

Determination 2025/038

Whether parties identified in a notice to fix were specified persons, the adequacy of the remedies in the notice and the timeframe provided for in the notice

303A Fenton St, Thames, Coromandel

Summary

This determination considers the issuing of a notice to fix for retaining wall works. It examines whether the director of the owning company was correctly identified as a specified person under section 163, the adequacy of the remedies proposed in the notice, and the reasonableness of the four-month compliance timeframe.

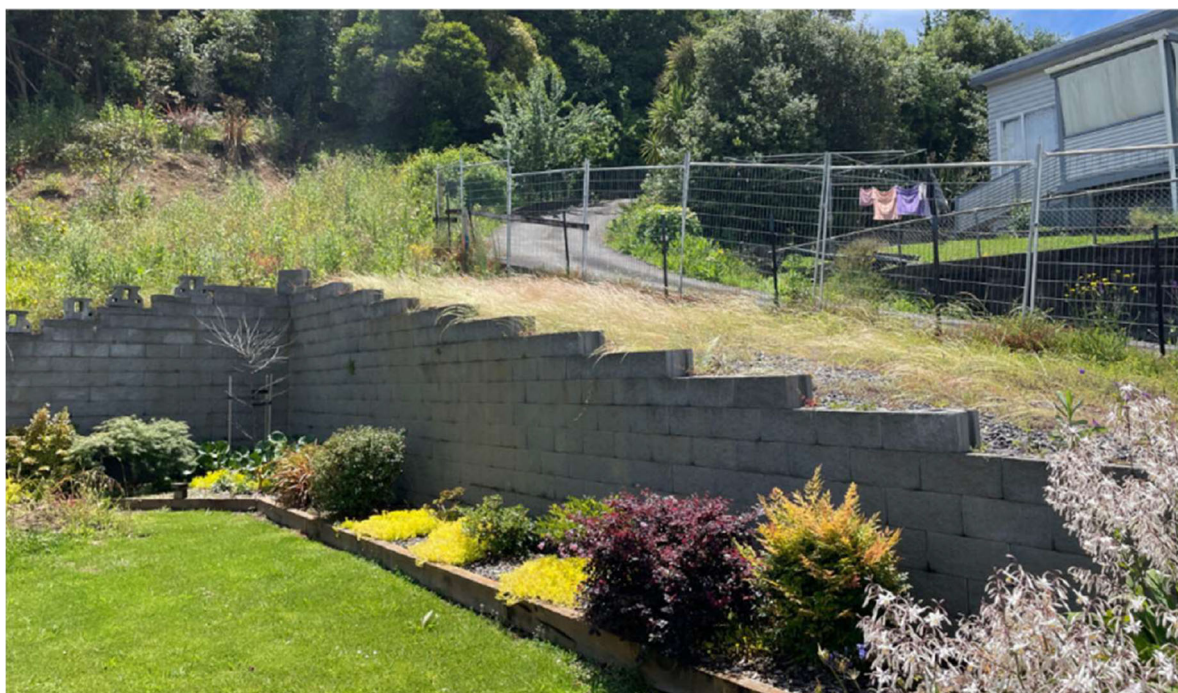


Figure 1: The retaining wall

In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”) and references to “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

The Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (eg Acceptable Solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Andrew Eames, Principal Advisor Determinations, for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment (“the Ministry”).¹
- 1.2. The parties to the determination are:
 - 1.2.1. The owner of the property Runes Investments Pty Ltd² (“the owner”), who applied for this determination.
 - 1.2.2. K Mansfield, who was also issued the notice to fix and is the director of Runes Investments Pty Ltd (“the director”).
 - 1.2.3. Thames-Coromandel District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. This determination considers the authority’s decision to issue notice to fix NTF/2024/097 on 12 August 2024, specifically in relation to:
 - 1.3.1. The identification of specified persons under section 163;
 - 1.3.2. The remedies provided in the notice;
 - 1.3.3. The timeframe given to comply with the notice.
- 1.4. The matter to be determined, in terms of section 177(1)(b) and (2)(f), is the authority’s decision to issue notice to fix NTF/2024/097 on 12 August 2024.
- 1.5. The determination will only consider the specified persons listed on the notice in relation to section 163, the remedies provided, and timeframe given to comply with the notice.

Issues outside this determination

- 1.6. The contraventions identified in the notice, as this is not in dispute.

¹ The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

² Runes Investments Pty Ltd is a registered Australian Proprietary Company.

- 1.7. The compliance of the proposed building work in the consent.

2. Background and building work

- 2.1. The property in this determination is located on a previously undeveloped site, which the current owner purchased on 11 October 2013. At the time of purchase, the bare site was undeveloped and lacked a driveway.
- 2.2. On 30 August 2019, building consent (ABA2018/5565) was issued for the construction of a new driveway and the replacement and construction of boundary retaining walls (see figure 2).

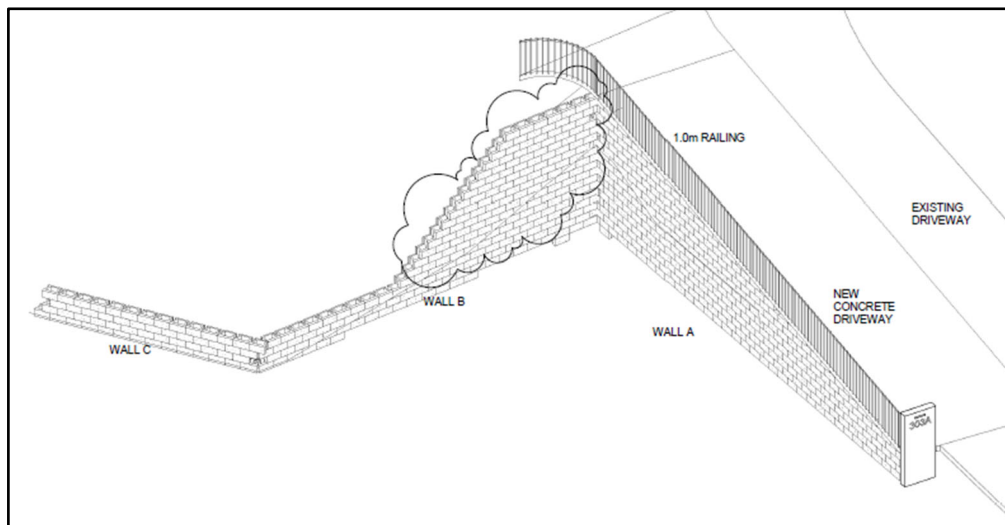


Figure 2: The driveway and retaining wall plans included in the building consent

- 2.3. Construction began in January 2020. By late March, work stopped due to a dispute about the blockwork wall.
- 2.4. The engineers engaged by the owner, who were responsible for the design of the retaining wall, subsequently advised that they would not issue a producer statement construction review (PS4) for the work in its current form.
- 2.5. Around this time, the country entered a nationwide lockdown due to the COVID-19 pandemic, which further delayed any progress on the site.
- 2.6. In November 2022, the authority issued the first notice to fix (NTF/2022/116). Although the owner does not hold a copy of this notice, they do not dispute that it was issued.
- 2.7. In early 2023, Cyclone Gabrielle significantly impacted the region. During this event, the site experienced damage due to overflow flow, which resulted in substantial slope movement as shown in figure 2.



Figure 2: Slope movement following Cyclone Gabrielle

- 2.8. Following the cyclone, the owner engaged a consultant (referred to in this determination as “the consultant”) to undertake a geotechnical appraisal of the slope movement.
- 2.9. The consultant carried out their first site inspection on 9 March 2023. On 16 March 2023, the authority issued a second notice to fix (NTF/2023/13), followed by a third notice (NTF/2023/58) on 25 July 2023.
- 2.10. On 28 September 2023, the consultant issued a geotechnical appraisal report addressing the slope movement affecting the property³. Based on the findings of this report, the owner wrote to the authority on 2 October 2023 requesting that NTF/2023/13 be withdrawn.
- 2.11. Following legal advice, the authority subsequently withdrew that notice on 19 October 2023.
- 2.12. On 30 January 2024, the authority issued a fourth notice to fix (NTF/2024/9)⁴, followed by a fifth notice (NTF/2024/20) on 8 March 2024. In response, the consultant issued a subsequent report focusing on a recommended solution⁵ to address the matters raised in NTF/2024/20 on 8 July 2024.

³ The report identified several historical contributing factors affecting the site as well as the impact of overland flow from surrounding properties.

⁴ NTF/2024/9 is signed and dated 30 January 2023 rather than the correct date of 30 January 2024.

⁵ It is noted that some of the recommended solutions to the issues identified in NTF/2024/9 include building works outside of the property boundary.

2.13. On 12 August 2024, the authority issued a sixth notice to fix (NTF/2024/97), referred to in this determination as “the notice”. This notice is the subject of the current determination.

2.14. The specified persons identified in the notice were the owner and the director.

2.15. The authority identified non-compliance with sections 17 and 40, specifically:

2.15.1. Slope of the wall – The retaining wall was constructed at an angle which varies between 88–90 degrees, rather than vertically (90 degrees) as required by the building consent (section 40).

2.15.2. Height of the wall – The constructed wall height was less than that shown on the approved plans (section 40).

2.15.3. Inadequate support of neighbouring driveway – Sitework failed to provide adequate support for the neighbouring driveway, contravening Clauses B1.3.6 and B1.3.7 of the Building Code (section 17).

2.16. The authority offered the following remedies:

2.16.1. Take any steps necessary to bring the building work into compliance with the Act and the New Zealand Building Code. This may require an amendment to the building consent, and/or provision of verification from a suitably qualified engineer.

2.16.2. Submit to the Council an alternative option that would bring the unlawful work identified in this notice to fix into compliance with the Act and the New Zealand Building Code.



Figure 3: Aerial view of the retaining wall (see 2.17 for key to colours)

2.17. The authority included a photo with the notice to fix, , which illustrates:

2.17.1. Red line: Retaining wall damaged by Cyclone Gabrielle (not part of the notice to fix).

2.17.2. Blue line: Blockwork retaining wall relating to height and slope.

2.17.3. Yellow line: Area of undercut neighbouring driveway. (inadequate support of driveway)

2.18. The building work relevant to this determination is the retaining wall and associated site works described in the original building consent. For clarity, these works are referred to throughout this determination as “the retaining wall works”.

3. Submissions

The owner

- 3.1. The owner submits that the director is not a specified person under the Act and therefore should not have been issued the notice to fix.
- 3.2. The owner believes that before any action can be taken to comply with the notice, there must be confirmation of the steps required to resolve the issues identified in the notice.
- 3.3. The owner says they cannot fully resolve the issues on their own, as required under section 164(2)⁶. Resolving the matters raised in the notice requires consent from the neighbouring property owner, and that some of the relevant matters are currently before the Court⁷.
- 3.4. The owner submits that by issuing the notice, the authority is effectively determining matters that are before the Court and has therefore exceeded its powers.
- 3.5. The owner also challenges the timeframe given for compliance with the notice, arguing that the four-month period specified in the notice was unreasonable. In setting this timeframe, the owners are of the position that the authority have disregarded the complexity of the situation, which the owner describes as requiring a “global solution”.

⁶ 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.

⁷ Dated 25 June 2025. A fourth amended statement of claim is currently before the District Court (Thames/Pārāwai Registry), reference CIV 2019-075-15.

- 3.6. In support of their position, the owner referred to a previous determination⁸, which found that a compliance period of 10 to 11 weeks from the date of issue of several notices to fix was not reasonable in the circumstances of that case.

The authority

- 3.7. The authority submits that the director played a more active role than that of a passive landowner. It notes that the director was present on site during the building work, attended council inspections, and was listed as the contact person for the owner in the building consent documentation.
- 3.8. On this basis, the authority considers that the director meets the definition of a person who “supervised” building work under section 7, which includes providing control, direction, and oversight. Accordingly, the notice was correctly issued to the director as a specified person.
- 3.9. The authority says the notice gave clear options: either fix the work to match the consent or propose another way to meet the Building Code.
- 3.10. The authority acknowledges that the owner’s position that the authority should confirm the specific steps required to comply with the notice to fix. However, the authority states that it is not its role to prescribe the precise actions a recipient must take. Rather, it is for the owner to determine how to bring the non-compliant building work into compliance with the Building Code.
- 3.11. The authority referred to a previous determination⁹, which found that a notice to fix may require a recipient to consider and pursue any legal or practical options available to achieve compliance.
- 3.12. The authority maintains that it has adequately identified the particulars of contravention in the notice, and that the owner is therefore in a position to understand what is required to remedy the non-compliance.
- 3.13. Finally, the authority submits that the timeframe for compliance was reasonable and achievable. It notes that the owner has been aware of the non-compliant building work since at least 24 November 2022 and was provided with further particulars of the non-compliance in January 2024.

⁸ Determination 2019/054 *Regarding the issue of five notices to fix for a collection of buildings constructed without building consent* 31 October 2019

⁹ Determination 2024/068 *The issue of a notice to fix for a deck constructed without a building consent*. 29 November 2024

4. Discussion

The notice

- 4.1. Sections 163 to 165 set out the framework for issuing a notice to fix. Section 163 defines who may be issued with a notice (a "specified person"), section 164 outlines the content and purpose of a notice to fix, and section 165 requires that the notice specify a reasonable timeframe for compliance.
- 4.2. The notice in question identifies contraventions under sections 17 and 40. Section 17 requires that all building work must comply with the building code, while section 40 prohibits building work from being carried out except in accordance with a building consent. The notice therefore correctly identifies breaches of these requirements.

Specified Persons

- 4.3. The notice identifies both the owner and the director of the company as specified persons. Under section 163, a specified person includes the owner of the building, the person carrying out the building work, or any person supervising the building work.
- 4.4. The owner in this case clearly falls within this definition as the owner of the building.
- 4.5. The director is not the owner and was not associated with or employed by the contractor who undertook the building work.
- 4.6. The authority has submitted the director had a role in supervising the works.
- 4.7. "Supervise" should be understood as it is in section 7—

supervise, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—

(a) is performed competently; and

(b) complies with the building consent under which it is carried out

- 4.8. The director did not provide control, direction or oversight in a manner similar to what a licensed building practitioner or similar professional in a supervisory capacity

would have. This interpretation is supported by findings in previous determinations¹⁰¹¹.

- 4.9. The director did not meet the threshold of supervision required to be considered a specified person. Therefore, only the owner is appropriately identified as a specified person under section 163.

Remedies

- 4.10. The notice gives two options to remedy the contravention¹². The first option is to take any steps necessary to bring the building work into compliance with the Act and the Building Code. The notice states that this may require an amendment to the building consent, and/or provision of verification from a suitably qualified engineer.
- 4.11. The second option given was to submit to the authority an alternative option that would bring the unlawful work identified in this notice to fix into compliance with the Act and the New Zealand Building Code.
- 4.12. These remedies align with the principles in section 4, particularly:
- Section 4(2)(j)**
The need to provide for the protection of other property from physical damage resulting from the construction, use, and demolition of a building.
- 4.13. Section 14B is clear that the owner is responsible for ensuring compliance with the building consent and any notices to fix.
- 4.14. Although the property is subject to ongoing legal proceedings and presents environmental complexities—including the effects of Cyclone Gabrielle and overland flow from a steep slope as identified in the consultant’s report—these factors do not preclude the development of appropriate design solutions on the owner’s land to address the specific contraventions of the Building Act outlined in the notice to fix.
- 4.15. The first remedy may be achieved through an amendment to the existing consent or engineering verification. The second remedy does not require the work to be completed within the notice period—only that an alternative compliant option be submitted.
- 4.16. Although the consultant’s report recommends solutions that include building works within the neighbouring property, the owner remains responsible for ensuring that

¹⁰ Determination 2017/026 *Notice to fix issued in respect of a commercial laundromat* 26 April 2017 at paragraph 7.2.5

¹¹ Determination 2013/080 *The issuing of a notice to fix only to the owners of townhouses at 39 Garnet Road, Westmere, Auckland* 17 December 2013 at paragraph 5.4.6

¹² Also acknowledging that the notice clarifies that “it is not for the Council to specify the work that is required to achieve compliance with this notice to fix and you may wish to seek your own expert advice in that regard, however you may consider the following”.

the building work on their own property complies with the Act and the Building Code. Accordingly, the remedies specified in the notice are appropriate.

Timeframe of the notice

- 4.17. Section 165(1)(b) requires that a notice to fix specify a reasonable timeframe for compliance. While the non-compliance has existed since November 2022, each notice must be assessed on its own for whether the timeframe is fair.
- 4.18. Submissions from the owner referenced a previous determination¹³ with regard to reasonable timeframes. However, that case involved multiple unconsented structures, an owner without professional support, and timeframes which spanned through the Christmas period. In contrast, the current notice was issued on 12 August 2024 with a compliance deadline of 9 December 2024—providing approximately four months (17 weeks or 85 working days).
- 4.19. The owner in this case has an existing building consent and access to previously engaged design professionals. Under section 45(4)(b), an amendment to a building consent is subject to the statutory 20-working-day processing timeframe. Given that an expert report is already available, four months is a reasonable period to either amend the consent or submit an alternative option.
- 4.20. It is also noted that the inadequate support of the neighbouring driveway resulted from siteworks that did not comply with the Building Code¹⁴.
- 4.21. While the owner has raised the issue of the consultant's report outlining some significant long-term surface water management strategies the notice to fix only requires the owner to promptly address the contraventions described at paragraph 2.15, not everything identified in the consultant's report. Therefore, the timeframe specified in the notice is reasonable.

5. Conclusion

- 5.1. The owner is a specified person under section 163, but the director is not.
- 5.2. The remedies and timeframe set out in the notice are both reasonable and appropriate.

¹³ See paragraph 3.6

¹⁴ As noted in the consultants recommended solution report dated 8th July 2024.

6. Decision

- 6.1. In accordance with section 188, I determine that the notice is to be modified to remove the director as a specified person.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 6 August 2025.

Andrew Eames

Principal Advisor Determinations