Determination 2026/041

Compliance of raised garden areas and a pedestrian ramp with Building Code clause F4 *Safety from falling*

15 Holiday Road, Milford, Auckland[1]

Summary

The determination considers if certain parts of the property, namely three raised gardens and a pedestrian ramp, comply with Building Code clause F4 *Safety from falling*. The determination discusses whether people will be in a position where there is a likelihood of an accidental fall of one metre or more.



Figure 1: East boundary fence of property (left image) taken from outside the property, and the gardens either side of the driveway (right image) with pedestrian ramp to the right.

[1] The building consent documents and inspection records refer to the property as 26 Cecil Road, Milford.

In this determination, unless otherwise stated, references to "sections" are to sections of the Building Act 2004 ("the Act") and references to "clauses" are to clauses in Schedule 1 ("the Building Code") of the Building Regulations 1992.

The Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (eg, Acceptable Solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matter to be determined

1.1. This is a determination made under due authorisation by me, Peta Hird, for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment ("the Ministry").[2]

1.2. The parties to the determination are:

1.2.1. C Smale, F Smale and Voila Trustee Company Limited, the owners of the property ("the owners"), who applied for this determination; and

1.2.2. Auckland Council, ("the authority"), carrying out its duties as a territorial authority or building consent authority.

1.3. The matter to be determined under section 177(1)(a) of the Act is whether certain areas of the property comply with Building Code clause F4 *Safety from falling*, specifically at:

1.3.1. the raised garden toward the east boundary ("the east garden")

1.3.2. the planted gardens on either side of the driveway sloping down to a basement, and the adjacent pedestrian ramp.

1.4. The determination does not consider the compliance of any other elements of the building work or other Building Code clauses, or the authority's decision to issue the Building Consent.

2. The building work

2.1. There are two aspects of the building work at the property discussed in this determination (see Figure 2).

2.2. The first is a raised garden area, located between a deck and the east boundary fence of the property. There is in-built seating on the deck adjacent to the garden.

[2] The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

2.3. The raised garden is 850mm above the deck. Along the boundary wall, the garden also has a 400mm planter on it, making the wall a total height of two metres above the adjacent reserve land.[3]

2.4. The distance between the seating and the boundary ranges from approximately 1.7 metres to 3.5 metres (to the outer edge of the planter box). The owners state that dense plantings, including bromeliads with sharp or spiked leaves, are being re-established in this garden bed after removal for waterproofing remediation.

2.5. The second area is adjacent to the driveway, which descends into the basement parking of the property, with retaining walls on either side that at their highest point are over 1.8 metres in height.

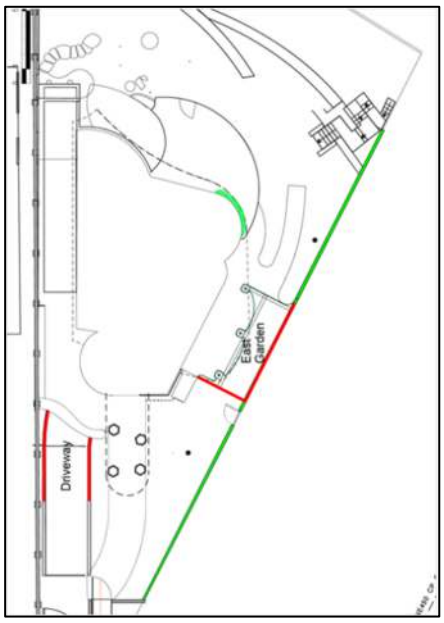


Figure 2: Site plan with garden areas in red

2.6. On the west side of the driveway is a planted garden approximately 600mm wide and a boundary fence approximately 2.0 metres high.

2.7. On the east side of the driveway is another planted garden, approximately 1.3m wide between the retaining wall and the pedestrian access ramp to the dwelling.

2.8. Both gardens are densely planted and include bromeliads.

2.9. The pedestrian access ramp runs roughly parallel to the driveway, leading to the main entrance. The ramp is located immediately adjacent the planted garden strip on the east side of driveway. Approved plans dimension the ramp as greater than 1m above the base of the garden.[4] The garden bed reduces this height to approximately 800mm – 870mm.

3. Background

3.1. Building consent BCO10027358 for demolition of an existing house and construction of a three-level dwelling (including landscaping and swimming pool) was granted by the authority in 2020. The eastern side of the property is adjacent to a council reserve providing public parking and beach access.

[3] The authority referred to a 'potential fall height of approximately 2.85m from the raised garden level to the reserve below', but it is unclear how the authority reached this view as it stated the total height of the structure was 2 metres above the grassed reserve.

[4] Entry canopy section B1, BC Amendment 3 (stamped as approved 20/7/2020).

3.2. An inspection carried out by the authority on 29 May 2026 identified, among other issues, the garden strips either side of the driveway and the garden alongside the east boundary as non-compliant with Building Code clause F4 *Safety from Falling*.

3.3. At a further inspection and site meeting on 11 June 2026, the authority concluded the pedestrian ramp also did not comply with clause F4. Notes from this meeting state:

> In particular, the entry ramp area adjacent to the garage driveway presents an unprotected fall hazard where the fall height exceeds approximately 1.8 metres with no safety barriers or protection measures installed. In addition, the garden area adjacent to the boundary fence includes a garden chair positioned in a manner that creates a climbable feature, enabling access to an unprotected fall height exceeding approximately 1.8 metres.

3.4. The issue remained unresolved between the parties and the owners applied for this determination.

4. Submissions

The owner

4.1. The owners have submitted (in summary), that:

4.1.1. the configuration and the dense planting around both the east garden and the driveway retaining walls make accidental access to the fall edges unlikely

4.1.2. a person would need to deliberately move beyond the normal practice by climbing onto or going past the seating and traversing dense and prickly planting, or travelling along planted wall edges before reaching any area where a fall could occur

4.1.3. the gardens are not intended for recreation or play and are therefore unlikely to be used in a manner that would expose the person to a fall hazard and the types of planting acts as a significant deterrent to access, making an accidental fall improbable.

4.1.4. the installation of barriers would adversely affect the visual amenity of the property and could impede garden maintenance.

4.1.5. barriers may create practical difficulties for accessing and maintaining the planted areas and could introduce additional risks, such as the need to use ladders on sloping surfaces.

The authority

4.2. The authority contends that the east garden and the gardens either side of the driveway do not comply with clause F4, and that barriers are required. The authority submitted (in summary):

4.2.1. the built-in seating adjacent to the east garden provides climbable access to the raised garden area and the boundary wall with the two-metre fall hight

4.2.2. the driveway and pedestrian ramp are regularly used access routes and the height of the falls over the driveway exceed 1.8 metres

4.2.3. people undertaking garden maintenance would be exposed to fall hazards greater than one metre and up to two metres

4.2.4. plantings do not constitute a barrier which would comply with Building Code clause F4.3.4

5. Discussion

The legislation

5.1. Section 17 requires all building work to comply with the Building Code:

> All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.

5.2. The relevant clause of the Building Code is Clause F4 *Safety from falling*. Its stated objective (F4.1) is "to safeguard people from injury caused by falling", and its functional requirement (F4.2) is that "building*s* shall be constructed to reduce the likelihood of accidental fall".

5.3. The performance 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.

5.4. The one metre fall height stated in clause F4.3.1 recognises that falls from this height are likely to result in significant injury.

5.5. The terms 'likely' and 'likelihood' are not defined in the Building Act or Building Code. The term 'likely' in relation to dangerous building provisions has been considered by the courts to mean "what is alleged must be 'a reasonable consequence' or 'could well happen'"[5] or "that having regard to the circumstances

[5] *Auckland Council v Weldon Properties Ltd*, 8 August 1996, DC Auckland NP 2627/95.

of the case it could well happen"[6]. Previous determinations have taken the approach that the term "likelihood of accidental fall" means a 'reasonable probability' or 'could well happen'[7]. I agree with the approach taken in those determinations.

5.6. I hold the same view expressed in Determination 1999/012[8] where it was considered "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". This supports an assessment of whether people are likely to be present where there is a sudden change in level, rather than treating every drop exceeding one metre as automatically requiring a barrier.

East Garden

5.7. The height of the east garden boundary wall is over one metre. In dispute between the parties is whether people are likely to be present in this area.

5.8. The raised garden bed is not a place people frequent on a day-to-day basis, and the dense, sharp planting may discourage access to the garden area. However, the garden and wall-top planter will require ongoing maintenance.

5.9. While some parts of the garden will be accessible from ground level next to the garden or from the deck / deck seats, the garden area is too deep for all of it to be reached from the perimeter. This means that people maintaining the garden will have to do so from within the garden and therefore will be in a position where they could have an accidental fall greater than one metre.

5.10. Since there is a change in level at the edge of the boundary wall that exceeds one metre, and it is foreseeable that people will access the garden to undertake routine maintenance, I consider there is a likelihood of an accidental fall of more than one metre. For that reason, Building Code Clause F4.3.1 applies and a barrier that complies with the requirements of clause F4.3.4 is required.

5.11. Other determinations have concluded that hedging and plantings cannot be used to meet the requirements of clauses F4.3.1 and F4.3.4.[9] The purposes of the Building Act are to regulate "building work" and the performance of the "building" to ensure the safety, health, physical independence and well-being of the people who use it.[10] This is achieved by the building work meeting the minimum standards of the Building Code.

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[6] *Rotorua DC V Rua Developments Ltd*, 17 December 1999, DC Rotorua NP 1327/97.

[7] See Determination 2026/027 *The compliance of a pool and associated pool deck with Building Code Clause F4 Safety from Falling* (13 August 2026).

[8] Determination 1999/012 *The requirement for a safety barrier on a retaining wall* (12 October 1999).

[9] See Determination 2024/070 *An authority's decision to refuse to issue a code of compliance certificate in relation to a hedge and safety from falling (16 Dec 2024)*, at paragraphs 5.12 – 5.18.

[10] Section 3(a).

5.12. Plants and plantings are neither “buildings” nor “building work” regulated under the Act and cannot be considered a compliant barrier for the purposes of clauses F4.3.1 and F4.3.4. Furthermore, plants are likely to be impacted by seasonal growth patterns, have variable lifespans, and the type or density of vegetation may change over time.

5.13. There is no barrier currently in place where there is a change in level, and so the performance clause F4.3.1 is not satisfied.

Driveway area – gardens and pedestrian ramp

5.14. On both the east and west side of the driveway there are gardens with a change in level of greater than one metre part way along as the driveway slopes down to the basement level. As with the east garden, these gardens will require periodic maintenance.

5.15. Turning first to the garden on the west side – if a person was to walk along the retaining wall capping or in the garden itself, there would be a risk of an accidental fall of one metre or more from some parts of the garden.

5.16. However, unlike the east garden discussed above, this area, which is around 600mm wide can also be accessed directly from the driveway. Although the owners expressed concern about the use of ladders on the sloping driveway, I am satisfied that any risks can be managed with the use of suitable equipment. This means it is not necessary for a person to stand in the garden or on the retaining wall capping to undertake routine maintenance of this area.

5.17. Accordingly, I do not consider people will necessarily be in a position where they are exposed to a fall of more than one metre. I conclude the garden on the west side of the driveway where it is greater than one metre above the driveway is not an area where there is a likelihood of an accidental fall, and so no barrier is required.

5.18. The garden on the east side of the driveway is wider, at approximately 1.3 metres, so not all of it would be accessible from the driveway. People maintaining this garden will have to do so, for parts of the garden, from within the garden or the ramp above.

5.19. I consider it is foreseeable that people will be in a position where they are exposed to a fall of more than one metre from parts of the garden on the east side of the driveway. This area therefore requires a compliant barrier to comply with clause F4.3.1.

5.20. Turning now to the pedestrian access ramp leading into the dwelling. The ramp provides access into the dwelling, so people will use the ramp regularly and it is necessary to consider the likelihood of an accidental fall from the ramp.

5.21. The owners submit that the garden bedding is less than one metre below the pedestrian ramp, and therefore no barrier is required. However, the High Court has held that when a person falls from a structure, what can be considered a 'fall' does not stop when the person first lands on something: "The reality is that the person goes on falling until that fall is arrested".[11] Previous determinations have also taken the approach that a possible fall that needs to be considered is not confined to a vertical fall.[12]

5.22. In this case, I must turn my mind to whether a person who falls from the pedestrian ramp is likely to have their fall arrested by the garden or the fall would continue beyond the retaining wall edge and down to the driveway.

5.23. Where a person falls from a standing position or while at a walking pace, the fall is predominantly vertical. In those circumstances I consider the garden bed is likely to arrest the fall.

5.24. The same cannot be said if there is additional impetus or greater momentum in the direction of the fall. This increases the possibility of the person falling beyond the retaining wall edge onto the driveway below.

5.25. In this case, taking into consideration the normal direction of travel for people using the ramp is parallel to the potential fall, and no intersecting pathways along the relevant length of the ramp where the fall to the driveway would be greater than one metre, I consider a fall from the pedestrian ramp with sufficient momentum to carry someone over the edge of the retaining wall to the driveway is unlikely.

5.26. I am satisfied that a fall from the pedestrian ramp would be arrested by the adjacent garden bed, which is less than one metre below the ramp. Therefore, a barrier alongside the pedestrian ramp is not required.

6. Decision

6.1. In accordance with section 188 of the Building Act 2004, I determine both the east garden and the garden on the eastern side of the driveway where there is a sudden change in level of one metre or more do not comply with Building Code Clause F4 *Safety from Falling*.

[11] *Northland Regional Council v Fletcher Construction New Zealand & South Pacific Ltd* [1997] NZHC CP41/96. In that case, the substance was water, but other determinations have held that this could apply to a fall onto any resilient material. See for example Determination 2002/6 *Safety net to safeguard people from falling* (21 July 2002) [7.3.5].

[12] See for example Determination 2008/081 *Safety barrier to a deck located adjacent to a retaining* wall (28 August 2008) and Determination 2025/055 *The compliance of a return section of a retaining wall with clause F4 Safety from falling* (14 November 2025).

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 28 October 2026.

Peta Hird

Lead Determinations Specialist