



Determination 2021/021

Regarding the withdrawal of a notice to fix for a retaining wall, near the boundary with another property, at 14 Aurum Court, Cromwell



Figure 1: Photograph of Part 1 of the retaining wall

Summary

This determination concerns a low retaining wall located near a boundary that was constructed without building consent, where a driveway was subsequently built near the top of the retaining wall on the neighbouring property. The determination considers whether the retaining wall was subject to a surcharge or load from vehicle traffic at the time of its construction, and whether the wall was exempt from the requirement for a building consent under Schedule 1 of the Building Act.

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004 (“the Act”) made under due authorisation by me, Katie Gordon, National Manager Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.¹

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

- 1.2 The parties to this determination are:
- Central Otago District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority, which applied for the determination
 - J and C Willems, the owners of the property at 14 Aurum Court, where the retaining wall is located, at the time the notice to fix was issued (“the owners”).²
- 1.3 S and S Keis are persons with an interest in this determination, as the owners of the neighbouring property at 12 Aurum Court (“the neighbours”).
- 1.4 The determination concerns a retaining wall constructed by the owners near the boundary with the neighbours’ property, when that property was still a vacant site. The owners did not obtain building consent for this building work on the understanding that it was exempt from requiring a consent under Schedule 1 of the Act. However, the neighbours are of the view that surcharge (or load) from the subsequent development on their property, which includes a driveway close to the boundary, should have been taken into account in the retaining wall’s design and construction.
- 1.5 The authority issued a notice to fix to the owners for contravening section 40 of the Act,³ on the basis that the retaining wall would be subject to surcharge from the neighbours’ development. The authority later reconsidered, withdrew the notice, and then applied for a determination concerning its decision.
- 1.6 Under section 177(1)(b) and (2)(f) of the Act, the matter to be determined is the authority’s decision to withdraw the notice to fix in relation to the retaining wall. In deciding this matter I must establish whether the building work associated with the wall was exempt from requiring a building consent under Schedule 1 of the Act.
- 1.7 In making my decision I have considered the submissions provided by the parties and the neighbours. I have not considered any clauses of the Building Code relevant to the design and construction of the retaining wall, as the notice to fix was not issued on the basis that the wall did not comply with the Building Code.
- 1.8 Unless otherwise stated, references in this determination to sections are to sections of the Act.

2. The building work

- 2.1 The retaining wall is on the owners’ property, near the boundary with the neighbours’ property. Both properties comprise relatively flat land, with total areas of 858m² and 728m² respectively.
- 2.2 The retaining wall was constructed between mid to late 2016, around the time the owners’ two-storey house and garage was being built, and while the neighbours’ property was still a vacant site. The retaining wall retains a small cut slope resulting from excavation, which appears to have been carried out to lower the ground level to form a level building platform for the owners’ house.

² The owners sold the property during the determination process, following the issue of the second draft of the determination. The new owners are not considered to be a party to the determination under section 176 of the Act, however a copy of the second draft of the determination was provided to the new owners to make any comment if they wished.

³ Section 40 of the Act: Buildings not to be constructed, altered, demolished, or removed without consent.

2.3 The retaining wall is of cantilever timber pole construction (160mm diameter timber poles set approximately 1040mm apart) and has two parts (see further at Figure 2 below):

- Part 1 (see photograph in Figure 1) extends from the rear of the owners' property, runs approximately north-south and is about 24m in length. It is about 400mm from the boundary (which has a 1.8m high sheet metal boundary fence), and has a maximum retained height of 900mm.
- Part 2 continues northeast-southwest towards the road and is about 15m in length. It is less than 400mm from the boundary (which is not fenced at this point). Part 2 has a maximum retained height of 700mm and tapers to nothing at the southwest end (the street frontage).

Location of the retaining wall relative to the neighbours' development

2.4 Figure 2 shows the approximate location of the retaining wall with respect to the neighbours' development, as depicted in concept drawings provided to the authority on 15 June 2016. The neighbours' development included subdividing their property, constructing two town houses with adjoining garages, and providing a driveway and vehicle parking spaces near the boundary with the owners' property.

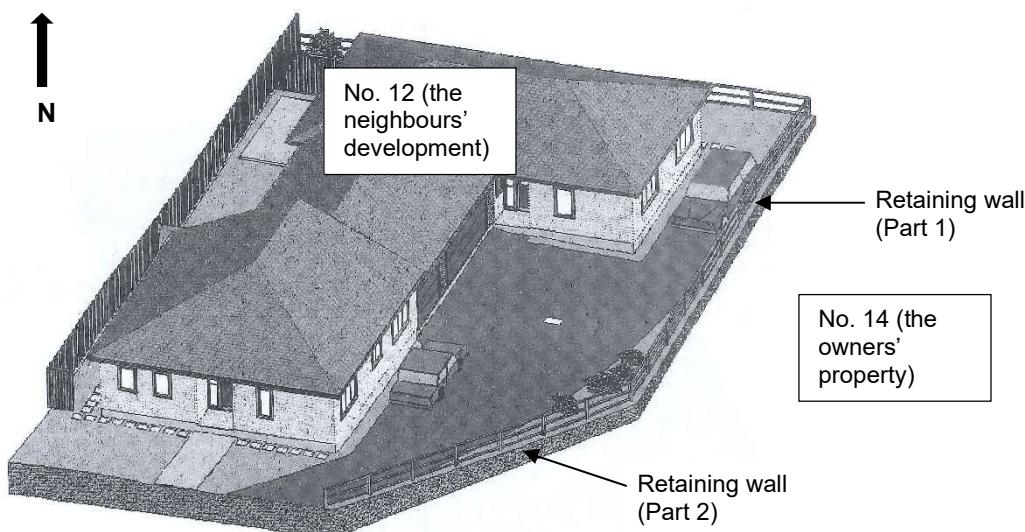


Figure 2: The neighbours' development showing the approximate location of the retaining wall (taken from the neighbours' concept drawings)

2.5 The neighbours received a building consent for their development in mid-2018, and a code compliance certificate in February 2020. As constructed:

- the northernmost town house is approximately 2.9m away from the boundary at its closest point
- the southernmost town house is approximately 3.5m away from the boundary at its closest point
- the driveway's eastern edge is approximately 1m from the boundary fence along the length of Part 1 of the retaining wall, and slightly less than 1m at the south end of Part 2 of the wall. (The neighbours have advised that this location

was amended during construction, and that the driveway's eastern edge was originally set as 500mm from the boundary fence.)

3. Background

Key events and communications

- 3.1 Table 1 outlines key events and communications between the parties and the neighbours between April 2016 and February 2020.

Table 1: Key events and communications

Date	Event
14 Apr 2016	Owners granted building consent BC160217 to construct their house and garage (followed by a code compliance certificate in February 2017). The consent does not include the retaining wall.
5 May 2016	Neighbours give the owners copy of authority's "Affected Persons Approval Form", as part of seeking resource consent for their proposed development. Neighbours claim the form had the concept plans for the development attached, although the owners dispute this. ⁴ Owners returned the form to the neighbours the following day, without giving approval.
15 Jun 2016	Neighbours email the authority about their development and the consents required, provide concept plans and drawings, and say they have given copies of these plans and drawings and the authority's Affected Persons Approval Form to the owners. ⁵ The concept plans include an undated site plan entitled "Concept 2-5-3 FLOOR PLAN".
16 Jun 2016	Neighbours email the authority about the owners' excavations near the boundary, saying the "presently exposed vertical batter" required a retaining wall. The neighbours ask for a copy of the retaining wall's design and for assurances that the authority took the Building Code requirements into account when issuing the owners' building consent, and note that the wall would require specific design (and a building consent) to take account of the surcharge from their development.
23 Jun 2016	Authority records on the owners' property file that "The driveway excavation will require a specific designed retaining wall with adequate drainage and is not to encroach in to the neighbouring property". ⁶
13 Jul 2016	Neighbours apply for resource consent (subdivision and land use consents) for their development. The application included a site plan showing the locations of the proposed buildings and driveway (entitled "Concept 2-5-4B, Drwg. No.1 - FLOOR PLAN", dated 27 June 2016) ("the resource consent site plan").
Mid-late 2016	Retaining wall constructed at some stage between 23 June 2016 and 13 December 2016.
Late Dec 2016 – early Feb 2017	Neighbours contact the authority. The authority says there was no surcharge when the wall was built, and the neighbours are creating surcharge with their development. Neighbours say they discussed their development with the owners and the authority before the wall was built and provided drawings, the owners should have taken the surcharge into account, and refer to Determination 2015/003 ⁷ to support their position.

⁴ In responses to the first draft of this determination. According to the neighbours, the concept plans provided to the owners with the Affected Persons Approval Form included documents named "Floorplan Concept 2-5-2", "Elevation Plan 1 Concept 2-5-2", "Elevation Plan 2 Concept 2-5-2", "Site survey Lot 8" [Lot 8 being the neighbours' property, 12 Aurum Court], and "Siteplan Concept 2-5-2" [this last document is a subdivision plan rather than a site plan – the site plan is the first document and is named "Floorplan Concept 2-5-2"].

⁵ The neighbours have advised that the concept plans provided to the owners with the Affected Persons Approval Form were substantially the same as those provided to the authority on 15 June 2016, and that "asymmetric overviews" (referred to in this determination as the "concept drawings") provided to the authority were not in fact attached to the form.

⁶ As an inspection record on the owners' building consent file (BC160217).

⁷ Determination 2015/003 Compliance of a retaining wall between two properties (10 February 2015).

Date	Event
	On 20 January 2017 the authority views the retaining wall and advises the neighbours by email that the wall is exempt under Schedule 1 as it is less than 1.5m high and not surcharged. It recommends the neighbours confirm the wall's adequacy in relation to their development "or make independent provisions on [their] side of the boundary [ie 12 Aurum Court]."
	On 1 February 2017 the neighbours meet the contractor who constructed the wall ("the contractor") on site to obtain information about the retaining wall's construction that the owners were unable to supply.
23 May 2017	Neighbours write to the authority regarding their concerns about the structural adequacy and Building Code compliance of the retaining wall. Points include: <ul style="list-style-type: none"> even if the wall was exempted building work under Schedule 1 it must still comply with the Building Code Building Code Clause B1 <i>Structure</i> requires that buildings shall withstand the combination of loads they are likely to experience throughout their lives Auckland Council Practice Note AC2231 - Retaining Walls⁸ ("the Practice Note") refers to "reasonable allowance for surcharge loadings likely to occur during the life of the structure" the wall does not incorporate a proper groundwater drainage system and also has to support the boundary fence.
23 Jun 2017 ⁹	Authority responds to the neighbours, saying the owners decided at the time of construction that the retaining wall was exempt from needing a consent, and it is the owners' responsibility to meet the Building Code and design for the circumstances. Authority says a conventional lightweight fence would not contribute to the loading on the wall, and suggest the neighbours engage a structural engineer.
16 Nov 2017	A report prepared for the neighbours by a structural engineer who is a Chartered Professional Engineer ("the engineering report") concludes: <ul style="list-style-type: none"> the retaining wall should not have been exempt from requiring a building consent due to the proximity to the neighbours' property and the possible driveway surcharge the wall's timber poles and lagging boards are "sufficient for the design loads", but the poles' embedment depth of "1m versus 1.6m" is insufficient for the surcharge loads along Part 1 and the higher end of Part 2. The poles are in direct contact with the ground and have no concrete encasement while no catastrophic failure of the wall is expected, it is expected that under surcharge loads close to the wall the poles may rotate out and cause "slight settlement" of the ground behind the wall. This may cause cracking of the asphalt surface to the neighbours' driveway.
13 Dec 2017	Neighbours write to the authority reiterating various points, noting the authority's record of 23 June 2016 regarding specific design being required, and providing details of the retaining wall's construction obtained from the contractor.
4 Jan 2018	Neighbours meet with authority to discuss findings of the engineering report. Authority says it will ask the owners to provide a specific engineered design for the wall.
11 Jan 2018	Authority meets with the owners on site. Authority's record of this meeting says owners were advised that as they were aware of the neighbours' intention to create a driveway adjacent to the retaining wall they will need to engage an engineer to certify it is adequate to support the surcharge loads.
11 Apr 2018	Authority follows up with the owners, saying if the required information is not received within a month a notice to fix will be issued.

⁸ Auckland Council Practice Note AC2231 – Retaining Walls. The latest version is v5, March 2019, however the paragraph quoted by the neighbours in their letter to the authority of 23 May 2017 appears to be identical to the current version.

⁹ This letter was incorrectly dated 23 June 2019; it is accepted that the correct date was 23 June 2017.

Date	Event
12 Jul 2018	Neighbours granted building consent for the town houses (BC180323). (Some minor variations to the consent were granted subsequently, with the latest being on 6 May 2019.)
30 Oct 2018	Neighbours ask the authority if the owners have provided specific design for the retaining wall or carried out any strengthening.
Feb 2020	Neighbours complete the building work for their development, including the driveway, and the authority issues a code compliance certificate for the completed work.

The notice to fix and subsequent correspondence

3.2 On 20 November 2018 the authority issued notice to fix No. NF0115 (“the notice”) to the owners in relation to the retaining wall, and sent a copy to the neighbours. The notice described the “particulars of contravention or non-compliance” as:

Under section 40 of the Building Act 2004 buildings not to be constructed, altered, demolished or removed without consent.

The retaining wall was constructed under Schedule 1 of the Building Act 2004. However, the retaining wall was to be subject to surcharge supporting the neighbouring driveway at 12 Aurum Court and therefore required a building consent.

3.3 The notice gave the required remedy, to be complied with by 1 January 2019, as:

Provide certification from a Chartered Professional Engineer to verify that the retaining wall can support surcharge. A PS4¹⁰ producer statement must be provided.

3.4 The authority has advised that on 29 November 2018 it withdrew the notice and advised the owners. I have not seen a record of the authority withdrawing the notice.

3.5 In late January 2019 the neighbours approached the authority regarding the status of the notice. On 6 February 2019, after being told of its withdrawal, the neighbours wrote to the authority questioning this decision, summarising previous correspondence (and providing copies), and noting that they had made the authority and the owners aware of the development “well … before the retaining wall had been detailed”.

3.6 On 1 April 2019 the Ministry received the authority’s application for a determination.

4. Initial submissions

The authority

4.1 The authority provided the following information with the application for a determination:

- copies of the material supplied to the authority by the neighbours with their letter of 6 February 2019, including communications between the parties and the neighbours (emails, letters and the neighbours’ records of conversations) from 3 June 2016 to 6 February 2019
- concept plans and drawings for the neighbours’ development
- an extract from the engineering report prepared for the neighbours

¹⁰ Producer Statement – Construction Review.

- a copy of the notice
 - two photographs of the completed retaining wall (undated) and some comments on material supplied by the neighbours, including the authority's records of some conversations.
- 4.2 Regarding the notice, the authority said the matter was raised at an internal meeting on 28 November 2018, and “[it was] agreed that the notice to fix had not been correctly considered and should be lifted”.
- 4.3 On 16 April 2019 the authority provided a submission which clarified the matter in dispute and contained more details of the relevant building work and background. In this submission the authority said issues it wished to have determined were as follows:
- whether the authority had to take possible future plans for a neighbouring property into consideration
 - whether the authority should issue a notice to fix to an owner to address “potential” surcharges that may be imposed from a neighbouring property for work carried out under Schedule 1
 - whether it was a case of “first come, first served” regarding building work and subsequent surcharges – i.e. if owner A completed building work that complies with the Building Code and then owner B applied for a building consent for work that imposed a surcharge not considered by owner A, whether owner A had to upgrade their building work or owner B had to ensure their building work was at a sufficient standard not to cause an issue for owner A.

The owners

- 4.4 On 17 June 2019 the Ministry asked the owners whether they wished to make a submission, if they could confirm the accuracy of the neighbours' sketch, and if they had any documentation for the retaining wall's design.
- 4.5 The owners replied on 18 June 2019 advising they did not wish to make a submission. The owners also supplied a copy of an email sent to the authority on 8 April 2019 that said they did not want to pursue a determination as the authority had already withdrawn the notice “recognising that the retaining wall is a landscape feature that conforms to all [the authority’s] planning and consent criteria”.
- 4.6 The owners' email to the authority also said the retaining wall was clearly located on their property not on the boundary, and if the neighbours wanted to establish any structures requiring “foundation loading” they should be responsible for any engineering and design factors.

The neighbours

- 4.7 On 8 May 2019 the neighbours provided a sketch of the as-built retaining wall based on information provided by the contractor. The neighbours said their views and relevant information were covered in material provided by the authority with the application for determination.

5. Drafts of the determination and responses

First draft

- 5.1 The first draft of this determination (“the first draft”) was issued to the parties and the neighbours for comment on 25 October 2019. The first draft concluded that the authority was incorrect to withdraw the notice on the basis that:
- the owners had been made aware of the neighbours’ proposed development and intended use of the land before the retaining wall was constructed
 - the owners were required to allow for the surcharge from a driveway and vehicle parking spaces directly adjacent to the boundary as a likely load that the retaining wall would experience
 - accordingly, the design and construction of the retaining wall required a building consent (as the exemption under clause 20 of Schedule 1 did not apply).
- 5.2 The parties and the neighbours provided responses to the first draft, as well as further information in response to requests by the Ministry. This information provided clarification of where and how it was considered that a surcharge applied on the as-built wall, as well as details of the Affected Persons Approval Form provided to the owners. The responses to the first draft and further information provided were as follows:
- The authority accepted the first draft on 4 November 2019, made various submissions from 4 February 2020 to 27 May 2020, and provided a copy of the neighbours’ resource consent application.
 - The owners responded to the first draft on 8 November 2019 expressing concerns about the draft and commenting on the retaining wall more generally. The owners made further submissions from 14 November 2019 to 18 March 2021, and advised that they considered the matter to be determined was between the authority and the neighbours, and that they should not have been included in the determination process. The owners also provided further information, including copies of correspondence between the authority and an erosion control company acting on the owners’ behalf, and undated photographs of the owners’ and the neighbours’ properties.
 - The neighbours accepted the first draft determination on 3 November 2019, then made various submissions from 12 November 2019 to 18 January 2021. They sent further information, including concept plans the neighbours assert were attached to the Affected Persons Approval Form, an as-built drawing of the driveway, a complete copy of the engineering report, photographs of the completed driveway, and plans and photographs showing the location of the driveway leading to the neighbours’ property before and after the driveway was constructed.
- 5.3 The submissions received on various issues are summarised in table 2. Other points were also raised that are not mentioned here as they are either outside the matters I can consider under section 177 (e.g. relating to the resource consent or the Fencing Act 1978) or do not affect the matter for determination. Any issues with a material impact on the matter to be determined have been taken into account and are reflected in my final decision.

Table 2: Submissions in response to the first draft

When the owners were made aware of the neighbours' plans to develop their property	
Owners	<ul style="list-style-type: none"> The owners accept that they were presented with the Affected Persons Approval Form by the neighbours, but state that this was not accompanied by any plans. The owners did not know of the neighbours' intention to build a driveway near the retaining wall until mid-2017. Accordingly, at the time the retaining wall was built, they did not know about the additional surcharge that would be imposed by the driveway. Had they known this, it could have been taken into account in the wall's design. Both the neighbours and the authority knew of the planned development, and the potential issues this would create for the retaining wall, before the wall was built. If the neighbours and the authority had raised these issues with the owners they could have been addressed. The photograph in the authority's letter to the neighbours of 23 June 2017 shows an existing driveway through the centre of the neighbours' property. The owners had no reason to think the driveway's location would change. The undated photograph the owners provided to the Ministry on 14 June 2020 shows that the retaining wall was complete before the neighbours' development began, that the existing driveway on the neighbours' property was "well away" from the boundary, and there was no indication of development or loading near the retaining wall.
Neighbours	<ul style="list-style-type: none"> The Affected Persons Approval Form included concept plans for the neighbours' development, including a floor plan, elevations and a site plan. The plans showed the driveway along the eastern boundary and parking area. The driveway's location and extent remain unchanged. The form and plans were provided to the owners on 5 May 2016. The owners returned the form the next day, advising they would not give their approval. There was no existing driveway on the neighbours' property before their development. Photographs show an unformed track used by pedestrians as a shortcut across the vacant property, not a driveway. The only "driveway" was an asphalt strip on the authority's verge, leading up to the property. Design work for the neighbours' development began in early 2016, and the development was "well in progress" before the retaining wall and boundary fence were built.
Authority	<ul style="list-style-type: none"> The resource consent for the neighbours' development was able to proceed without the Affected Persons Approval Form being required. This was because the development was assessed as having a "less than minor effect on the environment", so notification under the Resource Management Act 1991 was not required.
The fill added by the neighbours behind the retaining wall, the construction trucks accessing the neighbours' property, and the additional surcharge that these placed on the retaining wall	
Owners	<ul style="list-style-type: none"> The neighbours should not have been granted a building consent for their development without the owners being notified, when the building work would impact on the owners' property. For example, the work included adding "500mm of highly compacted fill to create a driveway that would carry construction trucks". The retaining wall was not intended to withstand such loadings.

Neighbours	<ul style="list-style-type: none"> An initial plan to backfill part of their property was abandoned before the neighbours applied for building consent. Instead, the design was altered to align with existing ground contours and allow for the retaining wall. The only filling that occurred was some “minor filling” required to construct the driveway. The neighbours have not caused “any adverse impact” on the owners’ property.
The surcharge loading on the wall	
Owners	<ul style="list-style-type: none"> There was no surcharge loading on the retaining wall when it was constructed, and it is not reasonable for the owners to be required to construct a wall capable of supporting unknown future loads. The owners purchased the property on the understanding that they could develop it to suit their own requirements. The neighbours should be responsible for the impacts of their own development. The neighbours are relying on the Practice Note (version 4) relating to retaining walls, but this Practice Note is not relevant to situations such as this where it is unknown how large a foundation should be provided for until plans and engineering requirements have been made available.
Neighbours	<ul style="list-style-type: none"> The authority’s note of 23 June 2016 on the owners’ property file shows that it understood the surcharge loading that would be placed on the retaining wall. Between June 2016 and January 2017, the neighbours queried the structural adequacy of the wall with the authority. The owners should have allowed for there being a surcharge loading on the wall “at the construction phase” of the neighbours’ building, when no driveway yet existed. There was already a surcharge load being exerted on the retaining wall from construction vehicles, even before the building work was completed. The neighbours instructed all construction plant and vehicles to stay as far away from the wall “as practically possible to minimise any loading induced on the wall”. The driveway has been built to minimise its impact on the retaining wall, with the eastern edge of the driveway located 1m away from the boundary fence (along the length of Part 1 of the retaining wall). Moving the driveway further away from the boundary (than shown on the resource consent site plan) was done deliberately to help resolve the dispute. The responsibility for the design and safety of a retaining wall, constructed in the vicinity of a boundary, lies with the owner of the wall and its condition should not negatively impact on a neighbour’s building intentions.
Authority	<ul style="list-style-type: none"> The authority considered that once the neighbours’ development was completed the retaining wall would receive surcharge from the driveway and vehicle parking The authority queried when allowance should be made for a surcharge.

Second draft

- 5.4 On 22 April 2021 the second draft of this determination (“the second draft”) was issued to the parties and the neighbours for comment. The second draft concluded that the authority was correct in its decision to withdraw the notice to fix.
- 5.5 On 29 April 2021 the authority accepted the second draft with no further comment.
- 5.6 On 28 April 2021 the owners accepted the second draft, and reiterated their position as set out in their previous submissions.
- 5.7 On 22 May 2021 the neighbours advised that they did not accept the second draft, and made the following points:

- The power to issue a notice to fix does not turn on whether the building work required a building consent. The Ministry must take into account the principle in section 4(2)(q)(iv) that owners and building consent authorities are each accountable for their role in ensuring that building work for which building consent is not required complies with the Building Code.
- The second draft contradicts the principles of the Act and sets a precedent that retaining walls can be built in contradiction with the Auckland Council Practice Note (refer footnote 8), and that building work can directly impact the structural integrity of a neighbouring property and does not need to comply with the Building Code if there is no knowledge a consent is required. It also sets a precedent that compliance or lack of compliance with the Act and Code is determined on a first in first served basis, which replaces the Act's objective factors for consideration with subjective factors.
- The owners' knowledge of compliance with the Act at the time the retaining wall was built is irrelevant. The question for determination is the authority's power to issue the notice.
- The authority knew that the building work was being undertaken on a boundary, which is an objective factor that the authority ought to have considered as a persuasive reason to ensure the work complied with the Act and the Building Code.
- The neighbours' driveway has been moved from the boundary, which will minimise any further surcharge. The applicable surcharge was temporary while construction took place.

6. Discussion

General

- 6.1 The authority issued the notice for a contravention of section 40, which provides that a person must not carry out any building work except in accordance with a building consent. The matter to be determined is whether the authority was correct to withdraw the notice, which it did on the grounds that it "had not been correctly considered".
- 6.2 Whether or not the authority was correct to withdraw the notice depends on whether the building work to construct the retaining wall required a building consent. Although the building work relating to the wall was carried out at the same time as the work to construct the owners' house, I understand the owners did not include the wall in their building consent application, as they considered it was exempt building work under Schedule 1 of the Act.
- 6.3 In reaching my decision I need to consider the provisions of the Act and Schedule 1 (relating to exempt building work), in particular whether there was a surcharge on the retaining wall that the owners needed to take into account when deciding if it was exempt work.

The legislation

- 6.4 While a building consent is generally required for building work, this is not the case if the building work falls under the exemptions contained in Schedule 1.

6.5 Sections 41 and 42A provide as follows:

41 Building consent not required in certain cases

- (1) Despite section 40, a building consent is not required in relation to—
 - (a) ...
 - (b) any building work described in Schedule 1 for which a building consent is not required (see section 42A);
- ...

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; or
- ...

6.6 The purpose of Schedule 1 is generally to exempt low-risk building work from the need for a building consent.

6.7 The relevant exemption in Schedule 1 in this case is clause 20:

20 Retaining walls

Building work in connection with a retaining wall that—

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

6.8 Even if building work is exempt from requiring a building consent under clause 20, or indeed under any clause in Schedule 1, it must still comply with the Building Code. Section 17 provides that all building work must comply with the Building Code to the extent required by the Act. In addition, under section 14B, an owner who carries out building work, whether or not it is exempted work, is responsible for ensuring it is Code compliant.

6.9 The relevant requirements of the Building Code in this case include that an owner is required to ensure that buildings (which includes retaining walls) can withstand the loads they are likely to experience during their lifetime (see Clause B1 *Structure*).

6.10 Under section 164, if a responsible authority considers on reasonable grounds that a “specified person” is contravening or failing to comply with the Act or its regulations (which include the Building Code), that authority must issue a notice to fix to the specified person. Failing to obtain a building consent when one is required is specified in section 164(1)(a) as an example of contravening or failing to comply with the Act. The “specified person” is the building owner, or person carrying out the building work (under section 163) and is the correct recipient of any notice to fix.

Whether the retaining wall supported a surcharge or additional load when it was constructed

6.11 The owners consider the retaining wall was exempt from requiring a building consent under clause 20 of Schedule 1. As the retaining wall is 900mm at its highest point it retains less than 1.5m of ground, so satisfies the criterion in clause 20(a). The issue, therefore, is whether the retaining wall also satisfies the criterion in clause

20(b), in that it “does not support any surcharge or any load additional to the load of [the ground it retains]”.

- 6.12 The term “surcharge” is not defined in the Act. However, a previous determination took the view that this term must be given its ordinary and natural meaning in context, and that its appropriate meaning is “the part of a load that is above the horizontal plane containing the top of a retaining wall”.¹¹ That determination also considered that surcharges arise not only from permanent loads from the ground itself, including buildings located on the ground, but also from occasional loads such as those of vehicles. I agree with those views. I also note that clause 20(b) gives “load of vehicles” as an example of an additional load that a retaining wall may be required to support.
- 6.13 When the retaining wall was constructed in mid-late 2016 the neighbours’ property comprised a vacant section of relatively flat land. Accordingly, I consider that the retaining wall did not support any surcharge or additional load at that time and therefore satisfies the criterion in clause 20(b). For the purposes of deciding whether the wall required building consent or not, it is any surcharge existing at the time the wall was constructed that is relevant, rather than any surcharge that exists currently following completion of the neighbours’ development (some three years after the construction of the wall).

Whether the owners should have taken into account the potential future surcharge on the retaining wall in deciding it was exempt work

- 6.14 The neighbours are of the view that, because they advised the owners’ of an impending development of the neighbours’ property, the owners should have accounted for the development in the design of the retaining wall.
- 6.15 The question that I must consider therefore is whether the owners should have taken into account the *potential future* surcharge, arising from the neighbour’s development, in deciding that the retaining wall was exempt building work. This depends on whether the owners had sufficient knowledge of a surcharge such that they were required to take it into account.
- 6.16 Based on the information provided to me, it appears that before the owners constructed the retaining wall the neighbours had prepared various versions of the concept plans and drawings showing a driveway and/or vehicle parking adjacent to the boundary.
- 6.17 I have been provided with three versions of the site plan relating to the neighbours’ development, as set out in table 3:

¹¹ See Determination 2008/7 Notice to fix in respect of a retaining wall (30 January 2008), which adopted meaning 7 (*Civil Eng*) from The Oxford English Dictionary (2nd Ed. 1989).

Table 3: Versions of site plan relating to neighbours' development

Dated	Name/Title	Driveway/car parking details
Undated (neighbours claim provided to owners 5 May 2016)	Concept 2-5-2 Floor Plan ("concept site plan v2")	Appears to show a similar layout to that in the concept drawing in Figure 2 of this determination. Shows an outline of a driveway, but lacks dimensions of distances to the boundary. Shows car parking areas for both units – car shown near part 1 of wall labelled "Off Street Parking Unit 2". Appears that Unit 2 car parking is in close proximity to part 1 of the wall.
Undated (neighbours provided to authority 15 Jun 2016)	Concept 2-5-3 Floor Plan ("concept site plan v3")	Copy is of poor quality – is not clear whether it indicates a driveway and also lacks dimensions. Car parking areas are shown and appear similar to that of Figure 3 and concept site plan v2, although labels are inconsistent.
27 Jun 2016 (included with resource consent application to authority on 13 Jul 2016)	Concept 2-5-4B Drwg. No. 1 – Floor plan (defined in table 1 as "the resource consent site plan")	Appears to show driveway, however is not annotated as a driveway and does not include dimensions of distances to the boundary. Does not show cars or car parking areas, so it is not clear whether a carpark is provided for in the area between the building/Unit nearest Part 1 of the retaining wall and that part of the wall.

- 6.18 The differences between the three versions of the site plan illustrate how the plans varied at that early stage, and how difficult it would have been for the owners to have built the retaining wall, at the time it was constructed, to take into account the neighbours' proposed building work.
- 6.19 I also note that there is a notation on all three versions stating "Lot 9 Retaining Wall not shown".¹² This would indicate that the retaining wall had been constructed and was already in existence at the time the plans were drawn up. However, the following records around that period indicate that the wall had not yet been constructed:
- the neighbours' email to the authority on 16 June 2016 referring to the "presently exposed vertical batter" requiring a retaining wall
 - the authority's note on the owners' property file on 23 June 2016 that the driveway excavation "will require a specific designed retaining wall".
- 6.20 The neighbours say they gave a copy of the concept plans (including concept site plan v2) to the owners with the Affected Persons Approval Form relating to their resource consent application. The neighbours are therefore of the view that the owners were aware of the potential surcharge from the neighbours' development before constructing the retaining wall.
- 6.21 In contrast, the owners acknowledge receiving the Affected Persons Approval Form but say they did not receive any concept plans, and they did not know about the

¹² Lot 9 being the owners' property, 14 Aurum Court.

additional surcharge that may be imposed by the driveway until after the retaining wall was constructed.

- 6.22 I note that the owners have also referred to an undated photograph, which they state was taken after the retaining wall was built but before the substantive work on the neighbours' development had begun. This photograph shows a dirt vehicle track leading across the centre of the neighbours' property. I have also seen other photographs showing this track, which clearly provided a means of accessing the neighbours' property when it was still a vacant site. However, I do not agree with the owners' assertion that this track is a "driveway", nor do I consider it provides grounds for assuming that any subsequent driveway would follow the same route once the site was developed.
- 6.23 It is not disputed that the neighbours sought the owners' approval for their proposed development. Nor is it disputed that the owners were aware, at the point that approval was sought, that the development was for more than one unit or dwelling. In these circumstances, it could be argued the owners had sufficient information about the proposed development to know there would be a surcharge on the land adjacent to the boundary.
- 6.24 That said, I do not consider that the owners (or indeed the authority) were required to engage in guesswork with respect to this potential surcharge for the reasons set out below.
- 6.25 Even if the owners received a copy of the concept plans before constructing the retaining wall,¹³ these plans were prepared for a resource consent application under the Resource Management Act 1991, and have no status or standing under the Building Act. Further, these plans could have been changed during the resource consent process, had conditions imposed on them, or could even have been withdrawn by the neighbours.
- 6.26 Plans submitted with a resource consent may also be changed in any manner as long as the resource consent or the relevant District Plan is not contravened. In other words, the neighbours could have gone ahead with any sort of building work permitted under the authority's District Plan and they would have had no obligation to inform the owners. Also any other number of circumstances could have changed in the two years between the concept/resource consent stage, the construction of the retaining wall in mid to late 2016, and the issue of the building consent for the neighbours' development in July 2018.
- 6.27 Schedule 1 is set out in such a way that it allows an owner, who may not have any building knowledge, to decide whether something is exempt building work. It uses plain language and objective measures such as height and floor area as metrics. It also uses examples, where necessary, to explain terms an owner may not be familiar with (such as the example in clause 20(b) that the load of vehicles is an example of surcharge or additional load). In my view requiring an owner to consider a future event, particularly one outside their control, is not consistent with the principles of Schedule 1.
- 6.28 In addition, clause 20 is framed in the present tense. I consider that the words "does not support any surcharge" mean that the surcharge to be taken into account is that

¹³ I am unable to resolve the factual issue as to whether the concept plans were provided to the owners by the neighbours given their conflicting versions of events, as there is no other evidence to verify either account. However, it is not necessary for me to do so.

existing at the time the retaining wall is built (or is shortly to exist and about which there is sufficient certain information) rather than any future or potential surcharge.

- 6.29 I also note that if the owners had consulted the Ministry Guidance on Schedule 1 exemptions, that was publicly available at the time, it would not have indicated that a clause 20 exemption was not allowable in this instance and a building consent was required.¹⁴ The guide is published by the Ministry to assist owners in deciding whether building work is exempt, and makes clear the present tense of clause 20.
- 6.30 In summary, I consider that at the time the owners decided the retaining wall was exempt building work, there was insufficient certain detail available for the owners to account for a surcharge from the neighbours' development, let alone confirm that there would be one.
- 6.31 Accordingly, it is my view that the retaining wall met the criteria in clause 20 of Schedule 1, and was exempt from requiring a building consent.

Response to the neighbours' submission regarding the second draft

- 6.32 The points made by the neighbours in relation to the second draft are set out at paragraph 5.7, and I have addressed these briefly below. However it appears to me that the neighbours have incorrectly focused on the compliance of the retaining wall as the basis for the notice, rather than whether it required building consent.
- 6.33 The neighbours state that the issue considered in this determination is the authority's issuing of the notice "in relation to the [owners'] failure to build the retaining wall in compliance with the Building Code". That is not correct. The notice was issued for an alleged contravention of section 40, not for non-compliance with the Building Code.
- 6.34 I therefore disagree with the neighbours' contention that the authority's power under section 164 to issue the notice does not turn on whether the building work required a building consent. It does turn on that, because that was the contravention stated in the notice. There was no mention in the notice that the retaining wall did not comply with the Building Code.
- 6.35 The neighbours refer to the principle in section 4(2)(q)(iv), that owners and building consent authorities (among others) are accountable for their roles in ensuring that building work for which a building consent is not required complies with the Building Code. They say that this determination contradicts the principles of the Act, and infers that exempt work does not have to comply with the Building Code. I do not accept this contention. As I stated at paragraph 6.8, even if building work is exempt from requiring a building consent, it must still comply with the Building Code. Section 17 provides that all building work must comply with the Building Code to the extent required by the Act. There is no evidence that the retaining wall in this case does not comply with the Building Code, either when it was built or currently.
- 6.36 I disagree with the neighbours' contentions regarding the precedent set by this determination. In relation to Auckland Council's Practice Note, such a note may provide guidance as to that authority's requirements regarding retaining walls, but it is not law and the parties in this case are not required to follow it. Building work

¹⁴ Ministry of Building, Innovation and Employment *Building work that does not require a building consent* (Third edition 2014) at pg 56. The third edition was amended in June 2016 but no changes were made to the guidance in relation to clause 20 of Schedule 1. The current (fifth) edition of the guidance (available at <https://www.building.govt.nz/projects-and-consents/planning-a-successful-build/scope-and-design/check-if-you-need-consents/building-work-that-doesn-t-need-a-building-consent/technical-requirements-for-exempt-building-work/>) is substantially similar in material respects to the third edition as it relates to clause 20 (at pg 191).

must comply with the requirements in the Act and Building Code. At the time the retaining wall in this case was constructed, the “structural integrity” of the neighbours’ property was not impacted; it could only have potentially been impacted if the neighbours had already carried out their development.

- 6.37 The neighbours state that as the applicable surcharge was temporary while their development was under construction, “the application of the legal issue to the factual circumstance is now a moot point”. However this is not the case. It is not whether the retaining wall complies with the Building Code now or if it complied when the neighbours’ development was under construction that is the issue, but whether at the time it was constructed there was a surcharge such that it was not exempt work.

Whether the authority was correct to withdraw the notice

- 6.38 The authority did not provide the Ministry with its reasons for withdrawing the notice, other than to advise the notice “had not been correctly considered”.
- 6.39 Given the particulars of the contravention of the Act as stated in the notice, I infer from the withdrawal of the notice that the authority no longer considered the retaining wall “was to be subject to a surcharge supporting the [neighbours’ driveway] and therefore required a building consent”.
- 6.40 As concluded above, I consider that the retaining wall did not require a building consent. Therefore, it is my view that the authority was correct in its decision to withdraw the notice.

7. Additional comments – whether the wall currently supports a surcharge

- 7.1 The matter to be determined is council’s decision to withdraw the notice, and this turns on whether the retaining wall required a building consent. As stated at paragraph 6.13, for the purposes of deciding whether the wall required building consent or not, it is any surcharge existing at the time the wall was constructed that is relevant, rather than any surcharge existing following completion of the neighbours’ development. However, as the parties have made submissions on this point, I consider it is appropriate to make some observations.
- 7.2 Since the construction of the retaining wall, the neighbours’ development has been completed (under a building consent issued mid-2018 – some two years after the construction of the retaining wall) and includes a driveway and vehicle parking near the boundary. Based on the information provided to me, it is my view that following development of the neighbours’ property, part of the retaining wall may support a surcharge from the driveway and vehicle parking on the neighbours’ property. There is insufficient evidence before me to reach a conclusion on that point, however, I note that any surcharge (if one exists) is likely to be relatively limited for the following reasons:
- The retaining wall is relatively low (Part 1 of the wall is 900mm at its highest point, while Part 2 is at most 700mm and then tapers to nothing).
 - The retaining wall is 400mm from the boundary along the length of Part 1, which is the highest and longest part of the wall (Part 1 is 24m long while Part 2 is 15m long), and is also set back from the boundary (albeit to a lesser extent) along Part 2.

- Vehicles parked or moving on the driveway on the neighbours' property are also set back from the boundary for the entire length of Part 1 of the wall, as the driveway edge is 1m from the boundary in that area, further reducing any surcharge. The distance from the boundary near Part 2 to the neighbours' driveway appears to be less than 1m for a section at the south end of the wall (from the as-built plan provided by the neighbour), however that is the end at which Part 2 tapers to nothing.
- 7.3 I note here that the engineering report prepared for the neighbours (which was based on a visual inspection and discussion with the contractor only) concludes that the lagging boards and timber poles used in the retaining wall's construction are "structurally adequate". However, the engineering report also noted the poles are insufficiently embedded to withstand surcharge loads and "may rotate" at the top, causing "slight settlement of the ground behind the wall" and cracking of the driveway surface. However, the engineering report's conclusions, for Part 1 of the wall, assumed the driveway would be set back 500mm from the boundary, whereas, as-built, the driveway's eastern edge is 1m from the boundary along this part. The engineering report also considered the surcharge from a laden concrete truck which, as the neighbours' development is now complete, is unlikely to reoccur.

8. The decision

- 8.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority was correct in its decision to withdraw notice to fix No. NF0115 in relation to the owners' retaining wall, and I confirm that decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 29 September 2021.

Katie Gordon
National Manager, Determinations