

Determination 2025/009

An authority's decision to grant a building consent amendment with a section 75(2) condition

81A Curry Road, Rimu, Invercargill

Summary

This determination considers an authority's decision to grant an application for a building consent amendment subject to a condition imposed under section 75(2). The matter concerns building work which crosses the boundary between two allotments held by the same owners under one fee simple record of title.

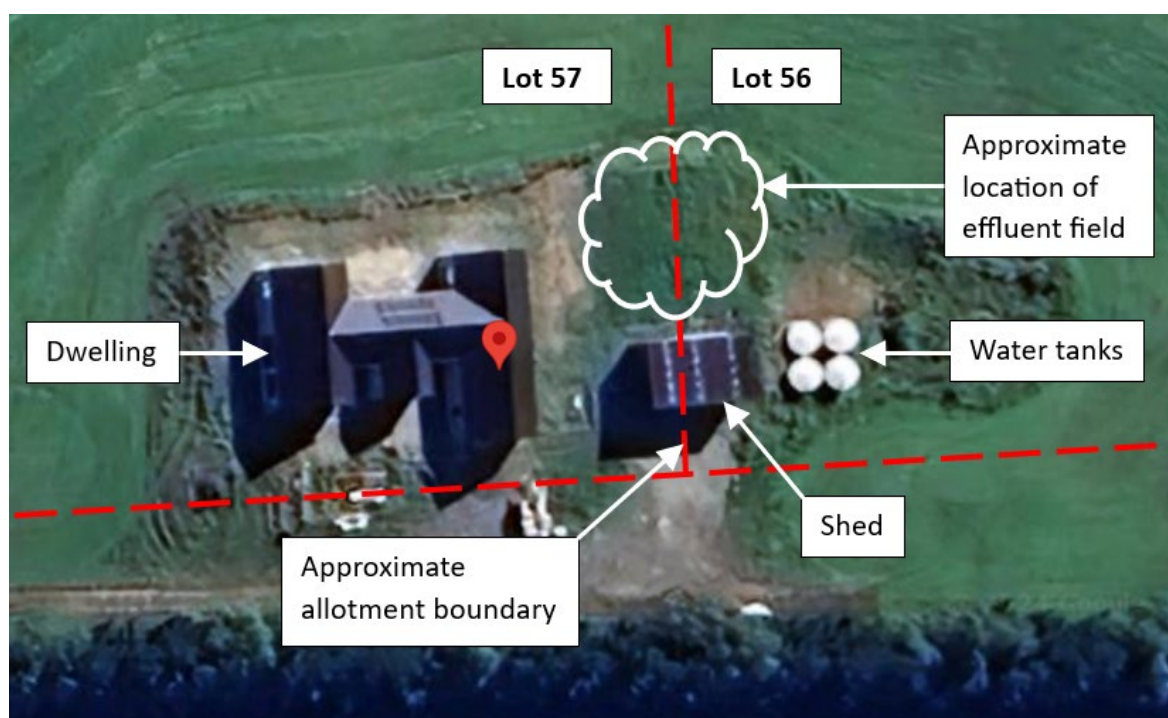


Figure 1: Aerial view of 81A Curry Road¹

¹ Figure 1 has been generated using a combination of imagery from Google Maps NZ (accessed 19 December 2024), Southland District Council maps (accessed 29 January 2025), and the submitted building consent plan.

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

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

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Peta Hird, for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment (“the Ministry”).²
- 1.2. The parties to the determination are:
 - 1.2.1. L and N Harrison, the owners of the property who applied for this determination (“the owners”)
 - 1.2.2. Southland District Council, carrying out its duties as a territorial authority and building consent authority (“the authority”).
- 1.3. The matter to be determined, under section 177(1)(b) and (2)(a), is the decision by the authority to impose a condition under section 75(2) in respect of an amendment to a building consent (number RBW/2023/200939/2) when conditions had already been registered on the record of title.
- 1.4. In deciding this matter, I must consider whether:
 - 1.4.1. section 75 applies when granting an amendment to a building consent
 - 1.4.2. the onsite foul water disposal system that crosses the boundary between two allotments in the amended building consent triggers the requirements of section 75(2).
- 1.5. I note that the parties have offered differing views on whether the repositioning of the new dwelling was a minor variation under section 45(4)(a). However, the owners applied for an amendment to the building consent under section 45(4)(b) and I have considered the authority’s exercise of its powers of decision in regard to that amendment.
- 1.6. Any building consents and associated amendments granted in relation to the new shed are outside the scope of this determination.

² The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

2. The building work and background

- 2.1. The property lies east of Invercargill and consists of three allotments on one record of title, including Lots 56 and 57 referred to in this determination.
- 2.2. The building work includes the construction of a new detached dwelling and associated onsite foul water disposal system and several water tanks.
- 2.3. The proposed onsite foul water disposal system is situated to the east of the dwelling and consists of a septic tank and an effluent field.
- 2.4. There are also four 22,500 litre concrete water tanks for the provision of potable water for the dwelling (two tanks) and fire-fighting water supply (two tanks) proposed to the east of the dwelling.
- 2.5. The original building consent application indicated the dwelling was to be located across the boundary of two allotments, as shown in figure 2 below. The onsite foul water disposal system and potable water tanks, including their connections to the dwelling, were to be located on Lot 56.

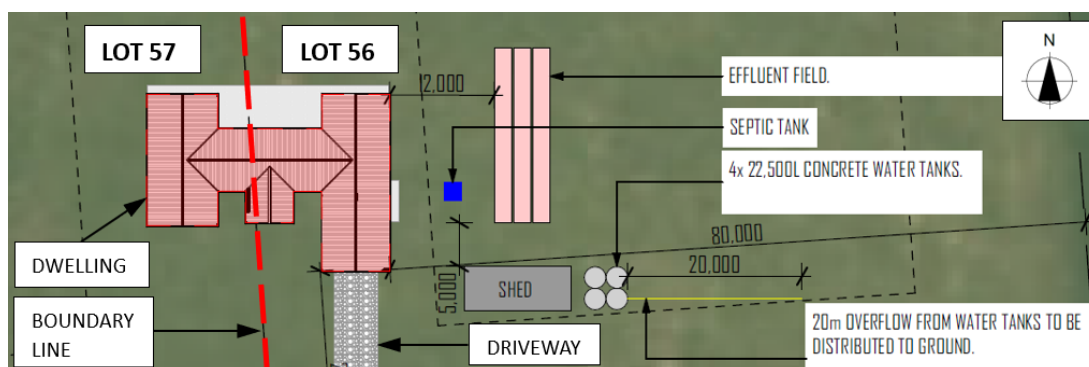


Figure 2: Original building consent site plan (not to scale)³

- 2.6. On 13 March 2023, the authority issued a certificate and lodged a copy of it with the District Land Registrar in relation to Lots 56 and 57 of the owners' property.⁴ The certificate states:

... as a condition of the grant of a building consent to construct a building over allotments held by the owners ... in fee simple, the [authority] requires that [Lot 56] shall not be transferred or leased, except in conjunction with [Lot 57].
- 2.7. On 19 April 2023, the authority issued the original building consent (number RBW/2023/200939/1). However, the building consent⁵ did not include a note on it about the condition imposed in the certificate as required under section 77(5).

³ Figure 2 has been reproduced from plan A101 revision 4, dated 11 April 2023. Dimensions are in metres.

⁴ The certificate was registered on the record of title on 17 March 2023 pursuant to section 77 of the Act, noting 'this record of title is subject to the condition imposed under section 75(2)'.

⁵ Form 5 of the Building (Forms) Regulations 2004.

- 2.8. After the original building consent was issued, a decision was made during construction to site the dwelling 30m west of the original proposed location, ie wholly on Lot 57.
- 2.9. The owner's submission states that at a siting and foundation inspection the authority advised the owners they needed to apply for an amendment to the original consent because the location of the dwelling was not consistent with the building consent plans. The authority also advised the owners another certificate would need to be registered against the record of title.
- 2.10. On 20 June 2023, the owners applied to the authority for an amendment to the building consent (number RBW/2023/200939/2) to reposition the dwelling. The dwelling and septic tank were to be located wholly on Lot 57, the concrete water tanks to remain on Lot 56, and the effluent field for the foul water disposal system located across the boundary between Lots 56 and 57. Refer to figure 3.

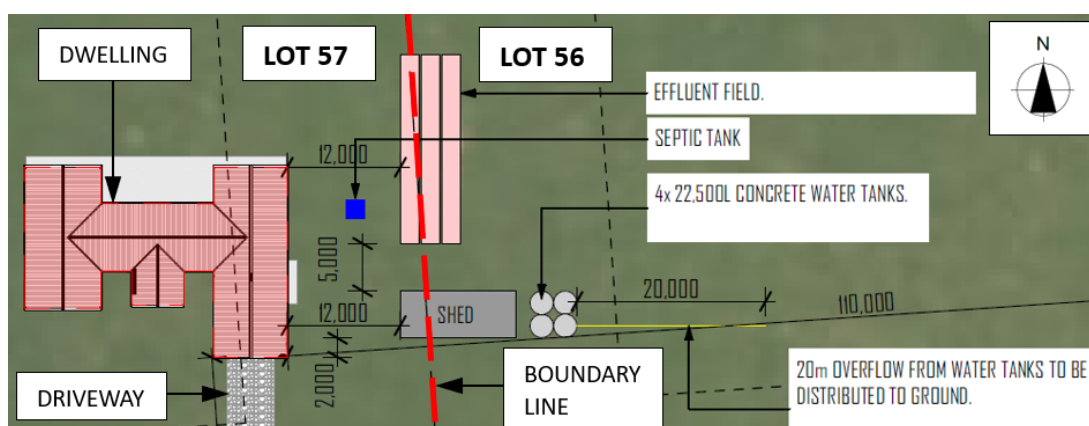


Figure 3: Amended building consent site plan (not to scale)⁶

- 2.11. On 20 July 2023, the authority issued another certificate to the District Land Registrar. The certificate referenced the amended building consent and the part of the building crossing the boundary as follows: "RBW/2023/200939/2 – Across boundaries relates to the effluent field". The documents provided indicate this was received by Land Information New Zealand (LINZ) on 4 September 2023 and registered on the record of title on 5 September 2023.
- 2.12. On 27 September 2023, the authority granted and issued the amendment to the building consent (number RBW/2023/200939/2) for the change to the siting of the dwelling and associated foul water disposal system. The building consent⁷ stated:

This building consent is issued pursuant to Section 75(2) of the New Zealand Building Act 2024.

⁶ Figure 3 has been reproduced from plan A101, revision 5, dated 24 May 2023. Dimensions are in metres.

⁷ Form 5 of the Building (Forms) Regulations 2004.

A Section 75(2) certificate is required for this building work as the building is on land comprised of 2 or more legal allotments, whether or not they are comprised in the same certificate of title.

A section 75(2) certificate prevents one or more of the allotments being transferred or leased except for in conjunction with the other allotments.

-> The effluent field is located across allotment boundaries ...

2.13. The certificate was duly recorded on the record of title.⁸

3. Submissions

The owner

- 3.1. The owners are of the view that a condition on the amended building consent was unnecessary because the record of title already had entries associated with previous certificates.
- 3.2. The owners submit (in summary):
 - 3.2.1. The authority has required “an excessive number of section 77 notices” for the building work.
 - 3.2.2. The building work for the dwelling and effluent field has been approved under one building consent, and the amendment is not for new work but relates only to work described in the original building consent.
 - 3.2.3. Regarding the effluent field, the owner referred to what is included in the definition of ‘building’ in section 8(1)(b)(i) and (2) and noted the term ‘building’ refers to all elements of the building work, including the dwelling and effluent field.
 - 3.2.4. The effluent field is integral to the foul water system for the dwelling and should not be added as a separate entry on the record of title because it is already included in the existing record under ‘building’.
 - 3.2.5. The proposed effluent system “always crossed the allotment boundary as it is connected via the septic tank and drains to the house to form the whole system”.
 - 3.2.6. A single section 77 notice on the title would suffice to advise any potential mortgagor or buyer that allotments are not to be transferred or leased except in conjunction with one another.

⁸ There are four such certificates recorded on the title. I have assumed the entries dated 3 July 2023 and 7 June 2024 relate to the application for a building consent for the construction of a shed and a subsequent amendment to that building consent (refer to paragraph 1.6).

- 3.2.7. An entry under section 77 is not required for the amendment to the building consent, and this could have been treated as a simple minor variation.

The authority

- 3.3. The authority submits (in summary):
- 3.3.1. Sections “75-80 are specifically relevant to each building consent and the associated works”, and any condition on a building consent must have a certificate issued and registered for it.
- 3.3.2. The record of title is subject to the condition imposed under section 75(2). The condition is the detail of the building work affected by the section boundaries and is applied with every building consent application.
- 3.3.3. “An amendment was applied for which then moved the effluent field over the boundary which was not originally over the boundary under the first consent”. The section 77 certificate is needed to show this amended work on the record of title.
- 3.3.4. The authority cannot impose the condition on the consent/amendment without following all processes of imposing that condition.

4. Discussion

- 4.1. The matter to be determined is the authority’s decision to grant an amendment to a building consent subject to a condition under section 75(2), when that condition had already been registered on the record of title.

Legislation

- 4.2. Sections 75 to 83 provide for situations where the construction of a building is proposed to be across two or more allotments. In such situations a certificate issued by a territorial authority is recorded against the record of titles of the affected allotments and prevents their transfer or lease except in conjunction with each other.
- 4.3. Determination 2017/015 considered the purpose of sections 75 to 83. Although I have elected not to repeat it here, I hold the same view expressed in that determination.⁹
- 4.4. Section 75 concerns the issuing of a certificate by a territorial authority:

75 Construction of building on 2 or more allotments

⁹ Determination 2017/015 *Regarding the grant of a building consent across two allotments* (dated 13 March 2017), paragraphs 5.2.11 to 5.2.22.

- (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 record 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.
- 4.5. Section 75(1) sets out when the provisions in the section apply. Two requirements must be met; there must be an application for a PIM or building consent for the construction of a building across two or more allotments (section 75(1)(a)), and the allotments must be “held by the owner in fee simple” (section 75(1)(b)).
- 4.6. Where the requirements of section 75(1)(a) and (b) are satisfied, then section 75(2) requires a territorial authority to issue a certificate stating that as a condition of granting the building consent the two or more allotments cannot be transferred or leased except in conjunction with each other.
- 4.7. Section 77 concerns the granting of a building consent with conditions imposed under section 75:

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).
- (2) The territorial authority must impose that condition if the building consent authority requests it to do so.
- (3) The certificate must be—
 - (a) authenticated by the territorial authority; and
 - (b) signed by the owner.
- (4) The territorial authority must lodge a copy of the certificate with the Registrar-General of Land.
- (5) The building consent authority must note, on the building consent, the condition imposed in the certificate.

- 4.8. This provision stipulates that a building consent authority must not grant a building consent for work to which section 75 applies until the territorial authority has issued a certificate under section 75(2), and that the territorial authority must impose that condition if the building consent authority requests it to do so. Further, the building consent authority must note on the building consent the condition imposed in the certificate.
- 4.9. Sections 78 to 82 contain provisions relating to the entry of the section 75(2) certificate against the record of title.
- 4.10. Section 83 enables an owner to apply to a territorial authority to remove an entry made on a certificate of title if the building is removed, demolished, or destroyed; the boundaries of the allotments are adjusted so that the building is contained entirely within one allotment; or circumstances have otherwise changed.

Do the provisions apply when granting an amendment to a building consent?

- 4.11. In this case, I need to consider how the provisions apply in respect of an application to amend a building consent.
- 4.12. Section 45(4) provides for two possible pathways to amend a building consent. The relevant provision in this case is section 45(4)(b), which provides that 'An application for an amendment to a building consent must...be made **as if it were an application for a building consent...**' [my emphasis].
- 4.13. Therefore, in granting an amendment to a building consent the building consent authority must consider the provisions in section 77. This means considering whether the proposed amendment alters the building in regard to the allotment(s) on which it is to be constructed. For example:
- 4.13.1. the building proposed in the amendment is over two (or more) allotments when it wasn't before
- 4.13.2. the building approved in the original building consent and proposed in the amendment is over two (or more) allotments, with no change in those allotments
- 4.13.3. the building proposed in the amendment is over two (or more) allotments, but differs from the allotments identified in the certificate issued under section 75(2) for the original building consent
- 4.13.4. the building proposed in the amendment is wholly contained within a single allotment when it was previously proposed to be constructed over two (or more) allotments.

- 4.14. It is then for the building consent authority to turn its mind to section 77(2) and the request to a territorial authority to issue a certificate. Where a territorial authority has already issued a certificate in respect of the proposed building across allotments, and the amendment to the building consent results in the building still being across those same allotments, I consider the requirement in section 77(1) is satisfied. In issuing the amended building consent, the building consent authority must note the condition imposed in that certificate, as required under section 77(5).
- 4.15. In comparison, should an amendment to a building consent result in the building being constructed over two or more allotments when it wasn't before, or over different allotments from those for which a certificate had already been issued, the building consent authority must not grant that amendment until the territorial authority has issued a certificate under section 75(2). The issuing of the certificate triggers the entry on the record of title to ensure that the allotments over which the building will be constructed cannot be transferred or leased except in conjunction with each other. Once the certificate has been issued, the building consent authority may grant the building consent noting the condition imposed in the certificate.
- 4.16. In circumstances where a building consent amendment proposes the building be wholly contained within a single allotment and a certificate has already been issued under section 75(2) for its construction over two or more allotments, or there is a change in the allotments over which the building is to be constructed, section 83(2) provides for owners to apply to territorial authorities for approval to remove an entry on the title if the circumstances¹⁰ have changed.

Is the 'building' across two allotments?

- 4.17. The relevant test section 75(1)(a) is that the building is across two or more allotments.
- 4.18. The original building consent showed the dwelling constructed across the boundary between Lots 56 and 57; the building was being constructed across two allotments, and a certificate was issued under section 75(2).
- 4.19. The application to amend the building consent resulted in the dwelling and the septic tank being repositioned wholly onto Lot 57, and the effluent field being located across the boundary of Lots 56 and 57 (see Figure 1).
- 4.20. There was some correspondence between the parties about whether the effluent field is part of the 'building' for the purpose of applying these provisions. The construction of the foul water system, which includes the effluent field, is building work associated with construction of the new dwelling and is integral to compliance with Building Code Clause G13 *Foul Water*. In this regard it was appropriate for the

¹⁰ Refer section 83(1)(b).

authority to consider the requirements of section 75 when granting the application to amend the building consent.¹¹

The certificate

- 4.21. The authority in this case held the view that the certificate needed to identify the building work or part of the building that was constructed across the boundary. I do not agree that a separate certificate was required for the purpose of identifying a particular part of the building that is constructed over the two allotments. It is necessary for the certificate to identify the allotments and the relevant building consent or PIM; it is the building consent documentation that makes clear where the building is in relation to the allotments on which it is constructed. The amended building consent plan¹² provides sufficient information for an owner or future owner to request an entry be removed if at some time in the future the location of the effluent field is moved, or boundaries are adjusted, or circumstances otherwise change.
- 4.22. There would be no practical effect to the authority issuing a second certificate under section 75(2) when approving the amendment in this case. There was already a certificate identifying the relevant allotments that must not be transferred or leased except in conjunction with the other(s) and already an entry on the record of title to that effect. Granting the amendment without the territorial authority issuing a certificate under section 75 does not alter the certificate issued for the original building consent nor the entry on the record of title. On issuing the amended building consent section 77(5) still requires that it notes the condition imposed in the certificate.
- 4.23. In conclusion, I am of the view the authority, in its capacity as a territorial authority, did not need to issue a second certificate under section 75(2) in respect of the application for an amendment to the building consent (RBW/2023/200939/2). I therefore reverse the authority's decision to issue the certificate dated 20 July 2023.
- 4.24. The authority, in its capacity as a building consent authority, issued the amended building consent with a note on it regarding the condition imposed in the certificate. I am of the view this condition remains in effect with regard to the certificate issued by the territorial authority dated 13 March 2023 and satisfies the requirements of section 77(5).

¹¹ I note the same reasoning applies to the water tanks located on Lot 56 that are intended to provide a potable water supply to the dwelling on Lot 57 in regard to clause G12 *Water Supplies*.

¹² Plan A101, revision 5, dated 24 May 2023.

5. Decision

- 5.1. In accordance with section 188 of the Building Act 2004, I determine the authority's decision to issue the certificate under section 75(2) dated 20 July 2023 is reversed.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 14 February 2025.

Peta Hird

Lead Determinations Specialist