

# Determination 2026/023

## An authority's decision to refuse to issue a notice to fix for building work to construct a retaining wall

### 5 Marjory Close, Broadmeadows, Wellington

#### Summary

This determination concerns an authority's decision to refuse to issue a notice to fix for building work associated with a retaining wall. The determination considers whether the building work (including sitework) carried out on the boundary of several properties complies with clause B1.3.6 of the Building Code as it relates to avoiding the likelihood of damage to other property.



Figure 1: View of neighbouring properties looking south

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](http://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](http://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”).<sup>1</sup>
- 1.2. The parties to the determination are:
  - 1.2.1. W Shepard, the owner of 5 Marjory Close who is responsible for the construction of the retaining wall (“the owner”),
  - 1.2.2. Kiwi Memories Limited, the owner of other property at 7K Marjory Close who applied for this determination (“the applicant”), represented by D Ewens,
  - 1.2.3. Wellington City Council, the authority carrying out its duties as a building consent authority or territorial authority (“the authority”),
  - 1.2.4. J and R Muller, the owners of other property at 74 John Sims Drive, represented by their agent, D Ewens.
- 1.3. This determination arises from a decision by the authority to refuse to issue a notice to fix for a contravention of section 17, specifically clause B1.3, for the construction of a retaining wall (see figure 1)<sup>2</sup>.
- 1.4. The matter to be determined, in terms of sections 177(1)(b) and (3)(e), is therefore, the authority’s decision to refuse to issue a notice to fix to the owner.
- 1.5. In deciding this matter, I must consider whether the sitework carried out to construct the retaining wall avoided the likelihood of damage to other property as required by clause B1.3.6, and whether a notice to fix could be issued to the owner to affect a remedy.
- 1.6. The determination will not consider the authority’s decision to grant and issue the building consent (SR56368), or the compliance of the building work with any other Building Code clause not described above. It will also not consider any matters

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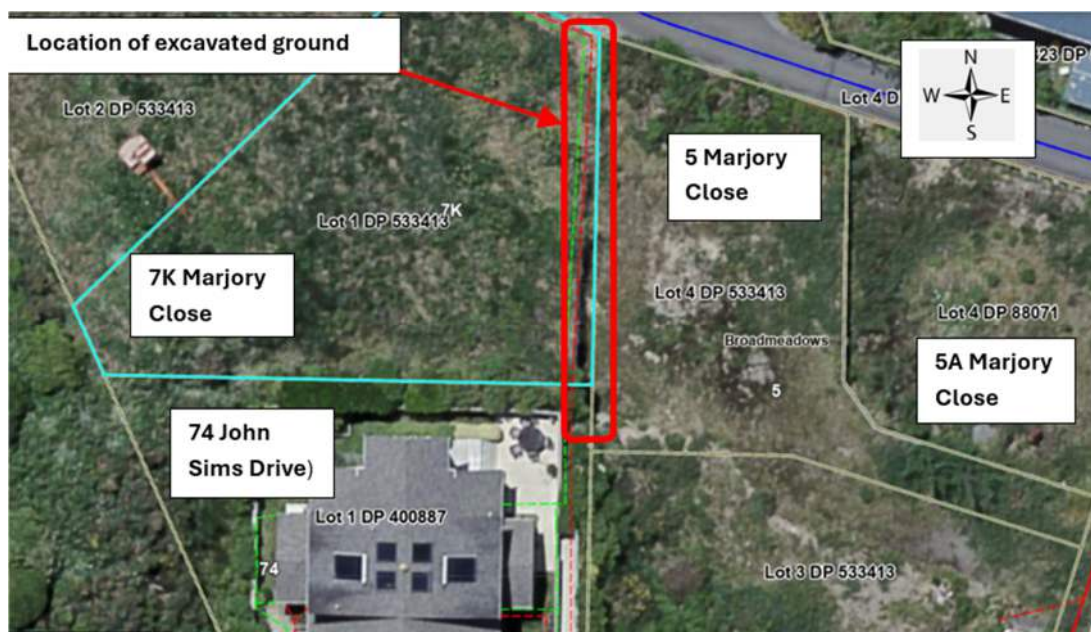
<sup>1</sup> The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

<sup>2</sup> Figure 1 has been generated based on a photograph taken by the authority on 26 March 2024.

arising from the Resource Management Act 1991 and/or District Plan requirements.<sup>3</sup>

## 2. Background and the building work

- 2.1. The three neighbouring properties are 5 Marjory Close, 7K Marjory Close, and 74 John Sims Drive. The sitework associated with the construction of the retaining wall being considered is located along the west boundary of 5 Marjory Close, corresponding to the east boundary of 7K Marjory Close and north-east corner 74 John Sims Drive (see figure 2)<sup>4</sup>.



**Figure 2: Aerial view of properties and approximate location of the sitework**

- 2.2. On 1 September 1999, the authority granted building consent SR56368 to the owner of 5 Marjory Close to construct 'Retaining walls only'<sup>5</sup>; it included:

This consent does not constitute authority to undertake the work if you are not the owner of the land and/or building(s) [such as a lessee]. You are still obliged to seek any approvals necessary' [...]

<sup>3</sup> The owner of 5 Marjory Close was granted a resource consent on 24 August 1999 for 'Earthworks for retaining walls and building platform' at 5 Marjory Close, and on 30 August 1999 a Council 'Bylaws consent to carry out earthworks' at 5 Marjory Close. A further resource consent for 'subdivision and land use' dated 6 June 2017 was issued by the authority, to the applicant, regarding 3, 5, 7J and 7K Marjory Close this included a "boundary adjustment"; I have assumed this boundary adjustment did not materially affect the previous work to excavate the land at 7K Marjory Close since this was first undertaken by the owner in late 1999 but it appears it did effect the extent (make longer) the encroachment at 74 John Sims Drive.

<sup>4</sup> Figure 2 has been generated based on an image taken from the authority's online maps (accessed on 5 May 2026).

<sup>5</sup> The building consent included several different retaining walls at 5 and 5A Marjory Close. This determination is only considering the wall along the west boundary of 5 Marjory Close.

Issuing of this Building Consent does not give any rights, legal or otherwise to transgress beyond your legal boundaries. Any work that is required beyond your legal boundaries can only be undertaken with the permission of the effected[sic] owner/s.<sup>6</sup>

- 2.3. The 200mm thick reinforced concrete retaining wall is the subject of a specific engineer design and is being put in place to support significant cuts excavated into a slope. It is intended to be constructed in three parts of varying heights (up to a maximum 3.4m towards the south end of the wall and the shallowest part being at the north end) and a total length of approximately 23m (more or less).<sup>7</sup> It is supported on a 250mm thick reinforced concrete foundation varying in width between 900mm and 1.3m.
- 2.4. The property boundary between 7K Marjory Close, 74 John Sims Drive and 5 Marjory Close is not clear from the building consent plan<sup>8</sup> but it is described by the owner as being “on the back face of the wall (west side)”.
- 2.5. On that basis, the building consent plans show part of the proposed new retaining wall construction (i.e. the reinforced concrete foundation and associated below ground drainage) extending onto other properties, at 7K Marjory Close and 74 John Sims Drive.
- 2.6. The sitework (excavation) was commenced by the owner in late 1999 and a part of the retaining wall and foundation construction, towards the north end, was likely commenced around 2003.<sup>9</sup>
- 2.7. On 29 November 2023, the applicant (on behalf of the owner) undertook to recommence work on the first of the retaining walls.
- 2.8. However, in or about March 2024, the work was stopped and the owner confirmed they “will not be building a retaining wall between 5 and 7” Marjory Close<sup>10</sup> and they intend to sell their properties (ie 5 and 5A Marjory Close). The building work to construct the retaining wall is currently incomplete.
- 2.9. On 8 May 2025, the applicant emailed the authority requesting it issue a notice to fix (ie to the owner) for a “breach of the [Building] Act and the conditions of...[building consent] SR56368”. The breach was described as the “earthworks approved by [the authority] consents have transgressed beyond the legal boundary

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<sup>6</sup> Although not a deciding factor, it is not clear what agreement(s) were reached between the owner and owner(s) of the other property before commencing the excavation work across the property boundary.

<sup>7</sup> The length of the wall is not specified in the building consent; therefore, based on the setting out of the property boundaries, the length of 23m has been approximated from the authority’s online maps (accessed on 17 June 2026) and the deposit plans attached to the records of title for each of the properties.

<sup>8</sup> Number 1331, sheet S1, dated 12 July 1999.

<sup>9</sup> I have relied on an inspection record (dated 15 April 2003) from the engineer overseeing the construction, albeit it is a photograph dated 11 July 2005 that shows the part of the wall and foundation in place.

<sup>10</sup> I have assumed the owner was referring to 7K Marjory Close.

of 5 Marjory Close, into [the applicant's] property at 7K Marjory Close. Permission was never given for any encroachment".

- 2.10. On 21 July 2025, the authority conducted a site inspection. On 18 August 2025, the authority confirmed it would not issue a notice to fix, as, in its opinion:

The cuts along the boundary are historic and have been in place since 2001. The rear retaining wall, as detailed on the updated structural plans, is within the legal boundary of 5-5A Marjory Close [ie the owner's property]. Backfill will be required once the retaining wall has been built. The updated design is to the current specifications and engineering requirements only. The building inspector has accepted the updated design specifications. The location of the walls has not changed [...] <sup>11</sup>

The consent holder is actively working towards completing the building work under the approved building consent [...]

The building inspector has confirmed that building work continues to be in accordance with the approved plans and that the complaint raised is for a historic matter, which will be remediated once building work is completed.

- 2.11. The authority's decision not to issue a notice to fix was reaffirmed by the authority, in an email to the applicant, on 22 October 2025.

### 3. Submissions

#### The applicant

- 3.1. The applicant describes this sitework as "an encroachment of approximately 20m<sup>2</sup>" into 7K Marjory Close "and some 40m<sup>3</sup> of...land...excavated and removed" and a vertical cut exceeding 4m in height.
- 3.2. Regarding clause B1.3.6, the applicant states the "siteworks have not been carried out to avoid the likelihood of damage to other property".
- 3.3. The applicant states the incomplete building work means the value of 7K Marjory Close has "been significantly impacted" and any expectation of receiving "a fair market value" for the property "is not possible in its current state".
- 3.4. The applicant does "not give approval for any building work, in any form, to be undertaken on [his] property".

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<sup>11</sup> In an email to the Ministry dated 22 May 2026, the authority confirmed the amended "documents have not been processed as either an amendment or minor variation to that that consent" ie SR56368. Therefore, for the purposes of this determination, I have relied on the original building consent plan dated July 1999.

## The authority

- 3.5. The authority submits the cuts along the western boundary were undertaken under an “earthworks bylaw consent” issued in 1999 and believes the “building work commenced prior to 24 December 1999”.
- 3.6. They submit the associated building consent applied only to the construction of retaining structures and did not include approval for earthworks. The authority believes, based on monitoring reports from a Chartered Professional Engineering (CPEng) and aerial photographs, the earthworks were carried out by at least 2001, “with minor localised weathering evident on the exposed cut face”. The earthworks “predates the development of the neighbouring properties along the affected boundaries”.
- 3.7. The authority maintains the owner was “actively progressing completion of the works, which would result in reinstatement of the affected area following construction of the retaining wall” and it has determined that the building structures (including retaining structures) constructed to date “are positioned correctly and within the legal boundary”.
- 3.8. While it acknowledges that the historic cut extends approximately 1.1m beyond the boundary of 5 Marjory Close, towards 7K Marjory Close, the authority believes “this land is expected to be reinstated upon completion of the retaining wall and backfilling”. It says there is no evidence of retaining wall footings or reinforcing currently extending beyond the legal boundaries, nor of evidence of recent building work on the western boundary which would increase or exacerbate the historic encroachment. It states matters of boundary enforcement and civil aspects fall outside the authority’s regulatory role.
- 3.9. The authority states that it “cannot authorise construction extending beyond the legal boundaries”, and since inspections have not identified any encroachment of retaining wall footings beyond the subject site boundaries, it has refused to issue a notice to fix.
- 3.10. In relation to the concern about Building Code clause B1.3.6, raised by the applicant, the authority states it has had no previous complaints about land stability or non-compliance with the building code before April 2024, and states it does not have reasonable grounds to consider that clause B1.3.6 has not been met.

## The owner

- 3.11. The owner states (in summary) that all appropriate consents were granted by the authority and the excavations were completed before the applicant purchased 7K Marjory Close, so he had full knowledge of the excavations at that time.
- 3.12. The owner has indicated he does not have the resources necessary to complete the building work.

## **The owners of 74 John Sims Drive**

- 3.13. The other owners believe the unretained cut undermines a significant portion of the property at the north-east corner and has significantly impacted the value of the property. The other owners refuse to grant permission for any building work to be carried out on their property.

## **4. Discussion**

- 4.1. The matter to be determined is the authority's decision to refuse to issue a notice to fix to the owner of 5 Marjory Close for the construction of the retaining wall, specifically, because the associated sitework did not avoid the likelihood of damage to other properties at 7K Marjory Close and 74 John Sims Drive.

### **Notices to fix**

- 4.2. Notices to fix are governed by sections 163 to 168 of the Act. Section 164(1)(a) provides for an authority to issue a notice to fix if it considers, on reasonable grounds, that a specified person is contravening or failing to comply with the Act or Building Code. Section 163 defines a 'specified person' to whom a notice can be issued, and this includes the owner of a building and the person carrying out or supervising the building work.

### **Was there a contravention?**

- 4.3. Section 17 provides:

All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.

- 4.4. The building work in this case is the construction of a retaining wall. Section 7 provides that 'building work' includes 'sitework' which 'means work on a building site, including earthworks, preparatory to or associated with the construction...of a building'.
- 4.5. Section 4(2)(j) states 'the need to provide for the protection of other property from physical damage resulting from the construction...of a building'.
- 4.6. Clause B1.3.6 provides, 'Sitework, where necessary, shall be carried out to...(b) avoid the likelihood of damage to other property'.
- 4.7. The sitework described at paragraph 2.3 was preparatory to and associated with the retaining wall.
- 4.8. Therefore, I must consider whether this sitework carried out, preparatory to and associated with the construction of the retaining wall has avoided the likelihood of damage to other property, in this case 7K Marjory Close and 74 John Sims Drive.

- 4.9. Regarding the likelihood of damage to other property, I have adopted the reasoning in *Auckland City Council v Selwyn Mews Ltd*, which refers to “a real and substantial risk that the stated consequence will happen” and clause B1.3.6 means “a real and substantial risk of such damage”.<sup>12</sup>
- 4.10. The ‘damage’ being considered in this case is the extent and protracted nature of the sitework (excavations), which remains unresolved.
- 4.11. ‘Damage’ is not defined in the Act or its Regulations. Its ordinary meaning is “Injury, harm; esp, physical injury to a thing, such as impairs its value or usefulness” and “Loss or detriment caused by hurt or injury affecting estate, condition, or circumstances”.<sup>13</sup>
- 4.12. The building consent does show the building work (eg the foundation of the retaining wall) extending onto other property and an intention to reinstate the excavated land with a combination of materials (eg drainage metal and granular fill) once the retaining wall was constructed. Although the work is only partially complete, the authority formed the view the building work is being carried out in accordance with the building consent, and I have received no information to suggest otherwise.
- 4.13. Although not a deciding factor, there is no specific statutory timeframe to complete the building work. The excavation and cut face on the other properties remains exposed and relatively stable after approximately 27 years (notwithstanding an area of 7K Marjory Close near to the east boundary has partially slumped and collapsed). However, there appears to be no clear indication when or if the work is likely to be completed. This uncertainty is a relevant factor.
- 4.14. The applicant and owners of 74 John Sims Drive refer to their properties being affected by the incomplete work where the current excavation encroaches onto their properties. As it currently presents, the incomplete work has physically damaged their properties through excavation and is likely to adversely affect the value and usefulness of their properties.
- 4.15. Therefore, I am of the view the sitework has not been carried out to avoid the likelihood of damage to 7K Marjory Close and 74 John Sims Drive, meaning the sitework in this case does not comply with Clause B1.3.6, and there was a contravention of section 17.

### **The refusal to issue a notice to fix**

- 4.16. Having concluded the sitework does not comply with Clause B1.3.6, I must now consider the authority’s decision to refuse to issue a notice to fix.

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<sup>12</sup> District Court Auckland CRN 2004067301-19, J McElrea, 18 June 2003, paragraphs [42] to [44] and [47].

<sup>13</sup> Oxford English Dictionary online (accessed on 8 May 2026).

- 4.17. The authority did inspect the work in July 2025 and subsequently decided to refuse to issue a notice to fix in August and October 2025 on the basis the “building work continues to be in accordance with the approved plans” and the historic cut along the boundary “will be remediated once [the] building work is completed”.
- 4.18. Section 164(2)(a) states that a responsible authority must issue to the specified person concerned a notice requiring the person “to remedy the contravention of, or to comply with, this Act or the regulations”.
- 4.19. However, a notice to fix cannot be issued to a specified person where, to remedy the contravention, that person would need to access other property that is beyond the control of the specified person to affect.<sup>14</sup>
- 4.20. Requiring building work to be carried out on another person’s property is dependent on the owner of that property agreeing to such work; if they did not agree then the specified person would be powerless to comply with the notice to fix. Nor can an authority require an owner, through a notice to fix, to reach an agreement with a neighbour. In this case, I note both the applicant and owners of 74 John Sims Drive have refused to grant permission for any building work to be carried out on their properties.
- 4.21. In my view, the notice to fix provisions in the Act are not the appropriate mechanism for addressing issues of encroachment and property law such as those arising in this case. These are civil matters to be resolved between the respective property owners.
- 4.22. As there was no remedy within the control of a specified person that the authority could have required in terms of section 164(2), the authority’s decision to refuse to issue a notice to fix in this case was appropriate.

## 5. Conclusion

- 5.1. The sitework, including earthworks preparatory to and associated with the construction of the retaining wall, did not avoid the likelihood of damage to other property and did not comply with clause B1.3.6, therefore, there was a contravention of section 17.
- 5.2. However, the authority could not require a remedy where the specified person (the owner of 5 Marjory Close) would need to access other property (7K Marjory Close and 74 John Sims Drive) which is beyond their control.

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<sup>14</sup> See Determination 2023/033 *Regarding the compliance of, and decisions made by an authority in relation to, building work encroaching on to a neighbouring property* (10 November 2023), paragraphs 6.81 – 6.83, and 6.85.

## **6. Decision**

- 6.1. In accordance with section 188 of the Building Act 2004, I confirm the authority's decision to refuse to issue a notice to fix to the owner of 5 Marjory Close.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 26 June 2026.

**Andrew Eames**

**Principal Advisor Determinations**