

30 January 2013

Sir John Hansen
Convenor
Canterbury Earthquake Recovery Review Panel
c/- Canterbury Earthquake Recovery Authority
Private Bag 4999
CHRISTCHURCH 8140

Dear Sir John

Canterbury Earthquake (Local Government Act 2002) Order 2013

Proposal

1. The Canterbury Earthquake Recovery Review Panel is asked to consider the draft Canterbury Earthquake (Local Government Act 2002) Order 2013 (the draft Order).
2. The draft Order would extend the powers of the Christchurch City Council (the Council) to access private land for the purpose of constructing or rebuilding Council owned retaining walls on or under private land. It would extend the application of existing powers under the Local Government Act 2002 (LG Act) that local authorities have in relation to similar functions such as sewerage and stormwater drainage. This will expedite the rebuild of damaged Council owned retaining walls in Christchurch City.
3. The draft Order is attached as Appendix 1.

Background

4. The Canterbury earthquakes caused extensive damage to many of the estimated 2,596 retaining walls owned by the Council, particularly in the Port Hills. There are ongoing risks to public safety, access and underground services until repairs or replacement of the damaged retaining walls are carried out. The ongoing risks are a potential liability for the Council.
5. In some instances the work will affect private land. In all of these cases the work will provide some direct benefit to affected private land owners as either their land, or land adjoining theirs, will be safely supported or retained.
6. The Council is undertaking a comprehensive information and consultation process around the programme of repair and rebuild work. Despite this effort, the consent of some affected private land owners is not being obtained in time to progress the programme of work as scheduled. In other cases consent is not able to be obtained at all. This could be for a range of reasons including absentee, disengaged or misinformed owners, uncertainty, or owners choosing not to give consent.



7. The draft Order would allow the Council to access private land for the purpose of constructing or rebuilding Council owned retaining walls, on or under private land, where this is necessary for the support and stability of public land or public infrastructure. It provides protections for private land owners through an objection process and appeal rights to the District Court under Schedule 12 of the LG Act.
8. The draft Order fulfils the purposes of the Canterbury Earthquake Recovery Act 2011 under:
 - section 3(a) - to provide appropriate measures to ensure that greater Christchurch and the councils and their communities respond to, and recover from, the impacts of the Canterbury earthquakes; and
 - section 3(f) - to facilitate, coordinate, and direct the planning, rebuilding, and recovery of affected communities, including the repair and rebuilding of land, infrastructure, and other property.

Policy Objective

9. The primary Crown objective is to expedite the recovery of greater Christchurch. A critical component of this is the repair and rebuild of horizontal infrastructure, comprising roads, fresh water systems, wastewater systems, storm water systems, stopbanks, footbridges and retaining walls.
10. The Council has advised that its objective is to promptly progress the repair and rebuild of its retaining walls in order to:
 - reduce on-going risk to public safety created by damaged retaining walls;
 - restore constrained vehicle access to properties and the reduce risk of losing access to properties in the future;
 - protect Council owned infrastructure assets and reduce the risk of weakened infrastructure being further damaged by water damage or further seismic activity;
 - avoid additional cost and inefficient use of resources that could occur if the Council programme of work is delayed or not progressed as sequenced; and
 - reduce the Council's liability associated with the above factors.

Timing

11. The Council's programme of work is scheduled and sequenced in a way that will optimise resources, minimise costs and prioritise those retaining walls that have affected underground services or that have a high risk of failure. It would be helpful for the draft Order to come into force as soon as feasible so that the programme of work can proceed as planned.
12. There are no retrospective authorities.

Preferred Option

13. In addition to the status quo, two alternatives were considered using an Order in Council mechanism.

Option One: Status Quo

14. Under the status quo option where:
 - the Council continues to use a combination of written agreement and easements to construct and maintain retaining walls on or under private land or under a building on private land; and
 - there is no regulatory intervention.

15. The status quo does not address the risks of delays in obtaining the consent of some affected private land owners to undertake work that affects their property. Easements involve time, survey costs and legal costs to prepare and register.

Option Two: Order in Council to extend section 181 to retaining walls (preferred option)

16. Option Two proposes an Order in Council under s71 of the CER Act.
17. The Order in Council would extend s181(1) of the LG Act to provide for the Council to construct works on or under private land or under a building on private land that it considers necessary for the support or stability of public land or public infrastructure by means of retaining walls. Easements are not required.
18. Under section 181(3) the Council would not be able to exercise these powers to construct works unless it had:
 - prior written consent of the owner of the land to the construction of the work; or
 - received no objection within one month of giving written notice under Schedule 12.
19. The Order in Council would extend s181(4) to allow the Council to enter onto private land, or adjoining land, to inspect, alter, renew, repair or rebuild existing retaining walls, including those not originally constructed under s181.
20. Under section 181(5) the Council would not be able to exercise these powers without first giving reasonable notice of the intention to enter the land to the owner and occupier (if any).
21. The Order in Council would leave the application of all other provisions of s181 unchanged, including:
 - Schedule 12 which covers an objection process and appeal rights; and
 - section 181(6) which covers compensation payable under the Public Works Act 1981 for any damage to the land made during the course of construction works and that is not remedied.
22. The Order in Council would cease on 19 April 2016 in line with the cessation of the CER Act.
23. The Department of Internal Affairs, the Canterbury Earthquake Recovery Authority and the Council support this option. This is the recommended option.

Option Three: Order in Council to extend section 181 to retaining walls and amend Schedule 12

24. Option Three proposes an Order in Council under s71 of the CER Act, as for Option Two, that in addition would:
 - shorten the objection period under clause 1(d) of Schedule 12 from one month to 14 days; and
 - streamline the appeal process to the District Court before a hearing commences under clause (2) of Schedule 12. This would be by way of a judicial conference taking place within 14 days of the Registrar of the District Court receiving the documents relating to the appeal. A judicial conference would allow the Judge to strike out the appeal, settle any issues to be determined or refer the case to appeal.
25. The curtailment of the existing objection period and modified appeal rights are not considered warranted, and may be a breach of natural justice under section 27 of the New Zealand Bill of Rights Act 1990 – (right to justice).

Costs, Benefits and Risks

Construction of retaining walls

26. The benefit to the Council of the draft Order is that it will allow the Council to commence work immediately with prior written consent and without the need for an easement. If no written agreement by the owner is forthcoming, the Council may proceed with the work if they do not hear from the owner within one month of notice of the work being given.
27. The draft Order puts the onus of engagement on the land owner. There is a risk that the powers under the draft Order are considered to be an infringement of private property rights. To mitigate this, and to provide consistency in the law, full objection and appeal rights under Schedule 12 apply, as for other functions under s181. This will fully align any additional functions with all existing functions under s181 and is consistent with principles of natural justice.

Rebuilding retaining walls

28. The benefit to the Council of the powers under the draft Order is that the repair and rebuild programme can proceed with less delay.
29. The cost to land owners will be the loss of the legal right to decline entry onto their land for the specific purpose of repairing and rebuilding retaining walls. The comprehensive communications programme by the Council will continue, to ensure residents are fully informed. The Council will continue to be as accommodating as practically possible to requests by owners. The benefit to land owners is that their land, or adjoining land, will be safely retained and stabilised.
30. The public good function of retaining walls in supporting or stabilising public land or infrastructure is akin to that of drainage and sewerage. Any infringement of private property rights is countered by the benefits to the wider public good. The Department considers that provision for retaining walls within the scope of s181 to be appropriate. Rights of access and construction of the Council, and objection and appeal rights of land owners, will be the same as those for works necessary for sewage and stormwater drainage works.
31. The powers under the draft Order will contribute to achieving the purposes of the CER Act as they will facilitate the repair and rebuild of land and infrastructure and mitigate risks of further damage and public safety.
32. From an administrative point of view, the draft Order can be readily implemented by the Council in line with drainage and sewerage works. As the draft Order would cease in 2016, it would be prudent for the Council to obtain easements over those properties where continuing access is needed for the ongoing maintenance of the retaining walls.

Other relevant matters

33. There are no other relevant actions underway or proposed that relate to the subject matter of the draft Order.

Consultation

34. The Selwyn District Council, the Waimakariri District Council and Environment Canterbury were consulted on whether the provisions in a proposed Order in Council should apply to their jurisdictions. They all responded that damage to retaining walls is not an issue in their jurisdictions.
35. The following were consulted on the Cabinet policy paper: The Canterbury Earthquake Recovery Authority, the Treasury, the Ministry of Justice, the Ministry of

Transport, Land Information New Zealand and the Christchurch City Council. The Department of Prime Minister and Cabinet has been informed.

36. The Canterbury Earthquake Recovery Authority and the Christchurch City Council were closely consulted on the draft Order.

Profile of draft Order in Council and proposed publicity

37. The proposals in the draft Order have already had some level of public profile and are mentioned in the Christchurch City Council's annual plan and on their website.
38. The Minister for Canterbury Earthquake Recovery and the Minister of Local Government may issue a media statement after the Governor-General has authorised the draft Order.

Conclusion

39. We look forward to receiving your recommendations so that regard can be had to them before the Minister of Local Government makes a recommendation on the draft Order.
40. The key contact for this item of work is:

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Yours sincerely



Marilyn Little
General Manager Policy

**Canterbury Earthquake (Local
Government Act 2002) Order 2013**

Governor-General

Order in Council

At Wellington this day of 2013

Present:
in Council

Pursuant to section 71 of the Canterbury Earthquake Recovery Act 2011, His Excellency the Governor-General makes the following order, acting—

- (a) on the advice and with the consent of the Executive Council;
and
- (b) on the recommendation of the relevant Minister made following the Canterbury Earthquake Recovery Review Panel's review of a draft of the order.

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Order

1 Title

This order is the Canterbury Earthquake (Local Government Act 2002) Order 2013.

2 Commencement

This order comes into force on [date].

3 Expiry

This order expires on the expiry of the Canterbury Earthquake Recovery Act 2011.

4 Effect

The modifications and extensions to the Act made by this order do not affect the text of the Act but require it to be read as if it had been amended in the manner indicated in this order.

5 Interpretation

In this order, unless the context otherwise requires, **Act** means the Local Government Act 2002.

6 Modification of section 181 of Act

(1) While this order is in force, section 181 of the Act must be read as if the following subsections were inserted after subsection (1):

“(1A) The Christchurch City Council may construct works on or under private land or under a building on private land that it considers necessary for the support and stability of public land or public infrastructure by means of retaining walls.

“(1B) In subsection (1A),—

“**public infrastructure** means community infrastructure or network infrastructure

“**public land** means land owned or controlled by the Crown (within the meaning of section 2(1) of the Public Finance Act 1989) or by a local authority.”

- (2) While this order is in force, section 181(3) of the Act must be read as if “, subsection (1A),” were inserted after “subsection (1)”.
- (3) While this order is in force, section 181 of the Act must be read as if the following subsections were inserted after subsection (4):
- “(4A) The Christchurch City Council may enter private land to inspect, alter, renew, repair, or clean any retaining walls owned or constructed by the council.
- “(4B) Subsection (4A) applies regardless of whether or not—
- “(a) the retaining walls were constructed under subsection (1A):
- “(b) the retaining walls were constructed before or after [date].”
- (4) While this order is in force, section 181(5) of the Act must be read as if “or subsection (4A)” were inserted after “subsection (4)”.

Clerk of the Executive Council.

Explanatory note

This note is not part of the order, but is intended to indicate its general effect.

This Order in Council, which comes into force on [date] and expires on the expiry of the Canterbury Earthquake Recovery Act 2011, modifies the operation of section 181 of the Local Government Act 2002 (the **Act**).

The modifications relate to retaining walls. The Canterbury earthquakes caused extensive damage to many of the estimated 2 596 retaining walls owned or constructed by the Christchurch City Council. Some of the damaged retaining walls have moved or blocked underground services such as wastewater and water supply. Others have impeded vehicle access or access to private properties. There are ongoing risks to public safety until repair or replacement of the damaged retaining walls is carried out.

Section 181 of the Act allows a local authority or territorial authority to construct works on or under private land or under a building on private land that it considers necessary for various purposes (for example, the supply of water and trade wastes disposal). The exercise of the power is subject to certain requirements under Schedule 12 of the Act if the owner of the land does not consent. Schedule 12 provides for the giving of notice of the proposed works, a process under which an occupier or owner may object to the proposed works, and a right to appeal to a District Court against a determination to proceed with the works.

The first effect of this Order in Council is to extend section 181 so that it allows the Christchurch City Council (the **council**) to construct works on or under private land or under a building on private land that it considers necessary for the support and stability of public land or public infrastructure by means of retaining walls.

Section 181 of the Act also allows a local authority to enter the land to inspect, alter, renew, repair, or clean any work constructed under the section or a corresponding provision of a former Act. This power is subject to giving reasonable notice of the intention to enter the land to the owner and occupier (if any). The second effect of this Order in Council is to extend this power to allow the council to enter private land to inspect, alter, renew, repair, or clean any retaining walls owned or constructed by the council (regardless of whether or not those walls were constructed under section 181 or before or after the commencement of this Order in Council).

This Order in Council is made under the Canterbury Earthquake Recovery Act 2011 and its effect is temporary.

Issued under the authority of the Acts and Regulations Publication Act 1989.

Date of notification in *Gazette*:

This order is administered by the Department of Internal Affairs.
