

Determination 2007/86

A notice to fix regarding a retaining wall at 24 Shoebridge Crescent, RD3, Whangarei

1. The matter 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, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department. The applicant is the Whangarei District Council (“the territorial authority”) and the other parties are the owners of the building, Mr and Mrs Robison (“the owners”).
- 1.2 This determination arises from a request by the territorial authority that its decision to issue a building consent and a code compliance certificate for a retaining wall be reversed, because it is now not satisfied that the retaining wall complied with clause F4 “Safety from Falling” of the Building Code² (First Schedule, Building Regulations 1992) as amended on January 2002.
- 1.3 The matter to be determined is whether the retaining wall as installed complies with clause F4.3.1 of the Building Code (see sections 177 and 188 of the Act).
- 1.4 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.
- 1.5 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.

2. The building work

- 2.1 The building work consists of a retaining wall that is approximately 50 metres long and is 2 metres high above ground level along most of its length. The retaining wall, which supports a concrete driveway, is constructed with 225mm diameter poles at

¹ The Building Act 2004 is available from the Department’s website at www.dbh.govt.nz.

² The Building Code is available from the Department’s website at www.dbh.govt.nz.

900 centres projecting 200mm above the top of the concrete slab. The poles are tied into the concrete driveway slab and their bases are embedded in concrete. The retaining wall has an infill of 200mm x 50mm tongued and grooved horizontal planking. There are no barriers erected to prevent people falling off the edge of the driveway onto the lower ground level.

3. Sequence of events

3.1 The territorial authority issued building consent No 74928 on 23 June 2004, under the Building Act 1991.

3.2 The territorial authority inspected the building work as it progressed and on 8 October 2004 issue a code compliance certificate relating to consent No 74928. This certificate noted:

This is a final code compliance certificate issued in respect of all of the building work under the above building consent.

3.3 In a letter to the owners dated 17 May 2006, the territorial authority stated that the retaining wall as constructed may not comply with the Building Code. As the wall was more than 1 metre above the ground level, it would require a safety barrier. Further work was required to ensure that the wall was made code-compliant.

3.4 The owners responded in a letter dated 28 May 2006, noting that the territorial authority had issued both a consent and code compliance certificate for the retaining wall. At no time during construction had the territorial authority requested that a barrier be installed on top of the wall.

3.5 The territorial authority issued a notice to fix dated 3 May 2007, which noted that the particulars of Contravention or Non-Compliance were:

1. Failure to fix a safety barrier on barrier (*sic*) retaining wall contrary to NZ Building Code F4.3.1 2004.

3.6 An application for a determination was received by the Department on 9 May 2007.

4. The submissions

4.1 In a letter to the Department dated 3 May 2007, the territorial authority accepted that it had issued the code compliance certificate in error and requested the Department to “overturn and lift” it. As the retaining wall is over 2 metres in height for most of its length, it would require a barrier to be installed to ensure that the requirements of clause F4.3.1 are met. The territorial authority noted that the retaining wall itself was constructed to “a good standard”.

4.2 The territorial authority forwarded copies of:

- the plans
- the consent documentation

- the code compliance certificate
 - the notice to fix
 - the territorial authority's inspection records
 - the correspondence between the parties, including a set of photographs showing some aspects of the retaining wall.
- 4.3 In an email dated 31 May 2007, the owners stated that they had complied with all the territorial authority's requirements and had been issued with a code compliance certificate for the retaining wall. At no time had a barrier been requested and the poles had been constructed to finish 200mm above the driveway to prevent a vehicle putting a wheel over the retaining wall. The owners stated that the territorial authority had issued a notice to fix under the 2004 Act, despite the retaining wall being constructed prior to the introduction of that Act.
- 4.4 The owners forwarded copies of:
- the notice to fix
 - the correspondence between the parties.
- 4.5 A copy of the draft determination was sent to the parties for comment on 15 June 2007. The draft was accepted by the territorial authority on 25 June 2007.
- 4.6 The owners responded by email on 27 June 2007, expressing disappointment with the conclusions set out in the determination. The owners also expressed some concerns, which I summarise as follows:
- The length of time that has elapsed since the building consent and code compliance certificate were issued.
 - The owners would have been in a position to install the barrier when the retaining wall was being constructed had the territorial authority informed them at that time.
 - The owners are not in the wrong and could not be held responsible for the territorial authority's errors, which had financial implications for the owners that should be met by the territorial authority.
 - The owners wished to know where in the legislation it was stated that the Department could act retrospectively.
 - The time given to complete the barrier was unreasonable.
 - The owners also disputed the length of retaining wall that required a barrier.
- 4.7 I amended the first draft determination in the light of the comments from the owners. I forwarded a second determination to the parties on 2 July 2007 and the territorial authority accepted the draft without comment.

4.8 The owners responded in an email to the Department on 17 July 2007. The owners stated that they had no intention of accepting the determination until such time as the territorial authority agreed to compensate them for the additional work. The owners also asked for clarification in the determination as to:

- what is a reasonable time to complete the safety barrier
- does the original building consent stand removing the necessity to apply for a separate consent for the barrier?

I have responded to this submission in paragraph 6.9.

5. The legislation

5.1 The relevant requirement of Building Code Clause F4 “Safety from Falling” is:

Performance	
Provision	Limit on application
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 <i>building</i> , 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 or to buildings providing pedestrian access in remote locations where the route served presents similar natural hazards.

6. Discussion

6.1 The territorial authority has accepted that the retaining wall has been erected to a good standard. The territorial authority has also accepted that it was in error in issuing a building consent and a code compliance certificate when it overlooked the lack of a safety barrier.

6.2 I note that, as set out in paragraph 3.5, the territorial authority has referred to the retaining wall being contrary to clause F4.3.1 “2004”. In relation to building work carried out under a building consent granted under section 34 of the 1991 Act, section 436(3)(b)(i) of the Act states:

A code compliance certificate may be issued only if the territorial authority is satisfied that the building work complies with the building code that applied at the time the building consent was granted.

Accordingly, Acceptable Solution F4/AS1 as amended on 6 January 2002, which was in existence at the time the consent was issued on 23 June 2004, is relevant in this instance. I also point out that an Acceptable Solution may not be the only method to ensure compliance with the Building Code.

6.3 The owners have also queried the retrospective and, in their opinion, the restrictive approach taken in this determination. To assist the owners, I set out below extracts from section 177 of the Act:

A party may apply to the chief executive for a determination in relation to 1 or more of the following matters:

- (a) whether particular matters comply with the building code
- (b) a building consent authority's decision [in this case the territorial authority's decision] to
 - (i) issue or refuse to issue, a building consent, code compliance certificate, or compliance schedule;
 - (iv) issue a notice to fix . . .

6.4 The above legislation clearly allows for a retrospective approach to be undertaken and restricts the matters that can be decided in a determination when considering the actions of a territorial authority. I also find that the retaining wall in question is not subject to the "limit of application" set out in clause F4.3.1.

6.5 Based on the plans and the territorial authority's submission, I accept that the retaining wall is unsafe where the possible fall exceeds 1 metre and there is no barrier to prevent falling. Accordingly I am of the opinion that the retaining wall does not meet the requirements of clause F4.3.1.

6.6 I have noted the owners' concerns that the retaining wall in its present condition has been issued with both a building consent and a code compliance certificate. However, I have found that the wall is not complete and is therefore non-compliant and in the interests of safety requires an appropriate safety barrier.

6.7 I also conclude that the territorial authority must withdraw its code compliance certificate.

6.8 I respond to the owners' submission regarding the draft determination as follows:

- I am required to apply the law, as set out under the Act, to the matters that are the subject of this determination. That is the process that I have followed in making my decision and, consequently, the matter considered in this determination is restricted to whether the retaining wall is code-compliant. I consider that the question of compensation is one that is outside the ambit of the Act and I suggest the owners obtain their own legal advice as to how to address their concerns.
- Again, it is for the territorial authority, rather than the Department, to establish any time-line for completing the work, preferably after consultation with the owners. Section 165(1)(b) states that a notice to fix "must state a reasonable timeframe in which it must be complied with". I note that the notice to fix gave the owners some 3 months in which to comply with the notice's

requirements. I consider this is a reasonable time-line and suggest another three month time-line from the date of issue of the determination.

- As to the question of a new building consent, as set out in my decision, I have determined in paragraph 7.1 that the territorial authority is to amend the original building consent to accommodate the new safety barrier. Accordingly, there is no requirement for a new consent to cover this work.

7 The decision

7.1 In accordance with section 188(1) of the Act, I hereby determine that:

- a) the lack of a safety barrier to that length of the retaining wall where people can fall 1 metre or more means that the retaining wall does not comply with the requirements of clause F4 “Safety from Falling” of the Building Code
- b) The territorial authority’s decision to issue the notice to fix dated 3 May 2007 was correct
- c) the territorial authority’s decision to issue the code compliance certificate for the retaining wall is reversed
- d) once a safety barrier has been installed to its satisfaction, the territorial authority is to amend the building consent to incorporate the barrier and issue a new code compliance certificate for the code-compliant retaining wall and barrier.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 14 August 2007.

John Gardiner
Manager Determinations