



Determination 2013/001¹

Regarding the issuing of a building consent for the separation of surface water drainage to 39 and 39A Towai Street, Kohimarama, Auckland

1. The matters to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004² (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”)³, for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to this determination are:

- St Margaret’s Trust, the owner of 39 Towai Street (“Lot 1”), acting through one of the trustees as their agent (“the applicant”)
- Mr and Mrs Holder (“the neighbour”), the owners of 39A Towai Street (“Lot 2”)
- Auckland Council (“the authority”), carrying out its duties and functions as a territorial authority or building consent authority.

1.3 This determination arises from the authority’s decision to issue a building consent for the installation of separate surface water and sanitary drainage for 39 Towai Street, which includes the termination at the boundary between the two properties of the existing surface water drain shared by 39 and 39A Towai Street. The work was proposed following the issue of a notice pursuant to section 459 of the Local Government Act 1974 to re-lay the surface water drains to 39 and 39A Towai Street.

1.4 I consider the matter to be determined is whether the authority was correct to issue a building consent for the separate Lot 1 surface water building work. In making this decision I must consider whether the building work complies with Clause E1 Surface Water of the Building Code⁴ (First Schedule, Building Regulations 1992). I have not considered whether the separate surface water building work complies with any other provisions of the Building Code and I have not considered the compliance of the sanitary drainage building work.

¹ Subject to a clarification under section 189 of the Building Act 2004

² The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.dbh.govt.nz or by contacting the Ministry on 0800 242 243.

³ After the application was made, and before the determination was completed, the Department of Building and Housing was transitioned into the Ministry of Business, Innovation and Employment. The term “the Ministry” is used for both.

⁴ In this determination, unless otherwise stated, references are to sections of the Building Act and references to clauses are references to the Building Code.

1.5 This determination cannot consider the issue of notices under sections 459 to 461 of the Local Government Act as I have no jurisdiction under other enactments; this determination considers only matters relating to the Building Act and its regulations.

1.6 In making my decision, I have taken into account the submissions of the parties, the report of an expert commissioned by the Ministry to advise on subdivision and property matters (“the expert”), the building consent issued by the authority, and the other evidence in this matter.

2. The building work

2.1 The building work in question for surface water drainage is the termination of the existing surface water drain, shared by 39 and 39A Towai Street at the boundary between 39 and 39A Towai Street, and the provision of new surface water drains including a new connection to the public main located in Towai Street and subsoil drainage to service 39 Towai Street, all located within 39 Towai Street.

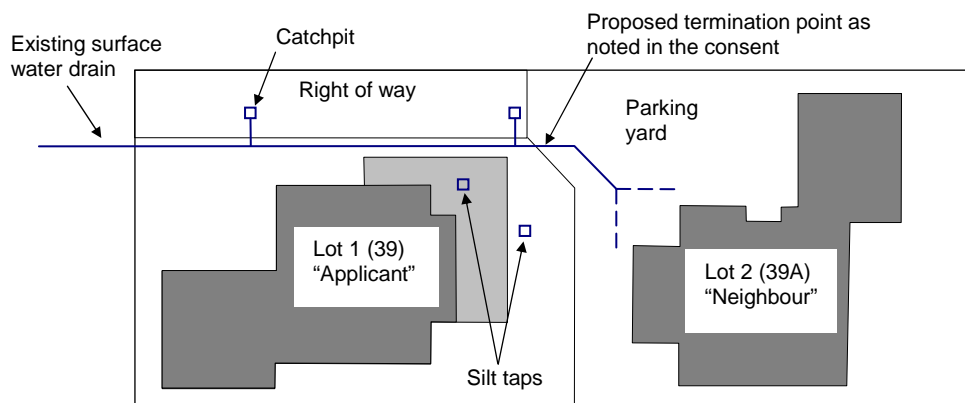


Figure 1: site plan (not to scale)

2.2 The site is essentially flat, with nominal fall from the property to the street (to the left of Figure 1).

2.3 In addition to the discharge from the roofs of both townhouses, the existing surface water drain collects surface water from the parking yard and the driveway for Lot 2, via two catchpits located within the right of way, and surface water via two silt traps.

2.4 The shared section of the surface water drain crosses Lot 1.

2.5 Lot 2 has a right of way and power, telephone, water and supply of gas rights over a designated part of Lot 1. The surface water from the parking yard to Lot 2 runs to two catchpits in the right of way which, in turn, are connected to the surface water drain to Lot 1. No part of the surface water drain used by Lot 2 is within the right of way.

3. Background

- 3.1 39 and 39A Towai Street, now Lot 1 and Lot 2 respectively of DP 149718, was originally one Lot with a house built in 1940. In 1991 the owner applied for consents to build two townhouses on separate titles created by subdivision of 39 Towai Street. Planning approval was granted on 15 May 1991. Separate building, plumbing and drainage permits for each unit were granted on 2 July 1991. Subdivision approval was granted on 26 August 1991. Approval as to survey was granted 28 January 1992. The survey plan was deposited 16 April 1992 and Lot 1 (39 Towai Street) was transferred to the applicant immediately.
- 3.2 The 100mm ceramic surface water drain for the 1940 house remained and was utilised to service both properties.
- 3.3 No easements or rights for sanitary or surface water services were created and 39A Towai Street was sold to the neighbour in 1999.
- 3.4 In early 2007 the neighbour reported to the applicant that persistent backflow from the top driveway catchpit and from under the deck of 39 Towai St was creating a nuisance to 39A Towai St. The neighbour requested that the drains to 39 Towai Street be repaired. Excavation of the blocked pipe revealed it was a damaged section of the original surface water drain. The blockage was caused by silt from the top driveway catchpit being trapped in tree roots that had infiltrated an uncapped lateral to an abandoned downpipe inlet of the previous house.
- 3.5 The layout of the surface water drains to 39 Towai Street was mapped using CCTV and a topographical survey was made of the shared surface water pipe to confirm invert levels along the pipe. The general condition of the materials and construction of the drains was poor and the survey technicians recommended re-laying before final survey for registration of title. The diameter and gradient of the shared surface water drain appeared to be inadequate and application of Verification Method E1/VM1 indicated that each lot required a dedicated 100mm drain.
- 3.6 In 2007 approximately 14m of drain was replaced to the original gradient of 1:90. There was only a marginal improvement in performance of the drainage system after this repair work.
- 3.7 The neighbour obtained an opinion from the authority that the neighbour interprets as meaning the existing shared drain has been approved as a continued existing use and they are entitled to a shared drain and to continue to use it without upgrading.
- 3.8 From 2007 to 2011 there have been numerous meetings and correspondence between the applicant, the neighbour, various officers of the authority and other parties concerning the rights, obligations, scope of work involved in and the process for the necessary repairs to the drains as well as the legal status of the drains; the matter has remained unresolved.
- 3.9 Subsequent to a pre-lodgement meeting held on 23 February 2010, the applicant lodged a building consent on 8 April 2010 for the building work and building consent B/2010/1653 was granted on 23 April 2010.

- 3.10 On 2 November 2010 the authority confirmed that it had issued section 459 Local Government Act notices to the owners of both 39 and 39A Towai Street requiring the re-laying of the existing shared private surface water drain serving these properties within their own properties. I have not seen a copy of these notices.
- 3.11 A draft application for a determination was received by the Ministry on 15 July 2011. As that application concerned the reuse of the existing drain in 1992, the applicant was advised that this was not a matter for determination under section 177 of the Building Act. A revised application, which is the subject of this determination, was received on 7 November 2011.
- 3.12 I understand that some of the building work has been undertaken and there remains more to be done before the consented works can be considered complete.

4. The submissions

- 4.1 With the draft application and the completed application for a determination the applicant provided a number of attachments including:
- A history and overview of the matter commencing with the 1991 subdivision.
 - Correspondence to and from the authority.
 - CCTV photos of the surface water public main at 39 Towai Street.
 - A copy of the Auckland City Code of Urban Subdivision and Development Drainage Requirements in 1991.
 - Extract from Plumbing and Drainage Regulations 1978.
 - Copy of building consent 2010/1653.
 - Site and drainage plan for the 1991 subdivision.
- 4.2 The authority acknowledged the application but made no further submission.
- 4.3 The neighbour responded in an email dated 21 November, saying:
- My position on this drainage issue has always been consistent. We brought the property and there were no indications on [the authority's] files that drains were an issue. The surface water and sewage systems appeared to be installed as plans approved detailed. They work as expected and there have been no problems other than maintenance and repair as needed. Pipe to street main has recently been replaced. We do not understand why we should be required to install separate system.
- 4.4 A draft determination was issued to the parties for comment on 8 May 2012.
- 4.5 The applicant responded in a detailed letter dated 30 May 2012, and did not accept the draft determination, maintaining the view that the authority was correct to issue the consent. The applicant provided a detailed submission on both the draft and the expert's report, as well as further submissions dated 10 June, 6 September, and

20 November 2012. I have taken into account the applicant's submissions in full, however I have provided only a summary of the points raised as follows:

- The authority could not have relied on past design considerations in granting the consent. The 1991 subdivision increased the catchment and the existing surface water pipe was inadequate. The existing drainage system is not an appropriate outfall for the disposal of stormwater from Lot 2. There were no drainage easements registered, and there were no inspection records or as-built drawings of the in respect of the 'original drainage permit'
- The existing drain does not have the capacity to function correctly, and rainfall events of 10% probability of occurring annually risk allowing the stormwater to escape to the ground water at the silt traps or distributing surface water to the perimeter of the floor slab via the subsoil drains. A section 461 notice⁵ was issued 'at the eleventh hour' in July 2012.
- The consent is in respect of the repair of the surface water drain to Lot 1 only; the surface water drainage to the right of way was part of the drainage system to Lot 2. The design of the upgraded drain to Lot 1 was derived by considering the total run-off from Lot 1. New subsoil drains to Lot 1 have been dimensioned to accept the run-off from the right of way as a secondary flow should those catchpits fail.
- All practical steps have been taken to prevent sub-soil water from Lot 1 reaching the right of way, to drain the substrate of the right of way and to deal with surface water from the right of way not captured by the catchpits.
- The authority considered the catchpits and overland flow path on the right of way to be part of the drainage to Lot 2 and reference to it was accordingly removed from the consent application.
- The documents submitted by the authority (as noted in paragraph 4.7) were incomplete.

The applicant sought amendments to the determination, and outlined the efforts made to resolve the matter and how resolution might be achieved.

4.6 The authority responded to the draft in a letter dated 1 June 2012, and did not accept the draft determination. The authority's submission noted:

- 'Consent B/2010/1653 is solely for the repair and upgrading of the existing [surface water] pipe that was damaged'.
- The existing surface water system addresses all surface water including the right of way. The upgraded pipe has a greater capacity than the existing. The right of way slopes towards the kerb drains in the public road which is an acceptable outfall.
- The authority had considered the surface water from the right of way in granting the consent and relied on 'past design considerations and site conditions'.

⁵ Under the Local Government Act 1974

- Reference was made to subdivisions under the Local Government Act 1974, and ‘if the existing [surface water drain] was functioning and the connections were approved under a Building Permit then any maintenance/replacement issues would be legally protected by [section] 461 of the [Local Government Act].

4.7 The authority also provided copies of

- correspondence from 1991 relating to the subdivision of the property and right of way access (The letters refer to the need for ‘separate drainage connections’, and reference is also made to a ‘schedule of easements’ (not included) to cover services in the right of way.)
- a document titled ‘consent for private drainage’ dated 14 October 1991 relating to sanitary drainage
- a timeline of ‘compliance events’ from May 1991 to January 1992
- a site and drainage plan dated 1991

4.8 Despite a number of requests from the Ministry, the neighbour made no further submission, or indicated their acceptance or otherwise of the draft determination.

4.9 Following the issue of the determination on 15 January, the applicant sought a clarification under section 189 of the Act on 12 February 2013. In the request for clarification, the applicant sought:

- Item 1: Changes to the wording included in paragraph 1.3 to describe the building work as remediation of the existing surface water drain.
- Item 2: Changes to the wording included in paragraph 1.3 in respect of the reasons for the work being proposed.
- Item 3: The reference to ‘owners’ in paragraph 3.1 to be altered to ‘owner’ to accurately reflect that subdivision and land transfer had not occurred at that time.
- Item 4: Changes to the description of the document listed in paragraph 4.7 (bullet point two) titled ‘consent for private drainage’ to note that it related to sanitary drainage from Lot 1 to traverse Lot 2.
- Item 5: Changes to the wording in paragraph 6.6 to indicate the removal of reference to catchpits from the consent documents was a result of a “direction” as opposed to “advice” from the authority, and that the reference include ‘outfall from Lot 2’.
- Item 6: Deletion of the decision at paragraph 10.2, or alternatively changes to the wording in that paragraph 10.2 in respect of the description of the sequencing work to be provided for in the modified building consent or to direct a letter be sent to the owners of both Lot 1 and 2.

4.10 On 25 February 2013 I wrote to the parties proposing to clarify the determination in accordance with section 189 of the Act; that proposal concluded that items 1, 2, 5 and 6 were not matters requiring clarification and set out the clarification of items 3 and 4 as:

- the word ‘owners’ in paragraph 3.1 be corrected to read ‘owner’

- paragraph 4.7 bullet point two be altered to “a document titled ‘consent for private drainage’ dated 14 October 1991 relating to sanitary drainage”

4.11 No further submissions or indication of their acceptance or otherwise of the proposed clarification was received from any party, though the Trustee acting for the applicant sought that the clarification be issued.

5. Grounds for the establishment of code compliance

5.1 In order to form a view as to whether or not the authority was correct in its decision to issue the consent I have relied on the documents submitted for the consent and the building consent issued by the authority. I am satisfied that these documents allow me to form a view with respect to the issuing of the consent.

6. Compliance with the relevant code clauses

6.1 Consideration has been limited to the surface water drainage building work that has been proposed and consented, and not to alternative arrangements that could have been proposed or implemented.

6.2 The building consent application includes comprehensive calculations together with specifications and drawings and notes regarding the construction sequence of the work and was prepared by a Trustee on behalf of the applicant.

6.3 The authority has submitted that the consent is ‘solely for the repair and upgrading of the existing [surface water] pipe that was damaged’. I do not consider this is correct as the work includes upgrading the surface water system to all of Lot 1 and is not confined to the repair or upgrading of pipework that has been damaged.

6.4 Clause E1.2 of the Building Code requires that:

Buildings and sitework shall be constructed in a way that protects people and other property from the adverse effects of surface water.

6.5 Clauses E1.3.3 (a) and (c) of the Building Code requires that:

Drainage systems for the disposal of *surface water* shall be constructed to:

- (a) Convey *surface water* to an appropriate *outfall* using gravity flow where possible, ...
- (c) Avoid the likelihood of leakage, penetration by roots, or the entry of ground water where pipes or lined channels are used

6.6 While the consented drawings and specification noted the severing of the surface water drain to Lot 2, they are silent with respect to the drains serving the catchpits located in the right of way. I note that the applicant has submitted that reference to the catchpits was removed from the consent documents on the advice of the authority.

6.7 In my opinion the collection of surface water in the right of way, including existing connections between the catchpits and the upgraded surface water drain, needed to be

addressed in the consent application, even if only as sequenced work dealt with in the same manner as the drain serving Lot 2.

7. Compliance with the Building Act

- 7.1 The consented work includes, as one part of the documented construction sequence, the stopping of the surface water drainage from Lot 2 with the drawings including a note that reads “existing pipe terminated at boundary. New surface water pipe and mains [connection] to be arranged by owner of Lot 2 under a separate consent.” The consented work also needs to take account of the termination of drains from the two catchpits located in the driveway (refer paragraph 6.7).
- 7.2 There is nothing in the Act that gives the authority the power to refuse to grant or issue the consent until it is satisfied that there is adequate documentation or assurance that the required work on Lot 2 will take place. The only grounds for refusing to grant or issue consent are non-compliance with the Building Code or non-payment of any charges or levies. As long as the proposed work on Lot 1 complies with the Building Code, the authority must grant the applicant, being the owner of Lot 1, a building consent. Any issue with respect to the drainage on Lot 2 falls to the neighbour, being the owner of Lot 2, and the authority to attend to as a separate issue.
- 7.3 The authority has placed “building consent drainage conditions” on the building consent around the replacing of the surface water drainage on Auckland Council land, but there is nothing in the Act that gives the authority the power to place such conditions on the building consent. Building consent conditions imposed by a building consent authority should be appropriate to the nature of the work being consented. If an authority requires an applicant to meet other requirements than what is shown on the plans and specifications, these should be communicated to the applicant separately by way of a letter so it is clear they are not part of the building consent.

8. Discussion

- 8.1 One of the significant factors in the background to this matter is the belief of the neighbour that they have a right to use the existing surface water drainage and they should not be required to install a separate disposal system. That belief may be based on the rights that could arise from an uncompleted process under section 461 of the Local Government Act 1974, although I have not been provided with any information about the actual basis of the rights and interests claimed by the neighbour.
- 8.2 It appears that the requirement that any repair or replacement of the drains comply with the Act makes the resolution of the legal and factual status of the neighbour’s belief redundant due to the following:
- in 2007 the surface water drain had failed
 - a replacement ‘like for like’ shared 100mm drain will not comply with the Building Code

- all building work, whether or not a consent is required, must comply with the Building Code
- a code-compliant surface water disposal solution for Lots 1 and 2 must therefore be different to what existed previously.

8.3 The upsizing of the shared surface water drain located in Lot 1 may not necessarily prevent the discharge of surface water from Lot 2 discharging via the sub-soil drains on to Lot 1 land.

8.4 As noted in paragraph 3.5 above, the application of E1/VM1 and E1/AS1 indicates that separate 100mm drains are required. It is therefore code-compliant, as well as current and good subdivision practice, for the new drains to be separate drains servicing Lots 1 and 2 individually. The installation of separate drains supported by legal easements will also help to avoid in the future the types of disputes that have plagued this matter since 2007.

9. What is to be done now

9.1 I am mindful that work has been undertaken by the applicant in good faith based on the issued consent, and therefore that work should be permitted to remain if it complies with the Building Code. I am satisfied that the consented work would, if properly carried out, comply with the Building Code.

9.2 Therefore, the consent should be amended to include the necessary surface water drainage work for the right of way over Lot 1 so that all surface water on Lot 1 is addressed by the consent. Of course, the applicant will not be able to complete the work until alternative drainage serving Lot 2 is installed or the applicant establishes that it has the legal right to terminate Lot 2's drain where it crosses the boundary onto Lot 1 (a right which the applicant does not claim).

9.3 The neighbour should be responsible for carrying out the necessary building work to ensure code-compliance for surface water on Lot 2, including the avoidance of any adverse effects on Lot 1. There are several possible solutions including:

- a separate 100mm surface water drain through the right of way over Lot 1
- the existing surface water drain, including the driveway catchpits, is covered by an easement and dedicated solely to the use of Lot 2
- the replacement drain in Lot 1 is sized take surface water for both Lots 1 and 2.

9.4 Given the history of this dispute and the inability of the parties to agree on whether replacement drains are required, where those drains should be located and who should contribute to the cost of those drains, the means of effecting any solution probably lies with the authority exercising its powers under the Local Government Act 1974 under sections 459 to 461. As set out in those provisions, the authority has the power to require Lot 2 to carry out the necessary work, and it can require an easement or rights for Lot 2 surface water services over Lot 1 or the right of way. I note that section 461(3) includes provision for the District Court to determine the liability of any party in relation to drains constructed pursuant to those provisions.

9.5 As noted in paragraph 3.10, the applicant has advised me that the authority's section 459 notices required "the re-laying of the shared private surface water drain serving these properties within their own properties". It is unclear what the authority was intending when it issued this notice. It would not be practically or legally possible for the applicant to re-lay the section of shared drain within their property and the neighbour to re-lay the section of shared drain within theirs. Any drain serving Lot 2 must pass over Lot 1 to access the public drain. The authority should carefully consider this determination and the solution suggested in paragraph 9.3 above before issuing amended section 459 notices to the applicant and the neighbour.

10. The decision

10.1 In accordance with section 188 of the Act, I hereby determine that the surface water drainage work to Lot 1 as detailed in consent B/2010/1653 complies with the provisions of the Building Code.

10.2 I also confirm the authority's decision to issue the building consent, but that the consent should be modified by incorporating into the building consent provision for the sequencing work necessary for connection of the driveway catchpits to a suitable outfall.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 12 April 2013.

John Gardiner
Manager Determinations and Assurance