



Determination 2016/037

Regarding dangerous building notices issued in respect of a retaining wall and fence on the shared boundary between two properties at 49 and 51 Roberts Road, Whangaparoa

Summary

This determination considers whether an authority was correct to issue dangerous building notices in respect of a concrete block retaining wall and fence located on the boundary between two properties: one notice was issued to each owner. The determination considers the state of the wall and likelihood it will collapse; and what can be done to render the wall safe.

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, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.

1.2 The parties

1.2.1 The parties to the determination are:

- the owners of the property at 51 Roberts Road, C & D Donovan, who applied for the determination (“the applicants”)
- the owner of the property at 49 Roberts Road, A Wissing (“the neighbour”)
- Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority

1.3 The matters

1.3.1 This determination arises from a decision made by the authority to issue the following dangerous building notices to the owners of adjacent properties in respect of a retaining wall that the authority considers is dangerous under section 121 of the Act²:

- Notice 6380 dated 23 February 2016, issued to the applicants
- Notice 6348 dated 15 February 2016, issued to the neighbour.

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

² Unless stated otherwise in this determination references to sections are to sections of the Building Act 2004.

- 1.3.2 The applicants are of the view that they should not have been issued with a dangerous building notice as they are not the owner of the retaining wall. The neighbour holds the view that the applicants are the owner, and is also of the opinion that the retaining wall is not dangerous and the notices were incorrectly issued for that reason. Though the application was initially made only on the basis of the notice issued to the applicants, given the views expressed by the neighbour, the applicants have agreed to the determination being expanded to consider both notices.
- 1.3.3 I therefore consider the matter to be determined³ is the authority's exercise of its powers of decision in issuing dangerous building notices 6380 and 6348. In making my decision I must establish whether the retaining wall is a dangerous building as defined in section 121 of the Act, and whether the authority was correct in its decision to issue notices to both the applicants and the neighbour.
- 1.3.4 In making my decision, I have considered:
- the submissions of the parties, including
 - the letter dated 30 April 2015 from the firm of engineering consultants engaged by the neighbour (“the consultant’s report”)
 - the report from the structural engineer engaged by the authority (“the engineer’s report”)
 - the report of the expert commissioned by the Ministry to advise on this dispute (“the expert”), and the other evidence in this matter.
- 1.3.5 The relevant sections of the Act and the Building Code are set out in Appendix A.

1.4 Matters outside this determination

- 1.4.1 Submissions from the applicants and the neighbour have raised issues regarding actions that may or may not have contributed to the failure of the retaining wall, liability, and cost agreements. It is not a function of the determination process to apportion blame between the parties as to what has occurred or to settle civil disputes regarding costs. The Act is particular about the matters for which a party can apply for a determination, and many of the issues the applicants and neighbour have raised are not matters that I can determine under the Building Act. I have not recorded the content of the submissions received that relate to issues of liability, cause of failure of the retaining wall, or costs.

2. The building work

2.1 The sites

- 2.1.1 The adjacent sites are situated on moderate grades with a south-easterly aspect; 49 Roberts Road (“the neighbour’s property”) is west of and elevated above 51 Roberts Road (“the applicants’ property”).
- 2.1.2 The neighbour’s garage and drive area behind the main house is level with the masonry retaining walls⁴ along the eastern boundary and perpendicular across the site to the rear of the garage. The ground to the rear of the ‘across site’ retaining wall slopes moderately to the southeast.

³ Under section 177(1)(b) and 177(3)(f) of the Act.

⁴ The expert’s report refers to the subject wall as “the masonry wall”, consisting of a “retaining wall”, being the wall up to and level with the ground level on the neighbour’s property, and the “fence” being the portion above ground level. I have used the term “the retaining wall” to describe the entire structure.

- 2.1.3 The edge of the neighbour's driveway and turning bay runs parallel to the retaining wall and is located approximately 1.8m from the face of the wall. The retained ground between is planted with ferns and tree ferns. There is an ornamental pond set into the retained ground at the southern end.

2.2 The retaining wall

- 2.2.1 The retaining wall is located on the boundary between the two properties and supports the neighbour's property. The retaining wall is made of 200 series concrete masonry blocks, located on a concrete foundation. No documentation has been provided by any of the parties in respect of the permitted or consented construction of the retaining wall. The retaining wall was in place when the neighbour bought the property in 1988.
- 2.2.2 There was a section of lower height fence/retaining wall, which based on the consultant's report I understand the retained height was approximately 600mm. This lower wall collapsed and has been completely removed; only the wall's foundations remain.
- 2.2.3 The remaining retaining wall runs along the neighbour's eastern boundary for approximately 16m (see Figure 1 below). At the northern end it extends perpendicular into the neighbour's property for approximately 2m ("the north wall"), and at the southern end in excess of 5m ("the south wall"). There is a ceramic drainage pipe exiting into the applicants' property through the wall/foundation at the southern end of the masonry wall. There is a masonry wall of the same construction, finish and age running along the neighbour's western boundary ("the west wall").

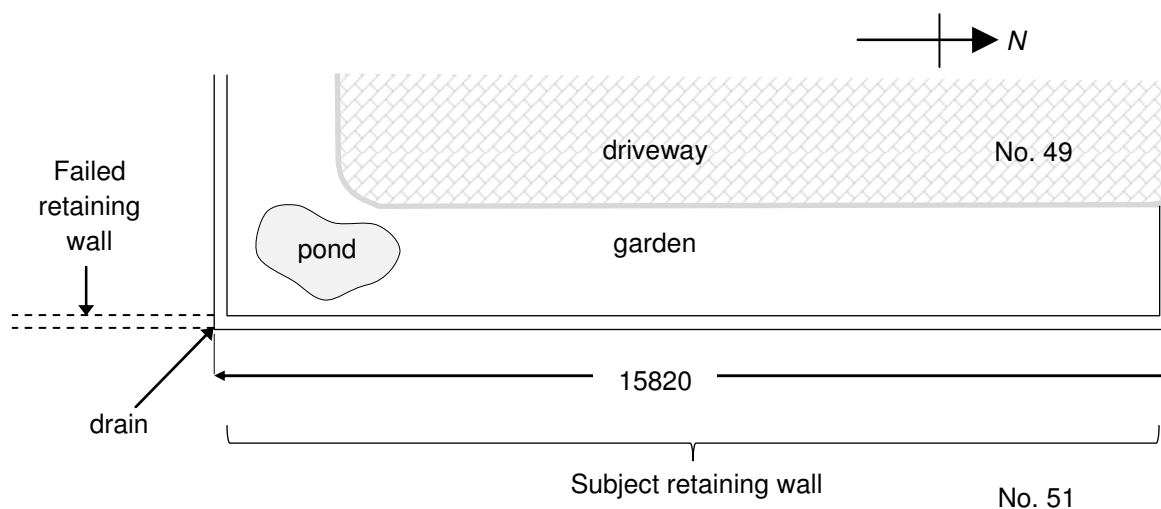


Figure 1 Plan of the wall (not to scale)

- 2.2.4 The wall is retaining 0.6m to 1.5m in height and then extends up above the retained ground level to form a fence up to 1.8m high (see figure 2). The fence has decorative open blocks the length of 1.2m for every 2.4m in length along the wall. The retaining wall has a stippled plaster finish.
- 2.2.5 The expert was unable to establish the depth or width of the foundations, but based on the tops of the foundations visible in several locations estimated the depth to be between 250mm and 300mm.

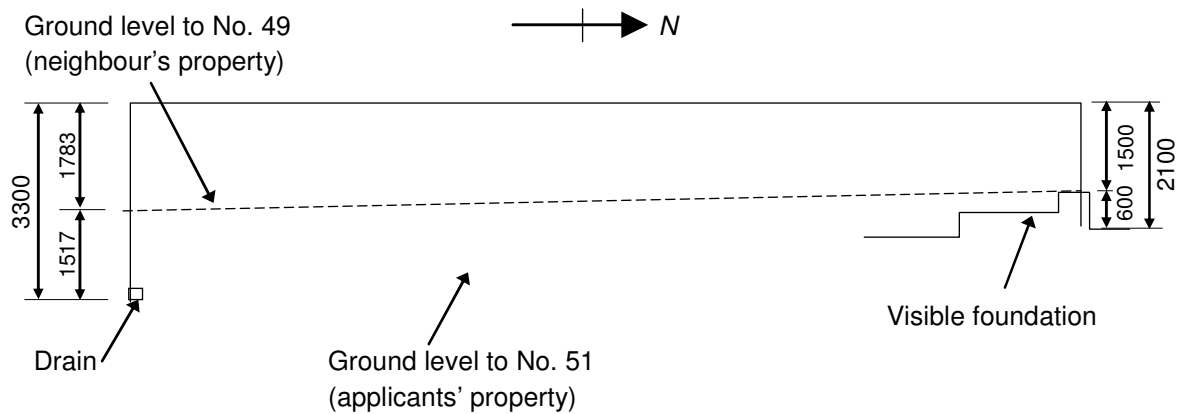


Figure 2 Elevation of the wall looking towards No. 49 (not to scale)

3. Background

3.1 Historical construction information

- 3.1.1 The dwelling on the applicants' property was constructed under a permit issued on 23 July 1956, and additions were permitted on 19 March 1975 – no indication of masonry walls or fences are evident as part of the documentation for either permit.
- 3.1.2 The neighbour purchased the property at 49 Roberts Road in April 1987.
- 3.1.3 The neighbour's garage and deck was constructed under a building consent issued on 17 March 1994, and the code compliance certificate was issued on 3 July 2001. The application drawings for the consent indicate:

- existing concrete block wall to the east and perpendicular across the site to the rear of the proposed garage
- existing concrete block wall to the west boundary.

3.2 Recent history

- 3.2.1 On 9 September 2014 a topographical survey plan of the applicants' property was prepared. The plan indicated the retaining wall that is the subject of this determination in relation to the applicants' property, and also noted the lower retaining wall as 'failing wall on boundary'.
- 3.2.2 The neighbour has stated that the lower section of wall collapsed in January 2015.
- 3.2.3 At some time around April 2015 the authority engaged a structural engineer to carry out an assessment of the retaining wall. In a letter to the authority dated 28 May 2015 the structural engineer noted observations made during a site visit undertaken on 15 April 2015, including:

The wall exhibited numerous cracks (vertical and horizontal) and had an outward lean from the vertical of about 1 in 12.

... part of the boundary wall had failed and broken blocks were lying on the grass [on the applicants' property]... these blocks were not filled with concrete grout and had failed close to foundation level ...

Where the wall has rotated forward but is restrained by the shed return a diagonal crack is visible over the full height of the wall to the base of the corner.

There were no weep holes in the wall that were visible and due to dampness the paint on the masonry had blistered.

On the high side of the wall [on the neighbour's property] there was evidence that the ground behind the wall had moved with damage to an ornamental pond tiled surfaces, gap between footpath and lawn edges and cracks opening up between panelled sections of the parapet wall.

3.2.4 The structural engineer concluded that the wall 'is now in the potentially dangerous category and unsafe to stand close by it'. The engineer considered it was unlikely to imminently collapse, but that the stability of the wall against overturning 'is marginal'. The engineer considered that the footing was likely to have rotated and be in poor structural condition, and recommended that the wall be demolished as soon as practically possible.

3.2.5 According to the applicants, the neighbour had received a dangerous building notice on 28 April 2015 requiring action be taken by 31 July 2015, and an extension was granted to 18 December 2015. The neighbour has submitted that the dangerous building notice was issued to both property owners. I have not seen a copy of the notice(s) issued in 2015.

3.2.6 The neighbour engaged a firm of consulting engineers to carry out an assessment of the retaining wall. In a letter to the authority dated 30 April 2015, the consultants noted:

- the lower retaining wall had collapsed into the applicant's property and broken up; it was constructed of un-grouted blocks with no reinforcing
- the higher retaining wall (the subject of this determination) 'has also failed but at this point has only rotated forward, approximately 100mm at the top of the retained height'
- the rotation has caused cracking in the blockwork
- in the consulting engineer's opinion 'the retaining wall is not at risk of catastrophic failure and could remain standing in its current condition for several years.

(I note here that the report appears to be in the context of supporting the neighbour's application for an extension of time in which to replace the wall.)

3.2.7 The consulting engineer noted that replacement would be difficult in winter conditions and requested an extension until 18 December 2015 to replace the wall, stating that the bottom of the retaining wall would be cordoned off 'and the [neighbour] will not park vehicles on the drive above the retaining wall.' The letter concluded by advising that the consulting engineer would carry out a design for either a pole or masonry retaining wall.

3.2.8 According to the neighbour he submitted an application for a building consent for the replacement of the wall on 29 September 2015. I have not seen a copy of the consent application or any correspondence with the authority relating to the consent application.

3.2.9 At some time in January 2016 the applicants contacted the authority regarding lack of progress and provided a copy of the survey plan.

3.3 The dangerous building notices

3.3.1 On 15 February 2016 the authority issued the dangerous building notice No. 6348 to the neighbour, and on 23 February issued the dangerous building notice No. 6380 to the applicants. The content of the notices with regard to the reasons for the notice being issued and the requirements are the same:

[The authority] is satisfied that the building identified [in the notice] poses a danger to the safety of people/property in that the building is dangerous in accordance with s121(a) and in the ordinary course of events is likely to cause injury or death to persons in it or to persons on other property, or damage to other property.

The Building (Boundary Retaining Wall/Fence) is considered dangerous as it is failing to an extent that failure may occur at any time.

In accordance with section s.124(2)(c)(i) and (ii)⁵ of the Act, [the authority] requires that you undertake the following building work, ...

1. To reduce the danger –

Hoard or fence off the area at the base of the retaining wall to the same distance as the height of the Boundary Retaining wall/Fence plus a further 1.5m so as to prevent anyone from accessing that area and effectively restrict the area above the Boundary Retaining wall that would be effected by a possible collapse and

2. To remove the danger –

Replace the Boundary Retaining Wall/Fence with a structure that is safe (this will require building consent)

- 3.3.2 The notice issued to the neighbour set the date for compliance with item #1 as 26 February 2016 and item #2 as 17 May 2016. The notice issued to the applicants set the date for compliance with item #1 as 4 March 2016⁶ and item #2 as 17 May 2016.
- 3.3.3 The covering letter for the notice issued to the applicants noted that the wall ‘rests on the boundary’ between the properties and accordingly the authority was issuing the notice to both property owners.
- 3.3.4 On 10 March 2016 the applicants’ lawyer wrote to the authority noting that there was no legal basis for the applicants being assigned liability for the retaining wall, noting that there were no easements on the title which would require the applicants maintain the wall and that the wall was encroaching on the applicants’ property. The lawyer concluded the letter by requesting the authority withdraw the dangerous building notice that had been issued to the applicants.
- 3.3.5 The applicants initially contacted the Ministry on 22 March 2016, setting out some of the background to the dispute and requesting the Ministry assist in settling the issue. On 30 March 2016 the Ministry received the application for a determination.

4. The submissions

- 4.1 In a covering letter with the determination application on 30 March 2016, the applicants said that they should not have been issued with a dangerous building notice for the retaining wall because:
- the wall was built to retain the neighbour’s driveway and the applicants receive no benefit from it
 - there is no legal precedent or ruling that shows the applicants are responsible for the removal and subsequent rebuild of the retaining wall
 - the notice was issued to the neighbour and not complied with, but a later notice was issued to both the neighbour and the applicants.

⁵ I note here that section 124(2)(c)(ii) is in respect of insanitary buildings and I consider this reference is an error in the notices.

⁶ The date on the applicant’s notice was written as “4th March February 2016” – given that the notice was issued on 23 February 2016 it is clear that the inclusion of February was a typographical error.

- 4.2 The applicants also consider that their property is not protected from any surface water surcharge and water running across the applicants' property causes saturated conditions. The applicants noted they had complied with the authority's request to cordon off the area, noting it was an inconvenience to the tenants and an eyesore as the grounds could not be maintained. The applicants are also of the view that any new wall should be solely within the neighbour's property and not on the boundary.
- 4.3 The applicants provided copies of:
- the letter from the applicants' lawyer to the authority, dated 10 March 2016
 - the dangerous building notice No. 6380 and covering letter, dated 23 February 2016
 - a survey plan dated 9 September 2014 showing the location of the retaining wall in relation to the applicant's property
 - photographs of the retaining wall.
- 4.4 By email on 11 April 2016 the applicants provided another photograph, showing the pump house structure at the south end of the retaining wall, and reiterating their views regarding the ownership of the wall.
- 4.5 By email on 28 April 2016 the applicants made a further submission in response to the neighbour. The applicants noted that it made no sense for the wall to be considered as being on their property as the benefit is solely the neighbour's, and the neighbour's approach to engineering consultants inferred acceptance the retaining wall was the neighbour's.
- 4.6 The authority did not provide a submission but acknowledged the determination application.
- 4.7 The neighbour provided a submission on 27 April 2016 in response to the application. In regards to who is the owner of the retaining wall and whether the wall is dangerous, the neighbour submitted (in summary):
- the sole responsibility to act on the notice lies with the applicants
 - on purchasing the property the neighbour was of the understanding that the retaining wall was on the applicants' property
 - both engineer's reports say that wall is not going to fall down soon – this can be read as meaning in the ordinary course of events the wall will not cause injury or death to any persons or damage to other property
 - the authority has issued a code compliance certificate for the garage and driveway, accordingly the authority must have considered the retaining wall would continue to perform for the 50 year durability period of the consented driveway and garage.
- 4.8 The neighbour provided copies of:
- the letter dated 30 April 2015 from the consulting engineer engaged by the neighbour
 - the letter dated 28 May 2015 from the structural engineer engaged by the authority

- statements from three neighbours regarding the clearing of vegetation on the applicants' property and the condition of the wall before and after this was carried out
- email correspondence between the applicants and neighbour regarding replacement of the retaining wall and filing of consent documentation
- an invoice to the neighbour from the authority for the cost of the structural engineer's report
- a code compliance certificate (ABA 940377) dated 3 July 2001, for the construction of the neighbour's garage and deck and the building consent dated 17 March 1994.

- 4.9 The submissions from the neighbour raised matters regarding: actions taken by the applicants that the neighbour considers has contributed to the failure of the retaining wall; a purported agreement between the applicants and neighbour as to share of the costs of replacing the retaining wall; the invoice from the authority for the cost of the structural engineer's report; and liability of the authority in issuing the building consent and code compliance certificate. These are not matters that I can determine under the Building Act.
- 4.10 In an email on 28 April 2016 the neighbour requested the matter for determination be expanded to consider the dangerous building notice issued to the neighbour. On 4 May 2016 the neighbour provided a copy of the notice.
- 4.11 By email on 2 May 2016 the applicants agreed to the expanded matter for determination (refer paragraph 1.3.2).
- 4.12 A draft determination was issued to the parties for comment on 22 June 2016. The authority accepted the draft without comment on 27 June 2016. The applicants accepted the draft without comment on 2 July 2016.
- 4.13 The neighbour accepted the draft on 5 July 2016 noting a typographical error, and requesting that the intent of paragraph 6.1.5 be made clearer. I have amended the determination as I consider appropriate.

5. The expert's report

- 5.1 As described in paragraph 1.3.4 I engaged the services of an expert, who is a chartered professional engineer to assist me. The expert carried out a site visit on 27 May 2016 and produced a report that was completed on 8 June 2016. Copies of the expert's report were forwarded to the parties on 10 June 2016.
- 5.2 The report, which was based on site observations and a review of the relevant documentation, described the site, the retaining wall, the observations made by the expert during the site visit, and summarised the background to the dispute.
- 5.3 The expert set out his observations as follows (in summary):
- The site visit was carried out not long after a period of heavy rainfall; the area below the retaining wall on the applicants' property was wet and soft.
 - Probing with a 1.2m spear indicated soft ground to the base of the wall up to 1.2m+ below existing ground level.
 - The wall and its foundations 'are of questionable design/construction' and would not comply with the current requirements of the Building Code.

- The wall is leaning over towards the applicants' property up to a maximum of 5 degrees.
- Ground shrinkage cracking was observed to the slope on the applicants' property below the retaining wall.
- Several full height cracks to the wall were observed, with cracking up to 8mm wide in the face of the wall and lateral displacement of sections of the wall of a similar magnitude.
- Several full height cracks were also evident in the south wall.
- Settlement of the fill behind the retaining wall was observed, with cracks opening up.

5.4 The expert considered that the retaining/fence walls were constructed as part of the site development of the neighbour's property (no. 49), noting that the subject wall is of the same construction, finish and age to the retaining wall on the other side of the neighbour's property.

5.5 The expert observed that the subject wall is 'clearly rotating/failing and will eventually collapse', noting that:

While the failure of the retaining wall is likely to be gradual there is the real and likely danger of sections of the cracked fence/screen wall above the retained height being dislodged and falling into either property, but particularly no. 51. The failure of the lower fence/minor retaining wall reinforces that opinion.

5.6 The expert concluded that in his opinion the retaining wall above the retained height is dangerous, and is likely to cause injury or death to persons on other property.

6. Discussion

6.1 Whether the retaining wall is dangerous under section 121 of the Act

6.1.1 The neighbour has submitted that as both engineer's reports do not indicate imminent failure, the wall has not met the test of being a dangerous building under section 121 of the Act as "in the ordinary course of events" the wall will not cause injury or death to any persons or damage to other property.

6.1.2 I disagree with the neighbour's interpretation of section 121. The phrase "in the ordinary course of events" does not exclude the gradual failure or deterioration of a structure; structures that are left without maintenance or repair may gradually deteriorate to such a point that they become dangerous. In regards to structural stability, I do not consider that the collapse of a structure must be imminent or the threat of collapse immediate in order that a structure is deemed dangerous under the Act.

6.1.3 Section 121(1)(a) establishes that a building is dangerous if, in the ordinary course of events, (excluding earthquakes) the building is "likely" to cause injury or death or damage to other property. The term "likely" has been considered in a number of judicial decisions regarding section 121 and its predecessor in the Building Act 1991 and means something that could well happen.⁷

⁷ See *Rotorua District Council v Rua Developments Ltd* DC Rotorua NP1327/97, 17 December 1999, and discussed in Determination 2006/119.

- 6.1.4 In considering the reports provided by the neighbour's consulting engineer, the structural engineer engaged by the authority, and the report of the expert, I conclude the retaining wall located on the boundary between 49 and 51 Roberts Road presents a risk of collapse or partial collapse such that in the ordinary course of events it is likely to cause injury or death.
- 6.1.5 I accept the expert's view that it is the portion of the wall above the retained ground that is at risk of collapse and is likely to cause injury or death. I consider that the removal of this portion of the wall will mean the wall is no longer considered dangerous in respect of collapse. I note that if this portion of the retaining wall is removed, it will, in part, result in a sudden change in level greater than 1m that protection will need to be provided for.
- 6.1.6 I am of the view the authority was correct in its decision to issue a dangerous building notice on the basis that the retaining wall is a dangerous building as defined in section 121 of the Act.

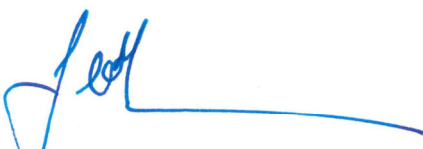
6.2 Who the dangerous building notice(s) should be issued to

- 6.2.1 Both parties dispute the ownership of the retaining wall and consider that the other is liable for the building work to remove and replace the wall. The consideration of ownership in this determination is limited to the authority's exercise of its powers in issuing notices under section 125 of the Act.
- 6.2.2 A notice issued under section 125 in respect of a dangerous building must be issued to the owner (section 125(2)(a)). In this case the survey plan indicates the wall as being on the boundary; it appears that the wall is not wholly within one property or the other. Accordingly the "owner" in this case for the purpose of section 125 are the owners of 49 and 51 Roberts Road. I conclude therefore that the authority was correct in the exercise of its powers of decision in issuing the dangerous building notice to both the applicant and the neighbour.
- 6.2.3 I note here that any dispute regarding ownership and liability for replacing the wall is a matter of property law and not one that falls within the ambit of a determination under section 177 of the Act.

7. The Decision

- 7.1 In accordance with section 188 of the Building Act 2004, I determine that the authority correctly exercised its powers of decision in issuing dangerous building notices No. 6380 and 6348 in respect of the retaining wall and fence on the shared boundary between two properties at 49 and 51 Roberts Road, Whangaparoa.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 5 August 2016.



John Gardiner
Manager Determinations and Assurance

Appendix A

A.1 The relevant sections of the Building Act 2004

7 Interpretation

owner, in relation to land and any buildings on the land,—

(a) means the person who—

(i) is entitled to the rack rent from the land; or

(ii) would be so entitled if the land were let to a tenant at a rack rent; and

(b) includes—

(i) the owner of the fee simple of the land; and

(ii) for the purposes of sections 32, 44, 92, 96, 97, and 176(c), any person who has agreed in writing, whether conditionally or unconditionally, to purchase the land or any leasehold estate or interest in the land, or to take a lease of the land, and who is bound by the agreement because the agreement is still in force

121 Meaning of dangerous building

(1) A building is dangerous for the purposes of this Act if,—

(a) in the ordinary course of events (excluding the occurrence of an earthquake), the building is likely to cause—

(i) injury or death (whether by collapse or otherwise) to any persons in it or to persons on other property; or

(ii) damage to other property; or ...

124 Dangerous, affected, earthquake-prone, or insanitary buildings: powers of territorial authority

(1) This section applies if a territorial authority is satisfied that a building in its district is a dangerous, affected, earthquake-prone, or insanitary building.

(2) In a case to which this section applies, the territorial authority may do any or all of the following:

(a) put up a hoarding or fence to prevent people from approaching the building nearer than is safe:

(b) attach in a prominent place on, or adjacent to, the building a notice that warns people not to approach the building:

(c) except in the case of an affected building, issue a notice that complies with section 125(1) requiring work to be carried out on the building to—

(i) reduce or remove the danger; or

(ii) prevent the building from remaining insanitary:

(d) issue a notice that complies with section 125(1A) restricting entry to the building for particular purposes or restricting entry to particular persons or groups of persons.

(3) This section does not limit the powers of a territorial authority.

125 Requirements for notice requiring building work or restricting entry

(1) A notice issued under section 124(2)(c) must—

- (a) be in writing; and
- (b) be fixed to the building in question; and
- (c) be given in the form of a copy to the persons listed in subsection (2); and
- (d) state the time within which the building work must be carried out, which must not be less than a period of 10 days after the notice is given or a period reasonably sufficient to obtain a building consent if one is required, whichever period is longer; and
- (e) state whether the owner of the building must obtain a building consent in order to carry out the work required by the notice.

...

(2) A copy of the notice must be given to—

- (a) the owner of the building; and
- (b) an occupier of the building; and
- (c) every person who has an interest in the land on which the building is situated under a mortgage or other encumbrance registered under the Land Transfer Act 1952; and
- (d) every person claiming an interest in the land that is protected by a caveat lodged and in force under section 137 of the Land Transfer Act 1952; and

...

(3) However, the notice, if fixed on the building, is not invalid because a copy of it has not been given to any or all of the persons referred to in subsection (2).