



## Determination 2019/016

# Regarding the refusal to amend a building consent for five detached dwellings at 29, 31, 33, 35 and 37 Adamson Road, Flat Bush, Auckland

### Summary

This determination considers the modification of a building consent issued for five detached dwellings; four dwellings were completed and one was not. The owners of the four completed dwellings applied to the authority to modify the consent so the incomplete dwelling and the four completed dwellings each had their own consent, thus enabling a code compliance certificate to be issued in respect of the four completed dwellings.

### 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, Katie Gordon, Manager Determinations, 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 owners of the five dwellings that the building work relates to, Ganday & Kang Property Trading Ltd, Ganday Property Ltd, Kang Trustee Company Ltd, Black Hawk Property Developers Ltd and H Singh, who are the applicants in this determination (together referred to as “the applicants”), acting through an agent (“the applicants’ agent”)
  - Auckland Council carrying out its duties and functions as a territorial authority or a building consent authority (“the authority”).
- 1.3 This determination arises from the authority’s refusal to split a building consent relating to the construction of the five dwellings. The applicants requested the building consent be split to enable a code compliance certificate to be issued for four of the dwellings, which are complete.
- 1.4 Accordingly, the matter to be determined<sup>2</sup> is the authority’s exercise of its powers of decision in refusing to amend the building consent.
- 1.5 In making my decision, I have considered the application, the submissions of the parties, and the other evidence in this matter. I have not considered any other aspects of the Act or Building Code, beyond those required to decide on the matter to be determined.

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

## 2. The building work and background

- 2.1 The applicants are the owners of five detached dwellings constructed on five discrete lots in a new subdivision at Flat Bush in Auckland. The three-storey dwellings all have similar although not identical designs.
- 2.2 The authority issued a resource consent relating to six dwellings. The applicants' agent advises that one resource consent was issued because 'it was only possible to subdivide down to the site size once the dwelling had been established'. This approach was carried over to the building consent (No. 20153789), which the authority issued on 29 September 2016, and which approved construction of five dwellings. The authority's building inspection records indicate that the sixth dwelling was "separated from this [building] consent".
- 2.3 Work on four of the dwellings (No.s 29, 31, 33 and 35 respectively) was carried out by one builder and this work is complete. The authority carried out a final inspection of these dwellings on 18 May 2018 and all four of the dwellings passed as compliant.
- 2.4 Work on the remaining dwelling (No. 37) was carried out by another builder. This work is incomplete and the authority has noted some compliance issues relating to its construction.
- 2.5 The owners of the four completed dwellings have applied for code compliance certificates in relation to their dwellings. However, the authority has advised that it is unable to issue the certificates because all five dwellings were covered by the one consent. The authority advised that all five dwellings must have passed their final inspection and the required paperwork lodged before a code compliance certificate can be issued for any of them.
- 2.6 In August 2018, the applicants' agent approached the authority about the possibility of splitting the building consent so that code compliance certificates could be issued for the four completed dwellings. The authority advised that it cannot "remove the completed work off [the] consent - it is just not legally possible", nor could it issue a certificate of acceptance for the four dwellings as the building work had been carried out pursuant to a building consent.
- 2.7 The applicants' agent sought legal advice on the matter and supplied this to the authority on 19 September 2018. The legal advice was to the effect that previous determinations had concluded it was possible to split a building consent in situations where multiple buildings were being built under one consent, and that the reasoning in those determinations applied to the applicants' dwellings.
- 2.8 The authority considered the advice, but maintained its position, in emails dated 20 and 21 September 2018, that it was not possible to now split the consent. In the authority's view, to do so would be the same as amending the consent, meaning that the authority would be granting an amendment for work already completed which it cannot do.
- 2.9 The applicants applied for a determination on the matter and this was received by the Ministry on 25 October 2018.
- 2.10 After the application for determination was received, the Ministry sought clarification on the authority's position, in light of previous determination decisions relating to similar issues. The authority's submission was received on 18 December 2018.

### **3. The submissions and the draft determination**

#### **3.1 The initial submissions**

##### ***The applicants***

- 3.1.1 In a submission accompanying the application the applicants set out the background to the dispute and explained the impact on the applicants of not being able to obtain a code compliance certificate for the completed dwellings.
- 3.1.2 The submission referred to previous determinations where the Ministry had directed that a building consent should be split, including determination 2009/56<sup>3</sup> (which related to a block of five semidetached townhouses, constructed under a single building consent covering 67 townhouses in total) and determination 2008/70<sup>4</sup> (which related to two detached townhouses constructed under a single consent). The applicants submitted that these two determinations:
- ...show that the commencement of physical works does not render the splitting of a building consent unlawful, as suggested by [the authority]. Indeed, in both cases the buildings in question had already been constructed.
- 3.1.3 The applicants referred to the two determinations being relied on by the authority, and stated they related to situations where work was carried out that was not in accordance with a building consent and an amendment was being sought to cover the alternative work. Those cases differed from the applicants' circumstances, as all of the applicants' dwellings had been constructed in accordance with the consent.
- 3.1.4 The applicants concluded that a determination was being sought 'requiring the building consent to be split to allow [code compliance certificates] to be issued for the four completed houses' and that it was 'difficult to see sound policy, legal, or good building control reasons' why the applicants should have to wait until the fifth dwelling was complete before this could occur.
- 3.1.5 With their submission the applicants provided copies of:
- the building consent
  - the authority's field card relating to the final inspection
  - correspondence between the parties
  - the legal advice obtained by the applicants' agent
  - a site plan showing the location of the applicants' dwellings within the larger development
  - photos of the applicants' dwellings, including the incomplete building work for No. 37.
- 3.1.6 The applicants' agent made a further submission dated 8 January 2019, in response to the authority's submission. The agent confirmed that all five of the applicants supported the building consent being split, including the owner of the remaining dwelling (No. 37) so that, when the work on it was complete and compliant, a code compliance certificate could be issued for that dwelling too. The submission referred to the authority's reasons for considering it is was legally unable to split the consent and stated that:

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<sup>3</sup> Determination 2009/56 Determination regarding the refusal to amend a consent and issue a code compliance certificate for a 5-year-old block of 5 semi-detached townhouses (30 July 2009)

<sup>4</sup> Determination 2008/70 Refusal to issue a code compliance certificate for a 10-year-old townhouse (28 July 2008)

The fundamental difference in this request for a determination from the previous circumstances cited by the [the authority] is that these are fully independent detached separate buildings. Splitting the consent will have no impact and no consequences on the other buildings. This is in marked contrast to other requests which are wanting to separate out a portion of a building for a separate building consent enabling other portions to be finally approved.

The submission concluded that the applicants were willing to pay the authority's 'administrative costs' associated with splitting the consent.

### ***The authority***

- 3.1.7 The authority made a submission dated 18 December 2018 in response to the application for a determination.
- 3.1.8 In its submission, the authority stated that it considered it was unable to split building consents that related to completed building work. There were no 'statutory grounds' under the Act that allowed a building consent to be issued retrospectively for work that has already been completed, and this was confirmed in the case of *Environment Waikato v Sutherland*<sup>5</sup> and subsequently in determinations 2016/046<sup>6</sup> and 2017/020<sup>7</sup>. Previous determinations had referred to an administrative function whereby an authority could 'split' a building consent. In the authority's view, if this referred to issuing an amendment to a consent, then the requirements of section 45(4)(b)<sup>8</sup> applied and the process would be the same as for issuing a building consent, which required the amendment to be issued before the work was undertaken.
- 3.1.9 The authority also advised that it had previously had a policy that allowed consents to be split, but that this will no longer be applied. In addition, the authority raised concerns regarding this practice in relation to multi-unit dwellings. The authority considers there is no legal mechanism to allow for the splitting of a building consent and it creates difficulties when there are no 'uniquely identifiable inspection records'.
- 3.1.10 The authority concluded by requesting that the Ministry 'make precise reference to the procedural method by which a single building consent can be turned into 2 or more building consents when the work has already been undertaken'.
- 3.1.11 With its submission, the authority provided a copy of a legal information sheet<sup>9</sup> relating to questions of law regarding the granting of building consents retrospectively in relation to Determination 2010/002<sup>10</sup> and the overturning of that determination on appeal in *Environment Waikato v Sutherland*.

## **3.2 The draft determination**

- 3.2.1 The draft determination was issued to the parties for comment on 13 March 2019. The applicants' agent accepted the determination without comment on the same day. The authority accepted the draft without comment on 28 March 2019.

<sup>5</sup> *Environment Waikato v Sutherland* District Court Wellington CIV- 2010-085-629, 1 March 2011.

<sup>6</sup> Determination 2016/046 The refusal to grant an amendment to a building consent for the use of imported composite slate roofing tiles on a house (26 September 2016)

<sup>7</sup> Determination 2017/020 regarding the decision to issue a certificate of acceptance for building work (24 March 2017)

<sup>8</sup> In this determination, references to sections are to sections of the Act.

<sup>9</sup> Legal Landscape, Brookfields Lawyers (June 2011)

<sup>10</sup> Determination 2010/002 The refusal to issue a code compliance certificate for a dam (21 May 2010)

## 4. Discussion

- 4.1 The applicants have requested that the building consent relating to their dwellings be split, so that a code compliance certificate can be issued for the four completed dwellings. The owner of the fifth dwelling (No. 37) intends to apply for a code compliance certificate once building work on that dwelling is complete.
- 4.2 The authority is declining to split the consent on the basis that it has no legal authority to do so – it is concerned that splitting a building consent amounts to issuing an amendment to a consent, and that as with the original decision to issue a building consent, an authority cannot do this retrospectively for work that is already completed.
- 4.3 In my opinion the authority is mistaken in its assertion that splitting a building consent involves retrospective approval of the building work it relates to; the test under section 49 of the Act has already been applied and approval given for the building work to be carried out. Subsequent splitting of the consent is not a new decision under section 49; rather it is an exercise that is administrative in nature and that will be suitable in relation to some, but not all, situations where two or more buildings have been constructed under a single consent.
- 4.4 This issue has been discussed in previous determinations, including those identified by the applicants in their submissions. In particular, I refer to determination 2009/56, where it was determined that a building consent relating to a block of five townhouses, as part of a large development of 62 townhouses covered by the same consent, should be split to enable a code compliance certificate to be issued for the block of five.
- 4.5 At paragraphs 11.4 and 11.5 of that determination I stated:
- 11.4 In my view, the authority has the power under the Act to deal with an administrative issue such as splitting a consent where a consent deals with two or more buildings and the owner requests the consent be split to deal with one or more buildings separately. Territorial authorities that are building consent authorities have broad and wide-ranging responsibilities in respect of the building consent process under the Act. The nature and extent of the building work described in a building consent and the management of the building consent process clearly fall within the discretionary powers of building consent authorities under the Act.
- 11.5 During the building process there will often be changes in circumstance produced by design changes, changes to the scope of work proposed, the number of buildings proposed or the timing of completion that may require changes to the scope of the building consent and the number of buildings covered by a consent. A building consent authority has the power under the Act to deal with those changes in circumstances affecting the number of buildings covered by a consent by way of an amendment to a consent to split off particular buildings.
- 4.6 I consider that reasoning still stands. Determination 2009/056 then went on to draw a distinction between a substantive amendment to a consent, which would require inspections, and an amendment for the purposes of splitting a consent, which would propose no new building work and would be of an ‘administrative nature only’.
- 4.7 In my opinion, this is a significant distinction and one that can guide the authority in its decisions as to whether it is appropriate to split a consent. In this case, for four of the dwellings, the building work is complete and has been carried out in accordance with a current building consent. There can be no question that splitting the consent for administrative purposes will create a need for any replacement or additional building work. Accordingly, the principles that apply to prevent the retrospective granting of consents for work that is already completed do not apply.

- 4.8 In its submission, the authority has referred to two determinations, which in its opinion, support its view that it can no longer split building consents: being Determinations 2016/046 and 2017/020. This interpretation is incorrect. Both of those determinations involved a situation where a change, other than a minor amendment, had been made to the consented building work without an amendment to the consent first being obtained. Had the authority issued an amendment to the consent in these situations, it would have amounted to the retrospective consenting of those changes. As already discussed, that is not the case with the applicants' dwellings, where all the work on the four completed dwellings has been completed in accordance with a valid consent.
- 4.9 The authority has also raised concerns in its submissions about the difficulties associated with requests to split consents relating to multi-unit buildings constructed under a single consent. The authority has a valid point in that not all building consents relating to multiple units or dwelling will be capable of being split as they cannot be neatly parcelled off into discrete units. But that is not the case with the applicants' dwellings, which are all stand-alone buildings.
- 4.10 The authority has also referred to the difficulty in situations where inspection records are not 'uniquely identifiable'. It is hard to see how this situation would arise in relation to developments such as the one that the applicants' dwellings are part of. Authorities must be able to be satisfied as to the compliance of all parts of a building or buildings, and maintain accurate records to this effect. It is not, in any case an issue that arises in relation to the applicants' dwellings, where the authority's inspection records clearly state which buildings have been inspected.
- 4.11 As a final comment, I note that the authority has asked me to 'make precise reference to the procedural method' by which a building consent is split. As noted in determination 2009/56, the provisions in the Act are designed to give authorities broad and wide-ranging responsibilities in respect of the building consent process. There are fundamental requirements that apply to this process, including the one in section 40 Act that no building work should be carried out except in accordance with a building consent. In granting or amending a building consent, an authority must ensure these fundamental requirements are complied with. Otherwise it has broad discretionary powers to manage the building consent process.

## **5. The decision**

- 5.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority was incorrect to refuse to amend the building consent as described in this determination. I reverse that decision, thus requiring the authority make a new decision taking into account the findings of this determination.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 7 May 2019.

Katie Gordon

**Manager Determinations**