

## Protection work process

This updates previous *Practice Note 2005-20* issued June 2005.

### 1. Summary

Building work may sometimes adversely affect adjoining properties. Owners proposing to build have obligations under the *Building Act 1993* (the Act) to protect adjoining property from potential damage.

If building work is close to or adjacent to the adjoining property boundary, protection work may be required to ensure that the adjoining property is not affected.

### 2. Background

Requirements relating to protection of adjoining property are contained in Part 7 of the Act and Regulation 602 of the *Building Regulations 2006* (the Regulations).

Protection work is only required when the relevant building surveyor (RBS) determines that it is necessary.

The information in this practice note sets out the roles and responsibilities of the RBS. There is also a guideline on the roles and responsibilities of the owner, adjoining owner and the builder. When the RBS requires protection work, they can provide a copy of this guideline to each of the parties involved. These documents should facilitate a consistent approach to implementing the protection work process.

### 3. What is protection work?

Protection work should not be confused with building work and is inherently different in its nature, even though protection work may be part of the building work.

Protection work provides protection from damage to the adjoining property. This includes:

- Under-pinning of adjoining properties' footings
- Retaining walls where site cuts have occurred
- Barriers to prevent material from falling on the roof or other part of an adjoining property.

### 4. Definitions

Adjoining owner

- ▶ the owner of an adjoining property.

Adjoining property

- ▶ Land (including any street, highway, lane, footway, square, alley, and right of way) situated in relation to the site on which building work is to be carried out so as to be at risk of significant damage from the building work.

Owner

- ▶ In relation to a building, means the owner of the land on which the building is situated.

Protection work

- ▶ Underpinning, including vertical support, lateral support, protection against variation in earth pressures, ground anchors and other means of support for the adjoining property.
- ▶ Shoring up of the adjoining property.
- ▶ Overhead protection for adjoining property.
- ▶ Other work designed to maintain the stability of adjoining property or to protect it from damage from building work.
- ▶ Any work or use of equipment necessary for the provision, maintenance and removal of work referred to above, whether or not the work or equipment is carried out or used on, over, under, or in the air space above the land on which the building work is or is to be carried out or the adjoining property.

### 5. RBS role and responsibilities

#### *Background*

The RBS can play a positive role in assisting all parties to reach a successful outcome when protection work is required. But the RBS must take care to ensure that they do not become an advocate for one side or the other.

Appeals against an RBS lie with the Building Appeals Board. These guidelines provide the RBS with information to enable them to carry out their function under the Act and along with other information in this Practice Note, to minimise the potential for disputes to arise.

#### *When should protection work be required?*

Some suggest that protection work may be required when the proposed building is one metre or less from the boundary. Although this formula may be appropriate for the majority of cases it ignores the possibility that protection work may be required in other circumstances. For example a deep footing system or site cuts in unstable soil may require considerable protection work.

It should also be noted that the “adjoining property” as defined in the Act must be at risk of significant damage from the building work. Although “significant damage” is not defined in the Act, reasonable and individual consideration should be given to each application for a building permit received by the RBS, in order to determine whether protection work is required.

Various triggers should be set to consider asking for more information if there is not enough at hand. In general the ‘1m rule’ may be an appropriate test, and the definitions of adjoining property and protection work should also alert the RBS when particular work is proposed. When the RBS or their building inspector are making the first visit to a site many complaints have been resolved where protection work should have been required at the application stage and for various reasons was not, but the need has been noted and addressed early in the building work process.

Regulations 302 to 305 require every application for a building permit to be accompanied by documents that shows any part of a building on an adjoining allotment. Anything built to the boundary may require protection work. A careful assessment of soil reports will give an indication of local conditions for site cuts and appropriate battering of soils.

Many incidents that have led to investigations, inquiries and prosecutions involve site cuts where

the RBS did not require protection work, but should have done. In some cases, the RBS could not initially have known that protection work was required, but did nothing to address the problem once aware of the need. This leaves the RBS exposed on two fronts — failing to require the protection work, and failing to implement the proper enforcement procedures when the adjoining owner makes a legitimate complaint. The RBS needs to document clearly the decision not to require protection work, as they could find themselves having to defend such a decision.

#### *Administration*

Having decided that protection work is required, the RBS sets in motion a process that provides both the owner and adjoining owner with certain rights and obligations under the legislation. It is critical that the administrative process is carried out correctly, in order for those rights to be exercised.

#### *Independence of the RBS*

The RBS acts as an independent decision maker in relation to protection work. The owner should provide the RBS with information that will enable the RBS to determine the appropriateness of the proposed protection work if the adjoining owner disagrees with the proposal or requests further information.

The RBS should refrain from acting as an arbiter where there is disagreement. If the determination is challenged via an appeal to the BAB, then the RBS should provide the BAB whatever evidence and/or information is necessary in order for the BAB to resolve the situation.

Even if the owner and adjoining owner have agreed to the protection works, the RBS should ensure that the design of the protection work and the appropriateness of the protection work provides the

level of protection and safety required by the Building Act. This may include inspection of the protection work during construction, issuing of building notices and orders as required under Part 8 of the Act.

## 6 The Act and Regulations

### *Background*

Regulation 602 provides the RBS with the discretion to require protection work in respect of an adjoining property. The RBS should discuss with the applicant the reasons for requiring protection work, so that they can address those issues in the details they provide to accompany the *Protection Work Notice* (Form 3).

The RBS should also explain that the prescribed forms must be filled out correctly and served in the proper manner. **It is not appropriate for the RBS to prepare or serve these documents.**

### *A note of caution re regulation 603*

Regulation 603 contains the provisions that allow an owner not to provide protection in relation to adjoining property. Certificates under paragraphs 603 (b) (i) and (ii) accompanying the application are not sufficient to satisfy the Regulations. The RBS must ensure that paragraphs (a), (c) and (d) of the subsection are also satisfied.

It is also the responsibility of the RBS to check that the certificates address every aspect of the building work that may give rise to the requirement for protection work. For instance, the *Certificate of Compliance – Design* may certify that the building structure and methodology provides inherent protection. This will be insufficient if there is also a site cut that is not addressed under the certification. Another aspect of the regulation is to remove the

jurisdiction of the BAB in relation to determination of disputes or appeals. Its application however does not remove the common law rights of the adjoining owner.

Under regulation 603, the certificates must be provided to the RBS before the work commences. Once a notice under section 84 of the Act has been served on the adjoining owner, then associated rights of the adjoining owner are in force. It is not appropriate after this point to accept certifications under regulation 603.

### *Regulation 602 Protection of Adjoining Property*

Once protection work is required by the RBS under regulation 602, and Part 7 of the Act is set in train, the RBS is required to administer certain procedures. Regulation 602 provides additional detail for those procedures.

The owner is required to serve the *Protection Work Notice* (Form 3).

An adjoining owner is required to respond in accordance with *Protection Work Response Notice* (Form 4).

The RBS may provide advice to the owner and adjoining owner to ensure sufficient details are provided with the protection work notice.

### *Section 84 Notice of Building Work*

This is self-explanatory, but if advising the owner, the RBS should satisfy themselves that sufficient details are provided under sub section (2) for an assessment to be made.

### *Section 85 Adjoining Owner Must Respond*

The RBS should be satisfied that the notice has been served correctly, in order to verify the 14-day response period.

### Practice Notes

#### *Section 85(1) (a)*

Is self-explanatory and then section 86 applies.

#### *Section 85(1) (b) (i)*

Is self-explanatory and initiates provisions of section 87.

#### *Section 85(1) (b) (ii)*

A requirement for more information is for the purposes of the RBS to consider the protection work proposal and initiates provisions of section 87(2).

There has been some confusion as to the application of the 14-day response period where a notice under section 85(1) (b) (ii), requiring more information is received. The 14-day period does not go into suspension when a notice requiring more information is received.

The purpose of such a response notice is to 'enable the proposal to be considered by the RBS'. It is not for the purpose of further consideration by the adjoining owner (unless the RBS considers it appropriate under section 87), in order to reach an agreement with the owner.

The 14 days referred to in this section is the period for giving a response notice under section 85 (1) (a) or (b). Once a response notice is received, then the 14-day period is at an end (there is no allowance for any supplementary information to be provided by the adjoining owner). There are no further time limits to be considered.

Once the 14-day period has ended, the timing of the process is in the hands of the owner and the RBS. Under section 87(2), the RBS must decide whether such a request is appropriate. Where the RBS determines that the request is appropriate, they may ask the owner to provide more information under section 87(2). There are no time limits for the owner to provide the information, but it is in the interests of the owner to do this promptly.

If the RBS asks the owner for further information, they must make a copy available to the adjoining owner under section 87(2) (b). Under section 87(3), the RBS may decide to consult further with the adjoining owner. Again, there are no time limits set for this process.

If the RBS considers it appropriate for the adjoining owner to comment on the additional information, they should provide reasonable time limits for that to occur. If no agreement is reached between the owner and the adjoining owner, then the RBS is ultimately responsible for making a determination, in accordance with section 87.

#### *Section 87 Effect of disagreement or request for further information*

*Where a notice under section 85(1) (b) (i) has been received:*

#### *Section 87(1)*

The RBS must make a determination as to the appropriateness of the protection work, but have discretion to ask for further information through inquiry under section 87(3).

#### *Section 87(4)*

When satisfied the protection work is appropriate, the RBS must notify the owner and adjoining owner in writing, and include with the notification, advice of the prescribed period for appeal against the decision required by regulation 602 (14 days under regulation 1601).

*Where a notice under section 85(1) (b) (ii) has been received:*

#### *Section 87(2)*

Is self-explanatory, but consider whether it is appropriate or not to require more information.

### Practice Notes

*Section 88 Work not to be carried out until protection requirements met.*

#### *Section 88(1)*

It is an offence under section 88 of the Act for the owner to commence that part of the building work giving rise to the protection work or the protection work itself (section 146) until:

- Agreement has been reached (section 88(1) (a)); or
- 14 days after the RBS has made a determination (section 88(1) (b) and section 146(1) (a)); or
- If an appeal is made, until such time as the BAB has made a determination (section 88(1) (c) and section 146(1) (b)).

The onus is on the owner to comply, but the RBS has an enforcement role under Part 8 of the Act under sections 106, 108, 111 and 113.

*Under section 146, the protection work cannot be commenced if:*

- In the case of a determination having been made by the RBS under section 87, until such time that the 14 day appeal period (Regulation 1601) has lapsed; or
- In the case of an appeal being made within that period, until such time as the BAB has made a determination.

#### *Section 88(2)*

The owner must carry out the protection work in accordance with:

- An agreement that has been reached (section 88(2) (a)); or
- A determination made by the RBS (section 88(2) (b)); or
- A determination that has been made by the BAB (section 88(2) (c)).

#### *Section 89, 90, 91*

These provisions deal with emergency protection work and provisions for the relevant Minister to appoint an agent for absent or incapable owners. These sections of the Act are outside the scope of the RBS role.

#### *Section 92 Adjoining owners may inspect plans*

The adjoining owner has a right to inspect plans, drawings and specifications relating to the proposed building work free of charge. The RBS must make them available to the adjoining owner.

#### *Section 93 to 100 inclusive*

The RBS can play no role in the administration of these provisions. It is recommended that the RBS resist any request or temptation to assist in resolving any differences of opinion between the owner and the adjoining owner, particularly in relation to section 93 to 98. The Building Appeals Board is the appropriate body for dispute resolution under these sections. Sections 99 and 100 are matters to be referred to the civil courts.

#### *Section 101 Lodgment of plans after the completion of protection work*

##### *Section 101(1)*

The owner within two months after completing the protection work must serve on the adjoining owner and the RBS a complete set of plans, documents and specifications showing the protection work as constructed.

It should be noted that a penalty of 10 units applies if the owner fails to comply with this provision.

##### *Section 101(2)*

The RBS is required to give a copy of those documents to the relevant Council.

Note: A penalty of 10 units applies if the RBS fails to comply with this provision.

## 7. Alternative protection work process for the RBS

### Summary

An alternative to conventional protection work processes exists, that may reduce time delays in some cases while retaining adequate measures for protection of adjoining property. If the RBS determines that protection work is required to an adjoining property, then the exception set out in regulation 603 of the Regulations can be used, provided certain criteria are met.

### Background

The conventional method is for the owner to serve a "Protection Work Notice" (Form 3) and the adjoining owner to complete a "Protection Work Response Notice" (Form 4), under the provisions of Part 7 of the Act.

Regulation 603 provides a more streamlined mechanism, where the building work being undertaken within the allotment provides inherent protection. In this case, the response of an adjoining owner to protection work is not necessary, subject to certain criteria being met.

This avoids the need to serve Form 3 and 4 Notices and for the RBS to make a determination on protection work. It also eliminates protection work issues as grounds for objection and appeal to the BAB by an adjoining owner.

### Procedure

If the RBS determines that protection work is required to an adjoining property under regulation 602, then the alternative process for considering protection of adjoining property as contained in regulation 603 can be used, if:

- ▶ A Form 3 has not already been served by the owner on the adjoining owner, as this indicates a decision has been made not to use the exception under regulation 603 and confers

certain rights under Part 8 of the Act on the adjoining owner.

- ▶ The building work that is the subject of the building permit is fully contained within the allotment.
- ▶ No buildings are to be erected or building work is to be carried out on, over, under, or in the air space of the adjoining property. It is generally difficult to construct a wall on the property boundary without requiring access to the adjoining property for scaffolding, brickwork joint raking, or construction joint caulking.
- ▶ Regulation 603 is also not applicable if construction methods such as ground anchors or similar are required into the adjoining property, or where party walls, underpinning or access over the adjoining property are required.
- ▶ The structural design of building work incorporating protection work or eliminating the need for protection work must be carried out by a structural engineer who is a registered building practitioner and who provides a certificate of compliance under section 238 of the Act for the design of that building work.

This certified structural design must be independently checked by a second structural engineer who is also a registered building practitioner and who provides a certificate of compliance under section 238 of the Act. The second structural engineer must also certify that the design complies with the Act and Regulations. This requirement for an independent check only applies to the part of the building work that incorporates or eliminates the need for protection work.

The building permit applicant must notify the adjoining owner by forwarding copies of the certificates issued by the design engineer and the checking engineer and relevant documents (including, for example, information on the staging and duration of works) referred to in those certificates. **This must happen before the building work is commenced.**

<sup>1</sup> This requirement for certification only applies to the part of the building work that incorporates protection work, or eliminates the need for protection work.

#### **8. Building Notices and Orders Requiring Protection Work to be done**

##### *A note of caution*

It is sometimes required that the RBS must issue a building order that may include the provision of protection being carried out.

The RBS needs to be aware that section 119 of the Act states that a person who carries out work in accordance with the order is not required to obtain a building permit or comply with the Regulations unless the relevant building surveyor directs.

It is advisable that building surveyors when making a building order for protection work direct the owner that regulation 602 is applicable and enforce part 7 of the Act, including the serving of protection work notices.

If this is not done it is possible that an owner may do protection work without first serving protection work notices and the requirements of surveys and insurance may not be completed. This may give rise to disputes, causing delays.

## Protection work: information for owners, adjoining owners, and builders

### Protection work: information for owners, adjoining owners, and builders

#### 1. Summary

Building work may sometimes adversely affect adjoining properties including land. Owners proposing to build have obligations under the *Building Act 1993* (the Act) to protect adjoining property from potential damage.

If building work is likely to cause significant damage to or adjacent to the adjoining property boundary, protection work may be required to ensure that the adjoining property is not affected.

#### 2. Background

The owner, adjoining owner and even the builder can play a positive role in reaching a successful outcome when protection work is required, but each needs a clear understanding of their role.

This guideline provides information to enable each party to carry out their function under the Act and along with other information provided in this Practice Note, to minimise the potential for appeals and disputes to arise.

The requirements for protection of adjoining property are contained in Part 7 of the Act and regulation 602 of the *Building Regulations 2006* (the Regulations). Protection work is only required when determined to be necessary by the Relevant Building Surveyor (RBS).

#### 3. What is protection work?

Protection work is often confused with building work, but is a completely different activity.

Building work involves construction of the building only. Protection work provides protection from damage to the adjoining property.

This includes:

- under-pinning of adjoining properties' footings;
- retaining walls where site cuts have occurred;
- barriers to prevent material from falling on the roof or other part of an adjoining property.

*When should protection work be required?*

It is the responsibility of the RBS to determine when protection work is required.

It is commonly thought that protection work should be required when the proposed building is one metre or less from the boundary. Although this formula may be appropriate for the majority of cases it ignores the possibility that protection work may be required in other circumstances. For example a deep footing system or site cuts in unstable soil adjoining basements may require considerable protection work.

It should also be noted that the "adjoining property" as defined in section 3 of the Act must be at risk of significant damage from the building work. Although "significant damage" is not defined in the Act, reasonable and individual consideration should be given to each application for a building permit received by the RBS, to determine whether protection work is required.

#### 4. Owner rights and obligations

*The Building Act 1993 and the Building Regulations 2006*

*Section 84*

The Act requires that an owner must notify the adjoining owner and the RBS of the proposed building work, including details of the proposed protection work.

#### Section 84(2)

The Regulations prescribe forms for the protection work notice (Form 3) from the owner and for the protection work response notice (Form 4) from the adjoining owner (refer regulation 602). An owner should ensure there is sufficient detail provided under the regulation 602(3) (a) and (b) for an assessment to be made.

#### Section 85

Following the serving of the notice, section 85 requires an adjoining owner to respond to the protection work notice no later than 14 days after the notice has been served (see section 236 of the Act on serving of documents). The adjoining owner may agree to the proposed work, disagree, or require more information to be given. Despite section 236, it is advisable that owners serve the forms personally and obtained a signed receipt or post them via registered mail. This provides a definitive date to measure the commencement of the 14-day response period.

#### Section 87 Effect of disagreement or request for further information

Where a notice under section 85(1) (b) (i) has been received:

#### Section 87(1)

The RBS must make a determination as to the appropriateness of the protection work, but has discretion to ask for further information through inquiry under section 87(3).

#### Section 87(4)

When satisfied the protection work is appropriate, the RBS must notify the owner and adjoining owner in writing. The RBS must include in the notification the prescribed period for appeal against the decision required by regulation 602 (14 days under regulation 1601).

#### Section 88

##### Section 88(1)

It is an offence under section 88 of the Act for the owner to commence that part of the building work giving rise to the protection work, or the protection work itself (section 146) until:

- Agreement has been reached (section 88 (1) (a)); or
- 14 days after the RBS has made a determination (section 88(1) (b) and section 146(1) (a)); or
- If an appeal is made, until such time as the BAB has made a determination (section 88(1) (c) and section 146(1) (b)).

The onus is on the owner to comply, but the RBS has an enforcement role under Part 8 of the Act under sections 106, 108, 111 and 113.

Under section 146 the protection work cannot be commenced if:

- In the case of a determination having been made by the RBS under section 87, until such time that the 14 day appeal period (regulation 1601) has lapsed; or
- In the case of an appeal being made within that period, until such time as the BAB has made a determination.

##### Section 88(2)

The owner must carry out the protection work in accordance with:

- An agreement that has been reached (section 88(2) (a)); or
- A determination made by the RBS (section 88(2) (b)); or
- A determination that has been made by the BAB (section 88(2) (c)).

#### *Other responsibilities under the Act*

The owner has other obligations and rights under the Act, however, the RBS is unable to act as a decision maker in the process. The RBS may be able to offer some guidance, but cannot act as the arbiter where differences of opinion occur between the owner and adjoining owner. The appropriate body with jurisdiction to determine these matters is the Building Appeals Board (the BAB), through an application by the owner or the adjoining owner. Alternatively, the owner can seek his or her own legal advice.

#### *Section 93 Owner to arrange insurance cover*

The owner is required under this section to obtain an insurance policy in the favour of the adjoining owner before protection work begins. It is recommended that owners seek the advice of professional insurance brokers or agents to ensure the requirements of this section are met satisfactorily. Non-compliance involves a statutory offence of up to \$10,000 for an individual, or \$50,000 dollars for a body corporate. This insurance can often be obtained as an extension of the builders public liability insurance. It can be difficult for an owner builder to obtain this form of cover, but this is not sufficient reason to proceed without insurance.

#### *Section 94 Survey of adjoining property*

Before an owner commences protection work, the owner or their agent, and the adjoining owner or their agent, must make an acknowledged record of any existing defects in the adjoining property. This section is to protect both parties, as it provides the owner with evidence against false claims of damage, and provides the adjoining owner with evidence of existing conditions to compare with damage allegedly caused by the work. Both parties should sign every document relating to the survey, whether in the form of a description or a photograph.

#### *Section 95 Entry on adjoining property*

This section provides the owner with the right to enter the adjoining owner's property, on the condition of giving the adjoining owner the required or agreed notice, to carry out a survey and the protection work itself.

#### *Section 96 Adjoining owner and adjoining occupier not to obstruct owner*

This section makes it an offence for the adjoining owner to refuse admission, obstruct, or hinder the owner or the owner's agent in carrying out the survey or protection work, provided the required or agreed notice has been given. The penalty is 10 units, plus 1 unit for every day of continued refusal of entry, obstruction or hindrance.

#### *Section 97 Expenses of Adjoining Owners*

It is reasonable to expect that there will be legitimate expenses incurred by the adjoining owner as a result of assessing and supervision of protection work. This section details that the reasonable costs necessarily incurred by the adjoining owner must be paid by the owner.

Owners are liable to pay the cost in two respects. One involves the expenses of checking the design documentation. This includes necessary and reasonable costs associated with engaging structural engineers or other specialists to check design computations and other documents. The second relates to the actual supervision of protection work.

If a dispute about the cost occurs, the owner or adjoining owner can refer the matter to the BAB.

If the BAB determines the matter and the owner fails to pay the costs, the adjoining owner can enforce the BAB's determination as though it were a judgement or an order of a court of competent jurisdiction.

Owners may consider seeking the adjoining owners agreement in engaging a mutually acceptable and independent engineer (at the owner's expense), who can check the documentation and certify the adequacy of the protection work. This is not a legislative requirement, but is a reliable way of managing agreements relating to expenses.

#### *Section 98 Compensation*

In addition to any reasonable expenses incurred by the adjoining owner that are to be paid, the owner is also responsible to pay compensation for any inconvenience, loss or damage, suffered by the adjoining owner or occupier. For instance, if damage is caused to any property belonging to the adjoining owner or occupier whilst carrying out the protection works, the owner is required to pay for the rectification of that damage.

#### *Section 99 Liability not affected*

This section clearly leaves open any rights under civil law which enable the adjoining owner or occupier has to take action against the owner, and/or the builder, in the event of causing injury to them.

#### *Section 100 Saving for easements*

Precludes the interference with light or party wall easements (unless with proper negotiation and the proper recording of this) and reinforces the civil law rights of an adjoining owner to protect their rights to any relevant easement.

#### *Section 101 Lodgement of plans after the completion of protection work*

The owner, within 2 months after completing the protection work, must serve on the adjoining owner and the RBS a complete set of plans, documents and specifications showing protection work as actually constructed.

It should be noted that a penalty of 10 units applies if the owner fails to comply with this provision.

## 5. Adjoining owner's role and responsibilities

### *The Building Act 1993 and the Building Regulations 2006*

#### *Section 85*

Following the serving of a protection work notice, section 85 requires an adjoining owner to respond to the notice no later than 14 days after the notice has been served (see section 236 of the Building Act for serving of documents). The adjoining owner may agree to the proposed work, disagree, or require more information to be given.

#### *Section 92*

The adjoining owner has a right to inspect plans, drawings and specifications relating to the proposed building work free of charge. The RBS must make them available to the adjoining owner.

#### *Other responsibilities under the Act*

The RBS may be able to offer some guidance, but is not able to act as the arbiter where differences of opinion occur between the owner and adjoining owner. The appropriate body with initial jurisdiction to determine these matters is the Building Appeals Board (the BAB), through an application by the adjoining owners or the owner. Alternatively, the adjoining owner can seek independent legal advice.

#### *Section 95*

This section provides the owner with the right to enter the adjoining owner's property, on the condition of giving the adjoining owner the required or agreed notice, to carry out a survey and the protection work itself.

#### *Section 96*

This section makes it an offence for the adjoining owner or occupier to refuse admission, obstruct, or hinder the owner or the owners agent in carrying out the survey or protection work, provided the required or agreed notice has been given. The penalty is 10 units, plus 1 unit for every day of continued refusal of entry, obstruction or hindrance.

#### *Section 97 Expenses of Adjoining Owners*

It is reasonable to expect that there will be legitimate expenses incurred by the adjoining owner as a result of assessing and supervision of protection work. This section details that the costs incurred by the adjoining owner must be paid by the owner.

Owners are liable to pay the cost in two respects. One involves the expenses of checking the design documentation. This includes necessary and reasonable costs associated with engaging structural engineers or other specialists to check design computations and other documents. The second relates to the actual supervision of protection work.

If a dispute about the costs occurs before work commences, the adjoining owner or owner can refer the matter to the BAB.

If the BAB determines the matter and the owner fails to pay the costs, the adjoining owner can enforce the BAB's determination as though it were a judgment or order of a court of competent jurisdiction.

Owners may consider seeking the adjoining owners agreement in engaging a mutually acceptable and independent engineer (at the owners expense) who can check the documentation and certify the adequacy of the protection work. This is not a legislative requirement, but is a reliable way of managing agreements relating to expenses.

#### *Section 98*

In addition to any reasonable expenses incurred by the adjoining owner that are to be paid, the owner is also responsible to pay compensation for any inconvenience, loss or damage, suffered by the adjoining owner or occupier. For instance, if property belonging to the adjoining owner or

occupier is damaged whilst carrying out the protection works, the owner is required to pay for the rectification of that damage.

#### *Section 99*

This section clearly leaves open any rights under civil law that the adjoining owner or occupier has to take action against the owner, and/or the builder, in the event of causing injury to them.

#### *Section 100*

Precludes the interference with light or party wall easements (unless with proper negotiation and the proper recording of this) and reinforces the civil law rights of an adjoining owner to protect their rights to any relevant easement.

#### *Section 101*

The owner, within 2 months after completing the protection work, must serve on the adjoining owner and the RBS a complete set of plans, documents and specifications showing protection work as actually completed.

It should be noted that a penalty of 10 units applies if the owner fails to comply with this provision.

### **6. Additional measures for owners and adjoining owners**

#### *Communicate with the neighbour*

As plans are developed for the building project, and especially if there is the prospect of having to provide protection work, an owner should consider engaging the neighbour in the process, so that they have an understanding of what may take place. If the owner explains what they are intending to do and that there may be concerns with the adjoining property that will be addressed, then the likelihood of a successful outcome is greatly enhanced.

### Practice Notes

#### *Communicate with the building surveyor*

Difficulties often arise when an owner does not provide the information to the RBS to ascertain that protection works are required. The neighbour may telephone the various authorities, which may result in the serving of a building order to stop work, or even an emergency order, on the owner.

This may happen even if a builder has been engaged to carry out the building work. Owners may suddenly be involved in delays and potential litigation, the cost of which may outweigh the cost of implementing protection work measures in the first place. It is important that the owner communicate with their builder and the RBS to avoid this possibility.

#### *Communicate with the builder*

It is reasonably common under a standard building contract that the owner appoints a builder to act as their agent for obtaining the building permit. This often means that the owner is not directly involved in discussions with the RBS or the adjoining owner when the RBS requires protection work.

The owner should communicate with the builder, asking questions about any process that the owner does not understand, and if protection works are required, the owner should get the builder to do more than just post the notices through the mail. If the builder is unwilling to spend a little extra time in dealing with the neighbour, the owners should offer to take the process into their own hands. If something goes wrong, it is the owner that will suffer through additional delays and costs. Most contracts have a clause allowing variation to the contract price if a regulatory authority requires something additional to what has been quoted on.

#### *If damage to the adjoining property does occur*

If damage occurs to an adjoining property from failure of the protection work, it is the responsibility of the owner to reinstate the adjoining property to

the condition it was in before the damage occurred. If the damage is substantial, then the matter should be referred to the insurance provider.

If a dispute arises between the owner and adjoining owner, about the nature of the damage and cause of damage then the matter should be referred to the Building Appeals Board, or to the insurance provider. It may also be appropriate that the owner and adjoining owner seek advice from their own legal professional.

#### *Emergency procedures, and absent or incapable owners*

Sections 89, 90 and 91 of the Act deal with the provision of emergency protection work and incapable or absent owners. Where these problems arise, owners or adjoining owners should contact the Building Commission for information on the application of these provisions.

## **7. Builders role and responsibilities**

### *Background*

The Builder can play a positive role in assisting all parties to reach a successful outcome when protection work is required, but to achieve this requires an understanding of individual roles and their responsibilities.

This guideline provides general information about the protection work process, but is not a guide for dealing with disputes that happen between the owner and the adjoining owner — the appropriate forum for that is the Building Appeals Board (the BAB).

The provisions relating to the protection of adjoining property are set out under the Act and the Regulations. Protection work is only required when determined to be necessary by the RBS under the Regulations.

*What should the builder do where protection work is required?*

The builder should ensure that the owner and adjoining owner have complied with the protection work process. That is, that the appropriate protection work notices have been completed and the RBS has determined the appropriateness of the protection work if necessary.

The builder should be involved in the project as early as possible, to ensure that the design of the protection work is appropriate to limit the potential for problems further down the track when construction begins.

#### *Some Common Questions*

As the builder may not be directly involved in the protection work notice process, but has a direct relationship on-site with the owner and possibly the adjoining owner, the following questions may arise when protection work is required.

*Can I start building work before the protection work is completed?*

No. The Act requires that protection work must be completed before building work begins.

Where protection work is required the building work associated with the protection work cannot be started until the protection work has been completed. This does not stop other building work being started on the site if protection work is not needed directly for that building work.

*Does insurance and survey of the adjoining property need to be completed before I start protection work?*

Yes. The Act requires that the owner and adjoining owner must complete these processes before protection work can begin.

*During protection work, if I change the design of the protection work due to site constraints, do I need to notify the RBS?*

Section 101 requires the owner, no later than 2 months after the completion of the protection, to serve on the adjoining owner and the RBS a complete set of plans and specifications of what protection work has actually been provided in respect of the adjoining property.

*Can the adjoining owner refuse the builder access to do protection work?*

No. The adjoining owner or adjoining occupier cannot refuse access to the site, as long as they have received notice of entry not less than 24 hours prior. It is an offence for the adjoining owner or adjoining occupier to obstruct the owner or owners' agent.

This provision only allows for protection work to be carried out. It does not automatically give the builder the right to enter the property to carry out building work. To gain access to carry out building work, the builder will require a separate civil agreement between the builder and adjoining owner.

*What if I do building work, and I think the adjoining property requires protection?*

Stop work on that part of the building and contact the RBS to request an inspection. The RBS will then determine the course of action and whether protection work is required.

#### **8. Disputes**

The Act provides for a dispute resolution service through the Building Appeals Board (BAB). The owner and the adjoining owner have the right to refer any matter that is relevant to protection works to the BAB.

The RBS may offer some guidance, as to what the legislation requires, but is not able to act as the arbiter where differences of opinion occur between the owner and adjoining owner. The appropriate body with initial jurisdiction to determine these matters is the BAB.

Alternatively, the owner or the adjoining owner can seek his or her own legal advice.

#### *Section 151 Emergency protection work*

If an owner or adjoining owner cannot agree about how or when protection work is required by declaration under section 89(1), then either of them may refer the matter to the BAB.

#### *Section 152 Insurance*

If an owner or adjoining owner cannot agree about the nature of insurance cover required under section 93, then either of them may refer the matter to the BAB.

#### *Section 153 Surveys of adjoining property*

If the owner and an adjoining owner cannot agree about how or when the survey is to be carried out, then either of them may refer the matter to the BAB.

#### *Section 154 Cost of supervising protection work*

If an owner or adjoining owner cannot agree on the adjoining owners costs incurred in supervising the protection work, then either of them may refer the matter to the BAB.

#### *Section 155 Other disputes between owners and adjoining owners*

If there is any matter the owner and adjoining owner cannot agree on and it cannot be dealt with under any other provisions within the Act, then either of them may refer the matter to the BAB.