

Determination 2024/010

The decision to issue a notice to fix for sitework required to avoid the likelihood of damage to other property.

**16A, 16B and 16C Gilfillan Street, Blockhouse Bay,
Auckland**

Summary

This determination considers the authority's decision to issue a notice to fix for siteworks carried out on 16A, 16B and 16C Gilfillan Street. The notice was issued for non-compliance with Building Code Clause B1.3.6. in relation to the requirement to avoid likelihood of damage to other property, being 14 and 14A Gilfillan Street.



The legislation discussed in this determination is contained in Appendix A. 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 matter 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.¹
- 1.2. The parties to the determination are:
 - 1.2.1. the recipient of the notice to fix and the original owner² of 16 Gilfillan Street when the siteworks took place, Z Pu (“the owner”)
 - 1.2.2. the project manager responsible for supervising the building work and who (along with the owner) was issued with the notice to fix, A Yu (“the project manager”); is the applicant in this determination
 - 1.2.3. Auckland Council, carrying out its duties as a territorial authority or building consent authority (“the authority”)
 - 1.2.4. the owner of the neighbouring property at 14a Gilfillan Street, S Ranchhod (“the neighbour”)
 - 1.2.5. the owners of the neighbouring property at 14 Gilfillan Street, P and W Bradley (“the road-front neighbours”).
- 1.3. This determination arises from the authority’s decision to issue a notice to fix for siteworks associated with construction on the owner’s properties. The authority was concerned that the siteworks did not comply with Clause B1.3.6(b) with respect to avoiding the likelihood of damage to other property. The authority issued the notice to fix to the owner and project manager sometime after the alleged non-compliance of the siteworks had been addressed, yet the authority remained concerned about damage the works had alleged to have caused to the neighbouring properties.

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

² The property at 16 Gilfillan Street was subdivided into four Lots. The owner sold the properties of 16, 16A and 16B during the determinations process. The new owners are not considered to be parties to the determination under section 176 of the Act.

- 1.4. The matter to be determined, under section 177(1)(b) and (2)(f), is therefore the authority's decision to issue notice to fix NOT21526059 for siteworks associated with the construction of the new building platforms at 16 Gilfillan Street. In considering this matter, I must consider whether there was a breach of B1.3.6(b) at the time the notice was issued.

Matters outside this determination

- 1.5. The determination does not consider:
- 1.5.1. The compliance of the new retaining wall at 16A, 16B and 16C Gilfillan Street or the existing retaining wall at 14 and 14A Gilfillan Street.
 - 1.5.2. The compliance of the siteworks with B1.3.6 prior to the notice to fix being issued.
- 1.6. I have also not considered any other aspects of the Act or of the Building Code, nor have I considered the Building Code compliance of the other building work covered by the building consent, other than as required to determine the matter.

2. The building work



Figure 1: Aerial view of 14A and 16 Gilfillan street

- 2.1. Prior to development, the owner's property was a large section with a single dwelling located towards the road front.

- 2.2. The owner applied to develop the site, demolishing the existing dwelling and creating four new lots within the original property. The authority pre-allocated new addresses for these properties on 3 August 2020, as follows:
- LOT 1 DP 534687 – 16 Gilfillan Street (“Lot 1”)
 - LOT 2 DP 534687 – 16A Gilfillan Street (“Lot 2”)
 - LOT 3 DP 534687 – 16B Gilfillan Street (“Lot 3”)
 - LOT 4 DP 534687 – 16C Gilfillan Street (“Lot 4”).
- 2.3. In 2019, the authority issued two building consents to build four new dwellings on the lots:
- BCO10279044 relating to 16 and 16A Gilfillan Street (Lot 1 and Lot 2), which included a ‘Proposed retaining wall’ within Lot 2
 - BCO10282271 relating to 16B and 16C Gilfillan Street (Lot 3 and Lot 4), which included ‘New retaining walls’ within Lots 3 and 4.
- 2.4. The building work under both consents is now completed. The authority has issued the code compliance certificate for the building work carried out on Lots 1 and 2, and I understand that a code compliance certificate for the building work on Lots 3 and 4 has also been issued, although this has not been confirmed by the authority.
- 2.5. The front of the section where the dwelling for Lot 1 is located is relatively flat and level with the road. From the end of Lot 1, the land contour slopes downwards towards the back of the section where the dwelling for Lot 4 is now located.
- 2.6. The building work that is the subject of the notice to fix is the siteworks forming a cut along the north-eastern boundary to construct a new timber pole and concrete block retaining wall (“the new retaining wall”), built on the owner’s property within Lots 2, 3 and 4. The siteworks have been carried out approximately 1m away from and parallel to an existing retaining wall on the neighbour’s property, and starts towards the rear of Lot 2, extending the length of Lot 3 and 4. The new retaining wall was designed by a structural engineer, with the engineer’s design report and calculations (dated October 2018) forming part of the building consent documentation.

3. Background

- 3.1. The neighbour’s property is a back section that shares a boundary with Lots 3 and 4 (“the shared boundary”) – see Figure 1.
- 3.2. There is an existing timber retaining wall on approximately three-quarters of the shared boundary. This wall was constructed in 2011 pursuant to a building consent

(B/2010/7150) to upgrade the driveway on the neighbour's property (among other building work). It is constructed of 125mm x 125mm timber posts at 1m centres, with 50mm thick timber planks set between them to retain the soil. This varies from the consented design for the wall, which specified 175mm SED round poles. The wall retains the edge of the neighbour's property and driveway in heights varying between 650mm and 980mm, with an average retained height of around 800mm. The top of the wall is flush with the finished driveway level and has a single runner board on top of it, set above the driveway level. The authority issued a code compliance certificate for the work covered by this building consent on 11 April 2012.

- 3.3. Work to develop the owner's properties commenced in 2019, with the building work to construct the dwelling on Lot 1.
- 3.4. Before sitework began on Lots 2, 3 and 4, a timber fence was constructed along the extent of the shared boundary. Towards the road, the fence is constructed at ground level, but as the boundary moves away from the road, the fence was constructed on top of the existing retaining wall.
- 3.5. The sitework then commenced and included extensive excavations to create the building platforms for Lots 2, 3 and 4. These excavations cut faces to varying degrees across its length, with a near-vertical face within Lot 4 and a more gradual sloped section within Lots 2 and 3. The excavations were within 1m of the existing retaining wall along the full length. I have not been provided with exact measurements for the depth of these excavations, but the plans indicate a maximum cut depth of 2.2m and the photos supplied by the authority confirm that the cut appeared to be over 1.5m high in several places. The vertical cut was covered, but the sloped cut was left exposed.
- 3.6. On 16 August 2019, the authority carried out a resource consent inspection of the work at which it was noted that construction of the dwelling on Lot 1 was almost complete, while Lots 2, 3 and 4 were at the 'earthworks/foundation stage'. The report noted that, with respect to the 'Earth Cuts' towards the rear of the properties there was a 'Large exposed section' near the shared boundary that needed to be 'secured and stabilized'. Photos accompanying the report showed this exposed area to be within Lots 3 and 4.
- 3.7. I understand that following the inspection the project manager took steps to protect the areas of excavated face that had previously been exposed, and work continued to construct the new retaining wall.
- 3.8. In September 2020, a dispute arose between the owner, project manager and neighbour about the impact of the building work and fence on the existing retaining wall. The neighbour contended that the existing retaining wall had moved because of the building work, and that as a result the posts of the retaining wall were no longer vertical, causing a gap to open between the concrete driveway and the top of the existing wall and leaving the driveway edge unsupported. The owner denied

that they were responsible for the damage to the retaining wall and was of the view that the wall had failed because it had not been properly designed and constructed.

- 3.9. The authority became aware of the dispute, and in correspondence with the owner and project manager advised that the siteworks had damaged the existing retaining wall, breaching clause B1 of the Building Code, and that failure to rectify the situation would result in a notice to fix being issued.
- 3.10. The new retaining wall was completed sometime before October 2020.
- 3.11. The project manager applied for a code compliance certificate for the building work on Lots 1 and 2, carried out under BCO10279044.
- 3.12. In December 2020, the project manager also applied for a code compliance certificate for the building work on Lots 3 and 4, carried out under building consent BCO10282271. However, on 9 December 2020, the authority advised that this application Lots 3 and 4 had been put on hold pending the resolution of the dispute relating to the siteworks and existing retaining wall.

The notice to fix

- 3.13. On 21 December 2020, the authority issued a notice to fix (NOT21526059) in relation to the building work on Lots 2, 3 and 4. The notice was addressed to both the owner and project manager and described the particulars of contravention or non-compliance as:

PARTICULARS OF CONTRAVENTION OR NON-COMPLIANCE

Contrary to section 17 of the Building Act 2004 (the Act) the following building works have been undertaken which do not comply with schedule 1 of the Building Regulations 1992 (the Building Code):

In the course of site works related to **LOT 2, LOT 3 and LOT 4 at 16A, B & C Gilfillan Street, Blockhouse Bay Auckland** damage has been caused to the boundary retaining wall located at your neighbour's property at **14 Gilfillan Street, Blockhouse Bay** in contravention of the following Building Code clauses:

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

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

To remedy the contravention or non-compliance you must:

Carry out all necessary work to ensure the contravention set out above regarding damage to the neighbour's property at 14 Gilfillan Street, Blockhouse Bay is remedied to achieve compliance with the Act and the Building Code.

Note – [The authority] recommend that you achieve compliance by:

(1) Providing [the authority] with an engineered solution from a chartered professional engineer suitably qualified to undertake the work and listed on the Auckland Council Producer statement Author's Register, and is to be accompanied by a PS1. The solution will be assessed by [the authority], and if deemed acceptable a stamped approval will be returned to you.

(2) Restoring the neighbouring property to the condition it was prior to the site works being undertaken.

3.14. In January 2021, reports regarding the condition of the existing and new retaining walls were provided to the authority by engineers engaged separately by the project manager and the neighbour. As these reports centre around the allegation of damage to the existing retaining wall, I have not considered the conclusions provided by these reports in the determination.

3.15. At some point, the authority issued the code compliance certificate for Lots 1 and 2. I am unclear whether this was before or after it issued the notice to fix. However, I understand the issues concerning the alleged damage have been settled between the owner and neighbour.

4. Submissions

The project manager

4.1. The project manager believes the notice to fix had been incorrectly issued for the following reasons.

4.1.1. A notice to fix can only be issued in relation to an existing contravention or non-compliance – the authority has identified instability and risk of damage as the breaches that the notice relates to, but there is no allegation or evidence of any ongoing breach. The notice relates solely to the damage to the retaining wall. A notice to fix can only be issued “in relation to an existing and subsisting breach of the Building Act or Regulations, and where there is none, there is no jurisdiction to issue a notice”.

4.1.2. Even if there was a breach, the notice to fix is invalid – the authority's notice is impossible to comply with because the remediation requires the existing retaining wall to be returned to the condition it was in prior to the construction works, an engineered solution and a PS1 (Producer statement – Design). This is not possible because the existing retaining wall never complied with the Building Code or the building consent under which it was constructed. A compliant engineered solution would require complete reconstruction, which would not be the condition the wall was in before the works.

- 4.1.3. There is a significant dispute between the parties as to the cause of failure of the retaining wall – it is not accepted or established that the existing retaining wall failed because of the building works, yet in issuing the notice to fix the authority “purports to determine” this matter. It is not the authority’s role “to seek to use a Notice to Fix to undermine the proper resolution of those difficult and complicated matters”.
- 4.2. The project manager’s submission concluded that the notice to fix should be withdrawn. The submission also covers other items, stating that:
 - 4.2.1. There was a significant dispute between the parties as to whether the building work on the owner’s property had contributed to the failure of the existing retaining wall.
 - 4.2.2. The existing retaining wall did not have adequate stability prior to any siteworks being carried out.
 - 4.2.3. The neighbours did not allege the siteworks had caused damage until ‘a significant time into the construction’. There was no present contention by the parties that the land on the owner’s property remained unstable or there was any present possible risk of damage to the neighbour’s property.
- 4.3. In correspondence, the project manager confirmed that the dispute around the failure of the existing retaining wall and how best to rectify it was now being handled by the relevant parties’ insurers, and that the project manager continued to deny that the failure had been caused by the siteworks.

The authority

- 4.4. The authority made a submission in response to the application for a determination and the Ministry’s requests for information. This submission stated:
 - 4.4.1. The project manager’s engineer’s report focusses primarily on whether the existing retaining wall complied. However, the issue is that the owner and project manager had an obligation in undertaking their building works, to not damage other property.
 - 4.4.2. The siteworks that contravene the Building Code are the excessive earthworks alongside the existing retaining wall, which were not stabilised. The cut was only protected after the authority ordered it to be. Prior to this, there had been no methodology for those works to protect other property.
 - 4.4.3. The existing retaining wall has been undermined and suffered lateral movement. The authority required a proposal or an application for remediation if it was to lift the notice to fix.

- 4.4.4. There is no doubt that the existing retaining wall was on other property and the likelihood of damage to other property is a real risk as evidenced by the expert reports.
- 4.4.5. The parallels to Determinations 2014/024³ where consideration was given to where the unsupported batter cannot be said to have ‘a low probability of becoming unstable throughout its lifetime’ in the decision to uphold that notice to fix.

The other parties

- 4.5. None of the other parties made a submission.

5. Discussion

- 5.1. The project manager has applied for a determination about the authority’s decision to issue a notice to fix in respect of the sitework on the owner’s property. The notice names non-compliance with Clause B1.3.6 in its particulars of contravention or non-compliance, on the grounds that the sitework at Lots 2, 3 and 4 had caused damage to the existing retaining wall.

The legislation

- 5.2. The provisions relating to notices to fix are covered by sections 163 to 168 of the Act. Section 164 describes the power of decision that authorities have to issue a notice to fix.
- 5.3. The relevant provisions of section 164 for the purposes of this determination are:

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); or

(b) ...

(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; or

(b) ...

³ Determination 2014/024 Regarding the issue of a notice to fix for building work carried out to remove a retaining wall (28 April 2024)

- 5.4. Section 163 contains definitions relating to notices to fix and makes clear that a specified person includes an owner of a building, a person carrying out building work, and any other person supervising the building work. In this case, the notice to fix was issued to the owner and the project manager, who are both specified people under the definition in section 163.

The issue of the notice to fix

- 5.5. The project manager has submitted that a notice to fix can only be issued under section 164 for ‘a present and existing breach of the Act and regulations’.
- 5.6. The period that was of concern to the authority was when the siteworks remained unsupported before the construction of the new wall, as evidenced in the notice to fix. However, the notice was not issued until December 2020, which was after the alleged breach had been remedied by the construction of the new retaining wall.
- 5.7. The wording in section 164 is clear that in order to issue a notice to fix an authority must have reasonable grounds for considering that a specified person “is contravening or failing to comply with this Act or the regulations”. In other words, the breach or contravention must be present and require remediation when the notice is issued. However, this does not mean that a notice to fix can only be issued while the building work is occurring and not after it has occurred.
- 5.8. The project manager also contends the remedy specified by the authority in the notice is not capable of being complied with.
- 5.9. The notice to fix specified that the owner and project manager must ‘Carry out all necessary works to ensure the contravention set out above regarding damage to the neighbour’s property at 14 Gilfillan Street, Blockhouse Bay is remedied to achieve compliance with the Act and the Building Code’.
- 5.10. This is requiring the owner and project manager to remedy damage allegedly caused by a breach of the Building Code, rather than to remedy the breach itself. This is not the function of a notice to fix, which is to give authorities the means of addressing the breach or contravention. Remedying any damage that may have been caused by the breach is a matter for resolution between the parties⁴, which I note has already occurred here.
- 5.11. In addition, the notice refers to ‘damage to the neighbour’s property’ with the recommended compliance pathway of ‘restoring the neighbouring property to the condition it was prior to the site works being undertaken’.
- 5.12. An authority cannot instruct someone to carry out building work or remedial works on a property that does not belong to them. I have discussed this at length in

⁴ The exception would be where the historic damages were creating a situation that was unsafe or insanitary, in which case an authority may have recourse under the provisions for dangerous, affected, and insanitary buildings of the Act.

Determination 2023/033.⁵ The owner and project manager have no legal right to carry out the work that the authority is requiring to be done, so the notice cannot be complied with.

- 5.13. I agree with the project manager that the notice and remedy in it are not capable of being complied with. The notice requires remediation of the contravention to achieve compliance, but as stated above, there was no contravention or breach of compliance at the time the notice was issued that was capable of being remedied. The breach had already been fixed and the remedy instructed the owner and project manager to undertake work on someone else's property.
- 5.14. In addition, section 165(1)(b) requires that a notice to fix must also state a reasonable timeframe within which it must be complied with. In this case, the authority issued the notice shortly before Christmas 2020 with the timeframe in which to comply ending on 29 January 2021. Given the recommendation that an engineered solution should be provided, the recipients would have had difficulty in accessing professional assistance over this period. Therefore, I do not consider the timeframe of just over one month to be reasonable in the circumstances.⁶

Conclusion

- 5.15. As there was no breach or non-compliance at the time the notice to fix was issued, and the remedy to restore damage to the neighbour's property is beyond the powers of the authority to require, I reverse the authority's decision.

6. Decision

- 6.1. In accordance with section 188 of the Building Act 2004, I determine that the sitework associated with the construction of the retaining wall was not in breach of clause B1.3.6 at the time the notice to fix NOT21526059 was issued, and I hereby reverse that decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 14 March 2024.

Peta Hird

Principal Advisor Determinations

⁵ Determination 2023/33 *Regarding the compliance of, and decisions made by an authority in relation to, encroaching building work* (10 November 2023).

⁶ For a more in-depth discussion of the matters authorities can consider in setting timeframes for a notice to fix, see Determination 2019/054 *Regarding the issue of five notices to fix for a collection of buildings constructed without building consent* (31 October 2019).

APPENDIX A Legislation

The Building Act 2004

163 Definitions for this subpart

In this subpart, unless the context otherwise requires,—

responsible authority means, as the context requires,—

- (a) a building consent authority; or
- (b) a territorial authority; or
- (c) a regional authority

specified person means—

- (a) the owner of a building;
- (b) if a notice to fix relates to building work being carried out,—
 - (i) the person carrying out the building work; or
 - (ii) if applicable, any other person supervising the building work;
- (c) if a notice to fix relates to a residential pool, a person referred to in section 162C(4).

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); or
- (b) a building warrant of fitness or dam warrant of fitness is not correct; or
- (c) the inspection, maintenance, or reporting procedures stated in a compliance schedule are not being, or have not been, properly complied with.

(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; or
- (b) to correct the warrant of fitness; or
- (c) to properly comply with the inspection, maintenance, or reporting procedures stated in the compliance schedule.

(3) However, if a responsible authority considers that it is more appropriate for another responsible authority to issue the notice to fix, it must—

- (a) notify the other authority that it holds that view; and
- (b) give the other authority the reasons for that view.

(4) The other responsible authority referred to in subsection (3) must issue the notice to fix if it considers that this section applies.

165 Form and content of notice to fix

(1) The following provisions apply to a notice to fix:

- (a) it must be in the prescribed form:
 - (b) it must state a reasonable timeframe within which it must be complied with:
 - (c) if it relates to building work that is being or has been carried out without a building consent, it may require the making of an application for a certificate of acceptance for the work:
 - (d) if it requires building work to be carried out, it may require the making of an application for a building consent, or for an amendment to an existing building consent, for the work:
 - (e) if it requires building work to be carried out, it must require the territorial authority, the regional authority, or both to be contacted when the work is completed:
 - (f) if it relates to building work, it may direct that the site be made safe immediately and that all or any building work cease immediately (except any building work necessary to make the site safe) until the responsible authority is satisfied that the person carrying out the work is able and willing to resume operations in compliance with this Act and the regulations:
 - (g) if it relates to a residential pool, it may direct that the pool be drained of water and be kept empty (until the requirements of section 162C are complied with).
- (2) Nothing in subsection (1) limits or affects the generality of section 164.

The Building Code

Clause A2—Interpretation

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 any road

sitework means work on a *building* site, including earthworks, preparatory to or associated with the *construction, alteration, demolition, or removal* of a *building*

Clause B1—Structure

Objective

B1.1 The objective of this provision is to:

- (a) safeguard people from injury caused by structural failure,
- (b) safeguard people from loss of *amenity* caused by structural behaviour, and
- (c) protect *other property* from physical damage caused by structural failure.

Functional requirement

B1.2 *Buildings, building elements* and *sitework* shall withstand the combination of loads that they are likely to experience during *construction* or *alteration* and throughout their lives.

Performance

...

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

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