



## Determination 2018/002

# Regarding the decision to issue a notice to fix for a retaining wall at 1/126 Island Bay Road, Beach Haven, Auckland

### Summary

This determination considers whether a retaining wall without a barrier at the top complies with Clause F4 Safety from falling. The determination also discusses the interpretation of section 42A(2)(c) of the Building Act and whether the building work to construct a retaining wall was exempt from the requirement to obtain a building consent.

### 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, Katie Gordon, Manager Determinations, 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 property that the building work occurred on, Eric Hebner Trustee Ltd (represented by E Hebner) and B R Hebner, who are the applicants in this determination (“the applicants”)
- Auckland Council carrying out its duties and functions as a territorial authority or a building consent authority (“the authority”).

1.3 This determination arises from the authority’s decision to issue a notice to fix in respect of a retaining wall built over the front boundary of the applicants’ property.

1.4 The matter to be determined<sup>2</sup> is whether the authority correctly exercised its powers of decision in issuing the notice to fix for the building work. In determining this matter, I must also consider whether the building work complied with Clause F4 Safety from falling of the Building Code.

1.5 In making my decision, I have considered the application, the submissions of the parties, information collected by a person appointed to visit the site to verify the relationship of the wall to the house and the road reserve, and the other evidence in this matter. I have not considered any other aspects of the Act or Building Code, beyond those required to decide on the matter to be determined. Refer Appendix A for the relevant sections of the Act and the clauses of the Building Code.

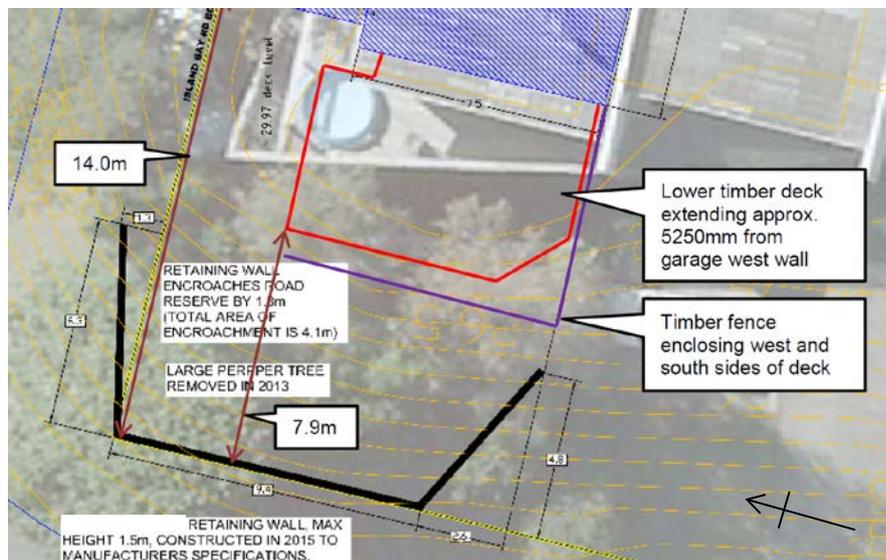
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<sup>1</sup> The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at [www.building.govt.nz](http://www.building.govt.nz) or by contacting the Ministry on 0800 242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

<sup>2</sup> Under sections 177(1)(b), 177(2)(f) and 177(3)(e) of the Act.

## 2. The building work

- 2.1 The applicants' property is located in a residential area, in the Beach Haven suburb of Auckland. The applicants hold a fee simple title to a one-third share of the property (Lot 1 DP 699942), and a leasehold title (999-year term) to a flat built on part of the property (Flat 1 DP 81321).
- 2.2 The property is a corner section, bounded on its northern side by Island Bay Road, and its western side by Valhalla Drive. The applicants' flat is one of three flats built on the property. The flats are in the nature of two-storeyed terraced townhouses, built in a row. The applicants' flat is the northernmost flat on the row, and shares its southern wall with Flat 2.
- 2.3 Vehicle access to the applicants' flat is via a driveway on the property's northern side, which leads from Island Bay Road to a garage on the ground floor of the flat. Vehicle access to the other two flats is via a driveway around the corner, leading off Valhalla Drive. A public footpath along the two roads skirts the northern and western boundaries of the property.
- 2.4 Between December 2015 and March 2016, the applicants constructed a concrete block retaining wall built along the western (Valhalla Drive) side of their property. The plan layout is shown in Figure 1. The wall is 9.4 metres long, along its western face, with two shorter walls off its northern (6.3 metres) and southern (4.8 metres) ends. At its highest point (along its western face and at both corners) it stands approximately 1.48 metres high. This height tapers off along the extent of the two side walls, until at their ends they merge with ground levels at the rear of the retained area.



**Figure 1: The plan layout of the wall and adjacent features**

- 2.5 The ground behind the wall has been raised to create a relatively level area. At the back of the retained area is a wooden fence, which partially encloses the lower-storey deck off the applicants' flat, and more grassed areas leading around to the applicants' garage and driveway. The lower deck and partial fence are approximately 7.9 metres away from the wall's western face. The applicants' driveway and north-western corner of their flat are approximately 14 metres from the face. At present, the retained area between the flat and deck, and the wall's faces is planted with grass and shrubs.

### 3. Background

3.1 According to the applicants the wall was constructed ‘for aesthetics and to ease maintenance for that section of the property’ and the work was completed in March 2016. The wall was constructed without a building consent and encroaches on the Island Bay and Valhalla Drive road reserves. The depth and total area of the encroachment are 1.3 metres and 4.1 square metres respectively.

3.2 The authority became aware of the unconsented work, and on 14 October 2016, wrote to the applicants enclosing a notice to fix (No. 7151). The notice to fix gave the following grounds for its issue:

**PARTICULARS OF CONTRAVENTION OR NON-COMPLIANCE**

Contrary to section 40 of the Building Act 2004 (the Act), the following building works have been carried out without first obtaining a building consent:

- The construction of a 1.5 metre retaining walls (*sic*) outside the legal boundary of the property;

**AND:**

Contrary to section 17 of the Act, building works do not meet the requirements of Schedule 1 of the Building Regulations 1992 (the building code) to the extent required by the Act as follows:

- Clause F4 safety from falling – it requires barriers where people could fall 1 metre or more.

**To remedy the contravention or non-compliance you must:**

Remove the unauthorised building works; **OR:** Carry out all such building work required to make the structure fully compliant with the Act and regulations; **AND/OR:**

Pursue any other legal option/s that may be available to make the structure fully compliant with the Act and regulations.

The notice gave a compliance date of 16 January 2017.

3.3 The authority’s covering letter with the notice to fix gave more details of the aspects of the building work that it considered contravened the Act:

The [authority’s] inspection revealed that a 1.5 metre retaining wall have (*sic*) been constructed outside the legal boundary of the property. While the wall does not exceed 1.5 metres in height, a building consent was required for the work because the wall breach (*sic*) the Resource Management Act.

The building work is unauthorised as it has been carried out without the authority of a required building consent, and constitutes a breach of section 40 of the Act.

3.4 The applicants subsequently applied to Auckland Transport for a road encroachment licence for the portion of the retaining wall that encroached onto the road reserve. This was granted on 15 September 2017.

3.5 The applicants also applied to the authority for a certificate of acceptance for the retaining wall, and obtained an extension of the compliance date for the notice to fix.

3.6 In subsequent correspondence between the parties, the applicants expressed their view that ‘a safety from falling barrier is not a requirement of the Building Code in this instance’. The reason given for this view was that it was unlikely that people would be frequently present at the top of the wall. The applicants cited determination 99/012<sup>3</sup> in support of this view.

<sup>3</sup> Determination 99/012 The requirement for a safety barrier on a retaining wall (12 October 1999) Building Industry Authority

3.7 The authority expressed the opposite view that ‘A safety from falling barrier is definitely a requirement’. It considered that Determination 99/012 dealt with a different situation than the current case, especially as:

The retaining wall on 1/126 Island Bay Road is at the front end of the property and in close proximity to a public footpath that is likely to be used by school children which increases the risk... .

3.8 On 3 November 2017 the Ministry received the application for determination. Pending the outcome of the determination, the applicants intend to make an application to the authority for retrospective land use consent for the portion of the retaining wall that encroaches on the road reserve.

## 4. The submissions

4.1 The applicants made a submission with their application for a determination which outlined the background to the dispute, and referred to the Acceptable Solution for Clause F4 (F4/AS1), which cites Determination 99/012. The applicants submitted:

*In regards to a building consent requirement for a safety from falling fence, we refer to ... Acceptable Solution F4/AS1 1.2.5 comment “NZBC Clause F4.2 refers to the ‘likelihood’ of accidental fall. Not all retaining walls are in a location where people are likely to fall from them. Therefore, the need for a barrier (and the type of barrier) on a particular retaining wall can be judged in terms of the likelihood of people being present at the top of that wall (see Determination No. 99/012...”*

4.2 The applicants then set out the reasons why, in their opinion, there is no likelihood of a person accidentally falling from the top of the wall, namely:

- the area at the top of the retaining wall is a garden, and provides no thoroughfare access
- people, especially those unfamiliar with the area are unlikely to be frequently close to the top of the wall in the course of their normal activities
- there is no access to the top of the wall for pedestrians using the footpath
- although the wall is only 2.5 metres from the footpath, there is no “significant likelihood” that someone using the footpath would fall off the retaining wall.

4.3 The applicants also pointed out that on the opposite side of Island Bay Road there was a ‘very high’ retaining wall that did not have a barrier to the top of it, and that there were no retaining walls alongside the footpath to a local wharf.

(I note here that those structures are not the subject of this determination and I make no comment on the compliance of those structures.)

4.4 With their submission, the applicants provided copies of:

- a site plan, dated 13 November 2017
- the notice to fix (No. 7151) and the authority’s covering letter
- email correspondence with the authority
- photographs of the wall
- the certificate of title for the property
- documents relating to the encumbrance granted by Auckland Transport in respect of the wall’s encroachment on the road reserve

- the retrospective land use consent application.
- 4.5 Acknowledgement of the determination application was received from the authority on 13 November 2017. The authority set out its view that the retained area ‘is likely to be frequented by children playing as the retaining wall is adjacent to or encroaches on the road reserve’. The authority attached a photograph of the wall which was dated 11 October 2016.
- 4.6 A draft determination was issued to the parties for comment on 12 December 2017.
- 4.7 On 19 December 2017, the applicants accepted the draft and provided additional information, and advised that materials had been ordered for the construction of a fence.
- 4.8 On 20 December 2017, the authority responded to the draft determination stating that it did not accept the determination as it does not agree with the interpretation of section 42A(2)(c) of the Act. The authority submitted that this subsection ‘should be given its ordinary meaning, and [the authority] does not see what purpose the subsection serves if it is not.’

## **5. The site visit**

- 5.1 As noted in paragraph 1.5 I appointed a person to visit the site to verify the relationship of the wall to the house and the road reserve.
- 5.2 The visit was completed on 18 November 2017 and resulted in an email to the Ministry containing observations, photographs of the site and the locality, and a marked-up plan of the retaining wall and house: the plan is included as Figure 1.
- 5.3 The email was provided to the parties on 12 December 2017 with the draft determination.

## **6. Discussion**

- 6.1 The applicant has asked for a determination about the authority’s decision to issue a notice to fix with respect to the retaining wall, and the requirement (expressed in its correspondence) that a barrier be installed along the top of the retaining wall.
- 6.2 In its notice to fix, the authority has given two grounds of contravention, upon which it has issued the notice. I have considered each of these in turn.

### **6.3 The first contravention**

- 6.3.1 The first contravention relates to the work being carried out without a building consent when one was needed. The reason that the authority gives, in the notice and in its covering letter, for a building consent being required, is that the retaining wall has been constructed (at least partially) outside the legal boundaries of the applicants’ property. The authority’s opinion is that because this breaches the Resource Management Act 1991, a building consent is required.
- 6.3.2 The authority is referring here to the provision in section 42A(2)(c) of the Act:
- 42A Building work for which building consent is not required under Schedule 1
  - (1) ...
  - (2) Subsection (1) [which sets out building work for which consent is not required] is subject to the following conditions:

- (a) the building work complies with the building code to the extent required by this Act:
  - (b) after the building work is completed, the building,—
    - (i) if it complied with the building code immediately before the building work began, continues to comply with the building code; or
    - (ii) if it did not comply with the building code immediately before the building work began, continues to comply at least to the same extent as it did then comply:
  - (c) the building work does not breach any other enactment:
- 6.3.3 The authority has interpreted section 42A(2)(c) to mean that building work cannot be exempt under Schedule 1 when it is carried out in breach of any other enactment.
- 6.3.4 This provision has been considered in a previous determination (2016/009<sup>4</sup>) to which the authority was also a party. In that determination it was stated:
- 7.2.7 I am not persuaded that the effect of not complying with the condition in section 42A(2)(c), that building work does not breach any other enactment, results in exempt building work losing its exempt status. Section 42A(2) lists a number of “conditions” for exempt building work. Some of those conditions are clearly intended to apply only after the building work is completed. For example, section 42A(2)(b) establishes requirements for exempt building work “after the building work is completed”. Obviously, the effect of failing to comply with this condition cannot have any impact on the exempt status of the building work that has already been carried out.
- 7.2.8 The condition in section 42A(2)(c) is similar to section 51(2), the effect of which acknowledges that building work under a building consent may breach another enactment and the owner must still comply with the other enactment, but there are no specific consequences under the Building Act in respect of that non-compliance with another enactment. It would be surprising if Parliament intended there to be far more serious consequences for exempt building work that breaches another enactment than for building work under a building consent that breaches another enactment.
- 7.2.9 The condition in section 42A(2)(c) is still an important condition on exempt building work and able to be enforced by the issue of a notice to fix – requiring the owner to comply with the condition in section 42A(2)(c) that the building work comply with the other enactment.
- 6.3.5 The authority’s submission has not altered my view on this matter. Accordingly, I consider that first grounds given by the authority in the notice to fix is not correct. Building consent is not required solely because the building work breaches another enactment (in this case the Resource Management Act 1991, by extending outside the boundaries of the applicants’ property), when a consent would not otherwise be required.
- 6.3.6 I note here that regardless of whether the building work was exempt under Schedule 1 or required building consent, the applicants are not relieved from complying with other legislation, such as the *Resource Management Act*. Whether or not there is a contravention of the *Resource Management Act* falls outside the matters that I can determine.

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<sup>4</sup> Determination 2016/009 Regarding the issue of notices to fix and the refusal to issue a certificate of acceptance in respect of the conversion of a double garage over a boundary (23 March 2016) Ministry of Business, Innovation and Employment

6.3.7 No building consent was in fact required in the current case, because the maximum height of the retaining wall is less than 1.5 metres. This means it comes within the categories of building work described in Schedule 1(20) that are exempt from the need for a building consent under Section 41(1)(b).

## 6.4 The second contravention

6.4.1 However, as stated above, the retaining wall must still comply with the Building Code and the authority, in the second grounds of contravention given in its notice to fix, has stated that the wall does not comply with Clause F4 Safety from falling, as it requires a barrier to prevent people falling from it.

6.4.2 Accordingly, I must now consider what is required by Clause F4 Safety from falling. The application of this clause to retaining walls has been considered in several previous determinations, including determination 99/012, and in the commentary in Acceptable Solution F4/AS1, both of which were referred to by the parties in their submissions and correspondence.

6.4.3 The objective of the clause, as set out in Clause F4.1, is to safeguard people from injury caused by falling. This is reinforced by the functional requirement in Clause F4.2, which requires buildings to be constructed to reduce the likelihood of accidental fall. This provision requires the risk of accidental fall to be reduced, as no person can ever be completely protected from falling.<sup>5</sup>

6.4.4 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>

6.4.5 Clause F4.3 sets out the performance requirements for Clause F4. The relevant provision in the current case is Clause F4.3.1, which 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.

The 1 metre fall height stated in the clause recognises that falls from this height are likely to result in significant injury. The building in the current case is the retaining wall, and it is not disputed by the parties that for much of its extent it stands over 1 metre in height.

6.4.6 In previous determinations, I have taken the approach that, in considering the application of Clause F4.3, I must consider the risk or likelihood of people falling from an opening or sudden change in level, in a given situation. I consider it appropriate to take the same approach here.

<sup>5</sup> See Determination 2010/85 Safety from falling from an infinity edge swimming pool at a house (15 September 2010) Department of Building and Housing

<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

- 6.4.7 The applicants have stated that they do not believe ‘there is any likelihood’ of a person accidentally falling from the top of the retaining wall, for the reasons given in their submission (see paragraph 4.2). These reasons include the current use of the retained land as a garden, and the restricted access to the top of the wall by pedestrians on the adjacent footpaths.
- 6.4.8 As stated in paragraph 1.5, the person appointed to visit the site confirmed that access to the top of the retaining wall from the footpath is currently obstructed by vegetation, in the form of low shrubs and trees. This vegetation makes it unlikely, at present that anyone using the footpath would wander up onto the land retained by the wall, at the point where it reduces in height and merges with the ground levels beyond. Any person seeking to gain access to the land beyond the wall, from the road, would have to do so by scaling the retaining wall. A person must also make a deliberate decision to get from the footpath to the land above the retaining wall, and I consider it unlikely that any passer-by would access the area unintentionally.
- 6.4.9 However, from the roadside is only one way that the land retained by the wall, and hence the top of the wall, can be accessed. The other way is directly from the applicants’ property, where a person could access the area from the lower deck or by going around the flat from the applicants’ driveway on the northern side. From the information available to me, it also appears that the area could be easily accessed from the parking areas for Flats 2 and 3, to the south.
- 6.4.10 In my opinion, there is at present much more likelihood, and hence risk, that people will gain access to the retained area in this way. The area is currently overgrown, but it is foreseeable that people may access the area above the wall for lawn-mowing or gardening purposes – the applicant has described the retained area as a garden. People may also wander onto it inadvertently seeking access to or around the applicants’ house, or toward the road from the parking area. In these situations, I consider there is a reasonable probability that a person could fall from the wall.
- 6.4.11 In addition, as established in previous determinations, it is important that I consider not only the current risk of falling, but also as it is reasonably foreseeable in the future. The factors that reduce the risk of a person accessing and potentially falling from the area above the wall at present are the vegetation that blocks access from the road, and the ways that the applicants use their garden and lower deck (the latter used mainly for storage).
- 6.4.12 However, I consider it reasonably foreseeable, and in fact likely, that future owners of the property may seek to use the property in a different way. One effect of the building work has been to create a relatively large area of land immediately out from the western side of the applicants’ flat. Future owners may well choose to turn this area into lawn, which without the temporary barriers of partial fence and vegetation could stretch from the lower deck to the edge of the wall. I also consider it reasonably foreseeable that if this area was cleared, any children visiting the applicants’ property or the adjacent flats might seek to play here. Clearing the vegetation would also make the area much easier to access, both from the footpath and from the parking areas for Flats 2 and 3.
- 6.4.13 As stated above, I consider this scenario a reasonably foreseeable one for the future. In this scenario, I also consider that the likelihood of a person being at the top of the wall is actually quite high, and accordingly there is a heightened risk that a person may fall from it. For these reasons, I do not consider that the building work currently complies with Clause F4 of the Building Code. Accordingly, I also consider that the authority was correct to issue the notice to fix, on the second ground.

6.4.14 I note here that, in their submission, the applicants have pointed out other retaining walls in the immediate vicinity of their property that do not currently have barriers on them. While I accept that these walls may also have risks associated with them, this does not impact on whether or not the wall in the current case is code-compliant.

## **6.5 Conclusion**

6.5.1 I conclude that the authority correctly exercised its powers of decision in issuing the notice to fix for the building work, with respect to the second grounds of contravention specified in the notice (relating to Clause F4 Safety from falling).

6.5.2 The authority should now reissue the notice to fix, with the first grounds of contravention (relating to unauthorised building work) removed.

## **7. The decision**

7.1 In accordance with section 188 of the Building Act 2004, I confirm the authority's decision of issue a notice to fix for the building work, but the notice is to be modified as outlined in paragraph 6.5.2 of this determination.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 13 February 2017.

Katie Gordon  
**Manager Determinations**

## Appendix A: The legislation

### A.1 The relevant sections of the Building Act 2004;

#### **40 Buildings not to be constructed, altered, demolished, or removed without consent**

- (1) A person must not carry out any building work except in accordance with a building consent.
- (2) A person commits an offence if the person fails to comply with this section.

#### **41 Building consent not required in certain cases**

- (1) Despite section 40, a building consent is not required in relation to—
  - (a) a Crown building or Crown building work to which, under section 6, this Act does not apply; or
  - (b) any building work described in Schedule 1 for which a building consent is not required (see section 42A); ...

#### **42A Building work for which building consent is not required under Schedule 1**

- (1) Despite section 40, subject to the conditions set out in subsection (2) and whether or not a building consent would otherwise have been required, a building consent is not required for building work in the following categories:
  - (a) building work described in Part 1 of Schedule 1; or
  - (b) building work described in Part 2 of Schedule 1 that is carried out by an authorised person (see subsection (3)); or
  - (c) building work described in Part 3 of Schedule 1 if the design of the building work has been carried out or reviewed by a chartered professional engineer and the building work has been carried out in accordance with that design.
- (2) Subsection (1) is subject to the following conditions:
  - ...
  - (c) the building work does not breach any other enactment:

#### **Schedule 1 Building work for which building consent not required**

##### Part 1 Exempted building work

##### 20 Retaining walls

Building work in connection with a retaining wall that—

- (a) retains not more than 1.5 metres depth of ground; and
- (b) does not support any surcharge or any load additional to the load of that ground (for example, the load of vehicles).

### A.2 The relevant clauses of the building code

#### **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...

## **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

**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 in level within or associated with a *building*, a barrier shall be provided.

**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.