

Determination 2024/024

The authority's refusal to modify a building consent for two relocatable detached dwellings to allow for separate code compliance certificates

11 Maultsaid Place, Irongate, Hastings

Summary

This determination considers an authority's decision to refuse to modify a building consent for two relocatable dwellings built in a factory by administratively splitting it to allow for individual code compliance certificates to be issued.

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

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

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Peta Hird, Principal Advisor, 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:
 - 1.2.1. J Roil, R Roil and Jara Trustee Company Limited, who are the owners of the dwellings and the property where they are being constructed, and the applicant in this matter (“the owners”)
 - 1.2.2. Hastings District Council, carrying out its duties as a territorial authority or building consent authority (“the authority”).
- 1.3. This determination arises from the authority’s refusal to administratively split a building consent for the construction of two relocatable detached dwellings, following a request from the owner. The owner made the request to enable individual code compliance certificates to be issued for each dwelling, one of which had been completed at the time of the request.
- 1.4. The matter to be determined in terms of section 177(1)(b) and (2)(a) of the Act is the authority’s refusal to modify building consent ABA20211104 by splitting it.

Matters outside this determination

- 1.5. I have not considered any other aspects of the Act or of the Building Code, other than as stated in paragraph 1.4. In particular, I have not considered:
 - 1.5.1. the compliance of the building work, either as consented or constructed, with the Building Code
 - 1.5.2. the authority’s decision to grant the building consent
 - 1.5.3. any other building consents or code compliance certificates for similar relocatable buildings being constructed on the owners’ property, including

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

ABA20210082 and ABA20211066, that were removed from the scope of this determination.

2. The building work

- 2.1. On 5 November 2021, the authority granted a building consent (ABA20211104) for the owners to construct two 80-100m² relocatable detached dwellings (“unit 1” and “unit 2”) in the factory on the owners’ property in Irongate, Hastings.
- 2.2. The two proposed dwellings were identical in construction and were to be constructed from the bearers up ready for relocation. Each dwelling was to have:
 - two bedrooms, a living area and kitchen, and bathroom
 - a pitched corrugated steel roof, with no eaves
 - external cladding being a mix of plywood cladding and vertical weatherboard, with a painted finish and aluminium external joinery
 - all internal wall and floor coverings installed, with kitchen and bathroom sanitary fittings, waste pipes, mechanical ventilation and smoke detectors in place.

3. Background

- 3.1. A construction company operating from the owners’ property obtains building consents for, constructs and then sells relocatable buildings, including dwellings. Once complete, the buildings are relocated onto other sites, where they are placed on foundations and connected to services.²
- 3.2. On 5 November 2021, ABA20211104 was granted and issued by the authority for the construction of units 1 and 2.
- 3.3. In addition to this consent, the owners had applied for and obtained several other building consents for the construction of multiple buildings. In relation to these other consents, the authority expressed reservations in correspondence to the owners about its ability to split the consents after they had been issued and when the work was still under construction.
- 3.4. The building work for unit 1 was completed, and on 9 June 2022, the dwelling had a final inspection, which recorded to have failed. The reason given on the inspection record for the failure did not relate to compliance of the building work, but rather that this was only the first unit of two. However, the inspection record indicated

² The onsite building work is the subject of separate building consents.

that all required inspections for unit 1 had passed and that the items to complete were in relation to unit 2.

- 3.5. On 20 June 2022, the owners applied for code compliance certificate on unit 1 and requested, in an attached letter, the building consent to be split by the authority³. This would allow the owner to obtain a code compliance certificate for unit 1 and for unit 2 to be constructed at a future date. The request letter referred to advice the owners stated they had received from the Ministry that the authority had the ability to split the consents and attached Determination 2019/070⁴ as an example of how this could be done.
- 3.6. The authority did not provide an initial response, and the owners followed up in an email dated 18 July 2022 asking whether the authority was intending to process or refuse the application.
- 3.7. Correspondence then passed between the parties seeking to resolve the matter. On 30 November 2022, the authority sent a letter that responded “at a general level, to the proposal to split consents” and refused to split the consent. The letter stated that the authority’s reasons were, in summary:
 - 3.7.1. It did not agree that the practice of splitting building consents “is currently provided for under provisions of the Building Act 2004”.
 - 3.7.2. Previous determinations that allowed splitting of consents were to resolve ‘legacy issues’ for units that “had already been constructed, were code compliant and on separate titles of land”.
 - 3.7.3. These determinations were all “one-off situations that couldn’t be resolved without splitting the building consent” and did not establish a business practice of splitting consents.
 - 3.7.4. It does not consider that the proposal of splitting the building consent where work has not been undertaken is supported by these determinations.
- 3.8. The Ministry accepted the application for determination on 10 January 2023. Around the same time, unit 1 was relocated from the owners’ property.

³ The email sent to the authority with the application for code compliance certificate and the request letter covered a total of seven building consents where building work had only been partially completed.

⁴ *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.*

4. Submissions

The owners

- 4.1. The owners have set out their views in correspondence with the authority and the Ministry, in summary:
- 4.1.1. When the owners apply for a building consent for multiple buildings, all the buildings under each application are identical.
- 4.1.2. This building consent is for two detached buildings built in a factory environment, and each building during construction is clearly identifiable against the consent documentation, for example “with an ABA number with a clearly identified building number eg ABA 20211104 Unit 1 of 2 and Unit 2 of 2”.
- 4.1.3. The authority has already inspected unit 1 and confirmed that it complies with the building consent. However, it has refused to split the consent so it can issue a code compliance certificate for it.
- 4.1.4. Previous determinations have indicated that authorities have the ability to split building consents, referring to determinations 2019/070, 2019/016⁵ and 2009/056⁶ in particular. The authority is refusing to accept these as guidance.
- 4.1.5. With respect to determination 2009/056, the owners stated the determination showed that:
- splitting a building consent is an administrative exercise
 - the authority has the power under the Act to modify a building consent in this way
 - the authority can seek additional information if required about the plans and specifications being split
 - modifying a building consent in this way does not constitute retrospective approval of the building work or raise requirements for further inspections.
- 4.1.6. Other authorities have processes for splitting building consents.

⁵ *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.*

⁶ *Determination 2009/056 Determination regarding the refusal to amend a consent and issue a code compliance certificate for a 5-year-old block of semi-detached townhouses at 131 to 139 Metcalfe Road, Waitakere City.*

The authority

- 4.2. The authority has given its reasons for refusal of the owners' request to split the consent that it does not agree that the provisions of the Act provide for this and does not consider the proposal by the owners to split the consent with building work that is still to be undertaken is supported by the previous determinations referred to.
- 4.3. In its submissions to the Ministry, the authority has stated, in summary:
 - 4.3.1. It does not take issue with the findings of the previous determinations. However, it believes "the facts of this particular application are clearly distinguishable from those previous determinations". The previous determinations related to legacy problems to assist owners in gaining a code compliance certificate for individual units where the work had been largely or fully completed, the buildings were code compliant and on separate allotments.
 - 4.3.2. Based on these previous determinations, the authority does not believe that a modification can be made to split a building consent prior to the building work being carried out.
 - 4.3.3. The units that are subject to the building consent were not complete at the time the request to split was made, which is an important distinction compared to previous determinations.
 - 4.3.4. The available mechanisms for the owners to split the consent would be to:
 - amend the building consent to limit the scope to the completed work. A code compliance certificate could then be issued for unit 1, and another individual building consent applied for, for unit 2.
 - Apply for individual consents for individual units at the start of the consenting process.
 - Investigate the Built Ready scheme.
 - 4.3.5. The authority does not currently have a process for modifying building consents as requested, and the Act does not require it to have such a process.
 - 4.3.6. The authority raised concern that a process to split consents would enable applicants to avoid "paying multiple consent fees". The authority has conducted a feasibility study on splitting consents, based on another authority's process, and found that:
 - significant resources would be required

- technical decisions would be required at certain milestones
- additional fees would need to be set.

4.3.7. By splitting a consent, new building consent numbers would be created and there would be an argument that the 12-month lapse period under section 52 would restart. The authority noted that the Building Code is regularly updated, and any building work carried out under split building consents would not comply with subsequent updates.

5. Discussion

- 5.1. In the following paragraphs, I consider the framework for splitting a building consent under the Act and the decision made by the authority to refuse the request to split the building consent.
- 5.2. Many previous determinations have discussed the matter of splitting building consents, including those referred to by the owners in their submissions and by the Ministry in its correspondence to the parties. These previous determinations established an approach for splitting building consents that had been primarily issued under the Building Act 1991 and allowed separate owners to obtain code compliance certificates.
- 5.3. The primary differences in this case are that the original building consent in this case was granted under the Building Act 2004, and some of the consented work (unit 2) had not been constructed.
- 5.4. Although the previous determinations relate to building consents issued under the previous Act, much of the reasoning given about why authorities have the ability to split a building consent as an administrative exercise were based on general principles, rather than the provisions of that Act. I consider those reasons remain valid.
- 5.5. In particular, I refer to determination 2009/56, where it was determined that a building consent relating to 62 townhouses, could be split to enable a code compliance certificate to be issued for a block of five of those townhouses. The reasons why authorities have the ability to split consents are set out in paragraphs 11.4 and 11.5 of that determination:

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 [modifying] a consent to split off particular buildings.

- 5.6. These reasons have been reiterated and confirmed in subsequent determinations, including Determination 2019/016, which applied them in relation to a consent issued under the 2004 Act.
- 5.7. Having established that an authority has the ability to split a building consent, Determination 2009/056 then went on to draw a distinction between a substantive amendment to a consent, which would require inspections, and splitting a consent, which would propose no new building work and would be of an 'administrative nature only'. 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.
- 5.8. In the current case, the building work covered by the building consent in question is for two discrete relocatable dwellings. There is no form of shared or common building work between the two buildings. The work on the first dwelling is complete, and the authority has already inspected it and passed it as compliant. If the consent was split, there would be no requirement to carry out any additional building work or inspections for unit 1 than those already required under the consent. The only additional input required from the authority would be administrative in nature.
- 5.9. I consider that the reasoning and framework set out in the previous determinations still stands, and like its precursor, the 2004 Act does not limit the authority from modifying building consents in this way.
- 5.10. The authority has submitted that there is no set process in the Act for splitting consents and sees this as evidence that authorities do not have this ability.
- 5.11. The Act does not prescribe how authorities should deal with every possible circumstance that may arise. In these circumstances, authorities can use their discretion as to how they deal with situations that are administrative and do not have prescribed methods in the Act and establish their own practice and process for doing so.
- 5.12. An example of where similar internal practices and processes have been developed is the use of stop-work notices. Numerous authorities have processes for issuing stop-work notices in situations where issues arise on site that need to be resolved quickly and as a possible precursor to issuing more formal enforcement, such as a notice to fix. There is no process for issuing a stop-work notice prescribed in the

Act; rather it is an administrative process that is used to support the resolution of minor on-site issues.

- 5.13. In this regard, I disagree with the authority's reasoning that a building consent cannot be split because there are no specific provisions in the Act that allow for this. Authorities have broad powers to manage building consents, and the ability to split a consent comes within them.
- 5.14. Unlike Determinations 2009/056 and 2019/070, in this case, the building work proposed to be split into separate consents had not yet been completed.
- 5.15. However, Determination 2019/070 does provide detail about considerations for splitting consents. At paragraph 5.3.12, it was stated:

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.

- 5.16. At paragraph 5.3.14 of 2019/070, the determination goes on to provide guidance on the supporting information that may be required where one building consent is being split into two or more, noting that how this is to be managed will depend on the circumstances of each case including the complexity of the building work and format of the original consent.
- 5.17. I agree with these statements. The supporting documentation required to accompany an application to split a consent will depend on the circumstances of each case, including its complexity. I note also in this case the units during construction are able to be identified individually and in relation to the building consent for the purpose of inspections.

Additional Comments

- 5.18. The authority has submitted that by splitting consents, the owners will avoid paying the standard fees for a building consent to the authority.
- 5.19. I note that section 219 of the Act allows a territorial authority to impose fees or charges in relation to a building consent or for the performance of any other function or service under the Act. Therefore, the authority would be able to set such a fee in relation to applications to split building consents to cover any time and resources needed to carry out the process.
- 5.20. The authority has also raised in its submission a concern about how the splitting of a building consent will affect the 12-month lapse period within which the building work must start under section 52. I consider that the Act provides provision in

section 52(b) to allow an extension of time to be given by the authority and that this provision can factor into the decision of splitting the consent.

Conclusion

5.21. I conclude that the Act allows for administrative splitting of building consents, as this falls within the authority's discretionary abilities in managing building consent processes. The authority can develop such a process, including specifying the supporting documentation required to accompany any application to split a consent, and set a fee or charge in relation to it.

6. Decision

6.1. In accordance with section 188 of the Building Act 2004, I reverse the authority's refusal to modify building consent ABA20211104 by splitting it.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 16 May 2024.

Peta Hird

Principal Advisor

APPENDIX A: Legislation

52 Lapse of building consent

A building consent lapses and is of no effect if the building work to which it relates does not commence within—

- (a) 12 months after the date of issue of the building consent; or
- (b) any further period that the building consent authority may allow.

219 Territorial authority may impose fee or charge and must collect levy

- (1) A territorial authority—
 - (a) may impose a fee or charge (or both)—
 - (i) in relation to a building consent; and
 - (ii) for the performance of any other function or service under this Act; and
 - (b) must collect the levy which an applicant is liable to pay to the chief executive under section 53.
- (2) If a fee, charge, or levy is payable to a territorial authority for the performance of a function or service under this Act, the territorial authority may refuse to perform the function or service, unless the fee, charge, or levy is paid.