

Determination 2024/026

The authority's decision to issue a notice to fix in relation to a retaining wall

6/19 Gardner Avenue, New Lynn, Auckland

Summary

This determination considers the authority's decision to issue a notice to fix in relation to the construction of a retaining wall. The determination considers whether there were grounds to issue the notice to fix (including whether the building work was exempt from the requirement to obtain a consent), and the form and content of the notice to fix.



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. D Kasabova, N Kasabov and K Kasabov, the owners of the property (“the owners”). D Kasabova and N Kasabov applied for this determination.
 - 1.2.2. Auckland Council (“the authority”), carrying out its duties as the territorial authority or building consent authority.
- 1.3. This determination arises from the authority’s decision to issue a notice to fix in relation to a retaining wall constructed at the owners’ property. The owners consider that the retaining wall was exempt from the requirement to obtain a building consent.
- 1.4. The matter to be determined, under section 177(1)(b) and 3(e), is the authority’s decision to issue notice to fix NOT21634416 in relation to the retaining wall. In determining this matter, I must consider:
 - (1) whether there were grounds to issue a notice to fix
 - (2) the form and content of the notice to fix
 - (3) the application of section 167.

Matters outside this determination

- 1.5. This determination does not consider the abatement notice issued under the Resource Management Act 1991. I have no jurisdiction under other enactments, and this determination only considers matters relating to the Building Act and its regulations.

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

2. Background and building work

- 2.1. The authority undertook site visit on 29 August 2022, following a complaint regarding earthworks and excavation taking place at the boundary of the property.
- 2.2. The authority's officers identified that a timber retaining wall had been constructed near the stream which runs through the property. The council officers measured the newly built retaining wall as being 21m in length and between 1.6m and 1.9 in height (see Figure 1).
- 2.3. The area behind the retaining wall had been filled with concrete debris. The area filled with concrete debris is approximately 7.7m by 21m (see Figure 2). The authority was told by the owner present at the site visit that they planned to make a car parking area.



Figure 2: The area behind the retaining wall

- 2.4. The authority issued the notice to fix on 6 September 2022. The notice to fix contained the following particulars:

PARTICULARS OF CONTRAVENTION OR NON-COMPLIANCE

Contrary to **s.40 of the Building Act 2004**, the following building works have been undertaken at, 6/19 Gardner Avenue, New Lynn, Auckland, without first obtaining a building consent.

- Construction of a retaining wall measuring 1.9 Meters in height which runs along the southern side of the main dwelling measuring 21 meters in length.

Contrary to **s.17 of the Building Act 2004**, the following building work does not comply with the requirements of schedule 1 of the Building Regulations 1992 (the Building Code):

- The barrier along the top of the retaining wall is not completed in a manner that complies with the acceptable solution of clause F4 (Safety from falling) of the New Zealand Building Code.
 - The retaining wall appears to be constructed in a manner that would not achieve compliance with the minimum requirements of clauses B1 (Structure), B2 (Durability) and E1 (Surface water) of the New Zealand Building Code.
- 2.5. The owners submitted a report (dated 25 October 2022) to the authority, that was prepared by a building consultant and included a “formal section 167 notice of compliance”.
- 2.6. Following correspondence between the parties, the owners applied for a determination.

3. Submissions

The owners

- 3.1. The owners consider:
- 3.1.1. The retaining wall is exempt under both clause 1 and clause 20 of Schedule 1 of the Building Act.
 - 3.1.2. The notice to fix is defective because the references to section 17 and section 40 are not supported with particulars and appropriate remedies.
 - 3.1.3. There is no offence under section 40 because no building work is being undertaken at this time that requires consent.
 - 3.1.4. The first reference to section 17 refers to an acceptable solution which is not mandatory, and the second speculates that some Building Code clauses are not being met with no evidence or reference to the relevant performance criteria.
 - 3.1.5. In terms of the remedies, “their inappropriate demands are indicative of the lack of a breach”.
 - 3.1.6. The authority “has failed to properly consider section 167 and has not provided adequate reasons for refusal of the owners notice of compliance with the notice to fix”.

The authority

- 3.2. The authority considers:
- 3.2.1. The Schedule 1 exemptions claimed are not applicable.

- 3.2.2. In terms of the remedies in the notice, the owners' suggestion that the authority cannot require a certificate of acceptance to be applied for is incorrect, as referenced in section 165(1)(c).² The removal of the structure is provided as an option to achieve compliance.
- 3.2.3. The suggestion that a notice to fix cannot be issued for completed building work is incorrect, as per section 165(1)(c).
- 3.2.4. Section 167 is not applicable as this refers to work that is required to be completed by the notice and that the work has been completed, which is not the situation in this case.
- 3.2.5. The authority acknowledges issues with the wording of the notice, particularly with the section 17 contraventions.

4. Discussion

- 4.1. This determination considers the authority's decision to issue the notice to fix, specifically:
 - (1) whether there were grounds to issue a notice to fix (which turns on whether the building work was exempt from the requirement to obtain a consent)
 - (2) the form and content of the notice to fix
 - (3) the application of section 167.

Whether there were grounds to issue a notice to fix

- 4.2. Section 164 provides for a notice to fix to be issued if "a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent)...". Further, the authority must issue a notice to fix requiring the person to remedy the contravention or to comply with the Act or the Building Code.
- 4.3. Section 40(1) states that a person must not carry out any building work except in accordance with a building consent. Section 40(2) states that a person commits an offence if the person fails to comply with this section.
- 4.4. The notice to fix alleges the following contravention of section 40:
 - Construction of a retaining wall measuring 1.9 Metres in height which runs along the southern side of the main dwelling measuring 21 metres in length.

² Section 165(c) provides that if a notice to fix relates to building work that "is being or has been carried out without a building consent, it may require that making of an application for a certificate of acceptance for the work".

- 4.5. Section 41(1)(b) states that a building consent is not required if the building work falls within the exemptions under Schedule 1 of the Building Act. Schedule 1 prescribes building work for which building consent is not required. Therefore, whether there has been a contravention of section 40 turns on whether the building work was exempt under Schedule 1.
- 4.6. The owners consider that the retaining wall is exempt from the requirement to obtain building consent under clause 1 and clause 20 of Schedule 1. I have assessed the building work against these exemptions in Table 1. In my view, neither of the exemptions apply. Accordingly, building work was undertaken without consent when consent was required, in contravention of section 40. Therefore, there were grounds to issue a notice to fix under section 164.

Table 1: Assessment of Schedule 1 exemptions

<p>1 General repair, maintenance, and replacement</p> <p>(1) The repair and maintenance of a building product or an assembly incorporated in or associated with a building, provided that a comparable building product or assembly is used.</p> <p>(2) Replacement of a building product or an assembly incorporated in or associated with a building, provided that—</p> <p>(a) comparable building product or assembly is used; and</p> <p>(b) the replacement is in the same position.</p> <p>(3) However, subclauses (1) and (2) do not include the following building work:</p> <p>(a) complete or substantial replacement of a specified system; or</p> <p>(b) complete or substantial replacement of a building product or an assembly contributing to the building’s structural behaviour or fire-safety properties; or</p> <p>(c) repair or replacement (other than maintenance) of a building product or an assembly incorporated in or associated with a building that has failed to satisfy the provisions of the building code for durability, for example, through a failure to comply with the external moisture requirements of the building code; or</p> <p>(d) sanitary plumbing or drainlaying under the Plumbers, Gasfitters, and Drainlayers Act 2006.</p>	
Authority’s view	<ul style="list-style-type: none"> Building consent drawings showing the extent of the retaining wall structures in 1996 exclude any structures in the area of the retaining wall. The replacement of any structure built since then would not be covered by the Schedule 1 exemption, as it would have failed to meet the durability clause of that exemption.
Owners’ view	<ul style="list-style-type: none"> The owners state that the authority’s records are incomplete. The wall is a replacement of a previous wall of the same dimensions and in the same position, exempt under clause 1 of Schedule 1. Correspondence from the owners to the authority on 13 September 2022 stated “The wall is replacement of an existing wall, made by new and strong materials, but it’s really little bit higher than the old one”.
Ministry’s conclusion	<ul style="list-style-type: none"> This exemption does not apply to the replacement of an entire building (such as an entire retaining wall). I also note that under subclause (3)(b),

	<p>this exemption does not apply where there is a “complete or substantial replacement of a building product or an assembly contributing to the building’s structural behaviour”.</p> <ul style="list-style-type: none"> In this case, the owners have not confirmed whether the entire retaining wall was replaced, or whether part of the original construction remains. However, even if some (or all) of the vertical posts are original, the new horizontal timber planks contribute to the structural behaviour of the retaining wall, and therefore the exemption does not apply due to subclause (3)(b).
<p>20 Retaining walls</p> <p>Building work in connection with a retaining wall that—</p> <p>(a) retains not more than 1.5 metres depth of ground; and</p> <p>(b) does not support any surcharge or any load additional to the load of that ground (for example, the load of vehicles).</p>	
<p>Authority’s view</p>	<ul style="list-style-type: none"> The authority states “For correctness I have not commented on the height of the retaining system and have simply stated that the owner advised the retaining wall will be supporting a vehicle parking area which will place a surcharge greater than the fill height on the wall. This takes the retaining system outside the schedule one exemption and the system would have required a Building Consent to legally be constructed.”
<p>Owners’ view</p>	<ul style="list-style-type: none"> The authority has measured the wall to the top of the structure and not the retained ground. The retained ground is between 600mm to 1500mm in height, and therefore the wall is exempt under clause 20 of Schedule 1. The extra rails at the top are there to deflect flood water and are not intended to be retaining ground. There is no surcharge present, and the authority is misconstruing comments from the owner in relation to the alleged surcharge. The only area of potential surcharge is within 1.5m of the wall and the owners are willing to put up a barrier to restrict vehicle access. The owners state “...in this case there is either no surcharge present or is so close to the wall as to be limited and avoidable. There was no driveway at the retaining wall and no need for the wall to be considered having a surcharge. The owner comment that parking was intended related to the wider general flat area and not the vicinity of the wall...”. The owners also referred to Determination 2021/021³, which states: <p>[6.13] When the retaining wall was constructed in mid-late 2016 the neighbours’ property comprised a vacant section of relatively flat land. Accordingly, I consider that the retaining wall did not support any surcharge or additional load at that time and therefore satisfies the criterion in clause 20(b). For the purposes of deciding whether the wall required building consent or not, it is any surcharge existing at the time the wall was constructed that is relevant, rather than any surcharge that exists currently following completion of the neighbours’ development (some three years after the construction of the wall).</p>

³ Determination 2021/021 *Regarding the withdrawal of a notice to fix for a retaining wall, near the boundary with another property* (29 September 2021).

<p>Ministry's conclusion</p>	<ul style="list-style-type: none"> • The owners state that no more than 1500mm depth of ground is retained, although this has not been confirmed by the authority. • Determination 2021/021 notes that "...surcharges arise not only from permanent loads from the ground itself, including buildings located on the ground, but also from occasional loads such as those of vehicles... I also note that clause 20(b) gives "load of vehicles" as an example of an additional load that a retaining wall may be required to support".⁴ • However, the circumstances in Determination 2021/021 are not comparable to the current case. Determination 2021/021 concluded that at the time the retaining wall in question was constructed, it did not support any surcharge or additional load. This is because the neighbour's development which created the potential surcharge was undertaken some three years after the construction of the retaining wall. • In this case, the authority undertook a site visit shortly after receiving a complaint that earthworks and excavation were being undertaken at the property. At the time of the site visit, the area supported by the retaining wall had been backfilled with concrete debris and the owner commented that it was intended to be used for carparking. There was no barrier restricting vehicle access at that time. In my view, this exemption does not apply due to subclause (b).
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- 4.7. The owners also argue that "the reference to section 40 is inappropriate as there is no offence under section 40 because no building work is being undertaken by a person at this time that needs consent".
- 4.8. There is a distinction between subsections (1) and (2) of section 40. Subsection (1) states that "a person must not carry out any building work except in accordance with a building consent". Subsection (2) makes it an offence to fail to comply with subsection (1). Therefore, while contravening subsection (1) is an offence which an authority can pursue via a criminal prosecution, alternatively an authority can choose to issue a notice to fix for that contravention. The basis for the notice to fix in this case, under section 164(1)(a), is a contravention of the Act (rather than an offence). There is no legislated time limit for issuing a notice to fix for a contravention of the Act, including for a contravention of section 40(1).⁵
- 4.9. I also note that section 165 (which sets out the form and content of a notice to fix), refers to building work that "...is being **or has been** carried out..." [my emphasis]. Therefore, there is no requirement for the building work to be ongoing for there to be grounds to issue a notice to fix under section 164.
- 4.10. I discuss the particulars of the section 17 contraventions in paragraphs 4.13 to 4.17. I have found that these particulars were deficient, and as such, it is not necessary for me to assess the compliance of the retaining wall with the Building Code clauses raised, in order to make a determination about the notice.

⁴ At [6.12].

⁵ Unlike filing a charging document, which has a time limit of 12 months under section 378.

The form and content of the notice to fix

4.11. Section 165 concerns the form and content of a notice to fix, and states:

- (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:
- ...

Section 17 particulars

4.12. The prescribed form⁶ for a notice to fix provides a space to insert the “particulars of contravention or non-compliance”. Previous determinations⁷ 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.

4.13. The notice to fix alleges the following contraventions of section 17:

- The barrier along the top of the retaining wall is not completed in a manner that complies with the acceptable solution of clause F4 (Safety from falling) of the New Zealand Building Code.
- The retaining wall appears to be constructed in a manner that would not achieve compliance with the minimum requirements of clause B1 (Structure) B2 (Durability) and E1 (Surface water) of the New Zealand Building Code.

4.14. In regard to both particulars, the notice does not adequately describe the reasons why the authority considers the work does not comply, nor does it identify the relevant performance criteria the authority considered had not been met.

4.15. Further, the particular relating to F4 refers to compliance with the acceptable solution. As set out in previous determinations⁸, non-compliance with an acceptable solution does not mean the building work does not comply.

4.16. The particular relating to B1, B2 and E1 states the retaining wall appears to be constructed in a manner that would not achieve compliance...” [my emphasis]. This

⁶ See Building (Forms) Regulations 2004, Form 13.

⁷ 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]

⁸ For example 2024/016, at [4.20-4.21].

indicates a lack of certainty as to non-compliance. I note that specific evidence that the Act or regulations are being contravened is required before a notice to fix can be issued. This was discussed in Determination 2019/036⁹, which stated:

[6.3.12] As previously stated, I do not consider that the notice to fix is the appropriate mechanism where there is a lack of evidence of whether the structure is compliant or not compliant. A notice to fix is an enforcement notice that requires a person to carry out work to remedy a breach of the Act or Building Code (section 164(2)(a)), specifies a time period for doing so (section 165(1)(b)) and may be enforced by a prosecution for failing to comply with the notice (section 168). For an authority to issue a notice to fix it must consider on reasonable grounds that a person is contravening or failing to comply with the Act or regulations. The authority's belief that the Act or regulations are being contravened will require some specific evidence in support of that belief before a notice to fix can be issued.

[6.3.13] Given that the building work to construct the structure is subject to the Act but was not granted building consent, the appropriate avenue for regularising that work is by way of the certificate of acceptance process. This will provide the opportunity for the compliance or otherwise of the structure to be assessed, and is the appropriate avenue for the authority to consider relevant information and for the authority to reach an informed view on whether the building work complies.

4.17. The section 17 particulars 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 fairly and fully inform the recipient about the basis for the notice.

The remedies in the notice to fix

4.18. The notice to fix stated:

To remedy the contravention or non-compliance you must:

Choose one of the following options:

- (1) Pursue any legal options to make the building works comply with the Building Act 2004 and the Building Regulations. This could include applying for and obtaining of a Certificate of Acceptance (COA) pursuant to section 96 of the Act.
OR
- (2) Remove the unauthorised structure.

4.19. The owners consider that the remedies are inappropriate and "indicative of the lack of a breach". They state:

⁹ Determination 2019/036 *Regarding a notice to fix and whether a structure on trailers is a vehicle or building* (25 July 2019).

- 4.19.1. “The NTF cannot demand a COA be obtained because only the council have discretion to issue a COA”.
- 4.19.2. “Obtaining a COA and removal of the unauthorised works (if so) cannot be required and is contrary to the councils own AC1805 guidance document...”¹⁰
- 4.20. I consider that the remedy to “pursue any legal options to make the building works comply with the Building Act 2004 and the Building Regulations” is appropriate. However, the particulars of the section 17 contraventions and remedies read in conjunction do not indicate what is required to bring the work into compliance.
- 4.21. Section 165(1)(c) states that if a notice to fix “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” [my emphasis]. Applying for a certificate of acceptance is a lawful option to remedy a contravention of section 40.¹¹ However, the notice incorrectly referred to “applying for and obtaining” a certificate of acceptance, rather than simply “applying” for one.
- 4.22. I also note that removing the building work is a lawful option to remedy the contravention(s).

The application of section 167

- 4.23. The owners consider that section 167 is applicable because they submitted a report (dated 25 October 2022) to the authority, that included a “formal section 167 notice of compliance”. The owners state “Section 167 is the moderating section that requires council to accept the reasoned position of the NTF [notice to fix] recipient and only then provide reasons for disagreement (and only then issue a further NTF if justified or considered necessary)”.
- 4.24. Section 167 sets out the process regarding the inspection of building work that is required to be completed under a notice to fix.¹² Section 167(1) states “If a specified person to whom a notice to fix was issued is required to notify a territorial authority... that the relevant building work has been completed, the territorial authority... must, on receipt of the notice from the specified person concerned, inspect... the building work to which the notice to fix relates”.
- 4.25. In this case, the owners had not completed any building work that was required by the notice to fix, and accordingly, had not notified the authority that the relevant

¹⁰ This refers to the authority’s practice note regarding unauthorised building work (AC1805 *How unauthorised building work is assessed*). I note that this is guidance published by the authority and is outside the scope of the determination.

¹¹ The determination does not consider what is required in this case under any other legislation, such as the Resource Management Act 1991.

¹² This process is set out in Determination 2024/016, at [4.34-4.36].

building work had been completed. As such, section 167 does not apply.

5. Conclusion

- 5.1. The construction of the retaining wall was not exempt building work under Schedule 1. Therefore, this work contravened section 40 and there were grounds for issuing the notice under section 164. Building work does not need to be ongoing for there to be a contravention of section 40(1).
- 5.2. The particulars of the section 17 contraventions set out in the notice were deficient. This is because they referred to an acceptable solution rather than the Building Code, they did not specify which performance criteria were not being met, and they did not specify the reasons why the authority considered the work was non-compliant.
- 5.3. In terms of the remedies, due to the deficient particulars of the alleged section 17 contraventions, it was not clear what was required to bring the work into compliance. Also, the notice incorrectly referred to “applying for and obtaining” a certificate of acceptance (rather than simply “applying” for a certificate of acceptance). However, to remove the building work is a lawful option to remedy the contravention(s).
- 5.4. Section 167 is not relevant in this case, as the owners had not completed any building work required by the notice to fix.

6. Decision

- 6.1. In accordance with section 188 of the Building Act 2004, I determine that there were grounds to issue the notice to fix, however, the form and content of the notice was deficient. Accordingly, I reverse the notice to fix.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 27 May 2024.

Andrew Eames

Manager Advisory, Determinations