

Determination 2024/030

The authority's decisions to issue two notices to fix for a retaining wall constructed by a previous owner of the neighbouring property.

90 Riverlea Road, Riverlea, Hamilton

Summary

This determination considers the authority's decisions to issue two notices to fix for a retaining wall constructed by a previous owner of the neighbouring property. The determination considers whether there were grounds to issue the notices to fix to the applicant, and the form and content of the notices.



Figure 1: The retaining wall under consideration

In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”).

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, Andrew Eames, Manager Advisory, 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. Corbel Six Limited (“the applicant”), the owner of 90 Riverlea Road, who applied for this determination.
 - 1.2.2. Hamilton City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. The matter to be determined under section 177(1)(b) and 3(e) of the Act, relates to the authority’s decisions to issue two notices to fix for a retaining wall. This will turn on whether there were grounds to issue the notices to fix to the applicant, and the form and content of the notices.

Matters outside this determination

- 1.4. The determination does not consider the compliance of the retaining wall with the Building Code.

2. The building work

- 2.1. The retaining wall runs the full length between two properties (90 Riverlea Road and 142 Riverlea Road (“the neighbouring property”). The wall is up to 4.2m in height and retains the earth of the neighbouring property (see Figure 1).
- 2.2. Before the construction of the retaining wall in the mid-1990s, there was a bank which sloped down towards the applicant’s property. The applicant states that the retaining wall was constructed by a prior owner of the neighbouring property, who also backfilled the slope to allow more usable space on their property. According to the applicant, this gave the neighbouring property the ability for trucks to turn, as well as new access.

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

- 2.3. The retaining wall was not consented at the time, and the authority has no records of who constructed the wall.
- 2.4. Following a survey to ascertain the correct location of the legal boundary between the two properties, the authority undertook a site visit on 4 July 2022 to view the boundary pegs. The extent to which the retaining wall is located on the applicant's land is unclear. However, it is evident that at least part of the retaining wall is located on the applicant's land.
- 2.5. The authority issued the first notice to fix to the applicant on 23 September 2022. The applicant requested withdrawal of this notice, which was refused by the authority.
- 2.6. The authority issued a second notice to fix on 17 February 2023. The applicant requested withdrawal of both the first and second notices, which was again refused.
- 2.7. Other than the compliance date, the particulars of the two notices were the same, as follows:

Particulars Of Contravention Or Non-Compliance

Hamilton City Council Compliance officers inspected the property at 90 Riverlea Road, the inspection identified the retaining wall on the property boundary between 90 and 142 Riverlea Road is showing signs of failure.

The New Zealand Building Act 2004, Section 17 States:

All Building work must comply with the 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.

To remedy the contravention or non-compliance you must:

1. Engage the services of a suitably qualified engineer to survey and furnish a report for the failing retaining wall at 90 Riverlea Road.
2. Supply the report to Hamilton City Council by the date outlined below on this notice.

3. Submissions

The applicant

- 2.8. The applicant considers:
 - 2.8.1. Both the first and second notices to fix are invalid. This is because the applicant did not carry out the building work referred to in the notices and did not contravene the Act.

2.8.2. The applicant referred to *Waikato Regional Council v Poseidon Holdings Limited*² (“*Poseidon (DC)*”), where the District Court Judge noted:

[67] I find it difficult to accept that the legislature intended that criminal liability can be sheeted home to an innocent owner of a building who is not prepared to remedy defective building work, carried out by a previous owner. Put simply, there would seem to be a strong policy argument against criminal sanctions being visited on the current owner of a building who had no knowledge of and was not responsible for the non-compliant work.

2.8.3. In this case, the retaining wall was constructed without the applicant’s permission and in such a way that it encroaches on their land from the neighbouring property. The applicant was not aware of the exact location of the boundary at the time the wall was constructed, and only recently learned that the previous neighbour had wrongfully placed the wall on parts of its land.

2.8.4. This does not equate to a breach by a tenant (as claimed by the authority), as a tenant has the owner’s permission to be on their land as a matter of contract, and the owner has remedies under that contract against the tenant. This is not the same as a neighbouring owner being held responsible for a former neighbour’s breach of the Act.

2.8.5. The applicant “...cannot be responsible for a contravention of the Building Act 2004 carried out by a prior owner of a neighbouring property without [the applicant’s] consent and for an illegal encroachment”.

2.8.6. Further, the authority does not have the power to require the applicant to provide an engineering report on the wall, as set out as the prescribed remedy.

The authority

3.1. The authority considers:

3.1.1. Under section 163, a specified person includes an owner. The authority accepts that a notice to fix cannot be issued to a subsequent owner. However, the applicant owned the property at the time the retaining wall was built on its land, and still owns the property now. As the owner, the applicant meets the definition of a specified person.

3.1.2. Section 14B sets out an owner’s responsibilities, and an owner’s liability under the Act is strict. The retaining wall is substantial and has been in place for a number of years.

² [2021] NZDC 6951.

- 3.1.3. Notices to fix are commonly issued to owners for works undertaken by their tenants, including works done without the owner's consent.
- 3.1.4. While the present case bears some similarities to Determination 2022/026³, it is not analogous. In that case, the licenced building practitioner and person who had applied for the building consent were readily identifiable, and the owners contacted the authority as soon as they realised that a retaining wall had been wrongly constructed on their property.
- 3.1.5. In this case, given the placement of the retaining wall, the construction of the retaining wall "could not possibly have escaped [the applicant's] notice. It is incumbent on the owner of a property to know where their boundaries are and to ensure work undertaken on their property is compliant".
- 3.1.6. An owner cannot say they do not need to comply with their statutory obligations if the work took place without their consent, and there is no sufficient evidence to support the claim that the work took place without the applicant's knowledge or consent. The analogy to a subsequent owner is not comparable, because a current owner knows (or can reasonably be expected to know) what occurs on their property.
- 3.1.7. It was correct to issue the notices to fix to the applicant, as the applicant was "a specified person being the owner of the Property at time the building work was undertaken".
- 3.1.8. As part of the remedy, it can require an expert report where appropriate to assist in remedial action.

4. Discussion

- 4.1. In making a determination about the authority's decisions to issue the notices to fix, I have considered:
 - 4.1.1. whether the applicant is a specified person who has contravened the Act, under section 164
 - 4.1.2. the form and content of the notices to fix, under section 165.

Whether the applicant contravened the Act

- 4.2. Section 164 of the Act concerns the issue of notices to fix. Section 164 states:

(1) This section applies if a responsible authority considers on reasonable grounds that –

³ Determination 2022/026 *Regarding the issue of a notice to fix in respect of a demolished retaining wall* (30 November 2022).

- (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
 ...
- (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...
- 4.3. Section 163 defines “specified person” for the purpose of notices to fix. A specified person includes the owner of a building, and if a notice relates to building work being carried out, the person carrying out the work or any other person supervising the work.
- 4.4. The application of sections 163 and 164 was discussed by the High Court in *Waikato Regional Council v the District Court at Hamilton*⁴ (“*Poseidon* (HC)”), which concerned whether a subsequent owner who did not undertake the building work in question can be issued a notice to fix. The Judge noted:
- [34] I agree with the [District Court] Judge that section 163 has to be read together with section 164. Section 163 is a dedicated definition section—the operative provisions are found in section 164. Section 164 requires the responsible authority to issue to the specified person concerned a notice to fix if the responsible authority considers on reasonable grounds that the specified person is contravening or failing to comply with the Act or regulations.
- 4.5. I acknowledge that the applicant was the owner of the property at the time the building work was undertaken, rather than being a subsequent owner (as was the case in *Poseidon*). Being the owner, the applicant meets the definition of a specified person in section 163.
- 4.6. However, sections 163 and 164 must be read together, and the specified person must be “...contravening or failing to comply with this Act or the regulations”, as per section 164(1)(a). In this case, the applicant did not build the retaining wall, or consent to the retaining wall being built on its property. Further, the encroachment of the retaining wall onto the applicant’s property was not known until a survey of the boundary undertaken more than twenty years later. As such, I do not consider that the applicant has contravened the Act.
- 4.7. The authority has referred to the responsibilities of owners set out in section 14B, and noted that liability under the Act is strict. Section 14B states:

14B Responsibilities of owner

An owner is responsible for—

- (a) obtaining any necessary consents, approvals, and certificates;
- (b) ensuring that building work carried out by the owner complies with the building consent or, if there is no building consent, with the building code:

⁴ [2023] NZHC 1271.

(c) ensuring compliance with any notices to fix.

4.8. These responsibilities were also considered by the Judge in *Poseidon* (HC), who found:

[39] There are three distinct responsibilities set out in section 14B. None of them are, in my view, relevant to the notice to fix issued to PHL by the WRC. I briefly comment on each as follows:

- (a) An owner must obtain any necessary consents, approvals, and certificates. This places obligations on an owner who is him or herself carrying out building work or is getting others to undertake building work that requires building consent or approvals or certificates. The responsibility would be relevant if, for example, an owner was carrying out or getting others to carry out building work without a building consent when a consent was required. A notice to fix could properly issue in such circumstances. The owner or person carrying out the work would be a specified person in terms of the section 163(b) definition.
- (b) An owner must ensure that building work carried out by the owner complies with the building consent, or if there is no building consent, with the building code. In its terms, this responsibility only applies to an owner who is him or herself carrying out building work. Again, in appropriate cases this responsibility could properly found a notice to fix if the owner failed to comply with the statutory obligation.
- (c) An owner must ensure compliance with any notices to fix. This responsibility cannot trigger the issuance of a notice to fix under section 164(1)(a). The obligation to ensure compliance with a notice to fix can only arise once a notice to fix has been lawfully issued. Anticipatory non-compliance cannot trigger the issuing of the notice under section 164(1)(a).

[40] Critically, the Act does not impose an obligation on a person who becomes the owner of a non-compliant building work to ensure that the building work is brought up to standard, so that it complies with the building code.

4.9. As the applicant did not carry out the building work, or get other parties to undertake the building work on its behalf, I do not consider the responsibilities in section 14B(a) and (b) are relevant in this case⁵. As described above, the responsibility in 14B(c) cannot trigger the issuance of a notice to fix.

4.10. The authority also argues that the present case differs from Determination 2022/026⁶, because in that case the persons responsible for the building work were readily identifiable, and the owners had quickly alerted the authority that the retaining wall had been wrongly constructed on their property. However, the

⁵ See also my additional comments at 4.12 on the owner/tenant argument.

⁶ Determination 2022/026 *Regarding the issue of a notice to fix in respect of a demolished retaining wall* (30 November 2022).

absence of these factors does not mean that the applicant can be said to have contravened the Act. Determination 2022/026 states:

[4.12] The contravention must be carried out by, or on behalf of or with the authority of the specified person. Therefore, there must be a link or connection between the specified person and the contravention or non-compliance, ie the contravention is done or caused by the specified person. I refer to this as a 'causal link' between the specified person and the contravention or non-compliance.

- 4.11. The applicant states that it did not give consent for the construction of the retaining wall on its property, and has emphasised that it “did not know [the retaining wall] was a wrongly placed structure”. I note that there is no evidence to the contrary, and the survey of the boundary was not undertaken until more than twenty years after the retaining wall was constructed. In these circumstances, I do not see any ‘causal link’ between the applicant and the contravention.
- 4.12. Further, I disagree with the authority’s statement that “it is incumbent on the owner of a property to know where their boundaries are and to ensure work undertaken on their property is compliant”. The responsibility for establishing the correct legal boundary falls on those who are undertaking the building work, not on neighbours who may inadvertently be affected. I also agree with the applicant’s view that the situation is not analogous to an owner/tenant relationship, for the reasons set out in paragraph 2.8.4.
- 4.13. In conclusion, as the applicant did not contravene the Act, there were no grounds to issue the notices to fix to the applicant under section 164.

The form and content of the notices to fix

- 4.14. Although there were no grounds to issue the notices to fix, I will also briefly address the form and content of the notices.
- 4.15. Section 165 prescribes the form and content of a notice to fix. The prescribed form⁷ for a notice to fix provides a space to insert the “particulars of contravention or non-compliance”.
- 4.16. Previous determinations⁸ have discussed the requirement that owners must be “fairly and fully” informed by the particulars in the notice to fix, so that they can address the identified issues.
- 4.17. In this case, the notices identified that the retaining wall was showing signs of failure and set out section 17⁹ of the Act. However, they did not specify any

⁷ See Building (Forms) Regulations 2004, Form 13.

⁸ For example, Determination 2024/016 *The issue of a notice to fix for building work associated with a two storey building with sanitary fixtures* (11 April 2024), at [4.12-4.13].

⁹ Section 17 states “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.”

particular Building Code clause, or identify the relevant performance criteria, that the authority considered had not been met. As such, the notices did not adequately specify the “particulars of contravention or non-compliance” as required by the prescribed form. I consider a notice to fix must contain sufficient details regarding the building, building work, and alleged contravention, to inform the recipient fairly and fully about the basis for the notice.

- 4.18. In terms of the remedy, the notices to fix required the applicant to “Engage the services of a suitably qualified engineer to survey and furnish a report for the failing retaining wall...” and to supply the report to the authority. Sections 165(1)(c)-(g) set out remedies that may be prescribed in particular situations. I note that there is no basis under section 165 to require an owner to provide a specialist report to the authority.

5. Conclusion

- 5.1. There were no grounds to issue the notices to fix to the applicant under section 164, as the applicant had not contravened the Act.
- 5.2. The particulars of the contravention set out in the notices were deficient, and there was no basis under section 165 for the specified remedy.

6. Decision

- 6.1. In accordance with section 188 of the Building Act 2004, I determine that there were no grounds to issue the notices to fix to the applicant, and the form and content of the notices was deficient. I reverse both of the notices to fix.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 7 June 2024.

Andrew Eames

Manager Advisory, Determinations