



## Determination 2013/062

# Regarding the issuing of a code compliance certificate for building work affecting other property at 2C Hastie Avenue, Mangere, Auckland

### 1. The matters 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, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to this determination are

- Mr and Mrs Sivilay (“the applicants”), the owners of 2 Hastie Avenue (“Lot 2”) that is the affected other property, acting through an agent
- Mr A Hudson (“the neighbour”), the owner of 2C Hastie Avenue (“Lot 4”), acting through an agent
- Auckland Council (“the authority”)<sup>2</sup>, carrying out its duties and functions as a territorial authority or building consent authority.

1.3 This determination arises from the issue of a code compliance certificate for building work carried out to Lot 4 that included excavation on Lot 4 up to the boundary with Lot 2. The applicants are of the view that the building work did not protect their property to the extent required under the provisions of the Building Code (First Schedule, Building Regulations 1992)<sup>3</sup>, specifically those that relate to ‘other property’.

1.4 I consider the matter to be determined is whether the decision to issue the code compliance certificate for Lot 4 was correct. In making this decision I must consider whether the building work complies with Clause B1 Structure of the Building Code (First Schedule, Building Regulations 1992) with respect to the provisions that apply to other property and consequently to the protection of such property.

1.5 I note that the application also raised issues regarding the Resource Management Act. I have no jurisdiction in respect of other enactments, and this determination considers only matters under the relating to the Building Act and its regulations.

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

<sup>2</sup> The building consents for Lots 2 and 4 were issued by Manukau City Council which was later transitioned into the Auckland Council. The term authority is used for both.

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

- 1.6 In making my decision, I have taken into account the submissions of the parties, the report of the independent experts (“the first expert” and “the second expert”) commissioned by the Ministry, and the other evidence in this matter.

## 2. The building work

- 2.1 The building work in question concerns the excavation at the boundary shared by Lots 2 and 4 to provide a flat building platform at Lot 4, and the affect of that excavation on Lot 2.
- 2.2 The original parcel of land was sub-divided into four sections and the overall site slopes from the street front down toward the south. The house on Lot 2 is located towards the north and west of Lot 4, with a large yard to the south. Lot 4 adjoins the east boundary of Lot 2 for approximately a third of the total length of Lot 2 (“the shared boundary”). The shared boundary is 20.8m long.

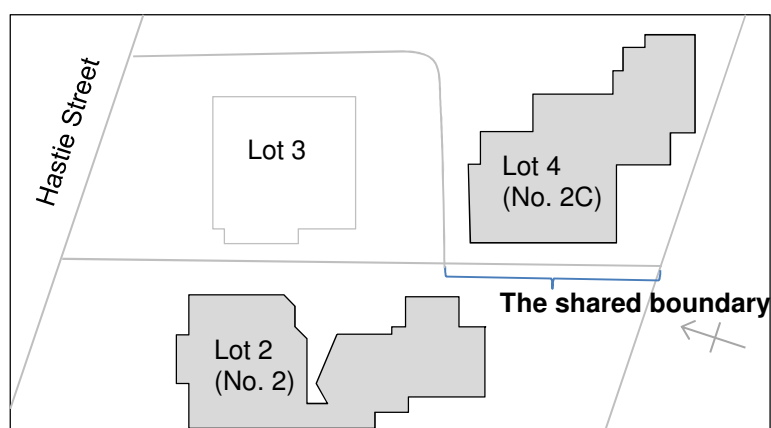


Figure 1: site plan (not to scale)

- 2.3 The height difference between the two properties either side of the shared boundary is approximately 2.3m at the northern end; this reduces slightly towards the south where it then drops away suddenly to be almost equal at the south boundary.
- 2.4 To form the building platform for Lot 4, considerable site excavation was carried out which left a vertical bank along almost the entire length of the shared boundary and part of the north boundary of Lot 4. The applicants’ agent described the site as having an exposed near vertical bank along almost the entire length of the shared boundary which, due to a lack of support, slumped over time.
- 2.5 The vertical bank remaining on the site of Lot 2 was later modified by battering and stabilizing it to avoid more slumping. The battered length extends approximately 18 metres before it falls away steeply to the rear boundary, and about 12 metres of the battered length is almost 2 metres high.
- 2.6 No engineered retaining wall has been installed, but a 1.8m high fence was constructed at or on the shared boundary at the bottom of the excavation for Lot 4. The fence is approximately 3m from the house on Lot 4 and is in line with an existing fence between Lots 2 and 3.

### **3. Background**

- 3.1 On 12 December 2002 the authority issued building consent No. 024883 under the Building Act 1991 (“the former Act”) for the construction of a house and minor household unit on Lot 4. The building consent was issued based on a building certificate issued by a building certifier (“the first building certifier”), which was duly registered as a building certifier under the Building Act 1991. (I note here that Lots 2 and 4 were not held under the same ownership at the time the consent was issued).
- 3.2 The building certifier’s records indicate it carried out inspections during construction on Lot 4; including siting, foundations and floor slab stages which were ready by 13 January 2003.
- 3.3 On 11 March 2003 the authority issued building consent No. 024798 under the former Act for the construction of a house and minor household unit on Lot 2. The building consent was issued based on a building certificate issued by another registered building certifier (“the second building certifier”).
- 3.4 The first building certifier issued a code compliance certificate (No. 02-1948) for Lot 4 on 19 June 2003 to the then owner of Lot 4; the current owner purchased the property in 2004 some time after completion.
- 3.5 The second building certifier issued an interim code compliance certificate for the building work on Lot 2, but was unable to issue a code compliance certificate on completion of the work as it had had its limitations reduced and was not permitted to approve monolithic cladding. A code compliance certificate was then issued to the applicants by the authority on 15 January 2004.
- 3.6 In 2010 the applicants sought the advice of a consultant in preparing a building consent application to build a new retaining wall. The consultant visited the site on 25 February 2010 and produced a report dated 1 March 2010.
- 3.7 The consultant considered that the retaining wall should have been built as part of the development of Lot 4 and dealt with as part of both the resource and building consents process. The consultant concluded that the excavation and lack of retaining wall was a breach of Clause B1 in a number of respects.

### **4. The submissions**

- 4.1 The applicants’ agent provided a covering letter, dated 5 April 2013, with the application for determination setting out the background to the dispute and the applicants’ views on the matter. The agent submitted that:
- no building consent or resource consent was sought after or identified as a requirement with respect to site-work (excavation) that took place during the development of Lot 4
  - the excavations extended over the boundary into Lot 2 and were not properly retained; an engineering solution to provide lateral support to Lot 2 was required
  - soil levels were left more or less level with and abutting the wooden fence which created a falling hazard from Lot 2

- the applicants removed approximately 20 cubic metres of slumping soils from Lot 2 to mitigate the falling hazard and to create an embankment that would reduce the slumping of soils
  - the applicants have lost a significant level of amenity of their land
  - the original excavation to Lot 4 was not properly retained; it required an engineered solution to provide lateral support to the applicants' land
  - the fence constructed on the shared boundary did not provide adequate protection (to the applicants and users of Lot 2) from falling
- 4.2 The applicants' agent submitted that there was a failure to detect the non-compliance with the Building Code at the time of the issue of the code compliance certificate for Lot 4, and that the decision to issue the certificate should be reversed and a notice to fix issued. The applicants' agent also held that the authority erred in issuing the building consent.
- 4.3 The applicants also provided copies of various relevant documents, including
- an aerial photograph
  - a report from the applicants' "expert witness"
  - correspondence between the parties
  - a timeline and details of events
  - approved consent documents for the building work on Lot 4
  - the code compliance certificate for the building work on Lot 4
  - a CD Rom containing the property file held by the authority for Lot 4
  - additional photographs.
- 4.4 The authority acknowledged the application and made a submission by email on 9 May 2013. The authority set out some of the background, noting that it was not aware of the applicants' concerns at the time that the code compliance certificate was issued for Lot 2 in 2004. The authority is of the opinion that the consents and code compliance certificates were 'issued validly' and that the matter is a private issue between the two property owners.
- 4.5 The neighbour did not make a submission directly to the determination, but the neighbour's agent emailed the applicants' agent on 5 May 2013 setting out a proposal whereby the applicants could install a retaining wall on the applicants' side of the shared boundary.
- 4.6 A draft determination was issued to the parties for comment on 5 July 2013.
- 4.7 The authority accepted the draft subject to comment in a letter dated 19 July 2013. The authority noted that the building certificates and code compliance certificates for the two properties were issued by two separate building certifiers that were employed by a third company. The authority also requested that if the determination reversed the code compliance certificate that it also provide comment to the effect that the building consent be amended to modify Clause B2.3.1 so that it takes effect from 19 June 2003.
- 4.8 The applicants responded to the draft determination in a submission dated 21 July 2013. The applicants submitted that, in addition to reversing the code compliance

certificate the determination should also direct that a notice to fix be issued. The applicants submitted that:

- The breach extends to Clauses B1.1(c) in relation to the free-standing vertical embankment that was left, and B1.3.1, B1.3.2, and B1.3.7 in respect of the sitework having suffered from ground loss and slumping.
- There is no rationale as to why Clause F4 is considered not to be breached and the draft determination does not treat this clause with consistency. The failure to meet the requirements of Clause F4 at the top of a retaining wall on a boundary with an adjoining property has an adverse effect on the “other property”, creating a risk of fall from persons on the “other property”.
- The approved plans for Lot 4 were inadequate in respect of the siteworks.
- The determination decision should be clear that the breach ‘belongs to’ the building work carried out on Lot 4 and that responsibility to carry out remedial work rests with parties involved with building consent No. 024883 and not with the applicants.

4.9 The agent for the neighbour provided a submission dated 19 August 2013 that was received by the Ministry on 2 September 2013. The agent submitted that as the neighbour had purchased the property after its completion and the issue of the code compliance certificate, the neighbour was ‘under no legal obligation to pay for works to support the land on Lot 2’, and that the neighbour was concerned that the code compliance certificate could be reversed without it being established how the works are going to be repaired or who is going to pay for them.

4.10 I then sought clarification from the parties as to the foundations to the house on Lot 2. The authority duly provided copies of the consent plans, the engineering design, and the building certifier’s inspection sheet, to confirm the foundation details. Subsequently I engaged the second expert to provide a view as to the effect the loss of ground support at the boundary may have had on the foundation of the house on Lot 2 (refer paragraphs 5.5 to 5.7).

## **5. The experts’ reports**

### **The first expert**

5.1 As mentioned in paragraph 1.6, I engaged an independent expert to assist me. The expert is a registered architect<sup>4</sup> and a member of the New Zealand Institute of Architects. He visited the dwelling on 7 May 2013 and furnished a report on 28 May 2013.

5.2 The expert made the following observations:

- The original levels shown at each end of the shared boundary were 27.760 RL at the north and 25.405 RL at the south (as shown in a site and drainage plan that formed part of the approved documents for Lot 4).
- The consented plans for Lot 4 also show a 2m height difference at the shared boundary, and battered area contained within the site on Lot 4 adjacent to the boundaries with Lot 2 to the west and Lot 3 to the north.

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<sup>4</sup> Registered Architects are under the Registered Architects Act 2005 treated as if they were licensed in the building work licensing class Design 3 under the Building (Designation of Building Work Licensing Classes) Order 2010.

- The site of Lot 2 has been compromised by the excavations carried out to form the building platform to Lot 4.
  - No satisfactory means of support to the excavated ground along the shared boundary was provided.
  - The ‘loss of usable property’ to Lot 2 is approximately 1.5m wide along the shared boundary.
- 5.3 The expert was of the opinion that the battered area shown on the consented plans for Lot 4 would not have been sufficient to accommodate the new house as it stands today.
- 5.4 In regards to Clause B1.3.6 in respect of damage to other property the expert concluded that compliance had not been achieved and this was evidenced by the ground loss and slumping that has occurred to Lot 2.

### **The second expert**

- 5.5 A second expert, who is a Chartered Professional Engineer, was engaged to give his opinion of the effect of the cut on the foundations to the house at Lot 2. The second expert provided his opinion to the Ministry in an email dated 17 September 2013
- 5.6 The second expert provided a plan including sections through the site showing the foundations of the house at Lot 2 in relation to the cut face adjacent the boundary. The expert said, in his opinion, that:
- the foundations of [Lot 2] immediately adjoining the cut face ... do not currently comply with clause B1 of the NZBC
- In creating the building platform for [Lot 4] consideration was not given to the adjoining property at [Lot 2].
- 5.7 The second expert’s opinion was provided to the parties on 17 September 2013.

## **6. Discussion**

### **Compliance with B1 Structure**

- 6.1 When considering the issue of a code compliance certificate for building work consented under the former Act, an authority (in this case the building certifier) must be satisfied that the building work complies with the Building Code that was in force at the time of issue of the consent.
- 6.2 I note that the Act and the Building Code both require that any building must be built in such a manner as to protect ‘other property’, where ‘other property’ is defined by the Building Code (Clause A2 Interpretation) as
- Other property means any land or buildings or part thereof which are –
- a) Not held under the same allotment; or
  - b) Not held under the same ownership, and...
- 6.3 Given that Lots 2 and 4 were not held under the same ownership at the time of the issue of the consents and the code compliance certificates, I conclude Lot 2 in this case is “other property” in relation to the building work.
- 6.4 Clause B1.3.6 of the Building Code that was in force at the time the consent was issued stated that:

Sitework, where necessary, shall be carried out to:

- (a) Provide stability for construction on the site, and
- (b) Avoid the likelihood of damage to other property.

6.5 I consider that ‘other property’ is not limited to the protection of buildings<sup>5</sup> and that the land itself must also be protected from the likelihood of damage. In respect of “the likelihood of damage” I refer to reasoning in *Auckland CC v Selwyn Mews Ltd*<sup>6</sup>, where the Judge stated:

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

6.6 In this case it is clear that the unsupported vertical excavation to establish a building platform for Lot 4 left a situation where the land to Lot 2 was unstable and subject to failure. The owners of Lot 2 were required to batter the land in an effort to stabilise the excavation carried out on Lot 4. The second expert is also of the opinion that in creating the building platform for Lot 4, insufficient consideration was given to the adjoining property at Lot 2

6.7 I consider that the requirement of Building Code Clause B1.3.6(b) to avoid the likelihood of damage to other property has been breached.

6.8 The consented plans for Lot 4 clearly showed the excavation to be battered within the boundary to Lot 4. I accept the expert’s opinion that the area of battered ground as shown on those plans was not sufficient to accommodate the difference in level between the building platform for Lot 4 and the ground level at the boundary with Lot 2. The as-built work is at variance with what was consented. I am therefore of the opinion that the breach of Clause B1.3.6(b) was evident at the time of final inspection by the building certifier and therefore that the code compliance certificate was incorrectly issued.

6.9 Matters related to Clause F4 Safety from falling at the boundary would also have been apparent at the time the code compliance certificate was issued for Lot 2, as the owners of Lot 2 had not yet battered the face of the excavation.

### **The issue of the building consent**

6.10 The applicants’ agent is of the view that the authority erred in issuing the building consent, however, I note that the sitework at the shared boundary that has affected Lot 2 is a departure from the approved plans as noted above. In issuing the building consent for Lot 4 the authority was entitled to rely on the building certificate issued by the building certifier: in this instance it was the building certifier who had established that the proposed work would satisfy the requirements of the Building Code and not the authority.

6.11 The remainder of the building work carried out under that consent has been undertaken in good faith in reliance on the issued consent, and therefore that work should be permitted to remain if it complies with the Building Code. In this case it is the sitework for Lot 4 that is not compliant and must be remedied. As such I do not consider that a reversal of the building consent for Lot 4 is appropriate in this instance.

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<sup>5</sup> See also Determination 2007/141 Requirement for a fire protection barrier to a coolstore

<sup>6</sup> 18/6/03, Judge McElrea, DC Auckland CRN2004067301-19

- 6.12 At noted in paragraphs 5.5 to 5.7, during the course of determination it was found that the foundations to the house at Lot 2 adjacent the boundary with Lot 4 do not currently comply with Building Code Clause B1. As a code compliance certificate has been issued for Lot 2, the authority has no powers to deal with this non-compliance unless it meets the test of a dangerous building under section 121, which based on what I see, it does not. However, I strongly suggest that the authority place this determination on the property file for Lot 2.

## **7. The decision**

- 7.1 In accordance with section 188 of the Act, I hereby determine that the sitework carried out under building consent No. 024883 does not comply with Clause B1.3.6(b) of the Building Code and accordingly I reverse the authority's decision to issue the code compliance certificate.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 1 October 2013.

John Gardiner  
**Manager Determinations and Assurance**