



Determination 2020/019

Regarding the authority's decision to issue a notice to fix in respect of an agricultural effluent storage pond at 242 Rawhiti Road, Te Aroha

Summary

This determination considers the authority's decision to issue a notice to fix for an agricultural effluent storage pond to the current owner of the pond. The determination discusses the relationship of the previous owner and the current owner, and whether the current owner is a specified person for the purposes of section 163 and 164 of the Building Act. The determination also considers whether the authority had reasonable grounds to conclude that the pond did not comply with the Building Code.

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004 ("the Act") made under due authorisation by me, Katie Gordon, Manager Determinations, Ministry of Business, Innovation and Employment ("the Ministry"), for and on behalf of the Chief Executive of the Ministry¹.
- 1.2 The parties to the determination are:
 - Poseidon Holdings Limited, the owner of the building and who applied for the determination ("the applicant"), with the director of the applicant acting as the agent ("the director"). On 3 March 2020 the applicant appointed a legal adviser ("the applicant's legal adviser") to act as its agent.
 - Waikato Regional Council ("the authority"), carrying out its duties and functions as a regional authority and a building consent authority.
- 1.3 The application for this determination arises from the authority's decision to issue a notice to fix to the applicant for the construction of an uncovered aerobic agricultural effluent storage pond ("the aerobic pond") used as part of a pig farming operation. The applicant believes the authority did not have reasonable grounds to issue the notice to fix to the applicant.
- 1.4 The matter to be determined² is therefore whether the authority correctly exercised its powers of decision to issue the notice to fix to the applicant.
- 1.5 The pig farming operation is subject to a resource consent issued by the authority under the Resource Management Act 1991 (the RMA). This determination includes information about the resource consent necessary to explain the background to the matter to be determined. However, I note I have no jurisdiction under other

¹ The Building Act and Building Code (Schedule 1 of the Building Regulations 1992) are available at www.legislation.govt.nz. Information about the Building Act and Building Code is available at www.building.govt.nz, as well as past determinations, compliance documents and guidance issued by the Ministry.

² Under sections 177(1)(b) and 177(4) of the Act

enactments and therefore the application of the RMA is outside the ambit of this determination. I have referred to the Waikato Regional Council as ‘the authority’ in respect of background relating to the application of the RMA.

- 1.6 In making my decision, I have considered the submissions from the parties, the report of the independent expert commissioned by the Ministry to advise on this dispute (“the expert”) and the other evidence in this matter.

2. The building work

- 2.1 The pig farming operation is located on a large site on a hilly farmland property in the Kaimai Ranges. The pigs are housed in pens and sheds.
- 2.2 Wastewater material is flushed from effluent pits within the pig sheds through two storage tanks to the waste water treatment system.
- 2.3 The wastewater treatment system comprises two agricultural effluent ponds. One is an uncovered aerobic storage pond (“the aerobic pond”). The other is a covered anaerobic pond (“the anaerobic pond”). The anaerobic pond treats effluent prior to it entering aerobic pond. The aerobic pond is the subject of this determination; the anaerobic pond and other parts of the wastewater treatment system are not the subject of this determination.
- 2.4 The aerobic pond is located downhill of the anaerobic pond. The aerobic pond has an area of approximately 100x35m with the embankment to the pond ranging in height from 2.5m at the eastern abutment to 7m at the western abutment. The aerobic pond has a holding capacity of approximately 7,000m³.
- 2.5 The aerobic pond is not a large dam for the purposes of the Act, and the building work to construct the aerobic pond was exempt from the requirement to obtain a building consent (refer paragraph 6.2.9). The aerobic pond also has a ‘low’ Potential Impact Classification (“PIC”)³ (refer Appendix B for the authority’s engineer’s report dated September 2016) as the population at risk is “effectively nil” and “the expected damage level [in the event of the pond’s failure] is minimal”.
- 2.6 The aerobic pond was constructed by way of cut and fill: the site was cut back into the existing slope to the north and east and a dam formed across the slope to the west and south, in effect filling over the existing gully/watercourse. The aerobic pond is located adjacent to an existing unpaved road to the immediate south of the southern embankment: it is unclear whether the road or the embankment of the pond is the predecessor.
- 2.7 The aerobic pond has a synthetic liner and has also been constructed with a leak detection system, consisting of a water drainage network comprised of aggregate and perforated pipe underneath the liner which drains to a monitoring well. Water samples are collected from the well to assess effluent levels to determine if the pond is leaking.
- 2.8 A low level HDPE⁴ scour outlet pipe is located on the downstream face of the southern embankment, approximately 4.5 m below the pond crest. Operation of this low level outlet is via a valve at the downstream end.

³ See section 134B of the Act for the method of classification

⁴ High-density polyethylene plastic

2.9 Operation of the aerobic pond is as follows:

- the only uncontrolled inflow is direct rainfall.
- controlled inflow is via the upslope wastewater discharge system, operated manually.
- outflow is via a tractor-mounted pump to a vehicle tanker or an irrigation system.

3. The background

3.1 The property was owned by the previous owner of the property and the pig farming operation (“the previous owner”).

3.2 The parties have raised the previous ownership structure and the current ownership structure in relation to the notice to fix issued to the applicant. This matter is discussed in paragraphs 6.3.18 to 6.3.28. For ease of reference between the two ownership structures, I refer to the previous ownership structure (described as follows) as ‘the previous owner’ throughout this determination.

3.3 The previous owner is a company that had shareholding across a number of shareholders. One of the shareholders was a trustee company (“the trustee company”). The trustee company has one director who is also the shareholder. The trustee company has a 40% shareholding in the previous owner, across two parcels of shares. The wife of the director of the trustee company has an 8.5% shareholding in the previous owner.

3.4 The current ownership structure, which I refer to as ‘the applicant’, is a company with the same director as the trustee company and with two equal shareholdings. These shareholders are two trusts. One trust is managed by a second trustee company (“the second trustee company”) and the wife of the director is one of the trustees of the other trust. The second trustee company has the same director as the applicant and trustee company. The trustee company is the shareholder of the second trustee company.

3.5 The pig farming operation is subject to a resource consent, which provides authorisation for the activity of “discharge of contaminants to air from a 6600 pig equivalent piggery”. The resource consent contains conditions the operation of the activity must satisfy.

3.6 The wastewater treatment system, including the aerobic pond, was constructed in February 2015 by the previous owner.

3.7 A site compliance report by the authority (“the site compliance report” - provided as part of its RMA responsibilities) considers the level of compliance with the resource consent and the conditions of the pig farming operation from July 2014 to 31 May 2015. The site compliance report sets out the status of the conditions that apply to the activity authorised under the resource consent. The listed conditions that relate to the wastewater treatment system are:

Condition 14A

The effluent treatment and storage system shall be installed in general accordance with the Covered Anaerobic Pond Implementation Plan provided with this consent application ... and the Dairy NZ/IPENZ Practice Note 21 (Farm Dairy Effluent Pond Design and Construction, ...).

Condition 14B

A suitably qualified and experienced person shall supervise the construction of the effluent treatment and storage ponds. Prior to the use of the treatment and storage ponds, required by condition 14, the consent holder shall forward to the Council a written statement or certificate of compliance from a suitably qualified person confirming that the pond construction and liners have been constructed to appropriate standards.

3.8 Against these conditions, the site compliance report lists the following evidence:

- NIWA⁵ certification of pond design and installation
- geotechnical certification of earthworks
- pond liner certification
- anaerobic and aerobic pond liner pressure tests

The report notes that:

- all relevant certification has been provided to meet the requirements of condition 14A and 14B
- a NIWA representative supervised construction of the ponds and certified that the ponds have been built as designed (provided 18 May 2015)
- the geotechnical tests for the earthworks and pond liner certifications were provided to the authority prior to effluent entering the ponds.

3.9 According to the authority's file note, dated 4 August 2016, the authority carried out a resource consent compliance site inspection and in a report dated 8 March 2016 (of which I have not seen a copy) noted concerns about the risk of failure of the aerobic pond due to the stability of the embankment. A large pile of assorted rocks had been placed at the bottom of the embankment, along the unpaved road, which may have been placed to stabilise previous partial failure of the embankment, and the possible risk of overtopping in heavy rainfall or high wind events due to lack of operational freeboard.

3.10 In response to the resource consent compliance site inspection report dated 8 March 2016, on 3 August 2016, the authority carried out an inspection of the aerobic pond for the purposes of considering whether the requirements of the Building Act were met by the aerobic pond.

3.11 The authority noted the following in its file note dated 4 August 2016 with respect to the inspection carried out on 3 August 2016:

- The water level in the pond should have a minimum freeboard of 500mm and there is a significant risk to the aerobic pond should the water overtop the southern embankment
- The southern embankment has a number of concerns including the steepness of the downstream face and the rocks at its base
- While the pond is not a 'large dam' as defined in the Act and building consent was not required, there are a number of factors that should be taken account of in its design and constructing dams including the filling of the gully/watercourse underneath the pond, seismic design and the possibility of subsoil water.

⁵ The National Institute of Water and Atmospheric Research

- 3.12 The authority has stated it contacted the previous owner on a number of occasions (I have not seen copies of this correspondence) after its inspection on 3 August 2016 seeking engineering design and construction information.
- 3.13 On 1 September 2016 the authority engaged a geotechnical engineer (“the authority’s engineer”) to inspect the aerobic pond and form a view on whether the aerobic pond complied with the Building Code under section 17⁶ of the Act.
- 3.14 The authority’s engineer inspected the pond on 29 August 2016 and provided a report to the authority dated September 2016. The authority’s engineer’s report is summarised in Appendix B.
- 3.15 The authority’s engineer noted that only an initial assessment had been carried out and the report and its findings were not based on a geotechnical investigation of the fill material. The authority’s engineer also noted the lack of any available design and construction records.
- 3.16 The authority’s engineer considered there was sufficient evidence to show that the building work associated with the aerobic pond did not comply with aspects of the Building Code. The engineer noted the average slope of the embankment and the evidence of poor compaction, and concluded that “on the basis of the evidence available we consider the stability of the slope would likely be less than normally accepted factors of safety and therefore does not comply with the building code for Clause B1...”.
- 3.17 The authority’s engineer also noted other aspects of the aerobic pond where there were potential non-compliances and that further information needed to be provided by the applicant with respect to:
- lack of overflow spillway provision,
 - possible risk of internal erosion at the toe of the embankment, and
 - detailing of the valve and pipework.
- 3.18 On 5 September 2016, the authority issued a notice to fix to the previous owner. The notice to fix was issued because the authority was of the view that the previous owner had failed to comply with section 17 of the Act with respect to the construction of the aerobic pond.
- 3.19 The notice to fix stated the particulars of contravention or non-compliance, as follows:
- Failure to comply with Section 17 of [the Act] – “All building work must comply with the Building Code”.
- This relates to the non-compliance with Building Code [Clause B1 Structure] of an earth embankment of [the aerobic] pond ...
- 3.20 The notice to fix was required to be complied with by 1 November 2016, and the stated remedies were:
1. Engage a suitably qualified Chartered Professional Engineer (CPEng) with experience in similar structures, to address the issues raised in the [report from the authority’s engineer]. The report from the CPEng should either demonstrate how compliance with the Building Code is confirmed, or identify options to address any confirmed non-compliance with the Building Code.

⁶ Section 17 of the Act states all building work must comply with the building code to the extent required by the Act, whether or not a building consent is required in respect of that building work.

- 3.21 On 19 September 2016, the authority received advice that the property containing the pig farming operation had been sold by way of mortgagee sale to the current ownership structure (who is the applicant of this determination) on 15 September 2016.
- 3.22 On 28 September 2016, the authority contacted the director of the applicant to advise him, and provide copies of the notice to fix issued to the previous owner and the report by the authority's engineer.
- 3.23 On 11 October 2016, the authority reissued the notice to fix as the notice had not been complied with. This was reissued as the notice to fix to the applicant, and it is this notice that is the subject of this determination.
- 3.24 The authority issued an infringement notice to the applicant dated 8 February 2017. The infringement notice stated that the offence is a contravention of section 168(1)⁷ of the Act, because the applicant did not comply with the notice to fix dated 11 October 2016.
- 3.25 On 24 May 2017 the applicant wrote to the authority setting out its position on the issue of the notice to fix. The letter noted any requirements for the aerobic pond should have been established at the time of construction, but at the time of construction, it was understood that the construction of the aerobic pond was simply an excavation and that there were no Building Code requirements and the notice to fix should not have been issued.
- 3.26 On 20 July 2017 the parties entered a 'without prejudice' agreement on actions to be undertaken by the parties.
- 3.27 The applicant engaged a geotechnical engineer ("the applicant's engineer") to provide advice to the applicant in a report dated 5 February 2018. This report was provided to the authority on 9 February 2018. The report is summarised in Appendix B.
- 3.28 The applicant's engineer carried out a 'Soils Investigation and Geotechnical Assessment'. This investigation consisted of three machine auger boreholes with shear vane tests carried out along the pond crest, and dynamic core penetration tests undertaken beneath the base of the boreholes. The applicant's engineer concluded that the aerobic pond has an adequate factor of safety with respect to slope stability.
- 3.29 On 16 February 2018 the authority wrote to the applicant providing a response to the report of the applicant's engineer prepared by the authority's engineer. The authority's engineer's response is summarised in Appendix B.
- 3.30 The authority's engineer was of the view that the assessment of the applicant's engineer did not support the conclusion that the aerobic pond has adequate factors of safety with respect to slope stability.
- 3.31 The applicant's engineer provided further advice to the authority in a report dated 18 July 2018. This report is summarised in Appendix B.
- 3.32 The applicant's engineer was of the view that based on results of soil testing and analysis of the stability of the embankments, the aerobic pond as constructed is fit for its intended purpose. It is not clear what the authority's response was to this further advice.
- 3.33 The Ministry received an application for determination on 31 July 2018.

⁷ The offence being failing to comply with a notice to fix

4. The submissions

4.1 A number of submissions were made by the parties to this determination. A summary of the initial application and submissions, the documentation provided, and the correspondence received is set out in Appendix C.

4.2 The applicant is of the view that:

- the authority set the requirements for the construction of the wastewater treatment system, including the aerobic pond, and has confirmed full compliance with those standards through the site compliance report (refer paragraph 3.7 and 3.8)
- the site compliance report covers compliance with resource consent and Building Act requirements, and includes a structural design report for both ponds
- the grounds for issuing the notice to fix were not reasonable and therefore the test in section 164(1)(a) does not apply
- the authority's engineer's report lacks 'specificity and substance' as it is based on one site visit and without reference to the site compliance report which includes a structural design report for the ponds
- the trustee company is an independent trustee company, and the two parcels of shares were for two different groups of beneficiaries
- the common beneficial interest in the previous owner and the applicant is 8.5%
- the commonality related to a small shareholder interest, not management or governance, but a commonality of shareholding interest does not equate to continuity of legal ownership.

4.3 The authority is of the view that:

- it had reasonable grounds to issue the notice to fix to the applicant because the aerobic pond does not comply with the Building Code
- the report of the authority's engineer was sufficiently robust to rely on in order to issue the notice to fix
- the site compliance report does not cover Building Act requirements, and relates only to the conditions in the resource consent
- the structural design report by the previous owner's engineer (included in the site compliance report) relates only to the design of the anaerobic pond
- the requirements of the notice to fix were reasonable and it was appropriate to require the applicant to engage an engineer
- although the applicant was not responsible for the construction of the effluent pond, a notice to fix can be issued to a subsequent owner
- there is substantial continuity between individuals and entities sitting behind the two companies representing the previous owner and applicant.

4.4 The first draft determination and submissions received in response

4.4.1 The draft determination was issued to the parties for comment on 6 September 2019.

4.4.2 The draft determination concluded that the notice to fix had been correctly issued to the applicant because it appeared there was a substantial similarity of ownership between the applicant and the previous owner. The various shareholdings and directorship arrangements (the director of the applicant apparently representing 40% of the previous owner) meant the director of the applicant could be expected to have had a level of knowledge and influence over the previous owner. This equated to substantial similarity of ownership that was sufficient to treat the applicant as the successor to the rights, interests and obligation of the previous owner, including the issue of the notice to fix.

4.4.3 The authority responded on 16 September 2019 accepting the draft determination and provided the following comments (in summary):

- the determination is about the authority's power of decision and so should turn on the reasonableness of that decision, and not on whether the expert engaged by the Ministry agrees with the expert advice received by the authority before it issued the notice to fix
- the authority agreed that the notice to fix had been correctly issued to the applicant because there was a substantial similarity of ownership between the applicant and the previous owner, but the authority disagreed with the draft determination's conclusions that a notice to fix could not be issued to an owner for building work carried out by a previous owner.

4.4.4 The applicant responded on 30 September 2019 not accepting the draft determination. The applicant made the following points in submission (in summary):

- at best, there is a common minority interest of 8.5% - this minor commonality of shareholding interest does not equate to significant or substantial interest, and does not equate to a continuity of legal ownership
- the minor common interest is shareholder interest, and played no part in either the management or governance of the previous owner
- the applicant purchased the assets from the previous owner's mortgagee bank, not from the previous owner, and the common minority interest between the previous owner and the applicant of 8.5% played no part in the applicant's decision to purchase the assets
- the applicant "undertook an arms-length purchase" from the previous owner's mortgagee bank and the applicant had no contact with the previous owner in respect of the sale
- the director of the applicant was not a director of the previous owner at the time of liquidation of the previous owner (I note here the director of the applicant ceased to be a director of the previous owner in September 2014)
- the applicant had no knowledge of the notice to fix issued by the authority to the previous owner until the authority issued the notice to fix to the applicant on 11 October 2016
- the trustee company provides independent trustee services to a number of distinct entities, and has no beneficial interest in either the capital or income of the shareholdings of those entities

- the director of the trustee company is required to act in the interests of each beneficiary and cannot merge those interests. The trustee services of the trustee company are provided to the entities by the director of the applicant on an honorary basis
 - the second trustee company operates in the same way as the trustee company.
- 4.4.5 Between 14 October 2019 and 17 October 2019, the Ministry and the authority corresponded regarding the authority making a submission in response to the applicant's submission received 30 September 2019.
- 4.4.6 On 7 November 2019 the authority requested information from the applicant regarding:
- the applicant's structure and changes to the structure prior to the purchase of the subject property
 - the extent of due diligence pre-purchase, details of the sale and purchase agreement, and
 - the director's role and relationship with the applicant pre-purchase.
- 4.4.7 On 14 November 2019 a representative of the director of the applicant responded advising the director was not in a position to respond to the authority's request due to significant health reasons.
- 4.5 The second draft determination and submissions received in response**
- 4.5.1 The second draft determination was issued to the parties for comment on 3 December 2019.
- 4.5.2 The second draft determination concluded that the notice to fix (dated 11 October 2016) had been incorrectly issued because the applicant is not a specified person who contravened the Act. The applicant's submission dated 30 September 2019 outlined a traditional trustee role (i.e. separate duties in respect of each trust rather than a consolidation of ownership and/or management), accordingly the determination concluded there is an insufficient basis for treating the ownership of the applicant as substantially similar to the beneficial interests in the previous owner, and the actions and knowledge of the previous owner cannot be equated with the applicant.
- 4.5.3 The authority responded on 12 December 2019 advising that it did not accept the second draft determination and that it would provide a submission that was received on 20 December 2019. The submission concluded that there appears to have been substantial similarity at both the ownership and management levels between the previous owner and the applicant, particularly during two key events; namely the time of the construction of the aerobic pond, and the purchase of the property by the applicant. However, the authority provided no further evidence and posed a number of questions to the director of the applicant similar to those outlined in paragraph 4.4.6.
- 4.5.4 On 10 February 2020 the Ministry was advised of the death of the director of the applicant. On 3 March 2020 the applicant advised it had appointed a legal adviser to act as its agent.
- 4.5.5 On 20 March 2020 the applicant's legal adviser further responded, confirming that the applicant accepts the second draft determination without further comment.

5. The expert's report

5.1 General

- 5.1.1 As stated in paragraph 1.6, I commissioned a firm of consulting engineers with specialist expertise in geotechnical engineering to assist me ("the expert"). The personnel used included an engineering geologist and a geotechnical engineer (the latter is a Chartered Professional Engineer). I sought the expert's view on whether the authority had reasonable grounds to consider that the aerobic pond does not comply with the Building Code.
- 5.1.2 The expert reviewed the reports by the authority's engineer and the applicant's engineer (refer to paragraphs 3.14, 3.27, 3.29, 3.31 and Appendix B) and provided a report dated 29 April 2018 which was provided to the parties on the same day.

5.2 Ground conditions

- 5.2.1 The expert noted that the applicant's engineer carried out a geotechnical investigation based on three machine auger boreholes with shear vane tests⁸ carried out along the crest of the aerobic pond. The boreholes were advanced to refusal depths⁹ of between 4.4 and 4.7m, and the termination depth of 6m below the crest level. Dynamic Core Penetration¹⁰ tests were undertaken beneath the base of the boreholes, advancing to a maximum depth of 7.2m below the crest.
- 5.2.2 The expert noted that the soil probe methodology carried out by the authority's engineer is not quantifiable, and therefore the results of the shear vane tests are the preferred method to measure soil strength.
- 5.2.3 The expert summarised the results of the applicant's engineer investigation as follows:
- Embankment material comprises firm to stiff silt, clay, gravel and topsoil fill to between depths of 3.4 to 4.1m below crest level. The in-situ shear vanes carried out within the boreholes recorded undrained shear strength in the fill of between 80 to 140kPa¹¹.
 - Foundation material comprises approximately 1 m of volcanic ash beneath the fill, with shear strengths in excess of 200kPa.
 - The volcanic ash soils are underlain by weathered andesite¹² to depths of about 4.4m, 4.7m and 7.1m below crest level, at which point the andesite become less weathered.

5.3 Compliance with the Building Code

- 5.3.1 The expert concluded that the authority had reasonable grounds to consider the aerobic pond does not comply with the Building Code. With respect to the compliance of the aerobic pond, the expert found:
- The applicant's engineer has provided adequate geotechnical characterisation of the aerobic pond and followed a reasonable assessment methodology, given the size and characteristics of the aerobic pond.

⁸ A method of measuring the undrained shear strength of a cohesive soil.

⁹ The test equipment used was unable to penetrate past this depth.

¹⁰ Used to measure the strength of in-situ soil and the thickness and location of subsurface soil layers.

¹¹ Kilopascal (kPa) is a unit of pressure measurement, being 1000 pascals.

¹² A fine-grained, brown or greyish intermediate volcanic rock.

- The authority's engineer had raised reasonable queries with the respect to the stability assessment and the overtopping detail. The expert was of the view that these queries arise from a lack of documentation to clearly verify the stability of the embankment and the overtopping detail.
- No assessment has been made to volumetric settlement in a seismic event that could lead to overtopping.

5.3.2 The expert's conclusions with respect to each failure mechanism are detailed in paragraphs 5.3.3 to 5.3.7.

Slope stability

5.3.3 With respect to slope stability, the expert was of the view that insufficient evidence has been provided to confirm whether the embankment and the area of the steepened rock toe meets slope stability criteria typical for embankment dams. The expert agreed with the applicant's engineer that an effective stress analysis, assuming the breakdown of the pond lining and an established steady-state seepage profile, should be undertaken as a worst-case scenario.

5.3.4 Commenting on the slope stability analysis carried out by the applicant's geotechnical engineer, the expert:

- noted it would be prudent to undertake an assessment of the stability of a failure surface passing along the inclined interface between the fill and the volcanic ash foundation
- agreed with the applicant's engineer that an Operational Base Earthquake (OBE) of 1 in 150 Annual Exceedance Probability (AEP) would be considered best practice in line with the New Zealand Society of Large Dams Dam Safety Guidelines 2015 ("the NZSOLD Dam Safety Guidelines") and this has not been applied to the analysis. However, the expert also noted that assessment of the data indicates that the aerobic pond is likely to be satisfactorily stable for a 1 in 150 AEP earthquake.
- noted the uniformly distributed load applied at the base of the aerobic pond should reduce as the water column reduces towards the crest of the slope
- noted the spoil friction angle (Phi of 10 degrees) should not be included in the Ultimate Limit State calculations for design purposes as this is not considered conservative for an undrained soil
- noted no static design case results have been presented.

Internal erosion

5.3.5 The expert was of the view that internal erosion has been sufficiently considered in the pond's design and construction.

Volumetric settlement

5.3.6 The expert noted that an assessment should be made of the volumetric deformation in a seismic event that could lead to overtopping.

Overtopping due to flood or overflowing

- 5.3.7 The expert noted that an assessment of the risk of overtopping should be provided that addresses catchment size, environmental impacts of a breach releasing effluent, and a comprehensive methodology for monitoring design water levels.

6. Discussion

6.1 General

- 6.1.1 The matter to be determined is the authority's exercise of its power of decision to issue a notice to fix to the applicant in respect of the aerobic pond.
- 6.1.2 The applicant is of the view that the authority did not have reasonable grounds to issue a notice to fix as section 164(1)(a) does not apply. The applicant believes it is not contravening or failing to comply with the Act, because the authority had already confirmed full compliance with all requirements of the aerobic pond through the site compliance report and its supporting information.
- 6.1.3 The authority is of the view that it had reasonable grounds to issue the notice to fix because the aerobic pond does not comply with the Building Code and the applicant, as the owner of the property, is a specified person under the Act.

6.2 Whether there were reasonable grounds for the authority to conclude the aerobic pond did not comply with the Building Code

- 6.2.1 I must first consider whether there was a contravention of the Act or regulations. In this case, this requires me to consider whether there were reasonable grounds for the authority to conclude that the aerobic pond did not comply with the Building Code (being the contravention of the Act specified in the notice to fix to the applicant).
- 6.2.2 A dam is defined in section 7 of the Act as:

dam

(a) means an artificial barrier, and its appurtenant structures that:

(i) is constructed to hold back water or other fluid under constant pressure so as to form a reservoir

(ii) is used for the storage, control, or diversion of water or other fluid

(b) includes:

(i) a flood control dam

(ii) a natural feature that has been significantly modified to function as a dam

(iii) a canal

(c) but does not include a stopbank designed to control floodwaters.

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.

This requirement includes the construction and alteration of dams.

- 6.2.6 Under section 41 of the Act, building work does not require a building consent in certain cases, including where the work is described in Schedule 1 of the Act.
- 6.2.7 Schedule 1, Part 1, clause 22 provides an exemption from the requirement to obtain a building consent for dams, excluding large dams, which states:
- 22 Dams (excluding large dams)**
Building work in connection with a dam that is not a large dam.
- 6.2.8 Under section 7 of the Act, a large dam is one that:
- ... has a height of 4 or more metres and holds 20 000 or more cubic metres volume of water or other fluid
- 6.2.9 The aerobic pond is 7,000m³, with embankments that range in height between 2.5m and 7m, and is therefore not a large dam for the purposes of the Act. Therefore, as the aerobic pond is not a large dam, the building work to construct the aerobic pond was exempt from the requirement to obtain a building consent.
- Notwithstanding that a building consent was not required, the building work to construct to aerobic pond was required to comply with the Building Code (refer paragraph 6.2.5).
- 6.2.10 In respect of the Building Code compliance of the aerobic pond, the expert concluded that the authority had reasonable grounds to consider the aerobic pond does not comply with the Building Code. The expert found that the authority's engineer had raised reasonable queries with the respect to the stability assessment and the overtopping detail. The expert was of the view that these queries relate to a lack of documentation to clearly verify the stability of the pond's embankment and the overtopping detail. The expert also noted that no assessment has been made regarding volumetric settlement in a seismic event that could lead to overtopping.
- 6.2.11 Given the expert's opinion of the stability assessment of the embankment and the area of the steepened rock toe and the overtopping detail, I am therefore of the view that the authority was correct to conclude that the aerobic pond did not comply with the Building Code.
- 6.2.12 I note the applicant is of the view that the authority set the conditions for the construction of the aerobic pond in the resource consent (under the RMA, refer to paragraphs 3.5 and 3.7), referring to this as "the alternative solution". The applicant is also of the view that the authority confirmed the compliance of the aerobic pond in the site compliance report (refer to paragraphs 3.7 and 3.8), which refers to both ponds and covers both compliance with the resource consent and Building Act requirements.
- 6.2.13 I note the resource consent and its conditions, and the site compliance report pertain to obligations under the RMA. A resource consent is a formal approval for such things as the use or subdivision of land, the taking of water, the discharge of contaminants in water, soil or air, or the use or occupation of coastal space.
- 6.2.14 This compares to the Act, which covers the construction, alteration, demolition and maintenance of new and existing buildings. The Act covers how work can be done, who can do it, and when it needs to be consented and inspected. The Act and its regulations set out the obligations for building work. Under the Act, it is the owner's responsibility to:

- apply for a building consent for proposed building work if one is required and provide the necessary information with the building consent application to confirm compliance with the Building Code, or
- determine whether or not proposed building work is exempt from the requirement to obtain a building consent; and if it is exempt, ensure the exempt building work complies with the Building Code.

6.2.15 The previous owner carried out the building work to construct the aerobic pond without obtaining a building consent, as the building work was exempt under Schedule 1 of the Act. However, section 42A(2)(a) requires that all building work that is exempt under Schedule 1 must still comply with the Building Code. The requirement in section 42A(2)(a) repeats, for clarity, the requirement of section 17 of the Act, which applies to all building work, including that done without a building consent under Schedule 1.

6.2.16 I am of the view that the site compliance report does not adequately address the Building Code compliance of the aerobic pond as constructed nor its present state.

6.3 Whether there were reasonable grounds to conclude a specified person was contravening the Act or its regulations

6.3.1 Having considered whether there was a contravention of the Act or its regulations and finding that the authority had reasonable grounds to conclude that the aerobic pond did not comply with the Building Code, I must now consider whether the authority was correct to conclude a specified person was contravening the Act and therefore issue a notice to fix.

6.3.2 The relevant sections of the Act are sections 163 and 164, which state:

163 Definitions for this subpart

...

specified person means—

(a) the owner of a building:

...

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); ...

6.3.3 The authority is of the view that a notice to fix can be issued to an owner of a building, including to any subsequent owner when that person has not undertaken non-compliant building work but a previous owner has.

6.3.4 The authority considers this is the correct approach because the definition of a specified person in section 163(a) simply identifies “the owner of a building”. The authority is of the view that the plain meaning of this phrase is the individual or entity that is the owner of the relevant building at the time a notice to fix is contemplated.

6.3.5 In taking this view, the authority has referred to Determination 2014/035¹³, considering the approach taken in this Determination to be incorrect because the

¹³ Determination 2014/035 The issue of a notice to fix for weathertightness remedial work carried out by a previous owner (15 August 2014)

approach applies the meaning of “specified person” in section 163 subject to the requirements for a notice to fix in section 164(1)(a) of the Act. The authority considers that the approach taken in the High Court¹⁴ does not support this interpretation of sections 163 and 164(1)(a).

- 6.3.6 With respect, I disagree with the authority’s interpretation of section 163 and 164(1)(a). I am of the view that the approach taken in Determination 2014/035 is the correct approach.
- 6.3.7 Section 164(1)(a) of the Act provides that an authority must issue a notice to fix to a specified person if the authority considers on reasonable grounds that the specified person is contravening or failing to comply with the Act or regulations. Section 163 of the Act defines a specified person as, among other things, the owner of a building.
- 6.3.8 Therefore, there are two tests that must be met for an authority to issue a notice to fix. Firstly, the authority must make sure that the person to whom a notice to fix is being issued is a specified person. Secondly, the authority must have reasonable grounds to consider that the specified person is contravening or failing to comply with the Act or regulations.
- 6.3.9 This is not an interpretation that makes the definition of “specified person” in section 163 subject to the requirements for a notice to fix in section 164(1)(a), as stated by the authority, rather it is an interpretation that ensures both provisions are interpreted and applied consistently with each other.
- 6.3.10 I also disagree with the authority in that the approach taken in the High Court (refer to paragraph 6.3.5) does not support this interpretation of sections 163 and 164(1)(a). In that case, the Judge overturned the notice to fix because the building work was undertaken before the enactment of the Building Act 1991. It is hard to read into this a conclusion that the Judge supported the issue of a notice to fix to a subsequent owner in respect of building work carried out by a previous owner.
- 6.3.11 The authority is concerned that the approach taken by Determination 2014/035 leaves it powerless to deal with non-compliant building work undertaken by a former owner. However, any non-compliant building work undertaken pursuant to a building consent by a former owner is likely to be identified as part of the authority’s regular building consent inspections.
- 6.3.12 If the building work has not been remedied by the time the property is transferred to a new owner then the inclusion of the non-compliant building work, and any enforcement action by an authority in the property file for the building, means the non-compliant building work will be apparent to any prospective new owner reviewing the property file. An authority also has powers under the Act to deal with any building that is dangerous or insanitary if the non-compliant building work is sufficient to bring the building within the scope of the authority’s powers in respect of such buildings.
- 6.3.13 Interpreting and applying both sections 163 and 164(1)(a) to this case, I must first consider the issue of the notice to fix to the previous owner.
- 6.3.14 At the time the notice to fix to the previous owner was issued (dated 5 September 2016), the previous owner was the owner of the property, including the wastewater treatment system. The wastewater treatment system, including the aerobic pond, was constructed in February 2015 by the previous owner, and as concluded in paragraph

¹⁴ *Seymour v Auckland Council* [2015] NZHC 743 in respect of Determination 2011/033 Notices to fix issued in respect of the conversion of a storage shed to a sleepout and alterations to the sleepout (13 April 2011)

- 6.2.11, the authority had reasonable grounds to conclude that the aerobic pond did not comply with the Building Code.
- 6.3.15 Therefore, I consider that the two tests for issuing a notice to fix were met (refer to paragraph 6.3.8) and the notice to fix (dated 5 September 2016) to the previous owner was correctly issued by the authority.
- 6.3.16 Having established the notice to fix to the previous owner was correctly issued, I now must consider whether the notice to the applicant (dated 11 October 2016) was correctly issued by the authority.
- 6.3.17 The applicant did not undertake any of the building work to construct the aerobic pond, nor was the applicant the owner of the land at the time when the aerobic pond was constructed. Applying the requirements of sections 163 and 164(1)(a), as discussed above, I conclude that the applicant was not a specified person to whom the notice to fix could be issued regarding the construction of the aerobic pond. The applicant has also not contravened or failed to comply with any requirements of the Act or Building Code.
- 6.3.18 However, in considering whether the applicant is a specified person, I must also consider the relationship between the previous owner and the applicant. As described in paragraph 3.1, the previous owner was a company with shareholdings across a number of shareholders. One of the shareholders was the trustee company, which had a director who was also the shareholder of the trustee company. The trustee company had a 40% shareholding in the previous owner, across two parcels of shares. The wife of the director of the trustee company had an 8.5% shareholding in the previous owner.
- 6.3.19 As described in paragraph 3.4, the applicant is a company with the same director as the trustee company and with two equal shareholdings. These shareholders are two trusts, one of which is the second trustee company, and the wife of the director is one of the trustees of the other trust. The second trustee company has the same director as the applicant and trustee company, and the trustee company is also the shareholder of the second trustee company.
- 6.3.20 To summarise, the trustee company and the wife of the director of the trustee company owned 48.5% of the previous owner, and the same trustee company and wife of the director of the trustee company are trustees of the two trusts that own the applicant.
- 6.3.21 On the basis of this information it would be possible to conclude that despite the change in ownership, the shareholdings of the applicant are substantially similar to the beneficial ownership of the previous owner. However, the information subsequently provided by the applicant (refer paragraph 4.4.4) shows that the ownership arrangements of the previous owner and the applicant cannot be taken at face value.
- 6.3.22 The applicant has submitted that:
- the trustee company had two separate parcels of shares, for two different parties
 - in respect of each parcel of shares, the trustee company is an independent trustee, has no beneficial interest in either the capital or income of either parcel of shares, and played no part in the management or governance of the previous owner

- the director of the trustee company is required to act in the interests of each beneficiary and cannot merge those interests
 - the director of the trustee company provides trustee services to the entities who own the two parcels of shares on an honorary basis
 - the second trustee company operates in a similar way to the trustee company
 - the director of the applicant was not the director of the previous owner at the time of the mortgagee sale
 - at best there is a common minority interest of 8.5%, but this is far from significant and is no more than a commonality, not a continuity
 - the applicant purchased the assets from the previous owner's mortgagee bank, not from the previous owner, and the common minority interest between the previous owner and the applicant of 8.5% played no part in the applicant's decision to purchase the assets of the previous owner.
- 6.3.23 The trustee company is the legal owner of the shareholdings, but is subject to trustee obligations in respect of each parcel of shares it owned in the previous owner and its interests in the applicant. That is:
- The trustee cannot merge the different interests of the beneficiaries of those parcels of shares
 - The trustee must act independently in respect of each shareholding and the applicant has advised that the common minority shareholding of 8.5% formed no part of the decision of the applicant to purchase the assets of the former owner.
- 6.3.24 The applicant has also noted the purchase was conducted at arm's length with the previous owner's mortgagee bank and the applicant had no contact with the previous owner in respect of the sale.
- 6.3.25 In response to the applicant's further submitted information the authority maintain that there appears to have been substantial similarity (see paragraph 4.5.3) between the previous owner and the applicant, however it did not provide further information and requested clarifying information from the director (see paragraphs 4.4.6 and 4.5.3). I note here that the Act does not provide me with the powers to compel a party to a determination to provide such information and I have made this determination based on the information provided by the parties.
- 6.3.26 In my view, there is an insufficient basis for treating the ownership of the applicant as substantially similar to the beneficial interests in the previous owner, and the actions and knowledge of the previous owner cannot be equated with the applicant.
- 6.3.27 Accordingly, and further to my conclusion in paragraph 6.3.17, I consider the applicant is not a specified person to whom the notice to fix could be issued regarding the construction of the aerobic pond. The second test (refer paragraph 6.3.8) to issuing a notice to fix is not satisfied.
- 6.3.28 I am therefore of the view that the authority was incorrect to issue the notice to fix to the applicant.
- 6.3.29 In respect of the matter of the dam and its compliance with the Building Code, this is still to be resolved. I recommend the authority record this determination on the property file. I acknowledge in taking the view in paragraph 6.3.27 that this leaves the authority in a position of being unable to enforce the notice to fix issued to the

previous owner dated 5 September 2016 (see paragraph 6.3.15). However, I strongly suggest the applicant addresses the compliance matters relating to the pond's safety.

7. The decision

7.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority was incorrect in its decision to issue a notice to fix dated 11 October 2016 to the applicant for the aerobic pond, and I reverse that decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 10 August 2020.

Katie Gordon
Manager Determinations

Appendix A: The legislation

A1 Relevant provisions of the Building Act 2004 and Schedule 1

A1.1 The relevant sections of the Act discussed in this determination include:

Section 7 Interpretation

building work

(a) means work—

- (i) for, or in connection with, the construction, alteration, demolition, or removal of a building; and
- (ii) on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code; and
- (iii) includes sitework; and ...

dam

(a) means an artificial barrier, and its appurtenant structures that:

- (i) is constructed to hold back water or other fluid under constant pressure so as to form a reservoir
- (ii) is used for the storage, control, or diversion of water or other fluid

(b) includes:

- (i) a flood control dam
- (ii) a natural feature that has been significantly modified to function as a dam
- (iii) a canal

(c) but does not include a stopbank designed to control floodwaters.

8 Building: what it means and includes

(1) In this Act, unless the context otherwise requires, building—

(a) means a temporary or permanent movable or immovable structure (including a structure intended for occupation by people, animals, machinery, or chattels); and ...

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.

41 Building consent not required in certain cases

(1) Despite section 40, a building consent is not required in relation to—

...

- (b) any building work described in Schedule 1 for which a building consent is not required (see section 42A); or

42 Building work for which building consent is not required under Schedule 1

(1) Despite section 40, subject to the conditions set out in subsection (2) and whether or not a building consent would otherwise have been required, a building consent is not required for building work in the following categories:

- (a) building work described in Part 1 of Schedule 1; or ...

(2) Subsection (1) is subject to the following conditions:

- (a) the building work complies with the building code to the extent required by this Act ...

163 Definitions for this subpart

...

specified person means—

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

164 Issue of notice to fix

- (1) This section applies if a responsible authority considers on reasonable grounds that—
 - (a) a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent); ...

Schedule 1, Part 1

22 Dams (excluding large dams)

Building work in connection with a dam that is not a large dam.

Appendix B: The geotechnical reports

- B1. The following summarises the reports from the authority's engineer and the applicant's engineer (refer to paragraphs 3.14, 3.27, 3.29, and 3.31 within this determination).

<p>Authority's engineer: Report date: September 2016</p>
<p>The authority's engineer carried out an assessment of whether there were reasonable grounds to conclude the building work associated with the aerobic pond complied with the Building Code and noted the following:</p> <p><i>Building Code Compliance pathway and Potential Impact Classification (PIC)</i></p> <p>The NZSOLD Dam Safety Guidelines are often used as evidence of compliance as an alternative means of compliance for Clauses B1, B2, and E1.</p> <p>The likely PIC (based on a high-level assessment) in accordance with NZSOLD Dam Safety Guidelines is low, as the Population at Risk (PAR) is effectively nil, and the expected damage level is minimal.</p> <p><i>Soil conditions</i></p> <p>Based on gum spear tests carried out to provide an indication of likely fill characteristics, there is evidence of poor compaction in at least the upper 1 m of fill.</p> <p><i>Slope stability</i></p> <p>Taking account of a factor of safety against instability of 1.5 recommended by the NZSOLD Dam Safety Guidelines, a slope of 2.5:1 (horizontal:vertical) or flatter would achieve this for well compacted earth fill subject to normal groundwater pressures. The guidance document 'Small Dams – Design, Surveillance and Rehabilitation' by the International Commission on Large Dams recommends a slope of 2.5:1 for a homogeneous earthfill dam (assumed for this structure). The average slope of the aerobic pond is 1.7:1, which is considerably steeper, and given there is evidence of poor compaction, the stability of the slope is likely to be less than normally accepted factors of safety.</p> <p><i>Other issues</i></p> <p>Even though inflows are controlled by manual operation, the outflow also requires pumping and there is no back-up automatic system. Low bunds have been created around most of the perimeter and the more likely overtopping point would be a low spot in the south eastern corner. This means should an overflow occur, the flow would be discharged over the embankment and the embankment could be compromised due to overtopping flow erosion.</p> <p>The slope is over-steepened at the highest section of the toe embankment and large boulders placed at the toe. There is no separator between the boulders and soil, which introduces a potential risk of internal erosion where soil particles may be transported through gaps between the boulders, which may lead to piping failure.</p> <p>The valve and pipework is missing bolts on the pipe flanges, the valve is not directly bolted or mechanically connected, the support pedestal is on the downstream side of the valve, rather than the upstream side, and the valve is out of alignment with the pipe.</p>
<p>Applicant's geotechnical engineer: Report date: 5 February 2018</p>
<p>The applicant's engineer carried out a Soils Investigation and Geotechnical Assessment, concluding that the aerobic pond has an adequate factor of safety with respect to slope stability and noted the following:</p> <p><i>Field investigation</i></p> <p>The subsurface conditions were investigated by drilling three machine auger borings</p>

together with in-situ shear vanes.

Soil conditions

Soil testing results demonstrate the soils have moderately high shear strengths. There is a presence of firm to stiff filling comprised on silt, clay, gravel and topsoil between depths of 3.4 to 4.1 m below ground level. Volcanic ash is present below the filling. The upper soils are underlain by weathered andesite to depths of about 4.4, 4.7 and 7.1 m below existing ground level, at which point the soils become less weathered.

The in-situ vanes recorded general shear strength values between 80 to 140kPa, indicating the filling material has been moderately compacted.

Slope stability

The upper fill soils which are present within the southern embankment area to a depth of about 3m typically possess shear strengths in excess of 80kPa, with the shear strength of the underlying volcanic ash being in excess of 200kPa.

No groundwater was encountered within any of the bore holes.

Slide analysis

Slope stability analysis of the southern embankment was carried out for static and seismic loading conditions. The 1 in 500 year return period seismic analysis concluded that in that event, the aerobic pond will remain stable.

Membrane and leak detection system

If the membrane over the leak detection system was to become damaged during a seismic event, the silt soils that form the aerobic pond possess a low coefficient of permeability, and therefore it is expected that these soils will be able to contain the effluent until such time that the pond is able to be manually emptied.

Water levels and risk of break

The maximum water level in the aerobic pond is unlikely to be exceeded as the water level indicator is visible to traffic on the road adjacent to the pond.

Should a break occur, the level of exposure to people and vehicles is low as the potential flow path is away from the access road area, apart from in the immediate vicinity of the aerobic pond and there are no houses identified in the potential flow path.

Authority's engineer: Response to 5 February 2018 report, contained in the authority's 18 February 2018 letter to the applicant

The authority's engineer reviewed the 5 February 2018 report and concluded that the assessment does not support the conclusion that the aerobic pond has adequate factors of safety with respect to slope stability, noting:

- a static analysis had been completed, noting that the slope stability models that have been carried out appear to be modelled as completely dry, rather than considering a worst case scenario, and that parameters used in the model for soil types do not match normally accepted parameters
- there was an as-built record of the leak detection system and reports of periodic monitoring
- the permeability of the embankment has been assessed
- the aerobic pond has previously overtopped at least once.

Applicant's geotechnical engineer: Report date: 18 July 2018

The applicant's engineer responded to the authority's 18 February 2018 letter, concluding that based on results of soil testing and analysis of the stability of the embankments, the aerobic pond as constructed is fit for the intended purpose, and reporting the following:

Design and construction data

The non-availability of the original design information and also construction records make it very difficult to assess the stability of the structure, and in particular the south-facing fill embankment where the deepest fill is present.

The aerobic pond has only overtopped on one occasion, but without appreciable damage to the structure. There was some minor scouring and soil slumping in the area of the breach, with the primary embankments remaining stable. This would not have been the case if the aerobic pond and its embankments had been poorly constructed.

Slope stability

The seismic slope stability models presented were the worst-case scenario. Static models were assessed but not presented as the factors of safety were higher than the seismic stability case.

A simplified stability assessment was carried out as the quality of the input data was poor as there were no construction records available. Soil strengths were determined from shear vane tests, and were underestimated as the soil samples were partially disturbed during the testing process.

The embankment soils are not poorly compacted. The outer soils are placed in a loose condition to a greater depth than normal to sustain the required deep-rooted grass cover.

The parameters for the model used are considered to be valid for the limited investigation that was carried out in the field, and the factors of safety are appropriate.

Appendix C: The submissions

C1 The initial application, documentation and correspondence

C1.1 The initial application for determination, documentation and correspondence, and the applicant's subsequent submissions before the issue of the draft determination are summarised in the following table:

31 July 2018	The applicant's submission in support of the determination application is summarised below:
<p>The authority's engineer's report confirms "the Alternative Solution process as being the correct path. "In originally devising this Alternative Solution, [the authority] has never made any reference to the NZSOLD Dam Safety Guidelines 2015".</p> <p>The authority set the requirements for the construction of the wastewater treatment system including the aerobic pond and has confirmed full compliance with those standards in the site compliance report. It is not relevant how the requirements/aerobic pond compares to the NZSOLD Dam Safety Guidelines. There has been no change to the aerobic pond since the site compliance report.</p> <p>The authority confirmed full compliance, and therefore the applicant is not required to take any action. Under section 18A of the Act, the applicant is not obliged to carry out any work that is additional to the performance criteria prescribed in the Building Code; and under section 18B the applicant is not required to take any action if the building work complies with the Building Code.</p> <p>Section 164 of the Act requires the authority to have reasonable grounds to issue a notice to fix. In light of the authority's confirmation of full compliance, and the authority's obligations under section 19 of the Act, the notice to fix lacks legal foundation and the grounds are not reasonable.</p> <p>The dates in the notice to fix to the previous owner are inconsistent as the notice states the date the breach was first noticed as 3 August 2016, which is a month prior to the publication of the report of the authority's engineer.</p> <p>The authority's engineer did not consider the construction evidence referred to in the site compliance report. It is unreasonable to rely on the statement in the report about "the lack of availability of design and construction record", when the construction evidence was not provided to the authority's engineer.</p> <p>The notice to fix is also not reasonable because it does not set out specific requirements. Rather, the notice contains a non-specific requirement for the applicant to "disprove the negative or unknown."</p>	
<p>The applicant provided copies of:</p>	
<ul style="list-style-type: none"> • Emails dated 1, 3, 9, 12, 16, and 20 November 2016, between the parties about the notice to fix and ownership of the piggery operation • The structural design report by the previous owner's structural engineer for the design of the anaerobic pond¹⁵ dated 10 December 2014 • The authority's site compliance report dated 1 July to 31 May 2015 • The notice to fix to the applicant dated 11 October 2016 • The report of the authority's engineer dated September 2016 • Invoices issued by the authority to the applicant and a calculation of costs incurred by the applicant in respect of the notice to fix to the applicant • The infringement notice issued by the authority to the applicant dated 8 February 2017 	

¹⁵ The anaerobic pond is not the subject of the determination

<ul style="list-style-type: none"> • A letter to the authority from the applicant's legal adviser dated 24 May 2017 setting out the applicant's position on the notice to fix to the applicant • The 20 July 2017 without prejudice agreement • An email from the applicant to the authority dated 28 January 2018 setting out the applicant's position on the notice to fix • The applicant's engineer's report dated 5 February 2018 • The authority's engineer response to 5 February 2018 report, contained in the authority's 18 February 2018 letter to the applicant • The applicant's engineer's 18 July 2018 report • Emails dated 7 and 15 March 2018 between the parties about the parties' positions with respect to the report of the applicant's geotechnical engineer. 	
25 October 2018	The applicant's submission in response to the authority's 11 September 2018 submission
<p>The trustee company provides independent trustee services to a number of parties and entities in the community. The trustee company held two separate parcels of shares in the previous owner.</p> <p>The trustee company "undertook an arms-length purchase" of the property from the previous owner's mortgagee bank. The common minority interest of 8.5% in the previous owner and the trustee company did not play a part in the trustee company's decision to purchase the property. There is no substantial continuity of interest as submitted by the authority.</p> <p>The applicant does not have a record of a letter from the authority dated 8 February 2017 (that accompanied the infringement notice).</p> <p>The site compliance report and construction evidence addresses compliance with both the RMA and the Building Act, and relates to both ponds.</p>	
30 January 2019	The applicant's submission in response to the authority's 15 November 2018 submission.
<p>The common beneficial interest in the previous owner and the applicant is 8.5%. The trustee company is an independent trustee company, and the two parcels of shares were for two different groups of beneficiaries. In its capacity as a fiduciary, the trustee company is obliged to take into account the distinct interests of the beneficiaries in each parcel of shares. To do otherwise would put the trustee company in breach of its obligations. In all shareholder meetings of the previous owner, the trustee company assigned by proxy the voting rights of the groups of beneficiaries to the primary beneficiaries.</p> <p>It is misleading for the authority to submit that the director of the trustee company is the controlling mind behind both companies.</p> <p>A commonality of shareholder interest does not equate to continuity of legal ownership. However, if this is deemed relevant, it must be taken into consideration that the extent of commonality is only 8.5% and the commonality related to shareholder interest, not management or governance.</p> <p>The previous owner was the owner at the time of construction of the wastewater treatment system, not the applicant.</p> <p>Although unsubstantiated, personnel employed by the previous owner have stated that the authority's involvement in the construction of the wastewater treatment system was considerable, and that advice was provided that building consent was not required for the construction of the aerobic pond, and the construction evidence would satisfy the requirements of the Act.</p>	
Correspondence with the Ministry	
26 February	In response to a request from the Ministry, the applicant provided a copy of the report of the applicant's engineer dated 5 February 2018

2019	(refer to paragraph 3.27).
29 April 2019	In response to the Ministry providing the parties with the expert's report, the applicant queried whether the expert was provided the site compliance report and its supporting information for review.
7 May 2019	<p>An officer of the Ministry advised the expert reviewed the information the authority had in exercising their powers of decision making in respect of the aerobic pond's compliance with the Building Code. The site compliance report and its supporting information (structural design report) were not raised between the authority's engineer and the applicant's engineer correspondence. Additionally, the authority believes the supporting information relates to the anaerobic pond only.</p> <p>The officer requested the applicant clarify the significance of the supporting information and whether the structural design report relates to the subject aerobic pond or whether there is additional information available in respect of the design of aerobic pond.</p>
29 June 2019	The applicant responded to the Ministry's request for clarification of the site compliance report and its supporting information (structural design report). The applicant advised he was not in a position to provide the clarification sought as the construction and any information to support its design were the domain of the previous owner.

C1.2 The authority's submission in response to the application and submissions before the issue of the draft determination are summarised in the following table:

11 September 2018	The authority's submission in response to the application for determination.
<p><i>Compliance and remedies</i></p> <p>The site compliance report considered the compliance of the wastewater treatment system (including the aerobic pond) with resource consent requirements. This report was not concerned with the requirements of the Building Act.</p> <p>Confirmation of compliance with clause 14B of the resource consent and the NIWA certification does not relate to the requirements of the Building Act and Building Code. These confirmations show the construction of the ponds was sufficient to mitigate adverse environmental effects.</p> <p>The authority does not agree with the applicant's view that the site compliance report confirmed the wastewater treatment system, including the aerobic pond, complied with the Building Code. To the extent that this report recorded full compliance relates only to the resource consent and has no bearing on whether the structure and durability of the aerobic pond meets the requirements of the Building Code.</p> <p>The structural design report by the previous owner's structural engineer relates to the design of the anaerobic pond.</p> <p>The authority does not agree with the applicant's view that it could not rely on the report of the authority's engineer to indicate non-compliance with the Building Code because the report was supposition and the result of one visit only. The foundation of the opinions expressed in this report were the measurement of representative embankment cross sections, cursory field assessments of exposed fill materials, and photographic survey.</p> <p>The requirements of the notice to fix were reasonable given the report had indicated non-compliance with the Building Code.</p>	

Notice to fix provisions

The view expressed in Determinations 2014/035¹⁶ and 2015/073¹⁷ does not accord with the broader purposes and principles of the Act.

The definition of specified person in section 163(a) is “the owner of a building”, the plain meaning of which is the individual or entity that is the owner at the time a notice to fix is contemplated.

Determination 2014/035 stated a notice to fix is on a person and the ability of that person to be prosecuted for failure to comply. The primary purpose of a notice to fix is the remediation of the contravention of the Act or its regulations.

This position is supported by the fact a notice to fix is issued to a specified person, as opposed to a building. Determination 2014/035 used this to support the conclusion a notice to fix cannot be issued to an owner not responsible for the building work. However, the authority is of the view that a notice to fix attaches to a person not a building is because the purpose of the notice is to ensure the non-compliance is fixed. A building cannot fix itself, but the owner of a building can fix the building.

The limitation that relates to building work being carried out in section 163(b) applies to the person carrying out or supervising the building work as applicable. There is no such limitation in respect of an owner.

The provisions of section 112 apply to the compliance of the building as a whole after an alteration and not to the building work itself; a subsequent owner should inherit the principle of ensuring the post-alteration building complies with the provisions of the Code.

The responsibilities of an owner under section 14B include “ensuring compliance with any notice to fix”. The language used implies no limitation on the obligation depending on whether or not the current owner was responsible for non-compliant building work. The word “any” can be read as imposing an obligation to comply with a notice to fix issued to a previous owner but not complied with at the time of sale. The other obligations concern prospective building work that only a current owner can be responsible for so the inclusion of the obligation to comply with a notice to fix as a distinct obligation must apply to earlier or existing obligations to which the current owner is directly responsible for.

If the ability of an authority to issue a notice to fix “turns principally on the questions of current legal ownership, there is the potential for incongruous consequences”, particularly with respect to commercial ownership. For example, a sale from one company structure to another after receiving a notice to fix, where shareholders and/or directors are the same.

¹⁶ Determination 2014/035 The issue of a notice to fix for weathertightness remedial work carried out by a previous owner (15 August 2014)

¹⁷ Determination 2015/073 Regarding the issue of a notice to fix for building work carried out without building consent and non-compliance with the Building Code (18 November 2015)

The authority provided copies of:	
<ul style="list-style-type: none"> • an aerial photograph of the pig farming operation • a New Zealand Companies Office Extract from the Companies Register for: <ul style="list-style-type: none"> ○ NZ Pork Limited ○ Paparoa Trustees Limited ○ Poseidon Holdings Limited ○ RVC Trustees Limited • internal files note dated 3 August 2016 and 1 September 2016 • the notice to fix to the previous owner dated 5 September 2016 • emails dated 28 September 2016 from the authority to the applicant • the report from the authority's engineer dated September 2016 • the notice to fix dated 11 October 2016 issued to the applicant • the letter dated 8 February 2016¹⁸ from the authority to the applicant that accompanied the 8 February 2017 infringement notice • the letter dated 16 February 2018 from the authority to the applicant about the geotechnical investigation carried out by the applicant's engineer. 	
15 November 2018	The authority's submission in response to the applicant's 25 October 2018 submission.
<p>The applicant focuses on the interrelation between the beneficial interest of the applicant and previous owner. The beneficial interest is of secondary relevance to the continuity in the controlling interests. In particular, the director is the sole director and therefore the controlling mind behind both companies.</p> <p>The applicant repeatedly refers to "alternative solution" as the requirements associated with the resource consent. The requirements are set under the resource consent and do not have anything to do with the requirements of the Act.</p> <p>The authority's involvement with the ponds was limited to resource management issues, and the site compliance report concerned compliance with the relevant resource consents only; design and construction issues raised were solely from a RMA perspective.</p> <p>The NZSOLD Dam Safety Guidelines concern compliance with the Act and Building Code; as the authority was not involved in the code compliance of the aerobic pond until after its completion "it makes sense that there are no references to the Dam Safety Guidelines prior to this".</p> <p>The authority provided copies of emails dated November 2016 from the authority to the applicant about compliance under the Act.</p>	

¹⁸ It appears the letter is dated 2016 instead of 2017.

C1.3 The applicant's and authority's submissions in response to the draft determinations are summarised in the following table:

<p>Authority's submission received 16 September 2019 in response to the first draft determination</p>
<p>The authority supported the conclusion in the first draft that it had correctly issued the notice to fix to the applicant.</p> <p>The authority agreed with the reasoning in the draft that the notice to fix had been correctly issued to the applicant because there was a substantial similarity of ownership between the applicant and the previous owner, but the authority disagreed with the draft's conclusions that a notice to fix could not be issued to an owner for building work carried out by a previous owner.</p> <p>The authority submitted the draft determination is about the authority's power of decision and the draft determination should turn on the reasonableness of that decision, not on whether the geotechnical expert engaged by MBIE agrees with the expert advice received by the authority when it issued the notice to fix.</p>
<p>Applicant's submission received 30 September 2019 in response to the draft determination</p>
<p><i>Knowledge of non-compliance and notice to fix</i></p> <p>The notice to fix dated 05 September 2016 was posted to the registered office of the previous owner. The applicant settled the purchase of the assets of the previous owner on 15 September 2016. The applicant purchased the assets from the previous owner's mortgagee bank, not from the previous owner. The common minority interest between the previous owner and the applicant of 8.5% played no part in the applicant's decision to purchase the assets of the previous owner.</p> <p>The applicant had no knowledge of the notice to fix issued by the authority to the previous owner, until the authority issued the notice to fix to the applicant on 11 October 2016.</p> <p><i>Substantial similarity of ownership</i></p> <p>The trustee company provides independent trustee services to a number of distinct entities. The trustee company has no beneficial interest in either the capital or income of the shareholdings of those entities and played no part in the management or governance of the previous owner.</p> <p>The director of the trustee company is required to act in the interests of each beneficiary and cannot merge those interests. The trustee services of the trustee company are provided to the entities by the director of the applicant on an honorary basis.</p> <p>The second trustee company operates in a similar way to the trustee company.</p>
<p>Authority's submission received 20 December 2019 in response to the second draft determination.</p>
<p>The authority did not agree with the conclusion in the second draft determination and is of the view that it had correctly issued the notice to fix to the applicant.</p> <p>The authority posed a number of clarifying questions to the director of the applicant</p> <p>The authority is of the view that there appears to have been substantial similarity between the previous owner and the applicant, both in respect of the ownership and the management levels, because the director of the applicant:</p> <ul style="list-style-type: none"> • held 48.5% of the shares in the previous owner (taking into account the various different shareholdings and directorship arrangements of the director of the applicant); and • was the director of the previous owner at the time the aerobic pond was constructed and the director of the applicant when the applicant purchased

the property..
Applicant's submission received 20 March 2020 in response to the second draft determination.
The applicant's legal adviser confirmed the applicant accepted the second draft determination without further comment.