



Determination 2011/060

The compliance of a garage near a common boundary, in terms of the protection from the effects of fire provided to an adjacent property, at 8 The Crescent, Tindalls Beach

1. The matter to be determined

1.1. This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of the Department.

1.2. The parties are:

- the part-owner of the adjacent property at 6 The Crescent who is the applicant, Mr R J Allsopp-Smith (“the owner of number 6”)
- the Rodney District Council² (“the authority”), carrying out its duties and functions as a territorial authority and a building consent authority
- Mrs Mackintosh, the owner of the garage in question (“the garage”) at 8 The Crescent (“the owner of number 8”).

1.3. I take the view that the matters for determination³ are:

- whether the garage, in respect of the level of fire protection provided to the adjacent property, complies with Clause C3 of the Building Code (Schedule 1, Building Regulations 1992)
- whether the decision of the authority to issue a code compliance certificate, for the building work including the garage, was correct
- whether the decision of the authority to issue a building consent for the garage was correct.

¹ The Building Act 2004, the Building Code the Compliance Documents, past determinations, and guidance documents issued by the Department are available from the Department’s website at www.dbh.govt.nz or by contacting the Department on 0888 242 243.

² After the application was made, and before the determination was completed, Rodney District Council was transitioned into the new Auckland Council. The term authority is used for both.

³ In terms of sections 177(1)(a), 177(1)(b), 177(2)(a), and 177(2)(d)

- 1.4 In making my decision, I have considered the submissions of the parties, and the other evidence in this matter. I also note that other enactments, such as the Resource Management Act 1991, have not been taken into account as I have no jurisdiction under those other enactments. In this determination, I have only considered building matters relating to the Act and its regulations.

2. The building work

- 2.1 The garage is a double garage, with dimensions of 6150mm x 6750mm and an overall floor area of 41.51m². The consented plans show the garage was to be situated 1200mm from the boundary between 6 and 8 The Crescent. The section of a concrete block wall near the garage is constructed on the adjacent property and it does not mark the boundary.
- 2.2 The garage is timber framed with exterior walls lined with solid plaster applied over wire netting and building paper. The plans do not indicate whether the interior of these walls are lined. The garage wall near the boundary has been constructed with a window and a door; however, the plans showed this wall with no door or window openings.

3. Background

- 3.1 On 2 September 1998, the authority issued a building consent for number 8 The Crescent (No 981680, which I have not seen). The building consent was for the construction of:
- a workshop and garage, to the west of the property
 - the garage, to the east of the property, near the boundary to 6 The Crescent.
- 3.2 The garage was constructed in 2004. I have not seen the construction records. The authority issued a code compliance certificate in respect of both buildings on 9 March 2005.
- 3.3 In a letter to the authority dated 23 May 2005, the owner of number 6 raised concerns that the garage had been built too close to the boundary, noting that the concrete block wall does not signify the surveyed boundary and therefore the garage does not comply with the authority's bylaws and regulations.
- 3.4 A significant amount of correspondence passed between the owner of number 6 and the authority about this matter, although much of the correspondence relates to Resource Management Act matters and the exact distance between the garage and the boundary which was disputed.
- 3.5 Retrospective resource consent was granted on 10 November 2006 to the owner of number 8 for the infringement of the side yard rule of the District Plan, which was noted as an infringement of 100mm.
- 3.6 Matters relating to the dispute were referred to and investigated by the Office of the Ombudsmen in between mid 2007 and mid 2008. Subsequent to this investigation, the authority agreed to a means proposed by the owner of number 6 of establishing the distance between the boundary and the garage.

- 3.7 The boundary to garage distances were measured in June 2008 by the owner of number 6 and the authority as:
- 860mm at the north east corner of the garage
 - 930mm at the south east corner of the garage.
- 3.8 The owner of number 6 subsequently put forward a number of options that would, in his view, resolve the matter in a satisfactory way, and a significant amount of correspondence passed between the owner of number 6 and the authority about the possible resolution of the matter. The matter was unresolved and the owner of number 6 referred the matter back to the Office of the Ombudsmen in August 2010.
- 3.9 The Ombudsmen recommended the owner of number 6 apply for a determination, as the central matter to the dispute was whether the authority's approach to the fire rating infringement was appropriate. The application for a determination was received by the Department on 27 September 2010.

4. The submissions

- 4.1 In a covering letter dated 23 September 2010, the owner of number 6 set out the background to the dispute, noting that it was his wish that an outcome be achieved so that the garage complied fully with the authority's rules and regulations so there is no physical or financial impact on the his property, now or in the future. The owner of number 6 summarised his view of what was required as follows:
- that the authority cancel the existing building consent for the garage, as its basis of application and granting are grossly in error and that the authority applies its 'codes and rules' properly to any future application covering the garage; or
 - that the garage is altered so that it complies with the original building consent; or
 - that the appropriate fire rating be applied to the garage wall or along the boundary; or
 - that the boundary is altered to accommodate the garage as it is built; or
 - a mutually acceptable solution be agreed upon.
- 4.2 The applicant supplied copies of:
- some of the plans of the garage, various site plans and photographs and the land transfer documentation
 - the resource consent documentation and the code compliance certificate dated 9 March 2005
 - correspondence between the owner of number 6 with the authority and the Office of the Ombudsmen.
- 4.3 In a letter to the Department dated 26 October 2010, the authority noted that the dispute initially related to the resource consent. However, the authority accepted that the garage as positioned does not comply with the authority's District Plan or the Building Code. The authority confirmed that the garage was located a minimum of 870mm and a maximum of 930mm from the common boundary, however the

authority considered the infringement was of a minor nature and requested that a waiver or a modification to the Building Code be granted in respect of the garage.

- 4.4 Copies of a draft determination were forwarded to the parties for comment on 18 November 2010. The draft confirmed the issue of the building consent, reversed the issue of the code compliance certificate, and found that the authority may issue a waiver in accordance with section 67(1) in respect of the fire protection to the boundary wall.
- 4.5 The authority and the owner of number 8 accepted the draft determination without comment on 22 November 2010 and 30 November 2010 respectively. The owner of number 6 did not accept the draft determination in a response dated 29 November 2010.
- 4.6 On 3 March 2011, I held a hearing in Orewa at the request of the owner of number 6. In attendance at the hearing were; the owner of number 6 and the two other part owners, a representative of the authority, an observer representing the owner of number 8, and representatives of the Department including a referee engaged under section 187.
- 4.7 The owner of number 6 and the authority presented information about the sequence of events and the current situation, additional facts and issues not canvassed in the draft determination, some material in the draft determination that was opposed (by the owner of number 6), legal issues, and possible solutions.
- 4.8 These matters were discussed with input from the parties. The information presented at the hearing allowed me to clarify matters of fact and I have taken account of the information and discussions in preparing this determination.
- 4.9 Copies of a second draft determination were forwarded to the parties for comment on 15 March 2011.
- 4.10 The owner of number 8 accepted the second draft determination without comment.
- 4.11 The owner of number 6 did not accept the second draft determination in a response received on 26 April noted an error in the description in paragraph 3.1 which has subsequently been corrected.
- 4.12 The owner of number 6 also submitted that a modification of Clause 3.3.5 (as referred to in paragraph 6.4) is not appropriate in this instance because:
- as remedy it would remain open to challenge
 - it would be inconsistent with the decision in *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZSC 158 regarding the duty a Council owes to a homeowner to use reasonable care and skill when carrying out inspections under the Act
 - it is not a reasonable for the authority to be able to correct its earlier error, also considering that the garage was not built to the consented plans or to the Building Code
 - it would not address with fire rating requirements of the window or door in the east wall

- it would ‘condone or legitimise’ the actions of the authority and would remove any responsibility or obligation for the owner of number 8 to resolve the issue in a different manner
- there are other options outside of a modification or waiver to bring the building into compliance and this should be the required resolution

4.13 In a letter dated 2 June 2011, the authority provided a submission to the second draft. Although the authority ‘accepted’ the draft it held the view that:

- the scale of the infringement was such that reversal of the code compliance certificate is not warranted
- reissuing the code compliance certificate would require the building to be reassessed for compliance with the Building Code that was in force at the time the building consent was issued
- the determination should not reverse the code compliance certificate but should either grant a waiver of Clause C1 (sic) or instruct the authority to issue a notice to fix.

4.14 The owner of number 6 responded to the authority’s submission in an email to the Department on 9 June 2011 which reiterated the owner’s views.

5. Discussion

The Building Code compliance of the garage, in respect of the fire protection to the adjacent property

5.1 Based on the measurements taken and agreed upon by the owner of number 6 and the authority (refer to paragraph 3.7), the distance from the boundary to the east wall of the garage (“the east garage wall”), which is the external wall adjacent to the boundary, is 860mm at the north east corner to 930mm at the south east corner.

5.2 The relevant performance requirement of Clause C3 of the Building Code requires that:

C3.3.5 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.

5.3 The relevant provisions of the Acceptable Solution C/AS1 amount to a means of compliance with the performance requirements of Clauses C of the Building Code. In respect of the level of protection afforded to other property, C/AS1 provides a solution to achieve this level of protection. C/AS1 states:

7.10.6 For detached dwellings (purpose group SH), in which the household unit firecell contains no more than three floor levels, the external walls are required to be fire rated only if less than 1.0m from the relevant boundary. In that case the external wall shall have a FRR of no less than 30/30/30. The same provisions apply to multi-unit dwellings ...

5.4 Therefore, if C/AS1 was the selected means of compliance, the east garage wall would be required to either:

- be at least one metre from the boundary; or
- have a fire resistance rating of 30/30/30 (which requires the wall to have 30 minute stability, integrity, and insulation capabilities).

Neither of these C/AS1 criteria is met.

5.5 Although C/AS1 is not the only means of complying with Clause C3, I have not been provided with information to support the design as an alternative solution. I therefore consider that the east garage wall does not meet the requirements of Clause C3.3.5.

The issue of the building consent

5.6 The consented plans showed the east garage wall to be sited 1200mm from the common boundary. Therefore, I conclude that based on the consented drawings, the authority was correct to issue the building consent that included the garage.

The issue of the code compliance certificate

5.7 Given that the construction of the garage does not comply with Clause C3 of the Building Code, I consider that the authority was incorrect to issue the code compliance certificate.

6. What is to be done now?

6.1 The authority has submitted that, as the infringement is relatively minor, a waiver or modification of the Building Code would be appropriate. Section 67 allows a territorial authority to issue a building consent subject to a waiver or modification of the Building Code.

6.2 A waiver or modification of Clause C3 is one method of addressing the issue of the non-compliance of the east garage wall. However, it is my view that there are a number of options for the owner of number 8, and I am of the view that the remedy sought is a matter for the owner to decide.

6.3 I am therefore of the view that a notice to fix should be issued to the owner for the contravention of Building Code Clause C3.

6.4 While it is for the owner to decide how to address the notice to fix, in order to assist the parties, I note the following solutions could be recommended on the notice to fix for consideration:

- The owner could apply to the authority to amend the building consent in respect of a modification of Clause C3.3.5, to the extent that the garage does not comply with this requirement. In this respect I note:
 - section 4(2)(a)(i) refers to the importance household units play in the lives of people who use them and the importance of Building Code compliance of household units and the modification is minimal in terms of the objective, functional requirement and performance criteria of Building Code Clause C3

- I therefore consider that it would be reasonable to grant a modification of the Building Code to Clause C3.3.5 in this case
- The owner could prepare a proposal to fire rate the wall, which will require an amendment to the building consent.
- The owner could, with the advice of a suitably qualified fire engineer, propose an alternative solution that would provide an adequate level of protection to comply with Clause C3.3.5. In this respect, I make the following observations:
 - Any solution could take account of the extent that the east garage wall is closer to the boundary than provided for by the C/AS1 solution (by only 70mm to 140mm) and the amount of protection required to compensate for this.
 - Some level of protection is provided by the east garage wall as it is constructed. Based on the plan I have seen, the garage is clad in a textured plaster system, and things that influence the fire rating of a plaster system include the size and materials used in the supporting members, the aggregate in the plaster mix, the interior wall finishing materials, and the thickness of the section.

6.5 I note the applicant's submission that any modification would be inconsistent with the Supreme Court's decision in *Sunset Terraces*⁴. I have set out above my view regarding a possible modification to Clause C3.3.5 and do not consider it inconsistent with the *Sunset Terraces* decision. I have no power to consider any matters relating to the liability of the parties to a determination. Determinations are confined to the matters set out in section 177 of the Act and the powers in section 188 of the Act.

6.6 I also note that the variation from the building consent documentation identified (see paragraph 2.2), and I leave this to the parties to resolve.

6.7 The authority has stated that in reissuing the code compliance certificate it will need to 'reassess the building for compliance with the building code'. In response I note that I have seen no evidence to suggest that the remaining building work does not comply with the remaining clauses or that the authority is unable to rely on the inspections it carried out when the work was undertaken. I also note that the consented work is low risk, is not used for habitation, and after 13 years of use any failures would be readily apparent. I consider the reassessment should be confined to the matters relating to compliance with Clause C3.

⁴ *North Shore City Council v Body Corporate 188529 (Sunset Terraces) and ORS 27/2010* (Supreme Court, 17 December 2010)

7. The decision

7.1 In accordance with section 188 of the Act I determine that:

- the garage, in respect of the level of fire protection provided to the adjacent property does not comply with Clause C3 of the Building Code
- the decision of the authority to issue the code compliance certificate for the building work is reversed
- the decision of the authority to issue the building consent for the building work is confirmed.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 20 June 2011.

John Gardiner
Manager Determinations