

LET ME IN! OR COMPLIANCE CERTIFICATES UNDER THE BUILDING ACT 2004

**Retirement Views,
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The practical implications for retirement village developers of changes to the Code Compliance Certificate ("CCC") regime under the Building Act 2004 are still coming to the fore as building projects are completed, even though the regime commenced early in 2005.

The key points to be aware of under the changed CCC regime are:

- It is an offence to sell a "household unit" or allow a purchaser into possession of a "household unit" without a CCC having been obtained.
- It is an offence to allow the public to use any part of a building intended for public use without a CCC.
- There is no longer the ability to have an interim CCC.
- "Certificates for public use" have been introduced.

There are also changes to the rules and procedures relating to CCCs but these are not discussed in this article.

What do these changes mean for you? Are occupation licences sold or not? Does a resident enter into possession of their unit?

The relevant provision in the Building Act is section 364. This section provides that a "residential property developer" commits an offence if, in relation to a "household unit" they:

- complete a sale of the "household unit"; and/or
- allow a purchaser of the "household unit" to enter into possession of the "household unit".

A "household unit" is defined as being a building, group of buildings or part of a building or group of buildings that is used for residential purposes and is occupied exclusively as the home or residence of not more than one household. Detached or semi-detached villas will each clearly be a "household unit". Each apartment in an apartment block will be a "household unit".

There has been much discussion over the years about occupation licences and their differences to other types of occupation rights arrangements used by retirement villages. Here is another difference. The issue of an occupation licence is quite clearly not the sale of a "household unit". It is the "sale" or the grant of a right to occupy a dwelling. No ownership in the bricks and mortar passes to the resident. This is in contrast with a unit title where the building is sold to a resident. The position is less clear with leases, but once again unless the lease is a ground lease (not commonly found in retirement villages), then the lease is the grant of a right to live in the dwelling, it is not a sale of bricks and mortar.

Nor, with an occupation licence, is a resident given "possession" of the "household unit". A licence to occupy is legally a different animal from a lease. Occupation licences in the retirement village context have quite deliberately been structured so that they are not leases. Different legal consequences flow from these different occupancy rights.

"Possession" is a well defined legal term and relates to ownership of or gaining a legal interest in property. Under a lease, a tenant has

"possession". They are entitled to occupation to the exclusion of the lessor, provided they comply with the terms of the occupation. An occupation licence on the other hand simply grants to the resident the right to occupy the dwelling. "Possession" remains with the owner.

Accordingly, it is the writer's view that section 364 does not apply to most occupation licences of retirement village dwellings and village developers can issue licences for new "household units" whether they are detached, semi-detached or in an apartment block and allow residents into possession before a CCC is issued.

Is an apartment building a public space?

However, there is a further issue for those building apartments, as section 363 prohibits an owner or developer to allow the public to use any part of a building that is intended for public use, and is affected by building work unless there is a building consent and a CCC.

A building is intended for public use if it is intended to be open to the public or is used by the public free of charge or for payment. It is not clear from the Building Act how far the meaning of "public" extends, nor does the Building Act make clear the range of buildings affected by the provision. The Department of Building and Housing's website relating to the Building Act gives some instances as possibilities of buildings or parts of buildings that may fall within this section. This includes "public foyers in office and apartment buildings". They also note that premises with restricted access (for example, where access is blocked and entry gained via a key pad or coded swipe card) are unlikely to be considered premises intended for public use. The site also states that the premises intended for public use can be all or part of a building.

In the writer's view it is debatable as to whether foyers in apartment buildings of the type included in retirement villages are "public areas" for the purposes of this section. Section 363 quite clearly refers to "a building that is intended for public use". It could be argued that an apartment building is not intended for public use and the fact that the public may have limited access to the foyer does not necessarily bring it within the section.

It should therefore be possible to issue occupation licences to residents in apartment buildings and allow them into possession without a CCC for the building being issued. If there is any uncertainty about the use of the foyer area, it is possible to apply for a Certificate of Public Use if a Council is satisfied that it is safe for members of the public to use the premises. Councils are able to take into account any safety precautions that have been put in place.

No interim CCCs

Community centres and other similar facilities will quite clearly be buildings intended for public use and will need a CCC or a "Certificate of Acceptance" before the building can be used.

It is therefore not practical, in most cases, to apply for a single building consent relating to an entire retirement village development, now that interim CCCs are not available. Whilst there may be no issues with detached and semidetached villas, developers may wish to be more cautious in relation to apartment buildings, and will wish to apply for separate building consents for these and for community services and buildings.

Personal Liability of Directors and Managers

Directors and managers should be aware that they will be personally liable under The Building Act if:

- an offence occurred with the director or manager's authority, permission or consent; or
- he or she knew or could reasonably expect to have known that the offence was to be or was being committed and failed to take all reasonable steps to prevent it.

Practically Speaking

Although the position as set out appears (in the absence of any case law) to be the legal position, practically speaking councils will have nearly as many different approaches as there are councils in New Zealand. You will be well advised to think ahead when undertaking a development, and talk to your local council to find out what their approach is and make sure there are no surprises at the end of the day.

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Contact Us

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