



Determination 2019/070

Regarding the authority's decision to refuse to split a building consent for townhouses at 14 and 16 Waterview Downs, Waterview, Auckland



Summary

This determination considers the authority's refusal to split a building consent to allow owner of two townhouses to pursue a code compliance certificate separately from the owners of other attached townhouses that were all constructed under one building consent. The determination discusses the framework for considering an application to split a building consent issued under the Building Act 1991, and whether assessment for compliance occurs when the consent is split or when a code compliance certificate is applied for.

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004 ("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
- 1.2 The parties to the determination are:
 - the owner of 14 and 16 Waterview Downs, Inspired Trades Limited ("the applicant") acting through a building consultant ("the agent")
 - Auckland Council ("the authority"), carrying out its duties as a territorial authority or building consent authority.
- 1.3 The application for this determination arises from the authority's decision not to accept an application to modify building consent BC010109413 ("the original consent") to split it into separate consents. The application to split the original consent was to be made so that the owner of two townhouses, 14 and 16 Waterview

¹ The Building Act and Building Code are available at www.legislation.govt.nz. The Building Code is contained in Schedule 1 of the Building Regulations 1992. Information about the Building Act and Building Code is available at www.building.govt.nz, as well as past determinations, compliance documents and guidance issued by the Ministry.

Downs, (“the townhouses”) can seek a code compliance certificate separately to the owners of other townhouses constructed under the original consent.

- 1.4 The applicant’s request to split the original consent resulted from the issue of notices to fix for the townhouses. The issue of the notices to fix was the subject of a separate determination application (“the first application”) that has since been withdrawn by the applicant. The first application concerned whether or not building work carried out was exempt from the requirement to obtain building consent. A hearing was held in relation to that application, and during that hearing the applicant raised the issue of splitting of the consent and it was agreed that this matter be addressed in a separate determination.
- 1.5 The authority did not accept the application to split the original consent for processing, and set out its reasons in a letter to the applicant (see paragraph 3.10). In that letter, and in its submissions, the authority has advised it is concerned that the intertenancy walls separating the townhouses are timber-framed, and it has concerns about interdependency in regards to the performance of the building.
- 1.6 I consider the authority’s refusal to accept the application is a refusal to modify the original consent as discussed under paragraph 5.1. The matter to be determined² is therefore the authority’s exercise of its powers of decision in respect of an application to split the original consent.
- 1.7 In making my decision, I have considered the submissions from the parties and the other evidence in this matter, including the information on the townhouses provided in relation to the first application.

2. The building work

2.1 The original development

- 2.1.1 The townhouses are two adjacent units and part of a larger development to the east of Great North Road, which extends down a steep slope towards the Oakley Creek Walkway to the east (above the Southwest motorway tunnel). The development was originally planned to provide more than 30 townhouses of similar construction, although it appears that only about half of these have been completed to date – to the north and west of the street.
- 2.1.2 Five townhouses, from 10 to 18 Waterview Downs (shown in Figure 1), were constructed in 1997/98 under a single building consent.
- 2.1.3 These were referred to in the drawings and the inspection records as units 5 to 9, with the site subsequently subdivided and unit titles (Lots 5 to 9) issued for each townhouse. Units 5 to 7 had identical designs, while Units 8 and 9 were individually designed to suit the plan and contours of Lots 8 and 9.

2.2 The townhouses

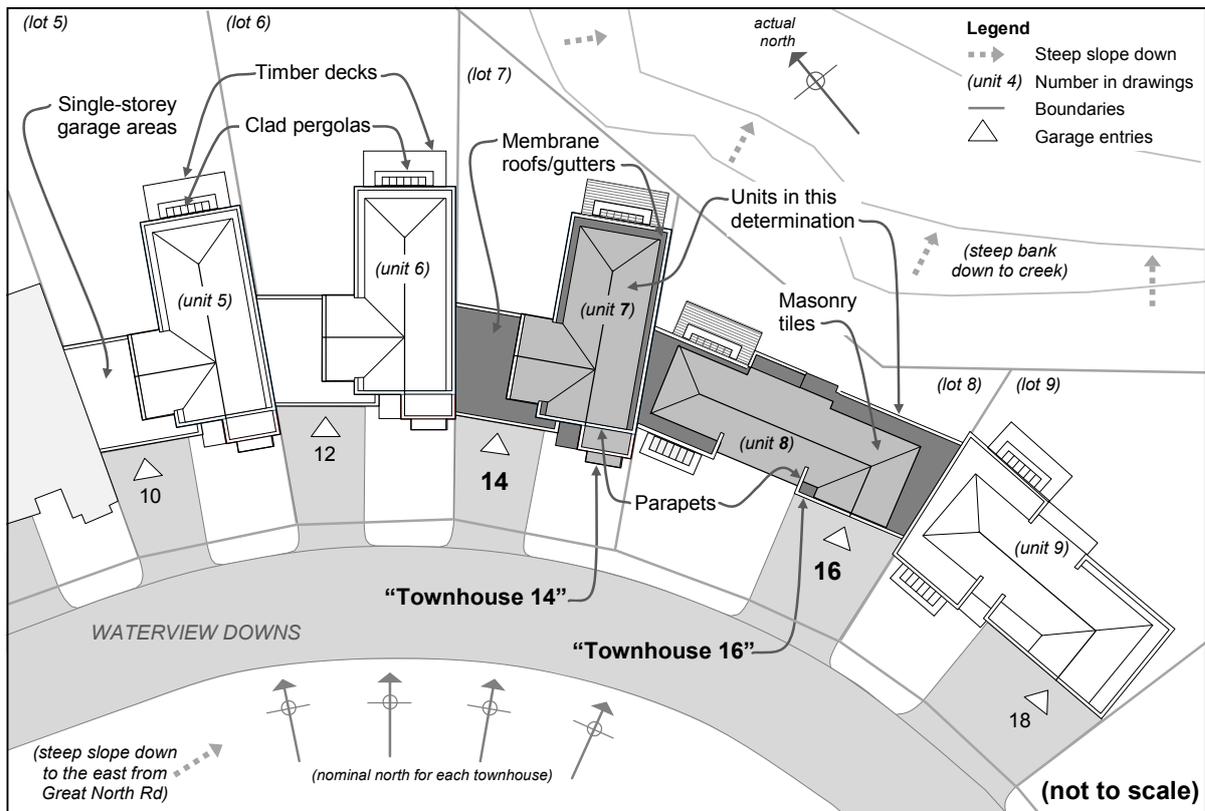
- 2.2.1 The townhouses are adjacent units as shown shaded in Figure 1:
- No. 14 on Lot 7, which was originally referred to as unit 7 (“Townhouse 14”)
 - No. 16 on Lot 8, which was originally referred to as unit 8 (“Townhouse 16”)

² Under sections 177(1)(b) and 177(2)(a) of the Act.

2.2.2 Based on the consent drawings, the townhouses provide:

- Townhouse 14 (about 170m²): Entry to the south, open plan living/ kitchen area and deck to the north, a bedroom to the south, stairs to the east, and garage to the west with external stairs to the north. On the first floor; a master bedroom/ensuite to the north, with two bedrooms and a bathroom to the south.
- Townhouse 16 (about 180m²): Entry to the south, open plan living/ kitchen area and deck to the west, stairs to the north and a double garage with external stairs to the west. On the first floor; a master bedroom and deck to the west, with two bedrooms to the east, study/bedroom to the north and two bathrooms to the south.

Figure 1: The five townhouses



2.2.3 The townhouses are complex in plan and form and have a high weathertightness risk.

2.2.4 Construction is generally conventional light timber frame, with driven timber pile foundations, concrete floor slabs to the garages and timber framed floors elsewhere, monolithic wall claddings, aluminium windows and a mix of masonry tile and membrane roofing. Although I have seen no information about the treatment, if any, to the timber framing of the townhouses, taking account of their construction in the late 1990s it is likely that framing was not treated to resist fungal decay.

2.2.5 The drawings call for the wall claddings to be a proprietary form of monolithic cladding system known as EIFS³, which consists of polystyrene backing sheets fixed directly to the untreated framing over the building wrap and finished with a proprietary plaster system. EIFS also clads pergola beams and columns.

³ Exterior Insulation and Finish System.

- 2.2.6 The 35° pitch hipped and gabled roofs are clad in clay tiles, with low-pitched single-storey areas of flat roof and internal gutters, both clad in a membrane (consented as butyl rubber). Although consent drawings show EIFS extending up and over parapet walls, 2008 photographs show new metal cappings retrofitted to the top of roof parapets.

3. Background

- 3.1 The developer applied for a building consent on 3 July 1997 to construct five residential units, and on 20 August 1997 the authority approved the commencement of foundation work and framing. Construction commenced in about September 1997 and by November 1997 framing had been completed to parts of the five townhouses.
- 3.2 The authority approved the original consent in November 1997 under the Building Act 1991 (“the former Act”). I have not seen a copy of the consent, but other records indicate it was issued on 24 November 1997.
- 3.3 The townhouses appear to have been substantially completed during 1998, with the first final inspection noted in July 1999. Townhouses 14 and 16 were sold, without a code compliance certificate having been issued, in November and October of 1999 (respectively) to their original owners.
- 3.4 According to records, during 2002 and 2003 the original owner of Townhouse 14 sought a code compliance certificate on behalf of owners of numbers 10 to 16. In regard to Townhouses 14 and 16, matters remained unresolved and no code compliance certificate had been issued when these were sold to their second owners in November 2006 and March 2005 respectively.
- 3.5 The authority carried out a final inspection in 2010, at the request of the then owner, and issues were identified with respect to the external cladding of the townhouses.
- 3.6 Inspections by a property inspection company were carried out in 2016 as a result of the townhouses being offered for sale and issues were identified with respect to the external cladding of the townhouses.
- 3.7 The applicant purchased the two townhouses on 3 March 2017⁴. The applicant carried out various repairs to the townhouses during 2017, and although it is not clear what led the authority to visit the townhouses in July 2017, the authority carried out a site visit, took photographs of the building work, and subsequently issued a notice to fix for each townhouse in October 2017.
- 3.8 Further work was carried out by the applicant, and the authority undertook more site visits. The authority subsequently issued notices to fix⁵ on 16 February 2018 under section 164 of the Act. The notices were issued in respect of building work carried out without building consent that the authority considers is not exempt building work under Schedule 1.
- 3.9 In August 2018 the applicant applied for an amendment to split the original consent.
- 3.10 The authority emailed the applicant on 16 August 2018, stating ‘the application cannot be successfully lodged’, and attached a letter setting out the reasons for this. In the letter the authority stated:

⁴ Agreements for sale and purchase of both townhouses were made on 13 January 2017, with transfers recorded on the property titles as 3 March 2017.

⁵ No. NOT21383772 for Townhouse 14 and No. NOT21380270 for Townhouse 16.

Separation to historic building consents which is more than 5 years old, and multiple owners are involved has certain criteria to meet. Units should be stand alone, in blocks, or in case of adjoining units to have well defined legal boundary (inter-tenancy walls) in the vertical axis with no interdependency on one another. Units with timber inter-tenancy walls or shared services (ie drainage) cannot use this process unless the entire block of units is being separated out.

The plans provided shows that the vertical inter-tenancy separating wall is timber. Accordingly, the request for separating one of mentioned [sic] the dwellings would not be valid.

- 3.11 As noted in paragraph 1.4, the applicant sought a determination on the authority's decision to issue the notices to fix, and during a hearing held in relation to that application raised the issue of splitting of the consent. It was agreed that this matter be addressed in a separate determination; the Ministry advised the parties of this application on 6 November 2018.

4. The submissions

- 4.1 Over the course of the determination I received various documents and a number of submissions from the parties. The information provided and submissions relevant to the matter to be determined, the draft determinations issued for comment, and the hearing are summarised in Appendix B as below:

- B.1 The initial submissions and documentation.
- B.2 The first draft determination issued on 8 February 2019 and submissions received in response.
- B.3 The second draft determination dated 31 May 2019, written submissions received in response, oral submissions at a hearing held on 2 August 2019 and documents tabled at the hearing.
- B.4 The third draft determination issued on 21 November 2019 and submissions received in response.

4.2 The applicant

- 4.2.1 The applicant considers the authority incorrectly refused to amend the original consent and submits (in summary):
- The applicant sought to get the application for a code compliance certificate underway, but was told the original consent needed to be split before the application could be considered. The authority then 'rejected the splitting of the consent because timber framed intertenancy walls are involved', and the authority's policy states "units with timber intertenancy walls or shared services (ie drainage) cannot use this process unless the entire block is being separated out." There is no basis under the Act for this policy.
 - Under the former Act the applicant could have been issued with an interim code compliance certificate, but that is no longer available, and a staged or split building consent is the only mechanism that provides a code compliance certificate for townhouses constructed in this manner.
 - No building work is proposed. The building work is already covered in the original consent and has already been carried out. Splitting the original consent is simply an administrative matter.

- The Act provides for a series of applications for building consents for stages of proposed building work, and it follows therefore that building consents can be split in the same manner. Ten townhouses were constructed under two consents; it is logical then that the authority can further split the consent for five of the townhouses constructed under one consent on the same basis as it issued the two original consents.
- The applicant compared the subject building to other types of unit-titled buildings.
- Splitting the original consent allows the applicant to deal with the issues relating to their property and obtain a code compliance certificate without having to rely on other owners addressing issues on their property.

4.2.2 In regard to interdependencies between the townhouses:

- The agent acknowledged the concerns that the authority has with regard to interdependency and that the issues raised by the authority regarding the performance of the building work may be reasonable, but noted that the compliance assessment occurs at the point the authority is considering whether it can issue the code compliance certificate and is not relevant to the question of whether the original consent can be split. Any potential for damage across the boundary is a civil matter between the owners.
- The party wall between the applicant's townhouse (no. 14) and adjacent townhouse (no. 12) is of the same design and construction as numbers 8 and 10 Waterview Downs, and the building work for these townhouses is covered under separate building consents.
- There are easements and covenants that mean the owner of one townhouse must take action if non-compliance of their unit is affecting ongoing compliance of another.

4.3 The authority

4.3.1 I received a submission from the authority that included the authority's policy entitled 'Separation of a historic building consent' ("the policy")⁶. The policy states:

Applications are able to be separated if the units are stand-alone; are in blocks or in the case of adjoining units, have a well-defined legal boundary (inter-tenancy wall) in the vertical axis with no interdependency on one another. Units with timber inter-tenancy walls or shared services (ie drainage) cannot use this process unless the entire block of units is being separated out. Units with horizontal boundaries and separations (for example multi-storey high rise) cannot use this process unless an entire block of units is being separated out.

...

For older consents, where a development includes multiple units in blocks, the individual owners in each block must apply as one for the separation of that block, rather than individual units. [The Ministry has] delivered several Determinations directing unit owners to join in making an application as a block. Reference Determinations 2009/56, 2009/77 and 2010/42 (there are a number of others also). The outcome is [code compliance certificates] can then be issued on a block by block basis; however, care must be taken in confirming the integrity of inter-tenancy walls, fire collars and electrical penetrations.

⁶ AC1148 'Separation of a historic building consent' v5, April 2018.

4.3.2 In a submission the authority stated:

... [It] is concerned about the viability of each part of the split building consent... If the split parts each comprise a free-standing building or buildings then all things being equal, there should not be any unresolvable problems. It is when the split parts of the consent are mutually interdependent in performance terms that difficulties are [most likely] to arise. [The authority] is going to require information as to performance with regard to all building work which is some years old, and if there has or is likely to be a performance failure is also going to require a scope of building work to deal with the failure which can be independently implemented by each owner. [The authority] sees the information about performance where appropriate, and a scope of building work to address any performance problems which have been identified, as an integral part of the application to amend the building consent by splitting it into parts.

4.3.3 The authority contends:

- splitting a building consent is not simply an administrative exercise, as the test for approving the amendment is the same as for granting consent and the authority would need to consider compliance of the existing building work
- when splitting the building consent the authority must have regard for the condition of the building, as it needs to know that the building work can perform. It would need to be demonstrated that the compliance problems can be managed or the applicant's townhouses isolated from compliance issues with adjacent townhouses
- the potential for non-compliance of one townhouse impacting on the compliance of another is a concern – for example moisture ingress and how that may 'travel' and affect an adjacent unit
- issues such as shared services in intertenancy walls, adjoining valley gutters, fire separation on the boundary, and cross-contamination from moisture ingress are issues that need to be considered in relation to splitting consents. However, the authority also noted that shared services in a wall between units, intertenancy walls, and items such as valley gutters are relatively straightforward to deal with and are an issue for the owners to manage by having relevant easements in place
- in this case there is evidence of failure to achieve compliance, and the authority could not approve granting the amendment when it is aware of the performance issues.

4.3.4 The authority noted that there is no mechanism under the Act to split a building consent and considers clarification is required as:

- the amendment of the original consent effectively reduces the scope of the original consent and a new consent must be granted for the work split out from that consent, noting that this raises considerations for the standard with which the building work within the scope of each of the consents must comply
- an amendment under the current Act to split a building consent that was issued under the former Act would mean there were different tests for issuing the code compliance certificates for those separate consents
- in the authority's view granting an amendment to a building consent must be in accordance with sections 48 to 51 of the Act⁷ and involves assessment for

⁷ Section 48 Processing application for building consent, section 49 Grant of building consent, section 50 Refusal of application for building consent, and section 51 Issue of building consent.

compliance (section 49(1)); however a consent cannot be granted for building work that has already been carried out and the authority sees this as a fundamental issue with splitting consents.

- 4.3.5 Other than this clarification, the authority does not have concerns regarding splitting of building consents for detached buildings as this does not present the same compliance issues, and splitting the consent in those cases is simply an administrative matter.
- 4.3.6 With regard to the original consent, the authority considers the intention reflected in the original consent was clearly for the townhouses to be interdependent, including with regard to structural elements. There are a number of features that lead to a high level of interdependence between units, and ongoing compliance of one unit is dependent on the compliance of adjacent unit(s).

5. Discussion

5.1 The refusal to accept the application to modify the original consent

- 5.1.1 The applicant has sought this determination because the authority has refused to accept an application to split the original consent so that the applicant can apply for a separate code compliance certificate for the townhouses.
- 5.1.2 In its letter to the applicant, the authority stated that it was not accepting the application to split the original consent because the application was ‘incomplete’. The authority submitted that the determination should confirm the authority was correct in its decision for the reason that the information provided was insufficient to support the application, with reference to paragraphs 5.3.11 to 5.3.14.
- 5.1.3 The reasons the authority considered the application incomplete, as stated in its letter of refusal (see paragraph 3.10), relate to the presence of the timber-frame vertical intertenancy walls and that, in the authority’s view, the presence of timber-frame intertenancy walls means there are issues with code-compliance interdependence and for that reason the request to separate the townhouses would not be ‘valid’.
- 5.1.4 In my view the authority incorrectly exercised its powers in refusing to accept the application as valid, because the reason given for that refusal was a reason relating to its decision-making rather than to the information provided as part of an application.
- 5.1.5 However, it is apparent that even had the application been accepted as valid, the authority would refuse to split the consent for the reasons given. Accordingly I have also considered in this determination the authority’s refusal to modify the original consent to split it into two or more consents.

5.2 Building consents issued under the former Act and interim certificates

- 5.2.1 The complex consists of 10 townhouses. These were constructed under two building consents that were issued under the former Act, with the scope of each consent consisting of five townhouses. This means only a single code compliance certificate can be issued for each set of five townhouses, and a code compliance certificate cannot be issued unless the authority is satisfied that all of the five townhouses constructed under that original consent comply with the Building Code that was in force at the time the original consent was issued. For that reason, the applicant in this case is not able to obtain a code compliance certificate without the cooperation of the other owners of townhouses constructed under the same original consent.

5.2.2 This issue has arisen as a result of changes to the legislation. The former Act, under which the original consent was granted, provided for the issue of interim code compliance certificates that certified the compliance of part of the work carried out under a building consent. Section 43 of the former Act concerns the issue of code compliance certificates, and subsection (4) provided:

The provisions of this section shall be deemed to enable interim code compliance certificates to be issued, subject to specified conditions, in respect of any part of any building work for which a building consent had previously been issued, whether or not it was previously intended that different parts of that building work were to have been completed in stages, but those interim certificates shall be replaced by the issue of a single code compliance certificate for the whole of the building work at the time the work is completed, to the extent required by the building consent.

5.2.3 This provision meant that, despite the building work not being staged under separate building consents, owners of townhouses like the ones in this determination were able to obtain an interim code compliance certificate when the construction of their townhouse was complete and the authority was satisfied about its compliance, and this could be done independently of the other owners. The interim code compliance certificates were typically used in support of mortgage or insurance applications or when on-selling the property, and provided some assurance with regard to the compliance of the building work for which the certificate was issued.

5.2.4 I understand that the owner of Unit 9 (no. 18 Waterview Downs) has an interim code compliance certificate. The question of the status of that interim certificate arose during the hearing, and while not a matter directly related to this determination, I note that this question has been addressed in previous determinations⁸.

5.2.5 The transitional provisions under section 436 of the current Act provide that for the purposes relating to a code compliance certificate in respect of building work carried out under the former Act:

... section 43 of the former Act—

(a) remains in force as if this Act had not been passed; but

(b) must be read as if—

(i) a code compliance certificate may be issued only if the territorial authority is satisfied that the building work concerned complies with the building code that applied at the time the building consent was granted; and

(ii) section 43(4) were omitted^[9].

5.2.6 With this change in legislation, owners of townhouses constructed under a single building consent issued under the former Act, like the applicant in this case, are no longer able to obtain separate certification that the building work relating to their townhouse is compliant with the Building Code by obtaining an interim code compliance certificate. This means that an application for building consent under the former Act may have anticipated a series of interim code compliance certificates being issued for various parts of the building work, but with the change in legislation individual owners are no longer able to obtain those interim code compliance certificates, rather the authority would have to be satisfied as to the compliance of all of the building work carried out under the consent, and this would require cooperation of the owners of each townhouse.

⁸ See for example Determination 2011/015 (from paragraph 7.5)

⁹ The provisions for an owner to apply for a series of applications for building consents for stages of the proposed building work was carried through in section 44(2) of the current Act.

5.3 The framework for splitting a building consent

- 5.3.1 Many previous determinations¹⁰ have considered this issue and there is a well-established approach whereby a building consent issued under the former Act can be modified on application to split it into separate consents, thus allowing owners to apply for code compliance certificates independently of other owners in a complex originally constructed under a single consent.
- 5.3.2 The authority has followed the approach set out in previous determinations for splitting consents as a means of assisting with this legacy issue where building work carried out under a consent issued under the former Act is no longer able to be issued with an interim code compliance certificate. However, at the hearing the authority raised a number of concerns, both in respect of this particular case and more generally in relation to the process. I address the general process considerations below and discuss the authority's concerns relating to this specific case under paragraphs 5.4 and 5.5.
- 5.3.3 In the authority's view, the splitting of a building consent involves an amendment to reduce the scope of the original consent and the granting of a new consent for the work that is being 'split off' or 'carved out' from the original, and in the authority's view this is not simply an administrative action.
- 5.3.4 The authority considers the splitting of building consents to be problematic because:
- section 45(4) which provides for an amendment of a building consent requires the authority to apply the provisions of sections 48 to 51;
 - the authority cannot grant building consent retrospectively for building work that has already been carried out;
 - if the split portion of the building work is the subject of a new consent granted under the current Act, it follows that the standards against which it is assessed for compliance in order to grant the consent are different to that of the original building consent, and the test for issuing a code compliance certificate for a building consent granted under the current Act is also different;
 - in relation to this particular case, the authority could not approve granting the amendment (ie the granting of a new consent for the owner's townhouses) when it is aware of compliance issues.
- 5.3.5 I note that similar issues were raised by Waitakere District Council in Determination 2009/056. While that determination considered the splitting of a building consent for a block of units within a larger development, the issues raised during that determination concerning modification of the consent are much the same as those raised by the authority in this case. That determination concluded (in summary):
- the splitting of a building consent is an administrative exercise;
 - a building consent authority has the power under the Act to modify a building consent in this way (on application);
 - a building consent authority can seek additional information in respect of plans and specifications for the building work being split from the existing consent;

¹⁰ See for example Determinations 2008/099 and 2009/056.

- the modification of the building consent is not retrospective approval of building work, nor does it raise requirements for inspection of the building work.
- 5.3.6 I agree with the views set out in that Determination, and reiterate that building consent authorities have broad and wide-ranging responsibilities in respect of the building consent process under the Act, and the management of the building consent process falls within the discretionary powers of building consent authorities under the Act.
- 5.3.7 In my opinion the splitting of a building consent is an administrative act; there is no reduction or change in the scope of the work previously approved and no new building work is involved, and for this reason I am of the view that splitting one building consent into a number of separate consents is not the granting of new building consents under section 49 of the Act. Splitting a building consent is not retrospective granting of consent for building work already carried out; the building work that was undertaken was undertaken lawfully pursuant to a building consent.
- 5.3.8 The logical extension of this reasoning is that the test for issuing the code compliance certificate remains the same as it was for the original building consent. The approval to carry out the building work was granted under the former Act and the splitting of the building consent is not an approval granted under the current Act, therefore the transitional provisions remain in effect. Put simply, the splitting of building work previously approved under one building consent issued under the former Act into two or more building consents is the division of that building work, with each subset of that work given a separate building consent number; those consents are each able to be issued with a code compliance certificate if the territorial authority is satisfied that the building work concerned complies with the Building Code that applied at the time the original consent was granted.
- 5.3.9 I am of the opinion that splitting a building consent can be compared to a series of building consents granted for stages of building work in the following ways:
- A series of staged building consents results in a number of building consents that each cover a subset of building work within one larger scope of work.
 - Although there is a relationship between the series of staged building consents, particularly in regard to assessment for compliance, separate code compliance certificates can be issued for the discrete work within the scope of each consent.
 - The granting of one in a series of staged building consents requires consideration of building elements, features, assemblies or spaces that may be within the scope of one or more of the other building consents when a compliance decision is made.
- 5.3.10 I also concur with the view expressed in Determination 2009/056 that splitting a building consent for building work that has already been carried out does not attract the assessment in section 49(1) as that relates to the granting of a new building consent. It is the original decision to grant building consent that approved the building work, and no building work is proposed that requires assessment.
- 5.3.11 The authority's policy raises issues with regard to establishing the boundaries for any proposal to split a building consent, and the difficulties that may arise, for example where there are shared services or the primary structure is not easily divided along one plane or axis. I have considered this issue both from the point of view of the

information required in an application to split a building consent (below) and in relation to the authority's assessment of compliance with the Building Code (see under paragraph 5.4).

- 5.3.12 An application to split a building consent will require documentation to support the proposal, which is a burden that will fall to the person making the application. This documentation should include an adequate description of the division of the scope of work, as well as plans, specifications, and other records and information relevant to the scope of building work proposed to be split from the original building consent.
- 5.3.13 The division of the scope of works for the purpose of splitting a building consent is likely to align with the subdivision of the building into separate titles, though whether the description used for subdividing the original property can be relied on for the purpose of splitting a building consent will depend on the level of detail. The description of the division of the scope of the works to split a building consent will be more complex in cases where the split is not along one plane or axis; however this does not mean that the split cannot be described successfully in three-dimensions, but rather that it will need to be described in greater detail. I note also that there may be some complexities that arise in respect of clauses of the Building Code that relate to the protection of other property. While these are likely to have been addressed under section 46(4) under the former Act when the property was subdivided¹¹, this should not simply be assumed when an application is made to split the building consent.
- 5.3.14 The application to split a building consent should also be supported with plans, specifications and any other records that would be relevant to the building work in the proposed consent; that is the building work that is being divided or split from the original building consent. How this supporting documentation, such as specifications and inspection records, is to be managed when one building consent is split into any number of consents will depend on the circumstances in each case. It may be relatively straightforward for generic information that can simply be duplicated for each subset of building work, but will be more complex where there are differences in the building work (such as varied specifications) or where information or records are specific to a particular part of the work (such as inspection records). In addition, where the building work that is to be divided up includes elements, assemblies, spaces or systems etc that are shared or that continue across boundaries, the application to split the consent should be supported with the documentation relevant to those elements, assemblies, spaces or systems etc as a whole.
- 5.3.15 Records of encumbrances, covenants, easements etc may also be relevant to support an application to split a building consent, particularly where there are shared building elements, assemblies and services etc. I discuss this further in paragraph 5.5.7 in relation to the assessment required for a code compliance certificate. It is the sum of information described in the application to split the building consent that will provide the record against which a code compliance certificate is issued.
- 5.3.16 In this case, the authority has refused to accept the lodgement of an application to split the original consent. Although there may be a number of complexities to be overcome by the applicant in providing the necessary information, it remains open to the applicant to provide the necessary information to support an application to split the original consent.

¹¹ Or section 116A if the subdivision occurred after the current Act came into force

- 5.3.17 I note here that two previous determinations have considered splitting building consents for separate units constructed under a single building consent where the conclusion reached was that the building consent could be split:
- 2008/099¹² concerned a block of three semi-detached units. In that case the units had clearly defined boundaries and party walls, and the determination noted ‘each unit should be able to be assessed separately for compliance with the Building Code’.
 - 2012/042¹³ concerned a block of six units. That determination found that a defect at the junction between the subject units and an adjacent unit was resulting in moisture ingress and affecting the condition of the framing in the party wall.
- 5.3.18 It is notable that neither of these determinations discussed in any detail the type of assessment required for the purpose of issuing a code compliance certificate. Because of the concerns raised by the authority in this case, I have discussed that assessment in more detail in the following paragraphs.

5.4 Compliance assessment

- 5.4.1 The authority routinely considers requests to split building consents issued under the former Act. However, in line with its current policy, the authority has stated in this case it is ‘concerned about the viability of each part of the consent’. The authority’s concerns relate to the performance, in terms of the compliance of the existing building work, both of the townhouses themselves and the complex generally. With regard to compliance with Clause B2 Durability, the authority has also noted non-compliant building work in one townhouse may impact on the ongoing compliance of an adjacent townhouse, and for this reason the authority maintains the view that the building consent should not be split.
- 5.4.2 I do not agree with the authority that any potential issue there may be with the performance of the building work is a valid reason for the authority to refuse to split the original consent. The compliance of the building work is a matter for consideration when an application is made for a code compliance certificate. As discussed above, the assessment of the plans and specifications was carried out when the original consent was granted and the splitting of the consent is simply the division of the scope of work across a number of consents. The question of whether the authority can be satisfied as to compliance of the building work in order for a code compliance certificate to be issued is a separate decision from the administrative act of splitting the consent.

5.5 Assessment for a code compliance certificate

- 5.5.1 Because the authority would not accept an application to split the original consent, no application for a code compliance certificate has been made. However, given the discussion held during the hearing and the concerns raised by the authority, I offer the following comments regarding the assessment framework when it comes to considering an application for a code compliance certificate.

¹² Determination 2008/099: Determination regarding the refusal to issue a code compliance certificate for a 6-year-old semi-detached townhouse (22 October 2008).

¹³ Determination 2012/042: Regarding the refusal to issue a code compliance certificate for a townhouse (28 May 2012).

- 5.5.2 The original consent considered in this determination was issued under the former Act, and accordingly the transitional provisions of the current Act apply when considering the issue of a code compliance certificate for work completed under this consent. Section 436(3)(b)(i) of the current Act requires the authority to issue a code compliance certificate only if it 'is satisfied that the building work concerned complies with the building code that applied at the time the building consent was granted'.
- 5.5.3 The obligations within the Building Code are expressed in terms of a subject, ie an aspect of the building to which the performance obligation applies. The subjects that various clauses apply to include¹⁴:
- buildings, household units, sites
 - building elements
 - building systems
 - amenities / user facilities and features
 - building materials / spaces and surfaces within a building.
- 5.5.4 For example:
- Clause B1.3.1 applies to buildings, building elements and sitework. This means the building as a whole, the building elements within it, and the sitework associated with the building must each be assessed against the performance criteria in Clause B1.3.1.
 - Clause C2.2 concerns the prevention of fire occurring as a result of the use of fixed appliances, and requires an assessment of combustible materials and their proximity to fixed appliances. Clause C3.7, on the other hand, concerns external spread of fire and requires an assessment of the external walls of buildings, which themselves are an assemblage of building materials¹⁵.
 - Clauses F7 and G10 require an assessment of systems, namely emergency warning systems and piped services respectively.
- 5.5.5 For detached buildings, such as those in Determinations 2019/016¹⁶ and 2011/051¹⁷, or where one block of units is being split from a larger development as considered in Determination 2009/056, the assessment for compliance for the purpose of issuing a code compliance certificate will be relatively straightforward. The compliance assessment carried out for the purpose of granting the original consent would have considered discrete and whole elements, assemblies, systems and features, and the compliance assessment for the purpose of issuing a code compliance certificate would consider those in the same way, ie the same whole elements, assemblies, systems and features, and not parts which have interdependencies. For example, the assessment of compliance with Clause G10 Piped services for the purpose of issuing the original consent would have considered the whole of the system within the detached house or block of units, and that assessment is made in the same way when considering the issue of the code compliance certificate.

¹⁴ Other subjects in the Building Code that fall outside of these include: evacuation time, liquid waste, and hazards during construction and demolition.

¹⁵ At the time the building consent was issued the equivalent clauses were Clause C1 Outbreak of fire and Clause C3 Spread of fire (specifically C3.3.3 as it applied to external walls)

¹⁶ Determination 2019/056 Regarding the refusal to amend a building consent for five detached dwellings (7 May 2019)

¹⁷ Determination 2011/051: Regarding the refusal to issue a code compliance certificate for one of a complex of six 16-year-old townhouses (30 May 2011)

- 5.5.6 The assessment for compliance will be more complex where elements, features, assemblies, or systems etc (such as claddings, piped services, and structural elements) are shared or continue across a boundary and therefore partly fall outside the scope of the building work described in the proposed (split) consent. At the time the original consent was issued and when inspections were carried out, these shared or continuous elements, features, assemblies, or systems etc would have been assessed as part of the larger structure or assembly. In those instances there is an inherent interdependence in respect of compliance and ongoing performance, and additional information about that building work will be necessary to support an application for a code compliance certificate. This is not to say that a code compliance certificate could not be issued in such circumstances, but rather that the decision to issue the code compliance certificate will need to be supported with sufficient information in respect of those shared or continuous elements, features, assemblies or systems etc for the authority to be satisfied that the building work concerned complies with the Building Code that applied at the time the building consent was originally granted.
- 5.5.7 The authority has raised concerns regarding the decision it must make about compliance as it relates to durability, and in particular the potential impact on the ongoing performance of the applicant's units from the non-compliance of adjacent units, or a lack of or deferred maintenance by owners of adjacent units. The applicant's agent has referred to covenants and easements as a means of managing the issue of interdependencies. I agree that these can be taken into consideration with regard to the ongoing maintenance of a performing building, and I note that the decision of whether building work complies with Clause B2¹⁸ presumes normal maintenance is carried out. However, in order for a code compliance certificate to be issued the authority must be satisfied that the building work, if subject to normal maintenance, will continue to satisfy the other functional requirements of the Building Code, and the existence of covenants or easements does not contribute to that initial compliance assessment.
- 5.5.8 Evidence as to compliance of the building work, both in scope of the proposed (split) consent and any relevant building work outside that scope, is able to be gathered from inspection records, the performance of the building¹⁹ (in this case over 21 years), and a visual assessment of the building work; the sum of which may or may not reveal that further evidence needs to be gathered to determine compliance with the Building Code. In townhouse complexes where the building work was carried out by the same people, using the same construction methods and materials, the authority will also be able to take into account its knowledge of the performance of the building work throughout the complex when considering the compliance of a particular unit. That is not to say the authority could refuse to issue a code compliance certificate for one unit on the grounds that building work on another unit is not performing, but rather the authority may need more information to be satisfied that the building work for which the certificate is sought complies with the Building Code that was in force at the time the original consent was issued.
- 5.5.9 In this case, it is apparent from the information provided during this determination that the townhouses share a number of features where the subject of the relevant Building Code clauses will have been assessed as part of the larger structure or

¹⁸ Given the age of the building work carried out under the original building consent, I have anticipated the applicant will apply for an amendment to the original consent to modify Clause B2.3.1 in respect of the starting dates for the durability periods beginning from the date of substantial completion.

¹⁹ This may include any remedial work and information on building elements exposed during any remedial works.

assembly. Subject to the original consent being split, the assessment of compliance in order to issue a code compliance certificate will need to take into account those features, systems, or assemblies as a whole. I note there are previous issues relating to the performance of the building as a whole that will also inform the authority's decision about compliance. However, as noted above those are matters for consideration when an application is made for a code compliance certificate.

6. The decision

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority erred in refusing to modify building consent BC010109413 for the reasons it provided. I reverse that decision, thus requiring the authority make a new decision on receipt of an application to split the consent.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 24 December 2019.

Katie Gordon
Manager Determinations

Appendix A: The legislation

A.1 The Building Act 1991

The relevant sections of the Building Act 1991 discussed in this determination:

43 Code compliance certificate

(1) An owner shall as soon as practicable advise the territorial authority, in the prescribed form, that the building work has been completed to the extent required by the building consent issued in respect of that building work.

...

(3) Except where a code compliance certificate has already been provided pursuant to subsection (2) of this section, the territorial authority shall issue to the applicant in the prescribed form, on payment of any charge fixed by the territorial authority, a code compliance certificate, if it is satisfied on reasonable grounds that—

- (a) The building work to which the certificate relates complies with the building code; or
- (b) The building work to which the certificate relates complies with the building code to the extent authorised in terms of any previously approved waiver or modification of the building code contained in the building consent which relates to that work.

...

(4) The provisions of this section shall be deemed to enable interim code compliance certificates to be issued, subject to specified conditions, in respect of any part of any building work for which a building consent had previously been issued, whether or not it was previously intended that different parts of that building work were to have been completed in stages, but those interim certificates shall be replaced by the issue of a single code compliance certificate for the whole of the building work at the time the work is completed, to the extent required by the building consent.

...

A.2 The Building Act 2004

The relevant sections of the Building Act 2004 discussed in this determination:

436 Transitional provision for code compliance certificates in respect of building work carried out under building consent granted under former Act

(1) This section applies to building work carried out under a building consent granted under section 34 of the former Act.

(2) An application for a code compliance certificate in respect of building work to which this section applies must be considered and determined as if this Act had not been passed.

(3) For the purposes of subsection (2), section 43 of the former Act—

- (a) remains in force as if this Act had not been passed; but
- (b) must be read as if—
 - (i) a code compliance certificate may be issued only if the territorial authority is satisfied that the building work concerned complies with the building code that applied at the time the building consent was granted; and
 - (ii) section 43(4) were omitted.

Appendix B: The submissions

B.1 The initial submissions and documents

9 and 11 April 2018 Authority	Documents submitted for consideration in the first application for determination: <ul style="list-style-type: none"> • Documentation from the original building consent. • Site visit report, dated 11 January 2018 with photographs appended. • Site meeting report and checklist, dated 23 January 2018 with annotated drawings appended. • Correspondence between the parties relating to the notice to fix. • Photographs.
21 August 2018 Applicant	Submission on first application for determination, noting the authority had 'rejected' the applicant's request to split the building consent, and providing the authority's letter of 16 August 2018 and some documentation from the original building consent.
27 August 2018 Applicant	Advising the authority was being asked to review its refusal to split the consent.
3 September 2018 Authority	Welcoming discussion on splitting consent as part of the hearing.
10 September 2018 Applicant	Hearing held on first application for determination. Request to expand scope to consider splitting building consent.
11 September 2018 Applicant	Addendum to written submission made at the hearing.
21 September 2018 Ministry	Requesting the authority provide the written submission it had offered to prepare regarding splitting the consent.
23 October 2018 Authority	Provided copy of its current policy document 'Separation of a historic building consent' (v5, April 2018), noting it was to be reviewed. Submitting it was concerned 'about the viability of each part of the split building consent', also that each part would be required 'to currently meet the statutory criteria for issuing a building consent based on the building code as it was when the [original] consent was issued'. The authority considers the performance of all the building work is an integral part of the application to split the consent.
23 October 2018 Applicant	Querying which parts of the policy the authority intended to review. Noting that there was no justification for the policy relating to timber framed intertenancy walls, and that issues relating to performance are matters for consideration when an application for a code compliance certificate (CCC) is made. Considered splitting consent analogous to staged consents.
25 October 2018 Ministry	Proposal to consider the matter of splitting the building consent under a separate determination.
31 October 2018 Applicant	Agreed with Ministry proposal.
25 March 2019 Applicant	Provided completed application form.

B.2 The first draft determination and submissions received in response

8 February 2019 Ministry	<p>First draft issued to parties for comment.</p> <p>Concluded the authority was incorrect to refuse the application for the reasons provided.</p>
	<p>The authority was not required to consider compliance of the building work that has already been carried out in order to grant an amendment (under section 45A) to split the consent.</p> <p>Performance of the adjacent unit is not relevant to splitting the consent but is a question for considering when a CCC is sought.</p> <p>The application to split the consent must clearly define the building work that is being separated.</p>
8 February 2019 Authority	Sought clarification that the draft meant the interdependence of the proposed split parts is not a matter for the authority to consider.
22 February 2019 Authority	Requested an extension of time in which to make a submission, until 1 March 2019.
6 March 2019 Authority	Request for further extension until 11 March 2019.
8 March 2019 Authority	<p>Did not accept the findings of the first draft determination, and provided a submission.</p> <ul style="list-style-type: none"> • Accepts the question of compliance of the building work should not prevent an application to split a consent from being made. • If the split is simply an amendment to the consent, then it will still result in one CCC being issued for all of the building work under the amended consent; there is no provision to issue more than one CCC (for an amended consent). • The creation of a new subsidiary consent (under sections 48-51) amounts to the issue of a building consent for work already undertaken, with reference to Determination 2016/046²⁰, <i>Environment Waikato vs Sutherland</i> and a summary of that judgement from an article in 'Legal landscape'²¹. • The amendment is effectively a reduction in scope of the original consent, but a new consent cannot be issued for the work that is 'carved off' from the original. • Without an appropriate mechanism under the Act to allow for the process (as interim CCCs did), there are substantial practical difficulties in splitting building work after construction without uniquely identifiable inspection records.
11 March 2019 Authority	Provided copies of court decisions referred to in its submission ²² .

²⁰ 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).

²¹ 'Consent declined! The issue of retrospective building consents', Legal landscape (June 2011), Brookfields.co.nz.

²² *Environment Waikato vs Sutherland* CIV-2010-085-000629, *Morresey vs Palmerston North City Council* CIV-2007-454-000463, *Waitakere City Council vs Eurovision Building Removals Limited* CRN: 5090500902.

B.3 The second draft determination and submissions received in response, and oral submissions at the hearing

31 May 2019 Ministry	<p>Second draft issued to parties for comment. Concluded the authority was correct to refuse to split the consent</p> <p>The authority was not required to consider compliance of the building work that has already been carried out in order to split the consent.</p> <p>Performance of the adjacent unit is not relevant to splitting the consent but is a question for considering when a CCC is sought; though the splitting of the consent is administrative, the assessment carried out when the consent was granted must remain relevant when the building work is split.</p> <p>Splitting a building consent without consideration for the original compliance decision could lead to the authority not being able to issue a CCC where there is interdependence.</p> <p>The townhouses share a number of features that would have been assessed as part of the larger structure or assembly and that assessment would not remain relevant if the consent were to be split.</p>
19 June 2019 Applicant	<p>Did not accept the draft determination and provided a submission (in summary):</p> <ul style="list-style-type: none"> • The townhouses were designed as stand-alone dwellings, with covenanted party walls, legal boundaries and separate ownership. • Construction over a boundary is an issue dealt with under section 75, but the authority has already approved the separation into separate titles. • An interim CCC was issued for Unit 9 (no. 18 Waterview Downs) in 2001. • The effect of splitting the building consent makes no difference to the building's performance. • Considered the 2nd draft internally conflicted as it noted that compliance of the building work was not a matter for consideration in splitting a building consent but then discussed compliance decisions relating to features that cross over boundaries and whether these remain relevant once the consent is split. Referred to Determinations 2008/099 and 2012/042 [ibid] in contrast to the approach taken in the 2nd draft. • The assessment remains relevant, as do the inspections that were carried out during construction. • Referred to the application of sections 45(4)(b) and 112 when a consent is split. • Provided a copy of <i>Auckland Council vs NZ Fire Service</i> in support of a request for any reports or legal opinion the Ministry relied on in making its decision. • Requested a hearing be held.
21 June 2019 Authority	Accepted the draft determination without further comment.

<p>2 August 2019 Hearing</p>	<p>A hearing was held in Auckland, and attended by:</p> <ul style="list-style-type: none"> • the applicant, their agent and another consultant (referred to together as “the applicant’s representatives”) • four representatives of the authority • myself, accompanied by four advisors of the Ministry. <p>The hearing was wide-ranging and discussed issues relating to splitting building consents generally as well as specifically in relation to this building.</p> <p>All attendees were invited to speak at the hearing and oral submissions were of assistance to me in preparing the third draft of the determination. I have summarised the key points made at the hearing below. The hearing did not include a visit to the site.</p> <p>General discussion was held regarding staging consents and building consents for multi-unit apartment buildings and whether these were analogous to splitting the building consent considered in this determination, and buildings constructed over boundaries with certificates issued under section 75 of the Act. The parties also discussed designing out the interdependencies, and the relevant assessments for consenting and for issuing a CCC, and how a waiver of certain Building Code criteria may be applied.</p>
<p>Authority</p>	<p>Tabled drawing details copied from the original building consent, and described:</p> <ul style="list-style-type: none"> • its policy concerning historical consents • issues it is currently experiencing with consenting strategies where multiple buildings are being constructed under a single consent with the intention to split the consent at a later date, noting there is a lack of clarity in the Act with regard to limitations on consenting building work • administrative difficulties when splitting consents in relation to the supporting documentation sitting with each consent and in particular where the intertenancy boundary is not symmetrical • concerns relating to interdependency, specifically in relation to continued performance (as this relates to anticipated performance for compliance with Clause B2) as well as building features such as shared foundations, cladding, and single timber-frame intertenancy walls.
<p>Applicant</p>	<p>Tabled written submission (in summary):</p> <ul style="list-style-type: none"> • Noted Determination 2019/016²³ supported the approach taken in the first draft of this determination. • Referred to the application of sections 44(2), 45(4) 45A, 48 to 50, 112, 94 and 436, and the definition of “building work” in section 7. • Considers the application to split a building consent is a minor variation to the consent ‘and should be treated as an administrative process only’. • The scope of the consent is only relevant in so far as it relates to the delineation of the work in the split consent, and this is comparative to staged consents. • Reiterates that the assessment for compliance is when the CCC is sought, not when the consent is split. • The issue of reliance on the performance of an adjacent unit (eg weathertightness or structure) is managed through easements and covenants.

²³ Determination 2019/016 Regarding the refusal to amend a building consent for five detached dwellings (7 May 2019).

B.4 The third draft of the determination and submissions in response

21 November 2019 Ministry	Third draft issued to parties for comment. Concluded the authority was incorrect to refuse the application for the reasons provided.
	Summary: The authority was not required to consider compliance of the building work that has already been carried out in order to split the consent; performance of the adjacent unit is not relevant to splitting the consent but is a question for considering when a CCC is sought; the application to split the consent must adequately describe the division of the works and be supported with the relevant plans, specifications and other relevant information; the assessment for a code compliance certificate will include building work outside the scope of the proposed consent where there are shared features, assemblies, spaces etc or where these are continuous across the boundary.
9 December 2019 Authority	<p>Did not accept the draft determination and submitted that the conclusion should be that the authority was correct to refuse to split the building consent for the reason that 'the application was not complete because it did not contain sufficient information to allow the application to proceed'. Referred to the letter of 16 August 2018, noting that it stated 'We are unable to accept the application for processing as it is incomplete'. However, the authority considered the draft correctly indicated the level of information required for such an application and set out the authority's view of the steps in the process required to split a building consent.</p> <p>Provided copies of:</p> <ul style="list-style-type: none"> • an extract from guidance published by the Ministry's guidance²⁴ about receiving applications for building consents • the certificate of title for Lot 7 (No. 14) • the application to split the building consent, completed lodgement checklist, plans and structural calculations • the authority's letter of 16 August 2018.
13 December 2019 Applicant	<p>Agreed with the conclusion in the decision, but raised concerns about the authority's submission with regard to the processing of an application to split a building consent, and that without a formal process requests to split consents will be frustrated. Also raised concerns about the burden on owners that may be required for a request to split a building consent. Reiterated the view that splitting a consent has the same effect of retrospectively staging consents, and submitted that splitting a building consent should be treated in the same manner as amending a building consent under section 45 of the Act with reference to section 49, and considered as a minor variation under section 45A, stating that 'the pathway must be a formal (<i>sic</i>) but administrative exercise', and that there was no provision in the Act for the authority to 'reject' an application to split a building consent.</p> <p>Described the threshold for the authority to be satisfied as to compliance when considering the issue of the CCC, and queried whether the assessment would be under section 95 of the Act or under the transitional provisions in section 436 of the Act.</p>

²⁴ <https://www.building.govt.nz/building-officials/bca-accréditation/detailed-regulatory-guidance/7-perform-building-control-functions/receiving-applications-building-consents/> published 10 April 2017.