



## Determination 2017/015

# Regarding the grant of a building consent across two allotments at 100 Halsey Street, Auckland central

### Summary

This determination considers the definition of an “owner” for the purposes of section 75 of the Building Act, and whether a section 75 certificate was required on the building consent. The determination discusses whether a building consent can be granted to a leaseholder, in respect of work over two allotments, without requiring a section 75 certificate.

### 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 this determination are:
  - Auckland Council, carrying out its duties as a territorial authority or building consent authority (“the authority”); the authority is the applicant in this determination, and is represented by lawyers (“the authority’s lawyers”)
  - Infratil Infrastructure Property Limited (“the leaseholder”), represented by lawyers (“the leaseholder’s lawyers”)
  - Viaduct Harbour Holdings Limited (“the owner”), represented by lawyers (“the owner’s lawyers”).
- 1.3 The determination arises from the authority’s decision to grant a building consent to the leaseholder, for the construction of a proposed hotel and carpark building across two allotments, without also issuing a certificate under section<sup>2</sup> 75 of the Act, as a condition on the building consent.
- 1.4 The matter to be determined<sup>3</sup> is whether the authority correctly exercised its powers in granting the building consent.
- 1.5 In making this determination, I have considered the submissions of the parties and the other evidence in this matter.

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<sup>1</sup> The Building Act 2004, 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 determination, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

<sup>3</sup> Under section 177(1)(b) and 177(2)(a) of the Act.

## **2. Background and proposed building work**

- 2.1 On 7 April 2016, the authority received an application for a building consent from the leaseholder. The application related to Stage 1 (foundations and drainage) of a proposed new seven-storey hotel and carpark building, to be built at 100 Halsey Street in central Auckland. The proposed building was to be constructed across the boundary of two allotments, namely Lots 1 and 2, Deposited Plan 80054 (“the properties”).
- 2.2 The owner is the fee simple owner of the properties. The leaseholder holds the current lease for the properties, as shown on leasehold titles 561663 and 561664, and the fee simple certificates of title NA36D/335 and NA40C/278. Both of the certificates of title have a certificate registered against them pursuant to section 643 of the Local Government Act 1974.
- 2.3 The authority subsequently sought confirmation from the leaseholder of the nature of its leasehold interest. The leaseholder provided that confirmation in a letter dated 10 May 2016. The letter included copies of the relevant fee simple certificates of titles, leasehold titles and memorandum of leases dated 23 December 1994.
- 2.4 The authority granted building consent B/2016/3382 on 30 May 2016. The building consent was limited to building work associated with the foundations and drainage of the proposed new hotel and carpark building.
- 2.5 The authority did not require a section 75 certificate to be registered as a condition of granting the building consent. The owner subsequently advised the authority that it considered that a section 75 certificate should have been registered before the building consent was granted, and that as a result the authority’s decision to grant the building consent was flawed.
- 2.6 The authority decided to seek a determination to provide clarity on the issue and on whether its decision to grant building consent B/2016/3382 was correct.
- 2.7 The Ministry received the authority’s application for determination on 11 July 2016.

## **3. Submissions**

### **3.1 The authority’s submission**

- 3.1.1 The authority’s lawyers provided a written submission with the application for a determination. The submission set out the factual background to the dispute, and the authority’s view on the application of sections 75 to 77 of the Act (relating to construction of a building on two or more allotments). The main points of this submission can be summarised as follows.
- Section 75(1)(b) of the Act provides that section 75 applies where the allotments are held by the owner in fee simple.
  - The reference to the “owner in fee simple” in section 75(1)(b) is a reference to the person who applied for the building consent in section 75(1)(a).
  - The reference in section 77(3)(b) to the section 77 certificate being signed by the “owner” is a reference to the same owner in fee simple referred to in section 75(1)(b), because section 77 only applies where section 75 applies.
  - The effect of section 75 is to confer a benefit on the owner that allows them to obtain a building consent that would not otherwise be granted because it would not comply with the ‘other property’ requirements of the Building Code.

Section 75 also imposes a burden on the owner that results in the two allotments being treated as one larger allotment.

- The existence of a certificate under section 643 of the Local Government Act 1974 (“the section 643 certificate”) in respect of a building that no longer exists does not remove the need for a section 75 certificate if one is required, as section 643 is not one of the exemptions in section 76.
- The authority must be satisfied an applicant for a building consent is an owner in terms of the definition in section 7 of the Act, but is not required to enquire further whether that owner is lawfully entitled to undertake the proposed building work. In the current case, the leaseholder is entitled to the rack rental of the properties, and accordingly qualifies as an owner under section 7 of the Act.
- The leaseholder does not hold the properties in fee simple so section 75 does not apply. The leaseholder does not receive the benefit of section 75 and the building consent must be assessed with reference to the property boundary, in particular the provisions of the Building Code concerning the protection of ‘other property’ in clauses B1.1(c), B1.3.6(b), C1(b), C3.2, C3.3, C6.1(c) and C6.2.
- The definition of “other property” in section 7 of the Act applies in two situations that may not be mutually exclusive. First, where land or buildings are not held under the same allotment, and secondly, where land or buildings are part of the same allotment but held under different ownership.
- The building consent granted to the leaseholder concerns allotments held under the same ownership, but not held under the same allotment. Consequently, the proposed building work that crosses the boundary from one allotment to another will be treated as other property under the Building Code.

3.1.2 With their submission, the authority’s lawyers provided copies of the building consent application and building consent.

### **3.2 The leaseholder’s submissions**

3.2.1 The leaseholder’s lawyers made a submission dated 25 August 2016. The main points of this submission can be summarised as follows.

- Section 75 does not apply to the leaseholder’s application for a building consent as the leaseholder is not the fee simple owner.
- The reference to “the owner in fee simple” in section 75(1)(b) refers to the owner who applied for the building consent in section 75(1)(a), and section 75 is accordingly restricted to an application for a building consent by the fee simple owner.
- This interpretation is supported by section 37(1) of the Building Act 1991, the forerunner to section 75, as it referred to an “application ... for a building consent to construct a building over land of the applicant comprised ... of 2 or more allotments ... and those allotments are held by the applicant as owner in fee simple ...”. There is nothing in the legislative materials relating to section 75 that suggests the change of wording was intended to be significant.
- Where an owner who is not the fee simple owner proposes to build across a boundary that owner must still comply with the Building Code and the

‘[Authority] must use its discretion to assess whether, in the particular circumstances of the case, the requirements of the Building Act and the building code are nonetheless likely to be met or a waiver or modification of the building code is appropriate.’

- The two allotments qualify as other property and the Building Code provisions will require that other properties are protected from damage caused by, for example, fire and structural failure.
- The authority was satisfied of these issues when it issued the building consent because the two lots can only be dealt with together under the existing section 643 certificates registered on the freehold and leasehold titles, which state:

Except with the prior consent of the [authority] none of the allotments described in the Schedule hereto [being the two allotments] shall be transferred or leased except in conjunction with the others.

- The certificates are worded generally and are not expressly related to any specific building. They cannot be removed while any building crosses the boundaries and only with the authority’s consent under section 83.
- Even if section 75 applied, the requirements of section 75 can be met by the section 643 certificates registered against the freehold and leasehold titles.
- The authority’s approach to the section 643 certificates was based on the presumption that the building no longer exists, but this was an error, as the building does still exist and is used as an office and administration building.
- The requirements of section 75 to issue a certificate and for the certificate to state the condition for the grant of the building consent can all be satisfied by the existence of the section 643 certificates that already provide for these matters. The requirement that the certificate must be signed by the owner under section 77(3) means it could be signed by the leaseholder, and in any event the section 643 certificates have already been signed by the fee simple owner and the leasehold owners at the time.
- There is no basis for the owner’s assertion that the authority should have considered the dispute between the owner and the leaseholder when considering the building consent application.
- There is also no basis for the owner’s assertion that the authority should have sought the view of the owner when the leaseholder applied for the building consent.

### **3.3 The owner’s submissions**

3.3.1 The owner’s lawyers made a submission dated 25 August 2016. The main points of this submission can be summarised as follows.

- The main issue to be decided is whether the provisions in section 75 of Act are intended ‘to apply to all building consent applications for building across legal allotments, or only some’.
- A section 75 certificate is required whenever it is proposed to build across the fee simple boundaries of two or more allotments, regardless of whether the fee simple owner or a lessee applies: ‘there is no limitation or exclusion for lessee applicants’. The authority’s interpretation of the section ‘is contrary to the

words and clear intention of the statute’ and would ‘undermine the efficacy of the section 75 certification regime’.

- Section 75(1)(b) has a clear meaning. It defines the type of allotment to which section 75 applies. It excludes from the requirement for section 75 certification allotments contained in one fee simple title, for example ‘where two or more leasehold allotments are contained within one fee simple allotment’.
- Section 75(1)(b) simply adopts the definition of “owner” in section 7 of the Act. It does not qualify the word owner in any way at all, including by requiring that the owner be the applicant for a building consent.
- The definition of “owner” in limb (b)(i) of the section 7 definition, is exclusively focused on fee simple ownership because the person entitled to the rack rent from the land is the person entitled to the full market rent due to a fee simple proprietor of the land.
- The definition of “owner” in limb (b)(ii) of the section 7 definition, which includes a lessee for the purposes of specific sections, shows that lessees are not otherwise intended to have the status of an owner. The leaseholder can apply for a building consent because section 44 is one of the specific sections listed. The leaseholder is not an owner for the purposes of sections 75 and 77, because these sections are not listed in limb (b)(ii) of section 7.
- The only owner who can sign the certificate under section 77 is the fee simple owner. This is because of the ‘nature of the restrictions’ placed on fee simple allotments by the registrations of a section 75 certificate
- In Determination 2015/036<sup>4</sup>, the Chief Executive rejected the argument that the owner in section 75(1)(b) is limited to an applicant owner.
- The ‘mischief’ that section 75 addresses is separate dealing with an allotment, where it is one of two or more allotments straddled by a building. If section 75 only applies where the fee simple owner is the applicant for a building consent, a lessee of two allotments could obtain a building consent without any restriction being imposed on the fee simple title. Those fee simple titles could then be sold separately or leased separately despite the presence of a building straddling them. It cannot have been intended that separate dealing of allotments straddled by a building would be prohibited by certification where a freehold owner applies for a building consent, but not a lessee.

### 3.4 Submissions in reply

3.4.1 Each of the parties’ lawyers provided submissions in reply on 1 September 2016.

3.4.2 In their submission in reply, the authority’s lawyers:

- affirmed the authority’s submissions as nothing in the leaseholder’s or owner’s submissions caused it to change its position
- noted that all parties agreed that a lessee can apply for a building consent and there was no dispute the leaseholder was entitled to apply for the building consent

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<sup>4</sup> 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, Ministry of Business and Innovation, 15 June 2015.

- submitted that as section 75(1)(a) refers to applications for a project information memorandum (“PIM”) or building consent, and only owners can make such applications, the “owner” in section 75(1)(b) and the applicant must be the same person
- submitted the interpretation of section 75(1)(b) by the owner made that provision redundant. According to the owner’s interpretation, requiring the allotments to be held in fee simple makes section 75(1)(b) of no utility, whereas the authority’s position gives meaning to section 75(1)(b) by narrowing the class of “owner”, as defined in section 7, to which section 75 applies
- submitted that Determination 2015/036 did not support the conclusion the owner’s lawyers attributed to it
- noted that when the authority is considering an application for a building consent it is not for the authority to determine whether the applicant has the right to carry out the proposed building work as that is a civil matter between the applicant and other persons.

3.4.3 In their submission in reply, the leaseholder’s lawyers:

- rejected the owner’s claims that the leaseholder was not an “owner” under paragraph (a) of section 7 because it was not entitled to the rack rent and cited a number of cases in support of its position. Also rejected were the owner’s claims that the leaseholder was not an “owner” under paragraph (b) of section 7
- rejected the owner’s interpretation of Determination 2015/036 that “owner” in section 75(1)(b) refers to owners who are not an applicant under section 75(1)(a)
- rejected the owner’s claims that section 75 would be undermined by the leaseholder’s interpretation of section 75 and would require ‘clear and profound policy and purposive justifications’.

3.4.4 In their submission in reply, the owner’s lawyers:

- considered there was little force in the legislative history argument put forward by the leaseholder and no basis for using it to undermine the plain meaning of section 75
- considered the leaseholder had misunderstood the owner’s submissions, as section 75 was not concerned with unregulated building, but with the risk that titles may be able to be dealt with separately when straddled by a building. The purpose of section 75 would be thwarted if it did not apply to all applicants for a cross-boundary building consent
- noted that the section 643 certificates are building specific and new certificates are required under section 75 for a new building.

3.4.5 I note here that parts of the leaseholder’s and owner’s lawyers’ submissions relate to a civil dispute between the owner and the leaseholder. These submissions are not relevant to the matters that I can determine under the Act, and I have paid no regard to them in making this determination.

## 4. The draft determination and hearing

- 4.1 A draft determination was issued to the parties for comment on 5 October 2016.
- 4.2 The authority accepted the draft determination on 17 October 2016, and requested that discussion on the section 643 certificate be revised. (The discussion on section 643 has been removed from the determination.)
- 4.3 The leaseholder's lawyers accepted the draft determination on 19 October 2016, noting that they accepted the determination's comments on the section 643 certificate.
- 4.4 The owner's lawyers responded on 19 October 2016 saying they did not accept the draft determination, saying the draft decision 'adopts a view of the [Act's] certification regime as limited to freehold owner-applicants for building consent over boundaries. This interpretation infers an intention to limit the regime to owners because of the existence of a parallel regime for lessee-applicants under the Building Code.' The owner's lawyers sought to remove the comment on the section 643 certificate because any discussion on this was not binding, it was outside the scope of the Act, and section 643 certificates are building-specific. The owner's lawyers requested a hearing on the matter.
- 4.5 I held a hearing in Auckland on 24 January 2017. The hearing was attended by myself, two officers of Ministry and one of the Ministry's legal advisors; the authority's representative and its lawyer; the leaseholder's representative and two of its lawyers; and two of the owner's lawyers.
- 4.6 The parties' lawyers made submissions at the hearing relating to matters raised in the draft determination. These were followed by discussions between myself and the parties about the nature of section 75 certificates and the potential impact of the decision in the draft determination. There was also discussion about section 643 certificates and whether the leaseholder was entitled to make submissions on these.
- 4.7 The parties' submissions at the hearing are summarised below.
- 4.8 The authority's lawyer's submissions at the hearing.
- The authority accepted the draft determination, but had concerns about the draft's comments about the application of the section 643 certificates.
  - The determination should interpret the words of section 75, without looking too far into the history or policy of either section 643 or section 75.
  - The reference to the fee simple owner in section 75(1)(b) limits the types of owners to whom the provision applies. The section confers a benefit on fee simple owners and is not about addressing a mischief. A leaseholder can build over an allotment boundary without a section 75 certificate, but must comply with the provisions of the Building Code for the protection of other property.
  - If section 75 doesn't apply, a leaseholder would have to seek a waiver or modification of the Building Code. The authority would be unlikely to grant such a waiver or modification as it could not be justified in the circumstances.
  - The authority's role is to apply the provisions of the Act and not to consider other issues between the parties. The implementation of the building consent is for the owner and leaseholder to sort out.
  - The authority queried the application of section 75 in situations where there are two different fee simple owners (as suggested in Determination 2012/075), and

submitted that it is important that the section only applies where there is one owner of two or more allotments, and does not apply where two different fee simple owners own two different allotments.

4.9 The owner's lawyer's submissions at the hearing.

- The mischief that section 75 is designed to prevent is the construction of a building across two allotments.
- Freehold owners should have greater rights than leaseholders, so if freehold owners are subject to section 75, so should leaseholders. Leaseholders shouldn't be able to build without a section 75 certificate when freehold owners require a certificate. It shouldn't be easier for a leasehold owner to construct a building than for a freehold owner.
- It is the plain meaning of the words in section 75 that must be applied. Section 75(1)(a) just refers to an application for a PIM or building consent. Section 75(1)(b) just refers to the fee simple owner. It is injurious to section 75(1)(a) to read in the word "owner" and require the application for a PIM or building consent to be by an owner when the word does not appear in the provision.
- There is no reason Parliament would have imposed a distinction between an owner and a leaseholder in section 75, when no such distinction appeared in section 643 of the Local Government Act 1974. Under section 643, a leaseholder proposing to build over two allotments required a section 643 certificate.
- The discussion of section 643 in the draft should be removed, as it is not relevant to the matter being determined.
- The determination as drafted would have a significant impact on other perpetually renewable leases. At present, leaseholders hold the view that to build over the boundary of an allotment (where they have leaseholder rights to more than one allotment) they must have the consent of the owner as they will have to obtain a section 75 certificate.

4.10 The leaseholder's submissions at the hearing.

- The leaseholder agreed with the authority's interpretation of section 75. The purpose of the section is to confer a benefit on fee simple owners, not to prevent a mischief of constructing a building across allotments.
- The section 643 regime was very prescriptive, but it also gave the authority discretion, in that the authority 'may' require a certificate as a condition of the building consent. The Building Act 1991 changed the approach in section 643, and implemented a fundamental reform imposing a new Building Code and Act. The Building Act 2004 made some wording changes to the 1991 Act, but there was no intention to change the way section 37 of the Building Act 1991 applied. That provision expressly required the applicant for the PIM or building consent to be the owner in fee simple.
- The leaseholder will have fewer rights than the owner, because the leaseholder will have to show how compliance with the Building Code is achieved without the benefit of section 75.

- There is no injury done to the wording of section 75, as any application for a PIM or building consent must be by an owner, and section 75(1)(b) limits that to an owner in fee simple.
- There is no ‘parallel regime’ under the Building Code as alleged by the owner’s lawyer. The Building Code applies and section 75 is an exception that is available to a fee simple owner.
- The section 643 certificates obtain their effect from their entry on the title, and are not specific to a building. There is no automatic discharge of the certificates. The certificates can only be removed through section 83. The certificates do not become null when the building is removed.

4.11 I have taken the parties’ submissions into account and altered the final determination as I consider appropriate.

4.12 In particular, I have removed the section discussing the status of the section 643 certificate currently noted on the certificates of title. This issue is clearly a matter of contention between the parties. However, it is not a matter I can determine in this decision as the authority placed no reliance on the section 643 certificate when granting the building consent, which is the subject of this determination.

## 5. Discussion

5.1 The authority has applied for a determination about whether its decision to grant building consent B/2016/3382 complied with the provisions in the Act relating to building across allotment boundaries.

### 5.2 Sections 75 to 83 – construction of a building across two allotments

5.2.1 Sections 75 to 83 of the Act provide for situations where it is proposed to construct a building across two or more allotments. In such situations, territorial authorities must issue a certificate, which is recorded against the titles of the affected allotments and prevents their transfer or lease except in conjunction with each other.

5.2.2 In the following paragraphs, I discuss the scope and relevance of these sections, in relation to the matter for determination and the parties’ submissions in relation to it.

#### Overview of sections 75 to 83

5.2.3 I will first provide a brief overview of sections 75 to 83 of the Act. For the purposes of this determination, sections 75 to 77, and section 83 are the most relevant.

5.2.4 Section 75 provides:

#### **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.

- 5.2.5 Section 75(1) sets out when the provisions in the section apply. Two requirements must be met. Put simply, 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)).
- 5.2.6 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 a condition of granting the building consent is that the two or more allotments cannot be transferred or leased except in conjunction with each other.
- 5.2.7 Section 76 contains two exceptions when section 75 will not apply. They are:
- when the proposed building will include a party wall on the boundary between the allotments
  - when a plan for the subdivision of the land has been applied for under section 82 of the Act.
- 5.2.8 Section 77 stipulates that a building consent authority must not grant a building consent for work to which section 75 applies until a territorial authority has issued a certificate under section 75(2). The certificate must be signed by the owner, a copy lodged with the Registrar-General of Land, and the territorial authority must note on the building consent the condition contained in the certificate.
- 5.2.9 Sections 78 to 82 contain provisions relating to the entry of the section 75(2) certificate against the certificate of title:
- section 78 requires the Registrar-General of Land to record on the certificate of title that it is subject to the condition in the section 75(2) certificate
  - section 79 provides that once an entry is recorded on a certificate of title under section 78 the allotments may not be transferred or leased except in conjunction with each other
  - sections 80 and 81 concern the effect of the entry on existing registered instruments on the certificate of title
  - section 82 relates to situations where the Registrar-General of Land considers it would not be practicable or desirable to record an entry on a certificate of title.
- 5.2.10 Section 83 enables an owner to apply to a territorial authority to remove an entry made on a certificate of title under section 78 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.

### **Purpose of sections 75 to 83**

- 5.2.11 It is also necessary to consider the purpose of sections 75 to 83. In their submissions, the authority and the owner have expressed very different views about what this purpose is. These differences are material, as they affect the interpretation of when these sections are intended to apply.
- 5.2.12 The authority’s view is that the purpose of section 75 is to confer a benefit on an owner, by allowing them to obtain a building consent that may not otherwise be granted for a building constructed over two or more allotments. The consent may not

otherwise be granted because it would not comply with the requirements of the Building Code concerning the protection of “other property”.

- 5.2.13 The owner’s view is that the purpose of section 75 is to prevent a specific ‘mischief’, namely the ‘separate dealing’ of allotments (for example through sale or lease) when they are straddled by a building. In this view, section 75 should be interpreted as applying to both a fee simple owner and a lessee. The owner submits that a lessee should not be able to deal separately with such allotments, when a fee simple owner cannot.
- 5.2.14 In my opinion, the key to understanding the purpose of sections 75 to 83 lies in two aspects of the legislation:
- the way in which the Building Code applies to buildings constructed over the boundary of an allotment
  - the exemption in section 76(1)(a), which provides that section 75 does not apply to the construction of a building over the boundary of an allotment if the building has party walls.
- 5.2.15 Turning first to the Building Code. The Building Code does not allow a building to be constructed over the boundary of an allotment unless those parts of the building that are on different allotments are fully protected from each other in terms of fire safety and structure etc.
- 5.2.16 This protection is achieved through the definitions of “other property” in section 7 of the Act, “allotment” in section 10, and the way these terms are used in provisions such as clauses B1.1(c), B1.3.6(b), C1(b), C3.2, C3.3, C6.1(c) and C6.2 of the Building Code.
- 5.2.17 “Other property” is defined in section 7 as:
- other property—**
- (a) means any land or buildings, or part of any land or buildings, that are—
    - (i) not held under the same allotment; or
    - (ii) not held under the same ownership; and
  - (b) includes a road
- 5.2.18 The term “other property” is used in numerous provisions of the Building Code, which require certain protections to be included when constructing a building in proximity to other property. The authority’s legal advisers are correct that the definition of other property applies in two situations. These are when the building work will be carried out on:
- land not held under the same allotment, or
  - land not held under the same ownership.
- Note that the provisions relating to other property apply in either of these situations. The definition does not require the land or buildings to be held under a different allotment and under different ownership – the existence of either circumstance will be sufficient to confer the status of other property.
- 5.2.19 The building consent granted to the leaseholder concerns allotments held under the same ownership, but not held under the same allotment. Therefore, putting to one side the question of whether section 75 applies, the starting point, in terms of Building Code compliance, is that any proposed building work relating to the

construction of a building across the boundary of one of the allotments, onto the other allotment, will be treated as “other property” under the Building Code, and required to comply with the provisions in the code designed to protect other property.

- 5.2.20 There is nothing inherently wrong with a building constructed on more than one allotment, as long as the parts of the buildings on each allotment are adequately protected from each other. Terrace housing, for example, generally involves a single building across numerous allotments, and each owner is free to deal with their own land and building as they see fit. The reason for this is that each part of the building, on each separate allotment, is protected from the adjoining part on the adjoining allotment by party walls. These walls must comply with the Building Code provisions for the protection of other property relating to fire safety and structure etc.
- 5.2.21 This is the reason for the exception in section 76(1)(a), whereby an owner can choose to build across an allotment boundary and not be subject to section 75, as long as the building has party walls on the boundary. Alternatively, an owner can choose to build across an allotment boundary without constructing party walls, provided they are willing to have a section 75 certificate noted on the allotments’ titles, which will have the effect of restricting the allotments’ transfer or lease, except in conjunction with each other. In the latter situation, section 75 prevents one allotment being transferred separately to the other, thereby avoiding a situation where owners are left with parts of a building that are not adequately protected from the parts of the building on the adjoining allotments.
- 5.2.22 In this way, I agree with the authority’s view that section 75 can be seen as conferring a benefit on an owner, by providing a quicker and more convenient way for building work to proceed across the boundary of two allotments, without the need for party walls or to amalgamate the allotments under the Land Transfer Act 1952. The section should be interpreted to ensure that the benefits outlined in sections 75 to 83 are conferred on those eligible for and intended to benefit from them. I do not think the sections’ purpose is to prevent any ‘mischief’ arising from separate dealings, which might cause the scope of these sections to be interpreted more restrictively.

#### **Definition of owner in section 7**

- 5.2.23 I must also consider the definition of “owner” in section 7 of the Act, as in the owner’s lawyers’ opinion this impacts on the interpretation of section 75.
- 5.2.24 The definition of “owner” in section 7 provides:
- owner, in relation to land and any buildings on the land,—**
- (a) means the person who—
- (i) is entitled to the rack rent from the land; or
- (ii) would be so entitled if the land were let to a tenant at a rack rent; and
- (b) includes—
- (i) the owner of the fee simple of the land; and
- (ii) for the purposes of sections 32, 44, 92, 96, 97, and 176(c), 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
- 5.2.25 In their submissions, the owner’s lawyers have stated that the definition of owner in section 7 relates solely to the fee simple owner of the land. With respect to limb (a)

of the definition, they state that “rack rent” is not defined in the legislation but has ‘an established common law meaning which is the full market rental due to a fee simple proprietor of land’. From this they conclude that limb (a) of the definition focusses exclusively ‘on fee simple ownership, as limb (b)(i) corroborates’. There is an exception in the context of the specific sections listed in limb (b)(ii) of the definition, where it can also include a lessee. They submit that this is the definition of owner that applies when interpreting section 75, and that because section 75 is not listed in limb (b)(ii) the leaseholder cannot be considered an owner in this context.

- 5.2.26 The owner’s lawyers go on to submit that the authority’s interpretation of section 75 would have the effect of qualifying the word “owner” in section 75(1)(b) by also requiring ‘that the owner be the applicant for the building consent’. They state that this would ‘explode’ the definition of owner given in the Act, ‘for no apparent reason’ and ‘without textual indications that a different meaning was intended’. The owner’s lawyers conclude that the words in section 75(1)(b) “...are held by the owner in fee simple” are intended to define the allotments that the section applies to (i.e. those held in fee simple, as opposed to leasehold allotments) and not the person or entity applying for the PIM or building consent.
- 5.2.27 The owner’s lawyers cite *Ashworth Frazer Ltd v Gloucester City Council* [1997] 1 EGLR 104<sup>5</sup> and Determination 2015/036 in support of their proposition that the person entitled to the rack rent (in limb (a)) is the person entitled to the full market rental due to the fee simple proprietor of the land.
- 5.2.28 I do not agree with the owner’s lawyer’s interpretation of Determination 2015/036, as it does not deal with the question of when a person is entitled to the rack rent from the land. I have, however, considered this issue in Determination 2009/045<sup>6</sup>, where I concluded (at paragraph 8.5) that a lessee under a cross-lease was an owner under limb (a)(i) of the definition of “owner” in section 7, because the leaseholder was entitled to the rack rent from the land. Determination 2009/045 stated ‘the rack rent represents the full rent of a property’ and in respect of the lessee’s status as an owner concluded (also at paragraph 8.5):
- It is the leasehold estates held by each of the owners that confer the fullest rights to ownership as they confer the right to exclusive possession of the buildings. In my view, the owner under section 7 of the Act is the holder of the leasehold estate who is entitled by virtue of their estate to let the buildings to a tenant at the rack rent.
- 5.2.29 The leaseholder’s lawyer made a detailed analysis of the *Ashworth* decision in their submission in reply. They submitted that the leaseholder is entitled to the rack rent from the land, because the lessee is entitled to full rent from the improved value of the land, whereas the owner is only entitled to the unimproved value of the land. They cite the *Ashworth* decision as authority for the proposition that the rack rents receivable by a lessee are ‘the full annual value of the holding’ due to the lessee.
- 5.2.30 In my opinion, the definition of “owner” in limb (a)(i) in section 7 refers to the person entitled to the rack rent from the land, and I agree with the leaseholder’s submission that this can include a lessee. Contrary to the owner’s lawyer’s submission, I do not consider that the section 7 definition focusses exclusively on fee simple ownership. Limb (b)(i) is included in the definition specifically to cover situations where the fee simple owner is not entitled to the rack rent from the land.

<sup>5</sup> *Ashworth Frazer Ltd v Gloucester City Council* [1997] 1 EGLR 104, Lord Justice Auld at [108G], Lord Justice McCowan at [109E], and Lord Justice Millet at [107D].

<sup>6</sup> Determination 2009/045: Determination regarding the issuing of a notice to fix for a shed at 103B Burke Street, Thames, Department of Building and Housing, 25 June 2009

5.2.31 Accordingly, it is my view that the leaseholder in the current case is an owner under limb (a)(i) of the definition of “owner” in section 7, because the leaseholder is entitled to the rack rent from the land, that is, the full rent from the improved value of the land.

### **When does section 75 apply?**

5.2.32 The authority takes the view that section 75 only applies when an application for a building consent to construct a building on two or more allotments is made by the fee simple owner.

5.2.33 In the authority’s opinion, sections 75(1)(a) and (b) set out the qualifying requirements for section 75(2) to apply to a building consent. Section 75(1)(a) relates to an application for a PIM or building consent in respect of two or more “allotments”, while section 75(1)(b) requires “those allotments” to be “held by the owner in fee simple”. The authority’s lawyers submit that the owner requirements in section 75(1)(b) follow on from the applications referred to in section 75(1)(a) and so refer to the same person; the “owner” in section 75(1)(b) is a reference to the person applying for the PIM or building consent in section 75(1)(a).

5.2.34 The owner’s lawyers propose another way of reading section 75(1), which involves reading the requirements in section 75(1)(a) and (b) independently. The person applying for a PIM or building consent in section 75(1)(a) may be a different person to the person in section 75(1)(b) who is the owner of the fee simple.

5.2.35 While it may be possible to read section 75 in the way the owner’s lawyers submit, there are a number of obstacles to this approach. In particular, it is not consistent with the subsequent references to “owner” in sections 76, 77 and 83 of the Act, nor is it consistent with the purpose of sections 75 to 83.

5.2.36 Section 76 of the Act specifies two situations where there is an exemption from the provisions in section 75. In section 76(1)(a), the reference to the “owner” is clearly to the person making the application for a PIM or building consent, as it concerns the type of building “the owner proposes to construct”.

5.2.37 Further, allowing one person, a lessee, to apply for a building consent, but requiring another person, the owner of the fee simple, to sign the section 75(2) certificate, would allow the owner of the fee simple to prevent the lessee carrying out any building work. That would be an unusual interpretation of the Act’s provisions, as the Act is concerned with the carrying out of building work, not whether a person has the property rights to carry out that building work. The Act does not concern itself with whether a person applying for a building consent has the right to carry out that building work or not, other than requiring an application for a building consent to be made by an owner. Any disputes regarding the ability of an owner to carry out building work are a civil matter between the owner and other persons.

5.2.38 The interpretation of section 75(1)(b) proposed by the owner’s lawyers has the effect of merely requiring the two or more allotments, over which it is proposed to construct a building, to be held in fee simple. That would make section 75(1)(b) effectively redundant, as almost all land is held by someone in fee simple. In my opinion, the interpretation proposed by the authority is preferable as it gives an important meaning to section 75(1)(b) in narrowing the type of “owner”, as defined in section 7, to which the section applies.

5.2.39 The leaseholder has noted that the predecessor to section 75, section 37 of the Building Act 1991, expressly required the applicant for a building consent to also be

the owner of the fee simple. Section 37 referred to an “application ... for a building consent to construct a building over land of the applicant comprised ... of 2 or more allotments ... and those allotments are held by the applicant as owner in fee simple ...”. The leaseholder states that there is nothing in the Parliamentary materials, concerning the enactment of section 75, that suggests Parliament intended to change the purpose of the new section, by de-coupling the applicant for the building consent from the owner of the fee simple.

- 5.2.40 The owner cites Determination 2015/036 in support of the proposition that “owner” in section 75(1)(b) is not limited to an applicant owner. However, Determination 2015/036 did not consider this situation. Instead, it involved a situation where the applicant for the building consent was one of several fee simple owners. The issue considered by the determination was whether the reference to “owner of the fee simple” in section 75(1)(b) could apply to the plural owners of the fee simple.
- 5.2.41 In my view, the preferable interpretation of the phrase “owner of the fee simple” in section 75(1)(b) is that it is a reference to the person applying for the PIM or building consent in section 75(1)(a). This ensures the term is given a consistent meaning throughout sections 75 to 83, and ensures only the owner of the fee simple can apply to obtain the benefit of building across the boundary of two allotments without constructing party walls.
- 5.2.42 Section 75 deprives lessees of that opportunity, but a lessee may still build across the boundary of an allotment as long as the building work complies with the provisions of the Building Code for the protection of other property, for example, by the use of a party wall on the boundary.

### **5.3 Other matters raised in the submissions**

- 5.3.1 The parties raised several other matters in their submission which I will comment on here. As noted in paragraph 3.4.5, I have not considered or commented on any submissions relating to the civil dispute between the owner and the leaseholder.

#### **The scope of the authority’s inquiries into the leaseholder’s ability to build**

- 5.3.2 As part of its processing of the application for a building consent, the authority requested further information from the leaseholder to satisfy itself that the leaseholder was an owner and therefore entitled to apply for a building consent under section 44 of the Act. The leaseholder provided that confirmation in a letter dated 10 May 2016.
- 5.3.3 In its submissions, the owner has raised a potential future issue around the authority’s ‘need or ability to consult or consider disputes’ when processing a building consent application. This issue has been raised, as there is currently a dispute between the owner and the leaseholder in relation to the proposed building work. The authority’s lawyers consider the authority was not required to further consider or investigate the nature of the dispute between the owner and leaseholder or take it into account when considering whether to grant the building consent.
- 5.3.4 The authority was correct to check the leaseholder was entitled to apply for a building consent under section 44. However, a building consent is only an approval to undertake building work under the Act. A building consent is not an authorisation for an owner to do something they may be restricted from doing under some other enactment, by a contract, by the terms of a lease, or by some other property law obligation, such as a covenant on a title.

5.3.5 The criteria for granting a building consent is set out in section 49 of the Act. There is nothing in the Act relating to the grant of a building consent that requires an authority to consider how proposed building work may affect an applicant's contractual, tortious or property rights or obligations to other persons. However, section 51(2) specifically addresses the relationship between the grant of a building consent and other statutory obligations of an applicant, as it states:

The issue of a building consent does not, of itself–

- (a) relieve the owner of the building or proposed building to which the building consent relates of any duty or responsibility under any other Act relating to or affecting the building or proposed building; or
- (b) permit the construction, alteration, demolition, or removal of the building or proposed building if that construction, alteration, demolition, or removal would be in breach of any other Act.

5.3.6 The same principles apply in respect of the private law obligations of an owner. A building consent does not authorise an owner to act contrary to or breach any of their contract, tort or property law obligations to another person. It is not for the authority to inquire into and consider the private law obligations of a building consent applicant. Those matters are for the building consent applicant to consider and address.

5.3.7 In my opinion, the authority was correct to check the leaseholder was entitled to apply for a building consent under section 44, but was not required to carry out any further inquiries into the leaseholder's ability to build, the terms of the lease, or the other contractual or property law rights or obligations of the leaseholder.

#### **Precedent effect on other perpetually renewable leases**

5.3.8 At the hearing, the owner's lawyers made submissions about how owners of perpetually renewable leases currently view their rights to build over boundaries, and claimed that a decision that section 75 only applies to fee simple owners would have an adverse effect on this understanding. The owner's lawyers suggested that leaseholders currently hold the view that to build over the boundary of an allotment (where they have leaseholder rights to more than one allotment) they must have the consent of the owner, as they will have to obtain a section 75 certificate.

5.3.9 I do not know how leaseholders of perpetually renewable leases generally view their rights to build over the boundary of an allotment. If leaseholders hold the views asserted by the owner, then they have developed those views themselves and not on the basis of any court decisions or determinations under the Building Act.

5.3.10 Limiting the application of section 75 to fee simple owners does not limit the ability of leaseholders to build across allotment boundaries. It simply denies them the benefit of a section 75 certificate. Leaseholders wishing to build across boundaries must fully comply with the Building Code in respect of the protection of other property. This ensures the interests of tenants on different allotments are protected, and if the leasehold titles can subsequently be dealt with separately, there will be no concerns about non-compliant building work across the boundary of the allotments.

#### **Application of section 75 to allotments held by two different owners**

5.3.11 At the hearing, the authority's lawyer requested that the determination clarify the application of section 75 in situations where it is proposed to build across the boundary of two adjacent allotments and the allotments are held by two different fee

simple owners. The authority's lawyer was of the view that in a couple of past determinations<sup>7</sup> it had been suggested that section 75 might apply in this situation.

- 5.3.12 I agree with the authority's lawyers submission that section 75 does not apply in this situation; it only applies where the same owner owns both allotments. This interpretation is consistent with the provisions in sections 80 and 81, which relate to certificates of title for two or more allotments that are subject to a section 75 certificate. For example, section 80(2) applies the mortgage powers over one allotment to the other allotment. When both allotments are owned by the same owner this outcome is fine: it means that a mortgagee's power of sale automatically extends from one property of the owner to the other property. This ensures the two properties continue to be dealt with as one property, consistently with the section 75 certificate. However, this could result in a very difficult situation where the two allotments are owned by different owners. It could result in a mortgagee exercising a power of sale over another party's property over which they should have no rights and over which another security holder may already have rights. Clearly, this cannot have been what was intended.
- 5.3.13 I note that neither of the two determinations referred to by the authority's lawyer was directly considering this point, and the comments in them were simply made as an aside. Likewise my comments in this determination are not part of the matter to be determined. However, I hope that they will provide further guidance for authorities when faced with this issue.

## 5.4 Conclusion

- 5.4.1 The authority was correct to conclude a section 75(2) certificate was not required when the leaseholder applied for a building consent. The leaseholder was not the owner in fee simple and section 75 did not apply to the leaseholder's application for a building consent.
- 5.4.2 It is a matter between the leaseholder and the owner whether the leaseholder is able to undertake the proposed building work. That was not a matter the authority was required to inquire into further or take into account when deciding whether to grant the building consent.

## 6. The decision

- 6.1 In accordance with section 188 of the Act, I hereby determine that the authority correctly exercised its powers of decision in granting building consent B/2016/3382 without requiring a section 75(2) certificate to be issued, and I confirm the grant of that building consent.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 13 March 2017.

John Gardiner  
**Manager Determinations and Assurance**

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<sup>7</sup> Determinations 2012/075 and 2015/036.

## Appendix A: Relevant extracts from the Building Act 2004

### 7 Interpretation

In this Act, unless the context otherwise requires,—

...

owner, in relation to land and any buildings on the land,—

(a) means the person who—

- (i) is entitled to the rack rent from the land; or
- (ii) would be so entitled if the land were let to a tenant at a rack rent; and

(b) includes—

- (i) the owner of the fee simple of the land; and
- (ii) for the purposes of sections 32, 44, 92, 96, 97, and 176(c), 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

*Limitations and restrictions on building consents: Construction of building on 2 or more allotments*

### 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.

### 76 Exemption from section 75

(1) Section 75 does not apply if—

- (a) the owner proposes to construct a building with party walls that will be on the boundaries of the allotments referred to in that section; or
- (b) the owner has applied to the Registrar-General of Land under section 82 for the Registrar's consent to the preparation of a plan (as defined by that section).

(2) Section 82 applies if subsection (1)(b) applies.

### 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.

### **83 Owner may apply for entry to be removed**

- (1) This section applies if—
  - (a) the requirements of sections 75 to 81 or the requirements of section 643(1) to (6) of the Local Government Act 1974 or any previous enactments were met to enable a building to be built on 2 or more allotments; and
  - (b) any of the following applies:
    - (i) the building is removed, demolished, or destroyed; or
    - (ii) the boundaries of the allotments are adjusted in a manner that results in the building being contained entirely within the boundaries of 1 allotment; or
    - (iii) circumstances have otherwise changed.
- (2) The owner may apply to a territorial authority for approval for the entry under section 78 to be removed.
- (3) If the territorial authority decides to approve the removal of the entry,—
  - (a) the decision of the territorial authority must be set out in a certificate that is—
    - (i) authenticated by the territorial authority; and
    - (ii) signed by the owner; and
  - (b) the certificate must be lodged with the Registrar-General of Land.
- (4) If a certificate referred to in subsection (3)(b) is lodged with the Registrar-General of Land, he or she must record an appropriate entry on—
  - (a) the certificate of title for each allotment or part of the allotment; and
  - (b) any mortgage, charge, or lien whose application was extended to additional land under section 80.
- (5) If subsection (4)(b) applies, any mortgage, charge, or lien whose application was extended to additional land under section 80 ceases to apply to that additional land.
- (6) The Registrar-General of Land does not need to record the entry on the duplicate certificate of title unless that duplicate has had an entry recorded on it under—
  - (a) section 78; or
  - (b) section 643 of the Local Government Act 1974; or
  - (c) the corresponding provisions of any previous enactment.
- (7) Subsections (2) and (3) apply, with any necessary modifications, to any request by an owner of land if the requirements of section 643(1) to (6) of the Local Government Act 1974 or any previous enactment or sections 75 to 81 were applied in error.