

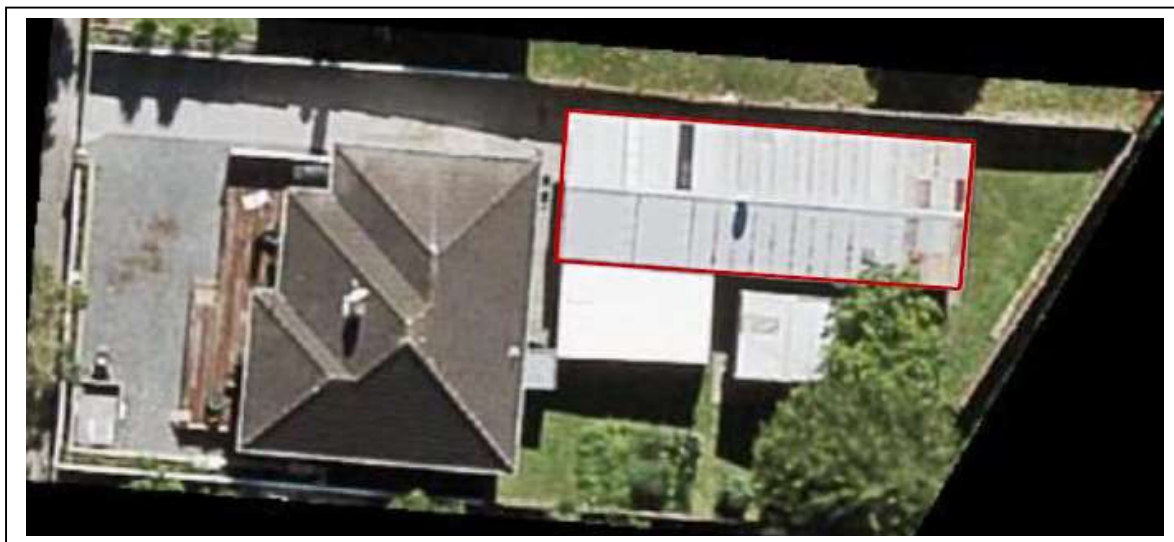
# Determination 2022/021

**Regarding the notice to fix issued for the construction of a replacement garage without first obtaining a building consent**

**42 Arran Street, Avondale, Auckland**

## Summary

This determination considers whether the building consent authority was correct in the exercise of its power of decision to issue a notice to fix for the construction of a garage to replace an existing garage, without first obtaining a building consent. This determination will turn on whether the building work to construct the garage is exempt under Schedule 1, clause 7 of the Building Act.



**Figure 1: Aerial view circa 2017**

The legislation which is 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](http://www.legislation.govt.nz). Information about the legislation, as well as past determinations, compliance documents (e.g., acceptable solutions) and guidance issued by the Ministry, is available at [www.building.govt.nz](http://www.building.govt.nz).

## 1. The parties and the matter to be determined

- 1.1. This is a determination made under due authorisation by me, Charlotte Gair, Manager Advisory Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.<sup>1</sup>
- 1.2. The parties to the determination are:
  - 1.2.1. The owners of the building, D M Cooper and K Estie (“the owners”) using the services of a legal advisor, who applied for this determination.
  - 1.2.2. Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. This determination arises from the authority’s decision to issue a notice to fix to the owners (reference number NOT21533089 dated 18 February 2021) in relation to the construction of a replacement garage without first obtaining a building consent.
- 1.4. The matter to be determined is whether the authority was correct in the exercise of its power of decision to issue the notice to fix.<sup>2</sup> In deciding this matter, I must consider whether the building work to replace the garage<sup>3</sup>:
  - 1.4.1. was exempt from requiring a building consent under Schedule 1 clause 7 of the Act.
  - 1.4.2. The matter turns on whether the replacement garage was made with a comparable outbuilding, as stated in Schedule 1 clause 7(b) of the Act.

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

<sup>2</sup> Section 177(1)(b) and (2)(f).

<sup>3</sup> The parties to this determination agree that the structure in question is an outbuilding, within this determination I will use the term garage to designate the outbuilding.

## Matters outside this determination

- 1.5. I have not considered any other aspects of the Act or of the Building Code, nor have I considered the Building Code compliance of the building work.
- 1.6. The parties have included references to matters that relate to the Resource Management Act 1991, which are outside the scope of this determination. I have no jurisdiction under other enactments, and this determination only considers matters relating to the Building Act and its regulations.
- 1.7. The determination does not discuss the content or completeness of the notice to fix NOT21533089. While the owners have expressed views that relate to the content of the notice to fix, the matter for determination only considers whether the authority was correct in the exercise of its power of decision to issue it.

## 2. The background and building work

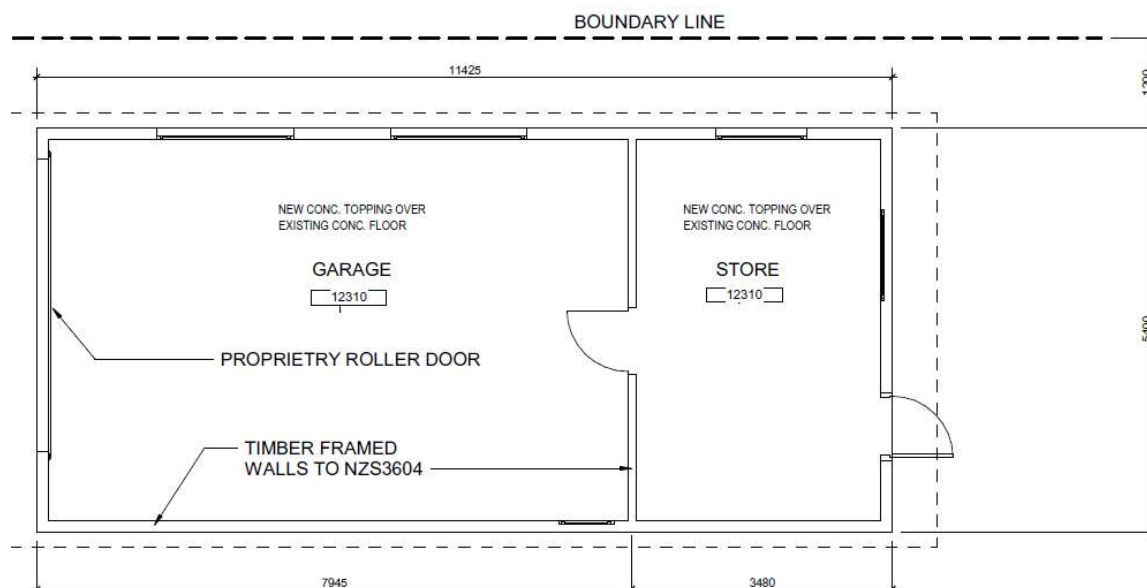
- 2.1. In January 2016, the owners purchased the property.
- 2.2. An existing garage was constructed in 1982 and is located at the rear of the owners' property (the "original garage"). The original garage was a timber framed structure with an iron roof and pressed metal external wall cladding. It was used to store vehicles, household items and equipment.
- 2.3. The basic dimensions of the original garage were 5400mm wide, 6600mm long, with a wall height of between 2075mm to 2400mm.<sup>4</sup> At an unspecified date by the previous owner, the building was extended so the total length was increased to approximately 11.4m.
- 2.4. In 2021, the owners demolished and removed the original garage and started constructing a new replacement garage ("the new garage") on the site, see figure 2, which they considered to be comparable to the demolished original garage.
- 2.5. The replacement new garage has the same function and use as the original garage.
- 2.6. The new garage is a lightweight structure constructed of timber framing on a ground bearing concrete slab<sup>5</sup>, with timber weatherboard external wall cladding, profiled metal roof cladding, and aluminium joinery.
- 2.7. The new garage is within the same footprint of the original garage.

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<sup>4</sup> The original design plan from 1982 indicates a vertical dimension of 2075mm, but it is unclear whether this relates to the height of the vehicle door opening or the external wall. However, an undated photograph of the existing garage provided by the owners, prior to its demolition, appears to indicate an external wall height of approximately 2400mm from finished floor level to the underside of the roof trusses. We note that the original height of the apex is not available.

<sup>5</sup> The design plan indicates a "new [concrete] topping" (of an unspecified depth) to be placed "over the existing [concrete] floor".

- 2.8. The external wall height of the new garage is 3000mm. This is to allow for a main door of 2750mm high for the owners' vehicle.
- 2.9. The roof pitch has increased from around 20 degrees to 30 degrees, and the height to the apex of the roof is 4550mm.



**Figure 2: Floor plan of the proposed design (not to scale)**

Note: Dimensions are in millimetres

- 2.10. On 13 January 2021, the authority carried out an inspection at the property following a complaint it had received. The owner states that the authority verbally advised them to stop work during the site visit.
- 2.11. On 15 January 2021, the authority emailed the owners in which they explained "the current building exceeds the height significantly than what was consented back in 1982 and therefore I do not consider it to be a 'like for like' replacement". The authority informed the owners that they would be receiving a notice to fix.
- 2.12. On 20 January 2021, A further email was sent from the owners to the authority, it indicated the work has stopped but a notice to fix was not received. The owners further explained that "A Building Consent is not required as the work is exempt work." The owners requested the stop work notice be withdrawn and requested details of why the authority did not consider the garage to be exempt work.
- 2.13. On 29 January 2021, the authority acknowledged the prior email and explained that further legal advice was being sought by them, and they refused to withdraw the stop work instruction. The authority went on to reiterate their main concern is "whether the original footprint [of the extended building] was a lawful structure".

2.14. On 8 February 2021, the owners emailed the authority and explained they have not received a formal stop work notice or any reasons why the building should be stopped.

2.15. On 10 February 2021, the authority responded to the owners stating:

The view of [the authority] supported by our legal advisors is that what you are building is not comparable with what was there previously and, therefore, paragraph (c) is not met and a building consent is required. "Comparable" in the context means something much closer to what was there previously and not a building of the heavier weight/sturdiness and greater height you are constructing. [The authority is] also concerned that part of the previous garage was there illegally and the exemption provisions may not apply although that is of lesser concern. [The authority is] also concerned that the new garage is in breach of the height to boundary provisions in the Unitary Plan<sup>6</sup>.

2.16. On 18 February 2021, the authority issued a notice to fix to the owners. The notice to fix stated:

Contrary to section 40 of the Building Act 2004 (the Act), the following building works have been undertaken at 42 Arran Street Avondale Auckland 0600 without first obtaining a building consent:

Constructed a replacement building that does not appear to be comparable to the original building.

None of the building works outlined above are exempt from the need to obtain a building consent under Schedule 1 of the Act.

2.17. The notice to fix required the owners to achieve compliance by 18 April 2021, either by way of an application for a certificate of acceptance<sup>7</sup> or to remove the building work.

### **3. Submissions**

#### **The owners**

3.1. The owners are of the view that the authority was incorrect to issue the notice to fix because the building work to construct the new garage falls within section 42A of the Act and was exempt from the requirement to obtain building consent under Schedule 1, clause 7 of the Act.

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<sup>6</sup> This is a local authority district plan requirement and not related to the Building Act.

<sup>7</sup> Sections 96 to 99A of the Act.

- 3.2. The owners are of the view that the new garage falls within the definition of “outbuilding” in clause A1, item 7.0.1 of the Building Code. They relied on the Ministry’s guidance on building work that can be carried out without building consent.<sup>8</sup>
- 3.3. The owners submit that the function and intended use of the new garage will not change and the structure and design of the replacement new garage is comparable to the original.
- 3.4. The owners also state that the materials used in the construction of the new garage are comparable. The original garage was a timber framed structure with an iron clad roof and pressed metal cladding, and the replacement new garage is a timber framed structure with an iron roof and weatherboard cladding.
- 3.5. The owners state that the proposed changes to cladding will overall assist with the longevity of the building. It is noted that the cladding is not yet installed.
- 3.6. The owners also submit that the notice to fix is “legally defective” because the notice only referred to section 40 but not section 42A of the Act as the owners are of the view that the authority did not consider if the building work for the replacement of the new garage fell within the scope of section 42A of the Act.<sup>9</sup>
- 3.7. In response to the authority’s submissions, the owners further submit that “scale” and “materials” are not factors to be considered as they are not the criteria under Schedule 1, clause 7 of the Act. Scale in this matter refers to the building’s size.

## The authority

- 3.8. The authority submits that it believes the work to replace the original garage required a building consent, as it is not “comparable” and therefore failed to meet one of the criteria under Schedule 1, clause 7.
- 3.9. The authority outlines key differences between the original garage and the new garage, namely:
  - 3.9.1. Scale – there is significant increase in height where the new garage walls have gone from 2075mm to 3000mm and the roof apex height is now 4550mm<sup>10</sup>. The roof pitch has also changed

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<sup>8</sup> Building work that does not require a building consent: Exemptions Guidance for Schedule 1 of the Building Act 2004. (Fifth edition - August 2020, First published - March 2014). Copy available at: <https://www.building.govt.nz/assets/Uploads/projects-and-consents/building-work-consent-not-required-guidance.pdf>.

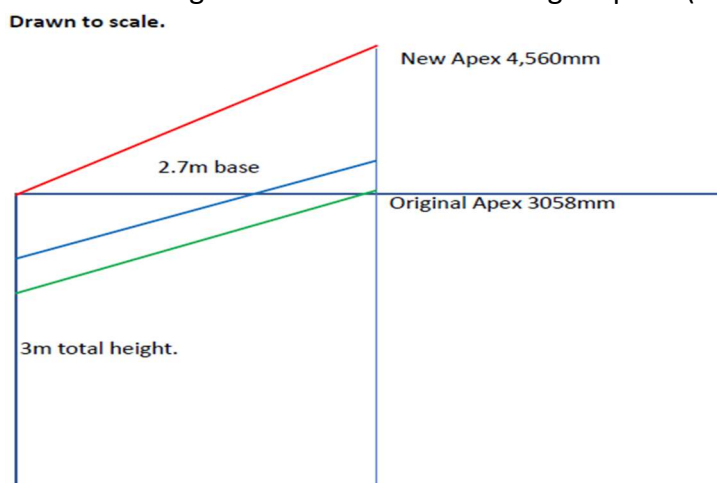
<sup>9</sup> I note that this aspect is not to be considered by this determination.

<sup>10</sup> There was a typographical error in the draft determination where “4055mm” was erroneously used, this is now rectified. The authority’s calculations suggest the height to be 4560mm and the owners plans suggest that the height is 4550mm. I have taken the calculation to be read as 4550mm and consider the difference of 10mm to be negligible and does not change the outcome of this determination.

- 3.9.2. Structure and design – heavier weight of the new garage due to sturdier walls and roof to accommodate the increase in roof height
- 3.9.3. Materials – light galvanised metal clad walls have been changed to weatherboard cladding.
- 3.10. The authority further submits that “comparable” in the context of Schedule 1, clause 7 of the Act means something much closer to what was there previously and not a building of the heavier weight or sturdiness, or of greater height.

### Submissions in response to the draft determination

- 3.11. The draft determination was sent to all parties on the 12 April 2022.
- 3.12. The owners accepted the draft on the 22 April 2022 subject to some minor non-contentious amendments, which have been incorporated.
- 3.13. The authority accepted the draft on the 28 April 2022 but added the following comments:
- 3.13.1. The authority accepts that “comparable” is not similar to “like for like”.
- 3.13.2. The authority attached a diagram of the difference in height between the consented sky-line garage with a 20 degree pitched roof and the new garage with 3m high walls and a roof at 30 degree pitch (see Figure 3).



Total width 5,400mm. Therefore base of truss is 2,700mm.

Green line is 2,075mm from ground and at 20°.

Blue line is 2,400mm from ground and 20°.

Red line is 3,000mm from ground and 30°.

Total increase in height is 1502mm.

**Figure 3: Drawing of the roof height and pitch (not to scale)**

3.13.3. The authority disagreed with my observation that the height increase is 600mm and stated that the height increase was 1502mm.

3.14. the owners responded to the authority's submissions, noting that:

3.14.1. they further dispute the authority's assertion that the original apex height was 3058mm, and that the original wall height was 2075mm.

3.14.2. apart from the apex heights, the dimensions in the authority's diagram are not new information in that the authority did not directly challenge the original wall height of 2400mm and therefore hold that the increase in wall height is an "unqualified 600mm".

## 4. Legislation

4.1. Section 40 of the Act sets out the general requirement that building work should not be carried out except in accordance with a building consent. Section 41 of the Act specifies the situations where a building consent is not required, including in subsection 41(1)(b):

...any building work described in Schedule 1...

4.2. Section 42A of the Act discusses the categories of building work for which building consent is not required, and conditions.

4.3. Schedule 1 of the Act details the type of building work for which building consent is not required.

4.4. This determination is focused on whether the building work is exempt work under Schedule 1, clause 7 of the Act.

The repair or replacement of all or part of an outbuilding if –

(a) the repair or replacement is made within the same footprint area that the outbuilding or the original outbuilding (as the case may be) occupied; and

(b) in the case of any replacement, the replacement is made with a comparable outbuilding or part of an outbuilding; and

(c) the outbuilding is a detached building that is not more than 1 storey; and

(d) the outbuilding is not intended to be open to, or used by, members of the public.

## 5. Discussion

5.1. With regard to the building work the parties do not dispute Schedule 1 clause 7, subclauses (a), (c) and (d), Accordingly I will turn my mind only to:



Subclause (b) - in the case of any replacement, the replacement is made with a comparable outbuilding or part of an outbuilding

- 5.2. Determination 2014/023<sup>11</sup> has previously considered 'comparable' in relation to Schedule 1. The determination listed the factors to consider when considering whether a proposed outbuilding is comparable to the original. These are function and intended use, structure and design, and materials.

*Function and intended use*

- 5.3. The previous structure was a garage used to store vehicles, household items, and equipment. The replacement garage will have the same function and use, which includes not being a habitable space.

*Structure and design*

- 5.4. I consider that it is appropriate to look at the structure as a whole rather than individual components.
- 5.5. Both the original garage and the replacement garage are single storey buildings, of a similar structure and design. Both are simple buildings featuring a timber-frame structure and similar floorplan-
- 5.6. The authority has raised concerns regarding the difference in scale and weight between the original building and the new one. However, scale and weight are not factors to be considered in Schedule 1, clause 7.
- 5.7. Although the building work may be exempt under schedule 1, clause 7, it is still required to meet the requirements of the Building Code. However, this determination has not considered the compliance of the building work.
- 5.8. I acknowledge that there is a difference in both the roof pitch and the overall height of the new garage. It is not disputed that the roof pitch increased from around 20 degrees to 30 degrees to allow for more effective rain run-off.
- 5.9. The total increase in height is a matter of contention between the parties. While the new height is clear at 4550mm (+/- 10mm) neither party can provide evidence to confirm the height of the original garage. Accordingly, I am of the view an increase in height has occurred although it is not clear as to the extent of the difference.
- 5.10. Schedule 1 clause 7 does not specify that the new building must remain the same height. Regardless, Schedule 1 clause 7(c) does refer to a building being one storey in height, and both parties agree that the height of new garage is one storey.

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<sup>11</sup> 2014/023: The proposal to issue a notice to fix for building work carried out without consent under Schedule 1(m) 28 April 2014

5.11. I reiterate that comparability is looking at the structure as a whole rather than individual components. While I note the increased roof pitch and overall height, I consider that the overall general structure and design of the building remains comparable.

### *Materials*

5.12. The previous garage was a timber framed structure with a metal roof and pressed metal cladding. The proposed replacement is a timber framed structure with a metal roof and weatherboard cladding. The authority identifies the difference in the external wall cladding for believing the garages are not comparable.

5.13. I note the owner's reference to the Ministry's guidance on the repair or replacement of outbuildings<sup>12</sup> one of the examples being the replacement of a timber weatherboard garage wall with a wall in the same position using pre-painted profiled metal cladding. I consider that this supports the replacement of timber cladding with metal cladding, or vice versa, as being comparable.

5.14. In this matter I consider that even though there has been a change in the external wall cladding materials they used can be considered comparable in this case.

5.15. When viewing the building as whole and specific to the circumstances mentioned in this determination, I consider the building work can be considered comparable.

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<sup>12</sup> Building Performance 2.8 Repair or replacement of outbuilding. available at: <https://www.building.govt.nz/projects-and-consents/planning-a-successful-build/scope-and-design/check-if-you-need-consents/building-work-that-doesnt-need-a-building-consent/technical-requirements-for-exempt-building-work/2-detached-standalone-buildings/2-8-repair-replace-outbuilding/>

## **6. Conclusion and decision**

- 6.1. I consider that the replacement has been made with a comparable outbuilding and therefore Schedule 1 clause 7(b) has been satisfied. Accordingly, the proposed outbuilding would be exempt under Schedule 1, clause 7.
- 6.2. In accordance with section 188 of the Building Act 2004, I determine the authority was incorrect in the exercise of its power of decision to issue the notice to fix (NOT21533089) in relation to the construction of a replacement garage without first obtaining a building consent. Accordingly, I reverse the authority's decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 31 October 2022

**Charlotte Gair**

**Manager Advisory**

## APPENDIX A: THE LEGISLATION

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### 41 Building consent not required in certain cases

- (1) Despite [section 40](#), a building consent is not required in relation to—
- (a) a Crown building or Crown building work to which, under [section 6](#), this Act does not apply; or
  - (b) any building work described in [Schedule 1](#) for which a building consent is not required (see [section 42A](#)); or...

### 42A Building work for which building consent is not required under Schedule 1

(1) Despite [section 40](#), subject to the conditions set out in subsection (2) and whether or not a building consent would otherwise have been required, a building consent is not required for building work in the following categories:

- (a) building work described in [Part 1](#) of Schedule 1; or
- (b) building work described in [Part 2](#) of Schedule 1 that is carried out by an authorised person (see subsection (3)); or
- (c) building work described in [Part 3](#) of Schedule 1 if the design of the building work has been carried out or reviewed by a chartered professional engineer and the building work has been carried out in accordance with that design.

(2) Subsection (1) is subject to the following conditions:

- (a) the building work complies with the [building code](#) to the extent required by this Act;
- (b) after the building work is completed, the building,—
  - (i) if it complied with the [building code](#) immediately before the building work began, continues to comply with the [building code](#); or
  - (ii) if it did not comply with the [building code](#) immediately before the building work began, continues to comply at least to the same extent as it did then comply;
- (c) the building work does not breach any other enactment;
- (d) the building to which the building work relates is not a hazardous substance location that is required to be authorised under the [Health and Safety at Work Act 2015](#) or any regulations made under that Act.

(3) In subsection (1)(b), *authorised person* means a person who is authorised under the [Plumbers, Gasfitters, and Drainlayers Act 2006](#) to do the work, except for a person who is authorised under [section 15](#), [16](#), [19](#), or [25](#) of that Act.

### Outbuildings

7.0.1 Applies to a *building* or use which may be included within each classified use but are not intended for human habitation, and are accessory to the principal use of associated *buildings*. Examples: a carport, farm *building*, garage, greenhouse, machinery room, private swimming pool, public toilet, or shed.