



Determination 2018/047

Regarding the code compliance of barriers to a pool at 32 St Andrews Drive, Hikuai



Summary

This determination considers whether the barriers to a small heated pool comply with Clause F9 – Means of restricting access to residential pools. The determination also discusses the waiver and modification provisions within the Building Act.

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, 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, J & L Paton (“the applicants”)
- Thames-Coromandel District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

1.3 This determination arises from a decision by the authority to issue a notice to fix to the applicant because the authority considers the barriers to a small heated pool² (“the pool”) do not comply with Clause³ F9 – Means of restricting access to residential pools of the Building Code (First Schedule, Building Regulations 1992).

1.4 The matter to be determined⁴ is therefore whether the barriers to the pool comply with Clause F9 of the Building Code.

¹ The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.building.govt.nz or by contacting the Ministry on 0800 242 243.

² I have assumed the pool falls within the small heated pool definition under section 7 of the Act.

³ In this determination, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

⁴ Under section 177(1)(a) of the Act.

- 1.5 In making my decision, I have considered the submissions of the parties, and other evidence in this matter. Refer to Appendix A for the relevant clauses of the Building Code and the Acceptable Solution referred to in this determination.

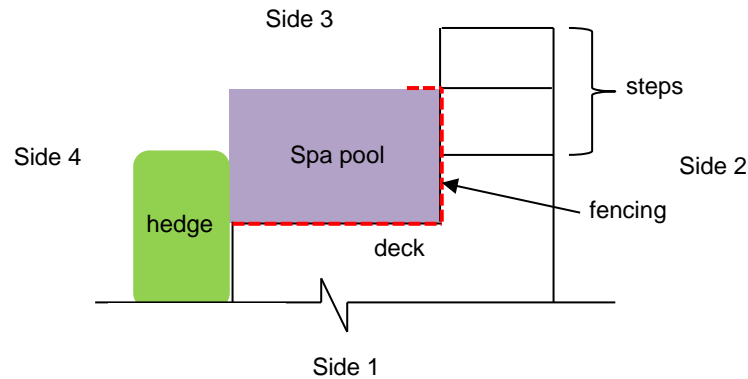


Figure 1: Site plan of the pool (not to scale)



Figure 2: Photographs of the pool

2. The property and pool

- 2.1 The property is a residential property located in a rural area near a stream and a lake.
- 2.2 The pool is situated on a concrete pad in a paved area to the rear of the property. It is adjacent to steps and a deck and configured as follows (see Figure 1) :
- the first side of the pool is adjacent to the deck (“side 1”). The deck is approximately the same height as the top of the pool.
 - the second side of the pool is adjacent to the deck, and there are two steps down to the paved area below the deck (“side 2”)
 - the third side of the pool borders the bottom step and opens out to the paved area (“side 3”)
 - the fourth side of the pool is adjacent to the hedge and open to the paved area (“side 4”).

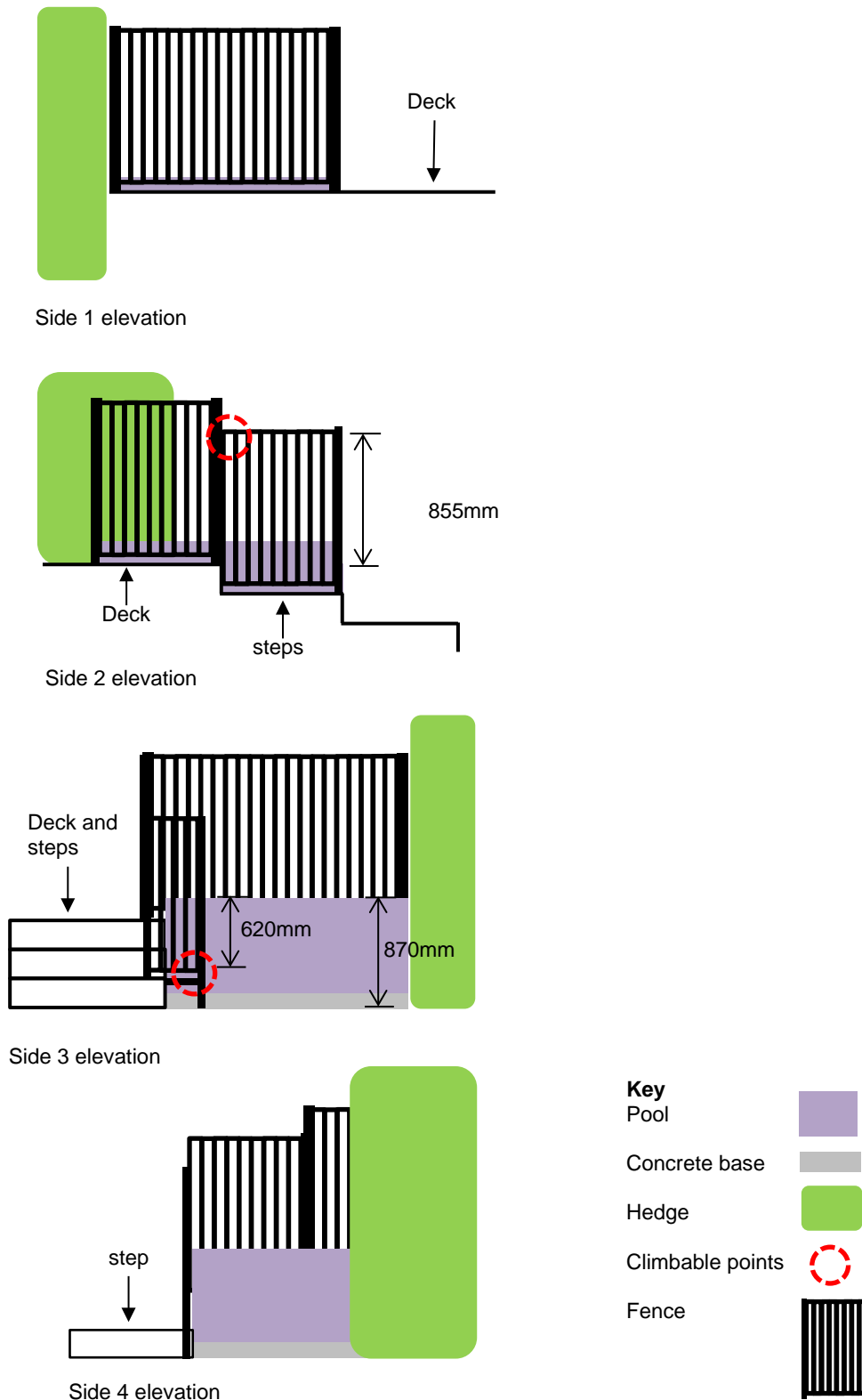


Figure 3: Diagram of pool elevations (not to scale)

- 2.3 The pool has a lockable cover. The pool walls are 870 mm high from the paved area to the top surface of the pool cover.
- 2.4 The pool is partially fenced, with fencing extending along sides 1 and 2 of the pool, and with side 3 being partially fenced with a small section of fencing. The fencing to side 2 of the pool includes a gate. Panels measuring approximately 1.2m high form

the fencing around the pool. The panels consist of a top rail and a bottom rail, with vertical uprights that are regularly spaced.

3. Background

- 3.1 The authority received a complaint on 13 October 2016 about the pool on the applicant's property.
- 3.2 The authority inspected the pool on 7 December 2016. The authority concluded the pool did not meet the requirements of the Fencing of Swimming Pools Act 1987 and sent a letter on 8 December 2016 advising the applicant of this. The authority also advised the applicant that new legislation would come into force in January 2017 and may provide some exemptions for smaller pools.
- 3.3 On 22 December 2016, the authority issued a notice to fix (no. 461) ("the previous notice to fix") to the applicant. The notice stated:
- Particulars of contravention or non-compliance
- The owner has failed to erect a compliant pool fence in accordance with clause F4.3.4(f) of the building code to restrict access to the spa pool for children under the age of 6⁵.
- To remedy the contravention or non-compliance you must:
- (a) Empty the spa pool immediately until a compliant pool fence is erected.
- (b) Obtain a building consent to erect a compliant pool fence as defined in section 2 of the Fencing of Swimming Pools Act 1987 so as to prevent access to the pool to any child under the age of 6 years, or remove the spa pool from site.
- 3.4 On 19 September 2017, the authority wrote to the applicant regarding the requirements of the new legislation. The authority stated:
- As discussed previously, the new Building (Pools) Amendment Act 2016, came into affect [sic] on the 1st of January 2017. This allows for the further option, which is to have the spa pool exempt from fencing requirements, if it complies with the following:
- Be 760mm from the ground or adjacent floor level to the top of the pool wall level at all points.
 - A hard pool cover is in place that restricts the entry of children when closed (locks in working order).
 - The lid is able to withstand a reasonably foreseeable load.
 - The lid can be readily returned to the closed position.
 - And signage indicating [its] child safety features.
- 3.5 On 20 December 2017, the authority inspected the pool following advice from the applicant that a lockable lid and fencing had been installed. The authority made the following observations:
- Access can be gained between the post and the hedge, onto the lid.
 - It is only 620mm from the bottom rail to the top of the lid and then a shorter distance from the lid to the top of the fence.
 - Gate installed in the new fencing. The fence to the right of the gate is only 855mm from the top deck, instead of 1.2m. This is also a climb point to the latch. The spa top edge is also a climb point.

⁵ The Building Code used to contain the requirement to restrict children under 6 years of age from accessing a residential swimming pool. From 1 January 2017 the Building Code was amended to restrict access to residential pools for children under 5 years of age.

3.6 The authority subsequently issued a further notice to fix on 19 March 2018 (“the current notice to fix”). The notice stated:

Particulars of contravention or non-compliance

The owner has failed to erect a compliant pool fence in accordance with clause F9.3.2 and F9.3.3 of the building code to restrict access to the spa pool for children under the age of 5.

To remedy the contravention or non-compliance you must:

- (a) Empty the spa pool immediately until the spa pool is made compliant, and either;
- (b) Obtain a building consent to erect a compliant pool fence as defined in section 162C of the Building (Pools) Amendment Act 2016, so as to prevent access to the pool to any child under the age of 5 years, or
- (c) Move the spa pool 760mm or more away from any possible climb points, such as the deck, and ensure it complies with building code clause F9.3.5 or
- (d) Remove the spa pool from the site.

3.7 An application for determination was received from the applicant on 7 May 2018.

4. The submissions

4.1 In the application dated 7 May 2018, the applicant noted a new gate, fencing, and a new cover for the pool with effective locks were installed. The applicant considered it would be very challenging for a young child to climb around the fence and get the lid unlocked. The applicant also noted unique features about the property, requesting a waiver from the need to install more fencing, stating:

We are struggling with this fencing issue due to a number of factors including the location of our house and spa pool and its proximity to the stream, which would make any parent or guardian of any child extremely cautious. We live in a gated community in the country; it is not accessible to the public; this is not an area where children play and certainly not an area which any parent or guardian would let a small child go unsupervised.

4.2 The application included:

- a copy of the current notice to fix and accompanying cover letter from the authority, both dated 19 March 2018
- a copy of the site instruction notice from the authority dated 20 December 2017 and accompanying photographs
- additional photographs.

4.3 The authority acknowledged the application on 21 June 2018, and responded with a submission dated 28 June 2018. The submission set out the background to the issue of the current notice to fix and its views that the pool barrier:

- Is non-compliant with section 162C of the Building Act 2004 and Clause F9.3.1 as it does not have compliant physical barriers to restrict access to the pool by unsupervised children under the age of 5.
- Is non-compliant with Clause F9.3.2 as the top surface of every wall of the pool is, at all points, not less than 760mm above adjacent ground and the walls do not inhibit climbing.
- Is non-compliant with Clause F9.3.3 as the pool barrier has objects that could assist children in negotiating the barrier.

4.4 Also, the authority made the following comments:

- The new pool barrier was erected without building consent even though all correspondence has clearly advised of this requirement.
- [The authority] has taken into regard the circumstances on site and is not willing to grant a waiver to Clause F9 to waive the need to restrict access by unsupervised children under 5 years of age.
- [The authority] has recommended repositioning the [pool] to achieve Building Code compliance F9.3.3 and F9.3.5.

4.5 The submission included copies of:

- the original complaint about the pool cover
- an inspection report dated 7 December 2016 with photos
- a letter from the authority dated 8 December 2016 about the non-compliance of the pool with the Fencing of Swimming Pools Act 1987
- the previous notice to fix and accompanying cover letter from the authority, both dated 22 December 2017
- emails between the applicant and the Ministry that the applicant sent to the authority on 26 April 2017
- a file note dated 19 June 2017 about a phone call between the applicant and the authority
- a letter from the authority dated 19 September 2017 about the expiry of the previous notice to fix
- emails dated 6 December 2017 between the applicant and the authority about the completion of the work and authority's inspection
- an inspection report dated 20 December 2017 with photos
- a copy of the current notice to fix and accompanying cover letter from the authority, both dated 19 March 2018.

4.6 A draft determination was issued to the parties for comment on 20 July 2018.

4.7 On 30 July 2018 the applicants accepted the draft determination noting the steps they had already taken to prevent access by young children.

4.8 On 2 August 2018 the authority accepted the draft determination with a non-contentious amendment regarding the fact that the pool has remained empty since December 2016.

5. Discussion

5.1 General

5.1.1 Section 162C requires:

Residential pools must have means of restricting access

- (1) Every residential pool that is filled or partly filled with water must have physical barriers that restrict access to the pool by unsupervised children under 5 years of age.
- (2) The means of restricting access referred to in subsection (1) must comply with the requirements of the building code—
 - (a) that are in force; or

(b) that were in force when the pool was constructed, erected, or installed (after 1 September 1987) and in respect of which a building consent, code compliance certificate, or certificate of acceptance was issued (in relation to the means of restricting access to the pool).

(3) In the case of a small heated pool, the means of restricting access referred to in subsection (1) need only restrict access to the pool when the pool is not in use.

5.1.2 The pool does not have a compliance document listed in section 162C(2)(b), so under section 162C(2)(a), the means of restricting access must comply with the Building Code requirements that are currently in force, which is Clause F9.

5.2 Compliance with Clause F9 of the Building Code

5.2.1 This determination concerns a pool with a cover and partial fencing. The matter for determination is whether the barriers to the pool comply with Clause F9 of the Building Code.

5.2.2 The authority's view is that the applicant has failed to erect a compliant pool fence in accordance with Clauses F9.3.2 and F9.3.3 of the Building Code.

5.2.3 The objective of Clause F9 is "to prevent injury or death to young children involving residential pools".

5.2.4 Performance Clause F9.3.1 requires:

Residential pools must have or be provided with physical barriers that restrict access to the pool or immediate pool area by unsupervised young children (ie, under 5 years of age).

5.2.5 Swimming pools and spa pools present a risk to unsupervised young children, and so the Building Code requires barriers to pools that will restrict their access into the immediate pool area. One common solution to achieve compliance is to install a fence surrounding the immediate pool area.

5.2.6 I note the applicant has mentioned the proximity of the property to a fast flowing stream and lake and is of the view this means that young children will be well supervised in this area because of these hazards. Determination 2007/087⁶ found that the presence of other water hazards is not a reason for not protecting children against the hazard of the pool. In my view that same reasoning applies in this case.

5.2.7 Clause F9.3.2 requires:

Barriers must either—

(a) surround the pool (and may enclose the whole or part of the immediate pool area); or

(b) in the case of a small heated pool, cover the pool itself.

5.2.8 Clause F9.3.2(b) is subject to the limit on application that states:

Performance [Clause] F9.3.2(b) applies only to those small heated pools where the top surface of every wall of the pool is at all points not less than 760mm above the adjacent floor or ground and the walls of the pool inhibit climbing.

5.2.9 Clause F9.3.3 requires:

A barrier surrounding a pool must have no permanent objects or projections on the outside that could assist children in negotiating the barrier.

5.2.10 I have not considered the compliance of the cover with Clause F9.3.5 as this is not in dispute between the parties.

⁶ Determination 2007/087 Use of a cover instead of a fence for a swimming pool (15 August 2007).

- 5.2.11 I will therefore consider whether the barriers comply with either Clause F9.3.2(a) or (b), and Clause F9.3.3.
- 5.2.12 The barriers do not comply with Clause F9.3.2(a) as the barriers do not surround the pool or enclose the whole or part of the immediate pool area.
- 5.2.13 Clause F9.3.2(b) allows for a cover to be provided as the barrier, without the requirement for a barrier to surround the entire pool and immediate pool area. The limit on application must be met for a cover to be used as the only method of restricting access to the pool. It is my view the barriers do not comply with Clause F9.3.2(b) as the configuration of the pool and adjacent decking does not satisfy the limit on application. The top surface of every wall of the pool cannot be less than 760mm above the adjacent floor or ground, which in this case is the deck, steps, and paved area⁷. In this case, the top surface of every side of the pool in most places is less than 760mm above the adjacent deck, steps, and paved area.
- 5.2.14 I consider the fencing has features that will assist children to climb the fencing and therefore does not comply with Clause F9.3.3 (see Figure 3 circled in red). Using Figure 1 from F9/AS1⁸ as guidance, the bottom rail and top of the pool on side 2 may assist a child in climbing over the fence because there is less than 900mm between the bottom and top rail. Also, the bottom rail of the small section of fencing to side 3 of the pool may assist a child in climbing up onto the pool because the pool cover lid is only 620mm from the bottom rail.
- 5.2.15 Of the sides that have barriers, the step adjacent to side 2 of the pool means the top rail of the fence is only 855mm above the deck at the nosing of the step. The Acceptable Solution, although not the only means of compliance, prescribes a height of 1200mm (refer to Appendix A) for barriers. I also note there appears to be a gap between the hedge and the fence that a child could use to access the pool.

5.3 Waiver or modification of the means of restricting access to pools

- 5.3.1 The applicants sought to waive the requirement to install more fencing around the remainder of the pool (refer to paragraph 4.1). While this is not a matter I can determine under section 177⁹, I provide the following comments to assist the parties.
- 5.3.2 I have established that the existing barriers do not comply with Clause F9 and therefore do not comply with section 162C(2) unless subject to a waiver or modification granted under section 67 or 67A.
- 5.3.3 The applicants could apply for a waiver or modification under either section 67 through a building consent, or through section 67A without needing to apply for a building consent.
- 5.3.4 Section 67 provides for the granting of a building consent subject to a waiver or modification of the Building Code, and the waiver or modification may be subject to any conditions the relevant territorial authority deems appropriate. Section 67A provides for waivers or modifications of section 162C(1) or (2) if the territorial authority is satisfied the waiver or modification would not significantly increase danger to children under 5 years of age and taking into account all the relevant circumstances.

⁷ While there might be a small gap between the adjacent decking and stairs, I consider these elements are close enough to be considered as "adjacent floor".

⁸ Acceptable Solution F9/AS1 Residential Pool Barriers.

⁹ Section 67A is not included in section 177(3) in relation to the decision of a territorial authority.

- 5.3.5 The ability to grant a waiver or modification recognises the Building Code cannot cover all possible situations, and provides the flexibility for authorities to address unusual circumstances.
- 5.3.6 Determination 2015/010¹⁰ described a list of factors the authority should take into account when considering whether a waiver or modification is reasonable:
- the extent and possible consequences of the non-compliance with the specific performance clause
 - the availability of other reasonably practicable solutions that would result in the building work fully complying with the Building Code, and the associated costs
 - any special and unique circumstances of the building work subject to the waiver or modification
 - the extent to which the modification or waiver will still be consistent with the purposes and principles of the Act
 - the waiver or modification complying with the relevant objective and functional requirement of the specific clause of the Building Code.

5.4 Conclusion

- 5.5 The fencing to the pool does not comply with Clause F9.3.2(a) because it does not surround the pool. Also, in this case a cover alone cannot be used to achieve compliance, because not every wall of the pool is more than 760mm above the adjacent deck, steps, and paved area.
- 5.6 Additionally, the fencing does not comply with Clause F9.3.3 because it has features (as noted above at paragraph 5.2.13) that could assist children to climb the barrier.

6. The decision

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that barriers to the pool do not comply with Clause F9 of the Building Code.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 25 September 2018.

Katie Gordon
Manager Determinations

¹⁰ Determination 2015/010 Regarding the authority's refusal to grant a modification of Clause C3.4(a) of the Building Code in respect of materials used for internal surface linings at a new school hall (31 March 2015).

Appendix A: The legislation

A.1 The relevant provisions of Building Code Clause F9 discussed in this determination are:

Clause F9—Means of restricting access to residential pools

Objective

F9.1 The objective of this provision is to prevent injury or death to young children involving residential pools.

Functional requirement

F9.2 Residential pools with a maximum depth of water of 400 mm or more that are filled or partly filled with water must have means of restricting access that prevents unsupervised access by a child under 5 years of age.

Performance

F9.3.1 Residential pools must have or be provided with physical barriers that restrict access to the pool or the immediate pool area by unsupervised young children (ie, under 5 years of age).

F9.3.2 Barriers must either—

(a) surround the pool (and may enclose the whole or part of the immediate pool area); or

(b) in the case of a small heated pool, cover the pool itself.

Limit on application of F9.3.2

In the case of a *small heated pool*, the means of restricting access referred to in Performance F9.3.1 need only restrict access to the *pool* when the *pool* is not in use.

Performance F9.3.2(b) applies only to those *small heated pools* where the top surface of every wall of the *pool* is at all points not less than 760 mm above the adjacent floor or ground and the walls of the *pool* inhibit climbing.

F9.3.3 A barrier surrounding a pool must have no permanent objects or projections on the outside that could assist children in negotiating the barrier.

A.2 The provisions of Acceptable Solution F9/AS1 discussed in this determination are:

Pool barriers not on a property boundary shall have a height of not less than 1200 mm from the finished floor or ground level outside the pool barrier.