



Determination 2014/024

Regarding the issue of a notice to fix for building work carried out to remove a retaining wall at 107 Wharf Street, Tauranga



1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, Tony Marshall, Manager Determinations and Assurance (Acting), Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The parties to the determination are
- W Taylor (“the applicant”), the previous owner² of the subject property at 107 Wharf Street to whom the notice to fix was issued, and who is also an owner of an affected other property at 105a Wharf Street
 - Tauranga City Council (“the authority”), carrying out its duties and functions as a territorial authority or a building consent authority
 - M Kershaw (“the neighbour”), the owner of 105 Wharf Street that is an affected other property, represented by an agent.
- 1.3 This determination arises from the decision of the authority to issue a notice to fix in regard to building work carried out to remove a retaining wall without a replacement wall being constructed.

¹ The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.dbh.govt.nz or by contacting the Ministry on 0800 242 243.

² After the application for a determination was made and before the matter was determined, the applicant sold the property at 107 Wharf Street.

- 1.4 The matter to be determined³ therefore is whether the authority correctly exercised its powers of decision when it issued the notice to fix for non-compliance with clauses B1.3.1, and B1.3.5 and/or B1.3.6 of the Building Code (First Schedule, Building Regulations 1992)⁴.
- 1.5 In making my decision, I have considered the submissions of the parties, and the other evidence in this matter.
- 1.6 The relevant sections of the Act and clauses of the Building Code are set out in Appendix A.

2. The building work

- 2.1 The building work in question relates to a retaining wall on the east boundary of 107 Wharf Street that abuts 105 and 105a Wharf Street (“the common boundary”). The height difference between the properties either side of the common boundary ranges along the length up to a maximum of 2.4m. The property at 107 Wharf Street is situated near the crest of a cliff top or steep bank and overlooks an estuary.
- 2.2 The driveway access to 105 Wharf Street (situated at the rear of the section that is a cross-leased property with 105a Wharf Street) runs immediately adjacent to the common boundary. The house at 105 Wharf Street is located a minimum of 6.2m from the common boundary.

2.3 The original wall

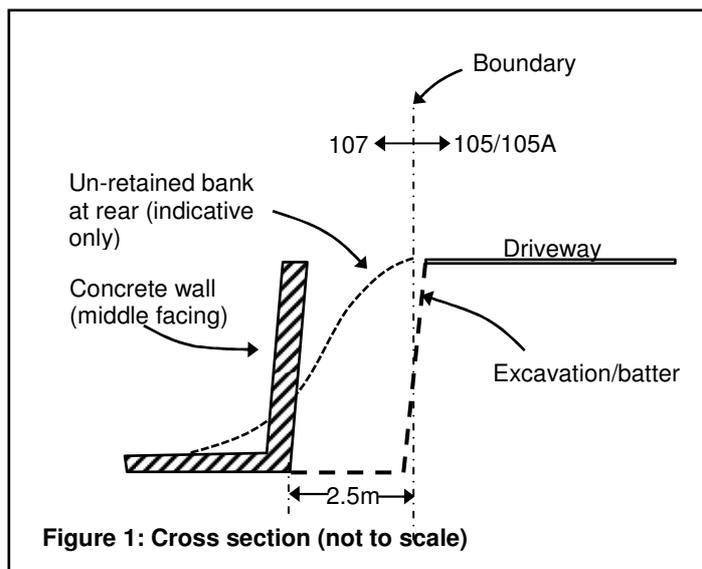
- 2.3.1 The applicant has stated that the original wall was made up of ‘free-standing concrete panels’, that it was ‘not attached at the bottom, had no reinforcing, and was not attached at the top’.
- 2.3.2 Photographs provided by the applicant, dated 11 March 2008, appear to show a concrete block wall with a concrete walkway running atop the wall, with concrete steps leading down at the north end and established trees and planting adjacent to the walkway. At the top of the wall and running along the edge of the pathway there was a metal barrier with wire netting.
- 2.3.3 A large portion of the original wall was made up of a number of tilted concrete slabs, and a smaller section (at the stairs) was cast in situ. The wall was located approximately 2.5m from the common boundary and within the applicant’s property.

2.4 The subject building work

- 2.4.1 The original retaining wall and a garage structure were removed in October 2008, and a section of land was excavated along a length of the east boundary up to, and in some places beyond, the common boundary. The excavation included the removal of mature trees and plantings along the neighbour’s driveway.

³ Under sections 177(1)(b) and 177(2)(e) of the Act

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



- 2.4.2 Undated photographs provided by the applicant, taken some time after the excavation show the extent of the excavation, some damage to the edge of the adjacent driveway and a temporary plastic netting barrier constructed along the top of the batter.
- 2.4.3 Photographs dated 7 May 2013 show a wooden fence constructed along the top of the batter with a wooden buffer rail installed on the driveway approximately 300mm out from the fence (refer also paragraph 4.13.10).

3. Background

- 3.1 The applicant purchased the property sometime in 2006 and around the same time purchased 105a Wharf Street.
- 3.2 The applicant was of the view that the retaining wall on the shared boundary needed to be removed and has stated that it didn't occur to him that building consent would be required to remove it.
- 3.3 In response to a complaint, the authority carried out an inspection on 8 October 2009; a notice to fix was subsequently issued on 9 October 2009. The covering letter noted various building work was being carried out to the interior of the building and that siteworks had also been undertaken without building consent being obtained. The letter stated that the property was within 'a 3-1 zone and any building works require a report from a Category One Geotechnical Engineer'.
- 3.4 The notice to fix detailed the particulars of contravention or non-compliance as:
- Failure to obtain a Building Consent for the following Building Work on the above-mentioned property.
- (1) ...
 - (2) Carrying out site work and excavations on or near the western boundary (*sic*) that has removed support to the driveway on the neighbouring property, and to the dwelling.

- 3.5 To remedy the contravention the notice required the applicant to cease building work and apply for a building consent. The authority required a report and design for the new retaining wall from a 'Category One Geotechnical Engineer as this property is within a 3-1 zone containing a relic slip'.
- 3.6 The applicant subsequently engaged a firm of consulting engineers to draw up plans for the construction of a new timber pole retaining wall. Plans dated October 2009 propose a new timber pole retaining wall 32m long and varying in height from 1.5m to 2.5m, with a 1m barrier to be constructed wherever the retaining wall is over 1m. The plans set out detailed specifications for the wall, including the requirement for 28 timber poles ranging in above-ground height from 1.5m to 2.5m and ranging in diameter from 150mm to 250mm.
- 3.7 A PIM dated 30 November 2009 notes in part that
- A building consent is required for retaining walls 1.5 metres or greater in height or for any wall subject to a surcharge load, which is a load imposed by a structure; vehicle accessway or parking area or sloping ground higher than the top of the retaining wall, irrespective of the height of the wall. ...
- 3.8 The authority granted building consent (No. 31800) for building work to the house and the construction of a new retaining wall. On 3 February 2010 the authority sent a reminder to the applicant to uplift the consent or to inform the authority if the building work was not going to proceed. The consent was issued on 30 March 2010.
- 3.9 On 29 March 2012 the authority wrote to the applicant stating that concern had been raised in a complaint to the authority that the replacement wall had not been built and the likelihood of collapse at the cut face. The authority requested the applicant construct the wall as per the building consent.
- 3.10 It appears that a further complaint about the new retaining wall not having been constructed was laid with the authority on 14 May 2012 by an agent acting on behalf of the neighbour.
- 3.11 On 24 May 2012 the authority issued a second notice to fix that described the particulars of contravention or non-compliance as:
- Carrying out site works and excavations on or near the eastern boundary that has removed support to the driveway and property, known as 105 & 105A Wharf Street.
- And to remedy the contravention the applicant was required to:
- Construct retaining wall in accordance with the design approved under Building Consent No 31800.
- 3.12 On 25 June 2012 the authority wrote to the applicant, stating that the applicant was in breach of the notice to fix issued on 24 May 2012 and noting that an infringement notice may be issued under sections 372 and 373 of the Act and infringement fees applied.
- 3.13 On 16 July 2012 the authority wrote to the applicant and issued an infringement notice for failing to comply with the notice to fix. The authority also enclosed another notice to fix, dated 16 July 2012, with the same particulars and remedies as stated in the previous notice to fix.

- 3.14 On 14 August 2012 the authority wrote to the applicant noting, amongst other issues relating to the infringement notice, that the notice to fix had still not been complied with.
- 3.15 On 7 December 2012 the applicant wrote to the authority in regards to building work carried out on the property. In respect of the original retaining wall the applicant considered the wall was dangerous as it had ‘no footings and was not attached to the bank in any way and was collapsing’. The applicant accepted that he had a legal obligation to support the soil on the adjacent property to the extent of supporting its own weight, but considered that this did not extend ‘to any construction thereon’. The applicant also noted his intention to develop 107 Wharf Street would mean that whatever was built to replace the wall would ‘need to be destroyed’. The applicant enclosed a photograph dated 11 March 2008 of a section of the original wall.
- 3.16 On 10 December 2012 the authority issued another notice to fix to the applicant. The notice did not differ in the remedy from the previous notice but described the particulars of contravention or non-compliance as
- Building work has been carried out on or near the eastern boundary of 107 Wharf Street that does not comply with the Building Code ... namely, the concrete retaining wall that ran between 107 Wharf Street and the adjacent property (105 & 105A Wharf Street) has been removed and no replacement retaining wall has been installed. This contravenes clause B1.3.1 of the Building Code (which requires any buildings and sitework to have a low probability of becoming unstable or collapsing throughout their lives) and/or clause B1.3.5 (which requires the demolition of buildings to be carried out in a way that avoids the likelihood of premature collapse) and/or clause B1.3.6 (which states sitework shall be carried out where necessary to avoid the likelihood of damage to other property).
- 3.17 In a letter to the applicant dated 18 December 2012, the authority responded to the applicant’s letter of 7 December, stating that the authority did not accept that a ‘simpler or lesser method of retaining the soil’ would be appropriate. The authority also stated its view that the original wall would have provided some lateral support for the bank and that by removing it the applicant had created a risk of instability and collapse with associated risk to the adjoining property. The authority deemed the retaining wall approved under the building consent to be ‘the minimum necessary to [give] support to the bank on the boundary’.
- 3.18 On 23 January 2013 a legal adviser acting on behalf of the applicant wrote to the authority in respect of the notice to fix, advising that the applicant and the neighbour own half shares in the fee simple of 105 Wharf Street. A letter dated 15 January 2013 signed by the neighbour was enclosed which indicated that the neighbour was ‘happy for the bank between our properties to be left as is’, and that the applicant had given an undertaking to reinforce the fencing along the driveway to avoid the possibility of the neighbour inadvertently backing her car over the batter.
- 3.19 Correspondence then continued between the authority’s and the applicant’s legal advisers and an agent acting on behalf of the neighbour in regards to the letter signed by the neighbour.
- 3.20 A meeting was held with the parties and their respective representatives on 19 February 2013. On 21 February 2013 the authority’s legal adviser wrote to the

applicant's legal adviser noting points discussed at the meeting; I have summarised those points as follows:

- The neighbour withdrew the letter of 15 January 2013 and did not want the batter left as is.
- The applicant was obtaining an alternative design plan for retaining the batter and this would be provided to the authority; construction would commence once the authority approved the design and the consent was to be amended accordingly.
- The applicant to install a buffer rail on the concrete on the driveway to temporarily reduce the risk of the neighbour backing over the batter. (A following email on 22 February 2013 from the neighbour's legal adviser also noted that this was to be done in a manner that would not cause damage to the concrete driveway.)

3.21 Correspondence continued between the legal advisers in regards to an appropriate method of installing the buffer to avoid damage, and it appears that this work was carried out in late March 2013.

3.22 The legal advisers for the authority then continued correspondence with the applicant's legal adviser in respect of the alternative design plans to be submitted to the authority. As no plans were submitted the authority engaged a chartered professional engineer with geotechnical expertise 'to assess the stability of the bank and the need for a retaining wall'.

3.23 The geotechnical report

3.23.1 A geotechnical report, dated 14 May 2013, provided a general description of the excavation that I have summarised as follows:

- The cut face is near vertical and ranges in height from 1.8m to 2.4m; the face gradients are at 65 to 75 degrees.
- The crests of the batters are probably at the boundary line with 105 Wharf Street.
- Sections of an old concrete mowing strip are absent toward the rear of the property and some minor erosion has occurred.
- A small section of driveway slab has broken away, possibly damage caused by the excavator.

3.23.2 The report provided a description of the soils exposed in the batter faces and noted that the marks made by the excavator remain on the faces, and that:

Some minor erosion is present at some of the sand exposures but the upper clayey silts are intact although some surface cracks are present from desiccation and shrinkage.

3.23.3 The report went on to describe two forms of instability that are usually possible for batter faces cut to the steep face angles as in this case, and noted minor erosion of not more than 100 to 200mm of the upper edges of the cut face at two locations. The report also noted that although there had been heavy or prolonged rainfall since the batters were cut there had been no rotational failure. The report stated that future

instability will become more likely as long as the batter is left in its unsupported state.

3.23.4 The report concluded that

Regression of the unsupported batters can be expected in the future which would be initiated by erosion. Some minor erosion has already extended into the property at 105 Wharf Street. Safety in the occupancy of the property is also compromised in that the temporary barrier that is present is only a visual one and does not provide any resistance to falling over the batter face. ...

Given that the excavation on 107 Wharf Street has been taken up to the boundary line, this does not provide any allowance to take into account any retreat due to erosion or the ability to form a fence or barrier along the boundary line.

3.24 The applicant has provided photographs taken in August and September 2013 which show a wooden retaining wall under construction. The compliance of the as-built retaining wall is not considered in this determination.

3.25 The Ministry received an application for a determination on 19 September 2013. The application remained on hold until payment of the fee was received on 14 October 2013.

4. The submissions

4.1 In a covering letter with the application for determination, the applicant set out the background to the situation, stating that in his view the original concrete wall was not retaining and he considered the condition of the wall to be dangerous. The applicant referred to a number of other 'similar' banks without retaining walls in the area. The applicant was of the view that the un-retained batter was not unsafe and that neither he nor the neighbour considered it urgent as the owners of the adjacent properties.

4.2 The applicant submitted that there is a low probability of the batter without a retaining wall built becoming unstable or collapsing over the next 50 years, and that the removal of the original wall in no way increased the probability of it collapsing.

4.3 In support of the application for determination, the applicant provided copies of

- photographs taken prior to and after the excavation
- correspondence between the parties
- the three notices to fix
- the application for building consent, the PIM, and the building consent
- the infringement notice issued by the authority
- the consulting engineer's report
- photographs taken in August and September 2013.

- 4.4 The authority's legal adviser responded to the application for determination in a letter dated 23 September 2013, stating that the notice to fix dated 10 December 2012 was also the subject of a prosecution and providing a copy of a summary of facts from that prosecution. The authority's submission also noted that the retaining wall that was required to be installed by the notice to fix is 75% complete.
- 4.5 Relevant points made in the summary of facts provided by the authority's legal adviser include (in summary):
- The section of land removed was approximately 3m wide and 30m long.
 - The property is within a zone containing a relic slip.
- 4.6 A draft determination was issued to the parties for comment on 22 October 2013.
- 4.7 The authority responded to the draft by letter dated 5 November 2013, noting that the retaining wall as constructed to date adheres to the design approved under the building consent. The authority accepted the decision in the draft without further comment.
- 4.8 An agent acting on behalf of the neighbour responded to the draft by email on 5 November 2013. The agent accepted the draft and provided more detail on the background to the dispute. The agent submitted that (in summary)
- the original retaining wall, which had trees and plants holding it together, was safe and there were no stability issues
 - the excavation crossed the shared boundary and went up to a metre into the adjacent property; the neighbour had given permission for one tree to be removed but had no knowledge the excavation was going to take place and did not give permission for the removal of the hedge trees and garden nor the land beyond the shared boundary
 - the un-retained batter was a danger to the neighbour and with the retaining wall as it currently stands there is a large gap between the adjacent driveway and the wall which is up to 1.5m in places which continues to present a safety hazard to the neighbour
 - the authority arranged to have the temporary wooden fence erected as the applicant's temporary fence was unstable
 - the applicant has been 'hassling' the neighbour about purchasing her land and/or a 1m strip along the boundary (which would leave the neighbour with no vehicle access) and had stated his intention to build a commercial building that would be built up to the boundary line and which would negate the need for the construction of the retaining wall
 - the letter referred to in paragraph 3.18 was prepared by the applicant; the neighbour did not understand what she was signing and regretted signing it.
- 4.9 The agent acting for the neighbour provided copies of:
- photographs showing the shared boundary before and after the excavation
 - an article dated 16 January 2009 outlining the history of the applicant's building

- a letter to the applicant dated 20 August 2012 stating that the neighbour did not wish to sell her property in full or part
- an advertisement showing the applicant's proposed commercial development at 107 Wharf Street.

4.10 The applicant responded to the draft determination on 11 November 2013. The applicant did not accept the draft and requested I hold a hearing on the matter. The applicant did not make any submission or expand on his reasons for not accepting the findings of the draft determination.

4.11 On 6 January 2014, a legal adviser acting on behalf of the applicant wrote to the Ministry stating that 107 Wharf Street had been sold on 19 December 2013.

4.12 On 13 February 2014 the applicant's legal adviser wrote to the Ministry, noting that the applicant considered some of the information provided by the authority was 'not supported by the evidence' and was not all relevant; the submission did not elaborate further.

4.13 The hearing

4.13.1 I held a hearing in Tauranga on Wednesday 26 February 2014 at the request of the applicant. I was accompanied by a Referee engaged by the Chief Executive under section 187(2) of the Act, together with an officer of the Ministry. Present at the hearing were

- three officers of the authority, the geotechnical engineer, and a legal adviser for the authority
- the agent and another representative acting for the neighbour
- the applicant, accompanied by a structural engineer and the applicant's legal adviser.

The then current owner had been invited but did not attend.

4.13.2 All of those present at the hearing had the opportunity to speak, and a site visit was also carried out. The information presented enabled me to amplify or clarify various matters of fact and was of assistance to me in preparing this determination. Although I have considered the parties submissions in full, I have only summarised the issues raised by those present at the hearing below.

4.13.3 The applicant's legal adviser noted that the geotechnical report (refer paragraph 3.22) was not sought for the purposes of ascertaining compliance of the building work with the Building Code, and that the report was produced after the notice to fix was issued and some 5-6 years after the excavation was carried out; the adviser questioned whether the findings could be used to support the conclusions drawn in the draft determination. The applicant's legal adviser discussed the scale or degrees of risk set out in *Auckland CC v Selwyn Mews Ltd*⁵, and put forward the view that the batter did not pose a 'greater than low probability' of rupturing, becoming unstable, losing equilibrium, or collapsing during its lifetime (Clause B1.3.1), nor was there a 'real and substantial risk' of damage to other property (Clause B1.3.6(b)).

⁵ 18/6/03, Judge McElrea, DC Auckland CRN2004067301-19

- 4.13.4 The applicant's legal adviser questioned the geotechnical engineer on a number of aspects of the May 2013 report. The applicant's legal adviser also noted that
- the geotechnical engineer made an assumption as to where the common boundary lay
 - the house is 6.2m from the boundary and is unlikely to be affected by minor erosion
 - the bottom plate to the barrier and the mowing strip would stop any water run-off down the batter, and there is minimal risk presented by rain hitting the surface due to the steep slope of the batter
 - there are other un-retained batters in the local area that would be as steep and of similar soil make up
 - there has been only minor erosion in the six years since the batter was cut and there has been no rotational failure; without knowing the rate of erosion it cannot be said there is a 'greater than low probability' of failure or a likelihood of damage to other property
 - the black polythene placed over the batter face was put in place by the contractor as standard practice and it should not be inferred from that action that the batter was at risk of erosion
 - there is an un-retained bank at the rear of the property, which is of a similar make up and has been in the same state for over 50 years
 - the notice to fix was issued for the removal of the concrete wall but does not include the excavation.
- 4.13.5 The applicant submitted that
- the original concrete wall was unsupported, it had no footing or foundation, and it had become unstable and a risk to the people at 107 Wharf Street
 - the original concrete wall was not a retaining wall
 - it was not intended to excavate beyond the common boundary, and the intention was to build a commercial property with car parking that would have meant the retaining wall as designed was not necessary.
- 4.13.6 The structural engineer representing the applicant provided photographs dated 11 March 2008, which showed the un-retained bank at the rear of the subject property, the concrete slab wall prior to its removal, and the section of wall with the concrete steps prior to its removal. The structural engineer requested the geotechnical engineer confirm whether or not the driveway surcharge was included in his calculations and what the zone of influence would be for migration of ground water. The structural engineer also noted his view that the probabilities of erosion or regression would be variable along the length of the batter, and that the bottom plate of the barrier stopped surface water from flowing down the face of the batter. The structural engineer confirmed that the retaining wall had been designed for active movement of the soil, but noted that this was standard practice and should not be taken to imply that the batter required retaining.

- 4.13.7 The geotechnical engineer outlined the soil type that makes up the batter and the failure mechanisms involved, and provided the following comments during the hearing:
- A geotechnical assessment that included a topographic survey was carried out in 2002 and accordingly he was already familiar with the soils (that survey was subsequently provided to the Ministry).
 - The 2002 survey showed a wall at the rear of the property where there is now an un-retained slope; that slope is not as steep as the subject batter on the boundary and it is likely that it was steeper than it is now and has eroded over time.
 - The calculations for the 2013 report did not include surcharge from the driveway.
 - A steeper batter face means the rain doesn't land directly on the face; the batter in this case is between 65° to 75°; the mechanism for 'dropping out' is present in the soils that make up the batter; heavy rainfall and migration of that water could cause rotational failure.
 - Particular zones identified in the relic slip zone require geotechnical assessment prior to consent being issued and would have been required in this case; no geotechnical advice was sought by the applicant.
 - The original concrete wall would have provided some protection to the face even if it was not a retaining wall.
 - There are other un-retained batters in the area, particularly around the domain, some of which are subject to erosion and require attention; regarding the batter at the Durham Street - it is likely there would have been some risk analysis carried out, and that batter is not as steep as the subject batter.
 - If there was no excavation in this case but only removal of the retaining wall, the same issues with the batter would exist and the question would be the safety of the un-retained batter to the building on 107 Wharf Street but not regression affecting the neighbouring property.
 - The practice of using polythene covers over a batter are temporary solutions to reduce the effects of direct water and to stop erosion occurring, and are generally used where there is a period of time between the excavation and the construction of a retaining wall.
- 4.13.8 The geotechnical engineer confirmed his view that there was a greater than low probability (in his view it was 'likely') that, given the climatic conditions and the soil types, the batter would be subject to erosion and regression into the neighbouring property during a 50 year period. The expert also noted that there were a number of factors set out in Clause B1.3.3 that would affect the batter.
- 4.13.9 The agent representing the neighbour stated that the applicant had breached the Resource Management Act and reiterated issues regarding the length of time that the batter went un-retained and that the neighbour was at risk from the driveway having no barrier (Clause F). The agent also noted that the neighbour had had the common boundary surveyed and the excavation went beyond the boundary line, that the extent of the excavation was never agreed to by the neighbour, and that the applicant's

intention to purchase a meter of the neighbour's land along the common boundary would have meant there was no vehicle access for the neighbour.

- 4.13.10 The authority agreed that the temporary barrier, which was put in place by the authority to address Clause F4, was critical in terms of the building work not being dangerous in terms of the Act⁶ and that it should be kept in place until the current owner completes the building work including a barrier. The authority also noted that the neighbour had contacted the authority in 2008 after the wall had been removed and the excavation carried out and at that time the authority had not been aware of the location of the original wall.
- 4.13.11 The authority noted that the applicant did not object to the issue of the notice to fix at the time but engaged the structural engineer to design a retaining wall that would comply with the notice to fix and satisfy the requirements of the Building Code in regards to stability of the batter and possibility of collapse. The authority also noted that the key points of the geotechnical report that were referred to in the draft determination were that future instability would become more likely if the batter were left in an unsupported state and that regression of the unsupported batter can be expected in the future from erosion, and that these key points support the decision of the authority to issue the notice to fix.

4.14 The second draft determination

- 4.14.1 A second draft determination was issued to the parties on 26 March 2014.
- 4.14.2 In a response received on 9 April 2014, the authority accepted the second draft without further comment.
- 4.14.3 The applicant's legal adviser wrote to the Ministry on 14 April 2014 noting he had been advised that 107 Wharf Street may have been on-sold since the hearing. The applicant did not respond to the second draft.
- 4.14.4 No response to the second draft determination was received from the neighbour.

5. Discussion

- 5.1 Section 40 of the Act states that building work must not be carried out except in accordance with a building consent. There is no dispute between the parties that the removal of the original retaining wall and the site work were carried out without consent first being obtained.
- 5.2 The applicant has requested I determine whether the authority was correct in its decision to issue a notice to fix dated 10 December 2012 in respect of compliance of the building work with the Building Code. I note that at the time of issue of the subject notice to fix, the building work referred to in the notice is the removal of the original retaining wall and the site work; it does not include building work subsequently undertaken to construct a new retaining wall.

⁶ As defined in section 121 of the Act

5.3 Compliance of building work

- 5.3.1 In accordance with section 17 of the Act the building work must comply with the Building Code regardless of whether a building consent is required. The contravention of the Building Code as identified in the notice to fix dated 10 December 2012 was in respect of clauses B1.3.1, and B1.3.5 and/or B1.3.6.
- 5.3.2 The Act and the Building Code both require that any building must be built in such a manner as to protect ‘other property’, where ‘other property’ is defined by the Building Code (Clause A2 Interpretation) as
- Other property means any land or buildings or part thereof which are –
- a) Not held under the same allotment; or
 - b) Not held under the same ownership, and...
- 5.4 Given that the fee simple for 105 Wharf Street is in part owned by the neighbour, I conclude 105 Wharf Street in this case is “other property” in relation to the building work.

Clause B1.3.1

- 5.5 Clause B1.3.1 of the Building Code states:

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.

- 5.6 The geotechnical report (refer paragraph 3.23) concluded that regression of the unsupported batters could be expected in the future and that given the excavation was taken up to the boundary line there was no provision for retreat due to erosion. The geotechnical engineer confirmed at the hearing that he continued to hold this view and that it was likely that the batter would be subject to erosion and regression into the neighbouring property within a 50 year period.
- 5.7 The functional requirement of Clause B1 required the unsupported batter to withstand ‘the combination of loads’ it was likely to experience during its life. I consider those loads to include the surcharge of cars using or parked on the adjacent driveway.
- 5.8 I accept the findings of the geotechnical engineer and in this respect I consider that the unsupported batter cannot be said to have ‘a low probability of becoming unstable’ throughout its lifetime and accordingly I consider the excavation did not comply with the requirements of clause B1.3.1.

Clause B1.3.5

- 5.9 Clause B1.3.5 of the Building Code states that ‘the demolition of buildings shall be carried out in a way that avoids the likelihood of premature collapse’.
- 5.10 I take the reference to this clause in the notice to fix as relevant to the removal of the original concrete wall; the compliance of the sitework (being the excavation and the un-retained batter) are more appropriately addressed under Clause B1.3.6, which was included in the notice.

Clause B1.3.6

5.11 Clause B1.3.6 of the Building Code states:

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.

5.12 I consider that ‘other property’ is not limited to the protection of buildings⁷ and that the land itself must also be protected from the likelihood of damage. In respect of “the likelihood of damage” I refer to reasoning in *Auckland CC v Selwyn Mews Ltd*⁸, where the Judge stated:

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

5.13 Taking into account the report of the geotechnical engineer and submissions made by all of the parties at the hearing, I am of the view that the unsupported vertical excavation of land up to the shared boundary with 105 Wharf Street left a situation where the land on 105 Wharf Street, including that supporting the driveway adjacent to the shared boundary, was likely to be subject to failure during its expected lifetime of 50 years. I consider therefore that the requirement of Building Code clause B1.3.6(b) to avoid the likelihood of damage to other property was breached.

5.14 Given my conclusions above as regard compliance of the excavation, I am of the view that the authority was correct in its decision to issue the notice to fix.

5.15 I also note that building work matters related to Clause F4 Safety from falling required attention at the time, though this was not identified in any of the notices to fix issued by the authority.

6. The Decision

6.1 In accordance with section 188 of the Building Act 2004 I hereby determine that the authority correctly exercised its powers in issuing the notice to fix dated 10 December 2012 for non-compliance with Building Code clauses B1.3.1 and B1.3.6(b), and I confirm the authority’s decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 28 April 2014.

Tony Marshall
Manager Determinations and Assurance (Acting)

⁷ See also Determination 2007/141 Requirement for a fire protection barrier to a coolstore

⁸ 18/6/03, Judge McElrea, DC Auckland CRN2004067301-19

Appendix A

A.1 The relevant sections of the Building Act 2004

17 All building work must comply with building code

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.

40 Buildings not to be constructed, altered, demolished, or removed without consent

(1) A person must not carry out any building work except in accordance with a building consent.

...

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

...

A.2 The relevant Clauses of the Building Regulations 1992 are:

CLAUSE B1—STRUCTURE

OBJECTIVE

B1.1 The objective of this provision is to:

...

(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

B1.3.1 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.

B1.3.3 Account shall be taken of all physical conditions likely to affect the stability of buildings, building elements and sitework, including:

- (a) self-weight,
- (b) imposed gravity loads arising from use,
- (c) temperature,
- (d) earth pressure,
- (e) water and other liquids,
- (f) earthquake,
- (g) snow,
- (h) wind,
- (i) fire,
- (j) impact,
- (k) explosion,
- (l) reversing or fluctuating effects,
- (m) differential movement,
- (n) vegetation,
- (o) adverse effects due to insufficient separation from other buildings,
- (p) influence of equipment, services, non-structural elements and contents,

- (q) time dependent effects including creep and shrinkage, and
- (r) removal of support.

B1.3.5 The demolition of buildings shall be carried out in a way that avoids the likelihood of premature collapse

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.