



Determination 2020/006

Regarding the decision to grant a building consent for alterations to a house at 381B Ngatai Road, Bellevue, Tauranga

Summary

This determination considers whether the authority was correct to grant a building consent where the submitted plans were inaccurate in respect of the location of the existing foul water drain. The determination also considers the role of the authority in keeping building-related records.

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 parties² to the determination are:
 - the owner of the building, M, S & S Whitwell as trustees of the Serendipity Trust, as the applicant (“the applicant”), acting through its lawyer as its agent (“the agent”)
 - Tauranga City Council carrying out its duties and functions as a territorial authority or a building consent authority (“the authority”).
- 1.3 This determination arises from the authority’s decision to issue a building consent for alterations to the applicant’s property. As the building work progressed, it became apparent that the existing sewer line on the applicant’s property was not in the location shown on the consented plans. The applicant contends that the authority should not have granted the building consent as, due to the inaccuracy of the plans, it could not be satisfied on reasonable grounds that the building work would comply with Clause G13 Foul water³ of the Building Code.
- 1.4 Accordingly, the matter to be determined⁴ is whether the authority correctly exercised its powers of decision in granting the building consent for the building work to alter the applicant’s house.

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.

² The design licensed building practitioner who carried out the design was not included in the determination application by the applicant in this matter.

³ In this determination, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

⁴ Under sections 177(1)(b), and 177(2)(a) of the Act.

- 1.5 In making my decision, I have considered the submissions of the parties, and the other evidence in this matter. I have not considered any other aspects of the Act or Building Code, beyond those required to decide on the matter to be determined.

2. The building work and background

- 2.1 The applicant's property is a back section in a residential area of Tauranga. The original three-bedroom house on the property that was constructed in 1994 by previous owners, under a building consent granted under the previous Act⁵. The authority issued a code compliance certificate for the original house on 4 April 1995.
- 2.2 The house is two-storey, in part, with the ground floor containing a garage to the south of the house. The site slopes to the south and west. There is a concrete block retaining wall running east-west to the east of the house, and a similar retaining wall also running under the house to support the ground to the north of the basement garage.
- 2.3 The site plan⁶ for the 1994 consent (which also appears to serve as the drainage plan) shows the foul water drain running from a single gully trap on the east side of the house going around the house in a clockwise direction to a main sewer connection on the opposite (western) side of the house. The single gully trap is located on the upper side of the retaining wall (the retaining wall is not shown on the site plan).
- 2.4 The main sewer line runs north-south along the western boundary of the property to the west of the house. The site plan for the original house provided with the application for determination also shows the foul water drain to the front property being diverted around the original house to the main sewer.
- 2.5 In April 2017, the applicant applied to the authority for a building consent to convert the garage into two additional bedrooms, an office and a bathroom, and to add an internal stairwell leading to the first floor. The work also included internal alterations to the upper level of the house.
- 2.6 The authority issued a building consent (BC170238) for the alterations on 26 June 2017, and an amendment of the consent on 2 July 2018. The consented plans show new foul water drains connecting the sanitary facilities in the proposed garage bathroom to an existing foul water drain located directly outside the bathroom. The plans for the alterations show two existing gully traps on the eastern side of the house (whereas the original consent shows only one).
- 2.7 The applicant advises that the new plans were based on the plans for the building consent for the original house held on the authority's files ("the original plans"). Both the inspection record and the 'job history' record for the issue of the code compliance certificate note that the house passed its drainage inspection and that the as-built drainage plans were still to come. However, there is no such plan on the authority's file.

⁵ Building Act 1991.

⁶ The site plan for the 1994 consent is the only plan from the original consent provided with the determination application.

- 2.8 The building work for the alterations commenced. However, when the drainlayer went to connect the new foul water drain to the existing, the drainlayer found that the drain was not in the location shown on the consented plans. Additional work is now required to connect the basement foul water drains to the sewer main as they cannot now be connected to the existing drain (the reason for this has not been stated but given the slope of the ground indicated on the elevation and the location of the retaining wall, it is assumed this is because the existing foul water drain is higher than the new basement drainage connections).

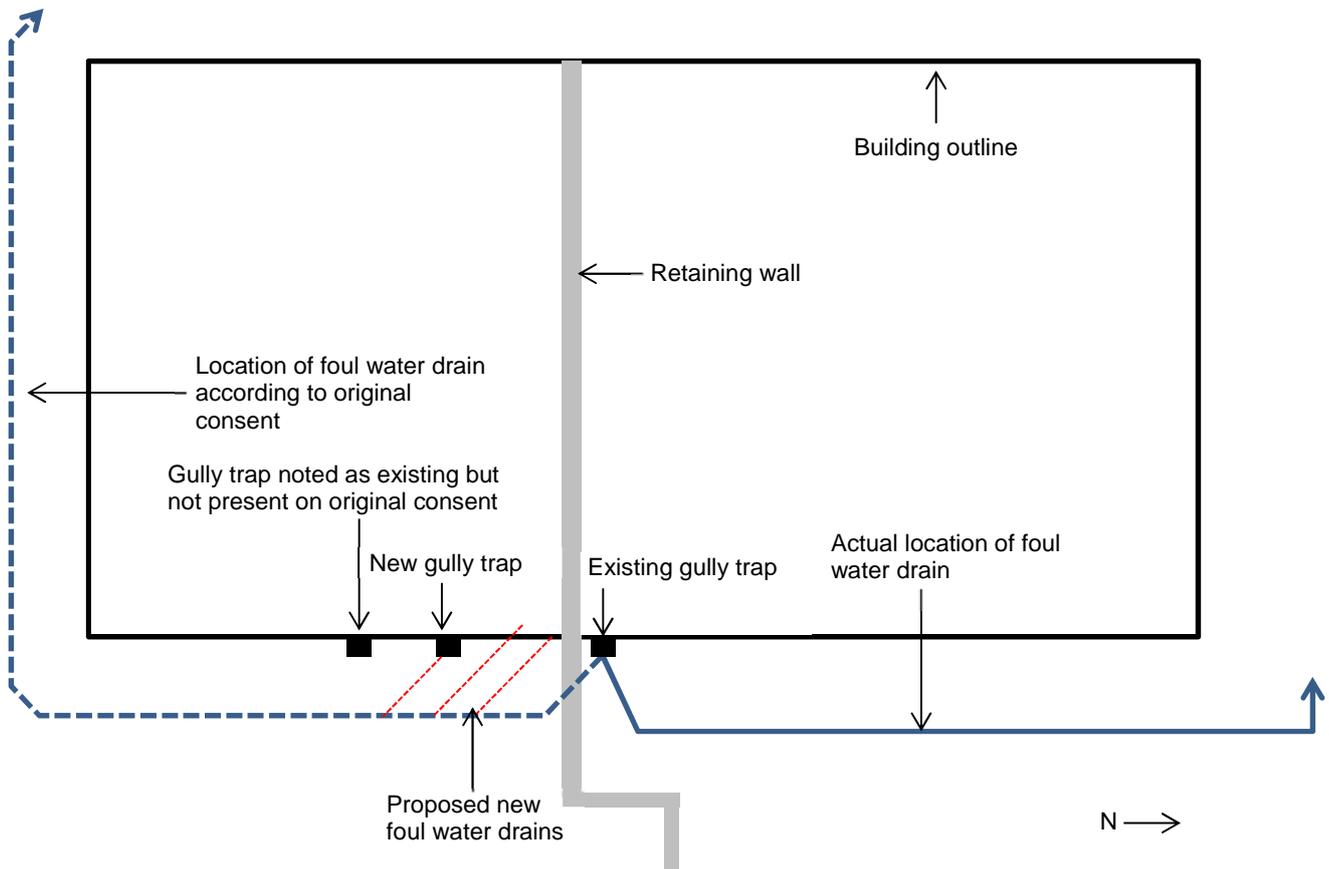


Figure 1: Diagram of proposed and existing drainage system (not to scale)

- 2.9 The applicant contacted the authority about the matter, and states that the authority advised that, as there were no as-built plans available for the original house, the applicant's architect should have carried out a site visit to determine where the sewer line was located, rather than relying on the original plans, and that the new building consent had been issued on the assumption that this had occurred. The authority considered that the issue around the location of the pipes was a private one between the applicant and its architect. (I have not seen any correspondence related to this exchange.)
- 2.10 The applicant applied for a determination and this was received by the Ministry on 12 August 2019.

3. The submissions

3.1 The initial submissions

3.1.1 The applicant provided a submission with its application for a determination. The submission described the building work and set out the background to the dispute.

3.1.2 The applicant submitted that:

- the authority was wrong to issue the building consent for the alterations, as it could not be satisfied that the building work would comply with the Building Code if constructed in accordance with the consented plans and specifications
- the building consent application showed ‘a new sewage disposal connecting to the existing sewer lines’, so the authority was required to ensure Clause G13 of the Building Code would be complied with
- because there were no as-built plans for the original foul water drainage on the file, the authority did not have accurate records showing the location of the sewer line, and did not have reasonable grounds to be satisfied that Clause G13 would be complied with.

3.1.3 The applicant concluded that:

It is submitted that where [the authority] knows that:

- a. “As Builts” were required,
- b. The drains are not located as shown on its approved plans
- c. The new plans show the drains in the incorrect location

then it is not complying with its statutory obligations in being satisfied that G13 has been complied with.

It is also submitted that [the authority] is not able to abrogate its responsibility under the expectation that the designer had carried out a site investigation.

3.1.4 With its submission, the applicant provided copies of the authority’s records for the original consent which included the building consent, a single plan, inspection records, and the code compliance certificate.

3.1.5 The applicant provided a marked-up plan showing the as-built foul water drain going from the single gully trap (located on the upper side of the retaining wall as noted in paragraph 2.3) running around the house in an anticlockwise direction to connect to the sewer main at the northwest corner of the house.

3.1.6 The authority made a submission dated 13 August 2019, and submitted that:

- as-built plans are required documentation for all building consent applications that involve drainage, as drainage layouts often change on site after building consents are issued; they are also required for code compliance certificate applications
- where as-built plans are not available, the designer should conduct a site visit to verify where the drains are, and carry out testing to confirm this, if required
- the authority accepts building consent applications “in good faith on the basis that the designer has satisfied themselves that the proposed design is workable”, and it is the designer’s role (not the authority’s) to “cross check information on previous plans”

- although there is no as-built plan on the authority's file, it "cannot be confirmed" if these were ever provided
- the drainlayer should have "established the discharge point" before starting work.

3.2 The draft determination and responses received

3.2.1 A draft determination was issued to the parties on 16 October 2019.

3.2.2 On 1 November 2019 the authority accepted the draft determination without further comment.

3.2.3 On the same day the agent responded that the draft determination was not accepted and made the following submission (in summary):

- The following sections of the legislation make it clear that an authority has a responsibility to keep and maintain private drainage plans:
 - In issuing a project information memorandum under section 35(1)(c) of the Act, an authority is also required to provide: "details of any existing stormwater or wastewater utility systems that ... relate to the proposed building work; or ... are on, or adjacent to, the site of the proposed building work".
 - Section 216 of the Act requires territorial authorities to keep "all plans and specifications submitted to the territorial authority in relation to an application for a building consent".
 - Section 44A of the LGOIMA⁷ regarding land information memoranda requires councils to supply "information on private and public stormwater and sewerage drains as shown in the territorial authority's records".
- The statement in the draft determination that authorities have no responsibility for private drainage because some plumbing and drainage is exempt under Schedule 1 of the Act is flawed. There is also building work that is exempt from requiring a building consent and by analogy an authority would not need to keep any records in respect of any building because some aspects of its repair and maintenance do not require building consent. (I note an authority is not required to proactively retrieve records of work done under Schedule 1. If the owner of the building work wishes they may provide this information to an authority.)
- The responsibilities set out in Part 4 of the Act are "not a definitive and exhaustive statement of the responsibilities of the parties but are an outline only" and are "for guidance only". Furthermore, the responsibilities overlap particularly with respect to designers and authorities. An authority is required to check information provided to it by owners and designers as guided by Part 4.
- The authority is not entitled to carry out its function of checking the information and issuing a building consent in a vacuum or without question.

⁷ Local Government Official Information and Meetings Act 1987

- An authority is not entitled to assume the information provided to it is correct when it is on notice or has knowledge based on its records that the information is incorrect.

4. Discussion

- 4.1 The matter for determination is the authority's decision to issue a building consent for the alterations to the applicant's house.
- 4.2 The agent considers that the authority was incorrect to issue the consent, because it could not be satisfied on reasonable grounds that the provisions of the Building Code would be met if the building work were properly completed in accordance with the consented plans. The agent holds this opinion because the plans showed the existing sewer line in the wrong location. The agent submits that the authority should have known that as-built plans were required for the issue of the code compliance certificate for the original house, and that because there were no such plans on the authority's file, it did not have reasonable grounds to believe that compliance with Clause G13 Foul water would be achieved for the alteration consent.
- 4.3 The agent is correct that, in granting a building consent, the authority must, under section 49:
- [be] satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.
- 4.4 However, I consider that the agent is not correct in their submission that it is the authority's responsibility to ensure that plans that are submitted to it are correct in their depiction of existing drainage systems. It is the property owner's responsibility to provide accurate representations of existing drainage system when applying for a building consent for work that affects them. This responsibility is particularly important because the authority may be unaware of all sanitary and drain-laying work that has been carried out because some work is exempt from the requirement to obtain a building consent under Part 2 of Schedule 1 of the Act.
- 4.5 The agent has referred to section 216 as evidence that the authority has a responsibility to maintain private drainage records. This section creates an obligation on territorial authorities to keep records of building consents and code compliance certificates. However, this section places no additional obligation for a territorial authority to verify the accuracy of the details contained on documents submitted to it, such as a site plan. The territorial authority acts as an 'archive' of building related records.
- 4.6 However, the issue of the code compliance certificate did not rely on the as-built drainage plan. The building consent was issued under the former Act, where the test for code compliance was whether the building work complied with the Building Code. There was no compliance reason for the authority to require an as-built drainage plan and I have been provided with no evidence to suggest that the as-built drains are not performing satisfactorily. The authority was not required to proactively seek this document.
- 4.7 Subpart 4 of the Act provides guidance on the responsibilities that various parties have in relation to building matters. Section 14B(a) states that it is the owner's responsibility to obtain any necessary consents, approvals, and certificates. Section 14D relates to the responsibilities of the designer, being "a person who prepares

plans and specifications for building work or who gives advice on the compliance of building work with the building code”. Section 14D(2) states:

(2) A designer is responsible for ensuring that the plans and specifications or the advice in question are sufficient to result in the building work complying with the building code, if the building work were properly completed in accordance with those plans and specifications or that advice.

- 4.8 Section 14F states that a building consent authority is responsible for checking that an application for a building consent complies with the Building Code and, once completed, that the building work has been carried out in accordance with the building consent for that work.
- 4.9 In discharging this responsibility, an authority is entitled to rely on the information provided to it by the owner (who is responsible for obtaining the consent) and their designer (who is responsible for ensuring that the plans and specifications accompanying the application are sufficient to achieve compliance). In this case, there appeared to be no reason for the authority to question the plans provided.
- 4.10 In other words, in the absence of information that might reasonably cause it to question the accuracy of the information presented to it, an authority is entitled to carry out its assessment under section 49 based on the information provided to it in the building consent application. The authority may request additional information where it is not satisfied that compliance had been demonstrated, but is not required to establish that the plans and specifications that are submitted are accurate when it has no reason to believe the plans and specifications are not accurate.
- 4.11 The question, therefore, becomes whether adequate evidence was provided to the authority in the current case for it to be satisfied on reasonable grounds that the new foul water drainage system would comply with Clause G13. I consider that it was. The plans provided to the authority clearly identified the location of the existing and new drainage systems, and there was no indication on the plans that there was any uncertainty as to the location of the existing sewer line, or that the authority could not rely on the accuracy of the submitted plans.
- 4.12 The discrepancy between the drainage layout as described in the site plan for the original house and as described in the alteration consent is noted (refer paragraph 2.6). The location of the single gully trap on the upper side of the retaining wall described in the site plan for the original house suggests that the foul water drain from the original house may have been run at a shallower depth around to the north west of the property rather than through and/or under the retaining wall – an examination of the drain from the adjacent toilet in the original house is likely to have assisted in confirming what way the drain was run. The absence (or presence) of the second existing gully trap shown in the plans for the alteration (and any waste pipes running to this) would also have assisted in confirming the location of the existing drain.
- 4.13 Accordingly, I conclude that the authority was entitled to rely on the provided plans and their depiction of the state of the house at the time, including the location of the existing foul water drain, and hence had reasonable grounds for being satisfied that compliance with Clause G13 would be achieved.⁸ It follows that I also conclude the authority exercised its powers correctly in issuing the building consent for the alterations. I note that in reaching this conclusion, I have not formed any opinion as

⁸ I note the original consent involved diverting the existing drain from the front house and it would have been prudent to be clear where this drain went as it is now a shared drain. It is unclear if there was an as-built for that drain, as it does not appear to have been sought.

to the actual compliance of the proposed work with Clause G13, as it was not required that I determine this matter.

- 4.14 It appears that the agent may be seeking the Ministry's intervention in this matter in a supervisory capacity of the authority and seeking a determination about the appropriateness of the way the authority carries out its functions under the Act. However, this is not the function of a determination. This determination concerns the exercise by the authority of a specific power of decision to grant a building consent. Section 188 of the Building Act 2004 provides that the determination must confirm, reverse, or modify that specific decision. There are other provisions of the Act that concern the way the authority carries out its functions, but they are not part of the determination process.

5. The decision

- 5.1 In accordance with section 188 of the Building Act 2004, I determine that the authority correctly exercised its powers of decision in granting building consent BC170238, and I confirm that decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 7 May 2020.

Katie Gordon
Manager Determinations