

Determination 2026/034

The authority's decision to issue a notice to fix for work carried out without building consent

18E Roseberry Avenue, Birkenhead, Auckland

Summary

This determination considers the authority's decision to issue a notice to fix for contravention of section 40 in respect of poles installed in the ground between a driveway and retaining wall. The determination discusses whether the work to install the poles is building work regulated under the Building Act.



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, Rebecca Mackie, 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. M & J McQuillan (“the owners”), the owners of the property who received the notice to fix and applied for this determination.

1.2.2. Auckland Council (“the authority”), carrying out its duty as a building consent authority or territorial authority.

1.3. The matter to be determined, under section 177(1)(b) and (3)(e) of the Act is the authority’s decision to issue notice to fix NOT21787091 to the owners (“the notice”). The authority is of the view the owners carried out building work that required building consent in contravention of section 40 of the Act, being the installation of poles. The owners are of the view that the work does not constitute a ‘building’ or ‘building work’ and therefore is not regulated under the Act.

1.4. In deciding this matter, I must consider whether the work that was undertaken is building work. If it is, I will go on to consider whether the work was exempt from requiring building consent under clause 20 of Schedule 1 of the Act, or if building consent was required and not obtained in contravention of section 40.

2. The work

2.1. In July 2025, the owner carried out work to install timber poles between an existing driveway on 18E Roseberry Avenue and an existing retaining wall on the neighbouring property. The driveway is approximately 1.2m away from the retaining wall. Eleven poles were installed at approximately one metre behind the retaining wall.

2.2. The treated timber poles are approximately seven metres in length and 350mm in diameter, fully buried in the ground and encased in concrete to 550mm diameter.

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

The poles are spaced approximately 1.35m centre-to-centre; they are not physically connected to one another and are not attached to the retaining wall or driveway.

3. Background

- 3.1. During a significant storm event in 2023, there was a shallow landslip on the neighbour's land adjacent to and downslope of the owners' driveway. The landslip occurred downslope of an existing retaining wall on the neighbour's land, exposing part of the retaining wall supports. The owners state that an engineer appointed by EQC² carried out an assessment of the slip and concluded the applicant's land was "at imminent risk" and recommended engineering work be carried out to reduce that risk. I have not seen a copy of that report.
- 3.2. The owners engaged a specialist geotechnical engineering consultancy to assess the impact of the slip to their land. The consulting engineer advised that possible ongoing regression of the slip could pose "some risk in time" to the owners' property and recommended strengthening the ground upslope of the retaining wall, on the owners' property, as a "risk reduction contingency measure". The poles would not act as a retaining wall unless/until there was failure of the existing retaining wall below, at which point the poles could become component parts for a future temporary retaining wall (ie with the future installation of horizontal lagging or waling timbers to form a retaining wall) until any necessary remedial work is carried out by the neighbour.
- 3.3. The owners undertook the work on their understanding that it did not meet the definition of a 'building' under section 8(1)(a), because it was not a 'structure'.
- 3.4. The authority issued the notice on 10 September 2025 to the owners. The particulars of contravention or non-compliance were described as follows:

[The authority] conducted a site inspection in relation to unauthorised building works.

As a result of this inspection, [the authority] has identified that building work undertaken would have required building consent.

The Schedule 1 exemptions that the [authority] has considered as being potentially relevant in reaching this conclusion are listed below (with numbers corresponding to Schedule clause numbers)

Clause 20 Retaining Walls

Contrary to **s.40 of the Building Act 2004** (the Act) the following building works have been undertaken at

18E Roseberry Avenue, Birkenhead, Auckland

without first obtaining a building consent:

Installation of soldier piles (6 – 10) to function as a retaining structure,

² Now the Natural Hazards Commission.

supporting the lateral earth pressures and surcharge loads imposed by the driveway located on the north eastern boundary of the property.

4. Submissions

The owners

4.1. The owners submit, in summary:

- 4.1.1. It is only work associated with a 'building' that requires building consent. They do not consider the buried poles to be a 'structure' as that term is used in the meaning of 'building' in the Act.
- 4.1.2. The neighbour's retaining wall supports the lateral earth pressures and surcharge loads imposed by the driveway, not the poles. The installation of the poles only "stiffens the ground upslope of the existing wall ... [and they are] not intrinsic to the existing retaining wall performance".
- 4.1.3. If it is building work, it is exempt under clause 20 of Schedule 1 because the poles retain no more than 1.5m depth of ground, and do not support any surcharge or additional load of that ground.

The authority

4.2. The authority considers the poles form a palisade wall and is a support structure, and submits (in summary):

- 4.2.1. The 'soldier piles' have been inserted to establish a "contiguous pile retaining wall to support the load of the driveway by supporting the soil underneath that is now unsupported due to the progressive failure of the original retaining wall, thus becoming a critical element of the structure (driveway and supporting mechanism)".
- 4.2.2. Being installed between the existing driveway and the retaining wall, the poles would be affected by some, if not all, of the driveway surcharge.
- 4.2.3. The work to install the poles is not exempt work under Schedule 1.

5. Discussion

Legislation

- 5.1. Section 164(1) provides for the issue of a notice to fix where an authority considers on reasonable grounds that a specified person³ is contravening or failing to comply with the Act or regulations made under the Act.
- 5.2. Section 40 sets out building work not to be carried out without a building consent. Sections 41 to 43 provides that building consent is not required in certain cases, including building work exempt under Schedule 1 of the Act.
- 5.3. The notice to fix in this case was issued to the owners on the basis that the installation of timber poles encased in concrete constituted building work undertaken without a building consent, contrary to section 40 of the Act.
- 5.4. Before considering whether there were grounds for the authority to issue the notice to fix to the owners, it is necessary to first determine whether the installed poles fall within the scope of the Act. In doing so, I must consider whether the installation of the poles constitutes "building work" within the meaning of section 7.
- 5.5. If the installation of the poles is found to constitute building work regulated by the Act, it will then be necessary to consider whether there was a contravention of section 40 or if the building work was exempt under Schedule 1.
- 5.6. However, if the installation of the poles is not building work for the purposes of the Act, the completed works are not regulated under the Act. In that case, the authority would have no power under section 164 to issue a notice to fix in respect of those works, and it would not be necessary to consider further whether a contravention had occurred or whether the notice to fix was correctly issued.

Was the installation building work?

- 5.7. Section 7 defines building work as work that is either:
 - (i) for, or in connection with, the construction, alteration, demolition or removal of a building;
 - (ii) on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the Building Code.
- 5.8. To determine whether the poles is building work as defined, I must consider whether it was work "for, or in connection with" work to a building or was likely to affect the extent to which an existing building (on the same allotment) complies.

³ Section 163 defines a 'specified person' to whom a notice can be issued, and this includes the owner of the building.

- 5.9. As there was no construction, alteration, demolition or removal of any other building carried out, I will consider first whether the installed poles in themselves constitute a building.
- 5.10. Section 8 provides that a building means “a temporary or permanent movable or immovable structure”. The poles are permanent and immovable. The issue is whether they are a ‘structure’ and therefore a building within the meaning of section 8.
- 5.11. The term “structure” is not defined in the Act. In previous determinations⁴, the Ministry considered that term in the context of sections 8 and 9, which describes what is included and excluded from the meaning of building, noting the examples in those sections comprise objects made up of different parts or possessing some degree of complexity. The Ministry concluded that for something to be a ‘structure’ for the purposes of the Act, it must have some elements or constituent parts and/or be of some complexity.
- 5.12. Applying that approach in the present case, and considering the physical characteristics of the completed work, I conclude the poles do not constitute a building for the purposes of the Act.
- 5.13. The poles are installed as separate elements, are not connected to one another, and are not tied together by a capping beam or similar structural component nor attached to a structure. In this regard I consider the installed poles do not constitute an assembly of constituent parts.
- 5.14. I have also considered the authority’s view that the poles function as a support structure and, although not connected to each other, their function to retain and support would mean they are acting collectively as a structure.
- 5.15. I do not agree with the authority’s view in this regard. The poles were installed as individual elements to improve ground stability. They are widely spaced and as individual elements do not act together as a continuous retaining structure, nor provide support for the driveway.
- 5.16. I have also considered if the poles are “likely to affect the extent to which an existing building” on the owners’ allotment complies with the Building Code. The parties did not submit on this test; however, there is no indication in the information provided to me that the driveway itself is a building in terms of being an assemblage of parts or of some complexity⁵ or that the poles would in any way affect the extent of compliance of some other structure on the owners’ property.

⁴ See for example Determination 2016/002 *Regarding the issue of a dangerous building notice in respect of a damaged shared driveway* (issued 20 January 2016) and Determination 2019/018 *Regarding the code-compliance of a proposed design for a domestic driveway* (issued 20 May 2019).

⁵ Refer Determinations 2016/002 and 2019/018 for discussion on whether a driveway is a building.

5.17. In conclusion, I do not consider the work to install the poles was building work. As such, it is not regulated under the Act.

6. Decision

6.1 In accordance with section 188 of the Building Act 2004, I reverse the authority's decision to issue notice to fix NOT21787091.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 16 September 2026.

Rebecca Mackie

Principal Advisor Determinations