



## Determination 2014/029

### Regarding the refusal to issue a code compliance certificate for failure to comply with Building Code Clause F4 for a batter slope at 23 Melksham Drive, Churton Park, Wellington



#### 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, 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, B and J Ferguson (“the applicants”)
- Wellington City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

1.3 This determination arises from the decision of the authority to refuse to issue a code compliance certificate as it was not satisfied that the batter slope complied with Building Code Clause F4 Safety from Falling. The authority required a safety barrier be erected at the rear boundary situated at the top of the batter slope.

1.4 The matter to be determined<sup>2</sup> therefore is whether the authority was correct to refuse to issue the code compliance certificate for the house with respect to Clause F4 of the Building Code (First Schedule, Building Regulations 1992).

---

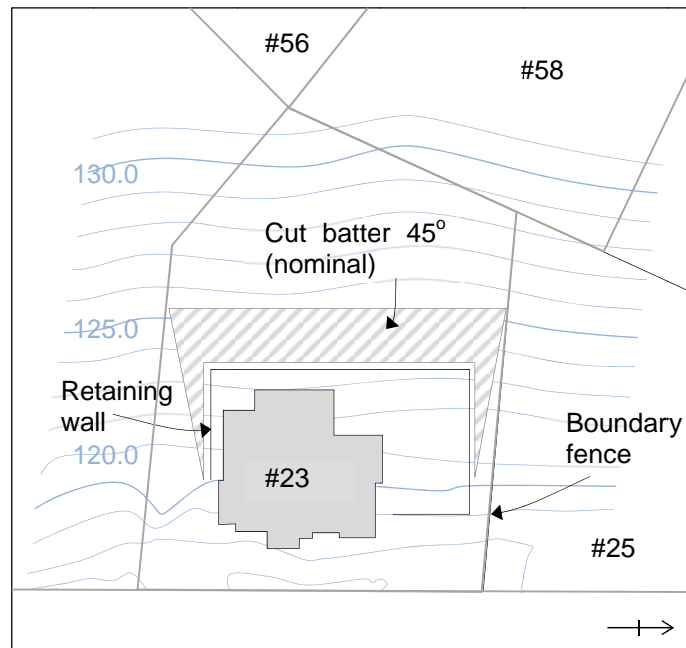
<sup>1</sup> The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at [www.dbh.govt.nz](http://www.dbh.govt.nz) or by contacting the Ministry on 0800 242 243.

<sup>2</sup> Under sections 177(1)(b) and 177(2)(d)

- 1.5 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.

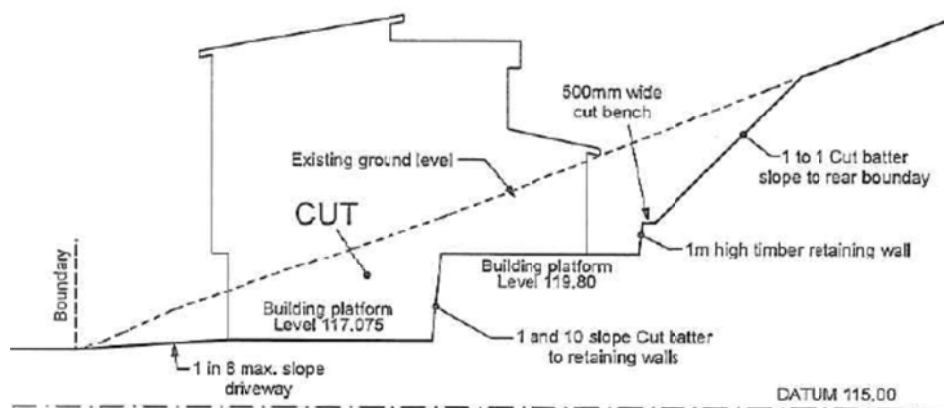
## 2. The building work

- 2.1 The building work comprises a two storey house and basement situated on a steeply sloping site that was excavated to form the building platform. The house is of timber frame construction with a 1m high timber retaining wall located at the bottom of the batter slope. There is a wooden boundary fence on the north side of the site between the applicants and the neighbouring property.



**Figure 1: Site Plan**

- 2.2 The excavation work has left a batter slope at approximately a 45-48 degree angle (refer to Figure 2). The top of the batter slope ranges between 6m to 14m to the rear boundary where the land has a 20 degree slope. The top of the batter to the north is very close to the boundary fence making access around the batter at this point difficult. The vertical height from the path behind the house to the top of the bank is approximately 5.2m.



**Figure 2: Cross section view of the property looking South**

- 2.3 The site currently shares a boundary line with two sections to the west above the batter (refer Figure 1 #56 and #58), where there are two dwellings under construction close to completion, and one to the south which has been partially excavated but has had no activity since November 2013. The adjacent north section (#25) has been developed and a boundary fence constructed (refer Figure 1).
- 2.4 It is accepted that all the currently vacant sites will be used for residential construction.

### **3. Background**

- 3.1 On 26 February 2013 the authority issued building consent number 275835 for the construction of the building.
- 3.2 Earthworks began at the site around mid-March 2013 and were completed on 26 March 2013. The construction of the building was completed on 16 October 2013 and the applicants' builder applied for a code compliance certificate for the house.
- 3.3 On 16 October 2013 the authority carried out a final inspection. The authority verbally indicated to the applicants that a barrier would be required at the top of the bank.
- 3.4 On 22 November 2013 the authority carried out a further inspection. The site inspection documentation states under 'failed items' that 'the barrier to the top bank is not in place yet.
- 3.5 On 14 January 2014 the applicants wrote to the authority setting out their submission and requesting that the authority remove the requirement for a barrier at the top of the bank. This letter is incorporated into the applicants' submission to the Ministry and is discussed at paragraph 4.1.
- 3.6 On 10 February 2014 the authority wrote to the applicants detailing the barrier requirements the authority considered necessary for the code compliance certificate to be issued. The letter states:

...the requirements for a safety barrier to the top of the new bank will need to meet the clauses laid out in the building code F4 safety from falling.

The batter cut to the rear of the property is deemed not to be in accordance with the approved plans and therefore the building officer has asked that this hazard be taken care of by way of a code compliant safety barrier. The barrier will need to extend the full extent of the hazard to eliminate the potential fall.

This has been asked for and is a requirement to issue Code of Compliance..(sic)

- 3.7 The applicants applied for a determination on 21 February 2014.

### **4. The submissions**

- 4.1 With the application for determination the applicants submitted the following points in summary:
- Under Clause F4.3.1 the applicants believe that a barrier would be incompatible with the intended use of the area above their batter slope as the area has no intended use. The batter slope extends to both the north and south boundaries and they are unable to access the area above the batter slope without passing through the neighbouring property on the south side.
  - The applicants refer to a previous determination 1999/012 quoting:

...at the time of construction the possibility that people might be at risk of falling from the top of the wall was so uncertain that it did not need to be taken into account in the design and construction of the wall...

- The applicants submit that they do not go into the area above the batter slope and no one else would need to enter this space unless they were trespassing. However, they do understand there is a possibility that someone could wander down from one of the three bordering sections at the rear of the property. These sections are still under excavation. In the future they will negotiate with the new owners regarding building a boundary fence which can double as a safety barrier. In this case they would be able to share the cost of the fence with their neighbours.
- The applicants are happy to plant a hedge as a psychological barrier to deter people from wandering through considering it is not an area expected to be frequented by people.
- In relation to the issue of the batter slope not being in accordance with the 45 degrees set out in the consent, the applicants submit that this is not an issue; it was never raised during any inspections by the authority and the applicants submit that most of the rear slope fluctuates around 45 degrees except the last few metres. It is also submitted that even if the gradient was changed the authority would still require a safety barrier.

4.2 The application was accompanied by:

- a site notice from the authority dated 22 November 2013
- the applicants' letter in response to the authority regarding the refusal of the code compliance certificate
- a letter from the authority detailing the barrier requirements for the house
- plans and photographs of the house and surrounding excavation
- an email from the applicants' builder

4.3 The Ministry received no submission from the authority in response to the application.

4.4 A draft determination was issued to the parties for comment on 19 March 2014.

4.5 The applicants, in a submission received on 25 March 2014, did not accept the draft determination, and made the following comments:

- The applicants do not see any substantive differences between determination 1999/012<sup>3</sup> and this case.
- 'Likelihood' relates to the likelihood of people being in the area (at the top of the batter slope) not the likelihood that if they were in that area they would fall.
- In what scenario would people be considered unlikely to be in the area of the falling hazard meaning that a barrier was not required?
- The applicants are seeking clarification as to what type of fence would be adequate and whether it would need to be something suitable for an area frequented by children under the age of six.

---

<sup>3</sup> Determination 1999/012: The requirement for a safety barrier on a retaining wall (12 October 1999) *Building Industry Authority*

- Is the authority entitled to specify requirements for a fence that are ‘more strict’ than the Building Code?
- 4.6 The applicants also identified a number of minor factual errors that have subsequently been corrected.
- 4.7 In an email on 1 May 2014, the authority accepted the draft without further comment.
- 4.8 I have taken careful account of the comments of the applicants and amended the determination as I consider appropriate. In response to the applicants queries regarding the comparability of circumstances with Determination 1999/012 and the situations where people would be considered unlikely to be at risk of falling, I note the following:
- In Determination 1999/012 a retaining wall was constructed along the boundary of two properties and the vacant property above the retaining wall was undeveloped at the time the wall was constructed. The determination concluded that it was not reasonably foreseeable what the precise nature of development of the vacant property would be, and therefore not reasonably foreseeable that such development would make it likely that people would be at risk of falling from the top of the wall.<sup>4</sup> In the current case, I consider the future use of the area above the batter is reasonably foreseeable.
  - The owner has asked in what scenario people would be considered unlikely to be in the area of the falling hazard meaning that a barrier was not required. Assuming the boundary fences to the property are all in place, circumstances that might give rise to such a scenario include the area above the batter being limited in size, and the terrain above the batter being steep and unlikely to be used in future.

## 5. Discussion

### Does the batter fall within the scope of Clause F4?

- 5.1 The first question that needs to be answered is whether the batter slope at the rear of the house is associated with a building and therefore subject to the requirements of Clause F4. I consider that the batter slope is associated with the house construction building work; the slope was excavated as part of the construction of the house and is not a natural occurrence.
- 5.2 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 in level within or associated with a *building*, a barrier shall be provided.
- 5.3 I consider that the approximate 45 degree angle of the batter slope would constitute a ‘sudden’ change of level for the purposes of Clause F4.3.1, and accordingly the batter slope is subject to Clause F4. I do not consider whether or not the batter slope is exactly 45 degrees as an issue to be determined, nor does it have any bearing on the matter being determined.

### Will people fall and injure themselves from the top of the batter slope?

- 5.4 Objective Clause F4.1 aims to safeguard people from injury caused by falling. This is reinforced by Clause F4.2, which requires buildings to be constructed to reduce the

---

<sup>4</sup> See Determination 1999/012 paragraph 7.5

likelihood of accidental fall. This is requiring the risk of accidental fall to be reduced, as no person can ever be completely protected from falling.<sup>5</sup>

- 5.5 The ‘likelihood of accidental fall’ relates to the chance of falling. Likely and likelihood are not defined in the Building Act or the Building Code. However, the word ‘likely’ has been considered in court, and 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>6</sup>

“Likely” means that there is a reasonable probability, or that having regard to the circumstances of the case it could well happen.<sup>7</sup>

- 5.6 The 1 metre fall height stated in Clause F4.3.1 recognises that falls from this height are likely to result in significant injury. The fall does not need to be vertical; a slope of 45 degrees is steep enough for someone to tumble down and injure themselves.<sup>8</sup> The batter slope in this instance is approximately 45 degrees, and there is no dispute that the fall is more than 1 metre.
- 5.7 In my view I need to consider the risk of falling as it is now, and as it is reasonably foreseeable with the adjacent residential sites complete with houses.

#### **Safety in the immediate term**

- 5.8 The site is located in a residential area that is currently being developed, meaning houses are being built as described in paragraph 2.3. It is reasonable to assume that a boundary fence will be built to the west of the property in the short term, as has happened to the north of the property. The property to the south is only partly developed and the erection of a boundary fence on this side of the property may be further in the future. The erection of boundary fences should, in my view, restrict movement of people onto the property to an adequate degree.
- 5.9 The current situation means it is likely that people, other than the applicants, will be present in the area adjacent the top of the batter. I consider there is a risk of falling if there is no form of barrier to warn people that the batter slope is imminent. There is a reasonable probability of a person wandering down from the area adjacent to the top of the batter and accidentally falling from the batter slope.
- 5.10 I therefore consider that some measure is required to mitigate the likelihood of a fall in the immediate term until the boundary fences are in place. The nature of this further measure is a matter for the applicants to propose and the authority to accept or reject. The parties may wish to refer to the Acceptable Solutions F4/AS1 paragraph 1.2.2 for guidance.<sup>9</sup> It is outside of the scope of this determination to conclude the type and specifications of these further measures to fulfil the requirements Clause F4, however, I consider a barrier is only required until such time as the remaining boundary fences are in place.
- 5.11 In my view I do not consider the area above the batter is likely to be frequented by children under six. Access to the area above the batter slope is currently limited and the area is not immediately adjacent outdoor living areas associated with the house. In Determination 2001/009 the *Concise Oxford Dictionary* defined ‘frequent’ as

<sup>5</sup> See Determination 2010/85 Safety from falling from an infinity edge swimming pool at a house

<sup>6</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>7</sup> Rotorua DC v Rua Developments Limited 17/12/99, Judge McGuire, DC Rotorua NP1327/97

<sup>8</sup> See Codewords Article Number 32, 2008.

<sup>9</sup> Acceptable Solutions Clause F4 Safety from Falling, Third Edition

‘attend or go to habitually’. For the batter slope to be frequented by children under the age of six it is not enough that they could well be in the location from time to time. If a location is frequented by children, anyone visiting that location at an appropriate time could well expect children to be present on many if not most occasions.<sup>10</sup>

- 5.12 For these reasons I consider the area above the batter is unlikely to be frequented by children under the age of six; accordingly the requirements of Clause F4.3.4(g) do not apply for the purposes of this determination.
- 5.13 I remind the parties that under section 18 of the Act building work is not required to achieve performance criteria that is additional to or more restrictive than the performance criteria prescribed in the Building Code.

### **Ongoing safety**

- 5.14 I accept the applicants’ position that boundary fences will be put in place once the surrounding building sites are complete. As noted in paragraph 5.10 above, I consider this to be adequate in terms of restricting people from outside the property moving into the area above the batter that poses the risk.
- 5.15 In my view the top of the batter slope will be difficult to access once the boundary fences are in place. The terrain is steep and a person would have to negotiate a difficult access route to get to the top of the batter slope. I consider any person accessing the top of the batter slope will be acutely aware of the nature of the incline and therefore the falling hazard. I do not consider the batter slope is an area expected to be frequented by people due to the difficulty in access.
- 5.16 While it is certainly the case that the bottom of the batter slope is associated with a building, it is much less clear that the top of the slope is also associated with a building. Once a person is at the top of the batter slope the likelihood of fall is less than if the batter was directly outside of a building and dropped away.
- 5.1 I consider a barrier is needed until the two remaining boundary fences are built. In relation to ongoing safety, once the boundary fences are in place the barrier required for the batter slope can be removed. In my view I do not consider that there needs to be both the two boundary fences and a barrier for the batter slope to comply with Building Code Clause F4.3.1.

### **The consent documentation**

- 5.2 I consider the as-built work closely resembles that shown in the consented drawings in terms of the size, slope, and position of the batter; I do not accept the authority’s view that the work is at variance with the approved plans (refer paragraph 3.6). The need for a barrier should have been identified before the building consent was issued.

---

<sup>10</sup> Determination 2001/009 Diagonal wire balustrade to a common stair in a multi-unit dwelling

## **6. The decision**

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that authority was correct in refusing to issue a code compliance certificate as the batter slope does not comply with Clause F4 of the Building Code with respect to safety from falling in the immediate term.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 12 June 2014.

John Gardiner  
**Manager Determinations and Assurance**



## Appendix A: The legislation

The relevant clauses of the building code

### A1 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

Provisions	Limits on application
<p><b>F4.3.1</b> Where people could fall 1 metre or more from an opening in the external envelope or floor of a <i>building</i>, or from a sudden change in level within or associated with a <i>building</i>, a barrier shall be provided.</p>	<p>Performance F4.3.1 shall not apply where such a barrier would be incompatible with the intended use of an area, or to temporary barriers on construction sites where the possible fall is less than 3 metres[, or to building providing pedestrian access in remote locations where the route served presents similar natural hazards].</p>
<p><b>F4.3.4</b> Barriers shall:</p> <ul style="list-style-type: none"> <li>(a) Be continuous and extend for the full height of the hazard,</li> <li>(b) Be of appropriate height,</li> <li>(c) Be constructed with adequate rigidity,</li> <li>(d) Be of adequate strength to withstand the foreseeable impact of people and, where appropriate, the static pressure of people pressing against them,</li> <li>(e) Be constructed to prevent people from falling through them, and...</li> </ul>	

### A2 Clause A2 - Interpretation

**intended use** of a building includes—

- (a) any reasonably foreseeable occasional other use that is not incompatible with the intended use; and

### A3 Acceptable Solutions F4/AS1

**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, or
- b) 460 mm vertically between longitudinal rails.