



## Determination 2015/036

# Regarding the exercise of the authority's power of decision in requiring a section 75 certificate for proposed alterations to a wharf at 267-289 Akerston Street, Port Nelson.

### 1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> ("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<sup>2</sup>, Talley's Group Ltd acting through a lawyer ("the applicant")
  - the other owner<sup>3</sup>, Port Nelson Ltd ("the other owner")
  - Nelson City Council ("the authority"), carrying out its duties as a territorial authority or building consent authority.
- 1.3 This determination arises from the authority's decision to suspend a building consent for the extension of two wharves, requiring the applicant complete a certificate under section 75 of the Act ("the section 75 certificate") against three allotments.
- 1.4 The matter to be determined<sup>4</sup> is therefore whether the authority was correct to suspend the building consent application until a section 75 certificate was completed.
- 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

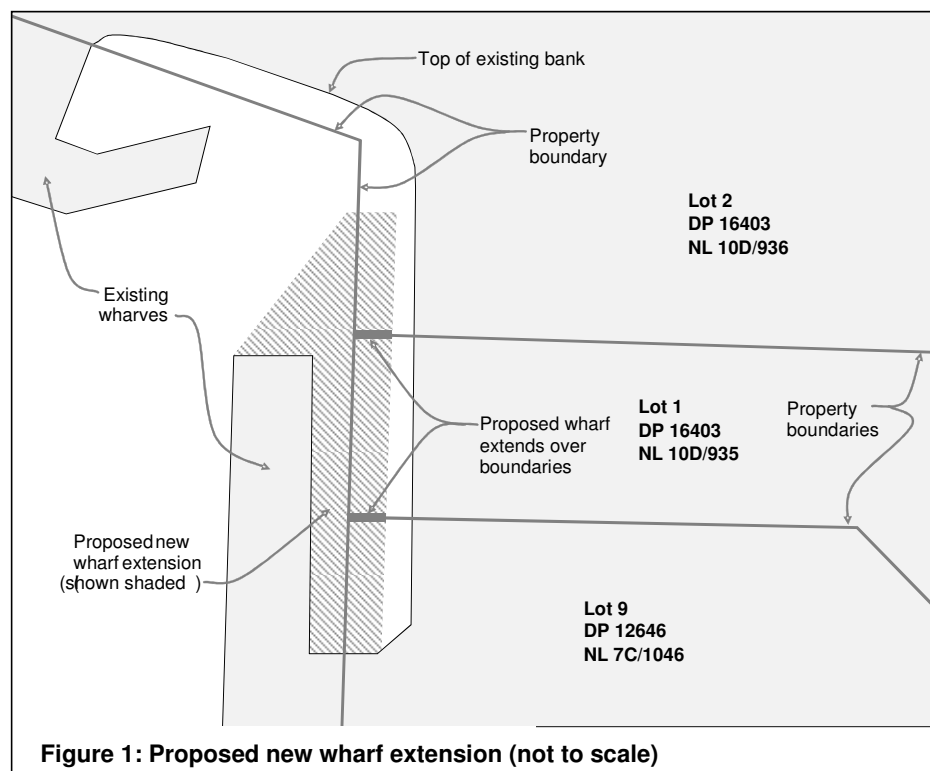
- 2.1 The building work consists of the extension of the 'Donker' and 'Talley' wharves. I have not been provided with any construction details relating to the extension; however the current Donker wharf is to be extended as per Figure 1 (over page).
- 2.2 The three allotments are:
- Lot 1 DP 16403, the applicant is the registered proprietor
  - Lot 9 DP 12646, the applicant is the registered proprietor
  - Lot 2 DP 16403, the other owner is the registered proprietor

<sup>1</sup> The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at [www.building.govt.nz](http://www.building.govt.nz) or by contacting the Ministry on 0800 242 243.

<sup>2</sup> In this sentence 'owner' is used as a general description only. The legal definition of 'owner' is discussed at paragraph 6.3 of this determination.

<sup>3</sup> During the course of the determination the 'other owner' transferred title to the applicant (refer paragraph 4.5)

<sup>4</sup> Under sections 177(1)(b) and 177(2)(a)



### 3. Background

- 3.1 On 6 November 2013 the applicant entered into a sale and purchase agreement with the other owner. The sale and purchase agreement is conditional on various works being completed within five years.
- 3.2 In August 2014 the applicant applied for a building consent from the authority for the extension to two existing wharves. The building consent application for Lot 2 lists the applicant as the owner and notes that a sale and purchase agreement has been provided to evidence this.
- 3.3 On 14 August 2014 the applicant emailed the authority detailing that a section 75 certificate was not able to be required.
- 3.4 On 16 September 2014 the authority wrote to the applicant requiring that a section 75 certificate be lodged covering the three allotments, with the applicant being the registered proprietors of Lots 1 and 9 and the other owner being the registered proprietor of Lot 2.
- 3.5 On 22 January 2015 the authority wrote to the applicants that processing of the building consent would be suspended pending completion of the section 75 certificate by the property owners.
- 3.6 On 28 January 2015 the authority responded to a query from the applicant's engineer and stated that if it was not possible to require a section 75 certificate then it was not possible to issue a building consent.
- 3.7 On 29 January 2015 the authority emailed the applicant stating that if the section 75 certificate is not returned the authority is unable to grant the building consent under section 77 of the Act. The authority also noted that the building is proposed to occupy part of two parcels of land and the section 75 certificate is therefore required.
- 3.8 The Ministry received an application for determination on 6 March 2015.

## 4. The submissions

### 4.1 The applicant

4.1.1 The applicant provided a written submission with the application for determination. In summary the applicant submitted:

- The authority had not taken into account the two criteria under section 75 and ignored section 75(1)(b), and the authority can only refuse a building consent under section 77 if the building work is work to which section 75 applies.
- The applicant accepts that the meaning of an enactment can be ascertained from the text and the purpose of the legislation under section 5(1) of the Interpretation Act 1999. The applicant notes care must be taken in the use of headings and section 5(1) of the Interpretation Act 1999 does not authorise a statutory provision to be completely ignored.
- The applicant submits the heading ‘Limitations and restrictions on building consents: Construction of building on 2 or more allotments’ provides a description with the circumstances detailed within the sections themselves.
- In the current case, section 75(1)(a) requires the building to be over two or more allotments and section 75(1)(b) that both these allotments are held by the owner in fee simple.
- Under section 7 of the Act ‘owner’ is the person entitled or who would be entitled to the ‘rack rent’ and includes the owner of the fee simple (the registered proprietor of the fee simple). Rack rent is the full rent of the property; the ‘owner’ will be the person who has the greatest interest in the land (see Determination 2011/068<sup>5</sup>).
- The applicant submits although a lessee may not normally be the person entitled to the rack rent, in some cases a lessee will be seen as an owner such as under a cross lease. Section 75(1)(b) therefore relates to owners who own the fee simple of all the affected allotments. The applicant submits the context of ‘owner’ in section 75 is the owner who applied for the building consent under section 44.
- Section 7(b)(ii) extends the ‘owner’ to include any person who has agreed in writing, whether conditionally or unconditionally, to purchase the land or any leasehold estate or interest in the land, or to take a lease of the land, and who is bound by the agreement because the agreement is still in force.
- A section 75 certificate is an administrative measure and does not relate to compliance under the Building Code (see Determination 2014/028<sup>6</sup>).
- The applicant states section 14B does not impose any requirement on an ‘owner’ but ‘owners’ who are required to obtain a certificate. The definition of ‘owner’ for the purpose of applying for building consents is ‘expressly’ extended to include people other than the fee-simple owner, including intending purchasers.
- Two examples of where it would be impracticable to impose a section 75 certificate where building will take place across allotments are boundary fences exceeding 2.5m (otherwise exempt under Clause 21 of Schedule 1) and roads, with the Local Authority usually being the fee simple owner.

<sup>5</sup> Determination 2011/068 The issuing of a notice to fix to a body corporate for a multi-storey commercial and residential unit-titled building *Department of Building and Housing* 30 June 2011

<sup>6</sup> Determination 2014/028 Dispute regarding the need for a section 75 certificate for building work for the alteration of internal partition walls at a house *Ministry of Business Innovation and Employment* 4 June 2014

- In this case, section 75 does not apply because although the building work is to be undertaken across the boundary Lots 1 and 2 the applicant does not hold the fee simple of both Lots 1 and 2.

4.1.2 The applicant provided the following documentation with their application:

- a photomap of the building site
- documentation from the Computer Freehold Register under the Land Transfer Act 1952 relating to the three allotments
- the building consent application form
- correspondence between the applicant and the authority dated between 16 September 2014 to 29 January 2015
- an extract from the New Zealand Law Society Seminar regarding “Cross leases and Unit Titles – Problems and Solutions” dated October-November 1994.

4.2 On 18 March 2015 I requested further information from both parties, the applicant was asked to clarify apparent inconsistencies in their submission and the authority was asked to provide information as to why a section 75 notification was required as although building work is take place across three allotments, they are not all held by the owner in fee simple as the Certificate of Title states the other owner is the registered proprietor of Lot 2 and the applicant the registered proprietor of the remaining two lots.

4.3 On 18 March 2015 the applicant responded noting they were listed as the owner for Lot 2 under the building consent application as for the purposes of section 44 of the Act the applicant is an owner of Lot 2 due to the extended definition of owner (section 1(b)(ii)) however is not the owner for the purposes of section 75. The applicant noted the reference to lessee’s was to note that although a lease might in some cases be the owner in fee simple under section 75, this was only in the case of a cross lease or perpetual lease. The applicant also noted section 75(1)(a) relates the section to an application for a building consent, which must be made by an ‘owner’ as defined for the purposes of section 44, therefore the reference to ‘owner’ must be to the person who made the application.

#### **4.4 The authority**

4.4.1 On 15 April 2015 the authority provided a written submission through a legal adviser. The applicant’s submission was initially provided to the authority on 30 January 2015; however agreement was reached that the applicant would defer filing the application to enable the matter to be considered and a response written from the authority (“the initial response”). A response was sent on 20 February 2015 through the authority’s legal adviser and a subsequent meeting held, however the matter was not resolved. The initial response and the substantive response provided for the determination application are summarised below:

- The applicant has argued that section 75 can only apply in circumstances where there is a common owner of the freehold title of the affected allotments, relying on a ‘literal interpretation’ of section 75(1)(b).
- In relation to statutory interpretation the meaning of an enactment must be ascertained from its text and in the light of its purpose. The purposes and principles of the Act (sections 3 and 4) promote accountability of owners and authorities to ensure building work complies with the Building Code, and protect

other property from damage resulting from construction, and ensure all necessary building consents are obtained.

- ‘Other property’ under the Act means land or buildings or part of any land or building not held under the same allotment, or not held under the same ownership. If section 75 does not apply, the other owner’s allotment would be ‘other property’ which would be ‘unworkable’ if the wharf extension will extend into it.
- Section 14B requires the owner to obtain any necessary consents, approvals and certificates. In this case both the applicant and the other owner must apply for the necessary building consent, otherwise the other owner’s allotment must be treated as ‘other property’. The ‘proper administration’ of the Act requires there to be a clear distinction between an allotment on which a building is constructed and other property.
- The purpose of a section 75 certificate is to ensure that there is a clear distinction between the allotments on which a building will be constructed and other property.
- Under the interpretation Act section 33, it states ‘words in the singular include the plural and words in the plural include the singular’. The authority submitted it does no ‘violence’ to the statutory language or the principles of statutory interpretation to read ‘owner’ as also including reference to ‘owners’.
- Section 75(1)(b) is required as it is only the registered proprietors of the fee simple who can give their consent to a section 75 certificate, and not persons having a lesser interest in the specified allotments due to the consequences of a section 75 certificate.
- Under the sale and purchase agreement between the applicant and the other owner, title will only transfer after the completion of the wharf development works. If the applicant’s interpretation of section 75 is correct, if the applicant were to become the fee simple owner prior to applying for building consent, the section 75 certificate would be required, however, if the allotment was transferred to the applicant after the building work had been carried out no section 75 certificate could be required. This is not in accordance with the statutory scheme.
- The authority’s lawyer does not agree with the comparative examples of a boundary fence, a fence under the Fencing of Swimming Pools Act, nor roads requiring a certificate of title under the Land Transfer Act 1952.
- The proper interpretation of section 75(1) is that where a building consent which relates to a building on land that is comprised of two or more allotments, a certificate will need to be recorded as an entry on each certificate of title for the specified allotments under section 77.

4.4.2 The authority provided the following document with its written submission:

- The certificate of titles for Lots 1, 2 and 9 and building plans to show the location of the allotments.
- The unsigned sale and purchase agreement between the applicant and the other owner including the special conditions of sale.
- The initial response from the authority to the determination application (originally sent to the applicant on 20 February 2015).

- An article from the Conveyancing Bulletin entitled ‘Certificates of Title for Roads’ dated 1986 by the then Registrar-General of Land (BE Hayes).
- 4.5 On 30 April 2015 the applicant notified the Ministry in writing that the other owner had arranged the transfer of its title to the applicant to allow the Section 75 certificate to be registered, and accordingly a determination was no longer required for the matter.
- 4.6 On 1 May 2015 the authority responded noting that the building consent can now be granted when the section 75 certificate is completed, however the authority still sees value in resolving this issue so the law can be correctly applied in the future. The authority noted its significant investment in time and in seeking a legal opinion, and requested the Ministry still provide a determination on this matter.
- 4.7 On 6 May 2015 I noted the applicant was entitled to withdraw the application under section 180 of Act, however notwithstanding any objection from the applicant the Ministry would be happy to proceed with the application. I noted there is nothing in the law that would prevent the authority from applying for a new determination on the same matter in the event the application was withdrawn by the applicant.
- 4.8 On 6 May 2015 the applicant responded, noting that the applicant has no requirement for a determination and ‘has doubts the factual situation arising here is necessarily the best one to allow resolution of some of the issues’. They also noted that the authority can re-file for a determination of its own decision, and no useful purpose would be served by withdrawing the application if the authority still wished to proceed; accordingly the applicant accepted the determination proceeding.

## **5. The draft determination**

- 5.1 On 15 May 2015 a draft determination was issued to the parties, confirming that a section 75 certificate can apply to more than one owner.
- 5.2 On 29 May 2015 the applicant’s lawyer responded, stating that while the applicant does not accept the draft determination as correct as the determination is no longer relevant to the applicant no further submissions were to be filed and the applicant accepted the determination can be issued.
- 5.3 On 3 June 2015 the authority accepted the draft determination without comment.
- 5.4 The other owner provided no response to the draft determination.

## **6. Discussion**

- 6.1 Section 75 will apply when an authority issues a building consent (or project information memorandum) involving the construction of a building over two or more allotments which are held by an owner in fee simple. The authority must include a condition on the building consent 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 the other specified allotments.

### **6.2 Construction of a building**

- 6.2.1 Section 75(1)(a) relates to the ‘construction of a building’ on land that is comprised or partly comprised of two or more allotments. In the current case the proposed wharf extension is over three allotments on the seabed. I note ‘land’ is not defined in the Act however it is clear from section 2 of the Resource Management Act 1991 that ‘land’ includes land covered by water.

6.2.2 Previous Determinations<sup>7</sup> have established that the use of ‘construction of a building’ and the omission of ‘alteration’ in section 75 shows the statutory intent to limit the requirement to substantial building work and prevent section 75 applying to alterations to an existing building. It is also noted ‘in some circumstances where part of a building is being constructed over a boundary, a section 75 certificate would still be required’. In Determination 2011/068 I noted that ‘part of a building’, and whether ‘building’ includes ‘part of a building’, must be ascertained from the text in light of its purpose has been dealt with inconsistently in the Act.

6.2.3 In relation to section 75 of the Act I consider the construction of ‘part of a building’ is included in the interpretation of ‘building’ where the building work enlarges the building over the allotment boundaries. In this case the wharf extension enlarges the Donker wharf over all three allotments and I consider the extension constitutes the construction of part of a building for the purposes of section 75(1)(a).

6.2.4 There has been no dispute raised between the parties in relation to section 75(1)(a).

### **6.3 Section 75(1)(b)**

6.3.1 The requirement of section 75(1)(b) states that the allotments referred to in 75(1)(a) must be held by the owner in fee simple.

6.3.2 The applicant is of the view that as they are not the sole ‘owner’ (as defined under section 7 of the Act) of the three allotments, section 75(1)(b) therefore excludes the requirement to obtain a section 75 certificate. The authority is of the view that section 75(1)(b) can apply to more than one owner.

6.3.3 In my view the intention of section 75(1)(b) is to apply to situations where there is one owner of both allotments, or two or more owners of two or more allotments. This is consistent with section 33 of the Interpretation Act 1999. If section 75(1)(b) was only to apply to a proposed building on land where both allotments were owned by the same person it would not be effective.

6.3.4 If the other owners were still on the Certificate of Title (refer paragraph 4.5) the applicant and the other owners would not be able to transfer or lease the three allotments except if all three allotments are leased or transferred together. The parties had an Agreement for Sale and Purchase that would have been caveated, therefore section 80(1) of the Act would have applied when the applicant sought to transfer the land. Section 80(2) provides that the whole of the land subject to the section 78(1) certificate over the three allotments are taken to be subject to the caveat and ‘all the powers, rights, and obligations under the registered instrument [the caveat]’ allowing the transfer of the land to the applicant to occur notwithstanding section 79.

### **6.4 Section 77**

6.4.1 This section states the authority must not grant a building consent until a section 75 certificate is completed. The authority must lodge the section 75 certificate with the Registrar-General of Land and note on the building consent the condition imposed by the section 75 certificate.

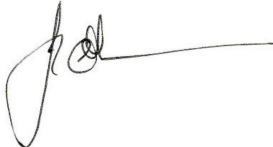
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<sup>7</sup> Determination 2012/075 Regarding the issue of a notice to fix and the amendment of a building consent for a 4-storey commercial building at a house *Ministry of Business Innovation and Employment* 3 December 2012 and Determination 2014/028 Dispute regarding the need for a section 75 certificate for building work for the alteration of internal partition walls at a house *Ministry of Business Innovation and Employment* 4 June 2014.

## **7. The decision**

- 7.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority correctly exercised its powers of decision when it refused to issue a building consent for the proposed building work without a completed section 75 certificate.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 15 June 2015.

A handwritten signature in black ink, appearing to be 'John Gardiner', with a long horizontal line extending to the right.

John Gardiner  
**Manager Determinations and Assurance**



## Appendix A

### A.1 The relevant sections of the Act

#### 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.

#### 80 Certificates of title for 2 or more allotments subject to registered instrument

- (1) This section applies if—
  - (a) an entry referred to in section 78(1) is made on 2 or more certificates of title; and
  - (b) any of the land less than the whole of the land comprised in all those certificates of title is, at the time the entry is recorded, independently subject to a registered instrument under which a power to sell, a right of renewal, or a right or obligation to purchase is lawfully conferred or imposed; and
  - (c) that power, right, or obligation referred to in paragraph (b) becomes exercisable but is not able to be exercised or fully exercised because of section 79.

(2) The whole of the land comprised in all those certificates of title is taken to be subject to the registered instrument and all the powers, rights, and obligations under the instrument, as if the instrument had been registered against the land at the time the entry is recorded.