

Determination 2024/070

An authority's decision to refuse to issue a code compliance certificate in relation to a hedge and safety from falling

30D Lazarette Loop, Gleniti, Timaru

Summary

The matter being determined is the authority's decision to refuse to issue a code compliance certificate for a dwelling in relation to the likelihood of an accidental fall from a retaining wall. The determination considers whether the change in level at the retaining wall is relevant to the refusal and whether the hedge meets the requirements of Building Code Clause F4 – *Safety from falling* clause F4.



Figure 1: The retaining walls

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”).¹
- 1.2. The parties to the determination are:
 - 1.2.1. H and C Rainbow, the owners of the property (“the owners”), who applied for this determination.
 - 1.2.2. Timaru District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. This determination arises from the authority’s decision to refuse to issue a code compliance certificate for the construction of a dwelling. The refusal is in relation to the sudden change in level where retaining walls have been constructed. The authority is of the view that the retaining walls are associated with the dwelling and are not protected by a barrier that complies with Building Code Clause F4 – *Safety from falling* (“clause F4”).
- 1.4. The matter to be determined under section 177(1)(b) and (2)(d) is the authority’s decision to refuse to issue a code compliance certificate for building consent BC 2.2019.185. In deciding this matter, I will consider:
 - 1.4.1. whether the sudden change in level at the upper retaining wall is relevant to the decision to refuse to issue a code compliance certificate for the dwelling
 - 1.4.2. whether the hedge at the top of the upper retaining wall meets the requirements of a barrier under Building Code Clause F4 – *Safety from falling*.
- 1.5. I have not considered the authority’s decision to issue building consent BC 2.2019.185, the compliance of the waratah and wire barrier or the lower retaining wall.

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

2. The building work

- 2.1. The sudden change in level is at two retaining walls located at the rear edge of the property where the ground slopes down to the north. The retaining walls appear to be assembled from dry stone wall construction.
- 2.2. The dwelling is located centrally on the property. A concrete patio and back yard, currently landscaped as a level grass lawn, lie between the dwelling and the upper retaining wall.
- 2.3. The lower retaining wall approximately follows the northern boundary of the property. The upper retaining wall is inset from this and is approximately 23 metres in length along its northern section, with returns either side that taper off in height. The returns on either side end within 5 metres of the patio/dwelling.
- 2.4. The upper retaining wall is generally 1.1 metres in height along its northern section.
- 2.5. The northern section of the upper retaining wall is approximately 12 metres at its closest to the dwelling, and 16 metres at its farthest.
- 2.6. The upper retaining wall has a fence formed of vertical steel waratahs with chicken wire mesh between. Adjacent is a hedge of Akapuka bushes (*Griselinia Lucida*). At the time the application was submitted these bushes were approximately 1.05 metres in height and 0.7 metres in depth.



Figures 2 & 3: Photos showing the retaining walls and gardens

3. Background

- 3.1. On 19 March 2019 an application for building consent BC 2.2019.185 was made. The scope of the building consent included the construction of a new single storey, three-bedroom dwelling and adjoining garage.

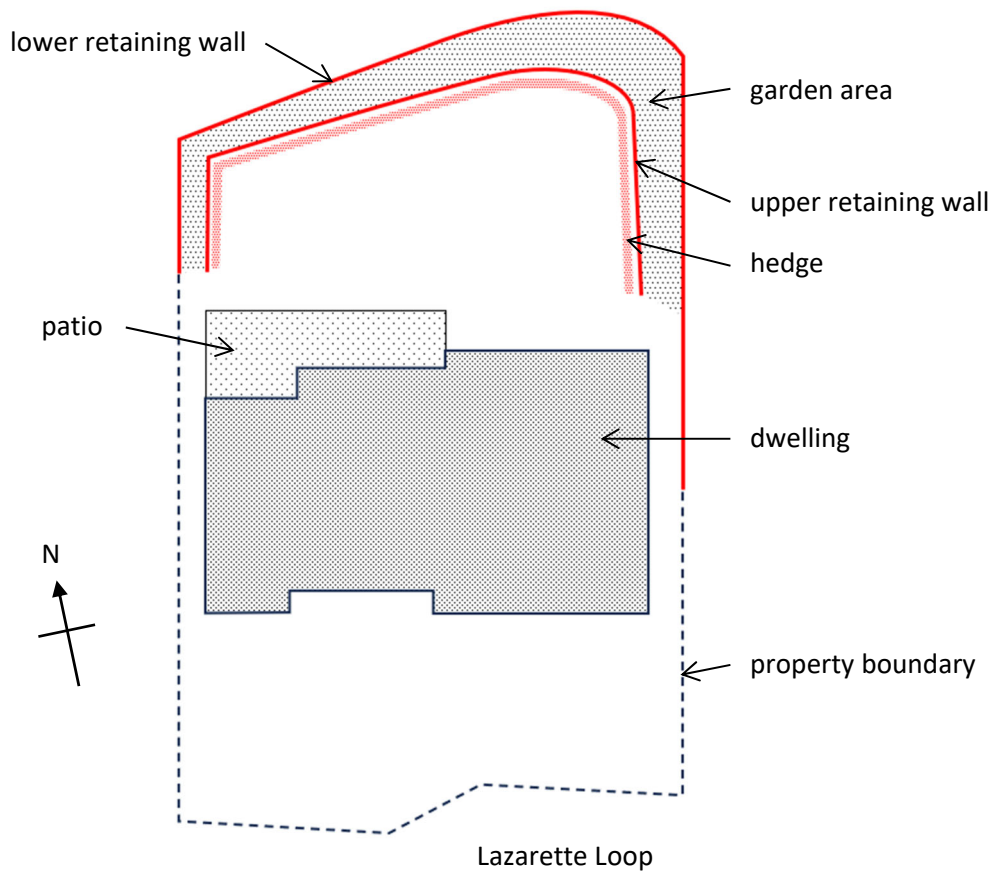


Figure 4: Diagram of the site layout, not to scale

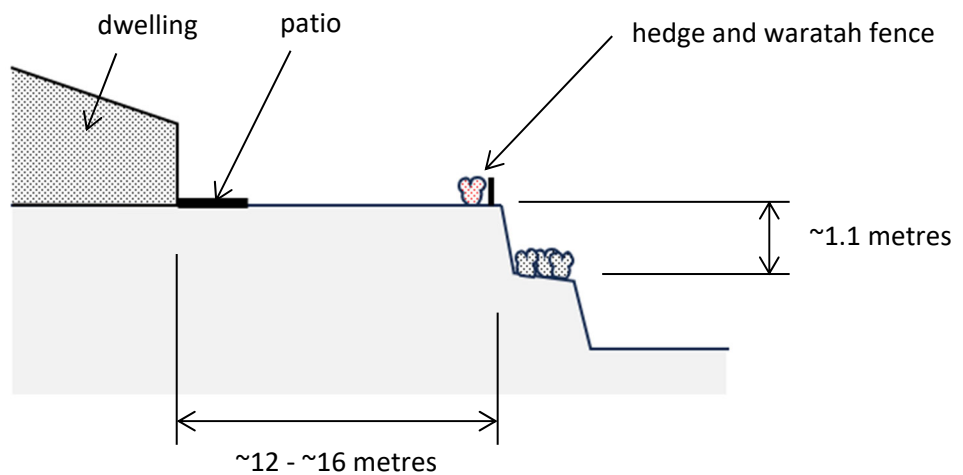


Figure 5: Section diagram layout, not to scale

- 3.2. The building consent was granted on 5 June 2019. Further amendments and minor variations were made to the building consent from May through to October 2019. The scope of the final set of approved plans did not include the construction of the retaining walls, the resulting sudden change in level, or barriers discussed in this determination.
- 3.3. Construction was carried out in 2019 and once works were complete an application for a code compliance certificate was made on 16 December 2019.
- 3.4. At some point during the construction of the dwelling, between August and December 2019, the two retaining walls were constructed at the rear of the property.
- 3.5. The authority carried out a “final” inspection on 16 December 2019. The inspection was recorded as “failed” and the authority noted “retaining walls in excess of 1.000 metre in height and are associated with the dwelling require barriers compliant with [compliance] document F4 falling from height.”
- 3.6. Further inspections on 15 January and 7 July 2021 were carried out in relation to the retaining walls. By the July inspection the owner had installed a temporary barrier consisting of medium height construction fence hoardings. Both inspections were recorded as failed, with the authority noting in the July inspection that the “fencing system [is] to be tied and supported fully. Written documentation [is] required to show that the fencing system or some other barriers will remain on site at all times to comply with the requirements of F4 of the NZBC and the approved building consent.”
- 3.7. The authority issued a letter to the owners outlining the outstanding items regarding the application for a code compliance certificate on 4 June 2021. In this letter they reiterated that the fencing system had to be “tied and supported fully” and requested supporting written documentation regarding the compliance of the fence.
- 3.8. During this time the owner and authority corresponded, and the use of hedging as a barrier was raised as a possible means of complying with the requirements of clause F4 – *Safety from falling*. The authority was of the view that a hedge might be a suitable barrier once “[it’s] established enough to fit the barrier requirements”, but that “this may take years.”
- 3.9. A further inspection was carried out on 9 February 2024, by which time the hedge had grown and the construction fence hoardings had been replaced with a waratah and wire fence. The authority considered that “the hedge [could not] be counted as a barrier and therefore the mesh fence need[ed] to be a compliant barrier which it is currently [was] not.”

4. Submissions

- 4.1. In support of their views on the matter, the owner's submitted (in summary):
 - 4.1.1. The authority, "gave no indication that, once established, hedging would not be acceptable as a barrier." Furthermore, the authority did not measure or inspect the hedge, or raise this as a potential issue until after the 9 February 2024 site inspection.
 - 4.1.2. The authority subsequently outlined the "necessary specifications" that the hedge would need to achieve in order to meet the requirements of a barrier in line with clause F4 – *Safety from falling*. The current height of the hedge exceeds the 1m height requested by the authority and they submit that the hedge's depth of 700-800mm potentially means it meets the "loading requirements specified in B1 Structure."
- 4.2. In response to the application for determination, the authority confirmed that the letter dated 4 June 2021 is "formal notification" of its refusal and reasons for the decision. The authority submitted (in summary):
 - 4.2.1. "Live plantings (hedge) can be considered as an alternative solution for establishing compliance with F4.3.4 (a-h)." The plantings need to be "of a height and density that [they] would stop someone from walking/falling through the plants."
 - 4.2.2. Until the hedging is established, and can meet those requirements, a compliant barrier is required.

5. Discussion

The legislation

- 5.1. Section 94 of the Act outlines the matters an authority must consider in deciding whether to issue a code compliance certificate. In particular, section 94(1)(a) states:
 - (1) A building consent authority must issue a code compliance certificate if it is satisfied, on reasonable grounds, —
 - (a) that the building work complies with the building consent; ...
- 5.2. A building consent is granted under section 49 of the Act, which states:
 - (1) A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.

5.3. Clause F4 is the relevant Building Code clause in this case. The objective of clause F4.1 is to safeguard people from injury caused by falling. The functional requirement of clause F4.2 in achieving this objective is that buildings must be constructed to “reduce the likelihood of accidental fall”.

5.4. 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. [my emphasis]

5.5. The term “associated with” is not defined in the Building Act or Building Code. I consider the relevant factors when assessing whether an opening or sudden change in level is associated with a building are its proximity to the building and the relationship between the use of the building and the consequential likelihood of an accidental fall where the opening or sudden change in level occurs. These factors are relatively narrow in scope as I do not consider that the Building Code envisages all changes in level on a site are to be provided with a barrier.

5.6. The sudden change in level occurs at the rear of the backyard, between 12 and 16 metres away from the dwelling. The dwelling opens out onto the patio and backyard, and the area is landscaped so that it is level from the dwelling across to the retaining walls.

5.7. It is reasonably foreseeable that this level area will be used for leisure, such as playing backyard games or entertaining guests, for gardening, such as mowing the lawn or maintaining the hedge itself, or for similar recreational activities on a regular and frequent basis. These activities arise as a result of the dwelling being constructed on the site. Thus, there is a close relationship between the use of the dwelling and the sudden change in level at the north end of the property.

5.8. Based on these factors, I consider the sudden change in level is ‘associated with’ the dwelling.

“likelihood of accidental fall”

5.9. Determination 2018/002² took the approach that in considering the application of clause F4.3.1 one must first consider the risk or likelihood³ of people falling from the opening or sudden change in level. This includes not only the risks related to the current use but also reasonably foreseeable future use. I consider it appropriate to take the same approach here.

² Determination 2019/002 *Regarding the decision to issue a notice to fix for a retaining wall at 1/126 Island Bay Road, Beach Haven, Auckland* (13 February 2018)

³ The term “likely” has been considered in *Rotorua DC v Rua Developments Limited* 17/12/99, McGuire J, DC Rotorua NP1327/97, and *Auckland City Council v Weldon Properties Limited* 8/8/96, Boshier J, DC Auckland NP2627/95 (upheld on appeal in *Weldon Properties Limited v Auckland City Council* 21/8/97, Salmon J, HC Auckland HC26/97).

- 5.10. The upper wall bounds the northern edge of the back yard to the dwelling, which as noted above is an area that people will access from the dwelling and utilise for recreation and leisure. The hedge as it currently stands limits access to the top of the retaining wall along its length. However, it is reasonably foreseeable that future owners of the property may change the landscaping to the back yard, including the removal of the hedge, with the effect of increasing the likelihood of an accidental fall from the upper retaining wall.
- 5.11. I therefore conclude there is a reasonable probability that people will or could be on or in close proximity to the top of the upper retaining wall, such that there is likelihood of accidental fall. Therefore, the functional requirement of clause F4.2 applies, and as the sudden change in level is associated with the dwelling it must be constructed to reduce the likelihood of that accidental fall from it. This would involve the construction of a barrier which meets the performance requirements of clauses F4.3.1 and F4.3.4.

Whether the hedge can be a ‘barrier’

- 5.12. Having concluded that there is likelihood of an accidental fall from the upper retaining wall, I now consider whether the hedge can be a barrier which meets the performance requirements of clauses F4.3.1 and F4.3.4.
- 5.13. Clause F4.3.4 sets out the performance requirements of a barrier where one is required under clause F4.3.1:

Barriers shall:

- (a) be continuous and extend for the full extent of the hazard,
- (b) be of appropriate height,
- (c) be constructed with adequate rigidity,
- (d) be of adequate strength to withstand the foreseeable impact of people and, where appropriate, the static pressure of people pressing against them,
- (e) be constructed to prevent people from falling through them, and
- (f) [Revoked]
- (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.
- (h) be constructed so that they are not readily able to be used as seats.

- 5.14. Considering this in the context of the Building Act, I note the following purposes:⁴

- (a) to provide for the regulation of **building work**, ... and the setting out of performance standards for **buildings** to ensure that –
 - (i) people who use **buildings** can do so safely and without endangering their health; and
 - (ii) **buildings** have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them;
- ...

⁴ Section 3 Purposes.

[my emphasis]

- 5.15. It is 'building work' that is regulated and the 'building' that must contribute to the safety, health, physical independence and well-being of the people who use it. This is achieved by the building work meeting the minimum standards of the Building Code.
- 5.16. Hedges are not buildings and are likely to be impacted by seasonal growth patterns and have variable lifespans. For this reason, it is untenable for the compliance of a barrier for the safeguarding of people from an accidental fall to be assessed in reliance on a hedge.
- 5.17. I note also that clauses F4.3.4(c), (e), and (h) refer to a barrier as being "constructed". This is suggestive of the construction of the barrier falling within the definition of building work.
- 5.18. As the hedge is not a building, its planting, growth, and maintenance is not building work regulated under the Act. Therefore, it is not a barrier for the purpose of clauses F4.3.1 and F4.3.4.

The refusal to issue the code compliance certificate

- 5.19. Section 94(1)(a) of the Act requires that the building work comply with the building consent. A building consent is granted under section 49(1), which is based on a test whereby the Building Code would be met if the building work were properly completed in accordance with the plans and specifications.
- 5.20. As concluded in paragraph 5.11, despite the change in level not being identified in the plans and specifications accompanying the building consent, the dwelling is required to comply with clause F4. This necessitates a barrier to reduce the likelihood of accidental fall from the sudden change in level that is associated with the dwelling.
- 5.21. The reasons for refusal listed in the 4 June 2021 letter clearly outline the building work in question, the barrier, and reference the relevant Building Code clause, F4. I am therefore of the view that the reasons are sufficient and valid reasons for refusing to issue the code compliance certificate.

6. Decision

- 6.1. In accordance with section 188 of the Building Act 2004, I determine that:
- 6.1.1. the change in level at the upper retaining wall is associated with the dwelling and is required to have a barrier for the dwelling to comply with clause F4.3.1

- 6.1.2. the hedge does not satisfy the requirements of Building Code Clause F4
Safety from falling
- 6.1.3. and I confirm the authority's decision to refuse to issue a code compliance certificate for BC 2.2019.185.1.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 16 December 2024.

Peta Hird

Lead Determinations Specialist