



Determination 2020/018

The compliance of a pool barrier with Building Code Clause F9 and whether the authority was correct to grant an exemption for its construction at 203 Papamoa Beach Road, Papamoa



Figure 1: Aerial view of the property showing the approximate location of the pool barrier and adjacent features

Summary

This determination considers the authority's decision to grant a discretionary exemption from the requirement to obtain a building consent for the construction of a section of pool barrier. The determination also considers the compliance of the new section of pool barrier with Clause F9 Means of restricting access to residential pools of the Building Code.

1. Preliminary

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004 (“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

¹ The Building Act and Building Code are available at www.legislation.govt.nz. The Building Code is contained in Schedule 1 of the Building Regulations 1992. Information about the Building Act and Building Code is available at www.building.govt.nz, as well as past determinations, compliance documents and guidance issued by the Ministry. References to clauses in this determination are to clauses of the Building Code and references to sections are to sections of the Building Act, unless otherwise noted.

1.2 The parties

1.2.1 The parties to the determination are:

- P and S Huse, the owners of the property (“the owners”)
- Tauranga City Council, carrying out its duties as a territorial authority or building consent authority (“the authority”), which applied for the determination.

1.2.2 The owners of a property adjacent to the new section of pool barrier (“the neighbours”) are of the view they are a party to this determination under section 176(c), based on their contention that the barrier’s footings encroach on their property so they are co-owners of the barrier. In addition, the neighbours are of the view they are a party under section 176(e)(i) as owners of other property they consider the barrier is supposed to protect.

1.2.3 The owners dispute the alleged encroachment of the pool barrier’s footings on the neighbours’ property. The owners objected to me considering submissions from the neighbours in this matter on the basis that they are not a party under section 176 and they are unlikely to be objective or present a balanced view.

1.2.4 The authority neither supported nor opposed the neighbours’ involvement, but said that activity on the neighbours’ property could have an impact on the pool barrier’s compliance with Clause F9 in terms of objects or projections on the outside of that barrier.

1.2.5 I have concluded that the neighbours do not meet the definition of a party in section 176² of the Act for the purpose of this determination. I am of the view there is insufficient evidence that they are owners for the purposes of section 176(c) in respect of the matters to be determined. Further, these matters do not concern clauses of the Building Code (such as Clause B1 Structure and Clause E1 Surface water) that have the purpose of protecting “other property”³ and therefore the neighbours are not a party under section 176(e)(i).

1.2.6 However, as the matter to be determined involves concern about access to the immediate pool area⁴ from the neighbours’ property, and the neighbours have raised various concerns about the authority’s decision and about the pool barrier’s compliance with the Building Code, I provided the neighbours with a copy of a draft of this determination and an opportunity to comment.

1.2.7 In making my decision I have considered the submissions of the parties and the neighbours, and the other evidence in this matter.

1.3 The matters to be determined

1.3.1 This determination arises from the authority’s decision to grant an exemption to the owners from requiring a building consent to construct a new section of pool barrier. The new section lies to the north of the owners’ pool, along or near the boundary with the neighbour’s property (“the boundary”).

² Section 176 of the Act: Meaning of party.

³ As defined in section 7: Interpretation.

⁴ ‘Immediate pool area’ is defined in section 7 of the Act to mean “the land in or on which the pool is situated and so much of the surrounding area as is used for activities carried out in relation to or involving the pool”.

1.3.2 The matters to be determined⁵ are:

- whether the section of pool barrier as constructed on the north side of the owners' property complies with Building Code Clause F9 Means of restricting access to residential pools
- whether the authority was correct to grant an exemption under Clause 2(a) of Schedule 1 of the Act for this building work to be carried out without building consent.

1.3.3 In considering these matters, I have had regard to the purposes and principles of the Act in sections 3 and 4, in particular the importance of:

- ensuring people who use buildings can do so safely and without endangering their health (section 3(a)(i))
- the role that household units play in the lives of the people who use them, and ensuring that household units comply with the Building Code (section 4(2)(a))
- promoting the accountability of owners and building consent authorities who have responsibilities for ensuring that building work complies with the Building Code and that the necessary building consents are obtained for proposed building work (sections 3(b) and 4(2)(q)(i)).

1.3.4 Relevant extracts from the legislation and the Acceptable Solution F9/AS1⁶ are set out in Appendix A.

1.4 Matters outside this determination

1.4.1 I have not considered the compliance of the new section of pool barrier with any other clauses of the Building Code aside from Clause F9. I have also not considered the compliance of the owners' pool barrier as a whole. The matters in this determination are limited to that described in paragraph 1.3.2.

1.4.2 The neighbours' concerns about whether the footings of the pool barrier encroach on their property are not material to the matters for determination and I make no decision on this issue.

1.4.3 The authority has also made an application for determination regarding its decision to issue a notice to fix to the neighbours concerning possible access to the owners' pool barrier⁷ from the neighbours' property. That matter is being considered separately.

1.4.4 The neighbour has also raised concerns with the authority and the Ministry about the structural integrity of the pool, that the pool is a dangerous building under section 121⁸, and their own carport is an affected building under section 121A⁹. Those concerns are a matter for the authority to consider and do not form part of the matters for consideration in this determination.

⁵ Under sections 177(1)(a), 177(1)(b) and 177(3)(c) of the Act.

⁶ Acceptable Solution F9/AS1 for Clause F9 Means of restricting access to residential pools

⁷ That determination concerns a notice to fix issued under section 116B of the Act in relation to the combined use of a trailer and the neighbours' boundary fence as a means by which young children could access the owners' immediate pool area.

⁸ Section 121: Meaning of dangerous building

⁹ Section 121A: Meaning of affected building

2. The building work

- 2.1 The owners' house and pool are located at 203 Papamoa Beach Road, Papamoa. The property is accessed by a common right-of-way, which runs along its eastern side towards the beach. There are other residential properties to the north and west – see Figure 1 at the start of this determination.
- 2.2 The section of pool barrier which is the subject of this determination (“the pool barrier”) is along or near the property’s northern boundary. It is approximately 13 m long and is located in front of the original pool fence constructed about 20 years ago when the pool was installed (“the original pool fence”).
- 2.3 The pool barrier as constructed (see Figures 2 and 3(a)-(e) below) is 2100 mm high and has:
- a lower section extending 1200 mm above ground level – this comprises horizontal slatted panels spanning between 50x50 mm box aluminium posts
 - an upper section extending a further 900 mm – this comprises vertical, powder coated aluminium fencing (19 mm diameter tubes at 100 mm centres), set between the same box aluminium posts.
- 2.4 Hanging baskets are positioned at intervals along the pool barrier just below the junction between the upper and lower sections (see Figure 3(a)).

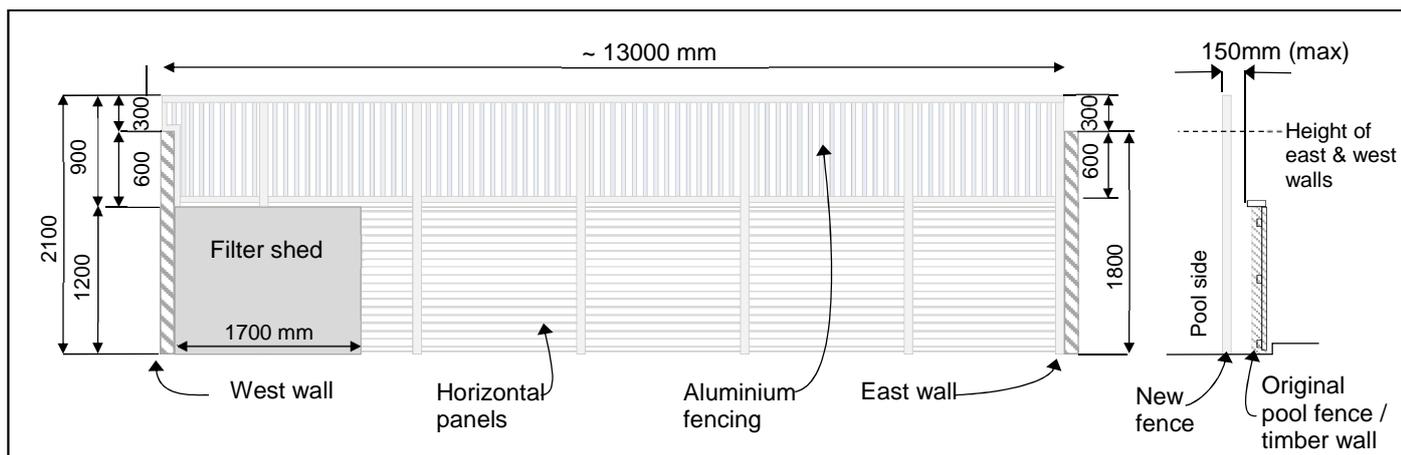


Figure 2: Sketch of the pool barrier north elevation (not to scale)

- 2.5 To the northeast, the pool barrier intersects with a solid masonry wall (“the east wall”). The east wall is 1800 mm high and has a flat top. As shown in Figure 3(b) the aluminium fencing and horizontal panels butt up against the east wall. The east wall extends slightly past the fencing towards the north.

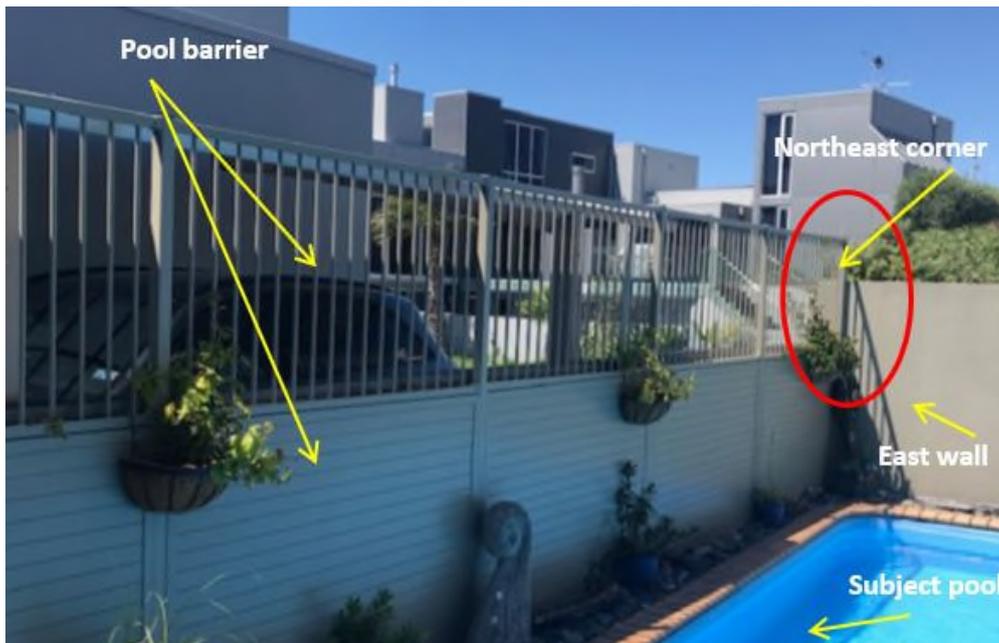


Figure 3(a): Pool barrier and northeast corner

2.6 To the northwest, the pool barrier intersects with another solid masonry wall (“the west wall”) which runs along the property’s western boundary. The west wall is 1800 mm high with a flat top. As shown in Figures 3(c) and (e) the aluminium fencing extends across the top of the west wall (which, like the east wall, extends slightly past that fencing towards the north).

2.7 A small filter shed is located in the northwest corner against the pool barrier and the west wall (see Figure 3(d)). This shed is about 1200 mm high (i.e. 600 mm below the west wall), about 1700 mm wide (west to east), and with a flat roof (see Figure 2).

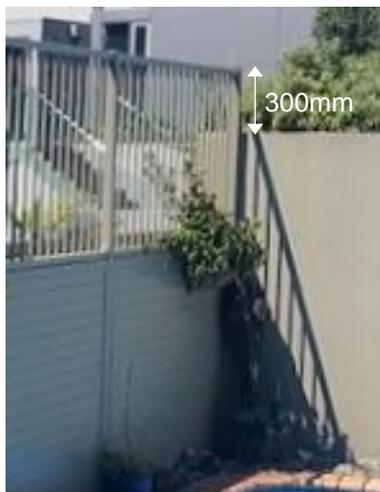


Figure 3(b): Northeast corner detail



Figure 3(c): Northwest corner detail

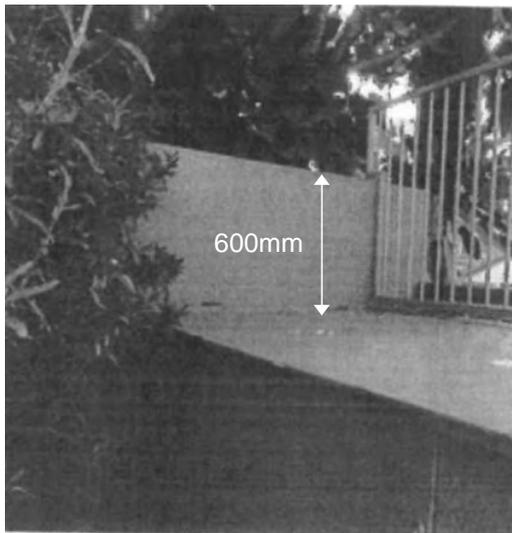


Figure 3(d): Northwest corner and filter shed



Figure 3(e): Northwest corner, seen from neighbours' property

3. Background

The original pool fence

- 3.1 In February 1999 the authority issued a building consent¹⁰ to the then owners of the property to construct a residential pool. The consented plans included a fence along the north boundary and a filter shed.
- 3.2 A 1200 mm high fibre-cement fence (“the original pool fence”) which formed part of the pool barrier was subsequently constructed near the boundary. In October 2007 the authority issued a code compliance certificate for the building work completed under the building consent. Later, the current owners bought the property.
- 3.3 In late 2015, when carrying out some building work, it was discovered that the original pool fence encroached on the neighbour’s property. In 2016 the neighbours lined their side of that original pool fence with a 1200 mm high timber wall capped with a flat top (“the timber wall”) – see Figure 3(e). The neighbours subsequently constructed a driveway along the boundary.
- 3.4 During 2017 the owners sought to gain the neighbours’ agreement to an encroachment easement and to increase the height of the original pool fence to address the reduction in height in relation to the ground level on the neighbour’s property – no agreement was reached.
- 3.5 On 23 August and again on 21 September 2017 the neighbours wrote to the authority with concerns about the timber wall with regard to access to the owner’s pool. The neighbours subsequently made a formal complaint to the authority about the compliance of the timber wall as a barrier to the owners’ pool.
- 3.6 On 7 October 2017 an officer of the authority inspected the barrier to the pool. The completed inspection report¹¹ marked the outcome as: “Has certain issues which will need to be resolved...”. The report said the pool fence was 1200 mm high and did

¹⁰ Building consent number 990372, issued under the previous Building Act 1991.

¹¹ On the authority’s inspection form titled “Building Act 2004 (Building Code F9) Pool Barrier Inspection Notes & Checklist”.

not have any climbable surfaces as part of the fence itself; “however there is a neighbouring trailer that could be used to climb the barrier”.

- 3.7 The report said the trailer on the neighbours’ property needed to be moved away from the fence to make the area safe and this was a matter for the two property owners to agree on. The report also said that in the meantime the owners should construct a non-climbable barrier 2100 mm high, which would “go some way to making the pool area safe, until the issue with the boundary is resolved”.

The proposed pool barrier

- 3.8 Between 30 October and 3 November 2017 the owners corresponded with the authority regarding their proposal for a new pool barrier, what would be appropriate in the circumstances, and whether its construction would require a building consent.
- 3.9 On 7 November 2017 the owners sent the authority an email with further details and a sketch of their proposed pool barrier (see Appendix B). The proposal comprised an elevated section of aluminium fencing supported by 50x50 mm posts, starting about 50 mm below the top of the timber wall and extending upwards at least 900 mm (i.e. without the lower section of horizontal panels). At the northwest corner the sketch indicated the location of the filter shed and west wall, and showed the aluminium fencing extending across the top of that wall. Details of the northeast corner were not shown.
- 3.10 In an accompanying email the owners said that as an encroachment easement had not been agreed, the proposed pool barrier would be located inside the boundary and in front of the timber wall, with a gap of about 40 -100 mm between the two (see Figure 2). The proposed pool barrier would have a total height of 2200 mm from ground level on the owners’ side and a little over 2100 mm on the neighbours’ side.
- 3.11 The owners asked the authority to: confirm the proposed pool barrier met the regulatory requirements; advise whether a building consent was required to construct it, and if so, whether they could be granted an exemption from requiring a consent on the basis of the work being urgent¹².
- 3.12 On 15 November 2017 the authority emailed the owners saying the proposed pool barrier would satisfy Clause F9 and it could be exempted under Schedule 1(2)(a) “as the work would be confirmed as Code compliant”.

Construction and inspection

- 3.13 In December 2017 the pool barrier was constructed as proposed, i.e. with posts supporting the elevated aluminium fencing. However, a visit by the authority on 22 December 2017 and a later inspection on 4 January 2018 identified gaps of up to 150 mm between this barrier and the timber wall. The authority advised the owners that there should not be any gaps of 100 mm or more¹³.
- 3.14 On 10 January 2018 the owners replied that they would fill in the lower part of the pool barrier with horizontal aluminium slats. This was completed in late January/early February 2018.

¹² Section 41(1)(c)(i) provides a building consent is not required in relation to any building work when a building consent cannot practicably be obtained in advance because the building work has to be carried out urgently for the purpose of saving or protecting life or health or preventing serious damage to property.

¹³ I note that compliance with Clause F9 by means of the Acceptable Solution F9/AS1 would require the pool barrier to have no openings that a 100 mm diameter sphere could pass through.

- 3.15 On 17 February 2018 the authority re-inspected the pool barrier as constructed. The inspection report recorded construction as “fully compliant” and said: “Should the original wall be removed, as may be the case, the new 2100 mm high barrier, having a clear zone of a minimum 900 mm as part of the structure meets the performance requirements of [Clause] F9.1¹⁴ and is fully compliant with [Clause] F9”. The inspection report also said that an exemption under Schedule 1(2)(a) from requiring a building consent “had been applied”.
- 3.16 On 15 May 2018 the officer of the authority who carried out the 17 February 2018 inspection wrote an internal memorandum concerning the pool barrier. The officer said (in summary):
- The original pool fence was “compromised” by placing a climbable object (the neighbours’ trailer) on a semi-permanent basis within 1200 mm of the top of this fence.
 - The pool barrier as constructed was considered code-compliant, but this decision had recently been called into question because it might be possible for an unsupervised young child on the neighbours’ property to climb onto the trailer then onto the timber wall and gain access from that point to the immediate pool area via the northwest corner.
 - The pool barrier as constructed was not in accordance with Acceptable Solution F9/AS1¹⁵ (for reasons including that the filter shed was only 600 mm rather than 900 mm below the west wall, and the pool was only 650 mm not 1000 mm from the pool barrier). However, the officer considered the pool barrier together with the existing barriers around the owners’ pool achieved compliance as an alternative solution and met the Building Code’s functional and performance requirements.
 - As the owners’ pool was located about 50 m up a private driveway it was “extremely unlikely” an unsupervised child under five years of age would be in the vicinity. A child would also have to know the pool was there as they would not be able to see it from outside the owners’ property; barriers surrounded the pool area; and these barriers provided “no real or credible assistance” to a young child.
- 3.17 On 13 September 2019 the authority issued a notice to fix to the neighbours in relation to their placement of a trailer near the pool barrier. As noted earlier, the authority’s decision to issue this notice is the subject of a separate determination.
- 3.18 On 18 September 2019 the Ministry received the authority’s application for a determination. This was accepted on 1 October 2019 after clarifying the matters to be determined.

4. Submissions

4.1 General

- 4.1.1 The Ministry corresponded with the parties and the neighbours regarding various issues including with regard to who was a party to the determination and what the particular matters to be determined were. The authority had asked for the determination to consider whether it “was correct in concluding an alternative

¹⁴ I note that Clause F9.1 is the objective clause, not the performance criteria set out in clauses F9.3.1 to F9.3.5

¹⁵ Acceptable Solutions and Verification Methods are published by the Ministry (they are available at www.building.govt.nz) and provide means of compliance with the Building Code. If followed, they must be accepted by a building consent authority as complying with the relevant Building Code provisions.

solution applied” for the pool barrier. As this is not determinable under section 177, the authority agreed that the determination would instead consider the compliance of the pool barrier as constructed with Clause F9.

- 4.1.2 A draft of this determination was issued on 31 January 2020 to the parties and the neighbours for comment. The draft concluded that the pool barrier does not comply with Clause F9, and that the authority was incorrect to grant an exemption under Schedule 1(2)(a) of the Act for the building work to be carried out without building consent.
- 4.1.3 Details of the submissions received from the parties and the neighbours during the determination process are outlined below.

4.2 The authority

- 4.2.1 The authority provided a submission with its application for a determination, saying it had received “an opinion”¹⁶ that was of the view there were issues with its decision to grant an exemption under Schedule 1(2)(a) for the proposed pool barrier. The authority said the conclusion was largely because Acceptable Solution F9/AS1 was not met. However, the authority said that when it granted the exemption it considered the proposed pool barrier was an alternative solution that met the functional and performance requirements of Clause F9.
- 4.2.2 The authority said it sought a determination regarding whether it was correct to grant the exemption, and, if the Ministry considered the authority should not have granted the exemption, what the authority should have taken into account in making that decision.
- 4.2.3 The authority provided supporting material with its application and subsequently (on 1 November 2019), including:
- a summary of correspondence and relevant events
 - a five-page “summary of facts” prepared by the writer of the opinion
 - the owners’ sketch of the proposed pool barrier and accompanying email of 7 November 2017
 - the authority’s inspection report dated 17 February 2018 and associated photographs
 - an internal memorandum dated 15 May 2018 by the same officer
 - the notice to fix issued to the neighbours on 13 September 2019
 - other internal memoranda, inspection records, and notes from the pool inspection register for the owners’ property
 - relevant correspondence between the authority, owners, neighbours, and the neighbours’ lawyers between September 2015 and 16 October 2019.
- 4.2.4 The authority did not accept the findings of the draft determination, and provided a further submission on 21 February 2020 stating (in summary):
- The ability of a young child to access the immediate pool area would be significantly reduced if the neighbours’ trailer was removed. Therefore the outcome of the other determination that considers the authority’s decision to issue a notice to fix for the trailer and timber wall is relevant to this determination.

¹⁶ No further details were provided, but I understand the reference to an opinion to be a legal opinion commissioned by the authority and provided to it in July 2019.

- If the Ministry determines the barrier is not compliant and the exemption was therefore issued in error, the authority requests the determination ‘overturn’ the exemption.
- In response to an argument made by the neighbours regarding Clause 21(2) of Schedule 1, which excludes pool barriers from exemptions relating to fences and hoardings, this does not prevent an authority from granting an exemption under Clause (2) nor other exemptions available under Schedule 1.
- The authority seeks comment from the Ministry on what it should take into account in assessing compliance with Clause F9 and alternative solutions where the pool barrier is on or near a boundary.

4.3 The owners

4.3.1 The owners made submissions, provided from 9 – 29 October 2019, in response to the application for determination, which included photographs and a summary of events. The owners said (in summary):

- The original pool fence was regarded as compliant with the relevant legislation of the time prior to the neighbours developing their property and the ground level on the neighbours’ side of the fence changing.
- The placement of the neighbours’ trailer next to the original pool fence (the timber wall) had created a safety risk because young children were able to access the timber wall via the trailer and from there the immediate pool area.
- There were simpler and more practical solutions to resolve the issue, but these were not possible without the neighbours’ agreement.

4.3.2 Regarding the compliance of the pool barrier as constructed, the owners said the authority had concluded at its 17 February 2018 inspection that this barrier was “fully compliant”. The owners strongly believed the pool barrier eliminated ‘as far as practical’ any risk to young children.

4.3.3 Regarding the authority’s decision to grant an exemption under Schedule 1(2)(a), the owners referred to the opinion sought by the authority, which in the owners’ view identified the neighbours’ trailer as ‘the root cause of the risk to young children’ and this was a relevant consideration in the authority’s decision. The owners believed the neighbours’ actions in storing this trailer next to the wall created a real risk to young children; ‘hence, our request to [the authority] for the exemption on the grounds of urgency’.

4.3.4 On 14 February 2020 the owners advised that they did not accept the draft determination and provided a submission, which reiterated their previous comments and also stated (in summary):

- The pool barrier was constructed as a matter of urgency as provided for by section 41(1)(c) – there was a real risk present to children who were able to easily access their property by way of the trailer parked near the timber wall.
- With the pool barrier as constructed, in order for a child to access the immediate pool area at the northeast corner the child would need to climb a 1200 mm high wall (the timber wall), which the owners noted is the height of a compliant pool fence, then climb 600 mm onto an 110 mm wide wall (the east wall), move approximately 1000 mm along the east wall before dropping 1800 mm to the pool area.
- The east and west walls are sheer 1800 mm high walls, so in practical terms offer a very significant barrier to a young child. “Extending the west wall to

give a 900mm drop onto the pool shed is possible but wouldn't [in the owner's opinion] materially enhance the protection offered by a [1800mm] barrier".

- The owners consider the statement that a child could circumvent the barrier 'with ease' to be inaccurate, misleading, and highly subjective. While not disputing that the pool barrier may not be 'fully compliant' with Clause F9, the owners do not agree that the non-compliances make the pool barrier inherently unsafe or 'easy to circumvent'.

4.3.5 The owners also submitted that the situation they are dealing with was caused by the development on the neighbours' property, and it seems unreasonable that:

- when a neighbour carries out work on their property there is no responsibility for ensuring their work does not impact on compliance of the existing structure¹⁷ (in this case the timber wall that was originally the pool barrier), and
- a neighbour could actively increase the risk by placing objects against a boundary fence, and by doing so compromise an otherwise compliant pool barrier.

4.4 The neighbours

4.4.1 The neighbours corresponded with the Ministry regarding the application between 19 September 2019 and 28 November 2019, providing submissions on various issues related to the application. The neighbours considered the authority was incorrect in granting the exemption under Clause 2(a) of Schedule 1, and noted they disagreed with some of the statements, dates and measurements in submissions provided by the parties.

4.4.2 In support of their views the neighbours provided copies of information including:

- a detailed summary of events and correspondence, including copies of internal emails by the authority on 9 and 10 May 2018
- sketches of the pool barrier and of their timber wall, and relevant photographs
- an annotated copy of the consented plans showing the pool and original pool fence, associated correspondence, and information from the pool manufacturer
- extracts from the legislation and from the opinion provided to the authority
- videos of a child walking along the timber wall and crossing to the owners' property at the northwest corner (which I understand had earlier been provided to the authority).

4.4.3 The neighbours made submissions in response to the draft of this determination, and included copies of email correspondence with the Ministry regarding pool barriers and exemptions, and a photograph show the footings of the barrier, which the neighbours consider encroaches on their property.

4.4.4 I have summarised key points from the neighbours' submissions below:

- Clause 21(2) of Schedule 1 excludes barriers to residential pools from the exemption and thus requires building consents be obtained for construction of a pool barrier (refer Appendix A1 for this clause in full). Clause 21(2) is not 'conjoined' with clause 21(1), and nor can pool barriers be exempt under other clauses of the Schedule.
- The building work was in breach of section 42A(2)(c) of the Act at the time the exemption was granted, because it was in breach of the height restriction in the Tauranga City Council City Plan and required resource consent. At the time the

¹⁷ Requirements to protect other property are limited to particular clauses of the Building Code but do not include Clause F9.

exemption was granted by the authority no resource consent had been applied for.

- Acceptable Solution F9/AS1 is ‘a default position as a set of rules for compliance’.

5. Discussion

5.1 Whether the pool barrier complies with Clause F9

5.1.1 The objective of Clause F9 is to prevent injury or death to young children involving residential pools. In particular, this clause requires pools to have physical barriers that restrict access to the pool or the immediate pool area by unsupervised children under five years of age.

5.1.2 One way to comply with the requirements of Clause F9 is to follow the relevant Acceptable Solution or Verification Method; in this case, Acceptable Solution F9/AS1. Another way to comply is to demonstrate that building work satisfies the relevant clauses of the Building Code in some other way – this is commonly referred to as an alternative solution proposal. With either solution it is the performance criteria of the Building Code that must be met.

5.1.3 The relevant performance clauses in this case are:

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); ...

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.

5.1.4 In making this assessment I have taken into account that this section of the pool barrier is on or very near the property boundary. The effectiveness of a pool barrier that is on or near a property boundary can be impacted by work carried out on the adjacent property, and a pool owner has no control over what happens on adjacent property. The types of things that may occur on a neighbouring property that can impact on the effectiveness of a pool barrier on a property boundary include a change to the height of the barrier relative to adjacent ground level or the construction of a structure or placement of an object against or close to the barrier.

5.2 Compliance via Acceptable Solution F9/AS1

5.2.1 I will start by considering whether the pool barrier as constructed is in accordance with F9/AS1. With regard to the matter in dispute, as the north section of the barrier is located on or near a property boundary the relevant criteria in F9/AS1 are as follows:

2.0 Barriers surrounding the immediate pool area

2.1 Pool barriers

...

2.1.3 Pool barriers shall not be angled more than 15° from vertical and may only slope away from the pool. Any rails, rods or wires forming a part of a pool barrier that are not themselves vertical shall be at least 900 mm apart vertically to restrict climbing. There shall be no openings in the pool barrier that a 100 mm diameter sphere could pass through.

...

2.1.7 Any projections or indentions on the outside face of a pool barrier shall not have a horizontal projection from the face of the pool barrier greater than 10 mm unless they are at least 900 mm apart vertically.

2.2 Pool barrier on a property boundary

2.2.1 If a pool barrier is located on a property boundary, it shall:

- a) Be not less than 1800 mm high, measured from the ground level on the pool side, and
- b) Have no openings that a 100 mm diameter sphere could pass through, and
- c) Be located not less than 1000 mm horizontally from the water's edge, and
- d) Have a 900 mm high zone on the pool side of the barrier that begins not more than 150 mm from the top and is constructed as specified in Paragraphs 2.1.3 and 2.1.7, to restrict climbing by children.

Comment:

Should a child gain access to the top of the barrier from the outside, this construction method will prevent them from climbing down into the pool area.

5.2.2 The purpose of the criteria in paragraph 2.2.1 of the Acceptable Solution is to address the fact that owners of residential pools cannot control what occurs on adjacent property that may assist a young child to reach the top of a pool barrier that is on or near the property boundary. For this reason, the Acceptable Solution sets criteria that will inhibit a young child's ability to climb down the barrier on the pool side, thus restricting access to the immediate pool area regardless of whether the child can access the top of the barrier from outside the property.

5.2.3 The requirements for this 'non-climbable zone' (to use the authority's phrase) are that it begin no more than 150 mm from the top of the pool barrier, and extend for 900 mm vertically downwards from that point. The pool barrier must also meet the criteria in paragraphs 2.1.3 and 2.1.7 of F9/AS1 as they relate to construction of pool barriers generally.

5.2.4 In this case, the top of the east and west walls are only 300 mm below the top of the pool barrier at the northwest and northeast corners (see Figures 2, 3(b), and 3(c)). At the northwest corner the filter shed is only 600 mm below the top of the west wall (see Figure 3(d)), and at the northeast corner the horizontal rail of the north fence is 600 mm below the top of the east wall. These aspects of the pool barrier's construction are not in accordance with paragraph 2.2.1(d) of the Acceptable

Solution. In addition, it would appear that the pool barrier is located closer at 650mm than is provided for in paragraph 2.2.1(c).

- 5.2.5 As the pool barrier is not in accordance with the criteria set out in F9/AS1 it cannot be accepted as complying with Clause F9 by way of the Acceptable Solution.

Compliance as an alternative solution proposal

- 5.2.6 I now consider whether the pool barrier as constructed demonstrates compliance with Clause F9 as an alternative solution proposal. In considering the pool barrier as an alternative solution, I must be satisfied that it meets the performance criteria in Clause F9.3.1 and F9.3.3. That is, the barrier must restrict access to the immediate pool area by children under the age of five years and it must have no permanent objects or projections on the outside that could assist a young child in negotiating the barrier.
- 5.2.7 The pool barrier is 2100 mm (from ground level on the owners' property), which is greater than the 1800 mm height in F9/AS1 for a barrier on a boundary. However, I am of the view that this increased height does not compensate for the features of the barrier and adjacent structures that would assist a young child in negotiating the barrier.
- 5.2.8 In this case the east and west walls, which are 300 mm below the top of the barrier, are permanent structures that project beyond the barrier. The timber wall, that is 150 mm from the barrier, is a permanent structure that abuts the projecting west wall. At the northwest junction the timber wall and the west wall are permanent objects on the outside of the barrier that would assist a child in negotiating the barrier. I conclude therefore the pool barrier at the northwest junction does not achieve compliance with Clause F9.3.3. It is not clear from the information provided to me whether the timber wall also abuts the east wall and would also not comply.
- 5.2.9 I have also turned my mind to the features of the barrier at the northwest and northeast junctions and whether these would assist a young child to climb down into the immediate pool area should they gain access to the top of the barrier from the neighbouring property.
- 5.2.10 As noted above, at the northeast junction the top of the east wall is only 300 mm below the height of the pool barrier (the new north section of barrier). While the east wall presents a sheer face of 1800 mm, the horizontal rail between the upper and lower sections of the pool barrier is only 600 mm below the top of the east wall. These surfaces provide foot- and hand-holds from the top of the barrier, and the vertical bars of the pool barrier also provide handholds that assist a child climbing down from the top of the barrier into the immediate pool area.
- 5.2.11 Similarly, at the northwest junction, the west wall, which is also only 300 mm below the height of the pool barrier, and the top of the filter shed, 600 mm below the west wall, are both features that would assist a child climbing down from the top of the barrier into the immediate pool area. From the broad, flat roof of the filter shed, a child can lower themselves the remaining 1200 mm to the immediate pool area.
- 5.2.12 For the reasons set out in the discussion above, I conclude the pool barrier does not restrict access to the immediate pool area by unsupervised young children, and therefore does not comply with Clause F9 as an alternative solution.

5.3 Whether the authority was correct to grant an exemption under Schedule 1(2) of the Act

- 5.3.1 Under Clause 2 of Schedule 1, the authority can use its discretion to grant an exemption from requiring a building consent.
- 5.3.2 The neighbours contend Clause 21(2) of Schedule 1 precludes an exemption being granted under Clause 2 of Schedule 1 for the construction of a barrier restricting access to a residential pool.
- 5.3.3 Clause 21 reads:
- 21 Fences and hoardings**
- (1) Building work in connection with a fence or hoarding in each case not exceeding 2.5 metres in height above the supporting ground.
- (2) Subclause (1) does not include a fence or hoarding to restrict access to a residential pool.
- 5.3.4 I disagree with the neighbours' contention. Subclauses (1) and (2) of Clause 21 must be read together. Subclause (2) can only be read as excluding fences or hoardings restricting access to a residential pool from subclause (1). In exercising its discretion under Clause 2 it may be relevant for the authority to consider the fact that pool barriers are excluded from the exemption provided for fences and hoardings under Clause 21 and the reasons for that being the case. However, the fact that pool barriers are excluded from the exemption provided for in Clause 21 does not modify the authority's powers to grant exemptions under Clause 2 of Schedule 1. There are no exclusions in Clause 2 of Schedule 1 in terms of the scope of work that can be granted an exemption.
- 5.3.5 The authority can only grant an exemption under Clause 2 of Schedule 1 if it considers a building consent is not necessary for the purposes of the Act because the authority considers that –
- (a) the completed building work is likely to comply with the Building Code; or
- (b) if the completed building work does not comply with the Building Code, it is unlikely to endanger people or any building, whether on the same land or on other property.
- 5.3.6 The owners sent the authority a sketch and description of the proposed pool barrier (see Appendix B, and refer paragraphs 3.9 and 3.10). The owners asked for an exemption so they could construct this quickly because of safety concerns. The authority said it considered the pool barrier was “fully compliant” and granted an exemption. From the authority's record of inspection of 17 February 2018, it appears that the basis for granting the exemption, in addition to its views on compliance, was the fact that the new barrier was replacing the original lower height timber wall.
- 5.3.7 In my opinion, it should have been apparent to the authority from the owners' sketch and description of the proposed pool barrier and from the authority's knowledge (from previous inspections) of adjacent features, such as the filter shed in the northwest corner and permanent structures adjacent to the barrier, that the proposal was not likely to result in a compliant barrier for the reasons set out in this determination. In my view, the criteria in Clause 2(a) of Schedule 1 were not met.
- 5.3.8 To conclude, I consider the authority was incorrect to grant an exemption under Clause 2 of Schedule 1 for the proposed pool barrier.

6. The decision

6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:

- the section of pool barrier as constructed on the north side of the owners' property does not comply with Clause F9, and
- the authority was incorrect to grant an exemption under Clause 2(a) of Schedule 1 of the Act for this building work to be carried out without building consent and I reverse that decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 3 August 2020.

Katie Gordon
Manager Determinations

Appendix A: Relevant extracts from the legislation

A1 Building Act 2004

Building consents

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.

...

41 Building consent not required in certain cases

- (1) Despite section 40, a building consent is not required in relation to—
- (a) ...
 - (b) any building work described in Schedule 1 for which a building consent is not required ...

Schedule 1 Building work for which building consent not required

2 Territorial and regional authority discretionary exemptions

Any building work in respect of which the territorial authority or regional authority considers that a building consent is not necessary for the purposes of this Act because the authority considers that—

- a) the completed building work is likely to comply with the building code; or
- b) if the completed building work does not comply with the building code, it is unlikely to endanger people or any building, whether on the same land or on other property.

21 Fences and hoardings

- (1) Building work in connection with a fence or hoarding in each case not exceeding 2.5 metres in height above the supporting ground.
- (2) Subclause (1) does not include a fence or hoarding to restrict access to a residential pool.

A2 Building Code

Clause F9 Means of restricting access to residential pools

Provisions

Limits on application

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 immediate pool area by unsupervised young children (ie, under 5 years of age).

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.

F9.3.2

Barriers must either—

- (a) surround the pool (and may enclose the whole or part of the immediate pool area);
- (b) in the case of a small heated pool, cover the pool itself.

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.

...

A3 Acceptable Solution F9/AS1 Residential Pool Barriers

2.0 Barriers surrounding the immediate pool area

2.1 Pool barriers

...

2.1.3 Pool barriers shall not be angled more than 15° from vertical and may only slope away from the pool. Any rails, rods or wires forming a part of a pool barrier that are not themselves vertical shall be at least 900 mm apart vertically to restrict climbing. There shall be no openings in the pool barrier that a 100 mm diameter sphere could pass through.

...

2.1.7 Any projections or indentions on the outside face of a pool barrier shall not have a horizontal projection from the face of the pool barrier greater than 10 mm unless they are at least 900 mm apart vertically.

...

2.2 Pool barrier on a property boundary

2.2.1 If a pool barrier is located on a property boundary, it shall:

- (a) Be not less than 1800 mm high, measured from the ground level on the pool side, and
- (b) Have no openings that a 100 mm diameter sphere could pass through, and
- (c) Be located not less than 1000 mm horizontally from the water's edge, and
- (d) Have a 900 mm high zone on the pool side of the barrier that begins not more than 150 mm from the top and is constructed as specified in Paragraphs 2.1.3 and 2.1.7, to restrict climbing by children.

Comment:

Should a child gain access to the top of the barrier from the outside, this construction method will prevent them from climbing down into the pool area.

Appendix B: Sketch of proposed fence

