



Determination 2014/028

Dispute regarding the need for a section 75 certificate for building work for the alteration of internal partition walls at 143 Rutherford Street, Nelson

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations 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 the determination are
 - the owner, Rutherford Hotel Holdings Ltd (“the applicant”), represented by a legal adviser
 - Nelson City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority
- 1.3 This determination arises from the decision of the authority to refuse to issue a code compliance certificate for the premises as a certificate under section 75 of the Act (“the section 75 certificate”) was not completed.
- 1.4 The matter to be determined² is whether the authority was correct in requiring a certificate under section 75 of the Act for the building work and whether it was correct in refusing to issue a code compliance certificate on these grounds.
- 1.5 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.

2. The building work

- 2.1 The building is a single-storey commercial building on a corner site that is constructed over two Lots (Lot 1 DP 9367 and Lot 2 DP 58); both Lots are owned by the applicant and are under a single lease to one tenant.
- 2.2 The building work consisted of the removal of a non-load bearing internal partition wall (“the partition wall”) across the legal boundary and the erection of a new non-load bearing partition wall in a parallel position (refer Figure 1). The wall was constructed as part of interior alterations to a retail premises. The partition wall has timber framing with studs and bottom plate anchors and was designed to NZS 3604:2011³.

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 Under section 177(1)(b) and 177(2)(d)

³ New Zealand Standard NZS 3604:2011 Timber Framed Buildings

- 2.3 The authority has stated that additional building work was also undertaken at the same time to create a new office space and an accessible toilet. Eight new emergency lights have been installed in areas across the legal boundary and an emergency warning system installed.

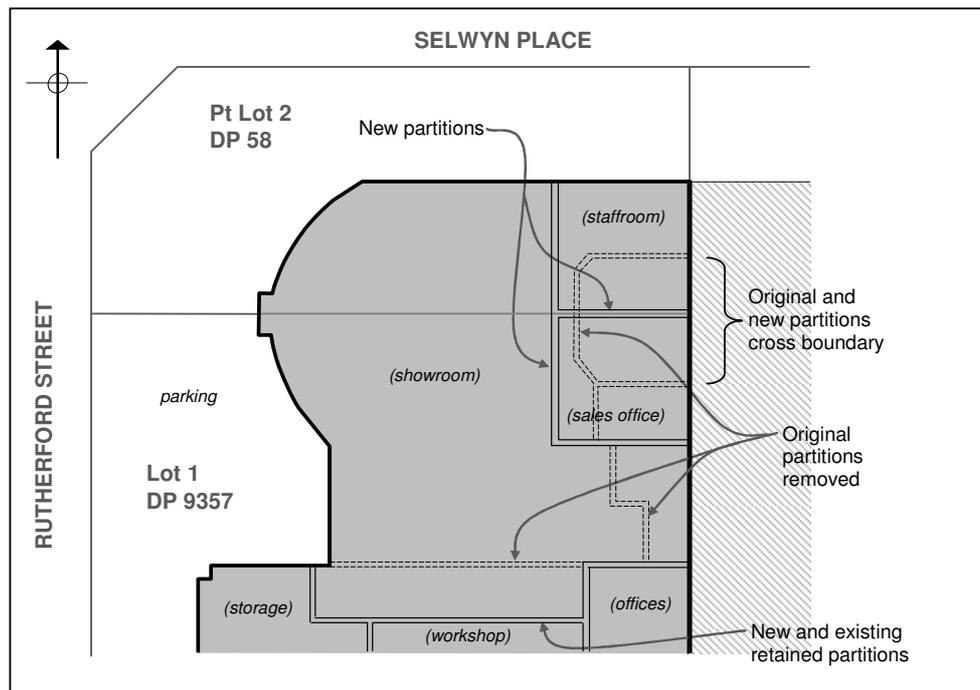


Figure 1: Site plan showing the building and the legal boundaries

3. Background

- 3.1 In early March 2012 the lessee of the applicant's property requested permission to undertake some alterations to the property. On 6 March 2012 the applicant provided this consent by letter.
- 3.2 The lessee then applied for a building consent to undertake the building work. The work included the removal and replacement of the partition wall.
- 3.3 On 28 March 2012 the authority sent a copy of the section 75 certificate to the lessee's architect to be signed and returned. The accompanying letter stating:
- Building consent application number 120163 may only be granted subject to the registration of a Certificate imposing Section 75 of the Building Act 2004 on the Certificate of Title.
- 3.4 On 31 March 2012 the applicant advised the authority that it did not consider a section 75 certificate would be required.
- 3.5 On 10 April 2012 the authority advised the lessee's architect that a certificate would be required, and issued building consent No. 120163 on this basis. The applicant has stated that they were not made aware of this information by the lessee and had assumed the requirement for a section 75 certificate had been withdrawn. The building consent issued noted:

This building consent is issued subject to the following conditions:

This building consent may only be issued subject to Section 75 of the Building Act 2004. As a condition of the grant of a building consent for the building work to which the project information memorandum relates, 1 or more allotments specified by the

[authority] (Lot 1 DP 9357) and Part Lot 2 DP 58) must not be transferred or leased except in conjunction with any specified other or others of the allotments

- 3.6 Building work was completed around April 2013. The authority then sought information from the applicant as to the progress of the section 75 certificate, stating it was unable to issue a code compliance certificate until the section 75 certificate was registered against the relevant titles.
- 3.7 On 16 April 2013 the applicant responded to the authority stating that they did not believe a section 75 certificate was required.
- 3.8 On 26 April 2013 the authority wrote to the applicant confirming their refusal to issue a code compliance certificate for the building work unless a section 75 certificate was registered over the titles. The authority notes the letter was not a comprehensive review of its position and was part of a conversation. In summary:
- The plans used to process the building consent show the wall was built across the boundary of the two allotments; therefore the consent was processed on the basis of a section 75 certificate being required.
 - The building of an internal wall falls within the meaning of a ‘building’ under section 8 of the Act. Section 8(1)(a) applies to all aspects of building work, not just the construction of a new building.
 - The authority provided the applicant with a copy of a certificate that was to be signed and lodged with the Registrar-General of Land.
 - Under section 94 of the Act, an authority must issue a code compliance certificate if it is satisfied, on reasonable grounds that the building work complies with the building consent. In this case a code compliance certificate cannot be issued as the consent was granted on the premise of a section 75 certificate registration being required.
- 3.9 The authority states that two meetings were held between the applicant and the authority on 19 May 2013 and 21 February 2014 to attempt to resolve the issue.
- 3.10 The Ministry received an application for determination on 26 March 2014.

4. The submissions

- 4.1 The applicant provided a submission through their legal adviser who stated that the authority should not require a section 75 certificate to be registered as a condition of issuing the building consent for the following reasons:
- The only cross boundary alterations involved removal and replacement of the non-structural partition wall.
 - There is no work being done across the boundary. Section 75 relates to “construction of a building” on land that is comprised or partly comprised, of two or more allotments. The building already existed and the definition of a building in the Act applies to the whole structure; modification of a building is not construction of a building.
 - The application should be considered under section 49 and 112 of the Act. Under section 49, the authority must issue a building consent if the building work complies with the building code.

- The authority issued a building consent and the work was carried out in accordance with that consent.
 - The requirement for a section 75 certificate is not within the scope of section 94(1) of the Act.
- 4.2 The applicant provided copies of the following supporting documentation with the application
- the two certificates of title
 - a photomap and site plans of the property
 - the site plans provided for the building consent
 - the approval letter between the applicant and the applicant's lessee
 - correspondence between the applicant and the authority from 28 March 2012 to 26 April 2013.
- 4.3 A draft determination was issued to the parties for comment on 16 April 2014.
- 4.4 The applicant accepted the draft determination with no further comment.
- 4.5 The authority provided a submission dated 22 May 2014 in response to the draft determination. The authority did not accept the draft determination and said (in summary):
- The partition wall was not a replacement wall, its design and construction met the definition of “construct” in relation to a building. The work does not meet the definition of “alter”.
 - The partition wall, and the emergency warning and lighting systems meet the definition of a “building” under section 8 of the Act as they consist of an “immovable structure” and “electrical work”.
 - The consent includes building work across two allotments and the building would not satisfy the Building Code unless it operated as one building. As the specified systems are located over both allotments, a section 75 certificate conjoining the two allotments would avoid the situation where those specified systems would be compromised if one of the allotments was sold.
 - The authority quoted Building Code Clause C3.3 and noted the requirements of section 112, and that ‘section 75 is one mechanism that allows a building consent to be granted where compliance ... would otherwise be reduced.’ The new partition wall located across the boundary ‘would result in [the] building not complying to the same extent as before [with respect to compliance with the fire safety clauses]’
 - Section 75(2) does not qualify the requirement to issue the certificate based on whether it is a “major alteration” under section 71(1). There is no justification for limiting the application of section 75 to “substantial” building work.
 - ‘Registration and any subsequent removal of a section 75 registration is a procedural matter...’
 - Seeking a section 75 certificate before the granting a building consent will delay a building consent; seeking this before a code compliance certificate is issued is ‘common industry practice’.

- The authority requested justification for the determination’s decision and guidance material, and clarification was sought as to whether the building consent was invalid.

5. Discussion

5.1 The section 75 certificate

- 5.1.1 Section 75 will apply when an authority issues a building consent involving a building to be constructed over two or more allotments. The authority must include a condition requiring a section 75 certificate to be registered on the certificate of title(s) that the affected allotments cannot be transferred or leased except in conjunction with any affected allotments.
- 5.1.2 The applicant submits that no building work was being done across the boundary and the definition of a “building” applies to the whole structure and not to the modification of an existing building. The authority submits that the building of an internal wall falls within the definition of section 8 of the Act, which can apply to all aspects of building work and not just the construction of a “whole or new building”.
- 5.1.3 Under section 8(1)(a) “building” is defined as:
- a temporary or permanent movable or immovable structure
- 5.1.4 Under section 2 ‘building work’ is defined as:
- (a) means work—
- (i) for, or in connection with, the construction, alteration, demolition, or removal of a building
- 5.1.5 The definition of “building” and “building work” are general terms that are most commonly used in the Act. However in my view you cannot solely rely on these broad definitions provided in sections 8 and 2 to ascertain the meaning of a particular section; you must look at the wording and context of the section itself and the wording of other sections in the Act.
- 5.1.6 Section 75 has the wording ‘construction of a building’. To help determine the meaning of this phrase I have looked at other sections for comparison. Within “building work” there are four more specific terms provided: construction, alteration, removal and demolition. The terms “construct” and “alter” are further defined in section 7 and used in different ways throughout the Act; some sections state only “construct”⁴ whereas other sections state “construct and alter.”⁵ The terms are defined as:
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| construct | in relation to a building, includes to design, build, erect, prefabricate, and relocate the building |
| alter | in relation to a building, includes to rebuild, re-erect, repair, enlarge, and extend the building |

⁴ s7 definitions of “scaffolding used in the course of the construction process” and “site work”, s20(2)(c), s33(1)(b)(i), s22, s123(1)(a), s148(2)(a), s402(1)(j) and s410(1)(c)

⁵ s7 definitions of “building work”, “plans and specifications”, s35(2), s51(2)(b), s71, s118 and s393.

- 5.1.7 The authority have stated that the partition wall falls within the definition of “construct”, as it was designed, built and erected, and that the partition wall cannot be an alteration as it was not a rebuild, re-erection or repair.
- 5.1.8 The words “construct” and “alter” can also be given their ordinary dictionary definition in addition to the meaning given under section 7 of the Act. Taken from the Oxford Dictionary:⁶
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| construct | build or make (something, typically a building, road or machine) |
| alter | change in character or composition, typically in a comparatively small but significant way |
- 5.1.9 These more general dictionary definitions assist in ascertaining the difference between the construction of a building and the alteration of a building. It is clear from the ordinary dictionary definition and the section 7 definition that the internal partition wall is an alteration of a building.
- 5.1.10 The legislation intends there to be a qualitative difference between the two terms as it uses them differently. The statutory intention of using a combination of the words “construct” and “alter” broadens the applicability of a section to expand the type of building work a particular section will apply to. The use of “construct” in isolation is to limit the type of building work for section 75 to apply to.
- 5.1.11 A comparison can be made with section 71(1) of the Act: the provision for natural hazards. The wording of section 71 only applies to the ‘construction of a building, or major alterations to a building’. This sets the threshold for the type of work that might trigger a natural hazards notice. Previous decisions, for example, Determination 2011/034⁷ have analysed what a “major alteration” would constitute. Section 71 has a similar function to section 75. I note that I do not state section 71 and section 75 are the same or that this determination needs to meet the requirements of section 71, however, in providing justification for the interpretation of section 75 it is important to draw parallels with similar sections under the Act.
- 5.1.12 For a section 75 certificate, the statutory intention is to limit this requirement to substantial building work, namely building, erecting, prefabricating or relocating a building. In my view it would be a burdensome requirement to extend this to include all alterations. The effect of section 75 is set out in sections 78 and 79 of the Act: when a section 75 certificate is noted on the certificate of title(s) the allotments cannot be transferred or leased without the other affected allotments. When a building is constructed, this is the stage when the requirements of section 75 apply, and therefore should already be noted on the certificate of title if subsequent alterations within the building are carried out with the required building consents.
- 5.1.13 Section 75 only uses the words “construction of a building”, which in my view is a conscious decision to prevent section 75 applying to alterations to an existing building. The building of the partition wall is not the construction of a building but a minor alteration to an existing building. I note that in some circumstances where part of a building is being constructed over a boundary, a section 75 certificate would still be required. The authority was incorrect to require the applicant to provide a section 75 certificate for the removal and replacement of the partition wall in this instance.

⁶ Oxford University Press 2014 www.oxforddictionaries.com

⁷ Determination 2011/034: Does work to an existing building constitute ‘major alterations’, and therefore should a section 73 notice be issued in respect of land subject to natural hazards at 82 Bisley Avenue, Nelson at paragraph 6.3

5.2 Compliance with the Building Code

- 5.2.1 The authority has submitted that the building will not satisfy the provisions of the Building Code without a section 75 certificate. The authority refers to the fire safety clauses of the Building Code and notes that the safety of users of the building would be reduced.
- 5.2.2 I do not consider that compliance with the Building Code is a requirement of a section 75 certificate. As noted by the authority, a section 75 certificate is a 'procedural matter'. Under section 17 of the Act all building work must comply with the Building Code to the extent required by the Act.
- 5.2.3 The applicant applied for a building consent for the partition wall and associated works. Under section 49(1) a building consent is granted if the authority is satisfied on reasonable grounds that the provisions of the Building Code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.
- 5.2.4 There is no indication that the building works in question have been completed in a manner otherwise than in accordance with the building consent, nor in a manner that does not satisfy the requirements of the Building Code. I note that Clause C3.3 relates to 'other property' as defined under section 7 of the Act: 'Other property' means buildings that are not held under the same allotment; in this case the allotments are held under the same ownership and therefore cannot be considered 'other property'.

5.3 The building consent and code compliance certificate

- 5.3.1 Although I have concluded in paragraph 5.1.13 that a section 75 certificate was not required for the purposes of this determination, I will make some general comments on the granting of a building consent subject to section 75.
- 5.3.2 Section 77 states that the authority 'must not grant a building consent for building work to which section 75 applies until the territorial authority has issued the certificate under section 75(2).' In this case the authority had granted a conditional building consent, where the section 75 certificate was noted as a requirement of the consent. In my view this is incorrect. The language used in section 77 is clear that the authority must complete the section 75 certificate before granting a building consent.
- 5.3.3 The authority has stated that it is 'common industry practice' for consenting authorities to issue building consents without a section 75 certificate even where they intended to impose a section 75 certificate. In my view the wording of section 77(1) makes it clear that a building consent authority cannot grant a building consent until the territorial authority issues a section 75 certificate. I do not foresee that this will delay the issuing of a building consent. Once a section 75 certificate has been issued the building consent can also be issued and the building work undertaken. The section 75 certificate is recorded on the certificate of title by the Registrar-General.
- 5.3.4 The authority has asked for guidance around the status of the applicant's building consent for this determination. As I have noted in paragraph 5.3, even if a section 75 certificate is required it should not be a condition on a building consent. For the purposes of this determination I do not consider the applicant's building consent invalid, and if the authority is satisfied the building work has been carried out in accordance with the building consent a code compliance certificate should be issued.

6. The decision

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority was incorrect in requiring a section 75 certificate for the partition wall and I therefore reverse the authority's decision to refuse to issue the code compliance certificate.
- 6.2 The authority should make a new decision whether to issue the code compliance certificate having regard to the decision of this determination.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 4 June 2014.

John Gardiner
Manager Determinations and Assurance

Appendix A

A.1 The relevant provisions of the Act include:

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 the certificate under section 75(2).
- (5) The building consent authority must note, on the building consent, the condition imposed in the certificate

78 Registrar-General of Land must record entry on certificate of title when certificate is lodged under section 77

- (1) If a certificate referred to in [section 77\(1\)](#) is lodged with the Registrar-General of Land, he or she must record, as an entry on each certificate of title for the specified allotments, that the certificate of title is subject to the condition referred to in that certificate.

79 Effect of entry recorded on certificate of title

If an entry referred to in [section 78\(1\)](#) is recorded on the certificates of title for the specified allotments, none of those allotments may be transferred or leased except in conjunction with the specified other or others of those allotments.

A.2 The relevant provisions of the Building Code

Clause C3.3 Buildings must be designed and constructed so that there is a low probability of fire spread to other property vertically or horizontally across a relevant boundary