



Determination 2010/037

Safety barrier to a carparking area at 16 Windy Ridge, Glenfield

1. The matters to be determined

- 1.1 This is a Determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the current Building Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department.
- 1.2 The parties to this determination are:
- the building owner, Mrs Brooke Wilmshurst (“the applicant”) acting through a firm of consulting engineers (the “consulting engineers”)
 - the North Shore City Council carrying out its duties and functions as a territorial authority and a building consent authority (“the authority”).
- 1.3 The dispute between the parties relates to the decision of the authority not to issue a code compliance certificate because a barrier was not provided in respect of the reconstruction of a retaining wall and carparking area. The reason given by the authority for not issuing the certificate was because there was a failure to comply with Clause F4 “Safety from falling” of the Building Code (Schedule 1, Building Regulations 1992). The applicant considered that a barrier was not required as the building work was an alteration only and no barrier existed before.
- 1.4 I therefore take the view that the matter for determination, in terms of sections 177(b)(i) and 188, is whether the decision of the authority not to issue the code compliance certificate is correct.
- 1.5 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.
- 1.6 The full text of the relevant legislation that applies in this determination is set out in Appendix A.

¹ The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Department are all available at www.dbh.govt.nz or by contacting the Department on 0800 242 243

2. The background

- 2.1 On 6 April 1997 the authority issued a building consent (number G11192) under the Building Act 1991 for retaining walls and a concrete “car pad”. The authority issued a code compliance certificate in respect of this work on 28 May 1997. This work did not incorporate any barriers.
- 2.2 After two of the retaining walls and other sections of the car pad failed, the consulting engineers designed various remedial works and on 31 October 2008 made an application for a building consent, which included this statement:
- The application is made under Section 112(1) of the Building Act 2004 and is for Stage 1 only of a 2 stage project. Stage II, which covers new balustrading where none existed before, will be constructed when funds allow and will be the subject of a separate application.
- 2.3 The authority wrote to the consulting engineers on 18 November 2008 about the consent application. With regard to the proposed barriers, the authority noted that the proposed retaining wall would extend 1.4 metres above the existing ground level. An authority’s officer confirmed that :
- ...pursuant to parts F4/AS1 (safety from falling) and B1/AS2 (handrail requirement) of the New Zealand Building Code a building consent for the proposed 1.1 metres high balustrade is required at this stage.
Please provide revised plans that incorporate the proposed balustrade into the current application.
- 2.4 The consulting engineers wrote to the authority on 26 November 2008 stating that as the remedial work was “an alteration to an existing building”, under section 112(1)(b) the authority could only require the building to comply with the Building Code to the same extent as before the alteration. Accordingly, the authority could not require the installation of a new balustrade in connection with the new work that was subject to the building consent application. It was noted that the applicant intended to have the balustrade constructed when funds became available and this work would be subject to a separate building consent.
- 2.5 The plans accompanying the consent application fully detail the barriers to the perimeter of the structure but there is a note on the plans that states:
- Balustrade is Stage 2 of a two stage project, not included in current building consent or contract works.
- 2.6 The authority issued building consent No BA1235252 on 12 January 2009 for
- Alterations and Additions – Residential – retaining walls, reconstruction of failed retaining walls on sides of elevated carparking area, reconstruction of tie piles and carparking slab, reconstruction of associated (*sic*) drainage works.
- 2.7 Following an inspection of the building work by an officer of the authority, the officer noted in a memorandum dated 24 June 2009 that:
- 1.0M high barrier will be required to replace R/T walls with threaded SS rod and washers 50 x 50 to the vertical balustrade posts – Engineer to Design. No toe hold between 150 and 760 – max gap 15mm for horizontal palings and 100 for vert.
- 2.8 The remedial work was completed in July 2009, without any barriers being installed and an application for a code compliance certificate was made by the consulting engineers on behalf of the applicant on 23 July 2009.

- 2.9 Various correspondence passed between the authority and the consulting engineers in October and November 2009, following the officer's memorandum note. The consulting engineers maintained, that in accordance with the building consent documentation, a barrier was not required.
- 2.10 In an email to the consulting engineers dated 9 October 2009, the authority stated that it would not be possible to complete the work in two stages as the work completed in each stage must comply with the Building Code. In this case, the code requirement was in respect of Clause F4. It was also noted that the building consent as issued did not mention any stages and that the work in its current state may be dangerous if left without a barrier.
- 2.11 In an email to the consulting engineers dated 25 November 2009, the authority noted that the consent plans showed how the balustrade was to be constructed, so should be installed under the current building consent. It was accepted that the plans noted that the balustrade was to be included under a stage 2 consent, and this in itself was not a real issue as long as the next consent followed immediately after the first consent. Both consents would then be signed off at the same time in one code compliance certificate.
- 2.12 The application for a determination was received by the Department on 21 December 2009.

3. The building work

- 3.1 The relevant parts of the remedial building work as set out in the consented drawings are shown in Figure 1 below.

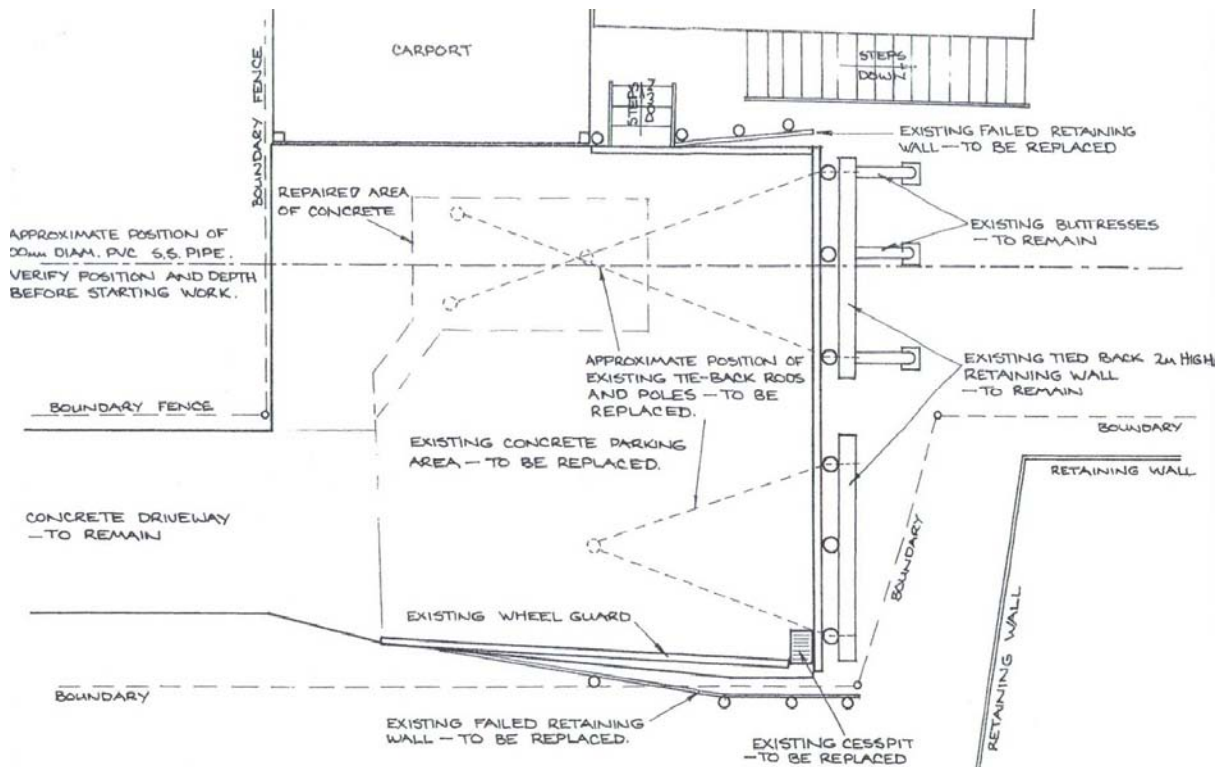


Figure 1: the relevant detail as shown on the building consent plans

- 3.2 The reinstatement work consists of post and close boarded timber retaining walls to replace the existing defective walls supporting the two shorter return sides of a 125mm thick concrete slab forming a car parking area. The front longer wall remains from the pre-existing construction carried out in 1997. The consented plans detail a timber framed barrier above all of the new and existing retaining walls.
- 3.3 According to the consulting engineers, there are 11 metres (out of a total of 25 metres) of the of the parking slab perimeters that are over 1 metre above the finished ground level.

4. The submissions

4.1 The consulting engineers provided a submission with the determination application on behalf of the applicant. The submission described the construction of the remedial work and also set out the background to the dispute. I summarise the other main points raised in the submission as follows:

- It was clearly defined on the consent documentation that the balustrade was to be covered by a separate Stage 2 consent and neither the consent application nor the building consent itself required the construction of a balustrade.
- As the remedial work is an alteration, comprising the reinstatement of short side walls and the retaining of the longer front wall, it must be considered in terms of section 112, and therefore does not require to be upgraded to comply with Clause F4.
- This is not the case of “enlarging or extending the building” but is “repairing” a retaining wall that has failed and that involves re-building and re-erecting the wall using new components in generally the same materials and configuration that has been its present use for more than 10 years.
- As the applicable upgrade provisions are within sections 112(1) and 112(2), there can be “no enforceable erection of balustrading to comply with the ‘new building’ provisions of F4/Safety from Falling”.
- The works were constructed in accordance with the plans and specifications without a balustrade.
- If it considers that the circumstances so warrant, the authority has the right to issue a dangerous building notice under section 124. This is a matter that can be addressed by the applicant with the authority on its merits.

4.2 The applicants supplied copies of:

- the plans and specifications
- the building consent documentation
- the correspondence with the authority.

4.3 In a letter to the Department dated 19 January 2010, the authority stated that it had advised the consulting engineers that “the final inspection can not be signed off until the building work is completed according to the approved drawings and the building code”. It was also noted that the consent had not been issued as an amendment or as a staged consent.

- 4.4 The authority supplied copies of:
- some of the consented plans
 - the email to the consulting engineers dated 9 October 2009.
- 4.5 The draft determination was issued to the parties for comment on 10 February 2010. Both parties accepted the draft without comment.

5. Discussion

- 5.1 The consulting engineers have submitted that the consent documentation specifically noted that the balustrade was to be covered by a separate Stage 2 consent. In addition, neither the consent application nor the building consent itself had reference to a balustrade.
- 5.2 The authority has informed the consulting engineers that it cannot issue a code compliance certificate for the rectification work until a barrier has been erected. However, it did concede that if a new building consent followed immediately after the first, consent, then both consents could be signed off and be covered by one code compliance certificate.
- 5.3 I accept that the application documents supplied for the 12 January building consent, although they detailed the barriers as requested by the authority, clearly show that the barriers were not to be part of that consent. I also accept that the consent as issued is mute as to the requirement to provide barriers. In addition, the authority has noted that the consent had not been issued as an amendment or a staged consent.
- 5.4 Section 94 states that a building consent authority must issue a code compliance certificate if it is satisfied on reasonable grounds that the building work complies with the building consent. Based on the observations made in paragraph 5.3, and taking into account section 94, I am of the opinion that the authority is in error in refusing to issue a code compliance certificate for Stage 1 of the reinstatement,
- 5.5 Having reached that decision, I must however consider whether the authority erred in issuing the building consent of 12 January 2009, for a stage of the reinstatement that did not specifically include any safety barriers in terms of Clause F4.
- 5.6 The consulting engineers are of the opinion that the reinstatement work should be considered as an alteration to an existing building in terms of section 112. Section 112 requires that an alteration, apart from means of escape from fire and access for persons with disabilities, should continue to comply with the provisions of the Building Code to at least the same extent as before the alteration. I am in agreement with this argument put forward by the consulting engineers that the work in question should be considered in terms of Section 112.
- 5.7 The provision of safety barriers comes within the scope of the general requirements of section 112. The authority has not queried the consulting engineers' statement that the existing car parking area did not have any barrier protection and had existed in this state for the past 10 years.
- 5.8 Based on these facts, I am of the opinion that in terms of section 112, there was no need to provide barriers to the perimeter of the car pad as regards the issuing of the building consent in question. Accordingly, I find that the building consent was

correctly issued and that the authority should issue a code compliance certificate in line with that consent without the necessity to install protective barriers.

- 5.9 I note that the applicant intends to install the barriers that the consulting engineers have detailed as and when finance is available. I strongly recommend that this work be undertaken as soon as possible to give additional protection to the users of the car parking area.

6. Conclusion

- 6.1 I conclude that the authority must issue the code compliance certificate in respect of the consented work. However, should the authority consider the matter to be dangerous it should invoke section 121 of the Act.

- 6.2 While it may be unusual for an authority to invoke section 121 in respect of safety from falling in an existing domestic situation, this specific situation has been brought to the authority's attention as part of the building consent process.

7. The decision

- 7.1 In accordance with section 188 of the Act, I hereby determine that the authority's decision not to issue the code compliance certificate is reversed.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 6 May 2010.

John Gardiner
Manager Determinations

Appendix A

The legislation

The relevant sections of the Building Act are:

94 Matters for consideration by building consent authority in deciding issue of code compliance certificate

- (1) A building consent authority must issue a code compliance certificate if it is satisfied, on reasonable grounds,—
- (a) that the building work complies with the building consent...

112 Alterations to existing buildings

- (1) A building consent authority must not grant a building consent for the alteration of an existing building, or part of an existing building, unless the building consent authority is satisfied that, after the alteration, the building will—
- (a) comply, as nearly as is reasonably practicable... , with the provisions of the building code that relate to—
- (i) means of escape from fire; and
- (ii) access and facilities for persons with disabilities (if this is a requirement in terms of section 118); and
- (b) continue to comply with the other provisions of the building code to at least the same extent as before the alteration.

121 Meaning of dangerous building

- (1) A building is **dangerous** for the purposes of this Act if,—
- (a) in the ordinary course of events (excluding the occurrence of an earthquake), the building is likely to cause—
- (i) injury or death (whether by collapse or otherwise) to any persons in it or to persons on other property; or
- (ii) damage to other property...

124 Powers of territorial authorities in respect of dangerous, earthquake-prone, or insanitary buildings

- (1) If a territorial authority is satisfied that a building is dangerous, earthquake prone, or insanitary, the territorial authority may—
- (a) put up a hoarding or fence to prevent people from approaching the building nearer than is safe;
- (b) attach in a prominent place on, or adjacent to, the building a notice that warns people not to approach the building;
- (c) give written notice requiring work to be carried out on the building, within a time stated in the notice (which must not be less than 10 days after the notice is given under [section 125](#)), to—
- (i) reduce or remove the danger; or
- (ii) prevent the building from remaining insanitary.

The relevant clauses of the Building Code are:

CLAUSE F4—SAFETY FROM FALLING

OBJECTIVE

F4.1 The objective of this provision is to safeguard people from injury caused by falling.

FUNCTIONAL REQUIREMENT

F4.2 Buildings shall be constructed to reduce the likelihood of accidental fall.

PERFORMANCE

F4.3.1 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 in level within or associated with a building, a barrier shall be provided.

F4.3.4 Barriers shall:

- (a) Be continuous and extend for the full extent of the hazard,
- (b) Be of appropriate height,
- (c) Be constructed with adequate rigidity,