ownership of the units, as stated in paragraphs 1.2 and 1.3, is given in terms of the legal description and is in respect of 160 Grafton Road. Elsewhere in the determination the term 'unit' refers to the apartment number as stated in the consented plans.

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- Grafton Road Ltd ("GRL"), as trustees of the Grafton Road Trust, the owners of Units 3A5 and 3A6, and assigned Accessory Units, a share of assigned Accessory Units, and all the associated common areas.
- McDonald Vague, the receivers in respect of the ground, first, and second levels of the building.
- Progression Development Limited (in liquidation), the owner of Unit 3A3, 3A4, and assigned Accessory Units, and a share of assigned Accessory Units, and who was also the developer (refer also Form Property Group Ltd above).

1.3 I also consider Body Corporate 379933 ("the body corporate") to be a person with an interest in this matter.

1.4 I take the view that the matters to be determined[5] are

- whether the authority correctly exercised its powers when it granted a building consent for alterations to a commercial building ("the building")
- whether elements of the building comply with Clause C3—"Spread of fire" of the Building Code (Schedule 1 of the Building Regulations 1992)[6] that applied at the time the building consent was granted
- whether the authority correctly exercised its powers when it issued the notice to fix in respect of the building work including the notice to stop work.

1.5 The authority has stated that it requires the determination to address the following matters:

- the cancellation or amendment of the building consent due to fire safety issues
- the amendment of the building consent to comply with section 75 of the Act
- a direction that works in the areas of concern must not continue until the above determinations are made.

1.6 With regard to the third matter described in paragraph 1.4, I note that under section 177 the Chief Executive has a power to determine matters in relation to a notice to fix. As the notice to fix issued by the authority specifically referred to the stop work notice I consider the stop work notice can be considered as part of the notice to fix (see for example, Determination 2011/089).

1.7 In making my decision, I have considered the submissions of the parties, the matters raised at the hearing, and the other evidence in this matter. The relevant legislation is set out in Appendix A.

2. Background

2.1 The building in question is a 4-storey commercial building. In early 2006, the authority issued a building consent and subsequent amendments for an office fit-out on Level 3 of the building. A code compliance certificate has been issued for this work.

[5] Under sections 177(1)(a), 177(1)(b), 177(2)(a) and 177 (2)(f) of the Act

[6] 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.

2.2 On 1 December 2006, a modified unit development plan dated July 2006 for the unit title subdivision was approved and the unit title boundaries were established according to the subdivision consent. Unit titles were issued on the basis of this plan.

2.3 On 14 November 2008 the developer made an application to the authority for a building consent to convert existing office space on Level 3 to apartments; the work included the installation of steel decks fixed to the building's exterior.

2.4 The application was accompanied by a 'Deed of Agreement' dated 16 September 2008 between the then owners of units 3A3, 3A4, 3A5, 3A6, 3B1, and 3B5; and KBT. The agreement provided for the named owners to amongst other things 'be responsible for all costs of errection (sic) and construction of all walls relating to the redevelopment as per attached sketch plan'. The Deed of Agreement was 'subject to [KBT's] solicitor's approval'. A plan was appended to the agreement showing eight units on Level 3. The plan shows a partition layout different to that contained in the consent plans.

2.5 In an email to the developer dated 16 January 2009, KBT's legal advisor stated that the redevelopment of level 3 was 'subject to Solicitors approval which has not been given'. Nor were any powers of attorney ever signed in relation to the property. The legal advisor advised that KBT would not agree to any further redevelopment of the property.

2.6 On 19 January 2009, a trustee of KBT wrote to the authority noting that the developer did not represent him as an owner, and that he did not consent to 'any redevelopment of commercial units into residential units anywhere in the building'.

2.7 On 14 April 2009, the authority issued a building consent (No. B/2008/24310) for the work to Level 3, which was described as "Convert existing office space to 11 apartments". The 'Accepted Value' for the work, as recorded on the building consent approval form, was $690,000.00.

2.8 On 10 November 2009 the developer made an application for an amendment to building consent No. B2008/24310 in respect of the Level 3 layout.

2.9 In written advice, which the authority received in November 2009, the designers for the work stated that they were providing new drawings in relation to the building consent. The drawings involved changes to the layout shown on the consented plans, and were required as the 'units and common area boundaries have to remain the same as per already established unit title boundaries.' The designers considered that the changes were minor.

2.10 The amendment to the building consent was subsequently approved by the authority, and granted on 3 December 2009 (No. B/2008/24310/A). The work was described in the issued amendment as 'Layout 3rd floor (minor) to internal areas of apartment layout and day light into bedroom'. The 'Accepted Value', as recorded on the building consent approval form, was $200.00.

2.11 On 1 September 2010, APL wrote to the authority stating that it had not agreed to the current development works or to a variation of the unit title plan.

2.12 In a letter to the authority dated 30 September 2010, KBT reiterated that its consent to the works had not been obtained, that it did not agree with a proposed unit title redevelopment plan, and that the developer did not have power to act on behalf of other owners.

2.13 On 6 October 2010, the authority wrote to KBT's legal advisors noting that a "Substituted Unit Development Plan" application lodged with the authority had been rejected. This was on the grounds that approval from all the unit owners had not been obtained.

2.14 On 26 October 2010, KBT's legal advisors wrote to the authority noting that 'any building over common areas should also form part of [the authority's] inquires'.

2.15 Subsequently, the authority issued a site instruction (No 34853) dated 23 February 2011, requiring the work stop until a surveying certificate had been provided showing the relation of the building to the unit title boundaries. The authority has advised that the building work continued.

2.16 Following a site inspection of the building on 23 February 2011, the authority issued the notice to fix (No. 3551) dated 26 April 2011 in regard to building consent No B/2008/24310/A. The notice to fix said:

> **Details of contraventions are as follows:**
>
> 4.0 The work carried out on the accessory units in the areas shown as hatched on the attached plan are in breach of the fire safety requirements of the Building Code due to the lack of proper fire breaks along the property boundary between principle units and the accessory units.
>
> In particular the work is in breach of the following specific requirements relating to fire safety:
>
> (a) Buildings shall be provided with safeguards against fire spread so that adjacent household units are protected from damage (clause C3.2(c));
>
> (b) Fire separations shall be provided within buildings to avoid the spread of fire and smoke within the same property and other property (clause C3.3.2).
>
> 5.0 The work on the units and accessory units cannot be carried out until the owner of the units obtains a certificate under Section 75(2) of the [Building] Act that multiple units subject to the works must not be transferred or leased in conjunction with other or others of the specified allotments.
>
> **To remedy the contravention or non-compliance you must:**
>
> 6.0 Address and rectify each of the contraventions set out in paragraphs 4.0 and 5.0, which includes stopping the works as shown on the attached plan.
>
> 7.0 With respect to paragraph 4.0 you must lodge with [the authority] an amended building consent including amended plans for the 3rd floor to ensure that the principal unit and accessory unit boundaries are located as per the Unit title boundaries. You must provide all necessary information that may be requested to allow this amended building consent to be processed.
>
> 8.0 With respect to paragraph 5.0 you must obtain a certificate pursuant to Section 75(2) of the Act.

2.17 The authority attached an annotated plan of the third floor to the notice to fix.

2.18 On 16 and 25 May 2011, APL wrote to the authority expressing concern that the authority had not properly addressed issues that the owners had previously raised with the authority and that the authority had allowed the work to proceed despite these objections. The unit owners stated that there was no agreement between themselves and the developer as to the redevelopment and that they had objected to the redevelopment being carried out.

2.19 The Ministry received an application for a determination on 16 September 2011.

2.20 In a letter to the designer dated 17 January 2012, the authority stated that building consent No B/2008/24310 had lapsed. The authority's letter said:

> Under Section 52 of the Building Act 2004, a building consent lapses and is of no effect if the building work to which it relates does not commence within 12 months of the date of issue of the building consent or any further time that the Council may allow.

3. The initial submissions

3.1 In a memorandum accompanying the determination application, dated 15 September 2011, the authority's legal advisors submitted the follows:

- As a result of errors in the consent application documentation, the authority had incorrectly issued the building consent No B/2008/24310 that permitted building work that gave rise to non-compliance with the fire safety requirements of the Building Code, and to the requirements of section 75.
- The differences between the location of the apartment walls as described in the building consent and the unit title boundaries came to the authority's attention early in 2011.
- As there were no proper fire separations due to the walls of the apartments not being located on the unit tile boundaries, the authority was applying for a determination to either 'cancel' or amend the building consent.
- When the building consent was applied for, the developer failed to disclose that it had not received consent from the adjacent owners for the construction of decks over the common property.
- As no section 75 certificate had been obtained the authority required the determination to impose a condition that required such a certificate, together with a direction to stop the works until the certificate was obtained.

3.2 The authority forwarded copies of:

- some of the plans relating to building consent No. B/2008/24310, and the amendment No. B/2008/24310A
- the proposed unit title plan dated July 2006
- the notice to fix dated 26 April 2011 and the site instruction to stop work dated 23 February 2011
- the correspondence with the developer, unit owners, and the architect
- an affidavit of an officer of the authority dated 15 September 2011, which described the background to the dispute, the dealings with the building owner, and the steps taken by the authority in respect to the dispute.

3.3 The Ministry sought further information by way of email on 23 September 2011, to which the authority's legal advisor responded by letter dated 20 October 2011 describing further the sequence of events and the discrepancies between the subdivision consent and building consent plans. The legal advisor stated that:

> The plans submitted for the building consent application B/2008124310 and dated 14 April 2009 showed the same incorrect wall alignment …
>
> …(B/2008/24310/A) was made to amend building consent B/2008/24310. An amended set of plans and a letter from the applicant's architect were attached, which explained that the new plans showed the correct alignment of established boundaries. These plans also did not correspond with the plans approved by the [authority] for the subdivision consent, but due to the architect's explanation were mistakenly approved by the [authority] …

3.4 In a further submission dated 11 November 2011, the authority provided copies of relevant certificates of title including plans dated July 2006, the second resource consent application (R/SUB/2010/4797) and related correspondence, and an affidavit of an officer of the authority dated 11 November 2011 which set out

- the concerns of the authority in respect of fire safety (as being that the fire breaks are 'in the wrong location' and consequently that there is not adequate means of escape from fire or prevention of spread of fire)
- various issues relating to the boundaries as regards rights of ownership and access.

4. The first draft determination

4.1 Copies of a first draft determination were sent to the parties for comment on 21 November 2011. I received comments and additional documentation regarding the first determination. I summarise these submissions as follows.

4.2 The authority

4.2.1 In a response dated 19 December 2011, the authority generally accepted the draft determination, but had concerns regarding the interpretation of section 75. The authority prepared a draft notice to fix, worded as per the notice to fix referred to in paragraph 2.16, but with the references to section 75(2) deleted.

4.2.2 In response to the second submissions made by APL, the authority did not object to the proposed technical amendments and additions being made to the draft determination. However, the authority requested that I consider whether it was appropriate for me to include the information listed by APL on the notice to fix. The authority suggested that the boundary wall question could only be resolved by doing one of the following:

> (a) to resurvey the unit title boundaries so that the boundaries are altered to align with the boundaries which have been constructed; or
>
> (b) to bring the building into compliance with the original title plan, by seeking an amendment to the building consent to ensure that the building work is consistent with the existing unit title boundaries and carry out the appropriate building work in accordance with the amended building consent.

4.3 KBT

4.3.1 KBT provided a submission dated 22 November 2011 that was received on 9 January 2012, stating that its main concern was that it had not given consent or approval for the work to be carried out.

4.4 APL

4.4.1 In a letter to the Ministry dated 28 February 2012, APL generally accepted the draft, subject to

- the implementation of the authority's comments
- references to Unit 3.02 to 3.11 description being amended to Apartments 3.02 to 3.11 to avoid confusion with unit title descriptions
- clarifying apartment 3.10 extension and decks to apartments 3.02 and 3.05
- a reference to the multiple penetrations through the common property
- the notice to fix to include requirement for the developer to remove and reinstate work to certain nominated areas.

4.5 The legal advisor acting for the new owners of 3A5 and 3A6

4.5.1 In an email to the authority on 1 March 2012, the legal advisor stated the owners were concerned about non-complying lifts, decks and plumbing. In a further email to the Ministry on 11 April 2012, the owners considered that, as the decks had been built without proper consent, they were illegal and unsafe and need to be removed urgently.

4.6 GRT

4.6.1 In a submission received by the Ministry on 12 March 2012, GRT rejected the draft determination and requested a hearing. It also

- denied that there was a breach of the Building Code
- stated that the plans for its units were in line with the 2006 boundaries and it was unaware of any revised boundaries
- was of the opinion that the fire walls were not unsafe and that the fire corridor walls had not been moved.

4.6.2 It also said that as the work in question was already completed the stop work notice was impossible to implement. GRT was also of the opinion that the unit titles had been incorrectly drawn. This was because the titles were based on an incorrect plan produced five years previously, which had been approved by the authority. This plan did not comply with the first approved plan that had been followed by GRT. The titles were also issued without accurate measurements being taken.

4.6.3 GRT also attached copies of correspondence relevant to its submission, including a letter to the authority dated March 2012 from the designer of the project that described the background to the design and construction processes. The designer confirmed that:

> none of the original walls along the both sides of the common corridor were moved to reduce or deviate any part of the common area, from the original state of affair what was on site prior any process on (*sic*) redevelopment started.

4.7 Additional submissions

4.7.1 On 21 February 2012 McDonald Vague advised the Ministry that they are now the receivers for some of the properties (as described in paragraph 1.2).

4.7.2 On 5 April 2012 the Ministry sought further information from the parties in regards matters relating to the decks and a proposal to have the boundaries modified to match the building as constructed.

4.7.3 In a submission dated 13 April 2012, the authority advised that no agreement had been reached to resolve the matter of the boundaries and that the only way to resolve the matter would be to resurvey the unit title boundaries to align with the boundaries as constructed (which would require consent of various owners), or to bring the building into compliance with the unit title plan.

4.7.4 In a submission dated 24 May 2012, APL restated some of its original comments and suggested that the notice to fix should require the modification of the boundaries to certain units, the removal of some skylights or the modification of the external joinery, and the reinstatement or removal of the internal works to 10 units. It also noted that consent of owners was not obtained for the affected units and the authority had been informed of this as far back as September 2010.

4.7.5 The authority made a further submission dated 5 June 2012 in response to APL, reiterating points made in its earlier submission, and requesting the determination consider the whether the suggested changes to the notice to fix proposed by APL in paragraph 4.7.4 were appropriate.

4.7.6 By email on 5 June 2012 GRL agreed with the submission make by APL but made no further comment.

4.7.7 In a response received by the Ministry on 7 June 2012, the developer stated that he did not accept the draft determination and requested a hearing.

5. The hearing

5.1 General

5.1.1 I arranged a hearing at Auckland on 3 July 2012, in order to give the parties the opportunity to discuss the various matters. I was accompanied by a Referee engaged under section 187(2) of the Act, together with two representatives of the Ministry Also in attendance were representatives of the following:

- The authority
- Alderman Property Ltd
- The developer
- The KB Trust
- The Grafton Road Trust
- Grafton Road Ltd

- McDonald Vague

5.1.2 Those attending spoke and the presented evidence. This enabled me to amplify or clarify various matters of fact and was of assistance to me in preparing this determination.

5.1.3 I asked the parties to state whether they agreed with the draft determination as published. The authority and GRL agreed with the draft but the developer and GRT did not. KBT did not offer a view on the matter. APL was of the opinion that the issues regarding the decks should be included in the matters to be considered in the determination.

5.1.4 I also requested that the authority provide copies of the building consent and relevant information.

5.2 The submissions

5.2.1 I summarise below the arguments put forward by the parties during the course of the hearing:

The boundary walls

The authority	GRT	The developer
Was not concerned if there were a mix of commercial and domestic units within the building. Its only concern related to the boundary wall issues. Had issued the building consent based on the application that had been made and only discovered the boundary wall changes after the work had commenced.	Was under the impression, in accordance with the resource consent, that the building was to contain apartments and not a mix of apartments and commercial units. If a change of use was granted, its apartments would be the only ones remaining in what was otherwise an office building. Considered that the certificates of title were incorrectly issued. If the walls as constructed were to be amended, the owners would not be getting the apartments that they had agreed to purchase.	Noted that the issues arising from the boundary walls related to the modified unit title plan. Both the plan and the unit titles had been incorrectly issued. _____ **APL** The Body Corporate is under the administration of a Court-appointed individual who is responsible for compliance of the common areas. The boundary wall question is not within this person's jurisdiction.

The stopwork notice and the notice to fix

The authority	The developer
The stopwork notice related to the boundary wall adjustments and building work had continued despite the issuing of the notice. As it "ring fenced" the boundary wall issues from the other building work, the issuing of the notice to fix was the only appropriate action that the authority could take. There were no alternative options open to the authority under the Resource Management Act 1991.	The notice to fix was issued in error as it was given on a building consent that was subject to a code compliance certificate The stopwork notice had been issued after the work involving the boundary walls had been completed.

The building services

The authority	GRT	APL
Had been notified that there were fire alarm and other safety issues. In the interests of safety, some occupiers had been removed from the building. GRT's occupied apartment, while not necessarily code-compliant and lacking lift access, was considered to be safe. Had not been approached regarding a solution to the lift problems.	There are plumbing and drainage problems with its apartments. In addition, there are no power supplies or any lift access.	Have not been able to occupy its units as there is no lift access and the power and other services have been cut off.

The decks

The authority	GRT	APL
At the time the building consent was issued, the developer was the owner of a significant number of units that together comprised a majority of the Body Corporate. The authority proceeded on the basis of the information that it received in April 2009, which purported to contain an agreement. Based on the information received to date, the decks are considered to be safe. However, before code-compliance can be confirmed some remaining elements require completion and inspection.	The decks were designed by an architect and an engineer. A certificate has been issued regarding the handrails and the authority had inspected the decks. **GRL** As at least one deck is not connected to the surface water disposal scheme, the decks are not complete. It is not known whether the decks are fully code-compliant. **KBT** Had informed the authority that not all the owners had approved the deck installation.	Not all the Body Corporate owners were contacted in respect of the building consent. Nor have all the owners given permission for the installation of the decks. There was a conditional agreement, involving one owner only, but this was not subsequently clarified. APL referred to letter to the authority dated 19 January 2009, in which KBT had expressed its concerns. On 1 September 2010 APL informed the authority of its concerns regarding the boundaries. The authority had not responded to this correspondence. The deck construction included openings through the common properties.

5.2.2 During the hearing, the authority proposed that it could facilitate a meeting between the parties to discuss the major issues, being the unit title boundaries and the decks. It was acknowledged that this would assist the parties to reach agreement in resolving their differences.

5.2.3 The authority forwarded a CD-Rom containing the property file for the building in the week commencing 30 July 2012.

5.2.4 The Ministry emailed an excerpt from the draft determination to the parties on 6 August 2012: the excerpt was limited to the paragraphs 1 (The matter to be

determined) and 2 (Background) and sought the party's response to this. The email also sought confirmation that the first consent had been lapsed by the authority (refer paragraph 2.20).

5.2.5 A representative of the GRT emailed the Ministry on 11 August 2012, stating that

- a search of the LINZ database was required in order to ascertain the documentation that related to the building consent
- it was understood that there was other documentation available relating to mortgagees who had given authority to build the apartments
- the letter from the authority dated 17 January 2012 concerning the lapsing of the first consent 'was sent after the majority of the [units] were completed, [the authority had inspected the work], and the [units] flats units had been sold & occupied'.

5.2.6 The authority emailed the Ministry on 31 August with various documentation that the authority advised it had 'relied on at time of the building consent application regarding the ownership and approvals'. Attached to the email was the deed of agreement (refer paragraph 2.4); the certificate of titles for Units 4, 5, 6, 7, 8, and 12, dated March to September 2007; and the letters referred to in paragraphs 2.13 and 2.14.

6. The second draft determination

6.1 Following the hearing described in paragraph 5, and on receipt of additional documentation, I prepared a second draft determination that was forwarded to the parties for comment on 7 September 2012.

6.2 APL responded by email on 10 September 2012 saying it did not accept the draft determination and submitted that:

- the consent was applied for and issued to the developer and not the body corporate, so (in reference to the authority's views in paragraph 5.2.1) the relevance of the developer's interest in the body corporate when the authority assessed the work being undertaken within common property is questionable. A majority ownership of units alone does not give that owner the right to represent the body corporate or undertake work without the consent of all owners
- the authority made 'no proper enquiries' to ensure the consent of all parties had been obtained, and it was clear from 19 January 2009 that consent of all the owners had not been obtained
- it disagreed with the Ministry's interpretation of section 75, given the definition of 'a "unit"' in the Unit Titles Act[7]. It was submitted that section 75 was therefore applicable.
- it was unclear whether the fire safety issues (refer paragraph 7.3) addresses the mix of commercial and residential use on adjoining boundaries

[7] Both 1972 and 2012

- the decks are constructed over common property and were part of the consent subject to determination. The determination has not adequately considered the 'construction of the decks over common property … which clearly prejudice other owners'.

6.3 APL disagreed with the determination's conclusion that although the authority erred in issuing the building consent it should not be reversed. APL submitted that the consent should be reversed as:

- the units subject to redevelopment consist of 'less than 20% of the body corporate' and approximately half of the third level only
- the developer has 'no control over' the first three levels of the building which are in the hands of receivers
- at least one party purchased their units in full knowledge of the dispute
- APL's interest in the building predates the commencement of the building consent.

6.4 The authority's legal advisors responded in a letter dated 24 September 2012, submitting the following:

- No inspections have been completed since the issue of the stop work notice to fix. Building work done after 23 February 2011 was outside the scope of the building consent and had not been inspected and because of this 'no code compliance certificate can be issued'.
- A number of required inspections have not been carried out, and due to the lack of inspections the authority 'is not in the position to complete final inspection', and
- The work to the decks must be completed before a final inspection can be undertaken.
- There has been no code compliance certificate issued for any work relating to the apartments

6.5 In response to GRT's submissions on completed work as noted in paragraphs 4.6.2, 5.2.1 and 5.2.5, the authority submitted that the drainage work was not started at the time the stop work notice to fix was issued, and all drainage work and some plumbing work is in breach of the stop work notice and has not been inspected.

6.6 The Ministry received no other submissions in response to the second draft determination.

6.7 I have taken into account the submissions and made amendments to the determination that I consider to be appropriate.

7. Discussion

7.1 The encroachment onto common property and adjoining unit titles

7.1.1 As a general comment I note that the unit boundaries on the subdivision plans approved in 2006 are not well delineated. Comparing the floor plan that formed part

of B/2008/24310/A with the unit title plan dated July 2006, I make the following observations:

- The southern boundaries of Apartments 3.02 to 3.04 as shown on the revised plans now extend into accessory units AU152 and AU158.
- Apartment 3.04 occupies an area of approximately 23m^2 of the original adjoining unit title area.
- The balance of Apartment 3.04 and the whole of Unit 3.05 occupy what was originally one unit title.
- Unit 3.10 extends into accessory unit 158, and a shelf area has been constructed over the common property lift shaft
- The new decks to Apartments 3.02 to 3.11 are all constructed over common property.
- The northern boundary walls of Apartments 3.06 to 3.09 have also been revised.

7.1.2 I note that, in addition to the incursions into the accessory units, there have been major amendments to the profiles of the units themselves. This is evident from the area of Apartment 3.04, which is now within the original Apartment 3.03 profile, and the subdivision of the originally designated Apartment 3B1 into two units.

7.2 Section 75

7.2.1 The authority and APL consider the authority acted wrongly in failing to require section 75 to be complied with before it granted the building consent. APL specifically refers to the definition of "unit" in the Unit Titles Act in support of its position.

7.2.2 Section 75 deals with the construction of building work over two or more allotments. Section 75(2) requires that where two or more allotments will be subject to building work a condition of the building consent is that those allotments must not be transferred or leased except in conjunction with each other. The condition must be contained in a certificate issued by the territorial authority and this certificate must then be noted against the titles of those allotments.

7.2.3 I do not agree that section 75 applies to building work over the internal boundaries of a unit title building between principal units, accessory units and common property and I have set out my reasons below.

- Section 75(1)(a) only applies to "the *construction* of a building on land" (my emphasis) and this would not include the internal alterations to these units on the third floor of the building. There is a significant difference between the construction of a building and internal alterations to an existing building. "Construct" and "alter" are both separately defined in section 7, and "construct" does not include "alter". While "unit" is defined broadly in section 6 of the Unit Titles Act 2010 to mean "in relation to land, means a part of the land consisting of a space of any shape situated below, on, or above the surface of the land" this definition cannot override the words of section 75(1) of the Act that apply only to "the *construction* of a building on land".

- Section 75(1)(b) requires that the allotments must be "held by the owner in fee simple", whereas the principal units at issue here are a stratum estate in freehold under section 18 of the Unit Titles Act 2010.
- I also consider it relevant to note that the provisions of the Act restricting the construction of a building on two or more allotments permits such construction if an entry is made on the certificate of title requiring the transfer or lease of the allotments to be in conjunction with each other. This type of restriction could not apply where building work was undertaken on common property or an accessory unit as there are other owners who have interests in those areas and it is not within the power of a territorial authority under section 75(2) to issue a certificate preventing the transfer or lease of those areas of common property and accessory units except in conjunction with each other.
- The "land" referred to in section 75(1)(a) must be comprised of 2 or more "allotments", and "allotment" is defined in section 10(1)(a) of the Act as "a parcel of land that is a continuous area of land". It is not an ordinary use of the words to describe a principal unit on the third floor of a building as "a continuous area of land".
- There are more suitable procedures in the Unit Titles Act 2010 relating to redevelopments that should be used for addressing building work across unit boundaries, and there are also specific disputes procedures in that Act that may be utilised by owners in respect of such boundary disputes.

7.3 The fire safety issues

7.3.1 Having established that the amended unit profiles do not correspond with the unit-title sub-division, I must now consider the fire safety of the units in question.

7.3.2 Clause C3.2(c) requires adjacent household units, other residential units and "other property" to be protected from damage in respect of the spread of fire, and Clause C3.3.2(c) and (d) require fire separations to be provided between household units within the same building and to avoid the spread of fire and smoke to "other property". The definition of "other property" in Clause A2 of the Building Code and in section 7 includes "part of any buildings … that are not held under the same ownership". Any principal units and accessory units within the building that are held under different ownership would come within that definition of "other property".

7.3.3 I note that some of the units are held by the same owners (units 3A3/ 3A4/ 3B5, and units 3A5/ 3A6) and that the common boundaries between some of these units have been adjusted and no longer match the units as designated in the subdivision consent and scheme plan. Clause C3.3.2(c) only requires fire separations between household units in the same building and so does not prevent, for example, two units being merged to create one larger apartment. However, Clause C3.3.2(d) requires fire separations within buildings to prevent the spread of fire and smoke to other property, and it is this provision that has been contravened by the construction of boundary walls of principal units across accessory units 152 and 158.

7.3.4 While the revised boundary walls may be fire separated, I am of the opinion that the areas within the units that were designated as other principal units or accessory units on the unit title plan are not protected in accordance with the requirements of Clauses C3.2(c) and C3.3.2 (d).

7.3.5 Accordingly, as the relevant requirements of Clause C3 have not been complied with, I consider that the building does not meet the requirements of the Building Code and that the authority acted incorrectly in approving the amended building consent.

7.3.6 Two approaches to resolve this issue have previously been raised (refer paragraph 4.2.2) and were discussed at the hearing. Under the provisions of the Act I am not able to determine what steps the parties should take to remedy the anomaly between the unit title plan and the subdivision work as constructed. However, I recommend the parties accept the authority's offer to arrange a meeting to resolve the issue.

7.3.7 APL has questioned the mix of commercial and residential use on adjoining boundaries in terms of fire safety (refer paragraph 6.2) but has not identified any specific provisions of the Building Code that have not been complied with. As a general observation the fire separation required between adjacent residential dwellings is no less onerous than between a residential unit and office accommodation, and therefore it is unclear how the mix of commercial and residential would alter the fire safety requirements.

7.4 The stop work notice and the notice to fix

7.4.1 The authority has used the notice to fix as a means to order that the building work cease immediately. I note that the prescribed Form 13 relating to a notice to fix, allows an authority to order work to cease immediately 'until the authority that issued the notice is satisfied that [the specified person] are able and willing to resume operations in compliance with the [Act] and regulations under that Act'. I therefore accept that a notice to fix provides a valid means of issuing a stop work notice.

7.4.2 The developer has noted that the boundary walls were part of a building consent for which a code compliance certificate had previously been issued (refer table at paragraph 5.2.1), and that the stopwork notice was issued after that date. The developer therefore considers that both the stopwork notice and the notice to fix were issued in error.

7.4.3 The authority argues that, given the circumstances and with no alternative remedies being available to the authority under the Resource Management Act 1991, the issuing of the notice to fix was the only appropriate action that it could take.

7.4.4 An assessment of the plans submitted to the authority for the office fit out in 2006, building consent No. B/2008/24310, and the building consent amendment No. B/2008/24310/A all show discrepancies between the locations of the partition walls built under those consents, and the location of boundaries described in the unit title plan.

7.4.5 In my opinion it is also not correct to take the view that the notice to fix was issued in respect of work for which a code compliance certificate had already issued. The partitions erected as part of building consent B/2008/24310 are not the same partitions previously erected under the 2006 consent for the office fit out.

7.4.6 As I have found that the building work does not comply with the Building Code I consider that the authority had sufficient reason to issue the stop work notice. I

therefore confirm the authority's decision to order the building work to cease by way of issuing the notice to fix.

7.4.7 With regard to the notice to fix, I have already decided in paragraph 7.2.3 that section 75 does not apply to building work over the internal boundaries of a unit title building. Accordingly, I am of the opinion that the authority was in error when it stated in the notice to fix that the owner of the units was required to obtain a certificate under section 75(2).

7.5 The grant of building consent No B/2008/24310

7.5.1 The request for the building consents was made by the developer, who at that time was the owner of a significant number of units that together comprised a majority of the Body Corporate. The developer has argued that this was appropriate and the authority has stated that it accepted the application based on a document purporting to confirm agreement to the proposed changes.

7.5.2 The document is described in paragraph 2.4. The agreement stated in the document is qualified, and does not appear to cover all the work for which the consent was issued. The plan appended to the agreement is different to that shown in the plans submitted for consent. In addition, based on the correspondence and submissions made on behalf of KBT, it appears that KBT's solicitor did not approve the deed as required. Accordingly, the agreement never came into force.

7.5.3 Two owners have submitted that they were not a party to any such agreement and that they informed the authority of this. KBT addressed this issue in a letter to the authority on 19 January 2009, and APL in a letter to the authority dated 1 September 2010. In this regard, I note that the KBT correspondence pre-dates the issuing of the building consent No. B/2008/24310 on 14 April 2009.

7.5.4 Taking into account the matters discussed above, and in addition to the code-compliance issues previously discussed, I am of the opinion that as unconditional approval of all the owners had not been obtained, the authority erred when it issued building consent No. B/2008/24310.

7.6 The lapsing of consent No B/2008/24310

7.6.1 The authority informed the designer on 17 January 2012 that due to the building work not having commenced, building consent No B/2008/24310 had lapsed and was of "no effect" (refer paragraph 2.20).

7.6.2 GRT has questioned this, noting that the letter was sent after the majority of the units were completed, the authority had inspected the work, and the units had been sold and occupied.

7.6.3 I agree with this position. The provisions of section 52 only apply in respect of building work that has not commenced; the provisions do not apply in respect of work that has commenced but may not have progressed to completion. The authority should formally withdraw its advice that the consent has lapsed.

7.7 The decks

7.7.1 The parties have requested that the installation of the decks be considered in this determination and they provided me with information in respect of the decks at the hearing. APL considers the Determination is deficient in that only the structural requirements of the decks have been considered.

7.7.2 From the hearing discussions it appears that the decks are structurally sound and appropriate certificates and inspections appear to corroborate this. However, the authority is yet to carry out a final inspection of the decks and there is still work to be completed regarding the discharge of surface water. Accordingly, at this stage, I cannot accept that the decks are code-compliant.

7.8 Whether to confirm or reverse the grant of building consent No B/2008/24310

7.8.1 The authority has sought the reversal or amendment of the building consent and one of the owners, APL, has specifically requested the reversal of the building consent. I have considered this submission and the facts and evidence of this matter before me as below.

7.8.2 I note that the reversal of the building consent is an issue that affects not just the owners in respect of whose units building work has been undertaken but also the other owners who have interests in the common property and accessory units. However, of those owners only APL has specifically sought the reversal of the building consent.

7.8.3 The non-compliance with the Building Code identified in this Determination does not involve unsafe work or building work that has been undertaken contrary to the Building Code, but is a technical breach in terms of legal process arising from the disparity between the location of apartment walls and the relevant unit title boundaries. Unlike unsafe work that should be remedied, in this case there are a range of possible solutions that could remedy the situation, some of which do not involve building work. I consider this another reason that points against the reversal of the building consent.

7.8.4 A practical solution to the current impasse between the owners would be for the unit plan to be amended; it is noted that some of the owners have indicated they will not agree to any such amendments. A plan change would come at some expense for the owners whose units have infringed the common property, accessory unit areas, and similar. However, any expense involved in obtaining such an amendment to the unit plan is likely to be significantly less than the disruption and expense that would be caused by a requirement to remove the building work and realign the units with the existing unit boundaries (for example, if such a notice to fix requiring the removal of the non-compliant work were to be issued in the future).

7.8.5 I am mindful of the prejudice to an owner that is likely to occur when a building consent is reversed. The consequences of such an action have been set out in previous determinations, such as Determination 2011/14. The consequences of reversing the building consent in this Determination would make any resolution of this matter considerably more difficult as the building work would become

unconsented building work, meaning that no code compliance certificate would ever be available for the work, and nor would a certificate of acceptance.

7.8.6 I accept that I cannot give too much weight to the prejudice that would occur to the newer owners of the units in question. The body corporate disclosure would have identified the boundary disputes among the existing owners, as would a LIM, if one had been sought. An inspection of the building should also have alerted any purchaser to the nature of the uncompleted building work.

7.8.7 Given the above considerations I conclude that it would not be appropriate for me to reverse the building consent.

8. The Decision

8.1 In accordance with section 188 of the Building Act 2004, I determine that;

- the building work does not comply with Building Code Clause C3 Spread of fire
- the authority did not exercise its powers correctly when it issued building consent No. B2008/24310 and the amended building consent No. B2008/24310/A.
- the authority's exercise of its powers in issuing the notice to fix in respect of a notification to stop work is confirmed
- the authority is to issue an amended notice to fix that takes into account the findings of this determination.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 3 December 2012.

John Gardiner
Manager Determinations and Assurance

Appendix A: The relevant legislation

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

10 Meaning of allotment

(1) In this Act, unless the context otherwise requires, **allotment** means a parcel of land—

(a) that is a continuous area of land; and

(b) whose boundaries are shown on a survey plan, whether or not as a subdivision—

(i) approved by way of a subdivision consent granted under the Resource Management Act 1991; or

(ii) allowed or granted under any other Act; and

(c) that is—

(i) subject to the Land Transfer Act 1952 and comprised in 1 certificate of title or for which 1 certificate of title could be issued under that Act; or

(ii) not subject to that Act and was acquired by its owner under 1 instrument of conveyance.

(2) For the purposes of subsection (1), an allotment is taken—

(a) to be a continuous area of land even if part of it is physically separated from any other part by a road or in any other manner, unless the division of the allotment into those parts has been allowed by a subdivision consent granted under the Resource Management Act 1991 or a subdivision approval under any former enactment relating to the subdivision of land: household units

(b) to include the balance of any land from which any allotment is being or has been subdivided.

75 Construction of building on 2 or more allotments

(1) This section applies if—

(a) an application for a project information memorandum or for a building consent relates to the construction of a building on land that is comprised, or partly comprised, of 2 or more allotments of 1 or more existing subdivisions (whether comprised in the same certificate of title or not); and

(b) those allotments are held by the owner in fee simple.

(2) The territorial authority must issue a certificate that states that, as a condition of the grant of a building consent for the building work to which the application relates, 1 or more of those allotments specified by the territorial authority (the specified allotments) must not be transferred or leased except in conjunction with any specified other or others of those allotments.

77 Building consent must not be granted until condition is imposed under section 75

(1) A building consent authority must not grant a building consent for building work to which section 75 applies until the territorial authority has issued a certificate imposing the condition referred to in section 75(2).

A.2 The relevant sections of the current Building Regulations current at the time the consent was issued are:

Clause C3—SPREAD OF FIRE

C3.3.2 Fire separations shall be provided within buildings to avoid the spread of fire and smoke to:

(c) Household units within the same building or adjacent buildings

(d) Other property.