

The requirement for a safety barrier on a retaining wall

1 THE MATTER TO BE DETERMINED

- 1.1 The matter before the Authority is a dispute as to whether a safety barrier is required on a certain retaining wall. The application for determination was made by a neighbour who claims that a safety barrier is required because the construction of the wall has made it possible to fall more than 1 m from the applicant's own property and also from a right-of-way giving access to that property.
- 1.2 The Authority takes the view that it is being asked in effect to determine whether clause F4.3.1 of the building code (the First Schedule to the Building Regulations 1992) requires a safety barrier to be provided on the wall concerned.
- 1.3 In making its determination the Authority has not considered compliance with any other provisions of the building code or of the Building Act 1991 ("the Act").

2 BACKGROUND

- 2.1 The retaining wall was constructed as part of the development of an allotment by the previous owner of that allotment. The developer subsequently constructed a multi-unit dwelling on the allotment. The allotment has since been sold. There is some confusion about the identity of the current owner, see 3.2 below. In this determination, the allotment is referred to as "the owner's property" and the adjoining allotment owned by the applicant is described as "the applicant's property".
- 2.2 When the retaining wall was constructed, the applicant's property was, in the words of the territorial authority, "a vacant undeveloped section". The Authority understands that a building consent and a code compliance certificate were issued but has not been given copies of them. The territorial authority was satisfied that the wall complied with the building code at the time it was completed.
- 2.3 The retaining wall varies between 1.0 and 2.2 m in height. It was apparently constructed in conjunction with excavations on the owner's property made to create a building platform. The wall runs along part of the boundary between the owner's property and the applicant's property until it turns to run along the edge of a right-of-way over the owner's property giving access to the applicant's property and also to other adjacent allotments. In other words, the retaining wall supports part of the applicant's property and part of the right-of-way to that property.
- 2.4 The applicant's property is currently undeveloped.

3 PRELIMINARY QUESTIONS

3.1 Does the Authority have jurisdiction to determine the matter?

3.1.1 Section 17(1) of the Act lists various situations in which doubt or dispute might arise, and provides that “any of the parties may apply to the Authority for a determination in respect of the doubt or dispute”. The Authority takes the view that those words prevent the Authority from determining a doubt or dispute on the application of anyone who is not a “party” as defined in section 16:

16. Definition of “party”—In sections 17 to 21 of this Act, “party” means—

- (a) The territorial authority affected; and
- (b) Any building certifier affected; and
- (c) The owner affected; and
- (d) The owner of other property (if the matter for determination relates to a provision in the building code that has the purpose of protecting that other property); and
- (e) Any affected person who, or organisation which, (pursuant to any other Act) has a right or an obligation to give notice in writing to a territorial authority in respect of matters to which this Act relates.

3.1.2 In this case, whether the applicant is a party depends on whether the applicant comes within section 16(d). The question, therefore, is whether in this case clause F4 of the building code has the purpose of protecting the applicant’s property.

3.1.3 The purpose of clause F4 is stated in clause F4.1 as being “to safeguard people from injury caused by falling”. Clause F4 does not have the purpose of protecting any property whatsoever.

3.1.4 The Authority therefore takes the view that the plain words of section 16(d) mean that the applicant does not have the right to be a party to the determination applied for.

3.1.5 Of course, the matter itself could be the subject of a determination, but only on the application of the territorial authority under section 16(a), any building certifier affected under section 16(b), the owner under section 16(c), or a statutory body such as the New Zealand Fire Service under section 16 (e). In other words, the owner of the building work concerned or someone acting in the public interest.

3.1.6 On the view the Authority takes of sections 16 and 17, therefore, it has no power to accept the applicant’s request to determine the dispute about whether a safety barrier is required on the retaining wall concerned. In other words, if the applicant does not have the right to make the application then the Authority does not have the jurisdiction to determine the matter.

3.1.7 However, the interpretation of the Act is a matter of law, and the Authority is not a court of law and cannot issue binding interpretations of the Act. Accordingly, in case the Authority is wrong about not having the jurisdiction to determine the matter, it records below the decision it would come to if it did have the jurisdiction.

3.2 Participation of the owner

- 3.2.1 The owner is a party to the determination under section 16(c). The definition of “owner” in relation to section 16 is discussed in Determination 97/004. For the purposes of this current determination, the Authority takes the view that the owner is the registered proprietor in fee simple of the owner’s property as at the time of the determination. The Authority has the impression that the individual household units in the building are currently held under unit titles. If that is correct then the Authority’s understanding is that the current owner is the corresponding corporate body as defined in the Unit Title Act 1972.
- 3.2.2 The Authority takes the view that the relevant parties as defined in section 16, and also any other appropriate persons, should be involved in any determination and in particular should be given an opportunity to comment on each of the documents submitted to the Authority and, if they wish, to request the Authority to hold a hearing at which they may speak and call evidence. To that end, the Authority requires the applicant for a determination to serve the documents on each of the parties. The legal requirements for service are set out in section 87. The usual practice is for the applicant to ensure that the Authority receives an acknowledgment of receipt of those documents from each of the parties.
- 3.2.3 However, the applicant was of the opinion that the developer, as the person who was responsible for the construction of the wall, should be a party to the determination rather than the current owner. The Authority disagreed, and asked the applicant to consult the certificate of title to the owner’s property, which is a public record, and thus identify the registered proprietor in fee simple of the owner’s property. The applicant did not do so, saying:
- Given that there may be one owner for each of the nine apartments and this could change with time I would have thought that [the developer] would still be liable on the basis of his construction which led to the claim.
- 3.2.4 That response indicates that the applicant misunderstands the nature of a determination. An application for a determination is not a “claim” and a determination is not concerned with “liability”. The reality is that a determination is a technical decision as to compliance with the building code. This particular determination is limited by section 18 to whether or not the retaining wall complies with the provisions of the building code. The Authority does not purport to decide whether any failure to comply arises from wrongdoing which might give rise to legal liability. Nor does it purport to decide who is to pay for any necessary remedial work. Those are matters for the general law.
- 3.2.5 Ordinarily, the Authority would refuse to continue with a determination until satisfied by the applicant that the other parties had been properly served in accordance with section 87. In this case, however, the Authority considers that the owner would not be disadvantaged by the decision that the Authority, without the benefit of submissions from the owner, would come to if it had the jurisdiction to do so.

4 THE PARTIES

- 4.1 If the applicant is in fact a party, then the other parties are the owner of the wall and the territorial authority.

5 CLAUSE F4

5.1 The relevant requirement of clause F4 is:

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 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, or to temporary barriers on *construction* sites where the possible fall is less than 3 metres.

6 THE SUBMISSIONS

6.1 The applicant's submissions

6.1.1 The applicant submitted that a barrier was required for the reasons set out in the article "Garden Retaining Walls – Do they Require a Barrier" in *Building Industry Authority News* No. 27, November 1993. The relevant passages from that article are:

The fact that retaining walls are themselves defined as buildings under the Act, has led some people to believe a wall more than a metre high will generally require a barrier, but the clause wording makes it apparent that the concern is for the safety of people going about their normal activities in or about buildings expected to be frequented by people.

Whenever apparent anomalies occur because a particular type of building work fails to fit sensibly into the criteria contained in the building code, the decision-maker should assess the situation in terms of the purposes and principles of the Act (s6).

In this case the relevant section is s6(2)(a) where the purpose is to "safeguard people from possible injury ... in the course of the use of any building ...".

In evaluating a particular case, account should be taken of the local conditions and expected use of the area, along with the guidelines provided for territorial authorities in s47 of the Act.

It would be logical to require a barrier where the area adjacent to the top of the wall is used as a path, or a space where people can be expected to gather for a public reception or other crowd activity. On the other hand, if the area concerned is separated from the top of the wall by a cultivated garden, a barrier may not be necessary.

In a domestic situation where users are familiar with the surroundings, a barrier is likely to be required only where the wall is adjacent to a path forming an access to the house.

The Decision

Barriers are required above retaining walls exceeding 1 metre in height, where people, particularly those unfamiliar with the area, would frequently be expected to be close to the top of the wall in the course of their normal activities.

6.1.2 The applicant said:

[The territorial authority] considers that a fence is not required at present as the [applicant's property] is not developed. We consider that the New Zealand Building Code does not make any such differentiation for undeveloped land. The [applicant] as a ratepayer should be accorded the same rights as a ratepayer on developed land. The [territorial authority's] letter of 30 March 1999 [see 6.2.1 below] intimates that a fence may be required when the proposed development of [the applicant's property] proceeds. This would put the cost of such a fence fully on [the applicant] which we maintain is totally unfair given that its need only arises out of the actions of [the developer].

The applicant is currently drawing up plans for [two residential buildings on the applicant's property].

6.1.3 The applicant also submitted relevant passages from the district plan to support the following submission:

The [applicant's property] has an area of 1011 square metres, the current zoning is Res A,(also applicable at the time of issue of building consent for [the owner's property]) provides for a minimum site area of 400 square metres for a residential unit . . . which means that two residential units can be constructed on the site. I consider it would be logical to assume one of these would use . . . the right of way. . . The right of way would be subject to pedestrian and vehicular traffic (including the likelihood of backing vehicles). The side yards applicable for both . . . sites is 1.5 m . . . and this would be as close as a building could be constructed to the retaining wall.

6.2 The territorial authority's submissions

6.2.1 The territorial authority made no specific submissions to the Authority. However, in a letter to the applicant dated 30 March 1999 the territorial authority said:

The following issues need to be considered:

- 1 The retaining wall is along the boundary of a vacant undeveloped section.
- 2 Council has approved the retaining wall without a fence.
- 3 Your future proposal to develop the property was not available to Council and could not be taken into account.

Unfortunately we cannot agree with your contention that a fence is required.

The situation of your new proposed development may identify a future requirement for a fence and if so a civil joint venture between neighbours may be the result.

6.2.2 In a letter to the applicant dated 11 June 1999 the territorial authority said:

On the matter of a fence on the boundary the council is of the opinion that this is a fencing dispute between neighbours. It has been established that no fence is required under the New Zealand Building Code. You should contact the owners of the neighbouring property to discuss financial contributions in accordance with the Fencing Act 1978.

7 DISCUSSION

- 7.1 The Authority takes the view that clause F4.3.1 is to be interpreted as requiring a barrier where it is reasonably foreseeable that people are likely to be at risk if there is no barrier. It would be different if clause F4 were concerned with the protection of other property, as is clause C3 for example. Protection of other property is to be provided whether or not that property is developed, but protection of people is to be provided only if people are, or can reasonably be expected to be, at risk.
- 7.2 The Authority accepts that in future people might be at risk if there is further development of the applicant's property. However, the Authority considers that people were not likely to be at risk at the time the wall was constructed, and that remains the case at the time of this determination.
- 7.3 The question, therefore, is whether, at the time the wall was constructed, it was reasonably foreseeable that the applicant would develop its property in such a way that people would be at risk if a safety barrier was not provided at the top of the wall. That is a question of fact depending on all of the relevant circumstances at the time of construction. Thus the territorial authority (or the Authority when it substitutes its own decision for that of the territorial authority) must make a reasonable decision on the facts available to it. On the one hand it must be concerned to protect people from risk, but on the other hand it must be wary of imposing unnecessary requirements on owners because of what other owners might possibly do in the future.
- 7.4 The relevant circumstances as submitted by the applicant are that the district plan allows for the construction of either one or two residential buildings on the applicant's property. If one is constructed it is clearly possible that the right-of-way would not in fact be used for access to that building. It is also possible that the building would be some distance from the wall so that "the area concerned is separated from the top of the wall by a cultivated garden", as contemplated in the article quoted in 6.1.1 above, so that a barrier would not be required.
- 7.5 In the specific circumstances of this case, the Authority considers that future development of the applicant's land was reasonably foreseeable at the time of construction. However, the precise nature of that development was not reasonably foreseeable. It was not reasonably foreseeable, therefore, that such development would make it likely that people would be at risk of falling from the top of the wall.

8 CONCLUSION

- 8.1 The Authority concludes that 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.

9 THE AUTHORITY'S DECISION

- 9.1 The Authority takes the view that it does not have jurisdiction to determine the matter raised by the applicant.
- 9.2 However, the Authority records that if it did have the jurisdiction it would determine that the wall, without a safety barrier, complies with clause F4.3.1 of the building code.

Signed for and on behalf of the Building Industry Authority on this 12th day of October 1999

W A Porteous
Chief Executive