

Determination 2023/033¹

Regarding the compliance of, and decisions made by an authority in relation to, building work encroaching on to a neighbouring property

54 Moncks Spur Road, Redcliffs, Christchurch

Summary

This determination considers compliance of building work that encroached across the boundary between two properties with Building Code Clauses B1 *Structure*, B2 *Durability* and C3 *Fire affecting areas beyond the fire source*. The determination also considers the authority's decisions to grant the original building consent, an amendment to that consent, and subsequent issue of the code compliance certificate, and the authority's alleged failure to issue a notice to fix.

¹ This determination is subject to a clarification under Section 189 of the Building Act 2004. The determination was originally issued on 10 November 2023. The clarification amends paragraph 6.70, adding footnote 45.

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. Information about the legislation, as well as past determinations, compliance documents (eg Acceptable Solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matters to be determined

- 1.1. This is a determination made under due authorisation by me, Peta Hird, Principal Advisor Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.²
- 1.2. The parties to the determination are:
 - 1.2.1. P Bowden and H Petrovic, the owners of the property at 54 Moncks Spur Road (“the owners”) who carried out the building work
 - 1.2.2. A Falloon, the owner of the property at 56 Moncks Spur Road and who applied for this determination (“the applicant”)
 - 1.2.3. B Corbett, who was the licensed building practitioner concerned with the relevant building work at the time the work was carried out (“the builder”)
 - 1.2.4. Christchurch City Council, carrying out its duties as a territorial or building consent authority (“the authority”).
- 1.3. I have included M Roche (“the project manager”) as a person with an interest in this determination, as the project manager in relation to the building work.
- 1.4. I have also included A Lind (“the engineer”) as a person with an interest in this determination, as the chartered professional engineer who designed the driveway and parking bay, the reinforced concrete block retaining wall, and parts of the timber vehicle deck structures, and undertook some construction monitoring.
- 1.5. I have consulted with Fire and Emergency New Zealand as required under section 170 for those matters that concern fire safety.
- 1.6. This determination arises as a result of building work carried out to remediate damage to elements of an existing concrete driveway and parking bay, retaining

² The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

wall, and a timber vehicle deck at 54 Moncks Spur Road (“the owners’ property”) as a result of the Canterbury Earthquake Sequence³.

- 1.7. Elements of the building work to construct the concrete driveway and parking bay, concrete block retaining wall, and timber vehicle deck were carried out across the boundary onto the applicant’s property at 56 Moncks Spur Road (“the applicant’s property”). The applicant disputes the compliance of the building work with certain clauses of the Building Code, and some of the authority’s decisions in respect of this work.
- 1.8. The matters to be determined are:
 - 1.8.1 Compliance of the as-built concrete driveway and parking bay, concrete block retaining wall, and timber vehicle deck with Building Code Clauses B1 *Structure*, B2 *Durability* and C3 *Fire affecting areas beyond the fire source* (under section 177(1)(a)).
 - 1.8.2 The authority’s decision to grant building consent BCN 2015/2452 (“the building consent”) for the building work (under section 177(1)(b) and (2)(a)).
 - 1.8.3 The authority’s decision to grant the third amendment to the building consent (under section 177(1)(b) and (2)(a)).
 - 1.8.4 The authority’s decision to issue a code compliance certificate in respect of the building work carried out under the building consent (under section 177(1)(b) and (2)(d)).
 - 1.8.5 The authority’s alleged failure to issue a notice to fix when it was identified that the building work encroached on the applicant’s property (under section 177(1)(b) and (2)(f)).
- 1.9. In making this determination, I have taken into account all of the information and submissions provided by the parties and persons involved in the determination.⁴

Issues outside this determination

- 1.10. I have not considered any other aspects of the building work covered by the building consent and the other amendments to the consent. This determination is limited to the building work related to the concrete driveway and parking bay,

³ The Canterbury Earthquake Sequence includes the Darfield Earthquake of 4 September 2010 with moment magnitude of 7.1, followed by a series of aftershocks that included a 6.3 magnitude earthquake on 22 February 2011.

⁴ As I am required to do, in terms of section 186(1)(c) and (5).

retaining wall, and timber vehicle deck that encroached onto the applicant's property.

- 1.11. Submissions by the applicant include references to matters relating to the Resource Management Act 1991. I have no jurisdiction under other enactments and this determination considers only matters relating to the Act and its regulations.
- 1.12. The applicant has also raised issues related to how the authority performed its duties when it exercised its powers in making decisions. Issues related to how the authority performed its duties and functions are not within the scope of matters that can be determined under section 177. The complaints procedures in the Act are the appropriate mechanism for allegations that an authority has failed, or is failing, without good reason to properly perform its statutory functions, or has been negligent in performing those functions.⁵ It is not the function of a determination to consider an authority's general processes and procedures, or to review how it reached certain decisions. Rather, a determination considers, in a particular case, the information and evidence available in order to determine whether the relevant legislative criteria are satisfied. For example, regarding an authority's decision relating to a building consent, whether the requirements of section 49(1) are met.
- 1.13. There are a number of existing building elements that were over the boundary between the two properties prior to the building work being undertaken that is subject of this determination. Those existing elements included parts of the original timber vehicle deck and retaining wall structures. It is unclear when some these were first constructed, albeit the timber vehicle deck is included on plans from 1983. Regardless, the legal status of these existing encroachments is not discussed in this determination as they are not within the scope of the building work associated with the building consent in this case. References to these existing elements over the boundary are included in this determination for context only.
- 1.14. The applicant has requested the determination comment on section 75, which deals with construction of a building on land that is comprised "of 2 or more allotments of 1 or more existing subdivisions". However, as the properties at

⁵ Sections 200-203C govern the Chief Executive's disciplinary powers in relation to complaints. Section 201 sets out the grounds for disciplinary action that can be the subject of a complaint made under section 202.

54 and 56 Moncks Spur Road are not held by the same owner, section 75 has no application in this case.⁶

1.15. The applicant also raised other issues that have not been considered in the determination because they fall outside the scope of the determination or are not relevant to the matters to be determined. These issues include:

1.15.1 Compliance with Clause F4 *Safety from falling*. This was not a matter for determination that was confirmed with the applicant.⁷

1.15.2 Whether the authority, in its capacity as a territorial authority, was required to issue a section 37 certificate when the necessity for a resource consent was not established at the time of the original building consent application.⁸ The exercise of a power of decision by a territorial authority under section 37 is not a matter for determination under section 177(3).

2. The building work

2.1. The owners' property is a steeply sloping hillside site. The main part of the site that contains the building is located down a driveway adjacent to the south-west boundary of the property. The south-west boundary of the property is the boundary with the applicant's property.

2.2. The building on the owners' property is an existing four-storey dwelling. The dwelling has a garage at the upper level (fourth storey) of the dwelling with an external timber vehicle deck and concrete parking bay and driveway areas. A series of timber retaining walls support the building platform for the dwelling.

2.3. Access to the owners' property is via a sloping concrete driveway to the south-west of the property. At the end of the driveway adjacent to the timber vehicle deck, there is a reinforced concrete parking bay. The timber vehicle deck provides access from the concrete parking bay to the garage. See figure 1.

⁶ Section 75(b) requires that the "allotments are held by the owner in fee simple" for section 75 to apply. The interpretation that section 75 applies only where the same owner owns both allotments was discussed in Determination 2017/015 Regarding the grant of a building consent across two allotments (13 March 2017) at paragraph 5.3.12.

⁷ As per correspondence from MBIE to the applicant on 3 March 2021 and 9 September 2021 confirming the matters to be determined and acknowledged by the applicant by email on 19 October 2021.

⁸ Section 51(1)(b)(iii) provides "A building consent must have attached to it a copy of a certificate issued under section 37 (if any)". A resource consent was not issued until after the date the building consent and its amendments were granted.

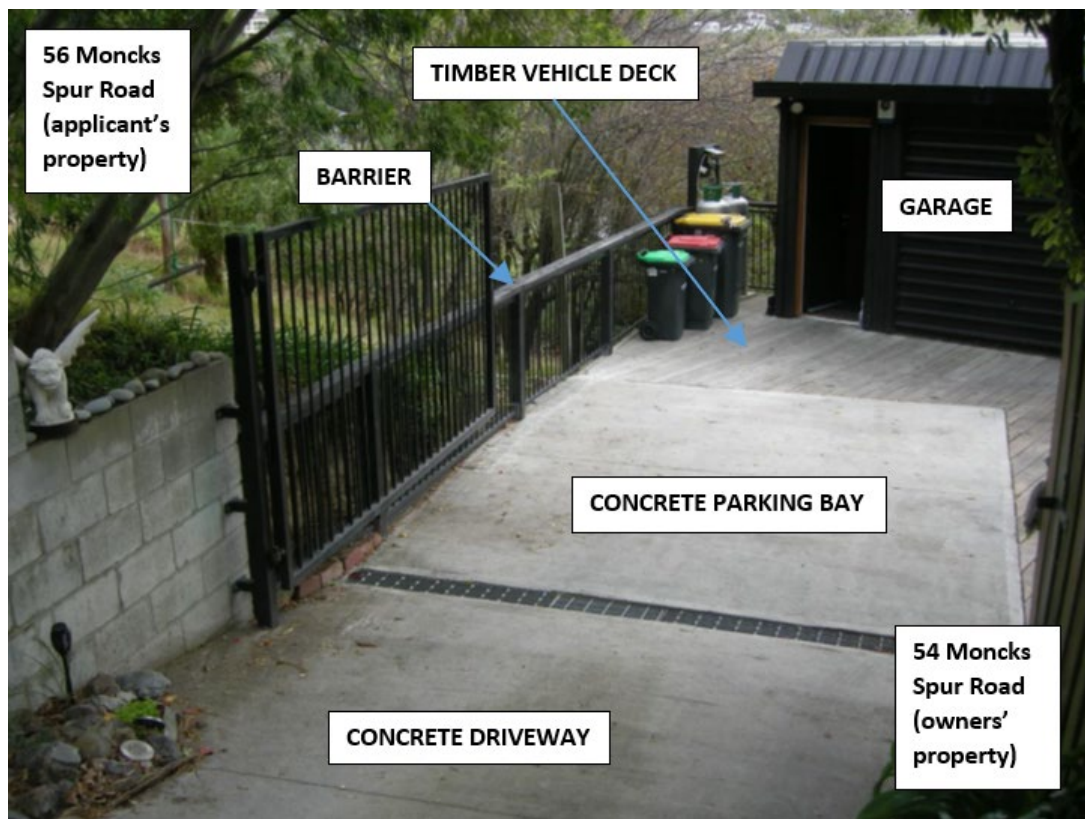


Figure 1: View looking north at 54 Moncks Spur Road

- 2.4. The building work described in the building consent included substantive work to the main building envelope of the dwelling, some internal alterations and works to the timber retaining walls supporting the building platform.
- 2.5. The building work that is the subject of the determination concerns only:
- 2.5.1 the replacement of part of the concrete driveway, the parking bay, and concrete block retaining wall under the parking bay, and associated earthworks⁹
 - 2.5.2 the repair and reinstatement of the timber vehicle deck as a result of the installation of new structural steelwork
 - 2.5.3 construction of the barrier along the edge of the concrete parking bay and timber vehicle deck.

⁹ The parties and persons involved in this determination have referred to the driveway and/or the parking bay as a combination of concrete slab and driveway. I have used the labels as shown in figure 1.

- 2.6. With respect to the driveway, the northern part that abuts the concrete parking bay was replaced with a reinforced concrete slab 150 mm thick x 5700 mm long x 2400 mm wide. Refer to figure 2.
- 2.7. The boundary line shown in Figures 2-6 is included in the determination for the purpose of describing the building work. It is indicative only, and is not intended to be an accurate representation of the property boundary for other purposes.
- 2.8. The concrete parking bay was replaced with a new reinforced concrete slab. This varies in both width and thickness, and is approximately 5.2m long. The north-east and north-west sides of the concrete parking bay were supported by reinforced concrete block retaining walls a maximum 1.6m high on reinforced concrete foundations. Fixed near to the top of the walls, and anchored into the edge of the concrete parking bay, are 200mm deep steel channels (visible in figure 5). The channels formed part of the overall specific engineering design for the steelwork installed to strengthen the dwelling in conjunction with some new reinforced concrete foundations.

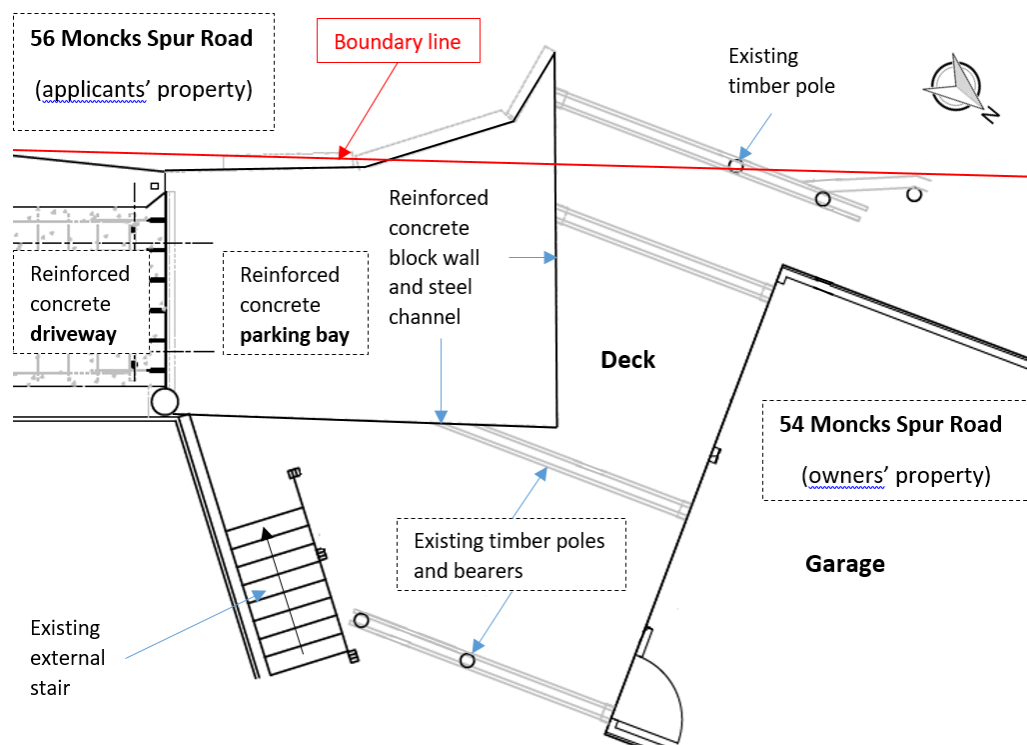


Figure 2: Plan of deck, driveway, parking bay and garage (not to scale)

- 2.9. Parts of the existing vehicle timber deck were removed so new structural steelwork could be installed below the level of the deck. The original intention was that the timber building elements were to be reinstated. However, during the course of the building work, it became apparent that some of the timber elements (ie decking, joists and beams) showed signs of decay and needed to be replaced. This building work was subject to a specific engineering design by a chartered professional engineer.
- 2.10. After construction had commenced, it was discovered that some elements of the building work to the concrete driveway, concrete block retaining wall, and timber vehicle deck had been carried out across the boundary on the applicant's property (refer to figure 2). This was a relatively discrete and proportionately small amount of the building work in the building consent. Further building work was then carried out to alter and remove some of those elements. Refer to figures 3 and 4.

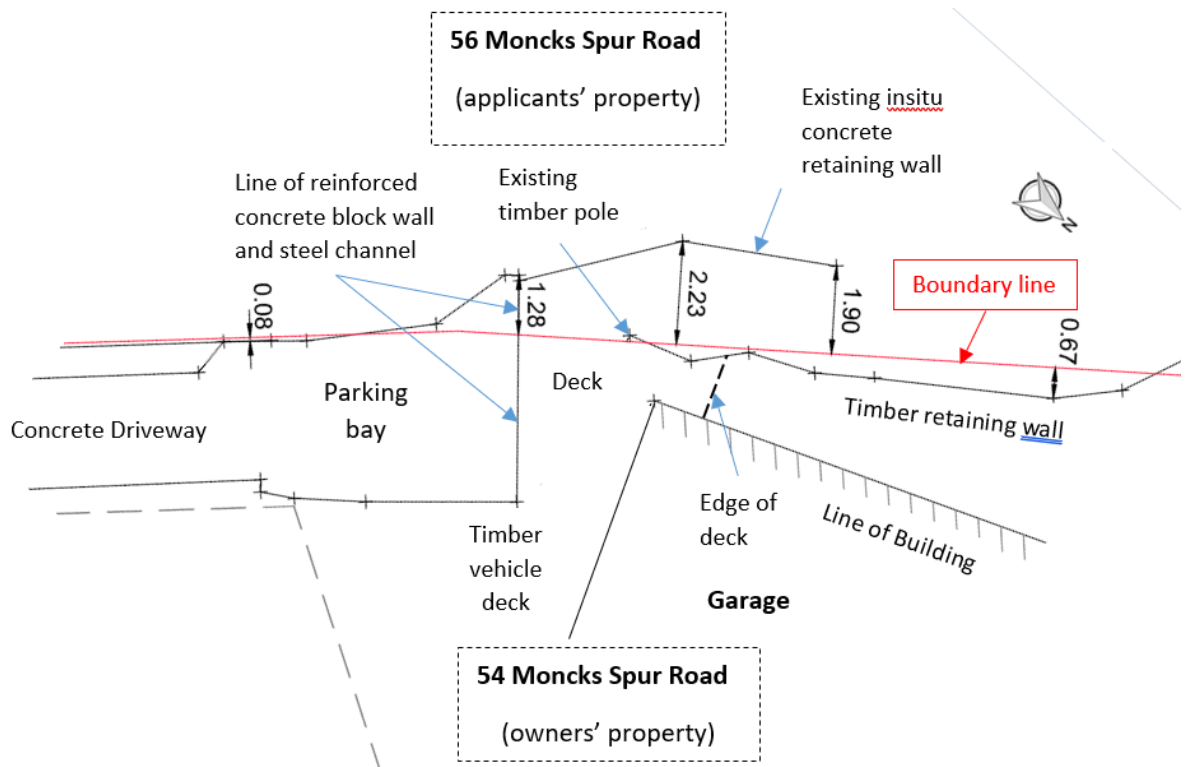


Figure 3: Extract from survey plan showing measurements to the boundary (not to scale)¹⁰

¹⁰ Figure 3 has been reproduced (in part) from survey plan 300 issue A, dated February 2016. Distances relative to the boundary are in metres.

- 2.11. Alterations made to remove part of the south-west corner of the timber vehicle deck that had encroached on the applicant's property and reconfigure the barrier were the subject of the third amendment to the building consent (see figure 4).
- 2.12. The alterations made to remove part of the west corner of the concrete parking bay that had encroached on the applicant's property were carried out as a minor variation to the building consent.¹¹ This building work included the installation of new specific engineer designed 100mm diameter grout filled steel piles (see figure 4). Although part of the concrete parking bay that was over the boundary has been removed, a portion remains on the applicant's property along with the reinforced concrete block retaining wall and steel channel (see figures 5 and 6).

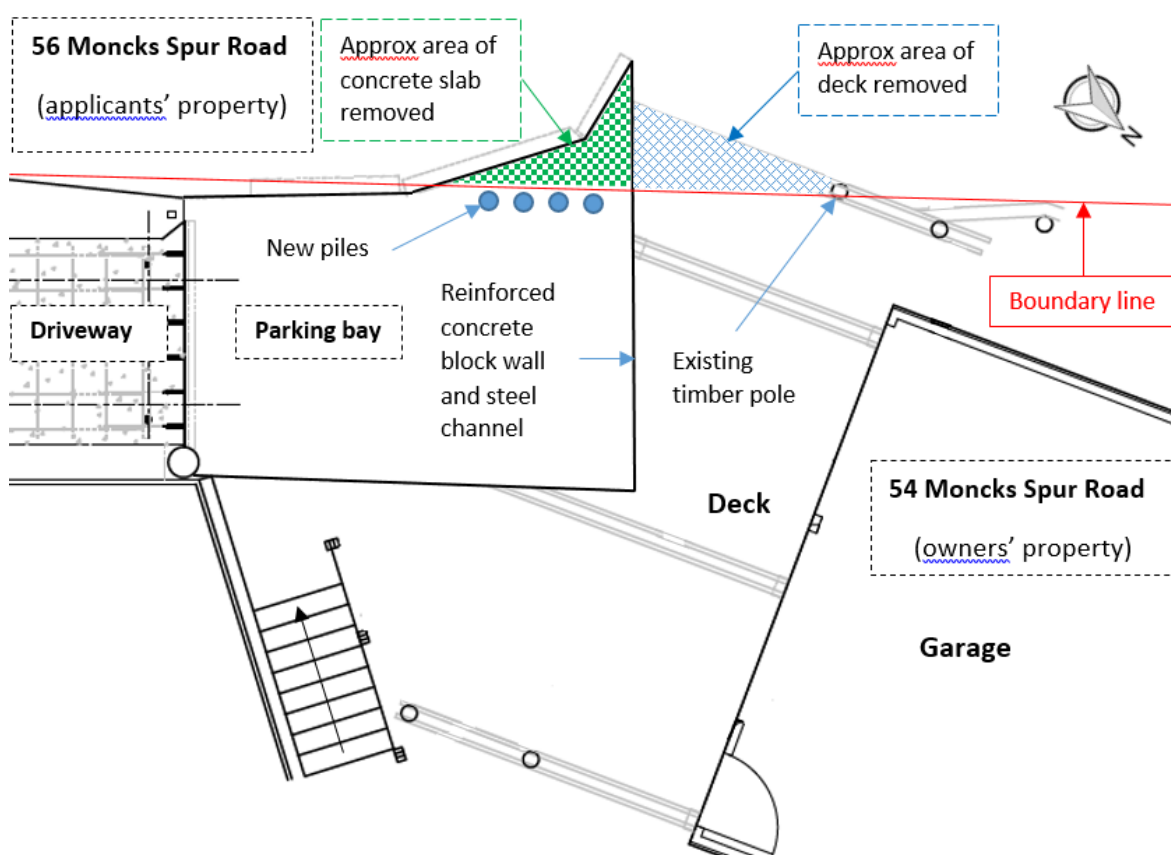


Figure 4: Plan indicating areas of deck and concrete slab removed (not to scale)¹²

¹¹ Sections 45(4)(a) and 45A.

¹² Figure 4 has been reproduced (in part) from building consent plan S9 of 15 dated 16 March 2015.



Figure 5: View looking south at encroachments over boundary

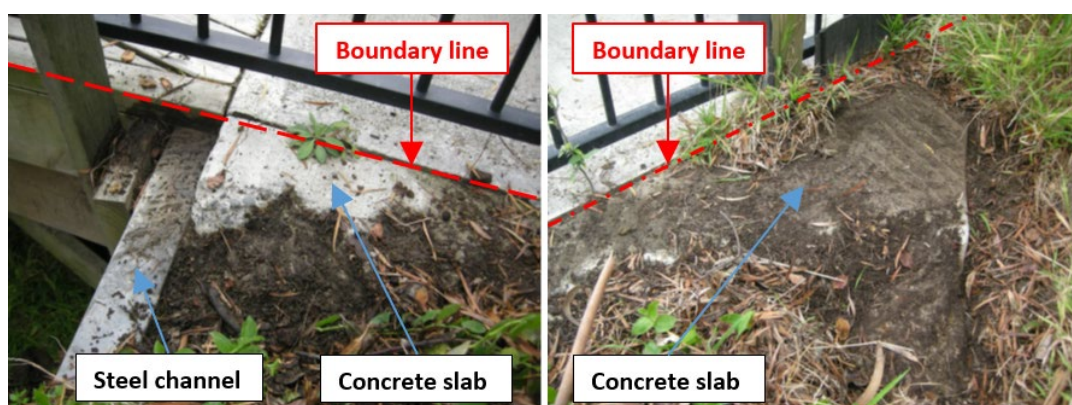


Figure 6: View from 56 Moncks Spur Road looking down onto concrete slab encroachments

3. Background

3.1. The authority received an application for a building consent for earthquake repairs and alterations to the dwelling in March 2015. The documentation provided to the authority as part of the application for building consent, and during the period that the application was being processed by the authority, included:

- 3.1.1 plans, specifications and calculations for the proposed building work
- 3.1.2 a design features report prepared by an engineer, dated 7 April 2015, provided to the authority on 15 April 2015 in response to a request for further information from the authority

- 3.1.3 a Producer Statement – Design (“PS1”) for the structural design work, dated 17 March 2015
- 3.1.4 an earthquake inspection report, prepared by another chartered professional engineer, reporting on the structural condition of the property, dated 28 March 2011.
- 3.2. On 4 August 2015, the authority granted building consent BCN/2015/2452 (“the building consent”).¹³ As a condition of the building consent, construction monitoring was to be carried out by the engineer with inspections required for pile driving, demolition, pre-pour, pre-line, excavation, and straightening of the dwelling.
- 3.3. The owners applied for two amendments to the building consent, as the building work progressed on site. These amendments were not related to the matters to be determined in this case and are not discussed further in this determination.
- 3.4. Between 17 September 2015 and 26 April 2016 the engineer conducted several site inspections of the building work.¹⁴
- 3.5. On 30 November 2015 and 4 December 2015 the authority carried out inspections for the pre pour foundation and block work construction respectively. Both inspections are recorded as having passed.¹⁵
- 3.6. On 7 March 2016, the applicant wrote to the authority advising that a report from a registered surveyor showed that some of the building work being carried out by the owners encroached over the boundary onto the applicant’s property.
- 3.7. The authority subsequently contacted the engineer requesting that the owners contact the applicant to resolve the situation. The authority advised the applicant that no further inspections would be carried out until the issue had been resolved. The authority’s records show further correspondence about the issue between the authority and owners and their representatives, and between the authority and the applicant during the course of 2016 and 2017.

¹³ The Ministry received copies of plans stamped as approved on 14 April 2015 in the building consent file, which I note preceded the date of issue of the Building Consent (in form 5 of the Building (Forms) Regulations 2004) on 4 August 2015.

¹⁴ The inspections conducted by the engineer included ‘pre-pour’ for the concrete foundations, blockwork, and driveway slab, as well as other inspections of the timber deck, and structural steelwork.

¹⁵ I have not received copies of the authority’s inspection records dated 30 November and 4 December 2015. However, the authority has provided a list of files associated with the building consent which include references to these inspections and the decisions reached by the authority.

- 3.8. On 3 May 2016, the engineer issued a Producer Statement – Construction Review (“PS4”) with respect to the inspections and construction monitoring carried out in relation to the building work.¹⁶
- 3.9. On 9 August 2016, the authority wrote to the owners advising that the consented plans “do not demonstrate compliance with the Building Code because the building work extends over the boundary”. The authority noted the boundary was not shown on the consented plans. The authority stated that it “considers that the building work will not comply with Building Code Clause C – Fire where it encroaches on other property”. The authority required the owners to provide revised plans showing the true boundary lines and provide a compliant solution to remedy the effects of work located over the boundary.
- 3.10. In March 2017, the authority received a third application to amend the building consent (in part) with respect to the encroachment of the timber vehicle deck and concrete parking bay. The drawings submitted showed replacement of the timber decking joists and bearers, and a new (approximately 2m long) retaining wall at the end of the concrete driveway running parallel with the driveway (“the remedial wall”). As part of constructing the remedial wall, the works over the boundary were to be demolished. The application included a PS1 related to the remedial wall and timber vehicle deck, along with an accompanying plan titled “Retaining Wall Fix” showing the location of the building work in relation to the boundary.
- 3.11. On 15 May 2017, the engineer provided further information to the authority in response to a request for further information, noting that:
- 3.11.1 A 1.28m section of the replacement (concrete block) retaining wall was built across the boundary and needs to be removed, subject to agreement with the applicant.
- 3.11.2 The replacement of the timber vehicle deck was carried out under Schedule 1¹⁷. The deck elements were not damaged but rot was identified during the course of the building work and the “elements were replaced ‘like for like’ as a general maintenance item”.

¹⁶ The PS4 is dated 3 May 2016; however, it includes a reference to Producer Statement – Construction (PS3) dated 11 May 2018 (a copy of which has been provided to me). Therefore, it appears the date of the PS4 is a typographical error.

¹⁷ Schedule 1 sets out building work that is exempt from the requirement to obtain building consent – see sections 40-42A. There is conflicting information about whether this was identified as Schedule 1 work in the application for the third amendment.

- 3.12. On 2 June 2017, the engineer provided a further PS1, which referred to compliance with clause B1 for the “Retaining wall to deck area” and “New Timber Decking and joists”.
- 3.13. On 2 June 2017, the authority granted a third amendment to the building consent (“the third amendment”) in respect of the work described in paragraph 3.10. Additional engineering inspections were required as a condition of the consent, including for the foundation and blockwork for the remedial wall, and the completion of the timber vehicle deck and barrier.
- 3.14. Removal of the encroaching elements on the applicant’s property were only partially completed as the contractors were not permitted to carry out work on the applicant’s property.
- 3.15. On 24 May 2018, the authority approved a minor variation prepared by the engineer. The minor variation was in respect of the remedial wall to the boundary (approved in the third amendment, but which could not be constructed) and stated “In order to retain the edge of the section, a series of piles should be installed through the vehicle slab along the boundary.” Additional details and a PS1 were included with the minor variation documentation.
- 3.16. Final inspections were carried out by the authority on 29 May 2018. The inspections are recorded as having passed.
- 3.17. On 29 May 2018, the authority received an application for a code compliance certificate from the project manager on behalf of the owners.
- 3.18. The code compliance certificate was issued by the authority on 13 August 2018.

4. Submissions

Applicant

- 4.1. With respect to compliance with the Building Code, the applicant submitted:
 - 4.1.1 The structures that encroached across the boundary are the parking bay and (concrete block) retaining wall structure, the timber vehicle deck and the timber pole. The consented drawings do not clearly show the boundary line, and this is a minimum requirement of a building consent application. As the existing structure was so close to the boundary, the boundary should have been confirmed before the new building work was carried out.

- 4.1.2 The plans for the third amendment do not accurately show the boundary and the parts of the structures that were not located on the owners' property.
 - 4.1.3 Any encroaching structure will not comply with the Building Code with respect to spread of fire.
 - 4.1.4 The authority had acknowledged that the building work carried out in the applicant's property did not comply with the Building Code, and it follows therefore that what remains on the applicant's property still does not comply.
 - 4.1.5 Even though the building work was replacing an existing structure, which was an unconsented structure, the new building work must comply with the Building Code. Compliance with section 112 or Schedule 1 (which deal with alterations to existing buildings and building work that does not require consent respectively) do not mean that new or replacement building work does not need to comply with the Building Code.
 - 4.1.6 The removal of part of the encroaching concrete block retaining wall would expose significant issues of drainage and bank stability. An engineering plan to address this should have been prepared and this would have allowed the removal of the encroaching structure.
- 4.2. With respect to the authority's decisions to grant the building consent and third amendment, and issue the code compliance certificate, the applicant submitted:
- 4.2.1 The authority had not considered whether the building work complies with the Building Code when it made its decisions to grant the building consent and the third amendment and issue the code compliance certificate.
 - 4.2.2 The authority had incorrectly granted the building consent as it should have been identified based on the plans that there was an issue with the building work not being within the boundary of the owners' property.
 - 4.2.3 The authority's inspections should check the details and location of the building work on the plans is correct.
 - 4.2.4 The building work associated with the third amendment had not been correctly checked and the conditions have not all been met. A survey certificate, Producer Statement – Construction ("PS3"), PS4 and engineering inspection records have not been provided.

- 4.2.5 The third amendment included work to be carried out on the applicant's property. As part of the proposed building work was not on the owners' property, the building consent for this work should not have been granted.
- 4.3. With respect to the authority's alleged failure to issue a notice to fix for the building work, the applicant submitted that the authority should have issued a notice to fix at the time it became aware that work had been carried out on the applicant's property or within 1m of the property boundary "without the required fire protection qualities as prescribed by [clause] C3.7".
- 4.4. The applicant seeks a notice to fix to be issued to the owners to remove the encroaching work, or work built within 1m of the boundary that the applicant contends does not comply with clause C3.7.
- 4.5. In response to the expert's report (see below from paragraph 5.1), the applicant submitted:
- 4.5.1 The expert incorrectly stated that the majority of the concrete parking bay across the boundary has been removed, however, most of it remains across the boundary.
- 4.5.2 The expert stated the building work complies with clause C3. This contradicts the authority's letter to the owners on 9 August 2016. The expert also does not comment on the fact that the authority did not assess and identify the non-compliances through the consenting process.
- 4.5.3 Replacement of building elements is new building work and is required to comply with the Building Code. Schedule 1 does not provide for replacement of illegal building work that is not compliant. While the timber vehicle deck, driveway and parking bay are replacements for existing items, the elements are all new building work and must comply with the Building Code.
- 4.5.4 The construction of the new driveway and parking bay slab are not comparable, as these are completely new and are larger structures than existed prior to the building work being carried out.
- 4.5.5 The timber vehicle deck and parking bay is not likely to protect other property as it is closer than the typically permitted 1m from the boundary.

- 4.5.6 The solution in paragraph 5.1.1 of Acceptable Solution C/AS1 current at the time the building consent was issued requires all elements including outbuildings to have a fire resistance rating (FRR) of 30/30/30, which would include a timber vehicle deck and driveway.¹⁸ The timber vehicle deck is a structure and has comparable elements to carports or other structures with roofs.
- 4.5.7 The means of escape should have been considered as part of the overall alteration to the building. The driveway and timber vehicle deck are part of the escape path.
- 4.5.8 The expert incorrectly stated there were no other encroachments. The 140mm thick concrete block wall was not part of the original driveway construction. The concrete foundations and rebar encroach onto the applicant's property.

Owners

- 4.6. The owners disputed various statements made by the applicant in relation to the background and building work. The owners are of the view that the building work meets the requirements of the Building Code. The owners rely on the documentation provided to the authority on their behalf by the project manager, builder and engineer.

Authority

- 4.7. With respect to compliance with the Building Code, the authority submitted:
- 4.7.1 It accepts that part of the replacement concrete block retaining wall is on the applicant's property. However, the structure performs independently from the structures on the owners' property and complies with the Building Code.
- 4.7.2 It does not have the ability to require the owners to remove the structure and carry out work on the applicant's property as the owners do not have an automatic right to enter the applicant's property.
- 4.7.3 The building work to the timber vehicle deck is within the boundaries of the owners' property and complies with the Building Code to at least the same extent as prior to the work commencing.

¹⁸ C/AS1 Acceptable Solution for Buildings with Sleeping (residential) and Outbuildings (Risk Group SH). Amendment 3, effective from 1 July 2014. Refer to page 10 for a definition of fire resistance rating.

- 4.7.4 The poles and part of the timber vehicle deck structure are existing. Section 112 applied, and these elements are required to comply to the same extent as before the building work commenced. This included the fact that the existing poles are across the boundary. As first constructed under the building consent, the timber vehicle deck extended over the boundary. This was required to be remedied and was done so with a minor variation to the building consent.¹⁹
- 4.8. Regarding the decisions to grant the building consent, the third amendment, and issue the code compliance certificate, the authority submitted:
- 4.8.1 The building work shown in the building consent application is within the bounds of the existing building envelope. The plans did not indicate that part of the existing building extended across the boundary to the applicant's property and had done since the early 1980s.
- 4.8.2 The building work covered by the minor variation to the building consent, and therefore the code compliance certificate, is within the boundaries of the owners' property.

Project manager, builder, and engineer

- 4.9. The project manager, builder, and engineer provided a joint submission, stating:
- 4.9.1 The owners' property had significant earthquake damage. The retaining wall existing at the time had structurally failed in the earthquake, with a permanent rotation that resulted in the timber vehicle deck pushing against the top of the dwelling, and it had potential to be subject to further rotation and movement that could lead to collapse.
- 4.9.2 A relatively complex repair was identified for the property. The first and critical stage was to replace the failed retaining wall and vehicle deck with new structures to comply with current Building Code requirements.
- 4.9.3 The assumption was made at the time of the building consent application that the existing retaining wall and timber vehicle deck were within the boundaries of the owners' property.
- 4.9.4 A boundary survey was commissioned by the applicant approximately four months after the retaining wall repair work had begun. A new

¹⁹ The minor variation remedied the encroachment of part of the concrete parking bay; encroachment of the timber vehicle deck was remedied by the third amendment.

concrete block retaining wall had been reinstated and the construction of the new timber vehicle deck was underway.

4.9.5 As a result of the survey, the timber vehicle deck was redesigned and constructed so it would no longer encroach on the applicant's property.

4.9.6 The parts of the concrete parking bay and concrete block retaining wall that encroached were not able to be removed as the applicant sought geotechnical and structural engineering design solutions to address possible stormwater control issues.

4.9.7 An "additional piled retaining wall" was designed and constructed within the owners' property to allow the concrete block retaining wall to be vertically cut on the boundary so there was no longer structural dependency between the deck and house support and the section of concrete block retaining wall on the applicant's property.

4.10. The project manager also submitted:

4.10.1 The encroaching structure is concrete and therefore there is a low probability of fire spread across the boundary.

4.10.2 The boundary was not identified as there was no natural or man-made boundary between the properties that clearly identified that existing structures were encroaching.

4.10.3 There were two existing encroaching structures. The first was the pole for the deck structure, which remained in-situ with no building work carried out to it. The second was the concrete parking bay and concrete block retaining wall. These were replaced, as new building work, but in the same position as the original parking bay and retaining wall.

4.10.4 Significant design and construction work was undertaken by the owners to separate the structures along the boundary after the encroachment was identified.

Draft determination and submissions in response

4.11. A draft of this determination was issued to the parties and persons with an interest on 21 April 2023. The draft determination:

4.11.1 concluded the building work complied with clauses B1, B2 and C3

- 4.11.2 concluded the authority's decisions in relation to the building consent, third amendment and code compliance certificate were incorrect, however the authority had not failed to issue a notice to fix
 - 4.11.3 proposed not to confirm, reverse or modify the decisions to grant the building consent and third amendment
 - 4.11.4 proposed to reverse the decision to issue the code compliance certificate.
- 4.12. The Ministry received submissions in response to the draft determination as set out below. No responses were received from the builder or engineer.

Applicant's further submissions

- 4.13. The applicant did not accept the draft determination and provided submissions in response.
- 4.14. The applicant reiterated their earlier submissions and made the following additional points relevant to the matters for determination (in summary):
- 4.14.1. Compliance with clauses B1 and B2 was not demonstrated, including concerns about the vehicle loading on the timber vehicle deck.
 - 4.14.2. Clause C3 ensures fire does not spread to other property and this is why elements cannot be closer than 1m to the boundary (for residential properties in the acceptable solution) unless they are fire rated. Clause C3 is not limited to what encroaches onto the other property. Concrete is typically fire rated but timbers are typically combustible; "for any timber closer than 1.0m, [the authority] needed to prove that it was fire rated".
 - 4.14.3. The new building elements rest on an existing pole that encroaches on the applicant's property, and so that pole forms part of the building work.
 - 4.14.4. The building consent should be reversed or modified. In a building project that is close to the boundary, the authority should have identified this issue as likely to be relevant. The authority didn't request a building location certificate, nor did it ensure all boundaries were defined.
 - 4.14.5. The attempted removal of the encroaching building work contravened section 40.
 - 4.14.6. A notice to fix could have included that the owners had to negotiate with the applicant about how the work that was over the boundary could be carried out.

Owners' further submissions

4.15. The project manager provided a response to the draft determination on behalf of the owners and referring to the applicant's response:

4.15.1 The applicant is not correct that the driveway and retaining wall is serving a different structural purpose than it was originally. The original structure provided retention of the ground, gravity support for vehicles travelling over it, and lateral restraint to the upper section of the property. The building work reinstated what was there originally but to a higher level of structural performance.

4.15.2 The barrier was reinstated in compliance with section 112 to reinstate the extent and capacity of the barrier, and complies with clause B1.

4.15.3 Timber sections of the deck were replaced as they were found to have rotted and required replacement. However, this was not part of the building consent work but was identified during construction. Structural analysis was completed in accordance with the requirements of Table 3.1 in Australian/New Zealand Standard AS/NZS 1170.1:2002 *Structural design actions -Part 1: Permanent, imposed and other actions*²⁰ to show compliance with clause B1.

4.15.4 The encroaching timber pole is the original pole (pre-1980); it is not new building work and is no more structurally loaded following the building work than it was previously. However, removal of the pole would destabilise the other structures.

Authority's further submissions

4.16. The Ministry received a submission from the authority in response to the draft determination, stating:

4.16.1 The authority's understanding of the third amendment was that the work was to remove the parts of the building that extended across the boundary from the building consent. The authority had no ability to direct that work on the applicant's property be undertaken; that is a matter for the owners and applicant to arrange between themselves.

4.16.2 The building work under the third amendment made the owners' building structurally independent to the applicant's property, and made the

²⁰ AS/NZS 1170.1:2002, Table 3.1 is titled: 'Reference values of imposed floor actions'.

timber vehicle deck compliant within the owners' property. The code compliance certificate was issued on that basis.

4.16.3 If the code compliance certificate was to be reversed, there would be no building work that would need to be undertaken in order to reissue it. The authority considers reversing the code compliance certificate would therefore only be procedural, and there would only need to be a minor change to the wording on the approved plans and specifications. The same outcome could be achieved with a file note on the building consent file along with a copy of this determination.

4.16.4 The reversal of the building consent would not be appropriate where any non-compliance can be rectified, which has been the accepted approach in previous determinations.

Engineer

4.17. The Ministry sought clarification from the engineer regarding the vehicle loading on the timber vehicle deck. The engineer advised the timber deck design loading is based on Table 3.1 of AS/NZS 1170.1:2002, Type of activity "F Light vehicle traffic areas."

5. Expert's report

- 5.1. I engaged a Registered Architect to assist me in this matter ("the expert"). They visited the site on 18 May 2021 and provided a report dated 19 June 2021, which was sent to the parties. The photographs in Figures 1 and 6 were taken by the expert.
- 5.2. The expert identified the relevant building work as the replacement of the section of concrete driveway, the new in-situ concrete retaining wall, the replacement of horizontal timber rounds to the timber retaining wall, and the reinstatement of the timber vehicle deck.
- 5.3. The expert identified the encroachments, for the purposes of the determination, as being part of the concrete parking bay, concrete block retaining wall and steel beam. A portion of the concrete parking bay that encroached over the boundary had been removed.²¹

²¹ The expert also considered another encroachment raised by the applicant, and was of the opinion it was likely to have pre-existed the building work.

- 5.4. The expert inspected the timber vehicle deck and noted that the work to replace the timber decking, joists and bearers had been carried out, along with the cutting back and replacement of the timber deck and barrier so it was within the boundary of the owners' property.
- 5.5. The expert inspected the concrete parking bay and retaining walls and noted that new piles were installed along the boundary line, with most of the concrete parking bay that was constructed across the boundary removed.
- 5.6. The expert considered compliance with clause C3.7 with respect to "external wall as defined in clause A2, none of the building work has any element or component that is intended "to provide protection against the outdoor environment". Therefore, the concrete parking bay and the timber vehicle deck are not required to provide for the control of external spread of fire.

6. Discussion

- 6.1. The matters for determination concern:
 - 6.1.1 compliance of the building work with clauses B1, B2 and C3
 - 6.1.2 the authority's decisions in granting and issuing the building consent, the third amendment, the associated code compliance certificate, and in allegedly failing to issue a notice to fix.
- 6.2. The building work was found to have extended across the boundary between the owners' property onto the applicant's property; this became apparent after the original building consent was granted by the authority and the building work had commenced. There were some existing structures that encroached across the boundary before the building work commenced, but the legal status of these encroachments are outside the matters for determination.
- 6.3. I consider the following purposes and principles of the Act are relevant in this determination:
 - 6.3.1 Section 3(b): to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.
 - 6.3.2 Section 4(2)(i): the need to provide protection to limit the extent and effects of the spread of fire, particularly with regard to –

- (i) household units (whether on the same land or on other property);
and
 - (ii) other property.
- 6.3.3 Section 4(2)(j): the need to provide for the protection of other property from physical damage resulting from the construction, use, and demolition of a building.
- 6.3.4 Section 4(2)(q): the need to ensure that owners, designers, builders, and building consent authorities are each accountable for their role in ensuring that—
- (i) the necessary building consents and other approvals are obtained for proposed building work; and
 - (ii) plans and specifications are sufficient to result in building work that (if built to those plans and specifications) complies with the building code; and
 - (iii) building work for which a building consent is issued complies with that building consent; ...

Compliance with clauses B1 and B2

- 6.4. The first matter for consideration is whether the as-built work complies with clauses B1 and B2.
- 6.5. The applicant is concerned about the protection of their property in relation to work carried out over the boundary as well as vehicle loading on the timber vehicle deck.

6.6. Section 17 provides:

All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.

6.7. The objectives of clause B1 include “to protect other property from physical damage caused by structural failure.” Clause B2 requires that a building will continue to satisfy the other objectives of the Building Code.

6.8. The performance requirements for clause B1 include:

B1.3.1 Buildings, building elements and sitework shall have a low probability of rupturing, becoming unstable, losing equilibrium, or collapsing during construction or alteration and throughout their lives.

B1.3.6 Sitework, where necessary, shall be carried out to:

...

(b) Avoid the likelihood of damage to other property.

6.9. The relevant building work (ie the replacement of part of the concrete driveway and parking bay, a new reinforced concrete block retaining wall and foundation, installation of structural steelwork, and repair and alteration to the timber vehicle deck) is all subject to specific engineering design and is covered by PS1s and a PS4 issued by the engineer.

6.10. Determination 2012/023, with reference to the High Court in *Body Corporate 326421 v Auckland Council*, discussed the use and acceptance of producer statements by an authority making a decision under section 49.²²

6.11. Based on the judgment of the High Court, the Ministry’s guidance²³ and Engineering New Zealand’s guidance about producer statements²⁴, the determination found there was a non-exhaustive list of items that should be considered by in accepting a producer statement. With reference to that list of items, I note that in this case:

²² See Determination 2012/023 *Regarding the purported refusal by an authority to grant a building consent for proposed new timber retaining walls* (6 October 2021), and *Body Corporate 326421 v Auckland Council* [2015] NZHC 862.

²³ <https://www.building.govt.nz/projects-and-consents/apply-for-building-consent/support-your-consent-applications/producer-statements/> (accessed on 01/08/2022).

²⁴ Engineering New Zealand, Practice Note 1, Version 3, dated January 2014 ISSN 1186-0907, titled “Guidelines on Producer Statement.”

- 6.11.1. the producer statements were issued by a registered Chartered Professional Engineer, who held a current registration at the time the producer statements were issued
 - 6.11.2. the building work covered by the producer statements is within the practice fields of the engineer, namely structural and civil engineering
 - 6.11.3. the PS1s describe the building work with reference to plans and calculations, the assumptions, the means of compliance, are signed and dated by the engineer, and include the engineer's CPEng registration number and qualifications
 - 6.11.4. the engineer provided plans and calculations, and a design features report
 - 6.11.5. the PS1s provide recommendations for construction monitoring which was conducted by the engineer during the course of the building work
 - 6.11.6. the engineer conducted site inspections (refer to paragraph 3.4) and subsequently issued a PS4
 - 6.11.7. the PS4 describes the building work carried out with reference to the relevant plans and other relevant documentation, is signed and dated by the engineer, and includes the engineer's CPEng registration number and qualifications.²⁵
- 6.12. The applicant is of the view the PS1 is "limited to the seismic strength of the driveway slab". However, the extent of the specific engineering design detailed in the plans, specifications and PS1 indicate otherwise. For example, the plans referenced in the PS1 includes the design information for the steelwork beneath the timber vehicle deck, reinforced concrete foundations, retaining wall and driveway.
- 6.13. While the applicant has raised questions about the vehicular loading on the timber vehicle deck, no evidence has been presented indicating that the specific engineering design does not comply with clauses B1 and B2.
- 6.14. The applicant considers the timber vehicle deck was required to be designed for medium vehicle traffic.²⁶ The engineer confirmed that the deck was designed for

²⁵ The PS4 confirms the engineer had received copies of photographs of the building work provided by the builder, and a Producer Statement – Construction (PS3) from the sub-contractor who installed the 'micropiles' described in the minor variation to the building consent (refer to paragraph 3.14).

²⁶ AS/NZS 1170.1:2002, table 3.1 'Reference values of imposed floor actions', uniformly distributed action of 5 kPa.

light vehicle traffic in accordance with AS/NZS 1170.1:2002, Table 3.1 Type of Activity F²⁷, and I agree that light vehicle traffic is an appropriate loading for the vehicle deck in this case. I also note:

- 6.14.1. The deck has been altered to be substantially on the owners' property.
 - 6.14.2. The decking, joists, and bearers have been substantially replaced and were included in the engineer's PS1 dated 2 June 2017.
 - 6.14.3. Regarding the existing elements of the original construction that remain, such support poles, it is not clear what the design vehicle loading was in the original construction but I consider the original elements that remain will continue to comply to at least the same extent as they did prior (as required under section 112).
- 6.15. Taking into consideration the factors above, I am of the view there is a low probability of the deck rupturing, becoming unstable, losing equilibrium, or collapsing throughout its life (in accordance with performance clause B1.3.1).
- 6.16. Regarding clause B1.3.6, I note there would have been, at the least, site works carried out on the applicant's property associated with the construction of the concrete block retaining wall. That wall is now retaining land on the applicant's property and the ground was reinstated. I am of the view that as-built the concrete block retaining wall complies with clause B1.3.6. I note that had siteworks on the applicant's property not subsequently been retained by the concrete block retaining wall, I may have reached a different decision.²⁸
- 6.17. Regarding clause B2, I note that generally the building elements are what would be expected to achieve compliance with clause B2 by way of Acceptable Solution B2/AS1. For example, concrete slab strength is specified at 30MPa, as outlined in section 6 of New Zealand Standard (NZS) 3109:1997 *Specification for Concrete construction*, retaining wall half round timber members are specified to be H4 treated in line with table 1 of NZS 3602:2003 *Timber and wood-based products for use in building*.
- 6.18. I have also considered the site inspections conducted by the authority (refer to paragraph 3.5). The records provided by the authority suggest that it had reached decisions in respect of the building work as it progressed, and there appears to be no indication of non-compliance regarding clauses B1 and B2 related to the

²⁷ Specific Uses: Parking, garages, driveways and ramps restricted to cars, light vans, etc., not exceeding 2500 kg gross mass, uniformly distributed action of 2.5 kPa.

²⁸ See for example Determination 2014/024.

alterations to the deck, barrier, reinforced concrete foundations, blockwork and driveway.

- 6.19. In conclusion, I am of the view the building work that is the subject of this determination meets the performance requirements of clauses B1 and B2 of the Building Code.

Compliance with clause C3

- 6.20. The next matter I need to consider relates to compliance of the as-built work with Clause C3 *Fire affecting areas beyond the fire source* as it relates to the protection of other property.
- 6.21. The items of dispute are the timber vehicle deck near the boundary and the barrier along the edge of the concrete parking bay and timber vehicle deck.²⁹ (See figure 1.)
- 6.22. I note the applications for the original building consent and the third amendment did not indicate a proposed means of compliance with Clauses C1 to C6 *Protection from Fire*.
- 6.23. In a letter to the owners dated 9 August 2016, the authority stated it “considers that the building work will not comply with Building Code [Clause]...C – Fire where [the building work] encroaches **on other property**” [my emphasis].³⁰ The authority did not confirm which performance clauses they had considered; it simply stated “because the building work extends over the boundary without appropriate consideration”.
- 6.24. Regardless, I note the authority subsequently issued a code compliance certificate on 13 August 2018 for the work carried out under the amended building consent.
- 6.25. In a letter to the Ministry dated 10 October 2019, the applicant stated:

Relevant to the issue of the Amendment 3 to the Consent, and issue of the [code compliance certificate], the [authority has] not clarified how compliance with C3 (Fire Spread) of the Building Code has been achieved in this location. The [authority] could not simply reply upon “like for like” rights in this instance, as this structure was an unconsented structure previously, with no existing rights. It still

²⁹ In response to the draft determination, the applicant referred to the “timber elements above the concrete slab including the barrier”. The barrier is constructed of timber posts and top rail, with metal vertical rods and associated horizontal rails fixed to the timber posts.

³⁰ I note this comment was made prior to the authority’s decision to grant the third amendment to the building consent.

needs to comply with the Building Code even if it is replacing an existing structure.

6.26. The functional requirement clause C3.3 states,

Buildings must be designed and constructed so that there is a low probability of fire spread to other property vertically or horizontally across a relevant boundary.

6.27. I have considered compliance of the building work against each performance clause under C3. Refer to table 1:

Table 1: Assessment of compliance with performance clauses C3.4 to C3.9

Performance clause	Assessment of compliance
C3.4 – materials used for internal surface linings, floor surfaces, and suspended fabrics <i>Limit on application</i> <i>Clause C3.4 does not apply to detached dwellings...or outbuildings and ancillary buildings.</i>	Not applicable. Because of the limit on application, this clause does not apply to either the timber vehicle deck or the barrier.
C3.5 - <i>Buildings</i> must be designed and constructed so that <i>fire</i> does not spread more than 3.5 m vertically from the <i>fire source</i> over the external cladding of multi-level <i>buildings</i>	Not applicable. The deck and barrier do not incorporate any external cladding and are not multi-level buildings.
C3.6 – <i>Buildings</i> must be designed and constructed so that in the event of <i>fire</i> in the <i>building</i> the received radiation at the <i>relevant boundary</i> of the property does not exceed 30 kW/m ² and at a distance of 1m beyond the <i>relevant boundary</i> of the property does not exceed 16 kW/m ² .	Not applicable. Clause C3.6 refers to ‘buildings’, which includes the timber vehicle deck and barrier. The clause applies in respect of fire events ‘in the building’. In this case, I am of the view a fire cannot occur ‘in’ the open timber vehicle deck or barrier.

<p>C3.7 - External walls of buildings that are located closer than 1m to the relevant boundary of the property on which the building stands must either:</p> <p>(a) be constructed from materials which are not combustible building materials, or</p> <p>(b) ...</p> <p>(c) for buildings in Importance Levels 1 and 2, be constructed from materials that, when subjected to a radiant flux of 30 kW/m², do not ignite for 15 minutes</p>	<p>Not applicable.</p> <p>The timber vehicle deck does not have 'external walls'³¹ closer than 1m to the boundary with the applicant's property.</p>
<p>C3.8 – <i>Firecells</i> located within 15 m of a <i>relevant boundary</i> that are not protected by an automatic <i>fire</i> sprinkler system, and that contain a <i>fire load</i> greater than 20 TJ or that have a floor area greater than 5,000 m² must be designed and constructed so that at the time that firefighters first apply water to the <i>fire</i>, the maximum radiation flux at 1.5 m above the floor is no greater than 4.5 kW/m² and the smoke layer is not less than 2 m above the floor.</p>	<p>Not applicable</p> <p>The deck and the barrier are not 'firecells'³² because they are not an enclosed space.</p>
<p>C3.9 – <i>Buildings</i> must be designed and constructed with regard to the likelihood and consequence of failure of any <i>fire safety system</i> intended to control <i>fire</i> spread.</p>	<p>Not applicable.</p> <p>The design and construction of the timber vehicle deck and the barrier do not incorporate and are not in themselves a 'fire safety system'³³.</p>

6.28. In conclusion, I am of the view that performance clauses C3.4 to C3.9 do not apply to the timber vehicle deck and barrier in this case.

6.29. In response to the draft determination, the applicant stated:

The issue, under code clause C,...should address fire spread which is not limited to encroaching onto other property. It also must ensure fire does not spread to other property and this is why it also notes elements cannot be closer than 1.0m (in dealing with residential properties in the acceptable solution for code clause C3) unless they are elements that do not allow fire to spread to other property. It is not limited only to what encroaches onto the other property....

³¹ Refer Clause A2.

³² Refer Clause A2.

³³ Refer Clause A2.

The [authority] should have required that any element closer than 1.0m from the boundary were able to prove a fire resistance for more than the minimum 30-minute rating required for residential property separation.

6.30. An Acceptable Solution is only one means of establishing compliance with the provisions of the Building Code (section 23).³⁴ Paragraph 5.5 of C/AS1 provides for carports to have walls and roof with 100% unprotected area provided certain conditions are met, one of which is that at least two sides are completely open to the environment. Based on the consent drawings and the photographs provided by the expert, it appears that the timber vehicle deck does not meet this criteria.

6.31. Accordingly, I have considered the criteria under paragraph 5.1.1 of C/AS1 for fire resistance ratings, which states:

Where the building is not protected with a sprinkler system, external walls shall have an FRR of no less than 30/30/30 in the following circumstances³⁵:

- a) Outbuildings, single household units and attached side by side multi-unit dwellings where part of the external wall is less than 1.0m and less than 90° from the relevant boundary...The wall shall be fire rated to protect from both directions...

6.32. However, paragraph 5.1.1 of C/AS1 specifically concerns the fire resistance ratings of “external walls”. I have already noted the timber vehicle deck does not have external walls.

6.33. Turning now to the requirements of section 112:

- (1) A building consent authority must not grant a building consent for the alteration of an existing building, or part of an existing building, unless the building consent authority is satisfied that, after the alteration, -
 - (a) The building will comply, as nearly as is reasonably practicable, with the provisions of the building code that relate to

³⁴ *Acceptable Solution for Buildings with Sleeping (residential) and Outbuildings (Risk Group SH) for New Zealand Building Code Clauses C1-C6 Protection from Fire, Amendment 3, effective on 1 July 2014 until 30 May 2017; this was the version that was current when the original building consent was granted by the authority on 4 August 2015, albeit Amendment 4, effective on 1 January 2017 until 3 November 2021, was current when the third amendment to the building consent was granted by the authority on 2 June 2017.*

³⁵ Fire resistance rating (FRR). The term used to describe the minimum fire resistance required of primary and secondary elements as determined in the standard test for fire resistance, or in accordance with a specific calculation method verified by experimental data from standard fire resistance tests. It comprises three numbers giving the time in minutes for which each of the criteria structural adequacy, integrity and insulation are satisfied, and is presented always in that order.

- (i) means of escape from fire; ...
 - (b) The building will, -
 - (i) if it complied with the provisions of the building code immediately before building work began, continue to comply with those provisions; or
 - (ii) if it did not comply with the other provisions of the building code immediately before the building work began, continue to comply at least to the same extent as it did then comply.
- 6.34. From the evidence submitted by the parties there is no dispute that part of the timber vehicle deck, when it was first constructed, encroached onto the applicant's property.
- 6.35. The alterations to the timber vehicle deck included removing some of the existing building elements (decking, joists, and some bearers) and replacing those with comparable materials in the same place. The timber vehicle deck was then substantially re-configured to be within the owners' property, including the removal of a part of the deck that had previously encroached onto the applicant's property.
- 6.36. However, the supporting timber poles to the vehicle deck were not altered as a result of the building work. This means at least one pole remains as an encroachment over the boundary onto the applicant's property.³⁶
- 6.37. If those parts of the original deck that remain did not comply with the relevant performance requirements in relation to the protection of other property immediately before the building work began, they must only continue to comply at least to the same extent as they did then comply.
- 6.38. I have received no information to indicate the existing deck (prior to the building work commencing in 2015) was fire-rated when it was first constructed or since.³⁷ There is no other information that would suggest the new building work has affected the existing building elements to the extent that compliance with section 112(1)(b) is not met.

³⁶ The fact this encroachment existed prior to the building work in this case is not a matter for determination and has not been considered further (refer to paragraph 1.12)

³⁷ Records indicate that the dwelling was first constructed in approximately 1973, and the garage and vehicle timber deck were added in 1983, ie prior to the introduction of the Building Act 1991. Section 8 of that Act meant these were not required to be upgraded to meet the requirements of the Building Code when that Act came into force.

- 6.39. Regarding compliance of the building as a whole after the alterations carried out under the building consent, I am of the view the building will comply, as nearly as is reasonably practicable, with the provisions of the Building Code that relate to the means of escape from fire (section 112(1)(a)(i)).
- 6.40. As noted in paragraph 1.5, I have consulted with Fire and Emergency New Zealand on the issue of clause C3 and section 112; they advised they had no comments to make in relation to this matter.

The granting of the building consent

- 6.41. Having considered the compliance of the building work with the Building Code, the next matters for consideration are the decisions made by the authority. The first of the authority's decisions for consideration is whether the authority was correct to issue the building consent initially for the building work that included work carried out on the applicant's property.
- 6.42. The applicant is of the view that the building consent should not have been granted because the proposed building work included work on the applicant's property. However, the authority considers that the plans and specifications submitted as part of the building consent did not indicate that the existing retaining wall and timber vehicle deck were originally constructed across the boundary on the applicant's property. The project manager, builder, and engineer submitted that the assumption was made at the time of the building consent application that these existing structures were within the boundary of the owners' property.
- 6.43. Section 49 provides:
- A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the Building Code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.
- 6.44. Put another way, if the authority is satisfied on reasonable grounds that the proposed building work would comply with all the relevant provisions of the Building Code, the authority must grant a building consent for that work.
- 6.45. As discussed above, there is no dispute that part of the deck, when it was originally constructed, encroached onto the applicant's property.

- 6.46. Therefore as the building consent included work on a neighbouring property, I must consider whether the owners had the statutory right to apply for a building consent with respect to the work on the applicant's property.
- 6.47. Subpart 4 of the Act provides guidance on the responsibilities that various parties have in relation to building matters. Section 14B states it is the responsibility of the owner to "obtain any necessary consents..." and sections 42 and 44 specify the circumstances when the owner is required to discharge this responsibility by obtaining a building consent. "Owner" is defined in section 7, in relation to land and any buildings on the land, as including "the owner of the fee simple of the land".
- 6.48. The responsibilities of an owner are further reinforced by the list of requirements for a building consent application in section 45, which includes that an application for building consent must be in the prescribed form. The prescribed form, Form 2, of Schedule 2 to the Building (Forms) Regulations 2004, is required to be signed by the owner or an authorised agent of the owner.
- 6.49. These provisions make it clear that the regulatory system for controlling building work is predicated on the applicant for a building consent being either the owner of the land on which the building work is to be carried out, or an authorised agent of that owner.
- 6.50. No application for a building consent for the building work carried out on the applicant's property was made by either the applicant, as the owner of that land, or an authorised agent of theirs.
- 6.51. As such, the authority was unable to consider the building work under section 49. Therefore the authority was incorrect in its decision to grant the building consent in relation to the building work on the applicant's property. I have addressed below from paragraph 6.59 the question of whether the decision to grant the building consent should be confirmed, reversed or modified.

The granting of the third amendment

- 6.52. The next matter for consideration is the authority's decision to grant the third amendment to the building consent.
- 6.53. Based on the evidence provided by the parties, the encroachment of the existing retaining wall and timber vehicle deck only became apparent after the original building consent was granted by the authority and the building work had commenced.

- 6.54. The third amendment was to alter and substantially reconfigure the deck to address the encroachment. This included work to bring the footprint of the timber deck within the boundary of the owners' property. It was also proposed to remove part of the building work that was located on the applicant's property, for example, a section of the concrete block retaining wall.
- 6.55. Section 45(4)(b) states 'An application for an amendment to a building consent, must... be made as if it were an application for a building consent...'.
- 6.56. This means that, as for an application for a building consent, an application for an amendment to a building consent must be made by either the owner of the land on which the building work is to be carried out, or an authorised agent of that owner.
- 6.57. No application for an amendment to the building consent for the building work on the applicant's property was made by either the applicant, as the owner of that land, or an authorised agent of that owner.
- 6.58. As a result, the authority was unable to consider the building work under section 49. Therefore, the authority was incorrect in its decision to grant the third amendment in relation to the building work on the applicant's property.

Remedies in relation to the building consent and third amendment

- 6.59. A determination under section 177(1)(b) is in respect of an authority's decision. Section 188(1) provides that a determination must confirm, reverse, or modify that decision, or determine the matter to which it relates.
- 6.60. The applicant is of the view the authority's decision to grant the building consent and third amendment in this case should be reversed or modified. I have concluded that the authority's decisions to grant the building consent and third amendment were both incorrect, but it does not necessarily follow that those decisions should be reversed.
- 6.61. The District Court, in *Estate Properties Ltd v Hastings District Council*³⁸ stated "The Chief Executive's choice of remedy under s 188(1) is an exercise of discretion" and that it was open to the Chief Executive to not apply one of the positive steps

³⁸ [2021] NZDC 17000 at [21].

required by section 188(1)(a).⁽³⁹⁾⁽⁴⁰⁾ Further, the court took the view that declining to reverse a decision did not have the effect of confirming the decision.⁴¹

- 6.62. The granting of a building consent by an authority is a statutory decision authorising building work to be undertaken. I take the view that while the Chief Executive has the power to reverse the decision to grant a building consent (and an amendment to a building consent), there would need to be compelling reasons to do so.
- 6.63. The factors that may be taken into account when deciding whether a building consent should be reversed have been considered in previous determinations and by the District Court.⁴² Those reasons may include, but are not limited to:
- 6.63.1 the decision to issue the building consent was incorrectly made on the basis that the authority did not have reasonable grounds to be satisfied the provisions of the Building Code would be met
 - 6.63.2 the decision of the authority was not relied upon
 - 6.63.3 the building work cannot be made compliant with the Building Code, notwithstanding that it was built in accordance with the building consent.
- 6.64. I am of the view the following particular factors are relevant in deciding the remedies in this case:
- 6.64.1 The building work considered in this determination complies with the Building Code clauses B1, B2 and C3 to the extent required by the Act.

³⁹ The court dismissed an appeal against a decision of the Chief Executive that a code compliance certificate had been wrongly issued but declining to reverse the certificate (refer to Determination 2020/034 *Regarding the compliance of fire safety precautions in a motel* (16 December 2020).

⁴⁰ [2021] NZDC 17000 at [30].

⁴¹ [2021] NZDC 17000 at [29].

⁴² See Determination 2011/119 *The issue of building consents and code compliance certificates for three buildings on land that has subsided* (23 December 2011), paragraph 6.3.8; *Cooper v Tasman District Council* DC Nelson CIV-2009-042-116, 21 July 2010 at [26]-[43]. I note in Determination 2012/075 *Regarding the issue of a notice to fix and the amendment of a building consent for a 4-storey commercial building* (3 December 2012) at paragraphs 7.8.2-7.8.3 it was determined not to reverse a building consent that had been incorrectly issued for work on other property without the consent of the owners. The reasons for not reversing the consent included that the reversal would affect a number of other parties of whom only one had sought the reversal of the building consent, and the building work was not unsafe or non-compliant as it was a technical breach in terms of the alignment of the apartment walls with the unit title boundaries.

- 6.64.2 The building work carried out on the applicant's property was a relatively discrete and proportionately small amount of the building work covered by the building consent (refer paragraph 2.4).
- 6.64.3 The owners have relied on the building consent and the building work has been carried out (largely in accordance with the amended building consent).
- 6.64.4 The purpose of the third amendment and minor variation was to remove the building work that encroached on the applicant's property; some of that work has been undertaken but it is incomplete.
- 6.64.5 The implications for the owners of reversing the building consent and third amendment would be significant. This would result in all of the building work detailed in the building consent (not only the building work the subject of this determination) becoming unconsented work, meaning a code compliance certificate could never be obtained for it. As the District Court noted in *Cooper v Tasman District Council*⁴³, "...to reverse the consent entails the consequence that the house would have been built unlawfully ...".
- 6.64.6 In relation to the building work carried out within the owners' property, the plans and specifications associated with the building consent (including the third amendment and minor variation) would appear to require minimal (if any) changes to them.
- 6.65. In these circumstances, taking into account the above factors, I elect not to exercise any of the powers in section 188(1)(a) in relation to the decisions to issue the building consent and third amendment.

The issue of the code compliance certificate

- 6.66. Having considered the decisions to grant the building consent and the third amendment, the next matter for consideration is the issue of the code compliance certificate.
- 6.67. Section 92 requires an owner to apply for a code compliance certificate once the building work covered by the building consent is complete. It states:

92 Application for code compliance certificate

⁴³ DC Nelson CIV-2009-042-116, 21 July 2010 at [37].

- (1) An owner must apply to a building consent authority for a code compliance certificate after all building work to be carried out under a building consent granted to that owner is completed.

- 6.68. I have found that as the necessary permissions were not obtained in relation to the building work carried out across the boundary on the applicant's property, the authority was incorrect in its decisions to issue the building consent and the third amendment.
- 6.69. It follows that the owners were unable to apply for a code compliance certificate in respect of the building work carried out on the applicant's property, and therefore the authority's decision to issue the certificate was incorrect.
- 6.70. I note the authority is of the view there only needs to be a minor change to the wording on the approved plans and specifications, and the same outcome could be achieved with a file note on the building consent file along with a copy of this determination. However, this does not take into account the building work described in the building consent appears to be incomplete, which will need to be considered by the parties.^{44, 45}
- 6.71. Consequently, I consider it is appropriate to reverse the decision to issue the code compliance certificate.

The alleged failure to issue a notice to fix

- 6.72. The final matter for consideration is the authority's alleged failure to issue a notice to fix.
- 6.73. Section 164 provides for the issuing of notices to fix:

164 Issue of notice to fix

- (1) This section applies if a responsible authority considers on reasonable grounds that—
 - (a) a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent); ...

⁴⁴ I also note another encroachment was raised by the applicant. However, I have insufficient details on which to reach a conclusion about that, including whether that encroachment (if any) was as a result of the building work subject to this determination.

⁴⁵ The scope of the third amendment included the removal of the building work that was located on the applicant's property, as described in paragraph 6.54. I have not seen evidence of this work having been completed.

- (2) A responsible authority must issue to the specified person concerned a notice (a notice to fix) requiring the person—
 - (a) to remedy the contravention of, or to comply with, this Act or the regulations; ...

- 6.74. Section 163 defines a “specified person” for the purpose of issuing a notice to fix. A specified person includes the owner of a building, and the person carrying out or supervising the building work.
- 6.75. The applicant considers that when the authority became aware of the location of the building work on the applicant’s property, in March 2016, the authority should have issued a notice to fix regarding the building work already carried out.
- 6.76. For the authority to have issued a notice to fix, the authority would have needed to consider that a specified person was contravening or failing to comply with this Act or the regulations. The specified persons in this case were the owners and/or the people carrying out the building work.
- 6.77. The applicant points to the authority’s letter of 9 August 2016 (see paragraph 6.23) stating that the building work did not comply with the building code, and is of the view the authority should have issued a notice to fix at that point in time. However, I have found the as-built work does meet the performance requirements of clauses B1, B2 and C3 to the extent required by the Act.
- 6.78. Notwithstanding my decision in this determination regarding the granting of the building consent, a consent had been obtained for the building work and based on the evidence provided it appears the work was being carried out in accordance with that consent.
- 6.79. In response to the draft determination, the applicant stated “there was no allowance for...demolition in the building consent”, but evidence of “partial removal and attempted demolition” was apparent in May 2016. I am of the view that this building work (the portion of the concrete parking bay that encroached on the applicant’s property) was exempt under clause 31 of Schedule 1 of the Act, because the removal does not affect the primary structure of the building, or a specified system, or a fire separation.
- 6.80. Therefore, there was no contravention of or failure to comply with the Act or the regulations.
- 6.81. I acknowledge it is arguable that the owners contravened the Act and regulations in obtaining building consent in relation to building work on the applicant’s land without proper authorisation. However, even if there was a contravention of the

Act or regulations, the authority could not have specified a remedy that the owners could effect without the consent of the applicant (such as removal of the work over the boundary).

- 6.82. Section 164(2)(a) states that a notice to fix must require the specified person “to remedy the contravention of, or to comply with, this Act or the regulations”. An authority is unable to include a remedy in a notice to fix that is beyond the control of the specified person to effect.⁴⁶ Requiring building work to be carried out on another person’s property is dependent on the owner of that property agreeing to such work; if they did not agree then the specified person would be powerless to comply with the notice to fix.
- 6.83. An authority cannot require an owner, through a notice to fix, to reach agreement with a neighbour. In my view the notice to fix provisions in the Act are not the appropriate mechanism for dealing with issues of encroachment and property law such as arose in this case; these are civil matters for the respective owners.
- 6.84. The applicant has referred to comments in Determination 2022/026 that the remedies in a notice to fix needed to acknowledge the role of the neighbour in approving any work to be carried out on their property. This was because without the neighbour’s agreement to the work being carried out, the owner could not comply with the notice. I note those comments were not necessary to determine the matter in that case. However, I remain of the view that an authority is unable to include a remedy in a notice to fix that is beyond the control of the specified person to effect.
- 6.85. I consider that even if the test in section 164(1) for the issue of a notice to fix was met in this case, there was no remedy within the control of a specified person that the authority could have required in terms of section 164(2). Therefore, the authority did not fail to issue a notice to fix.

7. Decision

- 7.1. In accordance with section 188 of the Building Act 2004, I determine as follows:
- 7.1.1 The building work to construct the concrete driveway and parking bay, concrete block retaining wall, and timber vehicle deck complies with Building Code clauses B1 and B2.

⁴⁶ Refer to paragraph 5.9 of Determination 2022/026 *Regarding a notice to fix in respect of a demolished retaining wall* (30 November 2022).

- 7.1.2 The building work to the timber vehicle deck and barrier complies with Building Code clause C3 to the extent required by the Act.
- 7.1.3 The authority was incorrect in its decision to grant building consent BCN/2015/2452 in relation to the building work on the applicant's property. However, for the reasons set out at paragraphs 6.59-6.65, I elect not to confirm, reverse or modify that decision.
- 7.1.4 The authority was incorrect in its decision to grant the third amendment to building consent BCN/2015/2452 in relation to the building work on the applicant's property. However, for the reasons set out at paragraphs 6.59-6.65, I elect not to confirm, reverse or modify that decision.
- 7.1.5 The authority was incorrect to issue the code compliance certificate in relation to the building work on the applicant's property under building consent BCN/2015/2452. I reverse that decision.
- 7.1.6 The authority did not fail to issue a notice to fix for the building work carried out on the applicant's property when it was identified that the building work encroached on the applicant's property.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 7 December 2023

Peta Hird
Principal Advisor, Determinations