CONNECT LEGAL TARANAKI

INCORPORATING RMY LEGAL AND BILLINGS

22 September 2023

New Plymouth District Council
84 Liardet Street
New Plymouth 4340

ATTENTION: Gareth Green – Chief Executive Officer and Zane Wood

BY SCANNED EMAIL
gareth.green@npdc.govt.nz
zane.wood@npdc.govt.nz

Dear Gareth and Zane

26 WOOLCOMBE TERRACE FENCE ISSUES – MR AND MRS ROACH

We act for Mr & Mrs Roach in respect of the above issues and are instructed by our clients to address you in respect of same.

Introduction

We understand that a fence has nearly been completed at our client's property at 26 Woolcombe Terrace, but that the Council has requested works to stop (11 August 2023) on the basis that the fence, which was designed to meet the rules that applied at the time construction was to commence (i.e. under the Operative District Plan), now requires resource consent under the decisions version of the Proposed District Plan (the rules of which took effect from 13 May 2023).

The fence was designed to meet the particular requirement that it would be below 2.5m in finished height above existing ground level, but its full details were not shown in the relevant building consent documentation submitted at the time (the retaining and structural elements were shown).

The fence was to have a combination of honed decorative block and timber panels, and its completion was delayed because of a delay in the manufacture of the honed blockwork – and we **attach** a copy of a letter from the manufacturer Eloc Masonry Limited dated 12 September 2023 evidencing same.

Finishing works also typically are programmed to be competed at the end of the build to avoid potential damage.

Background Facts

The timeline is as follows, with relevant photographs **attached** as referred to below:

- **September 2021**: Building consent lodged.
- **January 2022**: Building consent granted. The structural drawings show foundation design and block wall which is indicated to finish 1.8-0.4m above existing ground levels.
- **9 February 2022**: Overall development under the building consent was commenced by Chris Bell Construction without ceasing for any material period (although specified work on the wall paused from sometime after 1 July 2022 and recommended on 13 June 2023 with the arrival of the new blocks).

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Powderham Chambers 136-138 Powderham Street, Private Bag 2031, New Plymouth 4340, New Zealand

- **18 May 2022**: BTW Company advise Chris Bell excavations etc are properly done for front wall and ok to pour wall foundation – copy relevant report **attached**.

- **1 June 2022**: Retaining and work on the fence commences, with the footings and reinforcing and block work undertaken; with reinforcing steel at that time installed to the permitted 2.5 metre height for a maximum length of 12 metres (see **attached** photos 1, 2 and 3 taken between 13 June – 22 June 2022).

- **28 June 2022**: BTW Company Site Visit Report re side boundary 28 Woolcombe Terrace issued to Chris Bell, inter alia, noting reinforcing for walls footing ok; and ok to pour concrete booked for 28 June 2022 - copy relevant report **attached**.

- **December 2022**: Amended drawings issued to NPDC for updates to the main house. The intended fence outcome appears on relevant "BOON drawings".

- **December 2022**: our clients purchased all of the purple heart wood fence rails/panels to undertake further work on the fence/wall - at a cost of approximately $60,000.00 (as it was only the blocks they were still waiting on). Note: the wood fence rails purchased were for the entire height of the wall i.e., the permitted 2.5 metres (for a maximum length of 12 metres).

- **May 2023**: Honed blockwork for the fence arrives onsite for installation.

- **13 June 2023**: specified work on the wall (which had to be paused from sometime after 1 July 2022) recommended on 13 June 2023 with the arrival of the new blocks (see **attached** photo 4).

- **11 August 2023**: Council requests work on the fence to cease, stating:

> At present there doesn't appear to be any clear reference to the block and timber fence (currently under construction between 26 and 28 Woolcombe Terrace) on the Building or Resource Consent documents can you please have these amended to demonstrate compliance with NPDC DP rules.

Our clients would like to have the fence completed as intended, particularly since construction commenced prior to the relevant rule in the Proposed District Plan taking legal effect.

A key issue is whether the permitted fence rule under the Operative District Plan can be considered to have been sufficiently "given effect to" or "established", such that the fence/wall can be completed under the authority of the permitted status at the time, which in our view it can and should be.

Law

Existing use rights are addressed in s10(1) Resource Management Act 1991 ("the RMA"), as follows (my emphasis added):

> Land may be used in a manner that contravenes a rule in a district plan or proposed district plan if—
>
> (a) either—
>
> (i) **the use was lawfully established** before the rule became operative or the proposed plan was notified; and
>
> (ii) the effects of the use are the same or similar in character, intensity, and scale to those which existed before the rule became operative or the proposed plan was notified:

Of most relevance here is whether the fence can be said to be a use that was lawfully "established" by 13 May 2023. It should also be noted that the purpose of s 10 is to protect existing uses that (later) contravene a district plan after that comes into force.[1]

The existing use rights provisions can be compared to the provisions relating to the lapse of resource consents under s125, which provides in subsection 125(1A) that a consent will not lapse if:

> ... before the consent lapses,—
>
> (a) the consent is given effect to; or ...

Here, rather than the term "established", the phrase "give effect to" is used. While addressing a different issue as to the identification of the "environment", the Court of Appeal in *Hawthorn*,[2] used the term "implement" as synonymous to "give effect to".

It is also important to recognise that the statutory scheme also allows a person to obtain a certificate of compliance, under s139. This requires, under s139(5), a council to issue such a certificate if "the [relevant] activity can be done lawfully in the particular location without a resource consent". Such a certificate is then treated under s139(10) as if it is a resource consent that contains the conditions specified in the applicable plan, with specific provisions being stated in s139(12) as applying to the certificate. This includes s125.

There do not appear to be any cases directly on point which is somewhat surprising, as the issue must arise relatively frequently – and our clients would like the issue to be resolved pragmatically with the Council please.

A close example, however, is the decision of the Planning Tribunal in *Cooke v Auckland City Council* [3]. That case concerned an application for enforcement orders to require a dwelling to comply with the provisions of a proposed plan in circumstances where a certificate of compliance had been obtained for a dwelling, and the dwelling had been partially completed (it had reached the stage of being closed in), by the time that the certificate of compliance lapsed. By that time the proposed plan required consent for the dwelling. The Planning Tribunal in *Cooke* relied on the High Court decision in *GUS Properties*[4] to find that the certificate of compliance (deemed consent) had not been given effect to. *GUS Properties* had stated:

> The use of the words "give effect to"... clearly import the idea of full compliance, or completion of the thing envisaged, and it is straining their ordinary meaning to say that they contemplate only the first physical step of the operation envisaged by the consent.

However, the law has moved on from *GUS Properties*, and, in fact, *GUS* was overturned by the High Court on appeal in *Goldfinch v Auckland City Council*.[5]

Cooke is helpful however in that the Tribunal also looked at whether it could make an enforcement order under s17(3) requiring the alteration of the building. At the time, that section stated:

> (3) Notwithstanding subsection (2), an enforcement order or abatement notice may be made or served under Part XII to –
>
> (a) Require a person to cease, or prohibit a person from commencing, anything that, in the opinion of the Planning Tribunal or an enforcement officer, is or is likely to be noxious,

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1 *Chatham Islands Seafood Ltd v Wellington Regional Council* Decision A18/2004.

2 *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 ; (2006) 12 ELRNZ 299 (CA).

3 [1996] NZRMA 511

4 *GUS Properties Ltd v Blenheim Borough Council* SC Christchurch M 394/75, 24 May 1976.

5 *Goldfinch v Auckland City Council* [1997] NZRMA 117 (HC).

dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment; or

(b) Require a person to do something that, in the opinion of the Planning Tribunal or an enforcement officer, is necessary in order to avoid, remedy, or mitigate any actual or likely adverse effect on the environment caused by, or on behalf of, that person.

(4) Subsection (3) is subject to section 319(2) (which specifies when a Planning Tribunal shall not make an enforcement order).

Section 319(2) stated at the time:

(2) The Planning Tribunal shall not make an enforcement order under paragraphs (a)(ii), (b)(ii), (c), (d)(iv), or (da) of section 314(1) against a person who is acting in accordance with –

(a) A rule in a plan; or

(b) A rule in a proposed plan to which section 19 applies (changes to plans which will allow activities); or

(c) A resource consent, –

if the adverse effects in respect of which the order is sought were expressly recognised by the person that approved the plan, or notified the proposed plan, or granted the resource consent, at the time of approval, notification, or granting unless, having regard to the time which has elapsed and any change in circumstances since the approval of the plan, the notification of the proposed plan, or the granting of the consent, the Planning Tribunal consider that it is appropriate to do so.

The Tribunal stated the following:

Although the deemed resource consent was created by the certificate of compliance process, which did not itself allow for recognition of adverse effects on the environment, the basis on which the certificate was issued was compliance with the rules of the plan that were applicable at the time. It is to be supposed that in approving the district plan the city council would have recognised that buildings allowed by it (such as a building having the height, bulk and location of the Leuschke house) would have adverse effects on the environment.

In my opinion, giving s 17(3) (and its cross-reference to s 319(2)) the kind of construction stipulated by s 5(j) of the 1924 Act, the object of those provisions would be attained by construing them as precluding the making of an enforcement order under s 17(3) in this case because the adverse effects of the height, bulk and location of the building are to be taken as having been recognised by the city council in approving the district plan, by which the building was a permitted activity.

That result is confirmed by the implications of giving the provisions the wider construction contended for by Mr Brabant. That construction could have the effect that buildings which conformed with height, bulk and location requirements applicable at the time (as assured by issue of certificates of compliance) could be the subject of enforcement order or abatement notices to reduce the height or bulk authorised so as to avoid, remedy or mitigate what may later be considered to be adverse effects on the environment. The effects of that on investment in buildings, and securities given over them, would be too great to justify an inference from the language of these provisions. If Parliament had intended such as result, it would have been indicated more directly.

Accordingly I adopt the submissions made by Mr Kirkpatrick, and hold that the Tribunal is precluded by s 319(2) from making an enforcement order under s 17 requiring the respondent to alter the building so as to avoid, remedy or mitigate any adverse effects on the environment arising from its height, bulk or location.

While in the current circumstances, there is no certificate of compliance, similar observations may be made in respect of reliance being made on a permitted activity rule, with it following that the Environment Court would also be precluded from making any enforcement orders for works undertaken in reliance of a permitted rule in a plan.

The issue is whether sufficient progress has been undertaken to allow completion of what was permitted.

Assistance may be provided from the authorities on when a consent has been given effect to. The question here potentially being characterised as whether the permitted rule has been given effect to. If so, then, under the same approach, its completion should be allowed, just as with a resource consent that has been given effect to (but not yet completed).

As indicated above, *GUS* provided a stringent test for when such works had been undertaken or given effect to, but the authorities have now stepped away from its approach. In *GUS*, no work had also been undertaken, whereas substantial work has been advanced here by our clients in this case.

Reflecting this, in *Goldfinch v Auckland City Council*[6] (the appeal from *Cooke*), the High Court said:

> This decision is clear authority for the proposition when a consent holder takes no steps on the site with the proposal for which consent is being granted, then that consent has not been 'given effect to'. It is not authority for the proposition where a substantial amount of work has been done within the two year period and the consent holder has done all things reasonably possible but the proposal has not been totally completed the consent lapses.

The High Court went on to state:

> ... if the comments in Gus Properties were elevated to a binding general rule, then the result would be inflexible and practically unworkable. It would mean unless every detail shown, including such details as painting and landscaping, is completed within the two years so as to be "full completion of the thing envisaged", then the whole project would not be "given effect to". In my view, this is a totally unworkable proposition and should be rejected.
>
> The answers to whether a consent has been given effect to must, in my view, be one of degree and will vary from case to case depending on the facts found by the Tribunal and the answers to questions such as, "what is the nature of the work authorised by the consent", "what in fact has been done", "why has it not been completed", "why has it been discontinued", "was this discontinuation voluntary and justified"?

Other cases provide the following additional guidance:

In *Biodiversity Defence Society Inc v Solid Energy New Zealand Ltd*,[7] the High Court found, in respect of a set of related consents for the Cypress Mine, that:

> Significant progress has been made on that planning work and large sums have been expended. Numerous physical works have also been undertaken, such as construction of access roads. In light of the mischief underlying the reason for s 125, and the purpose of s 125, there is no material distinction between planning work such as preparation of management plans, and physical works or activities that are at the heart of the suite of consents.

The High Court further observed:

> The test of "given effect to" is a standard, the application of which reasonable people can differ upon. When Judges discuss the application of standards, their discussion is always against the material facts of the particular case they are deciding. It is dangerous to use such dicta to define the correct application of the standard in a wholly dissimilar set of facts. This is because the application of a standard depends very much upon the facts to which it is being applied, and to

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6 *Goldfinch v Auckland City Council* [1997] NZRMA 117 (HC).

7 *Biodiversity Defence Society Inc v Solid Energy New Zealand Ltd* [2013] NZHC 3283.

> achieving its purpose. Applying a statutory standard is not dissimilar to the legal method employed when applying a common law principle. It is more an inductive process.

In *Auckland Council v 184 Maraetai Road Ltd*,[8] the High Court confirmed that the questions posed in *Goldfinch* remain a useful framework for the enquiry as to whether the consent has been given effect. It also found that it was wrong to ask whether a consent should lapse, as opposed to whether it had lapsed.

In *Friends of Nelson Haven and Tasman Bery Inc v Marlborough District Council*,[9] the Environment Court summarised the principles as follows:

> (a) The statutory test requires a factual enquiry. It is not an evaluation of whether a consent should or should not lapse: *Auckland Council v 184 Maraetai Road Ltd*
>
> (b) 'Given effect to' does not necessarily require that the consented work be fully completed or operational. The question is one of degree and is dependent on the factual context. The High Court decision in *Goldfinch v Auckland City Council* indicates that the answers to the following questions may help inform the position:
>
> (i) what is the nature of the activity authorised by the consent?
>
> (ii) why has it not been completed?
>
> (iii) why has it been discontinued?
>
> (iv) was discontinuance voluntary and justified?
>
> (c) The mere fact that there has been no physical works undertaken under the authority of the consent is not necessarily fatal. Rather, the factual matrix has to be examined. The purpose and substance of the resource consent(s) in issue (including conditions) are central to that matrix. See both the Environment Court and High Court decisions in *Biodiversity Defence Society Inc v Solid Energy New Zealand Ltd*;
>
> (d) The overarching statutory purpose of the lapsing regime of s125 is that resource consents should not subsist for lengthy periods without being put into effect. A helpful illustration of why that is so is in the High Court in *Biodiversity Defence Society Inc v Solid Energy New Zealand Ltd*, with reference to the earlier Planning Tribunal decision in *Katz v Auckland Council*.

The existing use cases also provide assistance. It is clear that the "use" is to be lawfully established before the relevant rule became operative.

As the Court of Appeal has made clear, that requires an assessment of the activity immediately before relevant new plan takes effect.[10] But it is not a snapshot taken on a single day. It is accepted that uses may vary in extent:[11]

> In this context an existing use is to be assessed on the basis of the normal year-round operation, not the point in the operational cycle existing on the day the new rule takes effect.

In addition, "use" in the s10 context is an activity, or a bundle of activities, there being no real distinction between these.[12] In *McAughtrie*, the Court identified the 'use' in the s10(1) context with

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8 *Auckland Council v 184 Maraetai Road Ltd* [2015] NZHC 2254; [2015] NZRMA 490.

9 *Friends of Nelson Haven and Tasman Bay Inc v Marlborough District Council* [2018] NZEnvC 61 at [17].

10 *Rodney District Council v Eyres Eco-Park Ltd* [2007] NZCA 13, [2007] NZRMA 320 at [14].

11 Ibid at [18]. See also *Springs Promotions Ltd v Springs Stadium Residents Assn Inc* [2006] 1 NZLR 846, [2006] NZRMA 101 (HC) at [47].

12 *Southland District Council v Chartres* [2022] NZEnvC 215.

reference to the articulation of the use that was regulated by the rule giving rise to the existing use rights.[13]

Application of Law to Facts

The authorities relating to "giving effect to" resource consents recognise that something less than "completion" is sufficient to qualify a consent having been given effect to. It is a matter of degree, in the circumstances. While, for some consents, the undertaking of physical works might not be necessary for the consents to have been given effect to, it is usual that at least some physical works have been undertaken.

Where a person wants to "lock in" the right to undertake an activity as a permitted activity into the future, they are able to seek a certificate of compliance, which is then deemed to be a resource consent (for most purposes). In practice, people tend to apply for a certificate of compliance when there is some uncertainty as to whether the activity is in fact permitted, or if they want to lock in that permitted status so that they have certainty of being able to undertake those works later (and in case the plan changes).

Where a person is proceeding with a development in reliance on an uncontroversial permitted activity status, such as our clients did, they do not usually seek a certificate of compliance. That is unnecessary, and if was considered "appropriate", would undermine the permitted activity regime, putting additional burden on people wishing to get on with permitted activities, as well as Councils, who would risk being inundated with applications for certificates of compliance.

It must be the case, as with "giving effect to" resource consents, that there is some latitude to "establish" a use under a permitted rule so as attract the protection of existing use rights under s10A that falls short of "completion".

In this case, the fence/wall was part of a wider permitted development, for which building consent was granted in January 2022. In reliance on that building consent and permitted activity status, construction works relating to the overall development commenced on 9 February 2022, with particular works on the wall commencing in June 2022. Work on the dwelling continued without ceasing for any material period, although specific work on the wall paused around 1 July 2022.

In this context, it is considered that, by 13 May 2023, the relevant use (a wall as part of a wider permitted dwelling) was "established" by that date - such that a separate resource consent does not need to be obtained for the completion of those works.

This is not a situation like *GUS* where no physical works have been undertaken, and an existing use right is being claimed in such circumstances.

While the situation is not as complex as (say) *Biodiversity Defence Society*, the wall is part of an integrated housing development, and was designed as part of that development to meet the permitted activity standards at the time – as was the entirety of the development.

This is significant, as the wall is not an isolated activity that stands on its own.

The advancement of construction of the dwelling itself also adds to the wall being part of a proposal that is "established" (although not yet completed).

It is also clear, from an evidential perspective, that the proposed height of the wall was in mind from the outset – rather than being any sort of belated addition or afterthought. There is no suggestion of a "try-on" in terms of our clients endeavouring to belatedly rely on an old permitted rule to rectify a situation in this context.

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13 *Waitaki v W H McAughtrie Farm Ltd* [2021] NZDC 5074.

Summary and Conclusions

In light of the above matters, and in the face of that evidence set out in this letter, our clients respectfully request that the Council allows our clients to complete the fence/wall as planned in good faith and acting reasonably and pragmatically.

Thank you for considering these matters.

We look forward to hearing from you as soon as possible please.

Yours faithfully
CONNECT LEGAL TARANAKI

Scott Grieve
Director
T: +64 6 769 8051
E: scottg@connectlegal.co.nz

c.c. Mr & Mrs Roach
By scanned email

Mr Kyle Arnold
Boon Architects
By scanned email

eloc.
MASONRY Ltd

Hi Brian,

To inform you of why we have had such lengthy delays in the construction of your fence at 26 Woolcombe Terrace New Plymouth.

The blocks used for the construction on this fence are a custom, made to order product, these are the first of their type with new mix designs and new darker oxide imported.

We have had lengthy delays in not only getting the product manufactured as the manufacturing schedule at the time of ordering had an approx. 12-16week lead time.

We also had delays onsite with weather conditions not being favourable to undertake works as high humidity and wet weather causes the blocks to turn white and efflorescence to develop on surface creating an unsightly appearance.

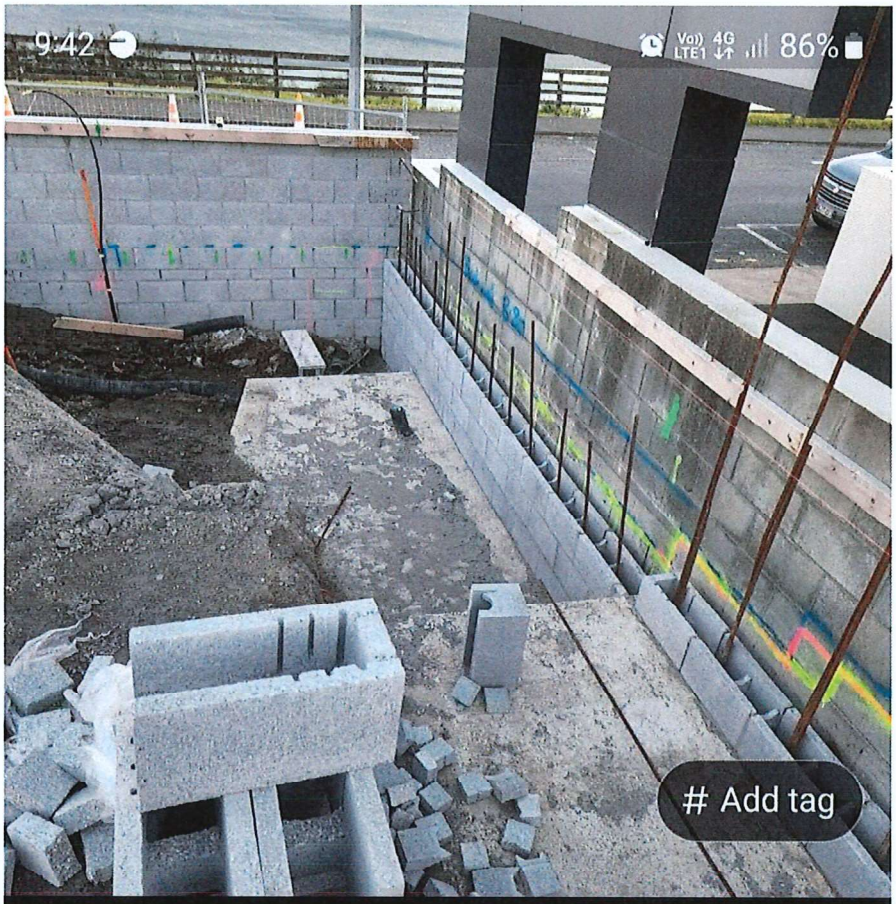
We have had a short window to construct the fence and now that the blockwork has been erected it is still yet to be filled with further delays from other parties outside of our control.

Any further delays are damaging to the product as it has been prevented from being core filled and then once it's filled the blockwork needs to be sealed to protect it from the elements, this delay may also incur additional work to re-hone the surface of the blocks since they have been outside unsealed for an extended period. The sooner we are able to fill and complete this blockwork the better appearance we will achieve for both side of the fence.

Sign:  Date: 12/9/23

Office: 1-5 Okey Lane, Bell Block Post: PO BOX 51, Inglewood 4347
Phone: (06) 755 2204 Mobile: 027 6644 794 Email: cole@eloc.co.nz

Photo 1 – 13 June 2022 footings started for boundary fence
Photo 2 – Block wall commencing for boundary fence 22 June 2022
Photo 3 – 22 June 2022 still laying blocks back of property
Photo 4 – 13 June 2022 commenced with the new black blocks the steel work has been there from 13 June 2022.



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Samsung SM-S908E Motion photo

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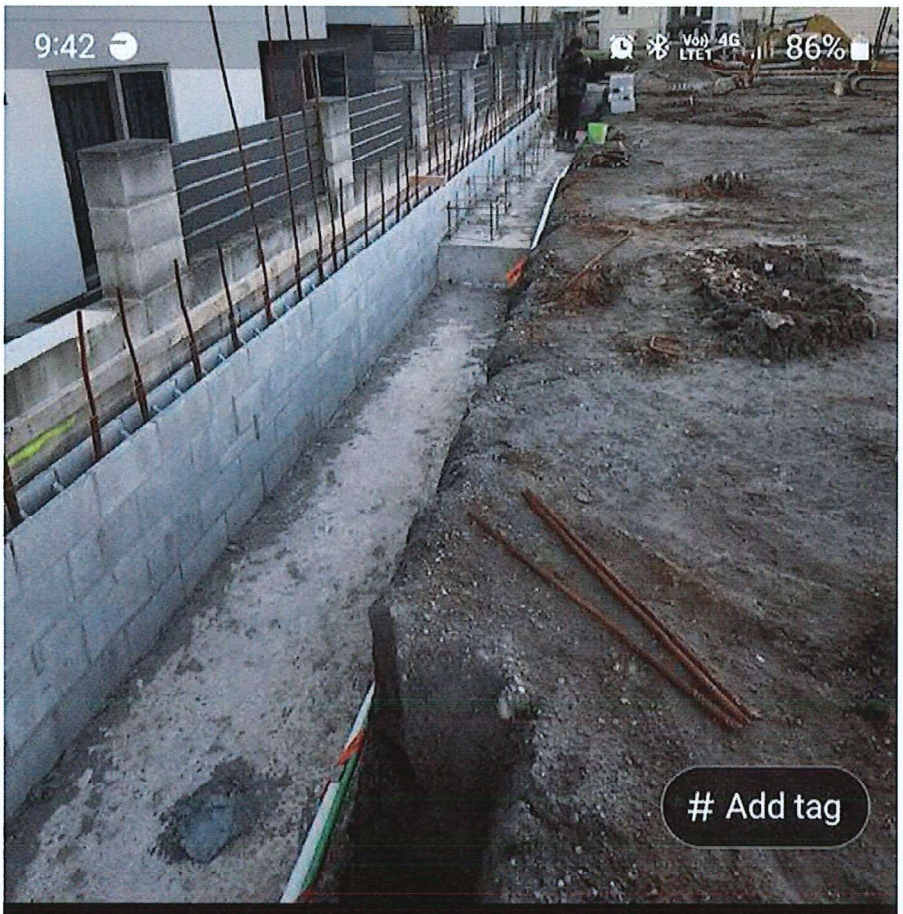

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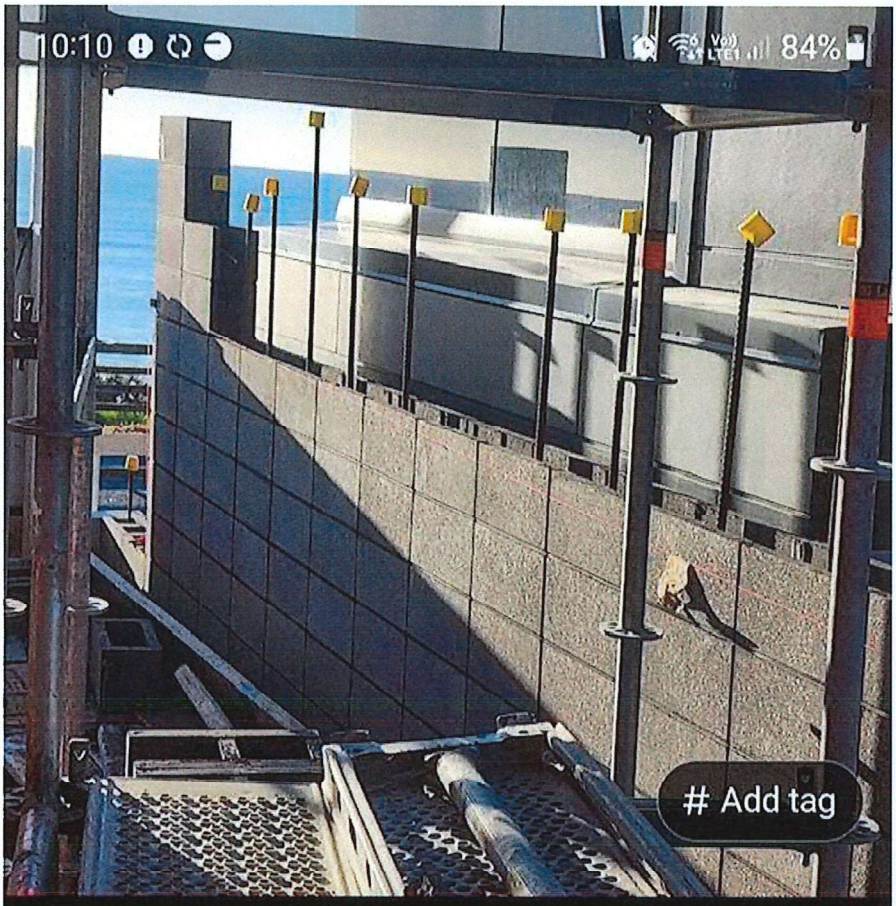

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Samsung SM-S908E

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BTWCOMPANY
SURVEYING | ENGINEERING | PLANNING & ENVIRONMENT

Your Reference : 26 Woolcombe Tce

Our Reference : *200175*

18th May 2022

Chris Bell
c/- Chris Bell Construction
Devon St East
New Plymouth

Dear Chris,

26 Woolcombe Tce New Plymouth - Radside retaining wall foundation inspection

BTW Company Ltd has reviewed site information received depicting footing excavation and new reinforcing cage tied in place for the proposed roadside retaining wall at 26 Woolcombe Tce, New Plymouth.

We are satisfied that excavation of the proposed retaining wall footing is correct size and depth, and new placed reinforcing steel is also correct in accordance with the approved building consent drawings. Please see photographs included below.

Excavation to base of footing depicts firm good-ground in accordance with foundation requirements.

We advise OK to pour wall foundation.

If you have any questions regarding this matter, please do not hesitate to contact BTW Company Ltd.

Yours sincerely,

Russell Harrison
Principal Engineer
CPEng CMEngNZ

SITE VISIT REPORT

Contract Details	
Contract Name: 26 Woolcombe Tce – B + K Roach	**Contract No:** BC21/128998
Contractor: Chris Bell Construction	**BTW Job No:** 200175
Inspection Details	
Inspected By: Russell Harrison – CMEngNZ, CPEng	
Site Location: 26 Woolcombe Tce, New Plymouth	**Inspection Date:** 28 / 06 / 2022
Inspection N#. 04	**Inspection Day** Tuesday
Inspector Arrival and Departure Times: 9.20 – 9.35	
Weather & Ground Conditions: (Muddy, Dusty, Sediment Concerns etc.) Fine and Dry – Site has dried from previous rain.	
Contractor Details	
Personnel on Site: (Contract Supervisor, Foremen, Laborers', Sub-contractors', Other Contractors' etc.) CBC Construction – Brent Bocock, 1 x labourer	
Plant and Material's on Site: (Excavator, Front loader (working/standby), Pipes, Metal etc.) Light vehicles, reinforcing steel	
Work in Progress:	
Insitu foundation slab pours to base of block retaining walls along East Boundary – Second stage of wall to rear of site. Foundation subgrade preparation clean, correct cut shape and dimensions for proposed footings. Vertical block wall reinforcing starter steel HD16 @ 400c/c correct and in position. Keyed footing with hooked starters OK. Horizontal steel HD16 @ 400c/c to footing width OK. All reinforcing in accordance with sections detail sheet S1.04.	
Discussions with Staff on Site:	
Reinforcement for walls footing OK. OK to pour concrete booked for Tuesday 28th June.	
Site Safety Issues:	
Specific HSE audit required or undertaken? (Yes / No) – Use *EF10-CM Site Safety Audit Form* N/A	
Site Traffic Management:	

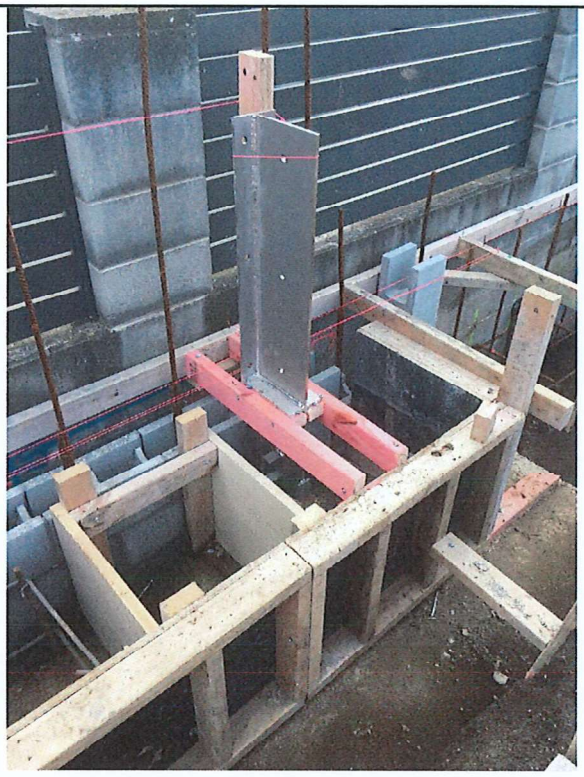
Traffic Management Complies with TMP: (Yes / No)
Was a 'TNZ' Site Condition Rating Form Completed: (Yes / No) (If yes please attach)

N/A

Construction Photos:

Taken? (Yes / No) Yes – See photos folder in job directory for this date.

SITE VISIT REPORT



General Comments: Variations required / Instructions issued on site etc.