



## Determination 2017/077

# Regarding whether retaining walls at 25B Stonebridge Heights, Fielding required a barrier to comply with Clause F4



### Summary

This determination considers whether the retaining walls without barriers would comply with Clause F4 Safety from falling. The determination also discusses whether the building work to erect the barriers was exempt from the need for a building consent under Schedule 1.

### 1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“the Act”) made under due authorisation by me, Katie Gordon, Manager Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to the determination are:

- the owners of the building, B and L Clayton (“the owners”)
- the licensed building practitioner concerned with the relevant building work, K Tunnicliffe (“the applicant”)
- Manawatu District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

1.3 This determination arises from a site notice issued by the authority requiring barriers to the two retaining walls located at the rear of the site because the authority was not

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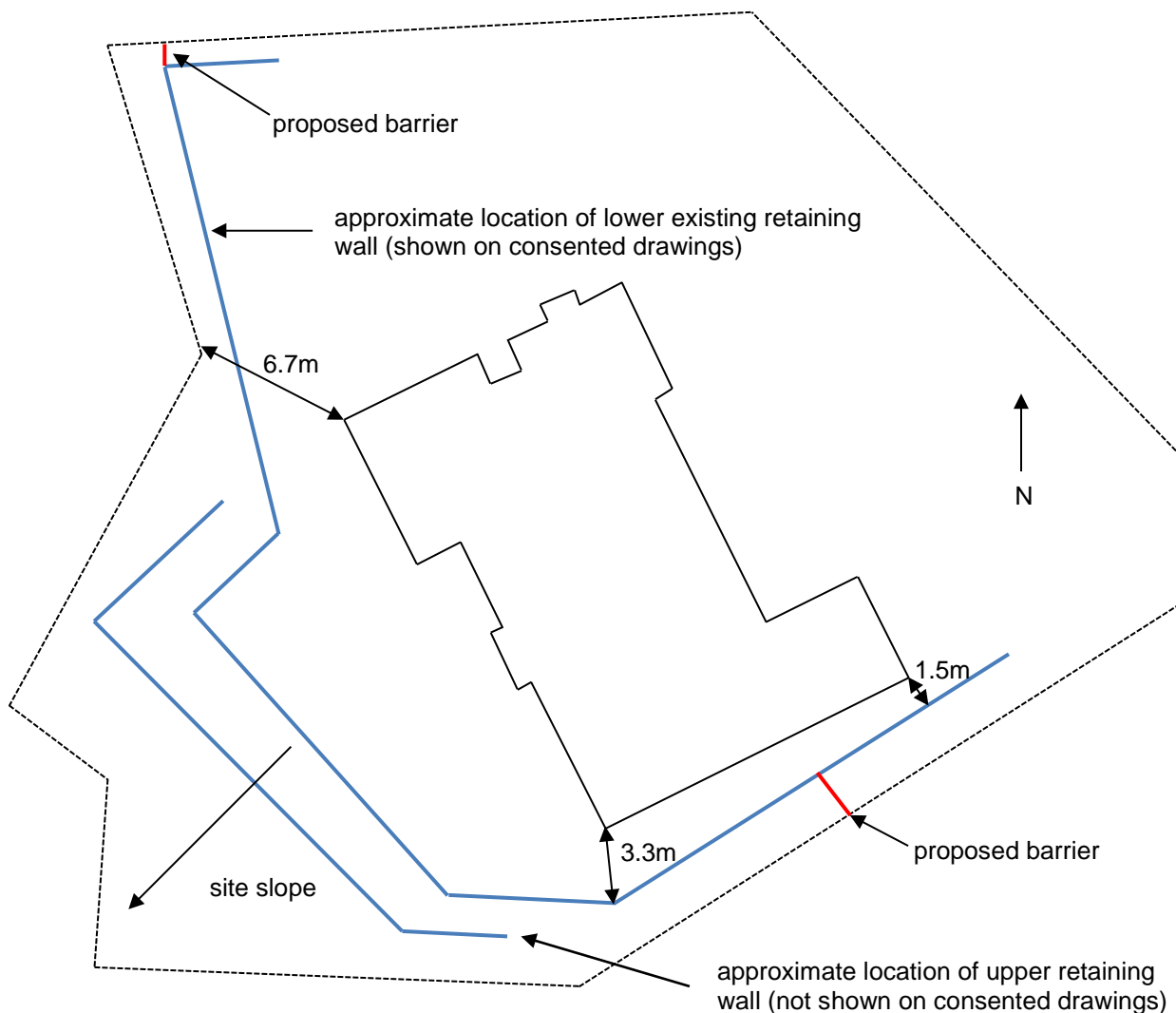
<sup>1</sup> The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at [www.building.govt.nz](http://www.building.govt.nz) or by contacting the Ministry on 0800 242 243.

satisfied the building work complied with Clause<sup>2</sup> F4 of the Building Code (First Schedule, Building Regulations 1992). The applicant is of the view that the requirements of Clause F4 are not applicable.

- 1.4 The matter to be determined<sup>3</sup> is whether the retaining walls without barriers comply with Clause F4 Safety from falling of the Building Code. In making this decision, I must consider whether the performance requirements of Clause F4 are applicable to the retaining walls. While not forming part of the matter to be determined, I have provided comment on whether the barriers are building work that is exempt from the requirement to obtain a building consent under Schedule 1, and the regulatory actions taken by the authority.
- 1.5 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.

## 2. The building work and background

- 2.1 The building work concerns two retaining walls (the “lower” and “upper” retaining walls), that were constructed without building consent in reliance on Schedule 1(20) of the Act to retain land excavated during site works in preparation for the construction of the house. The site slopes up from the house to the west and south-



**Figure 1: Site plan (not to scale)**

<sup>2</sup> In this determination, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

<sup>3</sup> Under sections 177(1)(a) of the Act

- west direction.
- 2.2 The retaining walls have a height of 1m or more in certain areas, but are not higher than 1.5m.
- 2.3 A building consent application to “construct new 4 bedroom residential dwelling with attached garage” was received by the authority on 5 February 2016. During the processing of the consent the matter of compliance of the retaining walls with Clause F4 was raised.
- 2.4 In an email on 16 March 2016 the authority requested further information regarding the existing retaining walls:
- ...some retaining walls are higher than 1.0m then consideration to F4/AS1 must be made. Please demonstrate compliance with F4/AS1 for all parts of the retaining walls 1.0m high or higher.
- 2.5 On 18 March 2016, the designer responded and provided a revised site plan, which stated in two locations:
- Construct 1m high barrier between boundary fence and retaining wall to prevent pedestrian access to the high side of the retaining wall prior to a point where possible to fall a height of 1m to ensure compliance with section F4 NZBC
- 2.6 The drawings showed barriers at either end of the lower retaining wall (refer Figure 1). No details were provided in the consent drawings to establish how the barrier construction would comply with the Building Code.
- 2.7 The building consent (BC 125426) was issued for the new house on 1 June 2016. A final inspection of the building work was carried out by the authority on 13 July 2017, which failed because barriers to the retaining walls had not been installed. The authority issued a site notice on the same day requiring barriers to both retaining walls where a fall of 1m or more was present.
- 2.8 On 14 July 2017, the applicant emailed the authority stating the retaining walls were exempt building work under Schedule 1, and questioned why they were included in the final inspection for the building consent issued for the house. The applicant stated the building work was compliant, but he could “install a 2.5 metre gate” if necessary to achieve compliance.
- 2.9 There was correspondence between the applicant and the authority from 14 to 17 July 2017 regarding compliance with Clause F4, and whether the retaining walls are associated with the building.
- 2.10 The applicant and authority met on 20 July 2017. In a subsequent email the authority reiterated that the applicant must comply with the site instruction notice and that a code compliance certificate could be issued once barriers were installed and inspected.
- 2.11 The applicant responded on 24 July 2017, informing the authority he would apply for a determination regarding the retaining walls. The applicant was of the view that the southern slope is fenced off from the associated dwelling, and would not be used by children. The applicant stated he would fit a “compliant rail” to the retaining walls as the code compliance certificate was necessary for the sale of the house. The applicant considered that the location of the retaining walls at the rear of the property, and the fact it was “completely barriered (sic)” off, meant it was not associated with the building.
- 2.12 The authority responded on the same day that it considered it was reasonable to expect people to use the grassed area above the retaining wall, and there is the

likelihood of an accidental fall. The authority reiterated the options to achieve compliance with Clause F4 as discussed in the meeting on 20 July 2017.

- 2.13 Barriers were installed to the retaining walls where there was a fall of 1m or more, and a final inspection was carried out on 26 July 2017. The inspection passed and the code compliance certificate was issued on 28 July 2017.
- 2.14 The Ministry received an application for a determination on 3 August 2017.

### 3. The submissions

3.1 The applicant included a submission with the determination application that said (in summary):

- The retaining walls were constructed without building consent in reliance on Schedule 1(20) and were in place before the house was constructed. While there were questions raised by the authority during the consenting process, the agreed method of compliance with Clause F4 was to fit “two fences/gates to” prevent access to the area behind the retaining walls.
- The applicant considered that the area in question is reasonably steep “unusable space”, and he considered in the future it would be completely planted.
- The authority is relying on Determination 99/012 that in fact supports the applicant’s view that a barrier is not required. The retaining wall retains an area at the rear of what is a large site, the area is otherwise fenced off and there are no amenities. The applicant considers Determination 99/012 and Determination 2001/09 both support his view.
- The authority had sufficient time during the construction and consenting process for the house to address this issue.

3.2 The applicant attached copies of the following:

- Excerpts from Determination 1999/012<sup>4</sup> and 2001/9<sup>5</sup>
- Retaining wall article from BUILD 120<sup>6</sup>
- Excerpts from the Building Code and Acceptable Solution for Clause F4
- Schedule 1(20) exemption regarding retaining walls
- Photographs of the retaining walls, and other structures without compliant barriers
- Consented drawings
- The site notice and relevant correspondence between the parties.

3.3 The authority acknowledged the determination application on 10 August 2017 and provided a submission as follows:

- The requirements of Clause F4.3.1 are applicable to both retaining walls. The authority’s view is based on the likelihood of the large grassed lawn area being used by people for “activities, play and maintenance (mowing lawns)”.

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<sup>4</sup> *Determination No. 99/012 The requirement for a safety barrier on a retaining wall* (12 October 1999)

<sup>5</sup> *Determination No. 2001/9 Diagonal wire balustrade to a common stair in a multi-unit dwelling* (28 August 2001)

<sup>6</sup> *Retaining walls* BRANZ BUILD Magazine (1 October 2010)

Consequently, the authority is of the view the retaining walls are associated with the dwelling.

- The authority had discussed several options with the applicant, such as cultivating the area, or planting along the edge of the retaining wall to provide a buffer, or providing lower gardens at the base of the retaining wall to reduce the fall to less than 1m, or providing physical barriers.

3.4 The authority provided the copies of the following:

- Photographs of the site
- Revised building consent application form
- Final inspection reports and site notice
- The code compliance certificate
- Consented site plan
- Relevant correspondence between the parties.

3.5 A draft determination was issued to the parties for comment on 19 September 2017.

3.6 The authority accepted the draft determination on 25 September 2017 and made no further comments.

3.7 On 3 October the applicant accepted the decision of the draft determination and provided further information regarding the fixings of the barrier to the retaining walls.

3.8 The owners on 6 October 2017 accepted the draft determination and made no further comments.

3.9 I have taken the submissions into account and amended the determination as appropriate.

## 4. Discussion

### 4.1 Are the retaining walls required to comply with Clause F4?

4.1.1 Under section 17 of the Act all building work must comply with the Building Code to the extent required by the Act whether or not a building consent is required for that work. Meaning that while the retaining walls were constructed without building consent in reliance on Schedule 1(20)<sup>7</sup>, they are still required to meet the performance requirements of the Building Code. In this case it is Clause F4 that is in dispute.

4.1.2 The objective of Clause F4 is to safeguard people from injury caused by falling, and the functional requirement is “buildings shall be constructed to reduce the likelihood of accidental fall”.

4.1.3 Performance Clause F4.3.1 states:

Where people could fall 1 metre or more from an opening in the external envelope or floor of a building, or from a sudden change of level within or associated with a building, a barrier shall be provided.

Performance F4.3.1 shall not apply where such a barrier would be incompatible with the intended use of an area...

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<sup>7</sup> I have not considered whether the building work to build the retaining walls was exempt under Schedule 1.

(The limitations to this clause do not apply in this instance)

- 4.1.4 There is no dispute that the retaining walls in some places are over 1m in height. What I must consider is whether the areas above the retaining wall are “a sudden change of level **associated with a building**”, and accordingly whether Clause F4.3.1 applies.
- 4.1.5 The net site area is 1481m<sup>2</sup>, with the distance between the dwelling and the lower retaining wall range from approximately 1.5m to 8m. The distance between the lower and upper retaining wall appears to be approximately 1.5m. The retaining walls are not so remote that I would consider them not to be associated with the dwelling. Therefore, I consider that Clause F4.3.1 applies.
- 4.1.6 Determination 2014/029 discussed the “likelihood of accidental fall” relating to the chance of falling, noting that “likely” and “likelihood” have not been defined under the Act or Building Code, however “likely” has been considered in the Courts where it was held that:
- “Likely” does not mean probable, as that puts the test too high. On the other hand, a mere possibility is not enough. What is required is “a reasonable consequence or [something which] could well happen”.<sup>8</sup>
- “Likely” means there is a reasonable probability, or that having regard to the circumstances of the case it could well happen.<sup>9</sup>
- 4.1.7 I have considered the likelihood of an accidental fall in terms of whether the area above the retaining walls is accessible. Where an area is inaccessible, a barrier is not required because there is no likelihood of an accidental fall.
- 4.1.8 However, the area above both retaining walls consists of grassed lawn, which will require maintenance, and there is nothing to prevent a person from accessing these areas for maintenance or other recreational purposes. I note the slope is also more likely to lead to rolling/falling down the area above the retaining walls. I do not agree with the applicant’s view that the slope of the upper level would prevent people from accessing this area.
- 4.1.9 I conclude that a barrier is required to the retaining walls, where there is a fall of 1m or more, to reduce the likelihood of an accidental fall from the two retaining walls.
- 4.1.10 The applicant referred to Determination 1999/012 as justification where users are familiar with their surroundings, that a barrier is not necessarily required. I note the section the applicant refers to was part of a submission and is not stated as the view of the Ministry. Whereas, I am of the view that familiarity with the environment is not an influencing factor in respect of the requirement for barriers to changes of level in or associated with buildings. Clause F4 requires barriers to reduce the likelihood of an “accidental fall”, an accidental fall is just that – an accident – and can occur even with the best care, intentions, and familiarity with the surroundings.

## 4.2 Other comments

- 4.2.1 The matter to be determined turned on whether the retaining walls without barriers comply with Clause F4 of the Building Code. I note that the applicant has since built barriers to the retaining walls, and I consider it relevant to provide comment on Schedule 1 exemptions and the building regulatory process.

<sup>8</sup> *Auckland City Council v Weldon Properties Limited* 8/8/96, Judge Boshier, DC Auckland NP2627/95, upheld on appeal in *Weldon Properties Limited v Auckland City Council* 21/8/97, Salmon J, HC Auckland HC26/97

<sup>9</sup> *Rotorua DC v Rua Developments Limited* 17/12/99, Judge McGuire, DC Rotorua NP1327/97

- 4.2.2 The applicant has stated that the building work carried out to construct the barriers to the retaining walls was exempt under Schedule 1<sup>10</sup>.
- 4.2.3 While not the subject of this determination, I am of the view that the construction of the fence (i.e. the barrier) was building work that was likely exempt from the requirement to obtain building consent.
- 4.2.4 The retaining walls without barriers were not included within the building consent. A code compliance certificate is issued when the authority is satisfied on reasonable grounds that the building work complies with the building consent. So, in this case it would have been more appropriate for the authority to issue a notice to fix under section 164, rather than withholding the code compliance certificate.

### **4.3 Conclusion**

- 4.3.1 The retaining walls are associated with the building and the areas above the walls are likely to be frequented. As there is a fall of 1m or more from the two retaining walls, Clause F4 applies and a safety barrier is required.

## **5. The decision**

- 5.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the retaining walls without barriers do not comply with Clause F4 of the Building Code.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 2 November 2017.

Katie Gordon  
**Manager Determinations**

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<sup>10</sup> Schedule 1(21) provides for building work in connection with a fence that does not exceed 2.5m in height above the supporting ground to be carried out without obtaining building consent

## Appendix A: The relevant legislation

A.1 The relevant legislation for issuing a notice to fix is section 164, which states:

- (1) This section applies if a responsible authority considers on reasonable grounds that—
  - (a) a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent); or...
- (2) A responsible authority must issue to the specified person concerned a notice (a notice to fix) requiring the person—
  - (a) to remedy the contravention of, or to comply with, this Act or the regulations; or...