



## Determination 2019/042

### The code compliance of a garage built over a boundary at 11 Orchard East Road, Ngatea



#### Summary

This determination concerns whether a garage built over a boundary complies with Clause C3 (Spread of Fire) of the Building Code in place when the building consent was issued, and whether the authority was correct to issue a code compliance certificate for the work.

#### 1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“the Act”) made under due authorisation by me, Katie Gordon, Manager Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to the determination are:

- the owner of the adjacent property at 13 Orchard East Road, R Gundesen, who is the applicant for the determination (“the owner of No. 13”)
- the owner of the property at 11 Orchard East Road, K Godwin (“the owner of No. 11”) who constructed the garage in question
- Hauraki District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

1.3 This determination arises from a dispute about the construction of a garage (“the garage”) built at No. 11 following the issue, in 1997, of a building consent for that work. The garage encroached over the boundary between No. 11 and No. 13. The applicant’s primary concern was<sup>2</sup> that the garage as built did not comply with the Building Code, particularly with regard to the requirements of Clause<sup>3</sup> C3 Spread of

<sup>1</sup> The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at [www.building.govt.nz](http://www.building.govt.nz) or by contacting the Ministry on 0800 242 243.

<sup>2</sup> Before the issuing of this determination the garage was moved from its disputed location.

<sup>3</sup> In this determination, references to clauses are to clauses of the Building Code, and references to sections are to sections of the Building Act 2004

Fire. A second issue raised by the applicant is the garage's compliance with Clause E1 Surface water.

1.4 Accordingly the matters for determination<sup>4</sup> are:

- whether the garage complied with Clauses C3 and E1 of the Building Code (Schedule 1, Building Regulation 1992) in force at the time the building consent was granted
- whether the decision of the authority to issue a code compliance certificate for the garage was correct.

1.4.1 In making my decision, I have considered the submissions of the parties, and the other evidence in this matter.

1.4.2 Other legislation such as the Resource Management Act 1991 and Property Law Act 2007 has not been taken into account in this determination as I have no jurisdiction under those other enactments. In this determination, I have only considered building matters relating to the Building Act and its regulations, and I have only considered compliance with the Building Code to the extent necessary to decide on the matters to be determined.

1.4.3 I note the owner of No.13 also disputes the location and compliance of a shed at No. 11 (refer to paragraph 2.1.1), however, because the shed (formerly a single garage) was built before the Building Act or Building Code came into effect, I have not considered it in this determination.

## **2. Background**

### **2.1 The properties**

2.1.1 No. 11 is a property of approximately 1156m<sup>2</sup>. The house, built in 1955, is located in approximately the centre of the property. A 3.7 x 6m shed built in 1955 is northwest of the house. The 6.6 x 8.4m garage which is the subject of this determination adjoins the shed and is located to the east of the house.

2.1.2 No. 13 is a property of approximately 1080m<sup>2</sup>, with a house built in 1935, located in approximately the centre of the property.

2.1.3 The two properties share one common boundary running the full length of both properties forming the eastern boundary of No. 11 and the western boundary of No. 13.

### **2.2 The building consent for the garage**

2.2.1 On 9 December 1997, the owner of No. 11 applied to the authority for a building consent to build the garage. The garage is a proprietary timber-framed building on a concrete foundation with profiled steel wall and roof cladding.

2.2.2 The building consent plans show the location of the existing shed and the proposed garage. The shed is shown being 1.7m from the common boundary and the proposed garage is shown being 200mm from the boundary. The plans show the garage wall adjacent to the boundary was to be lined with 9.5mm fire-rated plasterboard on both sides of the timber-framed wall.

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<sup>4</sup> Under section 177(1)(a), 177(1)(b), and 177(2)(d).

- 2.2.3 The then owner of No. 13 (at the time the building consent was applied for) gave permission for the garage to be located 200mm from the boundary and this is recorded in the building consent documentation.
- 2.2.4 The authority issued the building consent No. 9112 on 17 December 1997. The building consent contained the following conditions that are relevant to the matters to be determined:
- surface water was to be discharged into the existing system
  - external lining of the fire-rated wall required inspection.
- 2.2.5 Under the building consent, the authority was to carry out three inspections of the garage: a footing inspection, a pre-line inspection, and a final inspection. I have not seen the inspection records.
- 2.2.6 The authority issued a code compliance certificate for the work carried out under the building consent on 22 June 2000.

### **2.3 Correspondence about the boundary**

- 2.3.1 In 2002, the then owner of No. 13 sent a letter to the owner of No. 11 alleging that the garage encroached over the boundary. It appears from the submissions of the current owner of No. 13 that this was triggered by a survey carried out for No. 15 Orchard East Road which found the boundary between No. 13 and No. 15 Orchard East Road was incorrect.
- 2.3.2 As a result of the above letter, the legal representative of the owner of No. 11 contacted the previous owner of No. 13, but it appears there was no further correspondence on the matter.
- 2.3.3 The certificate of title for No. 13 shows the ownership for the property was transferred to the current owner in 2012.
- 2.3.4 The owner of No. 13 began correspondence with the owner of No. 11 during 2012. There followed a period of correspondence between the two owners and the owners' legal representatives, and between the owner of No. 13 and the authority.

### **2.4 The building survey**

- 2.4.1 A cadastral survey was carried out on 24 July 2015 at the request of the owner of No. 13 and the boundary between No's 11 and 13 was surveyed by a registered surveyor. In a letter about the survey dated 17 September 2015, the surveyor described the outcome:
- ...I confirm we have redefined the boundaries for this property. The redefinition survey has been approved by Land Information New Zealand ...
- The occupation diagram shows the encroachment of the fences and garage located on the adjoining [property] which is owned by [the owner of No. 11]. This encroachment is 1.3 metres at the road boundary of the property, rising to 1.5 metres at the front of the garage near the middle of the property. The encroachment at the [rear] of the garage is 1.6 metres and the fence encroaches by 1.7 metres at the rear or northern boundary of the property.
- 2.5 The owner of No. 13 applied for a determination relating to the construction of the garage that was received by the Ministry on 1 June 2018.

### **3. The submissions**

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

3.1.1 The application from the owner of No. 13 included submissions dated 18 May 2018 and 22 May 2018 setting out the background to the dispute and providing copies of:

- correspondence between the owner of No. 11 and the owner of No. 13, and the owners' legal representatives during the period from 2012 to 2016
- correspondence between the owner of No.13 and the authority, and between a prospective purchaser of the property and the authority
- property titles
- the building consent for the garage and code compliance certificate
- photographs of the garage with explanatory notes.

3.1.2 The owner of No. 11 acknowledged the application on 16 July 2018, and made a submission describing the background to the dispute. The owner of No. 11 also noted that she had applied for a building consent to relocate the garage. During the course of preparing this determination the building consent to relocate the garage was granted, and the garage has since been moved, so compliance of the garage in its previous location is no longer a live issue.

3.1.3 The owner of No. 11 provided copies of:

- plans and specifications for the building consent for the construction of the original garage and the code compliance certificate
- a copy of a letter dated 30 January 2002, from the previous owner of No. 13, and subsequent legal correspondence
- a copy of correspondence and photographs sent to the owner of No. 11 from the owner of No. 13.

3.1.4 The authority acknowledged the application on 15 August 2018 and provided a copy of the building consent including the approved building consent plans.

3.1.5 The owner of No. 13 made a submission received on 6 September 2018. The submission contained background information in response to the submission of the owner of No. 11.

#### **3.2 The draft determination and submissions received**

3.2.1 A draft determination was issued to the parties for comment on 26 September 2018.

3.2.2 The owner of No. 13 responded to the draft determination on 10 October 2018. He did not accept the draft determination and made a submission noting:

- the adjacent shed also encroaches on No. 13 and should be covered by the determination
- there was no fire-rated wall to the garage to protect the adjacent property
- rain water continued to discharge from the roof of the garage onto his property as it had done since April 2002
- there was no information to suggest the required inspections were carried out
- survey pegs should have been sighted before construction of the garage began.

- 3.2.3 The owner of No. 11 responded to the draft determination on 10 October 2018, noting that the authority had issued a building consent for the relocation of the garage, and that construction of the new foundations would be commencing soon. At the time of issuing this determination the garage relocation had been completed.
- 3.2.4 The authority accepted the draft determination on 26 October 2018 without comment.
- 3.2.5 The owner of No. 13 made further submissions received on 7 November 2018, 29 November 2018 and 14 January 2019, requesting a response to queries and points he had raised as part of the determinations process.
- 3.2.6 The owner of No. 13 made further submissions received on 15 March 2019 and 8 August 2019 (and also sent a number of other items of correspondence over this period on matters relating to the encroachment but outside the matters for determination). The submissions provided further commentary about the background to the matter, and commented on matters he believed the determination should cover, but which are outside the matters for determination.

## **4. Discussion**

### **4.1 General**

- 4.1.1 It has been established by cadastral survey (refer to paragraph 2.4.1) that prior to its removal the eastern side of the garage encroached over the boundary by 1.5 to 1.6m. Although it is not part of the matters to be determined, I note that the fact of the encroachment, and its extent, appear to be accepted by the parties.
- 4.1.2 In order to consider whether the garage – as constructed across the boundary – complied with the Building Code, I must consider the relevant requirements of the Building Code that applied at the time the building consent was granted.

### **4.2 Compliance with Clause C3 Spread of fire**

- 4.2.1 The building consent shows the eastern wall of the garage was designed with a fire resistance rating. I note that a condition of the building consent was the inspection of the external lining of the fire-rated wall (refer to paragraph 2.2.4), and while I have not seen the inspection records, I note that a code compliance certificate was issued for this work.
- 4.2.2 With respect to the spread of fire, the functional requirement of Clause C3 Spread of Fire, C3.2<sup>5</sup>, provided that :
- Buildings shall be provided with safeguards against fire spread so that: ... adjacent household units and other property are protected from damage...
- 4.2.3 The relevant performance clause is Clause C3.3.5, which required that:
- External walls and roofs shall have resistance to the spread of fire, appropriate to the fire load within the building and to the proximity of other household units, other residential units, and other property.
- 4.2.4 In this case, the eastern wall of the garage was designed to incorporate some resistance to the spread of fire, but the adjacent side walls and part of the roof structure also located across the boundary do not. I also note that the owner of No. 13 has submitted that the eastern wall of the garage was not built with any fire lining

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<sup>5</sup> Clause C3 is the applicable Building Code clause which was in force at the time the consent was issued.

and provided a photograph that shows no lining to either side of this wall; the photograph has not been independently verified.

- 4.2.5 Taking account of the functional requirement of Clause C3 – that other property is to be protected from damage – and the requirement of Clause C3.3.5 to have resistance to the spread of fire appropriate to the fire load and the proximity of other property, I am of the view that this requirement could not be met with the garage located partially over the boundary as it was. From the perspective of No. 13, the portion of the garage located over the boundary is an uncontrolled fire source without sufficient safeguards against fire spread, and it does not meet the test set out in Clause 3.3.5. Even if the eastern wall was lined in accordance with the consent and met the requirement of Clause 3.3.5, the other parts of the garage which were located across the boundary, ie the adjacent side walls and roof, could not.
- 4.2.6 Consequently my view is that the garage, located as it was over the boundary, did not comply with Clause C3.3.5.

### 4.3 Compliance with Clause E1 Surface water

- 4.3.1 The building consent shows gutters fixed to the eastern and western walls of the garage, and specifies downpipes fixed to both gutters. I note that a condition of the building consent was that the surface water was to be discharged into the existing drainage system (refer to paragraph 2.2.4), and while I have not seen the inspection records, I note that a code compliance certificate was issued for this work.
- 4.3.2 With respect to Clause E1 Surface Water, the functional requirement, E1.2, provided (and provides) that:
- Buildings and sitework shall be constructed in a way that protects people and other property from the adverse effects of surface water.
- 4.3.3 The relevant performance clause is Clause E1.3.1, which required that:
- Surface water, resulting from a storm having a 10% probability of occurring annually and which is collected or concentrated by buildings or sitework, shall be disposed of in a way that avoids the likelihood of damage or nuisance to other property.
- 4.3.4 In this context, I take this to mean run-off from the eastern side of the roof of the garage from a rainfall event with a one-in-ten-year chance of occurring.
- 4.3.5 The owner of No. 13 has submitted that rain water from the roof of the garage was falling onto his property from April 2002 until, presumably, the date that the garage was removed. Photographs supplied by the owner of No. 13 appear to show that there was no downpipe, or provision for one, at either end of the spouting on the eastern side of the roof, which is difficult to reconcile with the fact that a code compliance certificate was issued. However I do also note that the owner of No 11 submitted that prior to removal of the garage, water from the eastern side of the roof was diverted onto the roof of the adjacent shed.
- 4.3.6 The owner of No. 11 also submitted that ‘all properties along Orchard East Road have land trenches between each section as part of a natural drainage system’ [...] ‘although not maintained[,] it did drain the water from our sections’.
- 4.3.7 Determination 2015/052<sup>6</sup> described the tests for ‘likelihood of damage’ and ‘nuisance’.

In respect of “the likelihood of damage” I refer to reasoning in *Auckland CC v Selwyn Mews Ltd ...*, where Judge McElrea stated:

<sup>6</sup> Determination 2015/052 ‘Regarding the compliance of proposed building work, in respect of adjacent other property (12 August 2015)’

...In cl B1.3.6 “the likelihood of damage to other property” refers to a real and substantial risk of such damage.

The term “nuisance” is not defined in the Act or the Building Code, and it appears only in Clauses E1.3.1 and G4.3.4. The term “nuisance” has a particular common law meaning which is ‘the unreasonable interference with an individual person’s use or enjoyment of land or of some right connected with that land’. The question of whether a nuisance is unreasonable is a question of fact and must be considered in relation to factors such as the nature of the harm and the locality in which it occurs, and the frequency, duration and intensity of the interference.

A previous determination ... held that the word nuisance in clause E1.3.1 should not be given a narrow legal meaning and there ‘must be some *significant* nuisance effect before there can be a breach of clause E1.3.1’ (emphasis added). I am of the view that any nuisance has to be an *unreasonable interference*; calling a nuisance a significant nuisance is simply reflecting the fact that it is not a trivial or minor interference with a person’s use and enjoyment, but must be an unreasonable or significant interference with that use or enjoyment.

4.3.8 In my view, the requirements of Clause E1.3.1 are unlikely to have been met if rain water collected by (and from) the eastern side of the roof was not disposed of in such a way that it did not fall on the owner of No.13’s land. I note the owner of No. 11’s submission about the provision of drainage trenches between properties, but clearly any assessment of the contribution of such a trench to disposal of water is moot, given that any water falling from the roof would in the first instance fall directly onto land or other property belonging to No. 13, and in my view, would likely constitute at least a nuisance in terms of Clause E1.3.1. The garage is therefore not likely not to have met the requirements of that Building Code clause.

4.3.9 However, as the garage has now been removed it is no longer possible or necessary for me to arrive at a decision on whether the garage complied with Clause E1. It suffices, for the purposes of the application by the owner of No. 13, for me to conclude that the garage did not comply with Clause C3 and therefore did not comply with the Building Code.

#### 4.4 The issue of the code compliance certificate

4.4.1 The plans show the eastern garage wall to be 200mm from the boundary, and that wall being fire rated. I am of the view that this solution complied with the solution provided in C3/AS1<sup>7</sup>, which was in force at the time the building consent was issued. The solution provided by C3/AS1 was:

4.1.1 External walls and roofs ... shall be constructed to avoid

- (a) Vertical fire spread up the outer face of the external wall of any building containing ... other property.
- (b) Horizontal fire spread by thermal radiation or structural collapse, which could endanger;
  - (i) other property ...

4.1.2 The necessary protection shall be achieved by one or a combination of:

- (a) Building separation.
- (b) Providing an adequate FRR<sup>8</sup> for primary and secondary elements

4.4.2 In my view, based on the consented drawings, the authority had reasonable grounds to conclude that the proposed building work would comply with the Building Code under section 34(3)<sup>9</sup> of the Building Act 1991 (“the former Act”).

<sup>7</sup> The compliance document ‘Acceptable Solution C3/AS1’ which applied at the time the consent was granted.

<sup>8</sup> FRR: fire resistance rating

4.4.3 Section 43(3) of the former Act required the authority to issue a code compliance certificate if it was satisfied on reasonable grounds that:

The building work to which the certificate relates complies with the building code...

4.4.4 I note that the common boundary between No. 11 and No. 13 was redefined following a cadastral survey in 2015 (refer to paragraph 2.4.1), and that at the time the building work was carried out in 1997 there was nothing to indicate that the boundary indicated in the plans and on site did not match the actual boundary. The location of the garage as constructed matched the site plan shown in the approved building consent, and therefore in my view the authority was correct to issue the code compliance certificate on the basis of the information it had before it at the time.

4.4.5 However, given new information (i.e. the survey) shows the building work did not comply with the Building Code at the time it was built, the decision to issue the code compliance certificate should be reversed. Ordinarily, reversing the decision to issue a code compliance certificate would provide the ability for the building work to be brought into compliance and for a subsequent code compliance certificate to be issued. However, as the garage has been relocated and the building consent for its construction is now spent, my decision to reverse the code compliance certificate is largely academic.

## 5. The decision

5.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:

- the garage did not comply with Building Code Clause C3 Spread of Fire
- the authority was correct to issue a code compliance certificate for the garage on the basis of information it had before it at the time. However, for the reasons discussed in this determination, I reverse that decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 3 September 2019.

Katie Gordon  
**Manager Determinations**

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<sup>9</sup> Section 34(3) of the Building Act 1991 stated 'After considering an application for building consent, the territorial authority shall grant the consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work was properly completed in accordance with the plans and specifications submitted with the application.'