



Determination 2014/015

Regarding the compliance of a proposed barrier to be installed to a vehicle access way and hard standing area at 20 Rothsay Road, Ngaio, Wellington



1. The matters to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, 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 house, G and K Wishart (“the applicants”)
 - Wellington City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 The matter to be determined² is whether the proposed barrier to the vehicle access way and hard standing area complies with Clause F4 – Safety from Falling of the Building Code (Schedule 1 of the Building Regulations 1992)³ with respect to restricting the passage of children under 6 years of age in an area likely to be frequented by them.
- 1.4 In making my decision, I have considered the submissions of the parties and the other evidence in this matter. I have not considered any other aspects of the Act or of the Building Code. I note here that the vehicle access way and hard standing area is in part constructed on land designated as ‘road reserve’; I have no jurisdiction under other enactments and this determination considers only building matters relating to the Building Act and its regulations.

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

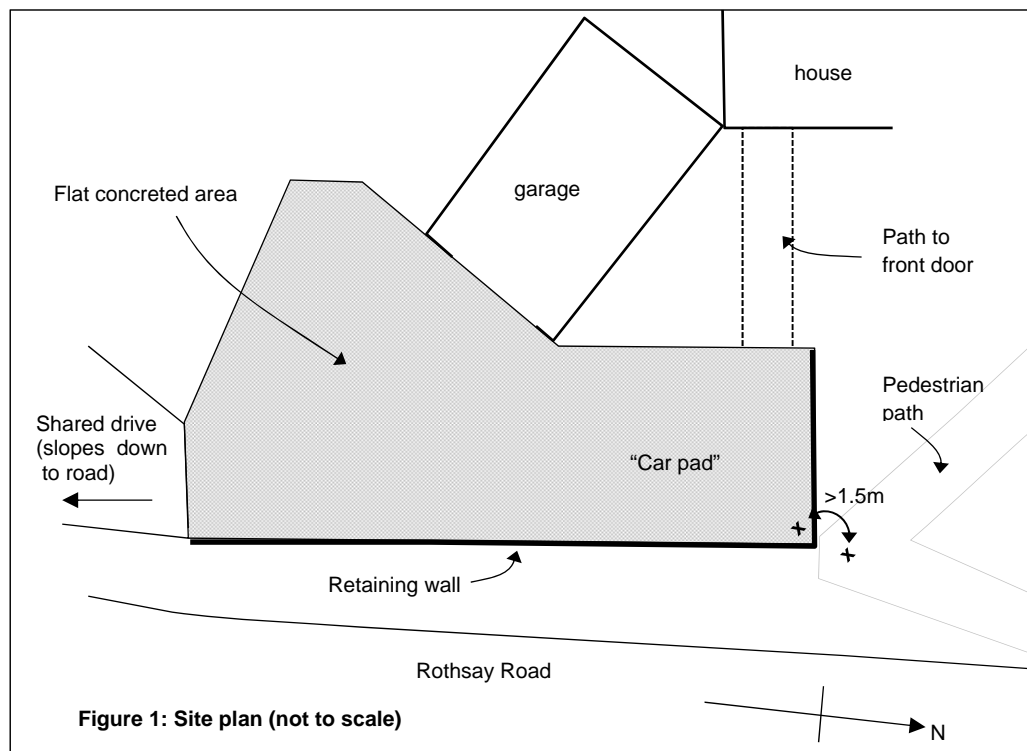
² In terms of section 177(1)(a) of the Building Act 2004.

³ In this determination, unless otherwise stated, references to sections are to sections of the Act, and references to Clauses are to Clauses of the Building Code.

- 1.5 The relevant clause of the Building Code and paragraph from the Acceptable Solution are set out in Appendix A.

2. The building work and background

- 2.1 The building work consists of a proposed barrier to be installed to a newly constructed vehicle access way and hard standing area (“the car pad”) to a residential house. The final design of the barrier has yet to be decided upon, however a dispute has arisen as to whether balusters in a proposed design (“the proposed barrier”) can be any greater than 100mm apart in order to restrict the passage of children under 6 years of age.
- 2.2 The property is located on a steeply sloping site, and construction of the car pad required the formation of a flat area with timber retaining walls to the northern end and the eastern side to the street. The east retaining wall is 1.5m at its highest point above the adjacent bank; the maximum fall height is at the northeast corner of the pad to the adjacent pedestrian path and is greater than 1.5m. The car pad has been constructed with a 200mm high nib wall along the perimeter which serves as a vehicle safety barrier.
- 2.3 The car pad is situated at the top of a short section of shared driveway and provides access to an existing garage and an area for turning. There is internal access from the garage to the house, and a path runs from the car pad to the front door of the house (approximately 5m). There is separate pedestrian access to the house from the street by way of an existing zig-zag concrete path.



2.4 The proposed barrier

- 2.4.1 The application for building consent for the construction of the new car pad noted that a barrier was going to be constructed, with the specification stating:

A safety hand rail and balustrade will be provided along the edge of the retaining wall. The final design has yet to be determined but for the purposes of this specification, the balustrade will feature vertical metal balusters with an overall

balustrade height of 1 metre and designed to meet the requirements of clause F4 of the Code of Practice (*sic*) and Acceptable Solution [F4/AS1 paragraph] 1.2.2.

- 2.4.2 The drawings provided with the consent documentation indicate balusters in the design, but the barrier details were not dimensioned other than confirming the height of the barrier to be 1m. The applicants have stated that the drawings were provided as an indication only of the need to fence.
- 2.4.3 The applicants' intention is for the proposed design to emulate an existing balcony attached to the house, with balusters constructed from alloy sections of up to 80mm square spaced approximately 275mm apart.

2.5 Background

- 2.5.1 In February 2013 the authority issued building consent No. TW276102 under the Act. At an inspection during construction, the authority advised the applicants that for the proposed barrier to comply the openings should be no more than 100mm apart.
- 2.5.2 The applicants subsequently contacted an officer of the Ministry to query the requirement for the balusters to be a maximum of 100mm. The officer responded by email on 7 November 2013 as follows:
- Clause F4 requires barriers that 'restrict the passage' of children under 6 'in areas likely to be frequented by them'.
- ... A deck to a house always needs a F4/AS1 type barrier but possibly the car manoeuvring area by a garage is not 'likely to be frequented' by young children in the same way. The Comment on p13 of F4/AS1 refers to Determination No. 2001/9^[4] which related to the common stair in an apartment building and gives useful guidance to interpreting the Clause F4 requirement.
- I understand that [authorities] generally do not expect barriers on driveways to be child resistant as per F4/AS1, and your car pad is essentially part of the driveway. You will need to discuss this matter with the [authority] though.
- 2.5.3 On 10 November 2013 the applicants wrote to the authority regarding the proposed barrier, referring to the relevant Clause F4, the Acceptable Solution F4/AS1, and Determination 2001/9. The applicants stated that they considered the car pad fell into the category of an area 'not likely to be frequented by small children on a regular basis'. The applicants commented that small children, particularly those of 2 years or younger, should not be frequenting a driveway or car pad; and that the applicants do not have children. The letter also noted that the consent was issued without any statement as to the specification citing compliance by way of paragraph 1.2.2 of F4/AS1 (refer Appendix A).
- 2.5.4 The authority responded by way of a letter dated 26 November 2013. The authority noted that:
- the 'submitted plans show compliance with F4/AS1 [paragraph] 1.2.1 even though [the] specification references another solution under [F4/AS1 paragraph] 1.2.2. The drawings when scaled show 100mm between vertical balustrades although the dimension for this and the thickness of the balustrades were not shown clearly in detail.
- 2.5.5 The authority considered that the area provided access to residential housing and formed part of the residential frontage to the property, and so was likely to be frequented by children. Accordingly the authority considered that paragraph 1.2.2 of

⁴ Determination 2001/9: Diagonal wire balustrade to a common stair in a multi-unit dwelling (Building Industry Authority) 28 August 2001

F4/AS1 was not acceptable as a means of compliance with F4.3.4(g). The authority noted that a final design for the proposed barrier was yet to be provided for its consideration.

2.6 The Ministry received an application for a determination on 9 January 2014.

2.7 The site visit

2.7.1 In order to verify the impression given by the evidence a consultant for the Ministry visited the house on 30 January 2014 to carry out a visual inspection. One of the applicants was present during the site visit and provided photographs of the car pad prior to the building work being carried out.

2.7.2 The consultant observed the height of the retaining wall and area of the car pad was as stated in the consent documentation, and also noted that

- separate pedestrian access was available from the street to the house
- there was direct access between the house and the car pad by way of a path from the front door to the car pad in addition to internal access through the garage
- in terms of alternative flat areas on the property, there was a small concrete area at the back of the house which provided access to a clothes line and the steeply sloping grassed yard at the back of the house
- a fall from the east of the car pad would be to a slope that was currently unplanted and down to the street, where there is no footpath; the fall height from the north (short edge) of the car pad ranged from 0 to 1.5m onto a grass surface, except at the northeast corner of the car pad where the corner of the car pad is immediately adjacent to the concrete pedestrian path and the fall height is greater.

2.7.3 The applicant that was present advised the consultant that consideration was being given to putting a gate at the entrance from the shared drive to the car pad, and the possibility of putting a second gate to the path to the house was also discussed.

3. The submissions

3.1 The applicants' submission

3.1.1 The applicants provided a submission which set out the background to the dispute and their views on the Building Code requirement. The applicants noted that the consent application specified F4/AS1 paragraph 1.2.2 as the means of compliance and indicative drawings only, and that the authority had approved the consent without comment. The applicants are of the view that

- the car pad, vehicle turning area and associated retaining wall are not 'housing' in terms of the Building Code, but 'ancillary'
- the driveway and vehicle access is not an area frequented or likely to be frequented by children less than 6 years of age on a regular basis, and in fact these are areas that are dangerous for unsupervised young children and so are unsuitable for frequent access
- the car pad abuts a shared driveway which exits onto the road; there is also no pedestrian footpath on that side of the road.

- 3.1.2 The applicant forwarded copies of
- the specifications and relevant drawings that were supplied with the consent application
 - correspondence with the authority
 - photographs of the shared drive way, car pad, and house balcony barrier.
- 3.2 The authority made no submission in response to the application for determination.
- 3.3 A draft determination was issued to the parties for comment on 10 February 2014.
- 3.4 The authority accepted the draft without further comment in a response received on 7 March 2014.
- 3.5 The applicants accepted the draft, but noted that the authority had not read the plans correctly and in the applicants' opinion the unintended consequences of 'requiring childproof fences around driveways' would be the perception of those areas as being safe areas for children to play when the driveways are inherently not safe.

4. Discussion

- 4.1 The objective of Clause F4 (to safeguard people from injury caused by falling) is an important one. It is reflected in the purposes provisions of the Act (section 3), where the first purpose of the Act is listed as ensuring that 'people who use buildings can do so safely and without endangering their health ...'.
- 4.2 The performance requirement in Clause F4.3.1 requires
- 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.
- (The limitations to this clause do not apply in this instance.).
- 4.3 Clause F4.3.4(g) states the barrier must 'restrict the passage of children under 6 years of age when provided to guard a change of level in areas likely to be frequented by them'.

4.4 Is the car pad likely to be frequented by children?

- 4.4.1 Where the building (including a change of level associated with the building) is a house, the assumption is that children are likely to frequent it.
- 4.4.2 The word "likely" was considered in *Auckland CC v Weldon Properties*⁵, in which the District Court held that in the context of section 64 of the Building Act:

"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".

The Ministry takes the view that the same meaning is to be given to the word "likely" in clause F4.3.4(g) of the Building Code.

- 4.4.3 In general, children are likely to frequent any household at some time in its life. That is why the Acceptable Solution F4/AS1 requires safety barriers that will restrict the passage of children in any building having the classified use "Housing". Though a current owner or tenant may not have children or be likely to have friends or family with children visit, houses in New Zealand change ownership comparatively

⁵ *Auckland CC v Weldon Properties Ltd* 8/8/96, Judge Boshier, DC Auckland NP2627/95.

frequently and current ownership cannot be considered as a factor in the assessment of compliance.

- 4.4.4 The applicants have submitted that in this case the area is used as a vehicle turning area and access to the garage, and accordingly it would be an area that is unsafe for unsupervised children. I acknowledge the applicants' point however this cannot be relied upon as a way of meeting the requirements of Clause F4. I am of the view that children under the age of 6 years may well be present in such areas as they get into and out of vehicles. In addition I note the car pad is associated with the house, it is easily accessible and I consider that as a large flat area it is an area that is likely to be used by children.
- 4.4.5 The applicants have also stated that the newly constructed car pad is not 'housing' in terms of the Building Code, but rather 'ancillary'; and that for 'non-housing' buildings Determination 2001/9 supports the applicant's view regarding areas frequented by children less than 6 years of age.
- 4.4.6 I consider this interpretation is not correct. Determination 2001/9 related to a wire barrier on a set of stairs providing an exit route to a multi-unit dwelling. In that instance the Ministry concluded that children were unlikely to frequent the stairs because
- the stairs serve only three apartments which were also served by a lift
 - the stairs were accessible from the three upper apartments only through security doors; the only unlocked way out is on to the street and so the residents were more likely to discourage children from playing on the stairs
 - residents were more likely to use the lift than the stairs, especially when accompanied by children.
- 4.4.7 In this instance I consider that in this situation the car pad is an area associated with the house that is likely to be frequented by children, and accordingly the proposed barrier is required to comply with Clause F4.3.4(g). I note here that each determination is considered on a case by case basis, and the same conclusion may not be reached in other cases involving driveways or vehicle access ways.

4.5 Compliance of the proposed barrier

- 4.5.1 I note that the specification in the consent documentation and the application for determination both refer to compliance by way of F4/AS1 paragraph 1.2.2, which states:
- 1.2.2** In areas used exclusively for emergency or maintenance purposes in buildings, and in other buildings not frequented by children, barriers may have openings with maximum dimensions of either:
- a) 300 mm horizontally between vertical balustrade members,
- 4.5.2 The car pad is not an area that is used 'exclusively for emergency or maintenance purposes', and as I have concluded that this is an area that for the purposes of the Building Code is likely to be frequented by children, it follows that paragraph 1.2.2 of F4/AS1 cannot be applied.
- 4.5.3 I acknowledge that the specification referred to compliance by way of F4/AS1 paragraph 1.2.2, and that the consent was issued by the authority without comment or conditions being attached to the consent. I also acknowledge that the final design details were yet to be put to the authority for its consideration and the drawings of a barrier with balusters did not include dimensions.

- 4.5.4 In a previous determination⁶ I have considered the situation where an authority incorrectly granted a building consent where the building work would not meet the requirements of the Act; however, in this instance as the final design was yet to be decided and building work to construct the barrier has not been carried out, there is an opportunity for a compliant design to be decided on before building work proceeds.
- 4.5.5 The applicants have the option of using an Acceptable Solution or proposing an alternative solution that meets the requirements of F4.3.4(g).

5. The decision

- 5.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the proposed barrier with balusters at 275mm spacing does not comply with Clause F4.3.4(g) of the Building Code.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 18 March 2014.

John Gardiner
Manager Determinations and Assurance

⁶ Determination 2009/076: Safety barriers for a swimming pool at 135B McLaren Falls Road, Tauranga (Department of Building and Housing) 11 September 2009

Appendix A

A.1 Relevant clause of the Building Code

F4.3.4 Barriers shall:

- (g) restrict the passage of children under 6 years of age when provided to guard a change of level in areas likely to be frequented by them.

A.2 Paragraphs of F4/AS1 discussed in this determination

1.2 Barrier construction

- 1.2.1 In housing and other areas likely to be frequented by children under 6 years of age:

...

- b) Openings anywhere over the full height of the barrier shall be such a size that a 100 mm diameter sphere cannot pass through them,...