

DRAFT

DRAFT

DRAFT

1 Introduction

This guidance note replaces *Party wall legislation and procedure* (6th edition), RICS guidance note. It provides guidance for RICS members who accept instructions for which the *Party Wall etc. Act 1996* (the Act) may be relevant. It also describes the circumstances in which the Act will apply, as well as the procedures to be followed where it does.

A surveyor as defined by the Act is any person not being party to the matter who is appointed or selected under section 10 to determine disputes in accordance with the procedures set out in the Act.

The role of surveyors when acting for a client in the early stages of these procedures is addressed in this document, as is the duty of surveyors who are formally appointed to administer the Act's dispute resolution mechanism. It assumes that those accepting such appointments possess the necessary knowledge and professional competence to do so. RICS requires that members carry out their professional work with due skill, care and diligence and with proper regard for the technical standards expected of them.

This guidance note deals only with matters connected with the Act, and members are advised that other legal, regulatory and practical considerations may also be relevant to construction work close to a boundary.

The role of a party wall surveyor is a statutory and personal one and one that is independent of instructions from an appointing party.

A member must comply with the RICS *Rules of Conduct* and have regard to this guidance insofar as they do not conflict with the provisions of the Act.

2 Professional conduct

While a party wall surveyor is minimally required to act only in accordance with their statutory obligations, a member of RICS is expected to meet public expectations of professional and ethical behaviour commensurate with membership, alongside their duty to act within the Act.

With this in mind, members should note that compliance with the wording of the Act may not itself be sufficient to achieve compliance with the standards expected of an RICS member. Members have professional duties over and above the strict wording of the Act. The quasi-judicial function of the party wall surveyor does not bestow judicial immunity upon a surveyor such that it protects a member, appearing before an RICS disciplinary panel, against allegations that they have acted incompetently or in bad faith.

RICS considers these two considerations (strict adherence to the Act and ethical conduct) to be complementary, not mutually exclusive, professional obligations.

For the purpose of this guidance note, members may want to consider the following rules of conduct:

- **Rule 3:** 'Members shall at all times act with integrity and avoid conflicts of interest and avoid any actions or situations that are inconsistent with their professional obligations.'
- **Rule 4:** 'Members shall carry out their professional work with due skill, care and diligence and with proper regard for the technical standards expected of them.'
- **Rule 5:** 'Members shall carry out their professional work in a timely manner and with proper regard for standards of service and customer care expected of them.'

There is a very real benefit, in terms of the requisite competence, ethical behaviour and client care, to a member of the public who chooses to instruct an RICS member as their party wall surveyor instead of a non-RICS member.

2.1 Conflicts of interest

The Act does not define a conflict of interest, nor does it explicitly prevent a party wall surveyor from acting where a conflict of interest exists.

Nonetheless, RICS members are expected to avoid actual or perceived conflicts of interest when accepting party wall appointments. Members should also consider whether a conflict arises during the appointment and whether that conflict renders them incapable of performing the role.

The surveyor should appreciate that, once appointed under the Act, they perform a statutory function and are therefore no longer solely responsible to the client but owes duties to both parties to the dispute (see chapter 7 of this document). To emphasise this, it is customary for the surveyor to refer to the party who makes the appointment as the 'appointing owner' rather than the client. As a result, a member should consider their position in relation to all parties as part of any conflict checking procedures.

RICS may ask members to demonstrate that they have considered whether a conflict of interest, or a perception of conflict, has arisen and what steps they have taken to avoid or manage that conflict.

Members should refer to *Conflicts of interest* (1st edition), RICS professional statement.

2.2 Acting with integrity

While the Act is silent on a member's conduct while carrying out their appointment, RICS expects its members to be honest, straightforward and trustworthy in all that they do. This can relate to both the way they interact with the parties and the way they make decisions pursuant to their statutory appointment.

The RICS *Global Professional and Ethical Standards* define acting with integrity as:

- Being trustworthy in all that you do.

- Being open and transparent in the way you work. Sharing appropriate and necessary information with your clients and/or others to conduct business and doing so in a way so they can understand that information.
- Respecting confidential information of your clients and potential clients. Don't divulge information to others unless it is appropriate to do so.
- Not taking advantage of a client, a colleague, a third party or anyone to whom you owe a duty of care.
- Not allowing bias, conflict of interest or the undue influence of others to override your professional or business judgements and obligations.
- Making clear to all interested parties where a conflict of interest, or even a potential conflict of interest, arises between you or your employer and your client.
- Not offering or accepting gifts, hospitality or services, which might suggest an improper obligation.
- Acting consistently in the public interest when it comes to making decisions or providing advice.

2.3 Competence

In the context of party wall surveyors, it is notable that not every award that is successfully appealed is the product of incompetence. Likewise, a member cannot evidence competence by virtue of the fact that their award has not been appealed.

Instead, members should ensure that, at all stages throughout their appointment, they undertake their work with due skill, care and diligence and with proper regard to the technical standards expected of them. The purpose of this document is to assist members in understanding the technical standards expected of them.

2.4 Standards of service and complaints handling procedure

It is an RICS requirement that all RICS regulated firms operate a complaints handling procedure (CHP). They should be prepared to provide a copy of the procedure when asked.

It is, however, well established that a party involved in a party wall dispute cannot use the CHP to influence or intimidate a surveyor who is acting in a statutory role under the Act. The CHP also cannot be used to avoid or delay satisfying award obligations under that statutory process.

RICS recognises the statutory independence of the surveyor in party wall matters. Both surveyors and owners should fully understand that nothing in the RICS *Rules of Conduct* or the RICS CHP can adjust or modify an award, as this can only be achieved via an appeal.

All members are expected to provide a proper standard of service pursuant to rule 5 of the *Rules of Conduct for Members*. If a complaint is received about work being carried out under a contract with an RICS regulated firm, the firm's CHP should be followed. In the case of a member working through a non-regulated firm the member should still consider their obligations under rule 5 of the *Rules of Conduct for Members* when addressing that complaint.

2.5 RICS investigations

This guidance is intended to ensure that parties to the dispute do not try to challenge the substance of an award through the RICS complaints process rather than using the appeal process required under the Act. It is not intended to allow ongoing party wall matters to prevent RICS from investigating and taking action in relation to alleged breaches of the *Rules of Conduct* where it believes it is appropriate to do so.

For the avoidance of doubt, it is entirely within the discretion of RICS to decide whether it should start or continue an investigation into a surveyor's professional conduct while party wall matters are ongoing. Should an RICS member wish to ask for matters to be put on hold it is for him or her to explain why an RICS investigation would interfere with proper operation of the statutory powers. For more information, please refer to *Complaints handling* (1st edition), RICS guidance note.

3 Nature and purpose of the Party Wall etc. Act 1996

3.1 Construction work close to boundaries

Despite its title, the Act is not concerned solely with party walls (as defined in section 3.5(c) of this document). It also defines the relationship between neighbouring owners, and in some cases occupiers, concerning specified types of construction work on, or in close proximity to, the boundary between adjoining properties. These types of construction work will often involve a party wall.

RICS members should be particularly mindful of the fact that work undertaken wholly on the land of an owner may nevertheless be subject to the requirements of the Act. For example, excavations at particular depths and within certain distances of adjoining buildings are regulated, even where no party wall is present. Furthermore, the Act also regulates work to certain types of structure wholly in the ownership of one of two neighbouring owners, in addition to work affecting party walls.

3.2 Historical context

The relationship between neighbouring owners during construction operations is governed primarily by common law. The law of tort limits the extent to which a landowner can undertake construction works that either directly or indirectly impinge on adjoining land.

In some cities in England, these common law rules have historically been varied in certain respects by the existence of local statutory codes. The most significant of these was the London code, which can be traced back to Henry Fitz-Ailwyn de Londonstane in 1189. The code first appeared substantially in its modern form in Part III of the *Metropolitan Building Act 1855* and, most recently, in Part VI of the *London Building Acts (Amendment) Act 1939*. Effective from 1 July 1997, the broad effect of the *Party Wall etc. Act 1996* is to extend the provisions of the London code to all of England and Wales.

The only exceptions are Crown properties occupied by the Royal Family and the London Inns of Court. Common law rules regulating the rights of neighbouring owners must be read in the context of the procedural requirements contained within the code.

When interpreting the code contained within the Act, RICS members should consider the cases decided under this Act and cases decided under earlier enactments containing the London code and any change to the wording of the relevant statute.

The Act has been amended by *The Party Wall etc. Act 1996 (Electronic Communications) Order 2016* which came into force on 6 April 2016.

3.3 Effect on common law rights

The purpose of the Act is to facilitate construction operations in the vicinity of boundaries. It achieves this partly by providing a procedural framework that ensures neighbouring owners are notified of impending construction works.

In addition, the Act entitles property owners to interfere with the land and structures belonging to neighbouring owners. The Act provides statutory authority to perform acts that would otherwise constitute the tort of trespass or nuisance, provided that the procedures under the Act are followed.

The demolition and rebuilding of a party wall, the cutting in of a flashing into a neighbour's wall and the entry onto a neighbour's land to perform other works in pursuance of the Act are all examples of the types of intrusive operation that are authorised.

Although sanctioned by the Act and subject to the service of formal notice or written agreement, these rights should not be exercised in a way that causes unnecessary inconvenience to adjoining owners or occupiers.

3.4 Unnecessary inconvenience

The Act authorises work that may involve physical encroachment onto a neighbour's land, or produce dust, vibration, noise or some other inconvenience or annoyance, but it must be carried out in such a way that it does not cause unnecessary inconvenience. If this is caused, it would be unlawful and

actionable by adjoining owners or occupiers. Surveyors should be careful not to authorise works outside of the Act.

The appointed surveyors are central to this process of regulation. Their primary role is to balance the interests of the two appointing parties and should not frustrate the statutory process. They are also required to ensure that the building owner is able to exercise his or her rights under the Act, but in such a way that only necessary inconvenience is caused to adjoining owners or occupiers. This is achieved by the surveyors defining, in an award, the detail of the work that may be lawfully carried out under the Act and undertaking reasonable inspections of work to which an award relates.

3.5 Definitions

Sections 20 – 22 of the Act contain the relevant statutory definitions and interpretation provisions. Attention is drawn to the following:

- a) The geographical area covered by the Act is England and Wales.
- b) An owner is defined, in simple terms, as someone with more than a yearly tenancy. There may be more than one owner of an adjoining property, e.g. a freeholder, long leaseholder or someone with an agreement to purchase or lease.
- c) A party wall has two definitions in section 20. It can be either:
 - i) type a – a wall standing on the land of two owners to a greater extent than simply projecting foundations (Figures 1 and 2) or
 - ii) type b – the part of a wall standing on the land of one owner that separates the buildings of two owners (Figures 3 and 4).

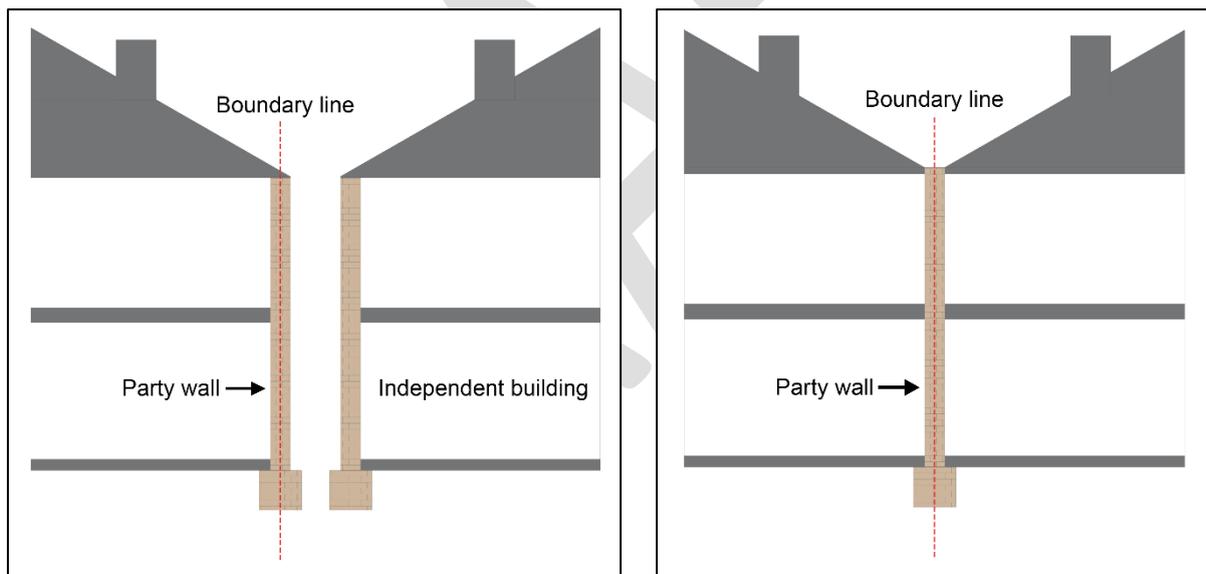


Figure 1 (left) and Figure 2 (right): Type (a) party walls

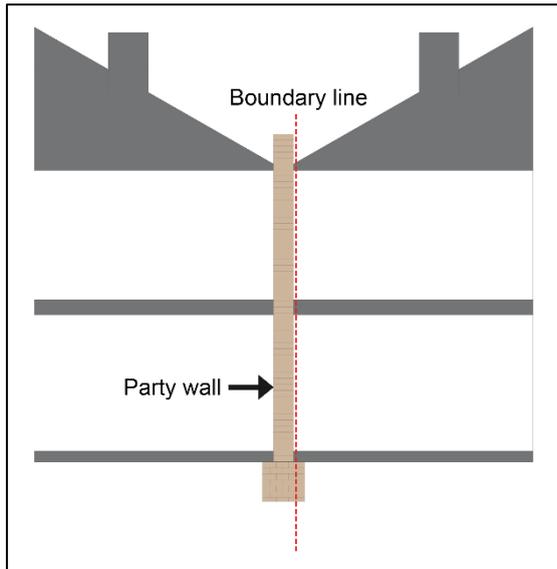


Figure 3: Type (b) party wall

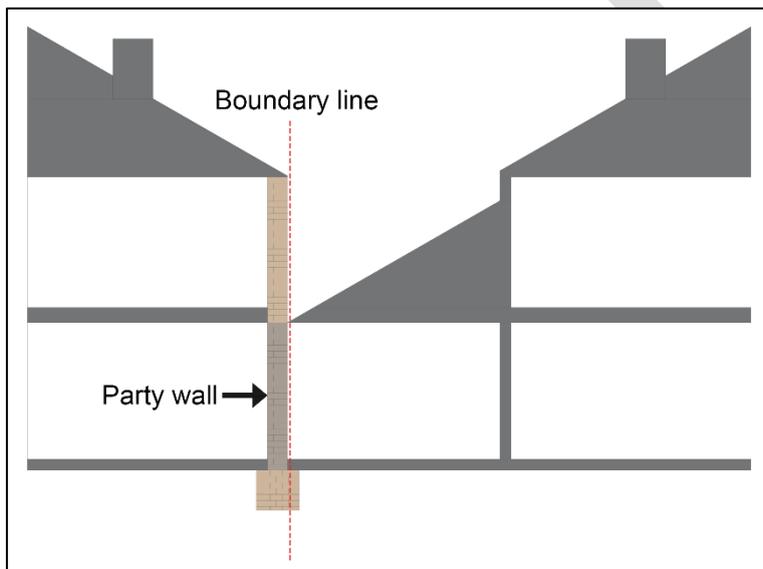


Figure 4: Type (b) party wall

In Figure 4, the owner, the house on the right, could have constructed a building using some part of the external wall of the building to the left to enclose his or her own building. The ownership of the wall remains with the owner of the building on the left, but wherever the building on the right connects with the wall, that part becomes a party wall (see the shaded area).

- d) A party structure can be a party wall, a floor or a partition separating different parts of a building each with separate staircases or entrances (Figure 5).
- e) A party fence wall is a free-standing wall that is not part of a building and stands astride a boundary (Figure 6).
- f) The person (or company) who wishes to initiate any work on their side of a wall is described as the building owner. The owner(s) on the other side is each an adjoining owner.
- g) Special foundations are foundations in which an assemblage of beams or rods are employed for distributing any load.

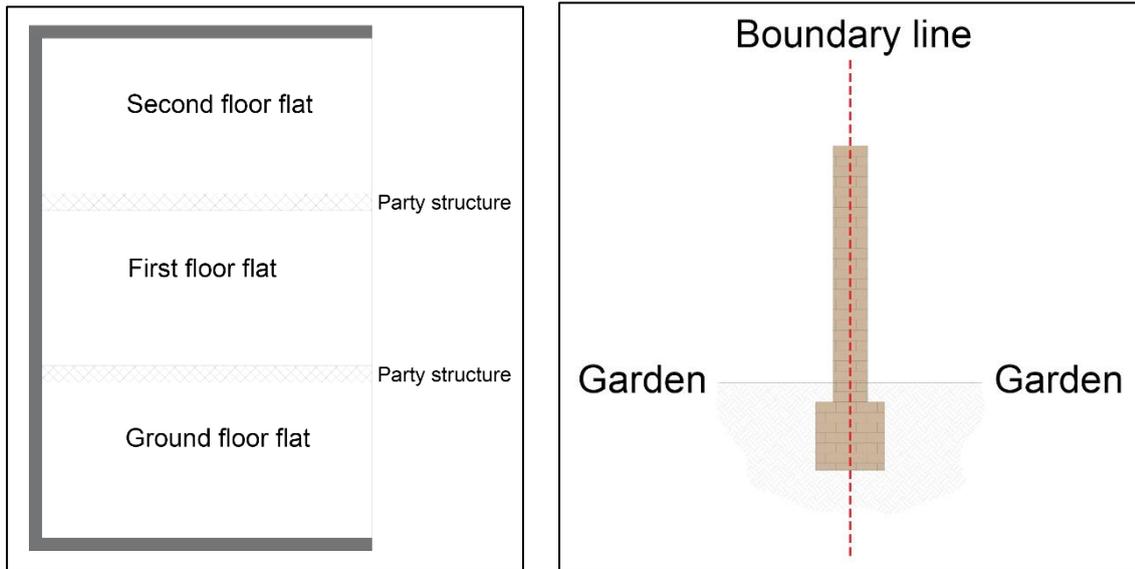


Figure 5 (left): Party structures and Figure 6 (right): Party fence wall

While not defined, the Act also uses the following expressions:

- A boundary wall is a freestanding wall, not being part of any building, which stands wholly on the land of one owner at, but not astride, a boundary (except to the extent of any projecting footing or foundation) (Figure 7).
- An external wall is a wall that forms part of a building standing wholly on the land of one owner and which may be situated at, but not astride, a boundary (except to the extent of any projecting footing or foundation) (Figure 8).

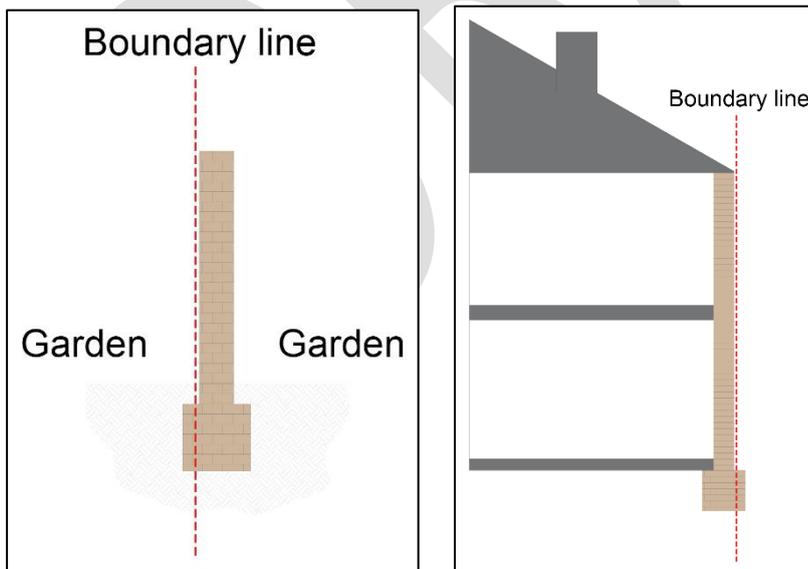


Figure 7 (left): Boundary wall and Figure 8 (right): External wall

4 Advising on the application of the Act

4.1 Surveyors' responsibilities

In taking instructions in advance of a dispute arising under the Act, a surveyor advising on the application of the Act should provide their client with a copy of their terms and conditions.

Surveyors are often asked to advise whether the Act applies to specific building operations. They should be familiar with the circumstances in which the Act applies and should be able to advise whether service of notices will be required in particular situations.

When advising in this context, surveyors are acting in the capacity of professional consultants and owe duties to their clients on this basis. This capacity may later change to that of an 'appointed surveyor' once notices have been served and a dispute has arisen under the Act (see chapter 6 of this document). At every stage of their involvement with party wall work, surveyors should be clear about the capacity in which they are currently acting and to whom their professional duties are owed.

The Act regulates construction operations in three distinct situations:

- line of junction works
- works to party walls and certain other boundary structures and
- adjacent excavation works.

Surveyors should be familiar with all of these.

4.1.1 Line of junction works

Line of junction works occur where nothing is built on a boundary line (line of junction) or where the only structure built is a free-standing boundary wall that does not straddle the boundary line (see the precise wording in section 1(1) of the Act). The presence of a fence alone means that the boundary line is not 'built on' within the meaning of the Act.

In such situations, a building owner is required to serve a line of junction notice, where the construction of one of the following structures along the line of junction is being proposed (see section 20 of the Act for definitions of the following terms):

- a party wall
- a party fence wall or
- a boundary or external wall on the building owner's own land up to the line of boundary.

Where the construction of a party wall or party fence wall astride the boundary line is being proposed, the building owner must serve notice under section 1(2) and the express consent of the adjoining owner must be obtained. If that consent is not forthcoming, the wall must be built entirely on the building owner's land and at his or her own expense. However, projecting footings may be placed onto the land of the adjoining owner provided these are necessary for the construction of the wall and are not special foundations. Special foundations are defined in section 20 of the Act (see section 3.5 of this document) and include reinforced concrete foundations. In circumstances in which special foundations are required, further notice is not needed under section 1(5).

Where the building owner wishes to build a wall directly along his or her side of the line of junction, section 1(5) requires notice to be served. In this case, the building owner will again have a right to place footings across the boundary, under the land of the adjoining owner, providing these are necessary for the construction of the wall and are not special foundations. In either of the aforementioned situations, the building owner can only place special foundations on the land of an adjoining owner with the adjoining owner's express consent in writing.

Where a line of junction notice is required, it must be served by the building owner on any adjoining owner at least one month before the intended start date for the works. The notice should describe the intended wall, state whether the building owner plans to lay projecting foundations on the adjoining owner's land and should give details of any access requirements.

4.1.2 Works to party walls and certain other boundary structures

Section 2 of the Act grants rights to undertake specific work to certain types of boundary structures. The boundary structures involved are generally jointly owned by the building owner and adjoining owner (party walls, party fence walls and party structures). However, in some circumstances, rights are also granted in respect of structures abutting the boundary line but situated entirely on adjoining land, or new structures entirely on the building owner's land adjacent to a party wall.

The rights granted include the following operations:

- underpinning
- thickening
- raising
- repairing
- demolishing and rebuilding
- cutting into
- cutting away/cutting off projections
- reducing height of and
- exposing.

When seeking to exercise any of the rights in section 2, the building owner must usually first serve a party structure notice on the adjoining owner (see section 3(3) of the Act for the limited circumstances when this is not required). Notice must be served at least two months before the intended start date for the works.

There is no right to place special foundations on the adjoining owner's land without the adjoining owner's written permission.

Surveyors should examine the precise wording of section 2(2) of the Act to determine the extent to which the Act applies to the particular structures under consideration. They should not assume that the Act does not apply simply because there is no party wall.

4.1.3 Adjacent excavation works

The Act not only regulates works to boundary structures, but it also provides protection for buildings or structures where excavations or excavations for and erection of a building or structure on adjacent land are planned. Before undertaking excavations falling within the scope of the Act, a building owner is required to serve a notice of adjacent excavation and construction on the relevant adjoining owner(s).

The building owner then has a right to undertake certain work on the adjoining owner's land 'to underpin or otherwise strengthen or safeguard' the foundations of adjacent buildings or structures.

Where requested by an adjoining owner, the building owner is required to do this as far as may be necessary and at their own expense.

The following types of excavations fall within the scope of the Act:

- under section 6(1), excavations within 3m of a building or structure to a lower level than the bottom of the foundations of such building or structure (Figure 9) and
- under section 6(2), excavations within 6m of a building or structure that will cut a line drawn downwards at 45 degrees from the bottom of the existing foundation from a point in line with the outside face of such building or structure (Figure 10).

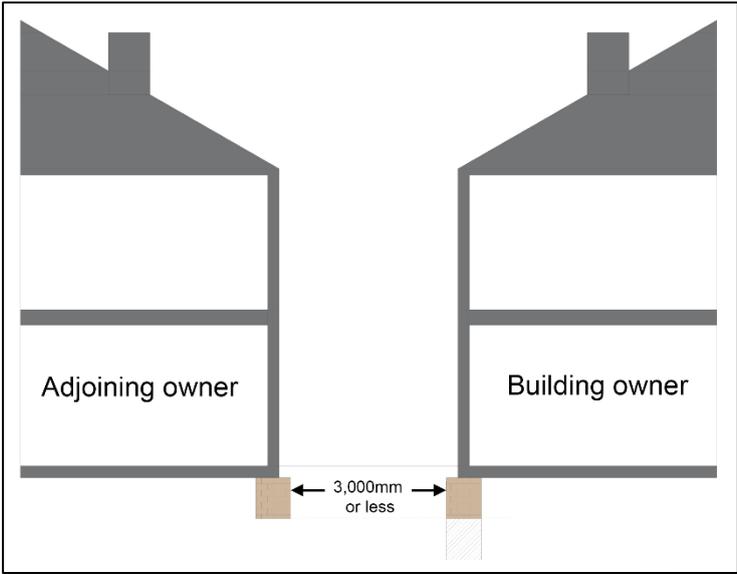


Figure 9: Section 6(1) excavations

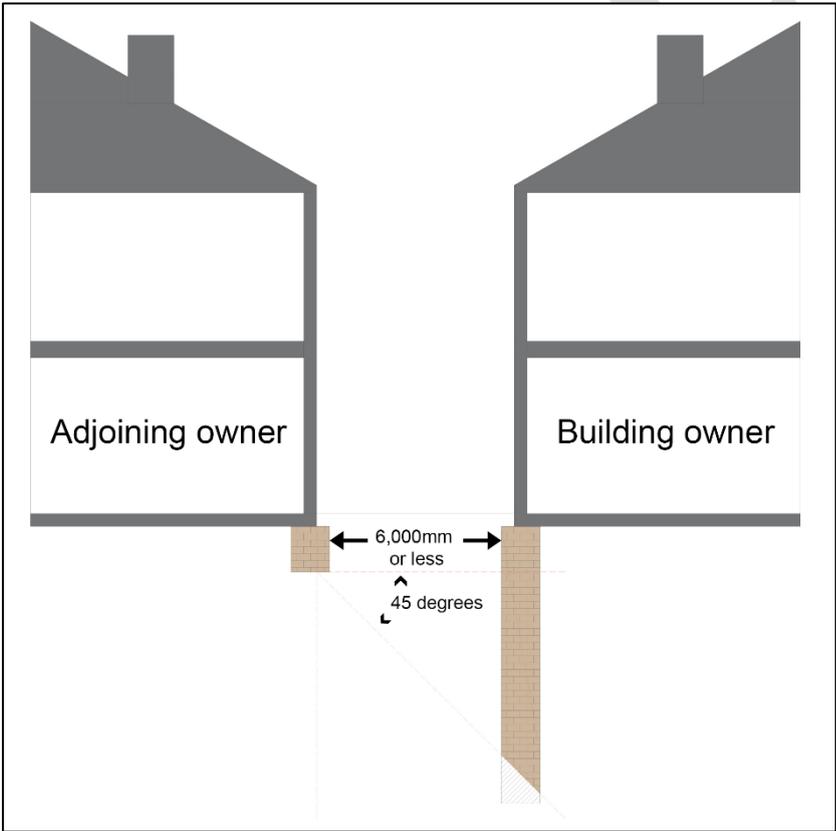


Figure 10: Section 6(2) excavations

As with the line of junction works (see section 4.2 of this document), the building owner must serve notice of such adjacent excavations on any adjoining owner at least one month before the intended start date for the works. There is no right to place special foundations on the adjoining owner's land without written permission.

The best practice recommendation is that all types of piling be notifiable for the purposes of the Act.

4.2 Access to an adjoining owner's land

Under section 8 of the Act, a building owner has a right of access to the adjoining owner's land for the purpose of executing work in pursuance of the Act (see section 8.7 of this document).

DRAFT

5 Service of notices

5.1 The importance of valid service

Service of primary notices (as required by sections 1, 3 and 6 of the Act) commences a statutory procedure. Any deficiency in service may render the whole procedure invalid (see chapter 6 of this document). The resulting delay to the project, with consequent increase in costs, may be considerable. Where surveyors are responsible for the preparation and service of notices, they should be aware of related professional liability issues.

It is particularly important for surveyors to be aware of the strict time limits stated in the Act for service of notices. These limits give adjoining owners time to consider the impact of the proposals and enable counter-notices, queries and, ultimately, disputes to be dealt with properly. These time limits may not be overridden other than by agreement between the owners. The building owner must, therefore, be advised as to the minimum notice periods and that the time to complete awards may be longer than the statutory notice periods.

It may be appropriate to advise the owners to allow for the option to extend the period for reply to notices by agreement – over bank holidays, for example, or other periods when it is known that neighbours may be away. Such courtesy would allow for a friendlier approach to be adopted.

5.2 Content of notices

Any notice should give enough detail and description for the adjoining owner to assess the impact of the proposals on the relevant building. Failure to provide this may invalidate the notice. The notice may be accompanied by drawings. Note that drawings are mandatory for section 6 notices. In any event, the notice being served must always comply with the Act's specific requirements, and surveyors should refer to the Act in this respect.

All notices are required to be served by building owners, but they can authorise surveyors, acting as their agents, to sign and serve notice on their behalf. Surveyors should ensure that they have the necessary written authority to do this. It will often be appropriate to use the form of surveyor's statutory appointment and authority provided in Appendix A of this guidance note. This appendix also deals with the formal appointment of surveyors under the Act, but the forms do not, in themselves, satisfy the requirements for terms of business for the appointment of a chartered surveyor.

All notices must:

- be in writing
- give the name and address of the building owner – if owned in joint names, all joint owners must be named
- be signed – signature should be by the owner, or a person fully authorised to sign notices on the owner's behalf
- be dated – the date on the notice should be the one on which it is delivered in person, posted to the recipient owner or delivered to the adjacent premises
- be properly served on all adjoining owners as defined by the Act, whether freehold or leasehold – if an adjoining property is owned in joint names, it has been held that it is only strictly necessary to serve the notice on one of them. However, it is good practice to effect service of a copy of the notice on all joint owners whose identities and addresses are known
- state the nature and particulars of the intended works and the date on which it is intended to commence the works – descriptions of intended works should be directed toward a layperson and contain enough detail to enable the extent of works to be understood
- where served under section 3 and involving special foundations, be accompanied by drawings showing the special foundation details and reasonable particulars of the loads to be carried and
- where served under section 6, be accompanied by plans and sections showing the site and depth of any excavation and the site of any new building, and state whether the building owner intends to underpin, or otherwise strengthen, or safeguard the foundations of the

adjoining owner's building – it is good practice to identify the location of the adjoining owner's building on the drawings.

There is no prescribed format for the required notices. However, specimen notices and acknowledgment forms are shown in Appendix B.

5.3 Methods of service

It is recommended that service of notices be made by one of the methods specified in section 15 of the Act. Section 15 provides that notices may be served on an individual in person, or by posting it to his or her usual or last known residence or place of business in the UK. In the case of a body, corporate service can be effected by delivering it in person or posting it to the secretary or the clerk at the registered or principal office.

Any notice (or other document) may alternatively be served on an owner by addressing it to 'The Owner' of the premises (naming the premises) and delivering (not posting) it to a person on the premises. If no person to whom it can be delivered is found there, the notice may be affixed to a conspicuous part of the premises (but not put through the letter box).

A time allowance should be made for postal delivery of both the notice and an acknowledgment or counter-notice.

Under section 15(1)(a) of the Act, where notice is served electronically the recipient must have stated a willingness to receive it electronically. However, it may be that a notice served electronically will be validly served if received by the recipient, notwithstanding the fact that he or she has not stated a willingness to receive the notice by electronic communication – see *Knight v Goulandris* [2018] EWCA Civ 237.

5.4 Responses to notices

When notice is received, the adjoining owner can do one of three things:

- nothing
- consent to the works as proposed or
- dissent from the works as proposed.

These choices are covered in the following paragraphs.

5.4.1 The adjoining owner does nothing

For party structure notices and notices of adjacent excavation, the adjoining owner's failure to respond within 14 days of service of notice will result in a deemed dispute. The section 10 statutory dispute resolution process then commences.

If the adjoining owner fails to respond to a notice the building owner can serve a request on the adjoining owner to appoint a surveyor within ten days. If the adjoining owner fails to appoint a surveyor as requested, or refuses to make an appointment, the building owner may appoint a surveyor on behalf of the adjoining owner under the provisions of section 10(4). In either circumstance, it is not possible to appoint an agreed surveyor.

In the case of line of junction notices served under section 1(2), if the adjoining owner fails to respond within 14 days, the building owner may only build the proposed wall entirely on his or her own land but can proceed as soon as the notice period has elapsed. As mentioned in section 4.2 of this document, the building owner has the right to place below the level of the land of the adjoining owner such projecting footings as are necessary for the construction of the wall, providing they are not special foundations (as defined in section 3.5(g) of this document).

Where line of junction notices are served under section 1(5), the adjoining owner's failure to respond allows the building owner to proceed with the proposed works after the notice period has elapsed. Again, this includes the right to place necessary projecting footings on the adjoining owner's land, providing they are not special foundations.

5.4.2 The adjoining owner consents to the works proposed

The adjoining owner may express consent in writing to the works as proposed in the notices. This should not be considered as a waiver of the adjoining owner's rights under the Act, but simply a statement that, at present, there is nothing in dispute.

The surveyor should therefore advise of the need to state the terms on which any consent is granted and the desirability or requirement of recording the current state of the adjoining owner's premises in a schedule of condition.

Consents should reserve the adjoining owner's rights under the Act and confirm that disputes which subsequently arise in connection with the works are to be resolved in accordance with the section 10 procedures.

5.4.3 The adjoining owner dissents from the works proposed

If the adjoining owner dissents from any notice served, the dispute must be settled in accordance with section 10 of the Act. Each owner may agree to the selection of one surveyor (the agreed surveyor) who will determine the matters that are in dispute. Alternatively, each party may appoint a surveyor and those two surveyors will select a third surveyor. It is good practice for the surveyors at this point to advise all appointing owners of the identity of the third surveyor.

Two of the three surveyors will then determine the matters in dispute. Although either of the appointed surveyors, or either of the owners, may call upon the third surveyor to determine matters on which they cannot agree (see chapter 10 of this document).

Section 10 allows the surveyors to determine any matters connected with any work to which the Act relates and are in dispute. These include the right to execute the works, the time and manner of execution of the works and any other matter arising out of, or incidental to, the dispute. It would also be sensible to advise the adjoining owner of whether there will be projecting foundations.

5.5 Service of counter-notices

Although rarely used, following receipt of a notice for works under section 2 of the Act, the adjoining owner may serve a counter-notice within one month setting out such limited additional works as defined in the Act to the party structure or to special foundations as may reasonably be required. It must be accompanied by plans, sections and particulars of that specific work.

The building owner must comply with the request unless to do so would be injurious or cause unnecessary inconvenience or unnecessary delay to the works. The costs of the work will be apportioned according to the benefit to either party.

6 Accepting appointments under the Act

6.1 Letters of appointment

The appointment of a surveyor arises out of a dispute between the two owners, usually following service of notice. A dispute is deemed to arise when the adjoining owner does not respond to a party structure notice or notice of adjacent excavation within 14 days, or may in fact arise from the proposed works or their execution.

In any of these situations, the parties must appoint surveyor(s) as described in section 5.4.3 of this document. Appointment(s) must be made in writing and directly to the individual surveyor appointed, rather than made in the name of the surveyor's firm. See the surveyor's statutory appointment and authority in Appendix A for an appropriate form of appointment.

It is important to note the distinction between an appointment as a party wall surveyor and an authorisation to act as an agent. In each case, however, the surveyor should make the necessary arrangements with the appointing owner in respect of terms of engagement and payment of costs.

An appointment must be signed by the owner of the relevant property, or an agent specifically authorised in writing to make such appointment. In the latter case it is good practice to request a copy of the agent's authority. Where property is held in joint ownership, for example a house owned by both a husband and wife, the appointment must be signed by, or on behalf of, all relevant parties.

If an appointment is invalid, a subsequent award may also be invalid (see chapter 7 of this document).

Therefore, appointed surveyors are recommended to provide each other with copies of their written appointment before proceeding with any work to negotiate an award.

The selection of a third surveyor should be communicated in writing between the appointed surveyors; it is not necessary for a letter of selection to be sent to the third surveyor at this stage. It is good practice to select a third surveyor who is a chartered surveyor with a sound knowledge of the Act and extensive experience of administering its provisions. The appointing owner should be advised of the name and address of the third surveyor.

6.2 Status of a party-appointed surveyor

Any surveyor appointed under section 10 of the Act is undertaking a statutory role. The appointed surveyor should seek to conclude an award that fairly sets out the rights and obligations of both owners, ensuring that the work specified in the award is permissible under the Act. The award should enable the building owner to carry out the work without causing unnecessary inconvenience to adjoining owners or occupiers.

The appointed surveyor should seek to identify and represent the interests of the appointing owner, but this should not extend to following instructions from their appointing owner where these conflict with their duties under the Act.

The appointment of a surveyor cannot be rescinded by an appointing owner. The appointment only comes to an end if the surveyor dies or becomes or declares him or herself incapable of acting. This ensures that the surveyor is able to conclude an award without undue interference from the appointing owner.

It is necessary for the surveyor to act diligently in considering information provided and in seeking to reach agreement and conclude an award. The Act allows one surveyor to conclude an award alone if the other surveyor has refused to act effectively or has neglected to do so for ten days after being so requested in writing.

6.3 Appointment as agreed surveyor

The two owners may expressly concur in the appointment of an agreed surveyor. This surveyor must act impartially and work towards concluding an award that is fair to both owners, regardless of which owner made the initial appointment, or if one owner is an established client. The agreed surveyor

must conclude an award that sets out the rights and duties of both parties and the works to be carried out.

If an agreed surveyor refuses to act or neglects to act for a period of ten days after being required in writing to do so by either party, the appointment will end. Both owners must appoint another agreed surveyor, or separate surveyors, who will then settle the dispute.

There is no third surveyor role where there is an agreed surveyor.

RICS recognises that the role of the agreed surveyor does not in itself represent a conflict of interest. Surveyors should still undertake checks as noted under section 2.1 of this document.

6.4 The statutory function of the surveyor

The surveyor should appreciate that the role of appointed surveyor differs significantly from the role in providing advice on the application of the Act, or in serving notices on a client's behalf. Once appointed under the Act, the surveyor performs a statutory function and is therefore no longer solely responsible to the client but owes duties to both parties to the dispute (see chapter 7 of this document). To emphasise this, it is customary for the surveyor to refer to the party who makes the appointment as the 'appointing owner' rather than the client.

7 Powers and duties of appointed surveyor

7.1 Surveyors' role

Once appointed, either the agreed surveyor acting alone, or the three surveyors (two party-appointed surveyors and the third surveyor) acting collectively, constitutes what has been referred to by the courts as a practical tribunal.

That role differs from that of most conventional tribunals (for example, the courts and arbitrators). It is charged with the specific task of enabling the building owner to exercise his or her rights under the Act without causing unnecessary inconvenience to adjoining owners or occupiers.

It achieves this by regulating the nature, time and manner of the construction operations even-handedly between the parties.

The actions of the members of a practical tribunal are restricted, as they must ensure that they act within their proper jurisdiction and that they only exercise powers granted to them by the Act.

Where surveyors exceed either their jurisdiction or their statutory powers, their awards, or some part thereof, may be invalid and set aside by the courts, or may be unenforceable. The surveyors are also subject to legal duties, both individually and as members of the tribunal. A party wall surveyor is a unique appointment. And despite having a quasi-judicial function, party wall surveyors do not hold judicial immunity.

7.2 Surveyors' duties

The first statutory duty of the appointed surveyors is to select a third surveyor to complete the tribunal. Before agreeing that selection, each surveyor should be satisfied that the nominee has substantial experience of the statutory proceedings and adequate expertise to fairly determine a statutory dispute if one is referred to him or her.

Surveyors should not select third surveyors where this may give rise to a potential or perceived conflict of interest. The tribunal is then under a duty to act impartially between the parties. It also owes a duty to perform its obligations diligently and to exercise reasonable care.

When acting as party-appointed surveyors, they owe a duty of care to their own appointing owner but will continue to owe a duty to both parties to perform the obligations diligently and impartially. Therefore, while safeguarding the interests of their own appointing owner within the tribunal, surveyors should not follow an owner's instructions where those instructions would frustrate the proper function of the legislation.

7.3 Surveyors' jurisdiction

The surveyors will only have jurisdiction if the tribunal of which they form a part has been properly constituted. The following paragraphs relate to the Act's requirements for the proper constitution and competence of the tribunal, as well as the authority it gives to the surveyors.

7.3.1 Proper constitution of the surveyors' tribunal

The Act sets out detailed requirements for the composition of the surveyors' tribunal and the appointment of the surveyors in section 10(1) – (9). Where there has been a failure to follow the requirements precisely, the surveyors may lack jurisdiction and the courts may declare their awards to be invalid. Because the Act sanctions the interference with the property rights of adjoining owners, the courts require the Act's requirements to be followed scrupulously and have advised that the approach of surveyors to those requirements ought not to be casual.

7.3.2 Competence of the surveyors' tribunal

Section 10(10) of the Act provides that the surveyors may only make awards on matters that are in dispute between the parties and are connected with work to which the Act relates. The nature of disputes within the meaning of the Act is explored in section 5.4 of this document, and there will rarely be any doubt as to whether matters are in dispute. The necessary degree of connection between the dispute and work to which the Act relates often causes more difficulty.

Although appointed surveyors are frequently called upon to resolve a variety of disputes between the parties, they should be careful to distinguish between those that must be settled by consensual negotiation and those that can be properly addressed by their award. Disputes about boundaries, crane oversailing, easements and the general conduct of piling operations outside the prescribed distances are all examples that would have to be settled by consensual negotiation. As such, appointed surveyors have no statutory jurisdiction to address them in an award. Surveyors may take separate instructions outside of their statutory appointment to consider other matters between the neighbours.

7.3.3 Authority of the surveyors

The surveyors' jurisdiction to make binding awards arises from and is prescribed entirely by the Act. This includes the power, under section 10(12), to determine any of the following issues:

- the right to execute work under the Act
- the time and manner of executing any such work or
- any other matter incidental to the dispute referred to them, including the costs of making the award.

An award that purports to determine some other issue will have exceeded the statutory powers, thus the award or part thereof may be invalid.

The surveyors' power to determine the right to execute work is only a declaration of the existence of a statutory right in a particular situation. The surveyors have no power to confer new rights on the parties. On the other hand, the power to determine the time and manner of execution of work is central to the surveyors' role.

Surveyors have an express power, under this heading, to adjudicate on the professional costs of making the award, which may include reasonable surveyors' fees and the reasonable costs of other advising consultants. They also have the power to implement the statutory rules on compensation, making good and the liability for the expenses of the work. Surveyors should, however, be extremely cautious about assuming the existence of powers to deal with matters that are outside of the dispute referred to them.

The Court of Appeal has confirmed that surveyors do not have any authority to award legal costs for the time and expense of threatening to seek an injunction, or similar relief via the courts, for non-compliance with the Act. This does not mean a wrongful party is absolved of the responsibility for such fees and costs, only that the administration of the recovery via a party wall award would be found to be incorrect.

7.4 Enforcement of surveyors' awards

A valid award creates legal obligations between the parties. Therefore, a breach of the terms of the award creates a legal liability, which can form the basis for court action by an aggrieved party. A successful action in the courts would result in a court judgment, which could then be enforced against the defaulting party in the normal way.

The award is for the benefit of the owners, so in the event of non-compliance with an award, it is for the owners to take enforcement proceedings. Surveyors should therefore always recommend that clients/appointing owners obtain legal advice in respect of enforcement of any part of an award.

8 Surveyors' role in preparing the primary award

8.1 Pre-works inspection

The appointed surveyors should understand the construction, fabric and condition of the adjacent owner's property before making an award and if necessary visit both owners' properties to understand the consequence of the awarded works.

While not a statutory requirement, a surveyor is recommended to record a schedule of condition of the relevant parts of the adjoining owner's building and append it to an award. A schedule should be compiled before any building works start and should include those parts of the adjoining building and grounds that may be affected by the works.

The extent of the schedule depends on the nature and location of the proposed works. For example, where it is proposed to build higher than the adjacent building, its roofs should be closely examined as they could be damaged by falling debris or materials. It is particularly important to record cracks, their location and, where relevant, their width. It is often useful to include a simple drawing, as photographs do not always show minor defects.

The purpose of the schedule is to identify to what extent any claim for damage is valid and, if it is, the extent of the damage. The schedule should be enough to avoid leaving significant areas of doubt, which will be a matter for the judgement of the two surveyors.

It is usual for the building owner's surveyor to prepare any schedule of condition, which should then be checked and agreed by the adjoining owner's surveyor.

8.2 Agreeing the contents of the award

The building owner's surveyor will usually prepare a draft award and send it to the adjoining owner's surveyor for comments. While there is no prescribed award format, a sample is shown in Appendix C. An award contains the limitations on the time and manner of carrying out works and will usually include a schedule of condition, relevant drawings of the notifiable works and method statements.

The surveyors agree the working conditions applicable only to the works to which the Act relates, such as the hours for noisy works, whether weekend working is acceptable, protection required to any exposed party walls, security arrangements and costs to be paid and by whom. Method statements may be attached for particular operations, such as demolition or details of access to the adjoining owner's premises.

It is for the surveyors to agree the terms of the award. While the surveyors should consult with their owners in respect of ascertaining specific preferences and/or requirements, they should not present the draft award to their appointing owners for approval.

8.3 Provision for disturbance, making good and compensation

The surveyor should refer to the Act to determine the precise situations in which compensation and making good are applicable. The building owner is responsible for making good damage caused by the notifiable works under the following sections: 2(2)(a), (e), (f), (g), (h) and (j). Alternatively, the adjoining owner can opt for payment in lieu of making good under section 11(8). The remedy for damage caused under any other section of the Act is compensation. All compensation is under section 7(2) and should be paid directly to the adjoining owner or occupier. Payments in lieu of making good under section 11(8) should be paid directly to the adjoining owner.

Where loss can be anticipated in advance of the work, provision should be made within the award. Note that such compensation is only available for justifiable and calculable losses, and not for mere inconvenience. For example, if car parking is impeded because of scaffolding, it may be justifiable to require the building owner to pay the cost of providing parking elsewhere (see also section 9.4 of this document).

Where a building is laid open under section 2(2)(e), the surveyors should also consider whether it is appropriate for the adjoining owners or occupiers to receive a payment in respect of inconvenience

and disturbance under section 11(6). If so, a fair allowance should be assessed for this in advance of the work and included in the award provisions.

8.4 Expenses of the works

Section 11 of the Act sets out guidelines on the responsibility of the owners for the expenses of works. In most cases the expenses of works under the Act shall be defrayed by the building owner, because the building owner, who has organised the works, will benefit from them while the adjoining owner usually will not.

Surveyors in taking an appointment should advise their appointing owners of the possibility of defrayed costs being awarded. For example, where building works are required because party structures or party fence walls (for which there is a joint liability) are defective, the costs of remedial works, and the proportion of fees that relate to them, should be split appropriately between the owners. The sum that each should be required to pay will have regard to the use each makes of the structure, the benefit that each derives from the structure and the responsibility for the defect.

Another exception is when improvements or extensions to the adjoining owner's property have been carried out and the building owner subsequently makes use of those works. In such case, the building owner may have a liability to make a payment to the current adjoining owner (see section 11(11) of the Act) This is calculated as a due proportion of the costs and expense of the original works that are being utilised at present-day costs.

Where a building owner proposes to reduce the height of a party wall or party fence wall under section 2(m) (to no less than 2m), the adjoining owner can serve a counter-notice within one month of the original notice requesting the existing height of the wall to be maintained. If so, the adjoining owner has to pay a due proportion of the cost of retaining that wall, including the full cost of its subsequent maintenance exceeding what is necessary for the purposes of the building owner.

8.5 Costs of the award

Reasonable costs are generally considered those incurred in obtaining and making an award, which includes the reasonable fees of the appointed or selected surveyors and other appropriate advisers.

Responsibility for these costs is determined by the surveyors making the award, but only to the extent that they have been properly incurred in administering the Act's provisions.

A failure of the appointed surveyors to agree upon the reasonable quantum of a claimed cost should not prevent them from making and serving an otherwise agreed award, with the issue of the reasonable quantum being subsequently referred to the third surveyor. The award should determine responsibility for the cost and quantify an interim sum on account at a level agreed between the surveyors, with the balance of the amount claimed referred to the third surveyor for determination.

However, given that only the surveyor(s) making an award can determine responsibility for costs, if the appointed surveyors cannot agree upon which owner is responsible for a specific cost, that matter should be resolved before the award is made (by referral to the third surveyor for direction, or to determine the responsibility by making an award).

The prudent surveyor should secure terms and conditions with the owners for the possibility of a matter being withdrawn by consent and his having incurred costs in advance of an award being made.

8.5.1 Surveyor fees

The fees of the surveyors and any additional appointments will normally fall on the building owner serving the notice. However, where the costs of work are to be apportioned between the owners, the costs of making the award may be apportioned accordingly.

It is usual for the award to include the adjoining owner's costs by way of surveyor fees as a lump sum based on time incurred, including an allowance for any necessary subsequent inspections. In addition, an agreed hourly rate is generally quoted if further involvement becomes necessary to determine subsequent disputes arising from change of design, problems found on-site or damage. Only fees that are proportionate to tasks necessary to making the award should be included in the award. The

surveyor appointed by the building owner would normally agree fees directly with that owner, but there is no reason why the responsibility for, and reasonableness of, these cannot be determined in an award.

When considering the issue of reasonable and proportional fees, the surveyor should consider rules 3 and 5 of the *Rules of Conduct for Members*.

A surveyor may wish to make an owner aware that an adjoining owner may be exposed to costs if for instance they make excessive demands on either of the surveyors or give rise by their actions to additional and unnecessary time such as incurring surveyors in additional time for making abortive visits.

8.5.2 Advising engineer fees

It may be necessary for one or both appointed surveyors to seek advice from an independent engineer to consider the suitability of technical proposals of an engineering nature, which would be outside of their expertise (for example, the adequacy of temporary shoring). It may be that in order to ensure the stability of its property is being adequately protected, the adjoining owner undertakes to pay the independent engineer to advise on this matter. In such circumstances, responsibility for this cost by way of engineer fee should be dealt with in the same way as surveyor fees in section 8.5.1 of this document.

Alternatively, the independent engineer's fee may be a contractual responsibility of the surveyor(s) instructing the engineer and is to be paid as a disbursement of the appointed surveyor. In such case, it would be prudent for this disbursement cost to be put in a separate clause from the surveyor fee so that the engineering advice element of the cost is distinctly identified. As with any cost, surveyors can only determine responsibility for reasonable costs that are proportionate to the necessary tasks to facilitate the making of the award. Therefore, in this context only engineer's fees that constitute a reasonable cost should be included in an award.

8.5.3 Other consultant fees

It may be appropriate in specific circumstance for the appointed surveyors to seek advice from a specialist in another discipline, for example a valuer or a quantity surveyor. As with engineer fees, a determination of responsibility for such costs by way of consultant fees considered reasonable should be distinctly identified in a separate clause of the award.

Solicitor fees may constitute valid costs for which the surveyors may determine responsibility, but they must be incurred directly in facilitating the making of an award. For example, they may be for advice on the interpretation of the Act or the applicability in the specific circumstances of a given situation.

Note that solicitor fees incurred in advising on litigation matters do not constitute a valid cost for the appointed surveyors to consider or determine responsibility for within an award. Examples of such excluded matters are: demanding notice be served, threatening injunctive proceedings or successfully obtaining an injunction until full compliance with the Act has been achieved. Costs for such matters should be resolved as part of the litigation proceedings or any settlement agreement.

8.6 Signature and service of awards

Once an award has been agreed it should be signed and dated by the agreed surveyor or by two of the three surveyors, as appropriate.

Where appointed surveyors make an award, it must be served forthwith in compliance with section 10(14) of the Act. The owners should be advised of their right to appeal to the county court against the award within 14 days of its service.

Serving an award electronically may be considered by the surveyors under section 15 of the Act. See section 5.3 of this document.

8.7 Entry onto adjoining land

Section 8 of the Act gives the building owner's, their servants, agents and workmen the right to enter the premises of the adjoining owner for the purpose of executing any work in pursuance of the Act. However, access is only available during usual working hours.

If it is known that access to an adjoining owner's property will be required to facilitate the notified works, it is prudent to include this requirement in the initial notice. This may require a notice for access to be served on an occupier who is not an owner as defined by the Act and is not a party to any award. Notice of any access requirement must be served upon any adjoining owner and occupier at least 14 days in advance, but in case of emergency such notice may be served as is reasonable in the circumstances.

The appointed surveyors will also have the right, subject to appropriate notice, to enter the adjoining owners' and building owners' premises for carrying out the object for which he or she is appointed or selected.

Details of access should be determined by the appointed surveyors when agreeing an award and should include such restrictions and safeguards as are necessary to protect the adjoining owner. It is generally accepted that there is a right to erect scaffolding to facilitate the access, if reasonably necessary to facilitate works in pursuance of the Act. Such scaffold can remain in place 24 hours a day so long as it is required to facilitate those works.

Preventing a statutory right of entry is a criminal offence. If access is not available, the building owner may break in if accompanied by a police officer.

8.8 Security for expenses

The Act makes provision for both the building owner and adjoining owner to request security for expenses. Security might relate, for example, to the cost of remedying works left uncompleted, compensation payable under the Act or disturbance allowance.

It will usually only be appropriate to make provision for security where there is a particular risk, such as a risk of non-completion or of default in carrying out the works or a real risk that the works will cause damage to the adjoining owner. The financial circumstances of the building owner may be relevant. The risk of default and foreseeable damage should be assessed in each case where the request for security is not agreed by the building owner.

Requests for security for expenses are not appropriate for a general risk of damage caused by failure to follow the terms of an award or accidental damage. It is for the owner, not the surveyor, to request security. The surveyor is not statutorily obliged to advise the appointing owner on security of expenses issues, unless there is a dispute in respect of requested security. If the adjoining owner wishes to serve notice requiring the building owner to provide security, this must be done before work commences. If the parties cannot agree the amount or nature of the security, this will be determined by the surveyors. The arrangements for payment of security should, in any event, be described in the award.

Where an adjoining owner has required the building owner to carry out additional works, under section 4 of the Act, for example, the building owner can request security from the adjoining owner. If this is not paid within one month of the request or award determining a dispute in respect of requested security, the building owner is not obliged to comply with the counter-notice. As with security required by an adjoining owner, all arrangements should be described in the award.

Security for expenses can be held in several ways. This can be in an escrow bank account with stipulation that the funds are only to be released on the signature of two of the three appointed surveyors (or the agreed surveyor). Alternatively, the funds can be held in a client account of an RICS regulated firm, and the firm should comply with the *Rules of Conduct for Firms* in handling it. Firms should refer to RICS guidance on handling client money.

It is the view of RICS Regulation that all security of expenses money held by an RICS regulated firm under section 12(1) of the Act is client money.

Security for expense is not intended to be a punishment or control method over owners. Therefore, on large projects as the areas of risk are removed, the phased return and release of the money held as security should be tightly administered. It will be common on small or medium scale projects for money held as security to form part of the capital cash flow. The administration of money should therefore be viewed as a serious financial responsibility of the surveyors, who should be proactively working together to achieve the timely and correct administration of the process.

The calculation for the sum needed to provide security of expenses under the Act should be realistic and based on a balanced view of the potential future needs. For example, if the risk following the demolition of a building is the long-term exposure of the party wall to the elements, the extent of security of expenses is based on the area of party wall that would need to be returned to a weather tight condition and those foreseeable costs that would need to be incurred to achieve the works.

In the event of security having been separately agreed by the owners, the agreement should state the basis on which it is to be released and, if necessary, used. Therefore, it is not for the surveyors to award security if there is no dispute about the security.

DRAFT

9 Surveyors' role subsequent to service of the primary award

9.1 Interim and final inspections

It is the responsibility of the owners to comply with the terms of the award.

Within the award, the appointed surveyors may include a provision for reasonable inspections to be carried out by them or their advisers. They may be required to ensure that specific conditions of the award are being complied with, or to inspect any detail or structure opened up during the works.

Appointed surveyors commonly provide for appropriate interim or final inspections in the primary award where the surveyors determine them to be necessary.

9.2 Design changes

Where there are changes to the design of works included in the award, they must either be agreed by the parties as anticipated by section 7(5) of the Act or, in the event of disagreement between them, be referred to the surveyors to be determined by a further award. This work may require a further notice.

Surveyors can obtain their appointing owners' authority to agree such changes on their behalf. In these circumstances where the surveyors are able to reach agreement, it is then recorded in an exchange of letters between them. In such case, there is no requirement for a further award, even for extensive changes in design.

9.3 Where additional work becomes necessary

After the service of a notice, the building owner may wish to undertake additional work under the Act that was not referred to in the original notice.

Where this work is closely related to that described in the original notice, it may legitimately be considered as a design change and dealt with according to the procedures described in section 9.2 of this document. In cases of doubt, surveyors should consult with their appointing owners to confirm that they agree with matters being handled in this way.

Where the additional work is entirely different or unrelated to that proposed by the original notice, the building owner will only be permitted to undertake it in accordance with the Act's requirements. In the absence of consent by an adjoining owner, there may be no alternative to serving a new notice and starting the statutory procedure afresh.

Surveyors should attempt to resolve the issue consensually. They may achieve this by reaching an agreement on the additional works on the owners' behalf, if they have their appointing owners' authority to do so, without the requirement for service of a further notice. Such agreement should always be made in writing and copied to the owners. This reflects the inherent right of parties to agree to works under the Act without service of notice, which is expressly stated, in the case of section 2 works, in section 3(3)(a).

Provided surveyors obtain all adequate additional authorities, they can expedite the procedure by receiving the notice, consenting to the works and waiving the statutory notice period for commencement of the works on their appointing owner's behalf.

9.4 Awarding compensation

The Act provides for the payment of compensation under section 7(2); such compensation is payable in respect of any loss or damage suffered by the adjoining owner or occupier that has been caused by works executed in pursuance of the Act by the building owner. This does not necessarily relate simply to physical damage.

9.5 Making good and payment in lieu

Surveyors should require the building owner to make good damage caused by the works where appropriate under the Act. Express provision will usually have been made for this in the primary award (see section 8.3 of this document).

The adjoining owner can instead require the surveyors to determine the cost of the making good, and this sum must then be paid to the adjoining owner in lieu of making good.

9.6 Changes of ownership

The Act makes no express provisions for changes in ownership, and there is no clear authority setting out the consequences of a change in ownership.

If the adjoining owner changes, the appointment of the adjoining owner's surveyor continues and the rights and duties of the adjoining owner pass to the successor in title. This avoids unnecessary delay, cost and inconvenience to the building owner by virtue of a change of adjoining owner. It also prevents an adjoining owner from thwarting a building owner's intention to proceed with work, for example, by transferring ownership of the adjoining property to a subsidiary company.

Where the building owner changes, the procedure must start afresh as the building owner who intends to carry out the work must be the one who served notice. In addition, the adjoining owner's response to the initial notice is likely to have been influenced partly by the identity and intent of the building owner at the time.

To avoid delay to the statutory proceedings, surveyors can facilitate a change of building owner, with the consent of the adjoining owner, by service of new notice, waiving the notice period and continuing the negotiations with only the building owner's name being changed. The same situation would apply when an award has been completed and work is taking place – with the already appointed surveyors reproducing the same award except for naming the new building owner.

10 Role of the third surveyor

10.1 Nature of the role

A party-appointed surveyor who considers that the other appointed surveyor is taking an unreasonable attitude has the option of requesting the third surveyor's involvement to settle the point in dispute. The Act also allows the appointing owners the same right, but in practice it is rare for an owner to take the initiative.

The third surveyor's decision will then be embodied in an award that will deal only with the referred dispute. The party-appointed surveyors will retain jurisdiction over all other matters in the original notice.

Any approach to the third surveyor should be on a joint basis even if that approach is for initial advice. However, any verbal advice or guidance so given does not constitute a determination.

10.2 Preliminary notification

Where party-appointed surveyors propose to refer a dispute to the third surveyor, they should inform their appointing owners of the points at issue, the efforts they have made to reach agreement and the impact in terms of time and cost of referring the dispute to the third surveyor. The owners may, for example, be prepared to concede the point in dispute, rather than risk further delay and expense, or make the referral themselves.

Before a party-appointed surveyor refers a dispute to the third surveyor, he or she is advised to confirm this intention in writing to the other appointed surveyor. Although the Act does not require this, it is suggested that failure to do so could be considered in awarding costs.

10.3 Referral to the third surveyor

The Act does not dictate the form of referral to the third surveyor, but it is suggested that, except in the most urgent cases, submissions should be in writing. The appointed surveyors should clearly define the disputes on which the third surveyor's decision is sought and attach all relevant documents.

The case should be presented in such a way as to enable the third surveyor to form a clear idea of the points needing decisions, and the main areas of factual or technical dispute. This will avoid uncertainty as to the scope of the third surveyor's jurisdiction and will ensure that costs and time required by the referral are minimised.

It should also be made clear that the submissions are a formal request to the third surveyor to deal with the matter, not simply a request for guidance.

10.4 Procedure on referral to the third surveyor

Once a dispute is referred to the third surveyor, the Act simply requires that the third surveyor shall make the necessary award. The Act is silent as to both the procedure to be followed, and who is to control or decide the procedure. However, the words of the Act suggest that the procedure is to be laid down by the third surveyor, who has responsibility to determine the disputed matters.

The rules of natural justice should be observed. It is suggested that in this context this will include the third surveyor:

- giving each party a fair opportunity to present its case and challenge the other party's case and
- avoiding, if possible, receiving information or submissions from one party to the exclusion of the other. Where this does occur, a note should be made and sent to both parties.

Subject to this, the third surveyor is free to adopt whatever procedure appears appropriate. Where the dispute has been referred by way of written submissions from one surveyor or owner, the third surveyor ought to call on the other surveyor or owner to reply to those submissions within a certain time. The third surveyor may wish to visit the site, meet the parties' surveyors and consider reports, drawings, photographs and other relevant material before reaching a decision.

10.5 Third surveyor's award

The third surveyor can only deal with the referred matters in dispute and does not, therefore, have power to carry out a general review of the previous actions of the party-appointed surveyors, and still less to reopen any awards they have made.

The third surveyor is not required to give reasons for his or her award, which is more in the nature of an expert determination (like any award made by surveyors under the Act). However, it is recommended that the third surveyor should do so to enable the owners to understand the basis of the decision and, if appropriate, to consider whether to appeal the award. After service of a third surveyor's award, there is no obligation on the third surveyor to respond to queries made by either party or surveyor. Guidance for dealing with complaints about conduct is noted in section 2.4.

The award should deal with the costs incurred, pursuant to section 10(13), which are within the discretion of the third surveyor. Responsibility for costs will usually depend on the determination but may have regard for the conduct of the parties or the surveyors.

Section 10(15) of the Act deals with service of a third surveyor's award. The third surveyor is to serve it forthwith on the parties, or their appointed surveyors, after payment of the costs of the award. The third surveyor is entitled to retain the award until those costs are paid. It is preferable for the award to be served by the third surveyor on the owners directly and with a copy provided for the surveyors.

11 Challenging the award and appeals to the county court

11.1 Challenging the award

Section 10(16) of the Act provides that 'The award shall be conclusive and shall not except as provided by this section be questioned in any court'. This might be thought to preclude any challenge to the award except by way of appeal to the county court. However, it has been held that it is open to a party to contend that an award is ultra vires and hence not a valid award, notwithstanding the absence of an appeal to the court.

The distinction lies between a valid award, which can only be challenged by appeal, and an award that is invalid because the surveyors had no jurisdiction to make it in those terms. Such an award can be treated as invalid in subsequent proceedings. The invalidity of the award can also be raised on an appeal.

11.2 Appeals to the county court

Section 10(17) of the Act confers a right of appeal by either party (i.e. building owner or adjoining owner) against an award. The appeal is to the county court and must be made within 14 days beginning with the day on which an award made under section 10 is served on that party.

Appendix A: Draft letters

The following drafts are intended to be for guidance only. They are neither definitive, nor should they be used without careful thought and consideration, which all surveyors are expected to exercise.

DRAFT

A1 Suggested letter of appointment for the building owner's surveyor

Dear <name of surveyor>,

Works are proposed at <insert address of the building owner> – under the *Party Wall etc. Act 1996* (the Act).

I am an owner/We are owners *, as defined by section 20 of the Act, of the following property: <insert address of the building owner's property where the work is to be undertaken>.

You are hereby authorised:

1. To sign and serve appropriate notices under the Act in connection with the works proposed at the above address.
2. In the event of a dispute, we appoint you, <name of surveyor>, in accordance with section 10(1)(b) of the Act, as our party wall surveyor.

If the adjoining owner is willing for you to act as an agreed surveyor under section 10(1)(a) of the Act, we appoint you as agreed surveyor instead. *

3. If the adjoining owner refuses or neglects to appoint a surveyor, we hereby authorise you to appoint a surveyor on their behalf under section 10(4) of the Act.

I hereby confirm that I am willing to receive any notice or document under the Act by email at the following address <insert email address>. **

Yours sincerely,

Signed:

Date:

Print name:

* Delete as appropriate.

** Complete if the appointing owner is willing to receive service by email.

A2 Suggested letter of appointment for the adjoining owner's surveyor

Dear <name of surveyor>,

Works are proposed at <insert address of the building owner> and my property at <insert address of the adjoining owner's property> – under the *Party Wall etc. Act 1996* (the Act).

In connection with the notice(s) dated <insert date of notice>, served on me/us * under the Act, I/we * hereby appoint you, <name of surveyor>, in accordance with section 10 of the Act as my/our surveyor and authorise you to sign, serve, receive and reply to any further notices in connection with the works proposed at the above address.

I hereby confirm that I am willing to receive any notice or document under the Act by email at the following address <insert email address>. **

Yours sincerely,

Signed:

Date:

Print name:

* Delete as appropriate.

** Complete if the appointing owner is willing to receive service by email.

A3 Letter to accompany a typical section 3 or 6 notice

Dear <name of adjoining owner(s)>,

<insert name(s) of the adjoining owner(s)>

of

<insert adjoining owner's main postal address>

Under the *Party Wall etc. Act 1996*, <insert name(s) of the building owner(s)> (the building owner) is obliged to serve you with the accompanying notice of the intention to carry out works which has the potential to affect your premises.

This letter is to explain in less formal terms that if you disagree with any of the proposed works you should concur in the appointment of an agreed surveyor or appoint your own surveyor to safeguard your interests.

The surveyor's costs, under all normal circumstances, will be paid by the building owner, who will also be responsible for making good any damage that the proposed works may cause.

I would be grateful to learn whether you agree to the proposed works or, if you are intending to appoint your own surveyor, who this will be. Please complete and return the enclosed acknowledgment form giving this information and kindly tell me of any other person having an interest in the property, either as landlord or tenant.

I would be pleased to explain in further detail the formalities involved in these matters if you so wish.

Yours sincerely,

Signed:

Date:

Print name:

Authorised to serve notices for <insert name(s) of the building owner(s)>.

Note: Notices will normally be sent to a lay adjoining owner and, while not required, this accompanying letter will assist in giving meaning to the legal requirements.

A4 Letter requiring an adjoining owner (or building owner*) to appoint a surveyor

Dear <name(s) of the adjoining/building owner(s)>,

<insert name(s) of the adjoining/building owner(s)>

of

<insert adjoining/building owner's main postal address>

Under the *Party Wall etc. Act 1996* (the Act)

On <insert date of notice>, notice was served upon you concerning proposed works <insert 'at' or 'adjacent to'> your property (copy attached). As you were advised at that time, the Act required you to appoint a surveyor if you dissent from the proposals. You have not signified your consent within 14 days and therefore you are deemed to have dissented and must now appoint a surveyor.

On behalf of the <insert 'building' or 'adjoining'> owner, I formally call upon you to appoint a surveyor in accordance with section 10 of the Act by concurring in my appointment as an agreed surveyor or appointing your own surveyor. If within ten days you fail to do so and notify me or the <insert 'building' or 'adjoining'> owner, the <insert 'building' or 'adjoining'> owner will make an appointment on your behalf.

Yours sincerely,

Signed:

Date:

Print name:

Note: If signed by the surveyor, insert 'authorised to sign on behalf of' and the name(s) of the owner.

Under section 10(4), the adjoining owner is obliged to appoint his or her surveyor within ten days of a written request where a difference has arisen. This letter provides such formal request.

* With suitable amendment if the building owner has served their own notice.

A5 Letter requiring an appointed surveyor to act effectively

Dear <name of the surveyor>,

<insert name of the surveyor>

of

<insert surveyor's postal address>

Under the *Party Wall etc. Act 1996* (the Act)

In accordance with section 10(7) of the Act, I formally call upon you to <identify specifically what it is that is required of the other surveyor> and give you notice that if you fail to do so within ten days, I will exercise my authority to proceed ex parte and make an award in respect of the subject matter of my request.

Yours sincerely,

Signed:

Date:

Print name:

Note: This gives ten days written notice, in accordance with section 10(7), to an appointed surveyor to act effectively. Failure to do so will enable the other surveyor to proceed ex parte.

A6 Letter to appointing owners upon service of the party wall award

Dear <name of the owner>,

<insert name(s) of the owner(s)>

of

<insert owner's main postal address>

Under the *Party Wall etc. Act 1996 (the Act)*

I enclose the party wall award made and signed by the two appointed surveyors, which sets out the rights and duties in connection with the proposed work.

I must point out that under section 10(17) of the Act you are entitled to appeal against the award in the county court within 14 days if you feel that it has been made improperly.

Yours sincerely,

Signed:

Date:

Print name:

Enclose party wall award.

Note: You must send the award and should inform the appointing owner that he or she has the right of appeal. The Act obliges the surveyors to serve the award on their appointing owners promptly and this letter, when accompanying the award, sets out the legal position without encouraging the owners to appeal.

Appendix B: Draft notices

The following drafts are intended to be for guidance only. They are neither definitive, nor should they be used without careful thought and consideration, which all surveyors are expected to exercise.

DRAFT

B1 Line of junction notice

Under the *Party Wall etc. Act 1996* (the Act), section 1

To <insert name(s) of the adjoining owner(s) or the owner> (adjoining owner) of <insert adjoining owner's main postal address>,

I/We * <insert name(s) of the building owner(s)> (building owner) of <insert building owner's main postal address> being owner(s) of the land known as <insert address of the building owner's property to be worked on> which adjoins your land known as <insert address of property adjacent to the works>

HEREBY SERVE YOU WITH NOTICE THAT

*Insert the relevant statement(s) marked ** as may be applicable.*

** under section 1(2), subject to your written consent, it is intended to build on the line of junction of the said lands a party wall/party fence wall.

** under section 1(5), it is intended to build on the line of junction of the said lands a wall wholly on my/our own land.

** under section 1(6) it is intended to place projecting footings and foundation below the level of your land at my/our expense.

** under section 7(4) it <insert 'is' or 'is not'> proposed to employ special foundations placed on your land, which would require your written consent.

The proposed works as shown on the accompanying drawings are: <give relevant details of the proposed works and describe the proposed wall>.

It is intended to commence works <insert 'after one month' or on [date]> or earlier by agreement.

Yours sincerely,

Signed:

Date:

Print name:

Note: If signed by the surveyor, insert 'authorised to sign on behalf of' and the name(s) of the building owner(s). Duplicate signature, date and name lines as necessary for joint owners' signatures.

* Delete as appropriate.

DRAFT

B2 Consent notice

Under the *Party Wall etc. Act 1996 (the Act)*, section 1(3)

To be completed and returned to the building owner or the surveyor named on the notice.

I/We * <insert name(s) of the adjoining owner(s)> of <insert adjoining owner's main postal address> having received notice on <insert date of notice> served by <insert name(s) of the building owner(s)> of <insert building owner's main postal address> in respect of proposed works at <insert address of the building owner's property to be worked on> which adjoins my/our * premises known as <insert address of property adjacent to the works> hereby consent to the above works.

Yours sincerely,

Signed:

Date:

Print name:

Note: Duplicate signature, date and name lines as necessary for joint multiple owners.

* Delete as appropriate.

B3 Party structure notice

To <insert name(s) of the adjoining owner(s) or 'the owner'> of <insert adjoining owner's main postal address>.

I/We * <insert name(s) of the building owner(s)> of <insert building owner's main postal address> being owner(s) of the land known as <insert address of the building owner's property to be worked on> which adjoins your land known as <insert address of property adjacent to the works>

HEREBY SERVE YOU WITH NOTICE THAT

under section 2(2) of the Act, and with reference to the <insert 'party structure', 'party wall' or 'party fence wall'> separating the above premises, it is intended to carry out the works detailed below after the expiration of two months from service of this notice, or earlier by agreement.

The proposed works are: <insert a full description of the works, identifying in particular the notifiable aspects of those works>.

Under section 5 of the Act, if you do not consent to the works within 14 days you are deemed to have dissented and a dispute is deemed to have arisen. In such case, section 10 of the Act requires that both parties should concur in the appointment of an agreed surveyor or should each appoint one surveyor.

In those circumstances, I/we * would appoint <insert surveyor's name> of <insert surveyor's practice and address> as my/our * surveyor <and if appropriate add 'or as an agreed surveyor'>

Yours sincerely,

Signed:

Date:

Print name:

Note: If signed by the surveyor, insert 'authorised to sign on behalf of' and the name(s) of the building owner. Duplicate signature, date and name lines as necessary for joint owners' signatures.

* Delete as appropriate.

B4 Acknowledgment of party structure notice

Under the *Party Wall etc. Act 1996 (the Act)*, sections 2 and 3

To be completed and returned to the building owner or the surveyor named on the notice.

I/We * <insert name(s) of the adjoining owner(s)> of <insert adjoining owner's main postal address> having received notice served by <insert name(s) of the building owner(s)> of <insert building owner's main postal address> in respect of proposed works at <insert address of the building owner's property to be worked on> which adjoins my/our premises known as <insert address of property adjacent to the works> and in relation to the works proposed under section 2(2) <delete two of the below options marked ** as appropriate>

** consent to the above works

or

** dissent from the above works and, a dispute having arisen, concur in the appointment of <insert surveyor's name> as an agreed surveyor

or

** dissent from the above works and, a dispute having arisen, have appointed/intend to appoint * <insert surveyor's name> of <insert surveyor's practice and address> as my/our * surveyor.

I hereby confirm that I am willing to receive any notice or document under the Act by email at the following address <insert email address>. ***

Yours sincerely,

Signed:

Date:

Print name:

Note: Duplicate signature, date and name lines as necessary for joint multiple owners.

* Delete as appropriate.

*** Complete if the appointing owner is willing to receive service by email.

Under the *Party Wall etc. Act 1996, section 6(5)*

To <insert name(s) of the adjoining owner(s) or 'the owner'> of <insert adjoining owner's main postal address>.

I/We * <insert name(s) of the building owner(s)> of <insert building owner's main postal address> being owner(s) of the land known as <insert address of the building owner's property to be worked on> which adjoins your land known as <insert address of property adjacent to the works>.

HEREBY GIVE YOU NOTICE THAT

Insert the word 'and' or delete the inapplicable option.

Under section 6(1), it is intended to build within 3m of your building and to a lower level than the bottom of your foundations, by carrying out the works detailed below.

Under section 6(2), it is intended to build within 6m of your building and to a depth as defined in the Act, by carrying out the works detailed below.

It <insert 'is' or 'is not'> proposed to underpin or otherwise strengthen or safeguard the foundations of your building/structure.

The accompanying plans and sections numbered <insert drawing numbers> show the site of the proposed building and the excavation depth proposed.

The intended works are: <insert a full description of the works>.

It is intended to commence works <insert 'after one month' or 'on <insert date>'> or earlier by agreement.

Under section 6(7), if you do not consent to the works within 14 days you are deemed to have dissented and a dispute is deemed to have arisen. In such case section 10 of the Act requires that both parties should agree in the appointment of an agreed surveyor or should each appoint one surveyor. In those circumstances, I/we * would appoint <insert surveyor's name> or <insert surveyor's practice and address> as my/our * surveyor <and if appropriate add 'or as an agreed surveyor'>.

Yours sincerely,

Signed:

Date:

Print name:

Note: If signed by the surveyor, insert 'authorised to sign on behalf of' and the name(s) of the building owner. Duplicate signature, date and name lines as necessary for joint owners' signatures.

* Delete as appropriate.

DRAFT

Under the *Party Wall etc. Act 1996*, section 6

To be completed and returned to the building owner or the surveyor named on the notice.

I/We * <insert name(s) of the adjoining owner(s)> of <insert adjoining owner's main postal address> having received notice served by <insert name(s) of the building owner(s)> of <insert building owner's main postal address> in respect of proposed works at <insert address of the building owner's property to be worked on> which adjoins my/our * premises known as <insert address of property adjacent to the works> and in relation to the works proposed under section 6

*Delete two of the below options marked ** as appropriate.*

** consent to the above works.

or

** dissent from the above works and, a dispute having arisen, concur in the appointment of <insert surveyor's name> as an agreed surveyor.

or

** dissent from the above works and, a dispute having arisen, have appointed/intend to appoint <insert surveyor's name> of <insert surveyor's practice and address> as my/our * surveyor.

I hereby confirm that I am willing to receive any notice or document under the Act by email at the following address <insert email address>. ***

Yours sincerely,

Signed:

Date:

Print name:

Note: Duplicate signature, date and name lines as necessary for joint multiple owners.

* Delete as appropriate.

*** Complete if the appointing owner is willing to receive service by email.

DRAFT

Appendix C: Draft award

The following draft is intended to be for guidance only. It is not definitive, nor should it be used without careful thought and consideration, which all surveyors are expected to exercise.

DRAFT

This document is AN AWARD under the provisions of the *Party Wall etc. Act 1996* (the Act) made by <insert name of surveyor(s) making the award> on <insert date of award>.

The parties

Building owner(s): ('the building owner')

Address for service:

Adjoining owner(s):

Address for service:

The relevant properties

Building owner's property: ('the building owner's property')

Adjoining owner's property: ('the adjoining owner's property')

The notice(s)

Notice under <insert section number> dated <insert date>:

The surveyors ('the surveyors')

Building owner's surveyor:

Adjoining owner's surveyor:

Third surveyor:

Note: Surveyors should ensure that all clauses in an award are relevant to the works under consideration. Suggested terms should be amended as appropriate, clauses not applicable should be omitted and additional clauses required to suit the specific work should be inserted as necessary.

C1 Introduction

1. This award is a written determination in resolution of an actual or deemed dispute under the Act, the general purpose of which is to enable notifiable building works to be carried out by a building owner to or in the vicinity of the built structures separating his property from that of an adjoining owner, while, at the same time, preventing unnecessary damage or interference to the adjoining owner's property or its occupants. The Act sets out the rights and responsibilities of the owners.
2. The contents of this award can be challenged by appeal in the County Court. **Such an appeal must be issued within 14 days of receipt of this award.**
3. References to 'the surveyors' herein is a reference to the duly appointed and/or selected surveyors and, where the Act and the context permits, may be a reference to one, two or three individuals.
4. As a record, but not forming part of this determination, the following are attached:

Attach here documents relevant to the making of the award such as security of expense agreements, licences and so on.

C2 Award

1. After service of the signed award, the building owner may carry out the following works ('the works'), which are set out in more detail in the documents mentioned in paragraph 6, namely:

Note: It would be helpful for the following list of works to follow the sequencing of the works on-site as closely as possible.

- a. _____
- b. _____
- c. _____
- d. _____
- e. _____

2. The following documents appended to this award form part of this award:
 - a. A schedule of condition taken on <insert date>, which records the condition of the relevant parts of the adjoining owner's property identified at that date.
 - b. *Continue with a list of relevant documents – e.g. drawings, plans, method statements, monitoring protocols – identifying each by date and reference. Or possibly refer to documents as being in an attached document register signed by the surveyors.*
3. No deviation shall be made from the works without the agreement of the owners (or surveyors acting on their behalf), or in the event of a dispute determined by the surveyors in accordance with section 10 of the Act.
4. If the building owner commences the works, he or she shall:
 - a. complete the works at his or her own cos

- b. take all reasonable precautions and provide all necessary support to retain the land and buildings comprised within the adjoining owner's property
 - c. provide temporary weathering in the form of heavy duty felt secured by timber battens at 1m centres both horizontally and vertically to those parts of the adjoining owner's property/party wall exposed because of the works. This will be maintained until permanent weathering has been provided unless otherwise agreed in writing by the surveyors (*Delete this paragraph as appropriate*)
 - d. where required by the Act, make good all damage to the adjoining owner's property occasioned by the works in materials to match the existing fabric and finishes. Making good to be executed upon completion of the works, or at any earlier time deemed appropriate by the surveyors. If so required by the adjoining owner, make payment in lieu of carrying out the work to make the damage good, such sum to be agreed between the owners. Disputes in default of agreement between the owners are to be determined by the surveyors
 - e. compensate any adjoining owner and any adjoining occupier for any loss or damage which may result to any of them by reason of any work executed in pursuance of the Act
 - f. permit the adjoining owner's surveyor to have access to the relevant parts of the building owner's property at all reasonable times during the works, and to inspect the progress of the works, giving notice for such access in accordance with section 8 of the Act
 - g. carry out the whole of the works so far as is practicable from the building owner's land. Where access to the adjoining owner's property is required, notice shall be given in accordance with section 8 of the Act. In the event of the building owner wishing to carry out the works from, or to erect scaffolding on or over the adjoining owner's property for the purpose of works, details thereof shall first be submitted to and approved by the surveyors and such approval shall be subject to such conditions as the surveyors may agree (*Delete this paragraph as appropriate*)
 - h. restrict noisy works to which this award relates to the party wall/party structure/party fence wall to between the hours of <insert working hours as appropriate>
 - i. remove any scaffolding or screens from the adjoining owner's property and land as soon as possible (*Delete this sentence as appropriate*)
 - j. clear away any dust and debris from time to time as necessary, or when agreed by the surveyors and
 - k. carry out the works taking all reasonable steps to avoid unnecessary inconvenience to the adjoining owner or occupiers.
5. The building owner's surveyor shall be permitted access to the relevant parts of the adjoining owner's property from time to time during the works at reasonable times and after giving notice in accordance with section 8.

6. The whole of the works shall be carried out in compliance with the provisions of all relevant statutory requirements. It shall be carried out in a proper and skilful manner in sound and suitable materials in accordance with the terms of this award to the reasonable satisfaction of the surveyors.
7. A signed copy of this award shall be immediately provided to and retained for a reasonable period by each of the surveyors.
8. The building owner at his or her cost shall upon completion of the works provide to the adjoining owner a set of drawings of the works insofar as they may be different from the drawings forming part of this award, at the sole cost of the building owner.
9. The building owner shall immediately on the service of this award pay the adjoining owner's surveyor's costs in the sum of £ <insert net figure> plus VAT £ <insert VAT figure> in connection with the obtaining and making of this award, and <insert number of agreed site visits> subsequent inspection(s) of the works. In the event of further disputes arising, further fees shall be payable to be determined by the surveyors.

Note: Insert additional similar clause(s) for costs by way of engineers' fees and/or other consultants' fees or costs. Insert additional clause(s) in respect of other monetary provisions such as 'due proportion', 'fair allowance', 'payments in lieu', 'compensation' and so on.

10. That nothing in this award shall be held as conferring, admitting or affecting any easement of light or other easement in or relating to a party wall.

Signed:

Building owner's surveyor

Witness:

Name:

Address:

Occupation:

Note: The second surveyor signing the award should date it. Some meaningful part of the award should appear on the signature page.

Signed:

Adjoining owner's surveyor

Witness:

Name:

Address:

Occupation:

DRAFT