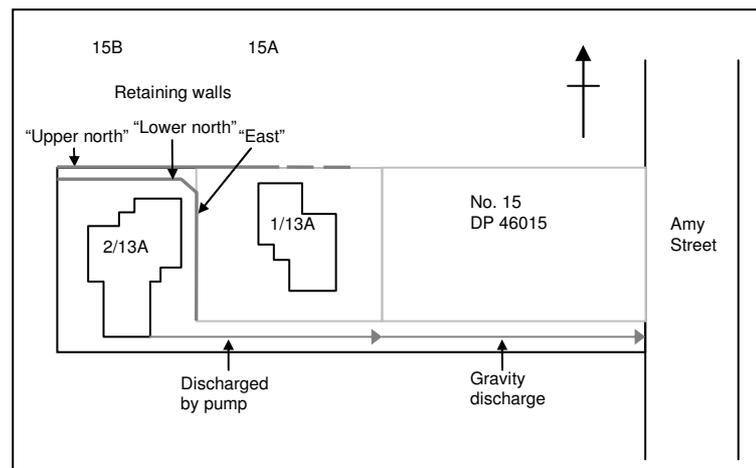




## Determination 2013/051

# The code-compliance of a surface water disposal system and a retaining wall at two cross-leased properties at 1/13A and 2/13A, Amy Street, Ellerslie, Auckland



## 1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> ("the current Act") made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment ("the Ministry"), for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to the determination are:

- K O'Brien, the owner of the cross-leased property situated at 2/13A, Amy Street ("2/13A") ("the applicant") acting through an agent ("the applicant's agent")
- Auckland Council, including in its previous capacity as Auckland City Council ("the authority")<sup>2</sup>, carrying out its duties as a territorial authority or building consent authority
- Mr and Mrs H J Wells, the owners of the cross-leased property situated at 1/13A, Amy Street ("1/13A") ("the adjoining owners").

<sup>1</sup> The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Ministry are all available at [www.dbh.govt.nz](http://www.dbh.govt.nz) or by contacting the Ministry on 0800 242 243.

<sup>2</sup> The area in which the building work is located was formerly under the jurisdiction of the Auckland City Council. The term "the authority" refers to both.

- 1.3 This determination arises from a decision made by the authority to issue a code compliance certificate for a house at 2/13A (“the dwelling”), which included a surface water disposal scheme and retaining walls.
- 1.4 Therefore I consider the matters to be determined<sup>3</sup> are whether
- the current surface water disposal system (“the system”) connected to the two properties complies with the requirements of Clause E1 Surface water of the Building Code<sup>4</sup> (First Schedule, Building Regulations 1992) that was current at the time the building consent was issued
  - the retaining walls to the north boundary of 2/13A comply with Clauses B1 Structure and B2 Durability of the Building Code that was current at the time the building consent was issued
  - the new retaining wall to the east boundary of 2/13A complies with Clause F4 Safety from falling of the current Building Code.
- 1.5 In making my decisions, I have considered the submissions of the parties, the reports of the experts commissioned by the Ministry to advise on this dispute (“the first expert” and “the second expert”), and the other evidence in this matter.
- 1.6 The relevant sections of the current Act and the Building Code are set out in Appendix A.

## 2. The building work

- 2.1 The building work that is the subject of this determination consists of a surface water system that serves both of the properties in question, and the retaining walls to the north and east boundaries.

### 2.2 The surface water system

- 2.2.1 The general nature of the ground where the properties are situated tends to direct surface water onto 2/13A.
- 2.2.2 The surface water from 1/13A and 2/13A is discharged into a 7.56m<sup>3</sup> detention tank<sup>5</sup> located under the floor of the garage to 2/13A. From the tank the water is pumped via a pump situated in a pump chamber located in the drive adjacent 1/13A up the drive, and once past the high point in the drive, it flows by gravity through a pipe that is connected to the authority’s drain in Amy Street.
- 2.2.3 The surface water from 1/13A is connected to the detention tank at some point but it has not been established where or how this connection occurs, and there are no records that a building consent was issued for this work.

### 2.3 The retaining walls

- 2.3.1 The retaining walls were originally constructed in 1994. The east retaining wall previously had a barrier to the top of the wall; the wall was demolished and a new retaining wall on the east boundary was built in 2011/2012.

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<sup>3</sup> Under section 177(1)(a), 177(1)(b), and 177(2)(d) of the current Act

<sup>4</sup> In this determination, unless otherwise stated, references are to sections of the current Act and references to clauses are references to the Building Code

<sup>5</sup> The tank is described on the plans as having a 10.8cubic metre capacity. However, the same drawings show the tank’s internal dimensions as 1m high x 1.4m wide x 5.4 m long; being 7.56cubic metres.

### **The east wall**

- 2.3.2 The east wall retains a maximum height of 1.5m. There is normally no surcharge, but cars are sometimes parked on the neighbouring property at the right-of-way end where the retained height is approximately 1.2m or less.
- 2.3.3 The wall consists of 190mm diameter posts at 1m centres up to 1.5m height above a concrete walkway. Galvanised steel coach bolts are used to fix some or all of the planks, and both the planks and posts appear to be treated with a CCA preservative. At the time of the second expert's inspection it was not backfilled.

### **The northern walls**

- 2.3.4 The double retaining wall to the north boundary of 2/13A retains a maximum height of 1.8m, and the surcharge is a concrete driveway on the neighbouring (high) side.
- 2.3.5 The lower north wall is the remaining section of the original timber retaining wall built in 1994, consisting of 100x100mm radiata pine posts at 1050mm centres and 150x50mm radiata pine planks, and is 1m high. The expert observed scoria at approximately 200mm below the top wall, but did not excavate to confirm the presence of drainage pipes.
- 2.3.6 The upper north wall is set back from the lower wall by 590mm and is up to 850mm higher. The upper north wall is constructed with 125x125mm radiata pine posts at 1150mm centres, with 160x50mm radiata pine planks. The expert observed galvanised steel ties fixed between the concrete drive way and retaining wall.

## **3. Background**

- 3.1 The authority issued building consent No. TC/94/2857 (which I have not seen) in late 1994 for the dwelling, under the Building Act 1991 ("the former Act").
- 3.2 The surface water from 2/13A was to run by gravity through a proposed adjoining subdivision but the subdivision did not proceed. The building consent was amended to show the detention tank and pump that exists at present.
- 3.3 At an undetermined date, the surface water drainage from the house at 1/13A was connected to the detention tank of the system serving the dwelling. The authority has confirmed that it has been unable to find any 'approved building consent plans to suggest that the two storm water systems should be connected'. The adjoining owners have submitted that the surface water from 1/13A was originally disposed of via a clay pipe that ran west to the boundary, and may have discharge to a soak hole at the north/western corner of 2/13A prior to construction at 2/13A. Surface water from a paved area to No. 15 also flows down the concrete drive to 2/13A.
- 3.4 It appears that no formal agreement yet exists between the applicant and the adjoining owners as to the repair, maintenance, and ongoing costs associated with the detention tank, pump, and pump chamber, or for the running costs associated with the system. Nor have I received information identifying the nature of the failure of the east boundary section of the retaining wall or whether a building consent has been sought or issued for the new wall.
- 3.5 It appears from LIM records for 2/13A that the authority issued a code compliance certificate for consent TC/94/2857 on 1 May 1995. I have not seen a copy of the code compliance certificate.

3.6 The applicant engaged an engineer to investigate the surface water system and the east boundary retaining wall. The engineer produced a report dated 10 March 2011; I summarise its findings as follows:

- The failure of the retaining wall was due to the inadequacy of its structural members and drainage and inundation from water because of soakage through the grassed yard above the wall.
- The surface water drainage from 1/13A was connected to the detention tank located in 1/13A. The tank was 'grossly overloaded' that led to flooding every time it rained heavily.
- Due to the lack of a silt trap before the tank, a build up of sludge occurred regularly.
- There was no overflow facility to the tank.
- The owner of the 1/13A was left with the responsibility for the cost of pumping and de-sludging the surface water disposal systems serving 3 properties.

The consulting engineers also described the works and solutions that they considered to be appropriate to solve the drainage problems.

3.7 The applicant emailed the authority on 26 January 2012, listing building work that the adjoining owner had undertaken and which the applicant considered constituted major improvements to the exterior of their property. The applicant also queried whether any building consents had been obtained for these works.

3.8 In a letter to the applicant dated 17 February 2012, the authority described a meeting held between the applicant and officers from the authority. The authority also noted:

- it had issued a building consent for the dwelling and this consent had been amended to accommodate the amended surface water drainage system
- the owner of 1/13A was to be given notice to connect the sub-soil drains to the existing 'approved' system
- a search of the covenants on the cross-lease Certificate of Title had not found no prohibitions preventing the connection of the surface water drains on the common property and exclusive area/s
- notice was to be given to both owners regarding the retaining wall due to the change in level exceeding 1 metre and the lack of a barrier
- the authority could only make recommendations in relation to the approved building consents and the work had been completed in accordance with the consents. Ongoing maintenance was a matter between the parties.

3.9 In a second letter to the applicant also dated 17 February 2012, the authority provided an inspection report covering an inspection of the two properties conducted on 16 February 2012 (in places the letter incorrectly describes the owner of 2/13A as that of 1/13A). The main matters described by the authority relating to the property at 1/13A were (in summary):

- The drainage installed behind the new east timber retaining wall was not connected to the surface water drainage system and, as a consequence, water discharged onto the paved surface at 2/13A. The wall lacked a barrier.
- An increased area of sealed paving had been installed.

- The pergola that had been built ‘can be exempted [from the need for a building consent] under Schedule 1 of [the Act]’.
  - The letter referred to a new timber retaining wall and fill adjacent existing garage retaining wall (this to the level below the existing garage).
- 3.10 The authority also described a test that it had carried out to determine whether in fact the drains from 1/13A were connected the surface water drainage system of the dwelling. While the test was not conclusive, water was heard to be entering the detention tank. While no calculations had been made, the report considered that the pump and the outlet size/orifice size appeared ‘to be very small for the application it is used for’. It was suggested the detention tank was ‘not very full’ but the tank was not draining into the pump chamber. (It is therefore unclear where the tank was draining to).
- 3.11 Finally, the authority recommended that:
- the parties should agree to apply to the authority for a new surface water drainage connection that would bypass the tank and pumping system
  - the concrete driveway ‘must’ be provided with channel drain(s) and silt trap(s) to reduce the volume of water arriving at 2/13A
  - the owner of 2/13A ‘must’ apply for a building consent for the alterations ‘to the existing ground levels, tanking, and the new [surface] water drainage installation’
  - both owners ‘must’ install a barrier to the top of the east retaining wall.
- 3.12 In a letter from the authority to the adjoining owners dated 6 March 2013 and in reference to a site meeting and inspection carried out on 27 February 2012, the authority noted that:
- an amendment to the building consent was approved for the storm water drainage system to its current state
  - notice would be given to the property owner of 1/13A to connect the sub-soil drains to the existing approved storm water drainage system
  - notice would be given to both owners of 1/13A and 2/13A regarding the retaining wall as the change in level is higher than one meter and requires a one meter high timber barrier to prevent persons from falling.
- 3.13 On 23 May 2012 the authority wrote to the applicant noting that the original plan for the dwelling had been amended and that a note on the plan had stated that the pump station installation was ‘subject to Property Owners Negotiations for private gravity drainage through neighbouring property...’. The note ‘indicates that there was an agreement, and based on that agreement the Consent was issued and the work carried out accordingly’. The authority said that the absence of a condition on the cross-lease regarding a shared responsibility did not necessarily mean that such an arrangement did not exist.
- 3.14 The authority went on to say that if the authority requested the adjoining owners to disconnect the drain, it would mean that surface water would flow onto the applicant’s property. While the question of the adjoining owner not contributing to costs and maintenance was unsatisfactory, that matter was between the cross-lease owners to resolve themselves rather than for the authority.

- 3.15 It appears the applicant and the adjoining owners were in dispute as regards the construction of a barrier to the east retaining wall; on 24 October 2012 the adjoining owners emailed a Fencing Notice, with the applicant emailing a Cross Notice on 11 November 2012<sup>6</sup>.

#### **4. The submissions**

- 4.1 The Ministry received an application for determination on 27 August 2012. In a covering letter forwarded with the application, the applicants' agent described the drainage system, and noted that the storm water drainage connection from 1/13A did not appear on any consented plans or on any other relevant documentation, nor was any mutual maintenance plan initiated at the time the dwelling was being constructed. In the agent's opinion, this connection was in breach of Clause E.1.3.1. In addition, the specifications for the pump station showed that it was not designed to accommodate the surface water discharge from two properties. There was also no evidence to show that the authority had inspected the system during its construction and, after a later inspection, the authority was unable to confirm whether what was designed was installed. Recent ground works on the adjoining property had exacerbated the problem.
- 4.2 With regard to the retaining walls, the agent noted that the original north and east boundary retaining walls were not built in accordance with the relevant Clause B1 requirements. The agent stated that the original wall on the north boundary had been replaced and the east boundary wall had also moved and was in danger of falling over. (I assume the descriptions north and east to be in error and should be transposed.)
- 4.3 The agent attached copies of the following:
- some of the consented plans
  - the authority's property file CD
  - a sanitary sewer pump chamber detail
  - references from Clauses B1 and E1
  - the correspondence with the authority.
- 4.4 The authority acknowledged the application for determination but made no formal submission in response.
- 4.5 The Ministry also independently obtained copies of the leases relating to the two properties in question.
- 4.6 A draft determination was issued to the parties for comment on 23 May 2013.
- 4.7 The applicant's agent responded on 5 June 2013. The agent did not accept the draft determination and submitted that:
- it is unclear whether the consent amendment for the detention tank and pump was ever formally approved (refer paragraph 3.2)
  - the consulting engineer will provide a PS4 to the authority when the rebuilding of the east wall is complete

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<sup>6</sup> Under sections 10 and 11 of the Fencing Act 1978 respectively.  
Ministry of Business,  
Innovation and Employment

- the LIM report shows that a code compliance certificate was issued for 2/13A before it was purchased by the applicant.
- 4.8 The adjoining owners provided a submission in response to the draft received on 9 June 2013. The adjoining owners submitted that the surface water drainage system serving 1/13A was in existence prior to the construction of 2/13A, with a pipe servicing two downpipes and ‘likely connected to a soak hole existing around the north/western corner of 2/13A prior [to] construction’.
- 4.9 The adjoining owners did not accept the draft and submitted that (in summary):
- it was not accepted that the system was beyond its capacity and calculations show the system supports the estimated surface water load. The submission referred to an email from the authority dated 23 June 2011 which describes a conservative load of 8.2m<sup>3</sup>, the system has a 10.8m<sup>3</sup> capacity, and ‘a more accurate view would see a requirement for 5.6m<sup>3</sup>. (I have not seen a copy of this correspondence or any of the calculations.)
  - evidence of the system’s non-performance, with or without appropriate servicing, has not been provided
  - ‘documented assessments’ of system capacity have not used accurate figures to identify true capacity load on the existing system; this is partly due to the lack of a thorough investigation of the setup of the system or an appropriate site inspection
  - attempts had been made at reaching agreement on a sharing costs associated with the surface water system. It was noted that there would have been no cost if the original surface water system had not been intercepted by 1/13A.
- 4.10 In regards to the addition of impervious areas, the adjoining owners expressed concern that the collection of surface water from their property was ‘not well managed’, noting that:
- while some areas of concrete have increased, others have been removed and the total impervious area ‘is about the same but possibly less’
  - the ‘newly established areas’ manage surface water better than what was there previously, with water draining ‘into the existing surface water system provided for 1/13A’
  - ‘a reasonable volume of surface water dispels from No. 15 misses the surface water management on 1/13A and continues to 2/13A. Removal of this would reduce load on the system.’
- 4.11 The adjoining owners provided copies of:
- a site plan marked-up to indicate an approximate location of the surface water pipes prior to construction at 2/13A
  - photographs indicating the changes to impervious areas and management of surface water run-off to 1/13A. These showed water from a hose running to drainage sump
  - an email to the applicant dated 6 April 2011 about invoices that had been presented in relation to the surface water drainage (I have not been provided with a copy of the document being responded to).

- emails dated October and November 2012 between the adjoining owners and the applicant in respect of the cost of a shared fence and/or a safety barrier to the retaining wall. Also included were notices issued under the Fencing Act, and the letter dated 6 March 2013 from the authority regarding compliance with Clause F4 (refer paragraph 3.12).

4.12 The authority emailed the Ministry on 5 August 2013 accepting the draft without further comment.

## 5. The experts' reports

5.1 As described in paragraph 1.5 I engaged the services of two independent experts to assist me.

### 5.2 The first expert's report on surface water drainage

5.2.1 The first expert, who is a certifying plumber and certifying drain layer, examined the site on 6 November 2012 and produced a report that was completed on 28 January 2013. Copies of this report were forwarded to the parties on 31 January 2013.

5.2.2 The report, which was based on site observations and a review of the relevant documentation, described the site, the surface water disposal system, the retaining walls, and the background to the dispute.

5.2.3 The expert set out his observations concerning:

#### Clause E1—Surface water

- No documentation had been provided regarding the plan note described in paragraph 3.12, which referred to an agreement between the two owners.
- There was no formal agreement in place for the repair, maintenance, and ongoing costs associated with the detention tank, pump chamber and pump or for ongoing costs.
- The increased site development of the two adjoining properties at 1/13A and 15B, Amy Street, in particular the additional imperviously paved areas, had increased the surface water runoff from these properties onto the adjacent ones.
- Based on the requirements of Clause E1.3.3, the system in question did not dispose of surface water in an adequate manner. In addition, the surface water from the adjoining properties was not adequately disposed of.
- While the pipe materials used in the system were code-compliant, no “as laid” plan was available to show what connections were made to the system. In particular, it was not clear whether the existing soakpit on the 1/13A property had been abandoned, or whether the downpipes from that property were re-directed to the system. If these actions had been implemented, these together with the construction of the additional impervious paved areas, would also add to the overloading of the pump.
- As the existing lid over the detention tank is not sealable, it does not protect the 2/13A property from flooding. In addition, the tank lacked an overflow pipe.
- The surface water runoff from No. 15 needed to be revised so as to prevent surface water discharging onto the lower properties.

5.2.4 The expert attached to the report a set of photographs showing aspects of the various adjoining properties together with copies of relevant documentation.

### **5.3 The second expert's report on the retaining walls**

5.3.1 The second expert, who is a member of the New Zealand Institute of Architects, examined the site on 30 April 2013 and produced a report that was completed on 6 May 2013. Copies of this report were forwarded to the parties on 9 May 2013.

#### **General**

5.3.2 The expert noted that photographs of the original east wall show that the construction was similar to the lower of the two walls on the north boundary. The photographs did not show sufficient damage, deterioration or distortion to indicate that the wall had failed to comply with the Building Code; however other evidence may do so.

5.3.3 Consent drawings indicate a single wall on the north and east boundary. The lower north wall appears to have been continuous with the east wall, though it is not shown on the drawings. It is reasonable to suppose that the three walls were constructed in 1994.

5.3.4 The documentation does not indicate whether the driveway of 15A Amy Street existed and was close to the boundary at the time of construction of the north walls. At the time of the expert's visit cars were parked on the driveway resulting in a surcharge load on the wall.

5.3.5 The expert made the following observations on the retaining walls:

#### **The rebuilt east wall**

- CCA treatment will lead to corrosion of galvanised fixings unless additional protection is provided or they are replaced with stainless steel.
- The back filling is incomplete, and the presence, correct height and slope of the drainage pipe will need to be checked before back filling.
- There is no barrier fitted to the east wall.

#### **The upper and lower north walls**

- The upper wall shows signs of distress; there are gaps between planks and posts of up to 50mm, and galvanized steel ties have been fixed through the planks into the edge of the concrete driveway which the applicant advised was done in an attempt to prevent further settlement.
  - The upper wall is 3.7° out of plumb, whereas the consent drawing indicates a 4° reverse batter; however there is no information to confirm that the wall was built plumb or with the reverse slope specified.
  - There was no visible evidence of problems with drainage behind the walls.
- 5.3.6 The expert also noted that the type and adequacy of the preservative treatment to the retaining walls would require sample analysis to confirm.
- 5.3.7 The expert was unable to confirm whether loads from the upper retaining wall were being transferred via the attached pergola to the house. The applicant advised the expert that windows on the north side were unable to be opened during wet periods.

## 6. Discussion

### 6.1 Surface water drainage

#### Compliance with Clause E1.3.3

- 6.1.1 Clause E1.3.3(a) requires that surface water drainage systems shall be constructed to convey surface water to an appropriate outfall using gravity flow where possible.
- 6.1.2 In considering Clause E1.3.3, both the consulting engineers and the first expert are in agreement that the system is not performing adequately. The consulting engineers have noted that flooding of the 2/13A property is a frequent occurrence and attribute this to the overloading of the retention tank. The first expert has also stated in his report that the garage of the dwelling has been flooded on previous occasions.
- 6.1.3 The detention tank lacks an overflow and the consulting engineers and the authority's report have also noted the lack of a silt trap to intercept the build up of sludge. The first expert has referred to the unsealed access lid to the tank. The authority has said the pump and outlet size appear to be 'very small' for this application.
- 6.1.4 I note the adjoining owners contend that the capacity of the detention tank is adequate. The volume of the tank is approximately 30% less than that stated in the drawings (refer footnote to paragraph 2.2.2). While the capacity of the tank itself may possibly be adequate, it is unclear from the consent drawings at what level the tank drains into the pump chamber (as is done for the sewer pump chamber). It is therefore unclear what empty capacity the tank has in each rain event.
- 6.1.5 I accept the opinions of the engineer, the first expert, and the authority, and find that some of the system's components and the conveyance of surface water by the system itself fail to meet the requirements of Clause E1.3.3.

#### Compliance with Clause E1.3.1

- 6.1.6 Clause E1.3.1 requires surface water resulting from an event having a 10% probability of occurring annually, and which is collected or concentrated by buildings or siteworks, be disposed of in a manner that avoids the likelihood of damage or nuisance to other property.
- 6.1.7 I now need to consider whether the effects of the surface water entering the applicant's property has created a nuisance or caused damage in terms of Clause E1. In so doing, I note that the terms "nuisance" and "damage" are not defined in the Act or in the Building Code. In Determination 2011/027 I accepted that based on previous determination decisions "nuisance must be considered in the broadest sense of the word". I continue to hold that view and believe it is relevant to this situation.
- 6.1.8 There appears to be little doubt that 2/13A receives significant water from adjacent properties. While the adjoining owner has demonstrated that water from a domestic hose will run to a surface water sump, I do not consider this will adequately intercept surface water in anything other than a light rainfall event: the adjoining owner himself also observes that a 'reasonable volume' of surface water runs from No. 15 to 1/13A.
- 6.1.9 However, 2/13A was consented and built with the adjoining properties and buildings as existing features and the proper disposal of surface water from these properties should have been properly considered as part of the approved building consent for 2/13A.

## **6.2 The maintenance of the pumping system**

- 6.2.1 The authority has stated that it based its decision on the granting of a building consent for the dwelling partly because of an entry on one of the building consent application plans. This entry noted that the pump station installation was “subject to Property Owners Negotiations for private gravity drainage through neighbouring property...”
- 6.2.2 I have independently obtained copies of the titles for 1/12A, 2/13A, and 15 Amy Street to see whether there was any specific agreement about the pump and drainage system. From a examination of the titles, I am unable to locate any such specific agreement. However, there are provisions within the leases regarding lessee/lessor rights and obligations as well as for dispute resolution processes. I also note that Clause 6 of the leases refers to sharing of costs in relation to drains serving buildings erected on the same land.
- 6.2.3 Clause B2.3.1 requires building elements, with only normal maintenance, must satisfy the performance requirements of the Building Code for specific time frames. As regards the system, there is no evidence that its accessible components have not been properly maintained. The questions that have arisen relate to the liability of each of the owners of 1/12A and 2/13A regarding the sharing of the costs to maintain and run the pumping system. However, these are matters outside the ambit of this determination. It is for the owners themselves to solve these issues, which fall outside the requirements of the Building Act and the Building Code.

## **6.3 The retaining walls**

- 6.3.1 The retaining wall on the east boundary is being replaced under the supervision of a structural engineer, and I have not considered the compliance of this building work in regards to Clauses B1 and B2. However, the authority has noted that the new retaining wall, which has a fall height of over 1500mm, does not have a barrier to protect it. Clause F4.3.1 requires a barrier to be provided where people could fall 1 metre or more from a sudden change of level. This retaining wall does not comply with Clause F4.3.1, and accordingly the authority should issue a notice to fix requiring the owners to bring the building work into compliance with the Building Code.
- 6.3.2 The second expert has made a number of observations that indicate the northern retaining walls are failing to withstand the loads that they are currently subject to after 20 years in service. I note that there is no documentation available to provide information on the design of the double wall in respect of the applied loads.
- 6.3.3 Taking into account the second expert’s findings I am of the view that the northern retaining wall does not comply with Clauses B1 and B2 of the Building Code. I also consider that further investigation into the possibility that loads are being transferred to the house, via the pergola, is also necessary.

## **6.4 The code compliance certificate**

- 6.4.1 As I have previously stated (see paragraph 3.2), there are no records available to show whether a code compliance certificate was issued for the corresponding building consents issued by the authority. In addition, the authority has indicated that they have no knowledge of the drainage connection from the dwelling on 1/13A, or when it took place.

6.4.2 Having found that neither the surface water drainage system nor the retaining walls met the requirements of the Building Code at the time they were installed or constructed, I also find that if a code compliance certificate was indeed issued, it would have been issued in error. This finding is based on the transitional requirements of section 436 of the current Act. Section 436 states that a code compliance certificate relating to a building consent issued under section 34 of the former Act can only be issued if the relevant building work complies with the Building Code that applied the building consent was granted. It is clear that the elements in question did not meet this requirement.

## **7. The Decision**

7.1 In accordance with section 188 of the Building Act 2004, I determine that:

- the surface water drainage system to 1/13A and 2/13A does not comply with the requirements of Clause E1 of the Building Code that was current at the time the building consent was issued
- the retaining walls adjacent the north boundary of 2/13A do not comply with Clauses B1 and B2 of the Building Code that was current at the time the building consent was issued
- the retaining wall adjacent the east boundary does not comply with Clause F4.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 9 September 2013.

John Gardiner  
**Manager Determinations and Assurance**

## Appendix A: the Legislation

### A.1 The Building Act 2004

#### **436 Transitional provision for code compliance certificates in respect of building work carried out under building consent granted under former Act**

- (1) This section applies to building work carried out under a building consent granted under section 34 of the former Act.
- (2) An application for a code compliance certificate in respect of building work to which this section applies must be considered and determined as if this Act had not been passed.
- (3) For the purposes of subsection (2), section 43 of the former Act—
  - (a) remains in force as if this Act had not been passed; but
  - (b) must be read as if—
    - (i) a code compliance certificate may be issued only if the territorial authority is satisfied that the building work concerned complies with the building code that applied at the time the building consent was granted; and
    - (ii) section 43(4) were omitted.

### A2 The Building Code

#### **CLAUSE B1--STRUCTURE**

##### **PERFORMANCE**

**B1.3.1** Buildings, building elements and siteworks shall have a low probability of rupturing, becoming unstable, losing equilibrium, or collapsing during construction or alteration and throughout their lives.

#### **CLAUSE E1—SURFACE WATER**

##### **PERFORMANCE**

**E1.3.1** Except as otherwise required under the Resource Management Act 1991 for the protection of other property, surface water, resulting from an event having a 10 percent probability of occurring annually and which is collected or concentrated by buildings or sitework, shall be disposed of in a way that avoids the likelihood of damage or nuisance to other property.

**E1.3.3** Drainage systems for the disposal of surface water shall be constructed to convey water to an appropriate outfall using gravity flow where possible.

#### **CLAUSE F4—SAFETY FROM FALLING**

##### **PERFORMANCE**

**F4.3.1** Where people could fall 1 metre or more from an opening in the external envelope or floor of a building, or from a sudden change of level within or associated with a building, a barrier shall be provided.