



## Determination 2011/038

### **The issue of a notice to fix for a building at 91 Whangapoua Road, Coromandel, for fire safety provisions to protect other property (to be read in conjunction with Determination No. 2010/030)**

#### **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, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department.

1.2 The parties to the determination are:

- The Barlow Family Trust, which is the current owner of the building (“the applicant”)
- The Thames-Coromandel District Council (“the authority”), carrying out its duties and functions as a territorial authority or building consent authority.

#### **1.3 The matter to be considered in this determination**

1.3.1 The matter to be determined<sup>2</sup> is whether the authority was correct to issue a notice to fix in respect of the requirement to fire rate the south wall of a relocated dwelling at 91 Whangapoua Road.

1.3.2 The dispute has arisen because parties have differing views as to whether the term “open space” as defined in Acceptable Solution C/AS1 (“C/AS1”) applies to the adjacent property (“the reserve”), and therefore whether it is necessary for the south wall of the building to be fire rated.

1.4 In making my decision, I have considered the submissions of the parties, the previous determination regarding the three relocated buildings on the property (Determination 2010/030), and the other evidence in this matter.

---

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

<sup>2</sup> Under sections 177(1)(b) and 177(2)(f) of the Act.

1.5 I have set out the relevant sections of the Act<sup>3</sup> and the Acceptable Solution C/AS1 in Appendix A.

## **1.6 Matters outside the determination**

1.6.1 The building that is the subject of this determination was identified as “the house” (consisting of Building A and Building C) in the previous determination for the property. It is the fire rating requirement for this building only that is considered in this determination.

1.6.2 The other building on the property has previously been identified as “the cottage” or “Building B”. I note that the notice to fix makes no mention that the cottage does not meet the fire safety requirements of the Building Code. This determination therefore does not consider that building.

## **2. The building**

2.1 The building consists of a large house which is situated on a flat rural site in a medium wind zone for the purposes of NZS 3604<sup>4</sup>. The building has timber framing, window joinery and floors, and corrugated steel roofing.

2.2 There is no dispute between the parties that the south wall of the building is located less than one metre from the boundary of the reserve.

## **3. Background**

3.1 The building in question was subject to Determination 2010/030, which among other items found that further investigation was required in regard to the fire safety of the south wall of the house.

### **3.2 The notice to fix**

3.2.1 A notice to fix (No. 1495) was issued by the authority to the applicant on 21 July 2010. Regarding the non-compliance of the building with Building Regulation Clause C, the notice stated that:

1. The building owner is to confirm the intended use of the building either as residential single family dwelling with fewer than 6 persons or home stay SA use.

2. Provide details of compliance relative to the intended use either:

A. For SH use as a Detached Dwelling

1.1 Boundary separation distance requirement of 1mt has been verified by a registered surveyor and it does not meet the building consent requirement. As the separation is less than 1mt you are to provide a proposal with a building consent application to remedy the non-compliance with regulations C3 and C4.

....

---

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

<sup>4</sup> New Zealand Standards NZS 3604:1999 Timber Framed Buildings.

B. For SA home stay or any other use:

Provide appropriate notification of change of use under section 114 of the Building Act 2004 together with full details of the intended use and appropriate building consent application with details to show that the building, in its new use, will comply as nearly as is reasonably practicable with every provision of the building code that relate to means of escape from fire, protection of other property, and fire rating performance.

...

- 3.2.2 The notice to fix states that a registered surveyor has verified that the building is located less than one metre from the property's south boundary, and as such does not meet the requirements of the building consent in terms of boundary separation distance.
- 3.2.3 In addition, the notice to fix states that
- ... to comply fully with C/AS1 of the building code the wall and eaves adjacent to this boundary require to be fire rated. This will also include the unprotected glazing.
- 3.2.4 The notice to fix also states that if, instead of being used as a residential dwelling (SH use), the property is to be used as a home stay for between 5 and 12 guests (SA use), the following relevant conditions apply:
- The 1mt separation allowance for the approved SH use does not apply to SA use. Protection to other property to be assessed for each fire cell dependent on the intended fire cell configuration.
- 3.3 The applicant considered two alternatives to bring the building's south wall into compliance with the Building Code:
- Apply to the authority to have the legal boundary of the reserve adjusted to more than one metre from the building, thus removing the need to fire rate the wall
  - Fire rate the wall.
- 3.4 As the option of adjusting the boundary would be both costly and time-consuming for the applicant to pursue, that option was consequently abandoned by the applicant.
- 3.5 The applicant subsequently sought advice from a fire design specialist regarding the requirement to fire rate the south wall of the house, which is the only exterior wall located less than one metre from a legal property boundary.
- 3.6 The fire design specialist considered the reserve to be "public open space" in terms of C/AS1 and therefore the relevant boundary would be that on the far side of the reserve. The fire design specialist therefore concluded that the wall did not require fire rating. (I note here that the fire design specialist referred to the 'North East wall').
- 3.7 The applicant then sought the view of the authority on the matter. In a series of emails between the parties the authority advised the applicant that the reserve was designated "Local Purpose Reserve" and under the authority's District Plan is zoned as "Low Density Housing". The authority noted that this meant that in the future the land could be developed for housing or the authority may use the land for another

purpose such as an expanded water plant. It was the authority's view therefore that the wall of the building required fire rating to comply with the Building Code.

3.8 On 26 October 2010 the authority further clarified its position in an email to the applicant, noting that the local purpose reserve status did not override the District Plan zoning.

3.9 The Department received an application for a determination on 21 December 2010.

## **4. The submissions**

4.1 The applicant provided copies of:

- the notice to fix
- the correspondence between the parties.

4.2 The authority did not acknowledge the application for a determination and did not make a submission to it.

4.3 In an email dated 10 February 2011 the Department sought clarification from the authority as to the status of the reserve and the controls it is subject to.

4.4 The authority responded in an email dated 16 February 2011, which noted that:

- ...the land was set apart as a local purpose reserve (water treatment plant and reservoir) subject to the Reserves Act 1977... and vested in the Thames Coromandel District Council
- The purpose of this designation is for a water treatment plant for Coromandel water supply
- [the land] is also zoned in the [authority's] District Plan as Housing Zone (Low Density Policy Area)

4.5 A draft determination was issued to the parties for comment on 25 February 2011.

4.6 In an email on 1 March 2011 the authority accepted the draft without comment. The parties held a meeting on 12 April 2011 and subsequently, in an email to the Department on 16 April 2011. the applicant accepted the draft with no further comment.

## **5. Discussion**

5.1 The authority has concerns regarding the compliance of the building in terms of Clause C3 Spread of fire of the Building Code.

### **5.2 The intended use of the building**

5.2.1 From the information I have seen, and as the authority has stated in the notice to fix, it is unclear to me whether the applicant intends to use the building only as a residential dwelling ("SH use"), or alternatively to use it as a home stay for up to 12 people ("SA use"). Given that the requirements of Clause C3 of the compliance document differ for each of these two uses, the intended use of the building needs to

be clarified and confirmed by the applicant before the conditions of the notice to fix in terms of Clause C3 of the Building Code can be properly determined and met.

- 5.2.2 Nevertheless, the applicant has clearly stated in correspondence with the authority and others that the question to be addressed is whether or not the south wall of the dwelling needs to be fire rated, given that the adjacent other property is classified by the authority as a “local purpose reserve”.
- 5.2.3 I also note that, in the general case, any wall of a dwelling that is located less than 1 metre from a legal boundary with another property is required to have appropriate resistance to the spread of fire for both SH and SA use buildings, in order that the other property is afforded appropriate fire protection.

### 5.3 General comments

- 5.3.1 In forming a view as to the requirements for the south wall of the building, I have considered the relevant clauses of the Building Code, the relevant sections of the Act, the definitions of the various terms that are provided in both of these documents, the submissions of the parties, and other information relevant to the matter.
- 5.3.2 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 includes roads.

- 5.3.3 I therefore conclude that the reserve in this case is “other property” in relation to the building work and that the south wall of the building is required to meet the relevant performance requirement in terms of other property as specified in Clause C3 of the Building Code.

- 5.4 In addition, the term “Relevant Boundary” in relation to fire safety requirements for other property is defined in C/AS1 as follows:

For the external wall of any building, the relevant boundary shall be the nearest of the following boundaries:

- a) A boundary of a freehold allotment, except that where the other property is a road, railway line or public open space the relevant boundary is the boundary on the other side of that other property.

- 5.4.1 The matter therefore turns on which boundary is the relevant boundary to the south wall of the building, and therefore, whether the reserve can be considered “open space” in terms of C/AS1.

- 5.4.2 Open space is defined in C/AS1 as:

Includes land on which there is and will be no buildings and which has no roof over any part of it other than overhanging eaves.

- 5.4.3 As confirmed by the authority (refer paragraph 4.4), the reserve is designated a Local Purpose Reserve under the Reserves Act 1977, as reserved land for a water treatment

plant and reservoir and is vested in the Thames Coromandel District Council. The reserve is also zoned as Low Density Housing in the authority's District Plan.

5.4.4 Open space is '... land on which there is and will be no buildings ...' and given the nature of the reserve under the Reserves Act 1977 and the zoning in the District Plan, I do not consider this to be the case for the reserve. The reserve could reasonably be built on in the future, and I am therefore of the opinion that the reserve in this case does not meet the definition of open space (as this term is used in the definition of 'relevant boundary' in the Acceptable Solution C/AS1) as it is not land on which there is and will be no buildings.

5.4.5 Therefore the relevant boundary in terms of C/AS1 is the boundary which lies between the property at 91 Whangapoua Road and the reserve.

## 5.5 Conclusion

5.5.1 As I have found that the reserve is "other property" as defined in the Building Code, and the reserve can not be considered as open space in terms of C/AS1, the relevant boundary is therefore that which lies between the property at 91 Whangapoua Road and the reserve. It follows therefore that the south wall of the building must meet the requirement of Clause C3.3.5 Spread of fire of the Building Code, which requires:

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.

## 6. What is to be done now?

6.1 The applicant should now produce a response to the notice to fix in the form of either; a detailed proposal as to how the south wall of the building will be brought into compliance with Clause C3 of the Building Code, whether by use of Acceptable Solution C/AS1 or an alternative solution; or an application to the authority for a waiver or modification of Clause C3.3.5. Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.

## 7. The decision

7.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the house does not comply with Clause C3 of the Building Code, and accordingly I confirm the decision of the authority to issue a notice to fix in respect of the fire safety provisions that relate to the protection of other property.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 18 April 2011.

John Gardiner

**Manager Determinations**

## Appendix A: The relevant legislation and the Acceptable Solution

A1 The relevant section of the Building Code is:

### Clause A2 – Interpretation

#### other property—

(a) means any land or buildings, or part of any land or buildings, that are—

- (i) not held under the same allotment; or
- (ii) not held under the same ownership; and

(b) includes a road

### Clause C3 – Spread of fire

**C3.1** The objective of this provision is to:

...

(c) Protect adjacent *household units*, other residential units, and *other property* from the effects of *fire*.

...

**C3.2** Buildings shall be provided with safeguards against spread of fire so that:

...

(c) Adjacent household units, other residential units, and other property are protected from damage,

...

**C3.3.2** *Fire separations* shall be provided within *buildings* to avoid the spread of *fire* and smoke to:

...

(d) *Other property*.

...

**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*.

A2 The relevant sections of the Acceptable Solution C/AS1 are:

### Part 7: Control of External Fire Spread

7.7.1 *External walls* and roofs shall be constructed to avoid:

...

(a) Horizontal *fire* spread by thermal radiation or structural collapse, which could endanger:

- i. *other property*, ...

#### Definitions

*Open space*: includes land on which there is and will be no buildings and which has no roof over any part of it other than overhanging eaves.

*Relevant boundary*: For the external wall of any building, the relevant boundary shall be the nearest of the following boundaries:

- a) A boundary of a freehold allotment, except that where the other property is a road, railway line or public open space the relevant boundary is boundary on the other side of that other property.

...