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Legal Bulletin

# How concerned is a party concerned? The question of standing at the Building Appeals Board

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In a previous article we examined the degree of responsibility that building surveyors have to adjoining owners under the *Building Act 1993*. It was concluded that an adjoining owner only has limited ability to challenge a private building surveyor's actions, unless that building surveyor has previously determined that protection works notices should be served, and Part 7 of the Act applies.

Decisions of a private building surveyor may be appealed to the Building Appeals Board, for example where an owner of land wishes to review a decision by the building surveyor to issue a Building Notice or Building Order. Under section 142 of the Act, reference is made to the *"owner of a building or land"* who may appeal the service of a Building Notice or the making of a Building Order. Conversely, section 155 widens the power to appeal to include adjoining owners, so that they too can apply to the Board if there is a dispute between the adjoining owner and the site owner arising under Part 7 (protection works).

The degree of standing of adjoining owners before the Building Appeals Board is limited, given the limited powers afforded adjoining owners by the *Building Act*. The fact remains that most of the adjoining owners' power to object arises at the planning stage, rather than under the *Building Act*. The Council however will retain on overseeing role if health and safety issues arise as a result of building works on private land. The municipal building surveyor, not the private building surveyor, has the power to issue an Emergency Order if public safety matters arise.

## The Queen v Building Regulations Committee Ex Parte Defris 42 LGR 147

This case illustrates the limited ability of the adjoining owner to challenge a building surveyor's discretion at the building permit stage. The primary decision from which the appeal was brought in *Defris* related to the issue of a building permit. It is unclear what loss or inconvenience the neighbours were alleging in that case, but the court found that the building surveyor in issuing the building permit was answerable to the owner of the land (or the applicant for the permit) rather than the neighbour / adjoining owner.

Although this case dealt with an earlier statutory scheme, prior to the advent of the *Building Act 1993*, the current Act does little to increase the capacity of an adjoining owner to challenge a building surveyor's decision, save where Part 7 (protection works) has been determined by the building surveyor to be applicable.

Even if a Building Notice or Building Order has been issued because of construction too close to a boundary, such that there is an overshadowing issue (for example, a breach of Regulation 417 of the Regulations), the adjoining owner's standing will still be limited. As we have seen, the power to issue a Building Order or a Building Notice by the private building surveyor arises by virtue of the earlier approval of a Building Permit by that practitioner. It is the owner of the site concerned (the subject property) who is served with the Notice or Order and who must comply with the requirements. It is the owner of the subject land who has the power to appeal a decision to serve a Building Notice or Building Order.

This is so even though the adjoining owner may be materially affected by the problems that the Building Notice or Building Order is designed to address.

Clause 13(3) of Schedule 3 to the *Building Act* discusses who must be served with a document commencing a proceeding before the Building Appeals Board, and this includes at (d): *"any other party concerned"*. So what does *"any other party concerned"* include? This is a vexed question, and makes it impossible with confidence to corral the connotations of those concerned, in the absence of a definition on point. Unless of course Part 7 issues are involved.

Clause 15(3) of Schedule 3 does state that, while the Board is not bound by any rule or practice as to evidence, it is bound by the rules of *natural justice*. On that basis, an adjoining owner whose interests (or whose amenity / enjoyment of their property) are disadvantaged may be afforded the right to be heard before the Board – where otherwise they may not be regarded as a party to the proceeding in a formal sense.

The case of **Kioa v West (1985) 159 CLR 550** is authority for the proposition that a decision maker is bound to accord procedural fairness when a decision affects (in a direct and immediate way) rights, interests or legitimate expectations.

Given the twin concepts of *procedural fairness* and *natural justice*, it is arguable that the Board is obliged to afford these people a right to be heard because their interests in the decision under review are material. Note however, that if they are not a party to the appeal in a formal sense they may not be given the right to be served with notices of determination, applications, and so forth.

We live in an age where consumer protection is becoming more rigorous. Only time will tell if, in the fullness of time, the lawmakers see fit to extend the powers to object and challenge under the *Building Act* to more fully cover the interests of adjoining owners.

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