



Determination 2018/033

Regarding the decision to issue notices to fix for the demolition of a building at 305 Broadway, Marton

Summary

This determination considers the authority's decision to issue notices to fix for demolition work carried out without building consent. The determination turns on whether the building is 'detached' and accordingly whether demolition of the building is exempt building work under Schedule 1.

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, Katie Gordon, Manager Determinations, 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:

- Marton Elim Church Trust, which is the owner of the property and the applicant for this determination ("the applicant"), acting through its lawyer as its agent ("the applicant's lawyer")
- Rangitikei District Council, carrying out its duties as a territorial authority or building consent authority ("the authority").

1.3 This determination arises from the authority's decision to issue two notices to fix for building work to demolish a building on the applicant's property which shares a wall with an adjacent property. The demolition work was already underway when the first notice to fix was issued. The applicant had not applied for a building consent for the work, and the authority's view is that consent is required. Demolition of the building is partly complete and the disputed matter centres on a wall on the boundary between the applicant's property and a neighbour's property.

1.4 The matter to be determined² is the authority's exercise of its power of decision in issuing the notices to fix. In deciding this matter, I must consider whether the demolition is exempt building work under Schedule 1 of the Act.

1.5 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.

1.6 Matters outside this determination

1.6.1 The applicant contends the neighbour has no legal right to have attached their building to the wall on the boundary or to incorporate that wall within their own building, and the neighbour has an alternative view. The authority has taken the

¹ The Building Act, Building Code, compliance documents, 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.

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

approach that this is a civil matter between the parties and that it is not the authority's role to resolve the dispute.

- 1.6.2 I agree with the authority's approach. Neither is it my role to resolve this dispute in making a determination. Such issues go beyond the scope of matters that may be considered by determination, as set out in section 177³ of the Act. Whether or not the applicant and neighbour have the right to use the wall, and to what extent is for them to resolve.

2. The building work and background

- 2.1 The determination relates to building work to demolish a building on the applicant's property at 305 Broadway in Marton. The building was a two-storey block of what originally may have been shops or offices, and a hotel. A capstone indicated that the building was constructed in 1913. The Lot that the building was built on (Lot 2 DP 88285) measures 1607sqm, and is located on the corner of Broadway and Lower High Street on the south. The building did not occupy the entire Lot; it spanned the length of the street frontage of the Lot on Broadway, and around a third of the street frontage on Lower High Street. The rest of the Lot appears to have been vacant or used as a car park. There also appears to have been a lower, more modern annex to the building built out the back.
- 2.2 At the northern end of the Lot the applicant's building abuts another building constructed on the neighbouring property at 301 Broadway. The wall between these two buildings is constructed of red brick and mortar – for the purpose of this determination I refer to this as “the shared wall”. I have no information about the construction of the neighbouring building, although the parties have stated it was built around 40 to 50 years ago.
- 2.3 The applicant advises that immediately before the applicant's building was substantially demolished, it was being used for activities associated with the church. The applicant also advises that the building was ‘at the end of its useable life and falling into disrepair’, and as a result the applicant decided to demolish it.
- 2.4 In September 2015, correspondence passed between the applicant and the owner or occupier of the neighbouring property at 301 Broadway (“the neighbour”) about the shared wall and the applicant's plans to demolish its building. The correspondence included:
- An email dated 8 September 2015, from the applicant to the neighbour – the email concerned the authority's property records relating to their two buildings, and noted that in the plans for the neighbour's building ‘there is reference to an existing red brick wall’. The applicant had contacted a surveyor ‘to confirm that the boundary is where we think it is’ and that ‘The plans show that the brick wall is on the boundary. This means that part of the wall is in your property’. The email stated the applicant's intention at the time to:

take the rest of the high wall down to the level of your building roof line and see that it is water tight with flashing. The remaining high wall still needs to come down because when we take the rest of our building away, it would leave it unsupported and up to 5.5 metres above your roof. After this is done it will leave 14.5 metres more or less of red brick wall on the boundary to the height of your building's roof.

³ In this determination, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

- A further email dated 8 September 2015, from the applicant to the neighbour – the email forwarded correspondence from a licensed surveyor relating to the shared wall and the boundary between the two properties. The email stated that the shared wall encroaches 0.07m onto the neighbour's property, and noted that there was no reference to 'a party wall agreement' on the certificate of title. The email attached the survey plans and title.
- 2.5 At some point during early 2016, the applicant went ahead with the demolition work. The applicant believed that no resource or building consents were required for the work, and accordingly did not apply for any. As the demolition work progressed, the applicant became aware the neighbour had 'affixed internal wall linings and related materials' to the shared wall, and was using this portion of it premises as a gaming lounge.
- 2.6 On 14 April 2016, the applicant sent an email to the neighbour about the demolition work. The email acknowledges 'the common wall between your building and our building', and states that the applicant had originally intended to leave this wall intact, but the demolition work had shown that it was 'structurally unsound'. The email acknowledged the common interest the applicant and neighbour have in 'part of the boundary wall' and sought the neighbour's views on the need for an engineer's report 'to correctly establish the condition of the wall'.
- 2.7 At some point, the demolition work came to the attention of the authority, and on 30 June 2016 the authority issued notice to fix number NF0190 in respect of it ("the first notice to fix") for non-compliance with section 17 and 40 of the Act through 'Demolition of a semi-detached building without a building consent'. The notice directed the applicant to apply for a building consent for the demolition of 'the semi-detached building at 305 Broadway Marton', with the consent to include details of how the structural integrity of the neighbour's building would be maintained once the demolition was complete. The notice further stipulated that the demolition work was to cease immediately, and gave a compliance date for the notice of 1 September 2016.
- 2.8 It is not clear what stage the demolition work had reached when the authority issued the first notice to fix; however, it appears that the applicant carried on with the work after the notice had been issued.
- 2.9 The applicant sought the advice of a consulting structural engineer ("the applicant's engineer"). The engineer inspected the authority's property files for both the applicant's and the neighbour's property, and inspected the shared wall, including an 'exploratory hole' that the applicant had drilled through it. In a letter dated 2 August 2016, the applicant's engineer expressed his opinion that:
- the building paper and gib board on the neighbour's side was 'almost certainly' fixed straight to the 'brick walls (ground to first floor) of the [applicant's] Building' (the shared wall)
 - if the applicant removed the shared wall, then the neighbour would not have a wall to prevent the weather or people from entering their property
 - 'The basic structure of the building will probably be unaffected as we are sure that it does not rely upon your brick wall for strength. However, you should point out to [the neighbour] that it is their responsibility, not only to provide their own weather-proof and people proof wall, but also to ensure that their structure is safe when your brick wall is removed.'

- 2.10 The applicant emailed the neighbour on 18 September 2016, enclosing legal advice regarding the demolition of the building. The applicant stated that pursuant to this advice the applicant intended to ‘take down the rest of the brick wall on 1st December, 2017’ and was giving the neighbour notice of this so the neighbour had ‘full opportunity to make suitable arrangements on your site to protect your building’. The legal advice enclosed, also dated 18 September 2017, confirmed that there were ‘no registered easements (party wall or otherwise) on either title’, and went on to consider the rights to support and to weather protection under New Zealand law. The advice concluded that the applicant had no legal responsibility to provide support or weather protection to the neighbour’s building, or to contribute towards the construction of a temporary or permanent replacement wall, if the shared wall was demolished.
- 2.11 The applicant’s engineer provided further advice in a letter dated 5 December 2016. The advice followed a site visit on 17 November 2016 to discuss ‘the proposed removal of approx. 14 metres’ of the shared wall. The letter confirmed that the neighbours ‘have no structural wall or foundation to their floor slab along this boundary, although they may have some concrete foundations to their columns along the same boundary’. The letter also set out a method of removing the majority of the shared wall, so that only a ‘stub brick wall’ remained, which the neighbours could use as a foundation for a replacement external wall.
- 2.12 The letter attached a plan showing the existing wall, and its potential replacement. The plan shows the neighbour’s building having an independent concrete slab as the foundation for its building, and buried concrete foundations for the shared wall, as part of the applicant’s building. It is not clear if the construction details shown in this plan were verified by the applicant’s engineer, or have been merely deduced by him as the most likely form of construction following the site visit. A question mark appears next to the foundation detail for the shared wall.
- 2.13 The authority became aware that the building was largely demolished, and wrote to the applicant advising that the first notice to fix ‘was no longer current’. It then issued a replacement notice to fix, number NF0206 dated 7 December 2016, ‘in order to retain the section of common wall’ between the applicant’s building and the neighbour’s building’. This second notice to fix stated:

PARTICULARS OF CONTRAVENTION OR NON-COMPLIANCE

Non compliance: Section 17 and Sections 40 of the Building Act 2004

- Demolition of a semi attached building without a building consent.

To remedy the contravention or non-compliance you must:

- Stop all work onsite (site clearance can continue on the site)
- The wall that is shared with the [neighbour’s property] must remain along with the approx. 10m2 x 10m2 building left to support the shared wall.
- The site must be securely fenced to comply with F5 of the Building Act.
- A building consent must be applied for and obtained for the removal of the shared wall and the reinstatement of the new wall for [the neighbour].

This notice must be complied with by: 27/1/2017

FURTHER PARTICULARS

- All building work must cease immediately...
- The following building work must cease immediately until the authority that issued this notice is satisfied that you are able and willing to resume

operations in compliance with the Building Act 2004 and regulations under that Act:

Demolition of 305 Broadway without a building consent.

- If you do not comply with this notice you commit an offence under section 188 of the Building Act 2004 and may be liable for a fine of up to \$200,000 and a further fine of up to \$20,000 for each day or part of a day that you fail to comply with this notice.

2.14 The applicant sought legal advice, and the applicant's lawyer wrote to the authority on 20 February 2018 about the notices to fix. The lawyer stated that the notices to fix had been issued 'erroneously and unlawfully', as the council's records showed that:

The wall was designed as a structural element for the building that was constructed on [the applicant's] property. It was not intended to operate as a structural element for the building on the adjoining property (301 Broadway) which was built subsequently. If at any time in the past the owner of that property had wished to erect a building that also utilised the structure of the [applicant's] building, it would have required a legal agreement and party-wall easement to do so. No such agreement or party-wall easement is in existence.

Furthermore our client's engineer has inspected the wall of the [applicant's former] building and advised unequivocally that the wall does not operate as a structural element for the neighbouring building. His advice is that the wall can be removed with no impact on the structural integrity of the neighbouring building...

In those circumstances, to conclude that the [applicant's] building is "semi-attached" to the neighbouring building is patently wrong.

2.15 The applicant's lawyer went on to conclude, that as the applicant's building 'is not attached in any way' to the neighbour's building, it comes within the class of exempt building work in Clause 30 of Schedule 1 of the Act as demolition of a detached building. No building consent was therefore required, and the notices to fix should be withdrawn.

2.16 The authority replied to the applicant's lawyer in a letter dated 5 March 2018. The authority stated that it had been advised the neighbour had documents 'indicating their right to use the wall' and that the legal right to use the remains of the shared wall was 'a civil matter between the respective property owners'. The authority also stated that it was clear that the current situation:

...does not fulfil the exempted Building work test set out in part 1, schedule 1 of the Building Act 2004. The fact that there has been and is a shared/party wall arrangement in place logically precludes this situation being considered by [the authority] as a 'detached building'. Therefore the removal of the remnant wall requires a building consent.

2.17 The authority concluded that a building consent could not be issued until the legal status of the wall had been resolved, and until that time the second notice to fix would remain in place.

2.18 The applicant applied for a determination, which was received by the Ministry on 26 April 2018.

3. The submissions

3.1 The applicant made a submission dated 13 April 2018 with the application for determination. The submission set out the background to the dispute and stated that the applicant was seeking to have the notices to fix withdrawn 'on the grounds that the demolition of the building on its property is work that is exempt under Schedule [1] of the Building Act 2004'.

3.2 The submission also stated:

- ‘With the protection afforded by an existing roofing element’, the neighbour had enclosed the space adjacent to the applicant’s building for use in its business
- this and the fact that the neighbour had affixed internal wall linings and related materials’ to the external wall of the applicant’s building only became apparent during the demolition
- no building consents have been issued for this building work: ‘The applicant’s building has simply been “borrowed” by the neighbour to provide a surface for the affixation of interior wall linings, enabling that part of the neighbour’s property to be converted to hospitality uses...’
- ‘There is no evidence that the neighbour’s building relies on the applicant’s building for structural support. Nor does the neighbouring property have any legal right (e.g. a party wall easement) to utilise the wall for structural support or any other purposes.’

3.3 With its submission, the applicant enclosed copies of:

- the notices to fix
- the certificate of title for the applicant’s property
- photos of the shared wall taken after demolition work had been carried out, plus other unlabelled photos
- correspondence from the applicant’s engineer
- correspondence between the applicant’s lawyer and the authority.

3.4 The authority made a submission dated 14 May 2018. In its submission it confirmed the first notice to fix ‘was no longer current’ and the second notice to fix had been issued on the grounds that ‘the removal of the common wall between the two buildings was not exempted building work pursuant to Part 1, Schedule 1 of the Building Act 2004, specifically clause 3—Demolition of Detached Building’.

3.5 The authority also stated:

- the applicant’s own engineer had confirmed in his letter of 2 August 2016 that the two properties ‘shared use of the wall’
- the ownership and right to use the wall was in dispute and a civil matter between the parties, and it was not the authority’s role to determine that matter.

3.6 With its submission, the authority also enclosed copies of documents relating to the matter to be determined that had been supplied by the neighbour. Under Section 186(1)(c) of the Act, the chief executive, in making a determination, must receive any relevant evidence, whether or not it would be admissible in a court of law. Accordingly I have received the documents supplied by the neighbour and taken them into account in reaching a decision in this matter. These documents have been summarised in the background section of this determination and included the applicant’s emails to the neighbour dated 8 September 2015, 14 April 2016 and 18 September 2017, and their attachments.

3.7 A draft of this determination was issued to the parties on 5 July 2018.

- 3.8 The authority responded on 11 July 2018 and accepted the draft without further comment.
- 3.9 The applicant's lawyer responded on 20 July 2018, accepting the draft determination and submitting that a consequence of the decision is an adjoining landowner who unlawfully attaches their building to a boundary wall in which they have no legal interest will have their unlawful attachment protected by the Act in the event that the owner of the wall wants to demolish it.
- 3.10 As noted in paragraph 1.6.2, whether in this case the attachments are lawful is a matter outside the ambit of a determination under the Act, and as discussed in paragraph 4.20 the authority will not be able to issue a building consent for demolition of the shared wall before the matter of ownership or usage rights have been resolved.

4. Discussion

- 4.1 The applicant has applied for a determination about the authority's decisions to issue notices to fix NF0190 and NF0206 in respect of the building work to demolish the building on its property, and has asked that the notices be withdrawn.
- 4.2 The authority has confirmed that notice to fix NF0190 has been replaced by notice to fix NF0206; however I can still consider whether the first notice to fix was correctly issued. The wording of the two notices is not identical, but whether they were correctly issued hinges on similar considerations.
- 4.3 The grounds for issuing a notice to fix are set out in section 164 of the Act. The relevant provisions in that section for the purposes of this determination are as follows.

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
 - (b) ...
- (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; ...

- 4.4 In this determination, the specified person is the applicant as the owner of the building (section 163). The particulars of contravention or non-compliance that led to the issue of both notices to fix⁴ was stated as:

Non compliance: Section 17 and Sections 40 of the Building Act 2004

- Demolition of a semi attached building without a building consent.

- 4.5 Accordingly, the ground the authority was relying on in issuing the notices to fix was that the building work to demolish the applicant's building required a building consent, and no consent had been applied for.
- 4.6 The requirement to obtain a building consent for building work derives from section 40 of the Act.

⁴ The wording of the first notice to fix was slightly different in that it referred to 'Demolition of a semi-detached building'. However, I consider the meaning of the two terms to be essentially the same for the purpose of this determination.

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.

(2) A person commits an offence if the person fails to comply with this section.

4.7 Section 7 specifies that building work includes work in connection with the demolition of a building, and this is reinforced in the heading of Section 40.

4.8 There are, however, some circumstances in which a building consent is not required, and these are set out in Sections 41 and 42A. The relevant provisions in 42A are:

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

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

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

4.9 In this determination, the applicant is claiming that the demolition work on its building is exempt from the requirement to obtain a building consent because it falls within the class of exempt work described in Clause 30, of Part 1 of Schedule 1. Clause 30 reads:

Schedule 1 Building work for which building consent not required

Part 1 Exempted building work

...

30 Demolition of detached building

The complete demolition of a building that is detached and is not more than 3 storeys.

4.10 The issue in the current case hinges on the wording of Clause 30, in particular the term ‘detached’. The applicant is of the view that its building is detached, and hence can be demolished without a building consent. The authority is the view that the building is not detached, as it shares a common wall with the neighbour’s building, and hence consent is required.

4.11 The term ‘detached’ is not defined in the Act (or the Building Code), although it is used several times within Schedule 1, and in Clause 9 of Schedule 1 appears alongside the term ‘semi-detached’, which is also undefined.

4.12 In the absence of a definition, I can look at the ordinary and natural meaning of the term in the light of the purpose of the texts in which it appears. The Oxford Dictionary gives a definition “detached” as⁵:

detached

1 Separate or disconnected.

1.1 (of a house or other building) not joined to another on either side.

‘a four-bedroomed detached house’

4.13 In my opinion, this definition encapsulates what is commonly understood as meant by the term ‘detached’ when used in relation to a building. That is, the building stands alone and is not joined or connected in any way to another building. I also consider that such an interpretation is consistent with the way the term is used in other places in Schedule 1.

⁵ Sourced from Oxford Living Dictionaries: English, <https://en.oxforddictionaries.com/definition/detached> (accessed on 29 June 2018)

- 4.14 Applying this interpretation in the circumstances of this determination, I do not think that the applicant's building can be considered to be 'detached'. Whether or not there is an easement or what the status of the shared wall is in terms of property rights, the wall straddles the boundary and formed a party wall between the applicant's and neighbour's buildings. The shared wall forms part of the neighbour's building and affects the performance of the neighbour's building.
- 4.15 The applicant has submitted that the shared wall plays no structural role in the neighbour's building. In my opinion this is not determinative of whether the applicant's building is 'detached'; there is no requirement that an attachment must be structural in order for a building to be considered attached.
- 4.16 It would also appear that the applicant's submissions about the structure of the neighbour's building are based on the opinion of its engineer. I have seen no evidence of the testing and inspections that the engineer's opinion is itself based on. The engineer's letters reference the authority's records, an exploratory hole the applicant drilled through the shared wall, and a site inspection of the applicant's property. In my opinion, more robust investigation is required before the role that the shared walls plays in relation to the structural stability of the neighbour's building can be established.
- 4.17 Given that the neighbour's building may have been affixed to the shared wall for upwards of 40 years and the roof of that building appears to be attached to the shared wall, I consider it entirely possible that some damage could occur if the shared wall were removed without proper investigation. There is also uncertainty, raised by the applicant's engineer, about the nature of the foundations for both the shared wall and the neighbour's building, including a possibility (raised in his letter of 5 December 2016) that the neighbour's building may have concrete foundations to its columns located along the boundary that the shared wall spans.
- 4.18 In summary, it is my view that the categories of exempt work covered by the various clauses in Schedule 1 are those which are considered to pose a low risk of damage or danger to people or property, and are therefore capable of being carried out without the examination and oversight that a building consent entails. That is the reason for the specification in Clause 30 that a building be under a certain height and be detached. This is not, however, the case for this building, where elements of another building are physically attached to the building to be demolished.
- 4.19 I conclude the authority was correct to issue both the first and second notices to fix on the basis that the applicant's building is not detached and therefore the building work to demolish it does not come within the exemption in Clause 30 of Schedule 1.
- 4.20 As an aside, I also note the authority is correct that it cannot issue a building consent for building work to demolish the shared wall before the matter of the wall's ownership or usage rights have been resolved, as under Section 44 of the Act it is the owner who must apply for a building consent.
- 4.21 Where, in my opinion, the authority has erred is in the wording of the second notice to fix in relation to the steps that the applicant must take to remedy the contravention or non-compliance. The notice stipulates that 'A building consent must be applied for and obtained for the removal of the shared wall and the reinstatement of the new wall for [the neighbour's building]'. The form and content that a notice to fix must follow are set out in Section 165 of the Act. While, under Section 165(1)(d) the notice can require an application for a building consent, it cannot direct the form that the building work covered by the consent should take. This is a matter for the consent

applicant to propose and the authority to assess, in order to establish whether compliance will be achieved. The notice to fix should restrict itself to requiring the building consent.

- 4.22 The notices to fix also referred to a contravention of section 17 of the Act. Section 17 provides ‘all building work must comply with the Building Code to the extent required by [the] Act, whether or not a building consent is required in respect of that building work.’ The notice to fix does not however identify any breach of the Building Code. I conclude therefore that the authority also erred in referring to contravention of section 17.

4.23 Conclusion

- 4.23.1 I conclude the authority correctly exercised its powers of decision in issuing notices to fix NF0190 and NF0206 on the basis that building work carried out to demolish the building was not exempt under Schedule 1.
- 4.23.2 However, the wording in notice to fix NF0206 relating to the remedial steps requires amendment and the reference to section 17 should be removed. Notice to fix NF0206 is to be modified to reflect these matters, as discussed in paragraphs 4.21 and 4.22 of this determination.

5. The decision

- 5.1 In accordance with section 188 of the Building Act 2004, I hereby confirm the authority’s decision to issue notices to fix NF0190 and NF0206 in respect of the contravention of section 40. However, the wording of notice to fix NF0206 is to be modified as discussed in paragraph 4.23.2 of this determination.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 30 July 2018.

Katie Gordon
Manager Determinations