



Determination 2016/002

Regarding the issue of a dangerous building notice in respect of a damaged shared driveway at 105 Roseberry Avenue, Birkenhead, Auckland



Summary

This determination considers the authority's decision to issue a dangerous building notice for a damaged shared driveway serving several residential properties. The determination discusses whether the shared driveway is a building under the Building Act.

1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ ("the Act") made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment ("the Ministry"), for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to the determination are as follows:

- The Collins Family Trust ("the applicant") who is the owner of 105 Roseberry Ave, one of the properties issued with a dangerous building notice. The applicant is acting through a legal adviser.
- Auckland Council ("the authority"), carrying out its duties as a territorial authority or building consent authority.

1.3 I consider the following to be persons with an interest in the matter:

- The owners of the other properties serviced by the shared driveway, (collectively "the other owners", and referred to in combination with the applicant as "the owners"). In this determination I refer to the properties of other owners in combination with the applicant's property as "the Roseberry Ave. properties".

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

- The owner of an adjacent property, 103 Roseberry Avenue, on which a retaining wall is constructed (“the neighbour”) and who was also issued with a dangerous building notice.

- 1.4 This determination arises from the decision of the authority to issue dangerous building notices in respect of a damaged shared driveway serving the Roseberry Avenue properties. The authority is of the view that the condition of the shared driveway means it is dangerous in terms of section 121² of the Act.
- 1.5 The matter to be determined³ therefore is the authority’s exercise of its powers of decision in issuing dangerous building notice No. 5717 under section 124 of the Act. In making this decision I have considered whether the shared driveway constitutes a “building” as defined in section 8.
- 1.6 In making my decision I have considered the submissions of the parties, and the other evidence in this matter.

1.7 Matters outside this determination.

- 1.7.1 The applicant was issued with two separate dangerous building notices (No. 5538 and No. 5717). The authority has confirmed that it has, or will, withdraw notice No. 5538; accordingly although I refer to it in the background to provide context, that notice is not included in the matter for determination.
- 1.7.2 The authority has also issued dangerous building notice(s) to the neighbour in respect of the retaining wall. The neighbour has disputed the issue of the notice(s) and has applied for a determination. The issue of the dangerous building notice for the retaining wall is considered in a separate determination.

2. The shared driveway and background

- 2.1 It is my understanding that the shared driveway is located wholly within the applicant’s property. The shared driveway is the subject of an easement (right of way), and serves as vehicle access for the nine Roseberry Avenue properties. I note here that there are separate driveways providing access to individual properties that branch off from the shared driveway – those driveways are not subject to this determination.

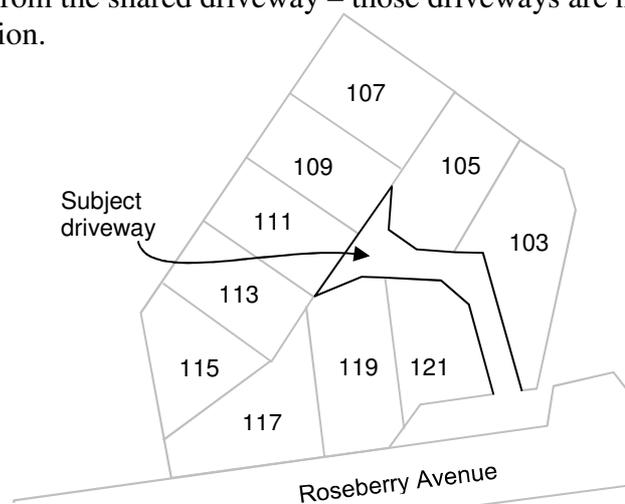


Figure 1: Site plan of the Roseberry Avenue properties (not to scale)

² In this determination unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code. The relevant sections of the Act discussed in this determination are shown in Appendix A.

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

- 2.2 The shared driveway runs north along the boundary with 103 Roseberry Avenue which lies to the east. Located approximately in line with the boundary is a bank with a supporting retaining wall.

2.3 The first dangerous building notice

- 2.3.1 The authority issued the first dangerous building notice (No. 5538) to the applicant, stating the reasons why the shared driveway was dangerous as follows:

On visual assessment, the retaining walls to the eastern side of the driveway have failed and there is a risk of complete failure causing injury or death to users of the driveway, there is also a risk of falling more than 1.5 metres.

...

[The authority] is satisfied that the building (**retaining walls to eastern side of driveway**) identified above poses a danger to the safety of people / property in that the building (**retaining walls to eastern side of driveway**) is dangerous in accordance with s121(a) of the Act.

The notice required the applicant carry out building work by 30 July 2015.

- 2.3.2 On 15 July the legal adviser acting for the applicant wrote to the authority, noting that the “building” the authority referred to in the notice was the retaining walls to the eastern side of the shared driveway, the retaining wall is not on the applicant’s property, and there was no building on the applicant’s property that was dangerous under section 121.
- 2.3.3 The legal adviser confirmed that the shared driveway is the subject of an easement (right of way) for a number of the neighbouring properties, including the property on which the retaining wall is constructed (103 Roseberry Avenue). The applicant was happy with the safety fence installed by the authority to remain on the property until the owner of 103 Roseberry Ave completed the ‘building work required to provide adequate support’ for the shared driveway and ‘adequate barriers to comply with Clause F4 of the Building Code’.

2.4 The second dangerous building notice

- 2.4.1 On 11 August 2015, the authority wrote to the applicant noting that it had carried out an inspection of the shared driveway ‘to see if the conditions of a dangerous building notice issued on 29 May 2015 had been complied and noting that ‘the visual inspection and search of the authority’s records shows no progress toward compliance with the notice’.

- 2.4.2 The authority issued the dangerous building notice No. 5717 to the applicant, stating in its covering letter that the area of concern had been fenced off in order to lessen the risk, and ‘this must and will remain in place until such time as the instructions in the notice have been complied with.’ The authority stated the reasons why the right-of-way was dangerous as follows:

On visual assessment, the lower end of the driveway at 105 Roseberry Avenue, servicing properties 103, 105, 107, 109, 111, 113, 115, 117, 119, 121 Roseberry Avenue has failed and there is a risk of complete failure causing injury or death to users of the driveway.

...

[The authority] is satisfied that the building (**Lower end of driveway servicing [the above mentioned] properties**) identified above poses a danger to the safety of people / property in that the building (**Lower end of driveway servicing [the above mentioned] properties**) is dangerous in accordance with s121(1)(a) of the Act.

The notice required building work to be carried out by 6 November 2015.

- 2.4.3 In the covering letter the authority also noted that it understood there was a ...an option for the driveway (as it is the use of this driveway that is dangerous) to be repaired within the boundary of number 105 Roseberry Avenue in the absence of a repair to the retaining wall within the boundary of 103 Roseberry Avenue ...

2.5 The neighbour's dangerous building notice

- 2.5.1 On the same day (11 August 2015) the authority also issued a dangerous building notice to the neighbour. The authority stated the reasons why the retaining wall was dangerous as follows:

On visual assessment, the retaining walls to the eastern side of the car park and to the eastern side of the driveway have failed and there is a risk of complete failure causing injury or death to users either on the car park or using the driveway, there is also the risk of falling more than 1.5 metres.

...

[The authority] is satisfied that the building (**retaining walls to the eastern side of car park and eastern side of driveway**) identified above poses a danger to the safety of people / property in that the building (**retaining walls to the eastern side of car park and eastern side of driveway**) is dangerous in accordance with s121(1)(a) of the Act.

The notice required building work be carried out by 6 November 2015.

- 2.5.2 The neighbour has made a separate application for determination in respect of that notice and it is not considered in this determination.

3. The submissions

3.1 The applicant

- 3.1.1 In a covering letter with the application, the applicant's legal adviser submitted that the applicant's shared driveway does not meet the definition of a "building" under the Act, and that the authority has not demonstrated that a satisfactory retaining wall can be constructed within the boundary line of the applicant's property. The application included copies of:

- The dangerous building notices No. 5538 and No. 5717 and the covering letter dated 11 August 2015.
- Site plan of the Roseberry Ave. properties.
- Three undated photographs of the damaged shared driveway.
- Correspondence from the legal adviser, dated 15 July 2015.
- Certificate of title for 105 Roseberry, and plan showing the shared driveway specified in a 1979 easement certificate.

- 3.1.2 In an email on 18 September 2015 the legal adviser referred to the remedial work in respect of the retaining wall.

- 3.1.3 On 4 October 2015 the legal adviser provided his opinion that the shared driveway is not a "building", noting that it was his understanding that the authority's concern is the retaining wall on the neighbour's property. The legal adviser submitted that the damage to the shared driveway is minor and cosmetic, and that the applicant holds

the authority partly liable for this damage due to its contractor's use of heavy trucks some years ago.

3.2 The authority

3.2.1 On 22 September 2015 I requested the authority provide a copy of the notice that had been issued to the neighbour and clarify the basis on which the notice was issued to the applicant, specifically whether the reference to the likely failure of the shared driveway was to the surface, the bank supporting the shared driveway, or both.

3.2.2 In response to a request for further information, on 2 October 2015 the authority advised that the shared driveway serves all the properties mentioned in the notice, and provided a copy of the correspondence of 11 August 2015 and the notice issued to the neighbour (No 5718). The authority also noted that

It is the driveway surface rather than the bank which [the authority] is currently concerned with in terms of actual damage which has already occurred, although if there is a further deterioration in the situation as seems likely then [the authority's] focus of concern may broaden.

...the emphasis in the [notice] is to the danger of personal injury, and while for example there is an obvious tripping hazard to pedestrians using the driveway (particularly in the dark) in its current state to access the properties it serves, it is suggested that there is also a likelihood of property damage in the form of damage to the underside of cars using the driveway unless they swerve to avoid the damaged surface.

3.2.3 On 7 October 2015 the authority responded to the application for determination by returning the completed form, noting that a submission was to follow.

3.2.4 On 13 October I sought a submission from the authority regarding its view that the shared driveway is a building. The authority responded on 13 October 2015, noting that the dangerous building notice No. 5538 'has been, or will be, withdrawn'. The authority submitted that:

- The definition under section 8(1)(a) "... a temporary or permanent moveable or immovable structure..." is a description which fits the shared driveway, and therefore the shared driveway is a building for the purposes of section 121.
- If a shared driveway is not a building, then the authority accepts that the dangerous building notice No. 5717 has been issued erroneously.
- There is no requirement on the authority to provide the information to demonstrate that a satisfactory retaining wall can be constructed within the boundary line of the applicant's property.

3.3 The neighbour

3.3.1 By email on 5 October the neighbour advised that he had an engineer's report, and a design of the shared driveway commissioned by the owners and an agreement regarding payment. The neighbour also noted there was an offer from the authority towards repair of the shared driveway, and issues regarding the shared driveway went back some 20 years.

3.3.2 The neighbour provided a submission on the matter by email on 16 October 2015. The neighbour agrees with the authority's submission that a driveway is a "building", and referred to the definition in section 117 for sections 118 to 120 in support of that view.

3.3.3 The neighbour also requested a determination ‘by which the responsibility for the repair of the shared driveway, including the construction of a new retaining wall, is to be shared by all property owners’. I note here that the matter of apportioning costs in respect of repairs is not a matter that can be subject to a determination under the Act.

3.4 The draft determination and submissions received in response

3.4.1 A draft determination was issued to the parties and persons with an interest for comment on 9 November 2015.

3.4.2 The applicant accepted the draft determination without further comment in a response received on 13 November 2015.

3.4.3 The authority provided comment on 23 November 2015. The authority disagreed with the analysis in the draft determination and made the following comment (in summary):

- Driveways have a complex structure. The substrate itself requires careful grading and preparation, with soft spots excavated and compacted fill. Concrete (as a composite of various materials) is a structural form in itself.
- The authority compared vertical formwork and horizontal formwork, concluding that both are man-made structures of some complexity and there is no basis for differentiation between a concrete driveway that is likely to cause injury or property damage and a concrete wall that is likely to do the same.
- The determination should uphold the purpose of the Act under section 3(a)(i), ensuring that the people using the right-of-way can do so safely.

3.4.4 The authority also expressed surprise that the ‘Minister of Health (representing ACC)’⁴ had not been made a party to the determination under section 176(g).

3.4.5 That section of the Act provides:

176 Meaning of Party

In sections 177 to 190, party, in relation to a determination, means any or all of the following persons affected by the determination:

...

(g) any person or organisation who or that has a right or an obligation under any other Act to give written notice to a territorial authority in respect of matters to which this Act relates.

The authority has not provided reference to any right or obligation under the legislation governing ACC (the *Accident Compensation Act 2001*) that requires ACC to give written notice to the authority in respect of a dangerous building, nor am I aware of any such right or obligation.

3.4.6 Two further submissions were received from the neighbour on 10 and 11 December 2015. The neighbour holds the view that the dangerous building notice issued in respect of the retaining wall is “100% related” to the notice issued for the shared driveway; however the neighbour also submitted that the shared driveway was not damaged due to a lack of support, but rather because of use by heavy vehicles.

3.4.7 The neighbour concurred with the authority’s assessment of the shared driveway as a building and with the authority’s view that the Ministry of Health be included in the

⁴ ACC is a crown agent and there is a Minister for ACC

determination. The neighbour expressed concern that the determination did not give attention to various geotechnical reports provided by the neighbour, and attached copies of a geotechnical report dated 6 July 2011, along with various items of correspondence.

4. Discussion

4.1 General

4.1.1 The Building Act provides for the regulation of building work and sets the performance standards for buildings (section 3(a)). Section 124 provides the authority may issue a notice in respect of a building deemed to be dangerous under section 121. In order for me to consider whether the authority correctly exercised its powers of decision in issuing the dangerous building notice in respect of the shared driveway serving the Roseberry Ave. properties, I must first consider whether the shared driveway is a “building” under the Act.

4.2 Is the shared driveway a “building”?

4.2.1 The term “building” is defined in section 8(1):

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

4.2.2 Section 8(1)(b) lists particular items that fall within the definition of a “building” for the purposes of the Act: mechanical, electrical or other systems attached to structures referred to in 8(1)(a), fences to swimming pools, mast poles or telecommunications aerials on or forming part of a building, and vehicles under certain circumstances.

4.2.3 I agree that the shared driveway is permanent and immovable; it is the term “structure” that I must consider in deciding whether the shared driveway falls within the definition of a building under the Act.

4.2.4 “Structure” is not defined in the Act and must be taken to have its usual or ordinary meaning: ‘A building or other object constructed from several parts’⁵, ‘Something constructed or having organization – a building, an edifice’⁶, and further ‘Any framework or fabric of assembled material parts; a (typically large) man-made construction’⁷.

4.2.5 For something to be a “structure” for the purposes of the Act, it must have some elements or constituent parts and/or be of some complexity. This is consistent with the content of sections 8 and 9 of the Act. The items included in the definition of “building” in section 8 or expressly excluded from the definition of “building” in section 9 are all objects composed of different parts and/or of some complexity.

4.2.6 The shared driveway in this instance is comprised of unreinforced in situ concrete and lacks any of the parts or complexity that would make it a “structure”. I therefore consider that the shared driveway is not a “building” under the Act to which the definition under section 121 can be applied; accordingly a notice under section 124 cannot be issued in respect of the shared driveway.

4.2.7 The authority holds the view that driveways are a “complex structure” and in its submission described the substrate and the composition of concrete. The authority

⁵ “Structure”, n: *Oxford Dictionary*. Web 25 Oct. 2015

⁶ “Structure”, n: *Oxford English Dictionary*. Web. 25 Oct. 2015.

⁷ “Structure”, n: *Oxford English Dictionary*. Web. 25 Oct. 2015.

could also see no principled difference between a concrete driveway and a concrete retaining wall.

- 4.2.8 I do not think the chemical composition of a material helps to determine whether the shared driveway is a ‘structure’. The chemical composition of concrete may be complex but the important point is that unreinforced in situ concrete poured on a driveway is not a structure that has any parts nor could it be called a complex structure.
- 4.2.9 I also consider that for the purposes of the term ‘structure’ there are important differences between a concrete driveway and a concrete retaining wall. The latter must be designed to withstand certain horizontal loads, and is likely to have certain parts, whether those be foundations, props, tiebacks or some other element to anchor the retaining wall and ensure it can withstand the loads it is designed for.
- 4.2.10 While an unreinforced in situ concrete driveway must withstand the loads of vehicles using the driveway this does not require the driveway to have any parts that would make it a ‘structure’ as that term is used in the Act. Of course, some driveways will be structures, because they will include parts such as foundations, bridges or retaining walls, however, that is not the case here.
- 4.2.11 I have also turned my mind to the definitions of “building work” and “sitework” in the Act and whether those definitions present an inconsistent approach to the definition of “building” or would indicate I have erred in my conclusion that the shared driveway is not a building.
- 4.2.12 Under section 7 of the Act “building work” and “sitework” are interpreted as follows:
- 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
- ...
- sitework** means work on a building site, including earthworks, preparatory to, or associated with, the construction, alteration, demolition, or removal of a building
- 4.2.13 Both definitions require the work be in connection with or associated with a building. In this case the shared driveway is approximately 100m in length and is entirely separate from the dwellings that it serves, with smaller driveways branching off to each dwelling. That being the case I am of the view the shared driveway cannot be said to be “in connection with” or “associated with” a building, and therefore would not fall within the definition of building work or sitework. The shared driveway is more akin to a private way as it is used as an extension to provide vehicle access to the properties it serves.
- 4.2.14 The neighbour has referred to the definition in section 117 in support of the view that the shared driveway is a building. However, that definition is expressly for the purposes of sections 118 to 120 which relate to access to buildings by people with disabilities; it cannot be read to apply to other sections of the Act. Further, the extension to the definition of “building” in section 117 has been expressly extended to include matters such as “driveways, access ways, passages within and between

complexes and developments, and associated landscaping” because the drafter no doubt considered such matters would otherwise not be covered by the definition of “building” in section 8.

- 4.2.15 Although I have found that in this instance the shared driveway is not a “building” under the Act, it does not follow that all driveways are not buildings. Each determination is considered on a case-by-case basis in light of the facts of that case; the fact that a particular shared driveway is not a building in one case does not necessarily mean that a driveway in another situation, which comprised elements such as foundations, poles, a retaining wall or bridge, would not fall within the definition of a “building” under the Act.

4.3 General comment

- 4.3.1 This determination does not consider the authority’s powers under section 124(2)(a) in respect of the barrier and whether a fence can be erected on an adjacent property or only on the land on which the dangerous building is sited. However, I acknowledge that the damage to the shared driveway may present a hazard to some users, particularly at night and for those not familiar with the driveway or its condition.
- 4.3.2 The applicant has agreed to the barrier remaining in place until remedial work is carried out. I agree that it is prudent to either keep the barrier in place or in some other way ensure users are made aware of the condition of this section of the shared driveway.

5. The decision

- 5.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the shared driveway in this case is not a “building” as defined in the Act, and accordingly I reverse the authority’s decision to issue the dangerous building notice No. 5717.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment 20 January 2016

John Gardiner
Manager Determinations and Assurance

Appendix A

A.1 The relevant sections of the Act

Meaning of building

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
- (b) includes—
 - (i) a mechanical, electrical, or other system; and
 - (ii) a fence as defined in section 2 of the Fencing of Swimming Pools Act 1987; and
 - (iii) a vehicle or motor vehicle (including a vehicle or motor vehicle as defined in section 2(1) of the Land Transport Act 1998) that is immovable and is occupied by people on a permanent or long-term basis; and
 - (iv) a mast pole or a telecommunication aerial that is on, or forms part of, a building and that is more than 7 m in height above the point of its attachment or base support (except a dish aerial that is less than 2 m wide); and

...

9 Building: what it does not include

In this Act, building does not include—

- (a) a NUO system, or part of a NUO system, that—
 - (i) is external to the building; and
 - (ii) is connected to, or is intended to be connected to, the building to provide for the successful functioning of the NUO system in accordance with the system's intended design and purpose; and
 - (iii) is not a mast pole or a telecommunication aerial that is on, or forms part of, a building; or
- (ab) a pylon, free-standing communication tower, power pole, or telephone pole that is a NUO system or part of a NUO system; or
- (ac) security fences, oil interception and containment systems, wind turbines, gantries, and similar machinery and other structures (excluding dams) not intended to be occupied that are part of, or related to, a NUO system; or
- (b) cranes (including any cranes as defined in regulations made under the Health and Safety in Employment Act 1992); or
- (c) any of the following, whether or not incorporated within another structure:
 - (i) ski tows;
 - (ii) other similar stand-alone machinery systems; or
- (d) any description of vessel, boat, ferry, or craft used in navigation—
 - (i) whether or not it has a means of propulsion; and
 - (ii) regardless of what that means of propulsion is; or
- (e) aircraft (including any machine that can derive support in the atmosphere from the reactions of the air otherwise than by the reactions of the air against the surface of the earth); or

- (f) any offshore installation (as defined in section 222 of the Maritime Transport Act 1994) to be used for petroleum mining; or
- (g) containers as defined in section 2(1) of the Hazardous Substances and New Organisms Act 1996; or
- (h) magazines as defined in section 222 of the Hazardous Substances and New Organisms Act 1996; or
 - (i) scaffolding used in the course of the construction process; or
 - (j) falsework.

Access to buildings by persons with disabilities

117 Definition for sections 118 to 120

In sections 118 to 120, unless the context otherwise requires, building includes—

- (a) parts of a building (including driveways, access ways, passages within and between complexes and developments, and associated landscaping (if any)); and
- (b) any premises or facilities.

Definitions of dangerous, affected, earthquake-prone, and insanitary buildings

121 Meaning of dangerous building

- (1) A building is dangerous for the purposes of this Act if,—
 - (a) in the ordinary course of events (excluding the occurrence of an earthquake), the building is likely to cause—
 - (i) injury or death (whether by collapse or otherwise) to any persons in it or to persons on other property; or
 - (ii) damage to other property; or
 - (b) in the event of fire, injury or death to any persons in the building or to persons on other property is likely.

...

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

- (1) This section applies if a territorial authority is satisfied that a building in its district is a dangerous, affected, earthquake-prone, or insanitary building.
- (2) In a case to which this section applies, the territorial authority may do any or all of the following:
 - (a) put up a hoarding or fence to prevent people from approaching the building nearer than is safe:
 - (b) attach in a prominent place on, or adjacent to, the building a notice that warns people not to approach the building:
 - (c) except in the case of an affected building, issue a notice that complies with section 125(1) requiring work to be carried out on the building to—
 - (i) reduce or remove the danger; or
 - (ii) prevent the building from remaining insanitary:
 - (d) issue a notice that complies with section 125(1A) restricting entry to the building for particular purposes or restricting entry to particular persons or groups of persons.