

Determination 2008/7

Notice to fix in respect of a retaining wall at 1102 Whangaparaoa Road, Whangaparaoa



Figure 1: The retaining wall (adjacent the May 2006 landslip) as at December 2007

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, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of the Department. The applicant is Mr W Kidd (“the owner”), the other parties are the Rodney District Council (“the territorial authority”), Mr G Leslie (the neighbour at 1110 Whangaparaoa Road), Mr M Fowler (the neighbour at 1112 Whangaparaoa Road), and Mr W Missen (the neighbour at 1114 Whangaparaoa Road) (“the neighbours”) as the owners of other property protected by the building work concerned.

- 1.2 The application for a determination arises from the territorial authority's decisions:
 - (a) to issue a notice to fix in respect of a retaining wall ("the wall") that was constructed without a building consent, and
 - (b) to refuse to issue a certificate of acceptance in respect of the wall.
- 1.3 Unless otherwise stated, references below to sections and schedules are to sections and schedules of the Act and to clauses are to clauses of the Building Code (the First Schedule to the Building Regulations 1992).

2 Background

- 2.1 The wall is constructed on the owner's property at the bottom of a slope up to the neighbour's property to the North. The boundary is located about two-thirds of the way up the slope. There are two houses on the owner's property. It is understood the majority of the landscaping and site works was undertaken in conjunction with the construction of the house located at the western end of the property.
- 2.2 The wall is approximately 45 metres long and ranges between 1.2 and 1.4 metres in height. It is constructed of 200mm to 250mm small end diameter ("SED") posts to the western end and 125x125mm square posts to the eastern end, all of which are generally at 900mm centres. The back of the wall is lined with 50mm thick timber. A site plan showing the extent of the wall is shown in Figure 2, which also shows a section through the wall at the location of the slip.
- 2.3 The wall was erected some time prior to December 2004. A consulting engineer ("the owner's engineer") prepared a design for the wall. That design showed "minimum 1,000 mm flat ground" at the level of the top of the wall. The flat area was marked as being subject to "surcharge loading".
- 2.4 The owner gave permission to the neighbour at 1110 Whangaparaoa Road to run a stormwater pipe along the back of the wall. In exchange, the neighbour was to remove soil from the bank, backfill behind the retaining wall, and reshape the slope to the profile required by the owner's engineer. This work was completed by a contractor engaged by the neighbour ("the neighbour's contractor") in December 2004.
- 2.5 The neighbour's contractor said that he:

. . . could not get the cut on the main embankment to [the owner's engineer's] specifications as there was not enough distance between the retaining wall and the boundary/driveway at 1110 [Whangaparaoa] Rd.
- 2.6 On 3 May 2006, there was a landslip that affected approximately 100m² of the slope behind the wall adjacent to the house at the eastern end of the property, and left other parts of that land at risk of slippage. Debris from the landslip extended over the top of the wall and damaged a timber deck attached to the adjacent house. The wall remained in place and apparently deflected. The debris included wood chip, topsoil, and weathered underlying soil. Stiff high-plasticity clays were exposed in the headscarp of the slip.

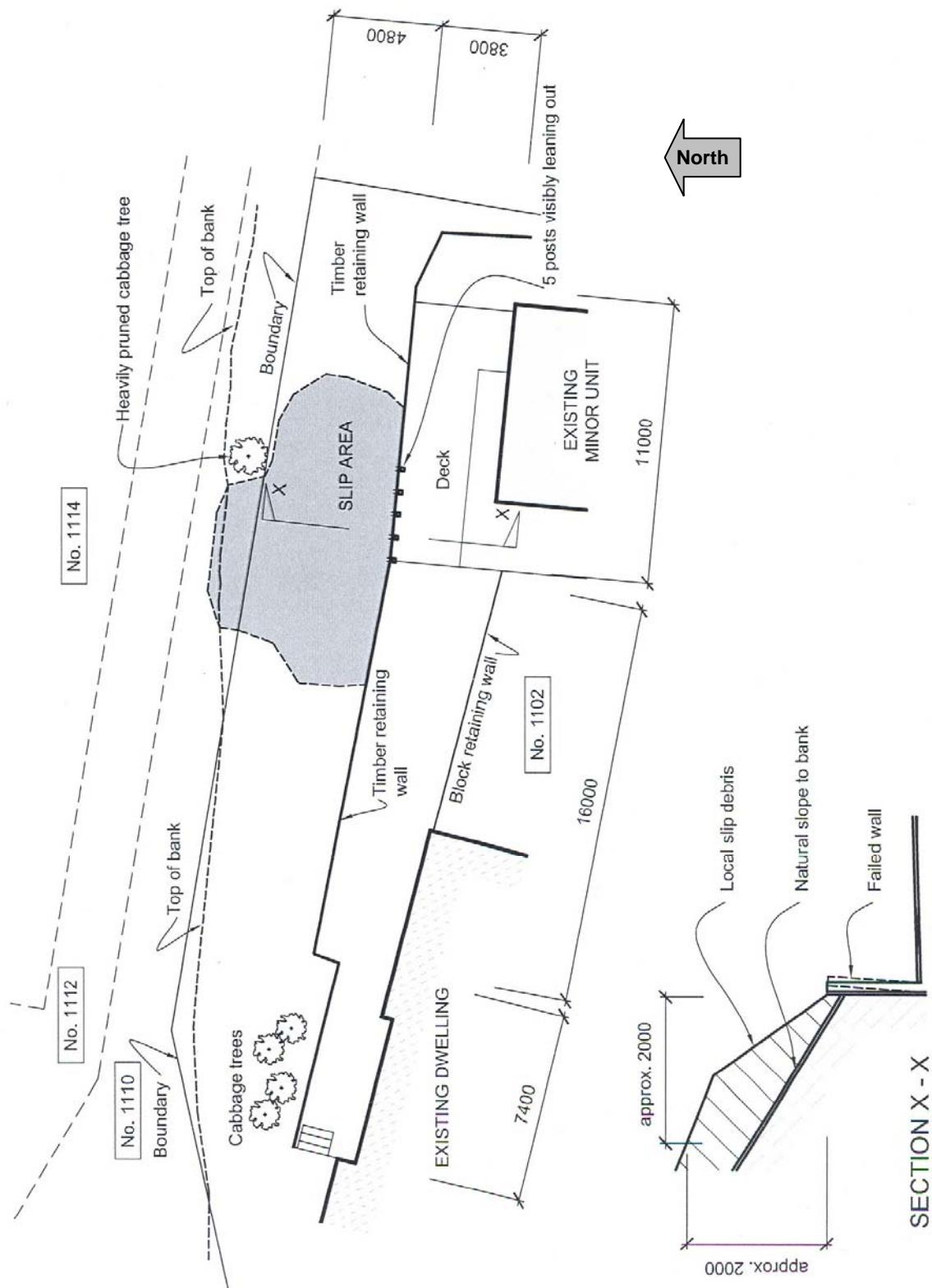


Figure 2: Site plan showing the extent of the wall and section at the slip.

- 2.7 The owner made a claim on the Earthquake Commission, which engaged a firm of consulting engineers to assess the claim. That assessment (“the EQC assessment”) was made on 16 May 2006. It said, amongst other things:

... A 1.4 m high cantilevered pole retaining wall [is at the foot of] a steep (approximately 40°) slope extending above the wall to the property boundary. A gravel/concrete driveway accessing the properties north of the subject property is located at the top of this steep bank. The bank has recently been landscaped with the face extensively planted and covered in wood chips. . . .

The landslip overtopped the timber pole wall at the base of the bank. No movement (rotation) or distress to the retaining wall was observed We note that a stormwater drain crosses the neighbouring driveway near the landslip. The inlet head for the culvert was partially blocked with branches. In addition, a driveway stormwater grate near the top of the landslip has been constructed well above formation level, rendering it ineffective. We expect that significant volumes of stormwater from the neighbouring driveway was likely to have partially contributed to the saturation of the failed bank.

The assessment recommended that certain building work be undertaken as a “stabilisation solution to reinstate the lost land”, and gave estimated costs to stabilise the landslip and repair the damaged deck.

- 2.8 There was apparently some correspondence between the owner and the territorial authority, and on 6 June 2006 the territorial authority wrote a letter to the owner saying (amongst other things):

... building work has been carried out without the required building consent. . . .

... building work [has also been] carried out without the required inspections. . . .

You are requested to supply a detailed report by a chartered engineer, to assess the timber retaining walls [*sic*] compliance with the New Zealand Building Code. . . .

... As this is now a retrospective situation . . . you have the option of placing a report on file or request a Certificate of Acceptance. . . .

... The levelling of the site from the drawings appears [to] involve a cut at the base of the bank before the retaining wall was constructed. . . .

- 2.9 The owner then obtained a report dated 19 September 2006 from another firm of consulting engineers (“the consulting geotechnical engineers”) which said (amongst other things):

We note that you have relied on Schedule 1 Item (c) of the Building Act 2004 in your claim that the retaining wall did not need a Building Consent. In our experience this particular item of the schedule readily leads to confusion. In our opinion surcharge **can** arise from sloping ground beyond the top of the wall but we are aware that this opinion is not universally held. . . .

Conclusions

... [the EQC assessment has] correctly identified the cause of failure of the slope ie saturation of an overstep [sic] slope. . .

... the timber retaining wall built at the toe of the slope was not subject to a Schedule 1 exemption from the need for building consent.

... The whole slope needs to be remediated, not just that part which lies on your property. A geotechnical investigation is required to support the design.

- 2.10 On 2 October 2006 the owner's engineer, responding to the territorial authority on the owner's behalf, applied for a certificate of acceptance (I have not seen the application) and provided a producer statement headed "Producer Statements for Design And Construction Review in the IPENZ format", including the drawing shown as Figure 3 below. The producer statement was subject to site verification of soil conditions and included the words "slope stability excluded".

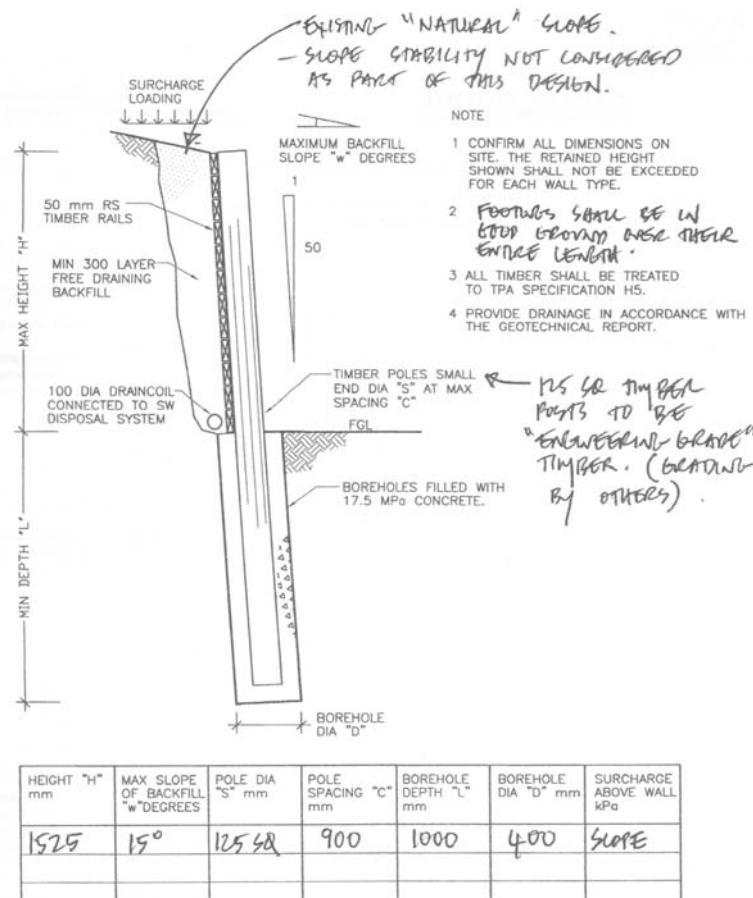


Figure 3: Sketch and design parameters of the wall prepared by the owner's engineer "to reflect the as-built situation".

- 2.11 The territorial authority apparently expressed dissatisfaction with the producer statement and, on 7 November 2006, it issued a notice to fix. The territorial authority also formally complained to the Institution of Professional Engineers New Zealand ("IPENZ") that:

. . . the producer statement was issued without adequate inspection of the site and retaining wall during the design and construction of the wall. . . .

That complaint was referred to an investigating committee. In a report, dated 2 April 2007, the committee said that the qualifying statements mentioned in 2.10 above "could have been better worded and explained" but dismissed the complaint as not warranting further investigation.

- 2.12 On 24 November 2006 the territorial authority wrote to the owner outlining the engineering reports received to date and saying:

On the basis of this summary of the various reports, the whole slope needs to be remediated and that is the responsibility of you, the property owner, to ensure that this is done.

Whether or not part of the remediation needs to be covered by a Certificate of Acceptance is a minor consideration. What is required is action outlined in the above conclusion

1. A geotechnical investigation.
2. A building Consent application for building work that:
 - a) Will address the existing retaining walls [*sic*] non-compliance with the Building Code
 - b) Will address the remediation of the whole slope
3. Carry out the building work authorised by an issued Building Consent for the issues above

In order to clarify the above issues I have changed the Notice to Fix dated the 7th November 2006.

- 2.13 That letter was accompanied by a notice to fix dated 23 November 2006 which said:

PARTICULARS OF CONTRAVENTION OR NON-COMPLIANCE

Carried out building work without a Building Consent contrary to [the Building Act]

The retaining wall and siteworks were constructed without a Building Consent.

To remedy the contravention or non-compliance you must:

Present to Council a Building Consent application for building work that:

- a. Will address the existing unconsented timber retaining wall and its non-compliance with the Building Code
- b. Will address the remediation of the whole of the earth slope above the retaining wall to ensure its long-term stability.

The Building Consent application will be accompanied by a geotechnical report on which the design solutions for a) and b) will be based.

Complete the building and remedial work as per the issued Building Consent.

2.14 At the owner's request, the consulting geotechnical engineers reviewed the notice to fix, and commented in an email dated 27 November 2006:

1. Keeping stormwater off the potentially unstable face can not be done from part way down the slope. It must be done from the top ie beyond your boundary. Given that the site boundary is part way down the slope this becomes a practical problem that may be overlooked by the notice requirements.

If your neighbour refuses to address the issue how do Council propose to address the issue. Our understanding of the legal position is that you have no right to enter your neighbour's property to do so and Council have no right to require you to enter your neighbour' property to do so.

2. . . . the remedial work must include the whole slope. Regardless of the method used . . . it will require some work beyond the boundary line. . . .

3. . . . The geophysical investigation must include your site, the site immediately above the slope and possibly [other properties]. We are currently proposing an investigation comprising 4 hand auger holes at the head of the slope (in other properties) to supplement those drilled in previous investigations on the actual site.

2.15 There were further meetings and correspondence between the consulting geotechnical engineers, the owner, and the territorial authority. In an email to the territorial authority dated 25 November 2006 the owner said:

. . . nothing has been done to control the water [from] the other side of the driveway above us, or the flow of water off the same driveway which has deteriorated significantly since 2003.

. . . We were of the understanding that [the neighbour] had Council consent to place the pipe [which I take to be a pipe from the stormwater grate mentioned in the EQC assessment] behind our wall and fill it with scoria . . .

Have you issued the neighbours above with a notice to fix their side of things as it is pointless us addressing ours if the stormwater situation is not resolved.

To which the territorial authority responded on 27 November 2006 by saying, amongst other things:

It is my understanding that your neighbour . . . sought your permission for a stormwater connection for his property. It would appear that you agreed to this and [the neighbour] applied for engineering approval for this connection. He obtained the approval however you objected to the approved design and suggested that it be placed behind the retaining wall. As a result of this change the engineering approval was invalid.

You suggest that we should take action in respect of the drain that does not meet the engineering approval or has no building consent. The fact of the matter is that since this drain is on your property any Notice to Fix would need to be issued to you.

2.16 Those discussions culminated in a letter dated 20 July 2007 from the territorial authority to the owner saying:

The Council does not consider that the instability issues on your property have been caused by the retaining wall and relies on the views expressed by the experts

in the various reports that the instability issues have resulted from a combination of the slope [above the retaining wall] becoming saturated with water, the earthworks undertaken on your property, and the removal and/or non-replacement of native bush on the slope.

The Council does however maintain the view that a building consent was required for the retaining wall and the associated site earthworks adjacent to this retaining wall, for the reasons stated above.

- 2.17 The owner applied for a determination on 5 September 2007.
- 2.18 I note that on 15 August 2007 the territorial authority issued a building consent for the “installation of 61 Micropiles to stabilise steep slope”.

3 The Act and the Building Code

- 3.1 Relevant provisions of the Act include:

7 Interpretation

In this Act, unless the context otherwise requires,—

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
- (b) includes sitework; and . . .

other property —

- (a) means any land or buildings, or part of any land or buildings, that are—
 - (i) not held under the same allotment; or
 - (ii) not held under the same ownership; and
- (b) includes a road.

plans and specifications —

- (a) means the drawings, specifications, and other documents according to which a building is proposed to be constructed, altered, demolished, or removed; and . . .

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.

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

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

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; or . . .

44 When to apply for building consent

- (1) An owner intending to carry out building work must, before the building work begins, apply for a building consent . . .

45 How to apply for building consent

- (1) An application for a building consent must—
(b) be accompanied by plans and specifications . . .

96 Territorial authority may issue certificate of acceptance in certain circumstances

- (1) A territorial authority may, on application, issue a certificate of acceptance for building work already done—
(a) if—
(i) the work was done by the owner or any predecessor in title of the owner; and
(ii) a building consent was required for the work but not obtained; or . . .
(2) A territorial authority may issue a certificate of acceptance only if it is satisfied, to the best of its knowledge and belief and on reasonable grounds, that, insofar as it could ascertain, the building work complies with the building code.
(3) This section—
(a) does not limit section 40 (which provides that a person must not carry out any building work except in accordance with a building consent); and

- (b) accordingly, does not relieve a person from the requirement to obtain a building consent for building work.

97 How to apply for certificate of acceptance

An application for a certificate of acceptance must—

- (b) if available, be accompanied by plans and specifications . . .
- (c) contain or be accompanied by any other information that the territorial authority reasonably requires; and . . .

99 Issue of certificate of acceptance

- (2) A certificate of acceptance may, if a territorial authority inspected the building work, be qualified to the effect that only parts of the building work were able to be inspected.
- (3) A territorial authority's liability for the issue of a certificate of acceptance is limited to the same extent that the territorial authority was able to inspect the building work in question.

164 Issue of notice to fix

- (1) This section applies if a responsible authority considers on reasonable grounds that—
 - (a) a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent); or . . .
- (2) A responsible authority must issue to the specified person concerned a notice (a notice to fix) requiring the person—
 - (a) to remedy the contravention of, or to comply with, this Act or the regulations . . .

165 Form and content of notice to fix

- (1) The following provisions apply to a notice to fix:
 - (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: . . .

Schedule 1 Exempt building work

A building consent is not required for the following building work:

- (c) construction of any retaining wall that retains not more than 1.5 metres depth of ground and that does not support any surcharge or any load additional to the load of that ground (for example, the load of vehicles on a road) . . .

- 3.2 Relevant provisions of the Building Code include (note that the neighbour's land is considered "other property"):

CLAUSE B1—STRUCTURE

B1.1 The objective of this provision is to:

- (a) Safeguard people from injury caused by structural failure,
- (b) Safeguard people from loss of amenity caused by structural behaviour, and
- (c) Protect other property from physical damage caused by structural failure.

B1.2 Buildings, building elements and sitework shall withstand the combination of loads that they are likely to experience during construction or alteration and throughout their lives....

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

- (d) Earth pressure,
- (e) Water and other liquids,
- (f) Earthquake . . .

4 The submissions

- 4.1 The parties submitted extensive documentation, which I relied on in preparing the background set out in 2 above.

- 4.2 In support of the application for a determination the owner said:

... the wall was built some 4-500mm away from the foot of the actual slope in approx 80% of its length and than [sic] filled with scoria some time after it was built therefore there was no actual surcharge on it from soil. . . . The whole idea of this wall was to stop falling debris from above falling on our lawn and to give it a finished look. It was only after the wall had been built that the neighbour asked if he could strap a 150m [sic] diameter stormwater pipe behind it, that the decision was made to fill up the gap with scoria and level it off at the top of the wall. No actual soil was placed in this void so therefore there was no surcharge from the existing slope, apart from where we had to step around an existing cabbage tree. . . .

- 4.3 Previously, in correspondence with the territorial authority, on 9 June 2006 the owner said:

... my understanding of this is that as it is an existing slope I don't have an obligation to supply a retaining wall to hold up what is existing. . . . The flat area [at the bottom of the slope] is in lawn and we wished to either fence off the slope or place some sort of wall that would catch/control any loose debris [sic] that may come down from time to time. [The territorial authority told us] that any retaining wall under 1.5m did not need a permit.

- 4.4 I prepared a draft determination dated 17 October 2007 ("the draft"), which I sent to the parties for comment. The owner did not accept the draft and requested a hearing which was held on 6 December 2007.

- 4.5 The owner and an engineer, the neighbours, and the territorial authority were represented. The owner's engineer did not attend the hearing.
- 4.6 At the hearing, the owner, the neighbours, and the territorial authority made submissions and called evidence. The parties submitted additional documents with their submissions for the hearing.
- 4.7 I shall not set out the various submissions and contentions made in the course of the hearing. However, I have considered what was said at the hearing and have taken all relevant points into account.
- 4.8 With the agreement of the parties, I visited the site prior to the hearing and recorded the dimensions and details shown in Figure 2.
- 4.9 During the visit I also observed that five of the 125x125 posts to the wall (as noted on figure 2) had a visible outward lean. In other words, the wall had ultimately failed structurally contrary to what had been said in the EQC assessment.

5 Discussion

5.1 Was a building consent required for the wall?

- 5.1.1 The relevant provisions of the Building Act 1991 ("the former Act") were in force at the time the wall was constructed. Nevertheless, I have considered this determination in terms of the Act only, because I take the view that its relevant provisions for building consents are effectively identical to those of the former Act.
- 5.1.2 At the hearing there was some discussion of the cause or causes of the May 2006 landslip. I take the view that the slip demonstrated that the slope is unstable, but that I have no jurisdiction to determine whether that instability was caused by the acts or omissions of any of the parties.
- 5.1.3 The owner claimed that "as it is an existing slope I don't have an obligation to supply a retaining wall to hold up what is existing", refer paragraph 4.2. At the hearing, I understood the owner to say that the wall was not intended as a retaining wall but was intended to be an aesthetic feature.
- 5.1.4 I take the view that whatever the owner's intentions, the wall is a structure that comes within the section 8 definition of "building". The construction of the wall was therefore building work as defined in section 7. Section 40 provides that a building consent is required for such work unless it comes within one of the exemptions listed in Schedule 1. Even if particular building work is exempted from the need for a building consent, section 17 provides that it must comply with the Building Code.
- 5.1.5 The only relevant exemption is paragraph (c) of Schedule 1:

... any retaining wall that retains not more than 1.5 metres depth of ground and that does not support any surcharge or any load additional to the load of that ground (for example, the load of vehicles on a road) ...

5.1.6 There was some discussion of the meaning of the word “surcharge” in that exemption. That word is not defined in the Act, and I therefore take the view that it must be given its ordinary and natural meaning in context. The *Oxford English Dictionary* (2nd Ed. 1989) includes the following definition of “surcharge”:

3. An additional or excessive ‘charge’, load, burden or supply

7. *Civil Eng.* The part of a load that is above the horizontal plane containing the top of a retaining wall.

5.1.7 I take the view that meaning 7 is appropriate in this case.

5.1.8 In my view “surcharge” is not limited to vehicles as the one example of an additional load given in paragraph (c) of Schedule 1. I take that example to show 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.

5.1.9 In addition in Determination 2007/67, which was about a similar type of retaining wall, I said:

6.2.1 Schedule 1(c) provides that a building consent is not required for a retaining wall that retains not more than 1.5 m depth of ground and that does not support any surcharge. A surcharge is any feature such as sloping ground, or a road, or another building which adds to the load on the wall over and above the load imposed by the depth of soil retained.

(Determination 2007/67 also included some observations on the key features of an acceptable design approach for such walls.)

5.1.10 Accordingly, I conclude that the wall did not come within exemption (c) and therefore that a building consent was required for the construction of the wall.

5.2 Is the wall retaining a stable slope?

5.2.1 Given the definition of “surcharge” discussed in 5.1 above, it could be argued that it is possible in this type of situation to create a flat area of ground behind a retaining wall merely by steepening the slope locally, notwithstanding that such steepening might introduce an instability, or worsen a pre-existing instability. That appears to be what has been attempted in this case.

5.2.2 I note the wording of the functional requirement in Clause B1.2 where it states that “buildings, building elements and sitework shall withstand the combination of loads that they are likely to experience . . . throughout their lives . . .” (emphasis added).

I interpret “throughout their lives” to mean that the designer has an obligation to consider, and to evaluate, whether the locally steepened slope will in fact remain that way for the intended life of the retaining wall (which is normally not less than 50 years).

5.2.3 I therefore consider that specific engineering advice should be obtained before any earthworks (such as locally steepening the base of a slope above a proposed retaining

wall) are undertaken for the purpose of allowing a horizontal ground surface to be formed behind a low rise retaining wall, in order to bring it within the exemption defined in item (c) of Schedule 1.

5.3 Discrepancies

- 5.3.1 The wall is approximately 45 metres in length. The western end of the wall (approximately 25 metres) is constructed of 200 to 250mm round SED posts, and retains a height of between 1.2 to 1.4 metres. The eastern end of the wall (approximately 12 metres) is constructed of 125x125mm square posts and retains a maximum height of 1.3 metres. The slope behind the wall is higher at the western end.
- 5.3.2 There are some discrepancies between documents, including:
- (a) The EQC assessment said that the slope of the bank was “approximately 40°” (refer paragraph 2.7) whereas the owner’s engineer took it to be 15°, refer Figure 3.
 - (b) The owner said that “the wall was built some 4-500 mm away from the foot of the actual slope”, whereas Section X-X in Figure 2 suggests that the foot of the slope was cut away.
- 5.3.3 At the hearing, I questioned the owner about the accuracy of Figure 3 and about the design approach adopted by the owner’s engineer to reflect the as-built situation. The owner was unable to answer those questions and apologised for the absence of the engineer. I offer no opinion on whether in fact the design shown in Figure 3 complies with the building code.

5.4 Does the retaining wall comply with the Building Code?

- 5.4.1 For the purposes of this determination, the relevant provisions of the Building Code are the clause B1 requirement that, for the purposes of safeguarding life, amenity, and other property, the wall must withstand the combination of loads that it is likely to experience, taking account of earth pressure, water and other liquids, and earthquake.
- 5.4.2 I take the view that it makes no difference whether the owner intended the wall to be aesthetic rather than structural. Whatever its owner’s intentions, any building must comply with the Building Code to the extent required by the Act.
- 5.4.3 The only evidence I have seen as to whether the wall complies with the Building Code is the producer statements by the owner’s engineer.
- 5.4.4 The term “producer statement” is not used in the Act (although it was used in the former Act). In the former Act, a producer statement was defined as:

Producer statement means any statement supplied by or on behalf of an applicant for a building consent or by or on behalf of a person who has been granted a building consent that certain work will be or has been carried out in accordance with certain technical specifications

In my view, that definition has become the ordinary and natural meaning of the term in the context of building controls.

- 5.4.5 Accordingly, I take the view that a producer statement is capable of being evidence, frequently evidence of opinion rather than of fact, but cannot be evidence of anything it does not actually state.
- 5.4.6 In this case, I read the producer statements concerned as being evidence of opinion only, subject to verification of soil conditions, and excluding site stability. At the hearing, it was suggested that the producer statement concerned had been endorsed or approved by IPENZ in its disciplinary investigation. That is not how I read the IPENZ report, but even if IPENZ had endorsed the producer statement it would still be a strictly limited statement of the owner's engineer's opinion.
- 5.4.7 As such, I take the view that the producer statement concerned does not amount to reasonable grounds on which I can be satisfied that the wall complies with the Building Code.
- 5.4.8 I do not regard the fact that the wall successfully resisted the loads imposed by the landslip as evidence that it complies with the Building Code because:
- (a) Those loads are not necessarily the greatest that the wall is likely to experience; in particular the slip was not associated with an earthquake.
 - (b) The wall failed as 5 of the posts had a visible outward lean. In other words, the wall had failed structurally.
 - (c) The wall failed to protect the neighbour's property. I take the view that the extent, if any, to which the neighbour contributed to the damage to his own property is not relevant to this determination.
- 5.4.9 I understood from the hearing that the building consent for the house at the western end of the property did not include any requirement to stabilise the slope on which the slip occurred. The house at the eastern end of the property adjacent to the slip is not considered "other property" (refer Building Code Clause B1.1(c)) and the wall is not required to protect it. The damage to the deck associated with this house appears to have been comparatively minor.
- 5.4.10 I conclude that I do not have reasonable grounds on which to be satisfied that the wall complies with the Building Code.

5.5 The notice to fix

- 5.5.1 As I have concluded that a building consent was required for the construction of the wall, it follows that in terms of section 164(1) the territorial authority had reasonable grounds to consider that the owner had failed to comply with the requirement to obtain a building consent. Therefore, the territorial authority was required to issue the notice to fix under section 164(2). I note section 164(2) says the territorial authority "must" issue a notice to fix, not "may".

- 5.5.2 At the hearing, it was contended that a notice to fix cannot be issued in respect of a natural slope. I do not accept that very wide contention, but I do accept that a notice to fix cannot be issued under section 164(1)(a) to an owner who is not contravening or failing to comply with the Act or regulations. However, in this case the owner contravened the requirement to obtain a building consent for the wall.
- 5.5.3 The notice to fix requires “remediation” to ensure the long-term stability of the slope. The only remedy that can be required under section 165 is the carrying out of building work. The notice might have been clearer if it had said “carry out building work in respect of” instead of “address the remediation of”.
- 5.5.4 Not notwithstanding the observation made in 5.5.3 above, I conclude that the notice was properly issued.

5.6 The certificate of acceptance

- 5.6.1 As I have concluded that I do not have reasonable grounds on which to be satisfied that the wall complies with the Building Code, it follows that section 96 cannot be satisfied and therefore that the territorial authority cannot issue a certificate of acceptance.

6 Decision

- 6.1 In accordance with section 188 of the Act, I hereby:
 - (a) confirm the territorial authority’s decision to issue the notice to fix, and
 - (b) confirm the territorial authority’s decision to refuse to issue a certificate of acceptance.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 30 January 2008.

John Gardiner
Manager Determinations