



Determination 2017/082

Regarding the compliance of a deck balustrade that forms part of the barrier to a swimming pool at 56 St Michaels Avenue, Point Chevalier, Auckland



Summary

This determination concerns the balustrade to a deck above an immediate pool area and the compliance of the barrier in relation to a set of external stairs from the deck to the pool. The determination considers whether the deck itself is included within the immediate pool area and whether the stairs are a climbable projection¹.

1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004² (“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 owner of the building, N McKenzie (“the applicant”)
- Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

1.3 This determination arises from a dispute between the parties concerning the height of the balustrade to the deck that forms part of the barrier to the swimming pool. The building work was subject to a building consent and construction is underway.

¹ As outlined within Acceptable Solution F9.

² 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.

- 1.4 The matter to be determined³ is whether the deck balustrade complies with Building Code Clause F9⁴ Restricting access to residential pools (First Schedule, Building Regulations 1992).
- 1.5 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.

2. The building work and background

- 2.1 The building work involves extensions and alterations to an existing house that was constructed in 2003. The house is two-storeys high, with a deck from the living areas, and a set of external stairs to the yard and pool below. As consented in 2003, the external walls of house form part of the barrier to the immediate pool area, and there are a number of doors that lead into the pool area as follows:

Ground level

- Sliding doors to two bedrooms
- A single leaf door to a hall (between the two bedrooms)

Upper level

- Two sets of sliding doors, from the sitting room and living room, leading out to the deck and set of external stairs.

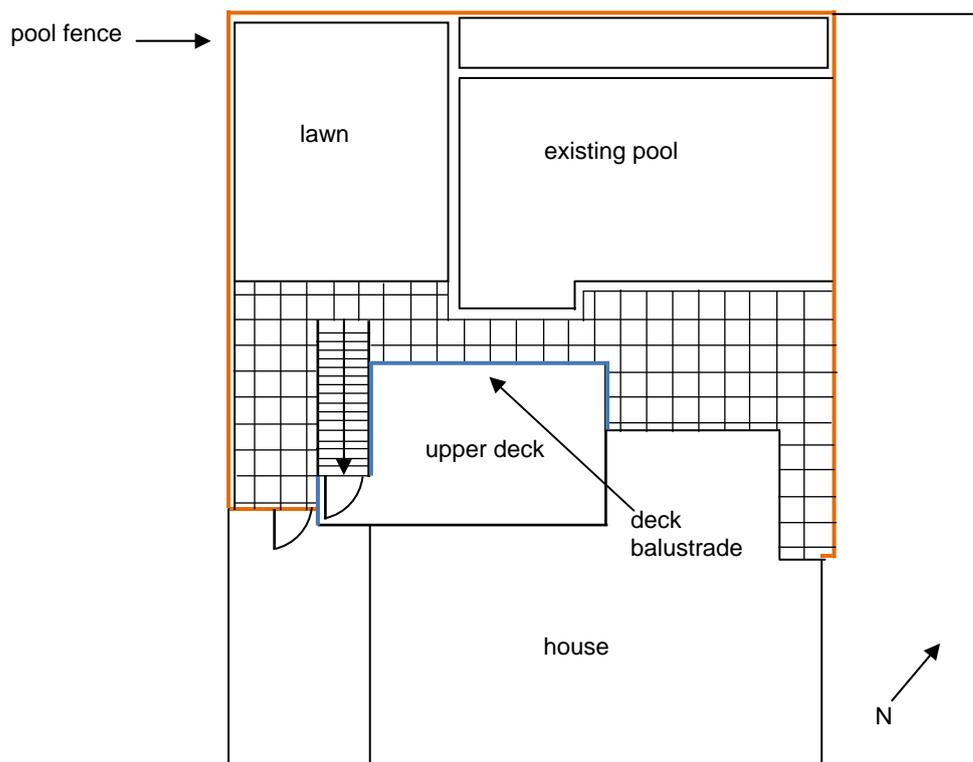


Figure 1: Site plan (not to scale)

³ Under section 177(1)(a) of the Act

⁴ In this determination, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

- 2.2 The authority issued building consent no. B 2017/1779 for alterations to the existing house on 31 May 2017 and approved amendments to the consent on 9 August 2017.
- 2.3 Much of the alteration involves replacing the existing monolithic cladding with a timber cladding over a cavity. The alterations also include extending the sitting room, replacing the existing external stairs from the upper deck to the pool, installing a new gate at the top of the stairs, extending the upper deck by 650mm, recladding the deck balustrade, and replacing the doors described in paragraph 2.1 above.
- 2.4 Drawings show the existing deck balustrade at 1000mm high. The gate is shown with a latch positioned 1550mm above the finished floor level of the landing and attached to a 100mm x 100mm post. The topmost stair and the edge of the landing are located less than 1200mm from the top of the balustrade as shown in Figure 2.

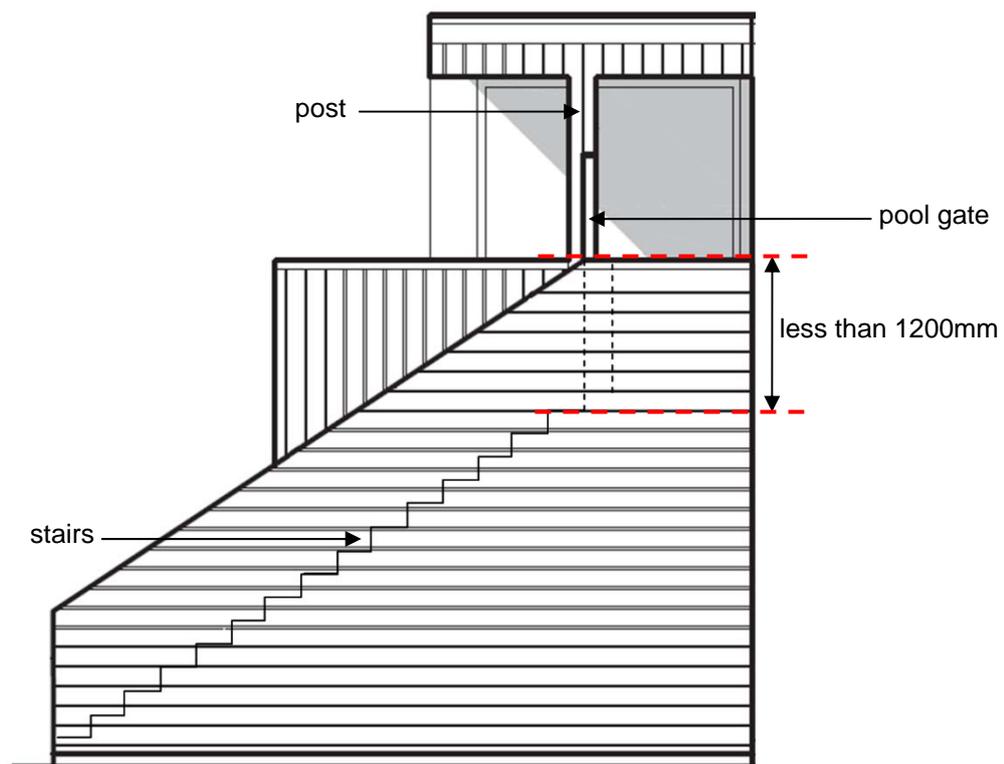


Figure 2: Elevation showing gate and stairs (not to scale)

- 2.5 It was the applicant's belief the upper level doors consented in 2003 formed part of a compliant pool barrier⁵, and accordingly no upgrade would be required to the deck balustrade during the alterations as the balustrade met the performance requirement in respect of Clause F4 Safety from falling.
- 2.6 At some stage during construction of the alterations, the authority came to the view that the height of the balustrade, in part, was not in accordance with paragraph 2.5.1 of the Acceptable Solution F9/AS1 in respect of "balconies projecting into the immediate pool area". The authority emailed the applicant's architect to this effect on 7 August 2017.
- 2.7 On 8 August 2017, the applicant spoke to the authority regarding the authority's concerns about the proposed balustrade. According to the applicant, the authority reiterated its view that the balustrade formed part of the pool barrier.

⁵ Clause F4 applied at the time the 2003 consent was issued. However, Clause F9 came into effect on 1 January 2017 and applied at the time the 2017 consent was issued.

2.8 The Ministry received the application for a determination on 17 August 2017.

3. The submissions

3.1 The applicant provided a submission with their application, which said (in summary):

- The 1000mm barrier to the upper deck is “non-climbable” and meets the requirements of Clause F4 Safety from falling.
- If a child managed to climb the 1000mm balustrade, they would not be able to reach the pool due to the likely consequence of falling between 1200mm to 3400mm.
- The balustrade is located away from the pool, and currently complies by preventing falling from a height.
- The proposed gate at the top of the stairs and the 1000mm barrier should be sufficient to restrict the access of children.
- To require a 1200mm height, part of the way along the balustrade would necessitate a redesign and add complexity regarding weathertightness, which would incur additional cost.
- A high level of safety has been provided to prevent children from entering the pool area, and the height of the balustrade in the consent is appropriate.

3.2 The applicant provided copies of:

- excerpts from NZS 8500:2006⁶
- excerpts from Acceptable Solution F9/AS1
- consented amended plans (Rev-I and Rev-J)
- correspondence between the parties.

3.3 The authority acknowledged the determination on 12 September 2017 and made the following comments:

... the accepted height for balustrades providing a barrier to the pool is 1200mm where the floor level is less than 2400mm above the lower level, not 1000m (F9/AS1 2.5.1). ...the authority correctly asked for the balustrade to be at this height where the potential fall was less than 2.4m, including the section adjacent to the stairs.

3.4 In an email to the authority dated 15 September 2017, the Ministry set out its view of the matter that the requirements of paragraph 2.5.1 of F9/AS1 applied only to projections that were 1200mm below the deck barrier. On 18 September 2017 the authority responded as follows:

In F9/AS1, 2.5.1 the requirement that there be no projections only applies when the floor of the balcony is more than 2.4m above the immediate pool area. If the floor level is less than 2.4m above the immediate floor level, this clause doesn't apply, including its reference to projections.

The deck is more than 2.4m above the immediate pool area. However, where the stairs lead up to the deck, the deck is less than 2.4m above the immediate pool area and clause 2.5.1 does not apply. Therefore, a 1.2m barrier is required in that area. This is what [the authority] requested.

3.5 A draft determination was issued to the parties for comment on 28 September 2017.

⁶ New Zealand Standard NZS 8500:2006 Safety barriers and fences around swimming pools, spas and hot tubs.

- 3.6 The authority accepted the draft determination, on the same day, subject to amendments concerning the vertical distance of the deck to the stairs.
- 3.7 The applicant accepted the draft determination without comment on 29 September 2017.
- 3.8 I have taken the comments into consideration and have amended the determination as appropriate.

4. Discussion

4.1 The relevant legislation and the code clause

- 4.1.1 On 1 January 2017 the Building (Pools) Amendment Act 2016 repealed the Fencing of Swimming Pools Act and inserted new provisions into the Building Act and a specific code clause relating to pool safety: Clause F9 Means of restricting access to residential pools. Clause F4 was also amended to remove any reference to pools.
- 4.1.2 The Objective of Clause F9 is to “prevent injury or death to young children involving residential pools”.
- 4.1.3 Performance Clause F9.3.1 requires:
- 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).

4.2 The deck

- 4.2.1 The applicant is of the view that the upper deck area is within the immediate pool area, and the doors act as the means of restricting access to the pool. The authority is of the view that the upper deck is not within the immediate pool area.
- 4.2.2 Section 7 of the Act defines the “immediate pool area” as:
- ...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
- 4.2.3 The term was also considered by the High Court in the case of *Waitakere City Council v Hickman*⁷. The decision in that case noted that:
- Activities which are carried on independently of the use of the pool or which have only a remote or indirect association with the use of the pool are to be excluded from the immediate pool area which must be fenced.

The decision considered the immediate pool area is a limited area commencing adjacent to the pool edge. The further away from the edge of the pool, the less likely the activity will be carried out “in relation to or involving the pool”.

- 4.2.4 In this instance, the upper deck is located above the pool, and access to the lower level is gained using the adjacent stairs. A lawn and paved area surround the pool, and I consider the activities that would occur in the lower level area will likely be carried out in relation to the pool. However, due to its separation from the lower level, I consider the upper deck area cannot reasonably be considered to be an area ‘used for activities or purposes carried out in conjunction with the use of the pool’ and so does not fall within “the immediate pool area”. Accordingly, I am of the view that the immediate pool area consists of the lower level outdoor area, and the stairs leading to the upper deck, due to the placement of the gate at the top of the stairs.

⁷ *Waitakere City Council v Hickman* 1/10/2004, Randerson J, HC Auckland CIV 2003-404-7266

4.2.5 Therefore, the deck balustrade and gate at the top of the stairs are the physical barriers that must restrict access to the immediate pool area to meet the performance requirements of Clause F9.

4.3 Clause F9 Means of restricting access to residential pools

4.3.1 The applicant is of the view that as the proposed balustrade will comply with Clause F4, it is not required to also comply with Clause F9.

4.3.2 The functional requirement of Clause F4 is to ensure buildings are constructed to reduce the likelihood of accidental falls, whereas the functional requirement of Clause F9 is to prevent unsupervised access by a child under 5 years of age to pools. The clauses have different requirements and compliance with both must be achieved. I note that in this instance, should compliance with Clause F9 be satisfied the balustrade would also comply with Clause F4.

4.3.3 As I have established that the upper deck is not located within the immediate pool area, I now turn to establishing whether the proposed building work would comply with Clause F9.

4.3.4 The deck can be considered a balcony projecting into the immediate pool area. Paragraph 2.5.1 of Acceptable Solution F9/AS1 states (my emphasis):

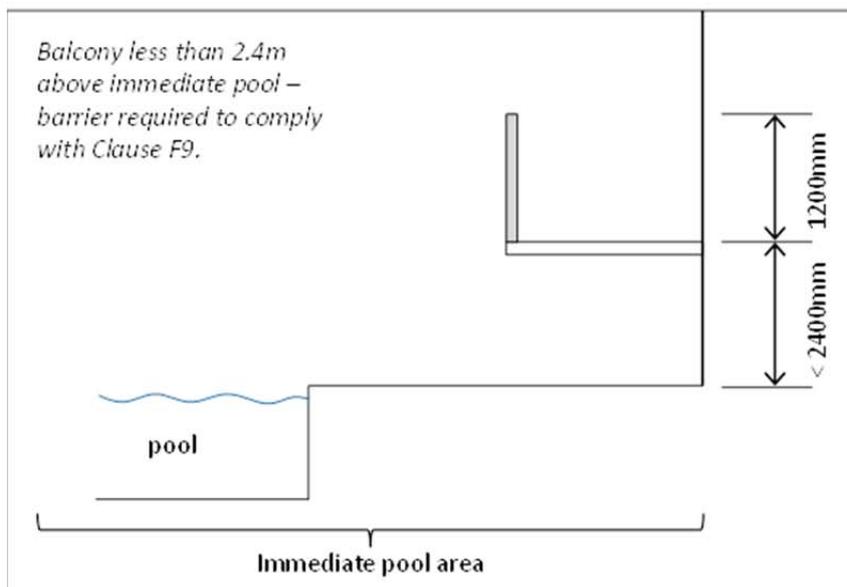
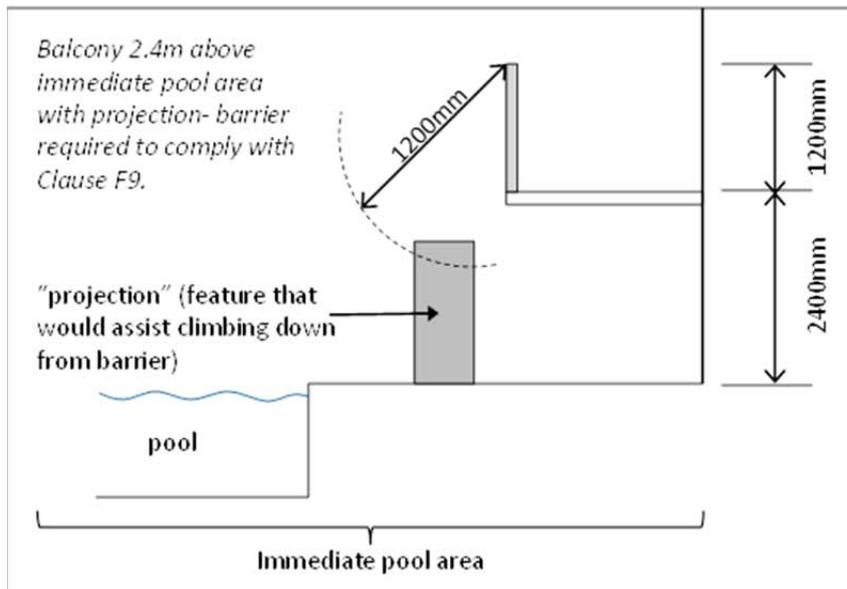
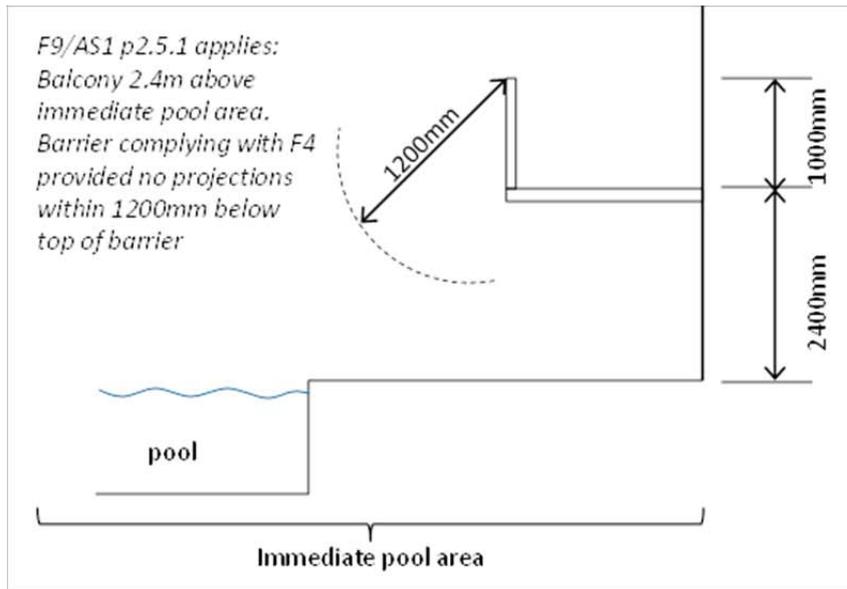
2.5 Balconies projecting into the immediate pool area

2.5.1 When the floor of a balcony is more than **2400 mm vertically above** the immediate pool area, a barrier complying with Clause F4 may be used instead of a Clause F9 barrier provided that there are...**no projections within 1200 mm below the top of it** (such as a wall or landscaping feature) that could assist a child to climb down.

4.3.5 In general terms this means:

- balconies sufficiently high (2400mm) above an immediate pool area only need a barrier of 1000mm in height (to comply with Clause F4) and not 1200mm (to comply with Clause F9); but this is only applicable where there are no “projections” (i.e. features that would assist a child climbing down from the balustrade) within 1200mm from the top of the barrier
- balconies 2400mm or more over an immediate pool area where there is a “projection” within 1200mm from the top of the barrier, will require a barrier that complies with Clause F9 to mitigate the risk of a child climbing down from the balcony barrier
- balconies less than 2400mm over an immediate pool area will require a barrier that complies with Clause F9.

I have illustrated the general principles described above in the following figures:



- 4.3.6 Provided the deck in this case is 2400mm vertically above the immediate pool area and there are no projections with 1200mm below the top of the balustrade, it would comply with Clause F4 and would also comply with F9 by way of the Acceptable Solution. However, if the deck is less than 2400mm above the pool area, or if there are projections within 1200mm of the top of the balustrade, then paragraph 2.5.1 of F9/AS1 does not apply.
- 4.3.7 The floor of the deck, is for the most part, more than 2400mm vertically above the immediate pool area, with the exception of the adjacent external stairs where the topmost treads to the stair leading to the deck are less than 1200mm below the top of the balustrade (refer Figure 2).
- 4.3.8 The authority has put forward the view that because the stairs are part of the immediate pool area and the distance between the upper steps and the deck is less than 2400mm, paragraph 2.5.1 of F9/AS1 does not apply.
- 4.3.9 I am of the view that paragraph 2.5.1 of F9/AS1 does not apply, regardless of whether the stairs are contemplated as part of the immediate pool area or as “projections” within 1200mm of the top of the balustrade. The risk to children is in climbing over the balustrade at a point where there is a height of less than 1200mm between the top of the balustrade and the upper steps or landing.
- 4.3.10 I am of the view that the ability of children to climb over the balustrade is exacerbated by the location of the gate.
- 4.3.11 I consider that the features of this design could assist a child to climb down into the immediate pool area, and accordingly the deck balustrade at 1000mm high does not meet the performance requirement of Clause F9.3.1 with respect to those areas adjacent the external stairs (as shown in Figure 3 below).

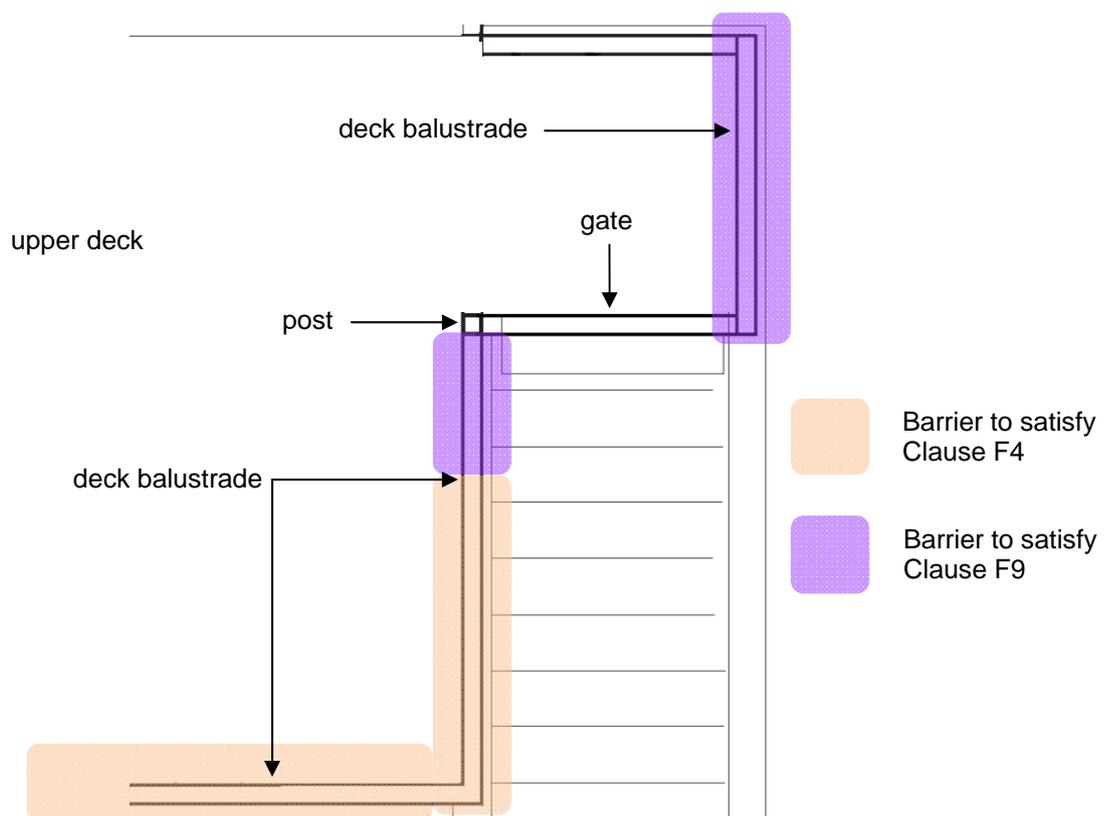


Figure 3: Approximate location of barriers (not to scale)

4.4 Conclusions

- 4.4.1 The upper deck is excluded from the immediate pool area, and as such the balustrade and gate are the physical barriers that must restrict the access of children into the immediate pool area.
- 4.4.2 The balustrade with a proposed height of 1000mm is insufficient to restrict access to the immediate pool area for those areas described in Figure 3, and as such it does not comply with Clause F9.3.1.

5. The decision

- 5.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the proposed balustrade to the deck in some areas, as described in this determination, does not comply with Clause F9.3.1.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 9 November 2017.

Katie Gordon
Manager Determinations