



Determination 2010/097

Safety barriers to a swimming pool and a spa pool at 17 Banks Road, Matamata

1. The matters to be determined

- 1.1 This is a Determination under Part 3 Subpart 1 of the Building Act 2004¹ made under due authorisation by me, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department.
- 1.2 The parties to this determination are:
- the owners of the house and pools, Mr R and Mrs V Bishop (“the applicants”)
 - the Matamata Piako District Council (“the authority”) carrying out its duties and functions as a territorial authority and a building consent authority.
- 1.3 The dispute between the parties relates to the authority’s decision to refuse to issue a certificate of acceptance for a spa pool and swimming pool already constructed on the applicants’ property.
- 1.4 The reason given by the authority for this decision was because parts of the barriers surrounding the swimming pool and spa pool did not comply with the requirements of Clause F4 of the Building Code (Schedule 1 of the Building Regulations 1992).

¹ The Building Act 2004, Building Code, compliance documents, past determinations and guidance documents issued by the Department are all available at www.dbh.govt.nz or by contacting the Department on 0800 242 243

1.5 Therefore, I take the view that the matters for determination² are:

1.5.1 **Matter 1: The barrier to the spa pool area that includes a sliding door**

Whether the barrier to the spa pool area that includes a sliding door complies with Clause F4 with respect to the requirement to restrict the access of children under six years of age to the pool area.

1.5.2 **Matter 2: The wall of the spa pool area**

Whether the wall of the spa pool area, which incorporates blocks protruding out from the wall (“the Hinuera stone detail”), complies with Clause F4 with respect to safety from falling.

1.5.3 **Matter 3: The swimming pool wall**

Whether the swimming pool wall, which is over 1200mm above ground level, complies with Clause F4 with respect to safety from falling.

1.5.4 **Matter 4: The refusal to issue a certificate of acceptance**

Whether the authority was correct to refuse to issue a certificate of acceptance for the pool structures.

1.6 In this determination, I will refer to the following legislation and standards, the relevant parts of which are set out in Appendix A.

- The Building Act 2004 (“the Act”) with its sections referred to as sections of the Act.
- The Fencing of Swimming Pools Act 1987 (“the FOSP Act”), with its sections referred to as sections of the FOSP Act.
- Clause F4 Safety from Falling of the Building Code, referred to as Clause F4.
- The Schedule to the FOSP Act (“the Schedule”), with its clauses referred to as clauses of the Schedule.
- NZS 8500:2006 Safety Barriers and Fences around Swimming Pools, Spas and Hot Tubs.

1.7 In making my decision, I have also considered the submissions of the parties and the other evidence in this matter. I have not considered any other aspects of the Act or of the Building Code.

2. The pool barriers

2.1 The property has a swimming pool and spa pool, both of which are accessed from the stone-clad terrace that adjoins the northern side of the house. The spa pool is sunk into the terrace.

The swimming pool is built above ground level and is constructed from concrete panels, giving it a roughly oval shape. The top of the pool is level with and connected to the terrace. The pool and the garden below the terrace are connected by a flight of stairs that run down the side of the pool. A plan of the swimming pool and spa pool areas is shown in Figure 1.

² In terms of sections 177(a) and 177(c)(ii) of the Building Act 2004 (prior to 7 July 2010).

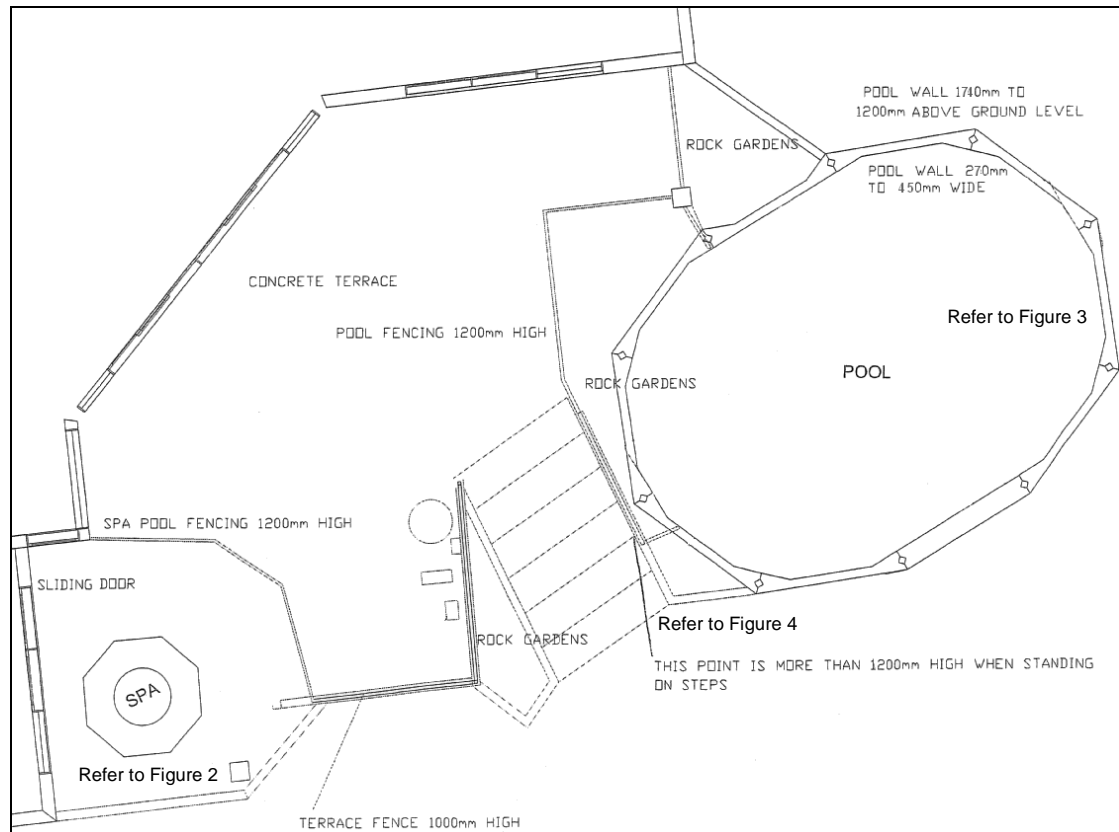


Figure 1: the swimming pool and spa pool areas

Barriers to the spa pool

- 2.2 The barrier to the spa pool enclosure includes the north wall of the house, which has a sliding door in it that leads into a bedroom. The spa pool has a cover that is attached with straps and clips, but is not currently capable of being locked.
- 2.3 The barriers also consist of 1.2m high glass-panel pool fencing, and a connecting wall between this fencing and the north wall of the house.

The sliding door

- 2.4 The sliding door is a bi-folding, sliding, tilt and turn, multipoint lock design. It is not self-closing or self-latching.

The wall of the spa pool area

- 2.5 The barrier formed by the wall connecting the glass fencing and the house has, on its far side, a fall from the top of the wall to the ground of at least 2 metres. In the corner where the wall meets the house, the wall has a detail that incorporates blocks made of Hinuera stone protruding out from the wall. This detail comprises four blocks of stone set in an alternating pattern on the connecting wall and house wall, rising from the terrace to the top of the connecting wall. Each block protrudes about 40mm out from the wall.

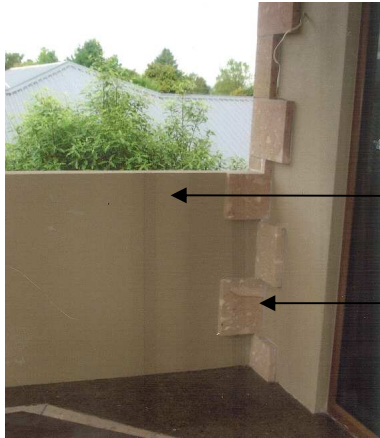


Figure 2: the interior of the spa pool enclosure showing the Hinuera stone detail at the corner of the house and connecting wall.

← The connecting north wall

← The Hinuera stone detail

Barriers to the swimming pool

- 2.6 The pool is fenced off from the house and terrace by a 1.2m high glass-panel pool fence. The fence runs from the house, across the terrace and along the side of the flight of stairs, and separates the pool area from the terrace.
- 2.7 The barrier to the remaining sides of the pool is formed by the pool sides themselves. The sides of the pool are between 1.2m and 1.74m above ground level. Their top surface is flat and finished with tiles, and varies in width between 270mm and 450mm.



Figure 3: the edge of the swimming pool wall

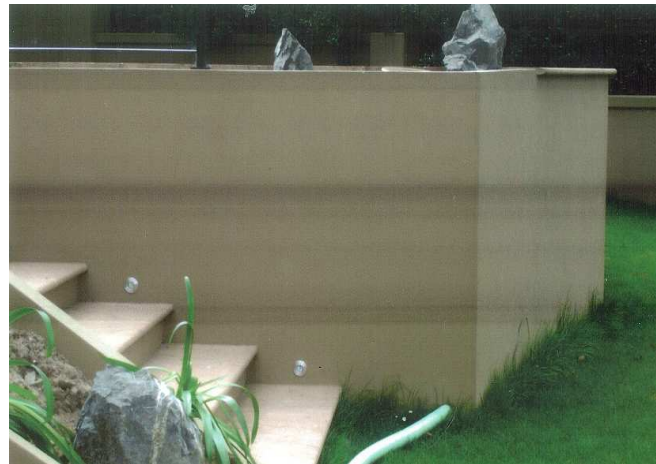


Figure 4: the swimming pool wall beside steps from the terrace to ground level

3. Background

- 3.1 The applicants applied for a building consent for a house, swimming pool, spa pool and decks on 25 January 2007. The applicants subsequently removed the pools from the consent application. The authority issued a building consent (number 32334) for the house in April 2007.
- 3.2 In July 2007, during the course of an inspection of the dwelling, the authority observed that a swimming pool was being constructed without a building consent having been issued. On 31 July 2007 the authority issued a notice to fix for the pool that required the applicants to either apply for a building consent for the pool or apply for an amendment to the existing building consent. The notice also required the pool to be fenced.

- 3.3 On 1 April 2008, the authority wrote to the applicants requiring that they comply with the notice to fix.
- 3.4 On 9 September 2008, the applicants applied for an amendment to the original building consent for the house. This amendment included the construction of the swimming pool and the pool fencing.
- 3.5 On 29 September 2008, the authority refused to issue the building consent amendment as the swimming and spa pools had by this time been built. The authority requested that the applicants apply for a certificate of acceptance instead.
- 3.6 On 6 November 2008, the applicants applied for a certificate of acceptance for the swimming pool and spa pool, and a building consent for the pool fencing.
- 3.7 On 24 November 2008, the authority carried out a site inspection in respect of the two applications. As a result of the inspection, the authority advised the applicants of its concerns about the use of the pool wall as a barrier to two sides of the pool. The authority noted that, as the fall from the top of the pool wall to the ground below was greater than 1m, a fence was required. The authority requested further information and stated that the certificate of acceptance and building consent applications would be placed on hold until this information was received.
- 3.8 Correspondence was exchanged between the two parties and the matters remained unresolved.
- 3.9 On 18 November 2009 the applicants applied for an exemption under the FOSP Act for:
- the sliding door
 - the Hinuera stone detail
 - the safety barrier on top of the swimming pool wall
 - the hose tap in the wall (which is not considered in this determination).
- 3.10 On 23 November 2009, the authority wrote to the applicants advising that their application for a certificate of acceptance had been declined as the authority had not received the additional information requested.
- 3.11 A Committee of the Council (“the committee”) considered the application for an exemption on 15 December 2009. On 18 December, the committee wrote to the applicants advising them that:
- an exemption for the sliding door had not been granted, since it considered that achieving compliance was neither impossible nor unreasonable and ‘in the absence of alternative safety measures, an exemption would significantly increase danger to young children’
 - an exemption for the tap in the pool wall would be granted (subject to conditions).

The committee declined to consider the matters of the Hinuera stone detail or the safety barrier on the top of the swimming pool wall, as it considered that these matters fell outside the scope of the FOSP Act.

- 3.12 On 16 February 2010, the applicants wrote to the authority suggesting two further proposals (described in paragraph 8) that might enable the swimming pool wall to comply with Clause F4 of the Building Code Building.
- 3.13 On 1 March 2010, the authority wrote to the applicants advising that it did not accept either of the two proposals with respect to the swimming pool wall and suggesting that the issues relating to the swimming pool walls should form part of an application for a determination.
- 3.14 The application for a determination was received by the Department on 26 April 2010.
- 3.15 I note that the authority has confirmed that it will be issuing a code compliance certificate for the dwelling, but that the swimming pool and spa pool are not included in the work covered by that certificate.

4. The submissions

- 4.1 In their application, the applicants stated that they were seeking a determination about Building Code compliance in respect of:
- the sliding door to the spa pool area
 - the Hinuera stone detail beside the spa pool
 - the swimming pool wall.
- 4.2 They also sought a decision on whether either of the two proposals that they had put to the authority, as alternative solutions for making the swimming pool wall compliant, complied with the Building Code.
- 4.3 In a document accompanying the application, the applicants submitted that:
- the bedroom sliding door complied with the Building Code as it was exempt from the requirement to be self-closing and self-locking and was fitted with a locking device that prevented it being readily opened by a child under 6 years of age
 - no door restricts access if it is purposefully left open, and the authority was being unreasonable in its 'expectation of the sliding door restricting access if it is left open'
 - the Hinuera stone detail in the spa pool wall 'does not contravene any Building Code performance requirements' as its size and position 'does not easily provide a climbing step' and it 'is not located in an area that children frequent without adult supervision'
 - the swimming pool wall complies with the Schedule and therefore must be treated as complying with 'the whole of' Clause F4 of the Building Code
 - the risk of falling from the swimming pool wall into the garden below was minimal. The area below the wall is grass, and that 'it can be assumed that any potential fall would be by someone big enough to open the gate – an adult or older child who would be more aware of the potential fall height'. In addition, children can only enter the swimming pool area when supervised by an adult.

4.4 The applicants supplied copies of:

- legislation, compliance documents, guidelines on swimming pool fencing and past determinations
- a chronological order of events
- correspondence between themselves and the authority
- plans showing the terrace, pools and fencing.

4.5 In its submission dated 29 April 2010, the authority stated that none of the matters raised by the applicant in their application (namely the sliding door, spa pool wall, swimming pool wall, and proposed alternative solutions for the swimming pool wall) met the requirements of the Building Code. The authority noted that it had refused to issue a building consent for the pool barriers because the construction was effectively completed. The authority was of the view that it was therefore correct to refuse to issue a certificate of acceptance for the spa pool, swimming pool and pool fencing because this building work did not meet the requirements of the Building Code.

4.6 The authority included its own proposals as to how the spa pool wall and the swimming pool wall could be made compliant with the Building Code and submitted that:

- while the sliding door onto the spa pool area is exempt from being self-closing and self-latching under Clause F4.3.5a, it still needs to comply with Clause F4.3.4(f) and restrict the access of children under the age of 6 to the pool area. As it is able to be left open, the door does not comply
- the area surrounding the spa pool is likely to be frequented by children under the age of 6, and the wall as currently designed 'does not meet the specifications set out in figure three of ... F4/AS1. F4/AS1 allows a maximum ledge width of 15mm or a 60 degree angle where the width is greater than 15mm'
- the top of the swimming pool wall width means that it acts as a platform for people to walk around, and therefore must comply with the requirements of Clause F4.3.1 and prevent falls of more than 1m to the ground below
- neither of the proposed solutions for the swimming pool wall would achieve compliance with the Building Code.

4.7 The authority supplied copies of:

- correspondence between itself and the applicants
- the original building consent issued for the dwelling, the notice to fix, the application to amend the original building consent, the application for a second building consent and the application for a certificate of acceptance
- documents relating to the applicants' application for an exemption under the FOSP Act
- a site plan dated 4 August 2009 and photos of the pools and barriers
- legislation, compliance documents, guidelines on swimming pool fencing, practice notes for infinity-edge pool and past determinations.

The draft determination

- 4.8 A draft determination was issued to the parties for comment on 28 June 2010.
- 4.9 The applicants did not accept the draft determination and requested a site inspection and hearing. In a further submission dated 9 August 2010, the applicants made several points with respect to the swimming pool barriers, including the following:
- The barriers comply with the Schedule, and therefore should be treated as compliant with clause F4.
 - If additional barriers were added to prevent people walking around the edge of the pool, and the only access to the top of the pool wall is from the pool itself, then the inside of the pool wall should itself be treated as a barrier.
- 4.10 The applicants also referred to advice given by an advisor of the Department to another territorial authority about situations where the edge of the pool formed part of the pool barrier. This included a discussion of 'how wide a pool wall should be before a barrier is required to stop people falling outside the pool'.
- 4.11 The territorial authority accepted the draft determination and made several comments, mostly non-controversial, which have been taken into account in the final determination.

The hearing

- 4.12 I held a hearing in Matamata on 1 September at the request of the applicants. The hearing was attended by the applicants, representatives from the authority and representatives of the Department, including a referee engaged under section 187. The hearing included two site visits to view the building work and discuss possible solutions.
- 4.13 Discussions at the hearing were limited to the barrier to the spa pool area and the swimming pool wall, as neither of the parties disputed the conclusion in the draft determination about the Hinuera stone detail.
- 4.14 The applicants expanded on the points and questions raised in their earlier submissions, and requested clarification on the following items:
- the relationship between the Building Code and the FOSP Act
 - the width of the top of the swimming pool wall and at what point it is considered sufficiently wide that people can walk or sit upon it
 - the risk to pool users of falling off the wall, if further barriers were added to prevent walking onto the top of the wall from the pool terrace, so that the only access to the wall was from the pool itself
 - potential design solutions to compensate for the fact that, if the sliding door into the spa pool area was open, it would not restrict access of children under six years of age.
- 4.15 With respect to the swimming pool wall, the applicants' position was that although it was possible that people would stand, walk or sit on the top of the wall, the risk that they would fall from it into the garden below was minimal.

- 4.16 The authority repeated its position as set out in its original and subsequent submissions. With respect to the swimming pool wall the authority considered that the wall was wide enough, and there was sufficient likelihood that someone could fall from it, that it should comply with Clause F4.3.1.
- 4.17 The authority repeated that it would be willing to reconsider the question of a certificate of acceptance for the pools and pool barriers once a final determination had been made.
- 4.18 Further discussions between the parties about the swimming pool wall focussed on design solutions to either reduce the risk of people falling off the wall or make the barriers compliant with Clause F4. These are discussed further in paragraph 8.
- 4.19 A second draft determination was issued to the parties for comment on 4 October 2010. Both parties accepted the draft without comment.

5. The relationship between the FOSP Act and the Building Code

- 5.1 I accept that I have no jurisdiction under the FOSP Act. However, it is helpful to look at the relationship between the FOSP Act and the Building Code.
- 5.2 I note that the FOSP Act does not specifically require that fencing (including gates and doors) must comply with the Schedule. What is required under section 8(1) of the FOSP Act is that fencing must comply with the Building Code, subject to any exemption granted under section 6 of the FOSP Act.
- 5.3 Section 6 gives authorities a general power to grant exemptions from ‘some or all of the requirements of the FOSP Act’, provided that such an exemption ‘would not significantly increase danger to young children’. Section 6(2) allows authorities to impose conditions on such exemptions.
- 5.4 The FOSP Act also provides, in effect, that fencing that complies with the Schedule is deemed to also comply with the Building Code, giving the Schedule the status of a compliance document with respect to the Building Act. Sections 22 and 23 of the Act provide, in effect, that building work that complies with a compliance document must be accepted as complying with the relevant provision of the Building Code. However, compliance documents are not the only means of establishing compliance.
- 5.5 Accordingly, if pool fencing complies with the Building Code (refer paragraph 5.2), then it complies with the requirements of the FOSP Act, even if it does not comply with the Schedule. In such a case there would be no need for an exemption under section 6 of the FOSP Act.

6. Matter 1: The barrier to the spa pool that includes a sliding door

Discussion

- 6.1 With respect to compliance with the Building Code of the sliding door, I take the view that:
- the sliding door comes within the exemption of Clause F4.3.5(a) and is therefore not required to be self-closing and self-latching

- nevertheless, the sliding door is required to comply with Clause F4.3.4(f) and ‘restrict the access of children under 6 years of age’
 - the means of doing so can include self-latching and self closing, but that does not prevent the use of other means.
- 6.2 Determination 2006/103 took the view, that under section 23 of the Building Act, compliance with an Acceptable Solution is not the only means of complying with the corresponding provision of the Building Code. I concur with that view and because F4/AS1 does not consider how sliding doors can be made compliant, any approved solution must be considered as an alternative solution to the Building Code.
- 6.3 In this case, the unlocking, opening, or leaving open of the door from the bedroom to the spa pool area would mean a breach of the pool barrier. Although I acknowledge that the door is heavy, is a bi-folding, sliding, tilt and turn door, is fitted with locks and would be difficult for children to operate, the effectiveness of the pool barrier relies on the behaviour of people using the door.
- 6.4 While I acknowledge the applicants’ intention to always keep the door closed when no supervising adult is in the spa pool area, this is a management practice and is reliant on the behaviour of the people using the spa pool. In Determination 1992/1102 made under the Building Act 1991, the then Building Industry Authority said, ‘The Building Act does not cover the management of buildings in that respect, and assurances as to future management practices will rarely be enforceable under the Act.’ In Determination 2006/22, I took the view that I must take account of how both present and future owners of the house will use the space.

Conclusion

- 6.5 For the reasons set out above I conclude that the spa pool barrier, which includes a sliding door, does not comply with Clause F4 of the Building Code as it does not restrict the passage of children under the age of six.

Comments on a possible solution

- 6.6 In their submission on the draft determination, the applicants did not make any comment about the barrier to the spa pool that includes a sliding door. However, the matter was raised at the hearing and possible solutions discussed. The solution favoured by the applicants was to install a self-closing and self-latching, outward-opening pool gate directly in front of the sliding door. If installed, such a gate will mean that the spa pool barrier, including the house wall with the sliding door in it, is compliant with Clause F4. With such a gate in place, even if the sliding door from the house is left open, the gate will ‘restrict the access of children under 6 years of age’.
- 6.7 If the applicants decide not to pursue the option described in paragraph 6.6, then Clause F4.3.5 allows solutions to maintaining a pool barrier for sliding doors, other than sliding doors that are self-closing and self-latching. It provides flexibility for compliance with Clause F4, keeping in mind that the Schedule provides only one possible solution and the Building Code is a performance-based document. It is for the authority to consider and accept an appropriate alternative solution, with the Schedule setting the safety standard.

- 6.8 As discussed in Determination 2007/79, until NZS 8500 is cited in the compliance document for Clause F4, it does not have the legal status of a compliance document. However NZS 8500 was approved by the Standards Council on 3 November 2006 to be a New Zealand Standard and as such must command respect as representing the consensus of the major national bodies represented, arrived at after a process of public consultation. The authority may well compare any solutions proposed by the applicants with those offered in NZS 8500. The above remarks must not be taken to mean that NZS 8500 is an Acceptable Solution for Clause F4.
- 6.9 I have no jurisdiction under the FOSSP Act and the following remarks are not binding. While the authority has declined the applicant's request for an exemption under section 6 of the FOSSP Act, the applicants may consider reapplying for an exemption subject to the provision of safety features described in NZS 8500 that would compensate for the presence of the sliding door.

7. Matter 2: The wall of the spa pool area

Discussion

- 7.1 The wall of the spa pool area that incorporates with the Hinuera stone detail acts as a barrier to prevent people falling from the terrace to the ground below – a distance of over two metres. As such the wall must comply with Clause F4.3.4(g) of the Building Code and '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'.
- 7.2 The authority has expressed concerns that the Hinuera stone detail in the wall could provide toeholds or steps that would enable a child to climb to the top of the wall, putting them at risk of falling to the ground on the other side.
- 7.3 The authority's concern was that the wall, as constructed, does not comply with Figure 3 of F4/AS1. In my view the matter at issue is not whether the barrier complies with the Acceptable Solution, but whether it complies with the requirements of the Building Code.
- 7.4 I consider that the spa pool area is an area unlikely to be frequented by children under the age of six, once the barrier to the spa pool area is brought into compliance with the Building Code; therefore the requirements of Clause F4.3.4(g) do not need to be met.

Conclusion

- 7.5 Assuming the barrier to the spa pool is brought into compliance with Clause F4 in respect of pool safety (refer paragraph 6), I conclude that the wall does not need to restrict the passage of children under the age of six, and as such it complies with the requirements of the Building Code with respect to safety from falling.

8. Matter 3: The height of the swimming pool wall and the proposed solutions

Discussion

- 8.1 There is no dispute that the swimming pool wall, as a barrier to the pool, complies with Clause F4.3.4 (f) to restrict the access of children under the age of six into the swimming pool area, as it is over 1.2m high. However, as the top of the pool wall is

- significantly higher than one metre it must also comply with Clause F4.3.1 and prevent people from falling from the pool edge to the ground below.
- 8.2 The top of the swimming pool wall is between 270mm and 450mm wide and in my view is easily able to be walked along or sat upon. With the current pool fence, there is nothing to stop a person (once inside it) from walking directly from the terrace onto the top of the wall. In addition, the water level in the pool is in close proximity to the top of the swimming pool wall, meaning that it would also be possible for a person in the pool to pull themselves up onto the edge from the water. I do not accept the applicants' submission that the inside of the pool wall should itself be considered a barrier.
- 8.3 For the sake of clarity, I wish to respond here to the applicants' submission (which was repeated at the hearing) that, because the swimming pool barriers comply with the FOSP Act, they should be treated as compliant with all of Clause F4. This is not correct. The Schedule is to be treated as a compliance document only for those aspects of Clause F4 that relate to the fencing of swimming pools. It is not a compliance document for the other aspects of the clause, including Clause F4.3.1. Where, as is the case here, the compliant swimming pool barrier itself creates a risk of falling 1m or more from it, then it should have a barrier provided to reduce the risk of that happening.
- 8.4 In their submissions the applicants relied upon an email from an advisor to the department on an unrelated matter, which indicated that, with respect to swimming pool walls, 'The general consensus seems to be that if a wall is less than about 350mm wide then there is no need to provide a barrier'. This email does not constitute guidance published by the Chief Executive of the Department under section 175, and cannot be relied upon as such. Instead it is general advice given by an officer of the Department to a territorial authority to provide guidance in a particular situation. I note also that in the current determination, the pool wall is in several places wider than 350mm.
- 8.5 At the hearing the applicants did not dispute that the swimming pool wall could be walked or sat upon. What they disputed was the degree of risk or possibility of someone falling off it. I consider that there clearly is a risk that both adults and children could fall off the wall. At its highest point the wall is 1.74m above the lawn below.
- 8.6 At the hearing there was also extensive discussion about what the risk would be if the ground level below the pool was brought up, so that the maximum fall from the wall was only 1.2m. This is a relatively common situation for territorial authorities to have to resolve, due to the differing requirements in the FOSP Act (which requires a pool wall of 1.2m) and the Building Code (which requires changes in level of over one metre to be fenced). In the normal course of events, a territorial authority might use its powers under section 67 of the Act in such a situation, and waive or modify the Building Code requirement to comply with Clause F4.3.1 (so that a wall of 1.2m was taken to comply without a barrier added).
- 8.7 However, this option is only available to territorial authorities where there has been an application for a building consent. In the current case, the applicants have limited their options by not applying for a building consent before the work was done. Had they done so, the authority may have been able to consider a waiver or modification of the Building Code for the pool wall. As it is, the building work was substantially

completed before the authority became aware of it. In this situation, the authority is correct that a certificate of acceptance is the correct tool for regulating the work. There is no provision in the Act for the authority to incorporate a waiver or modification of the Building Code in a certificate of acceptance. Instead the authority can only incorporate an assessment of whether or not a particular building element complies with the Building Code.

- 8.8 Both the applicants and the authority submitted proposals in their submissions to make the swimming pool wall code-compliant.

Proposal One (by the applicant)

- 8.9 The applicant has proposed the construction of additional barrier fencing to the pool wall, like batters or wings, to prevent people accessing the top of the pool wall by walking around the pool wall from the terrace.
- 8.10 I note that access to the pool wall will still be possible from the pool itself and it is reasonable to expect that people will climb on, sit on, and dive from the top of the wall, or reach that height on a floatation device. In my view the additional barrier fencing would not bring the pool wall into compliance with Clause F4.3.1.

Proposal Two (by the applicant)

- 8.11 The applicant has proposed the construction of a raised garden around the pool which would reduce fall from the top of the pool wall to no greater than 1.2m to 'break a fall and lessen any risk of harm'.
- 8.12 While the pool wall would continue to comply with the FOSP Act, in terms of restricting access to the pool, the fall height would not comply with Clause F4.3.1 as the fall would be over 1m (refer also paragraphs 8.6 and 8.7).

Proposal Three (by the authority)

- 8.13 The authority has proposed the construction of the barrier fencing described in Proposal One in conjunction with a slope being formed in the top of the pool wall (the slope being 30° or greater).
- 8.14 Though the slope to the top of the pool wall would reduce the likelihood of people being able to sit or stand on the pool wall, it would still be possible for people to pull themselves up onto the wall from the pool and perch on its side, or to reach the top of the wall on a floatation device.

Other proposals

- 8.15 In addition, several other proposals for making the swimming pool wall compliant with clause F3.4.1 were discussed at the hearing, with both parties putting forward possible design solutions.
- 8.16 From these discussions, one proposal emerged, which both parties indicated they would find acceptable. The proposal aims to limit foot access to the top of the wall and minimise the risk of injury should someone sitting or standing on the wall fall off it. It is discussed further in paragraph 8.18.

Conclusion

- 8.17 I conclude that the swimming pool wall does not comply with Clause F4.3.1.

Comments on a possible solution

8.18 The following proposal developed at the hearing, presents a way for the parties to resolve this matter.

- The ground level below the pool wall is to be built up so that it is an even 1.2m all the way around. This is to be done either by building up and then sloping away the ground level, or building a small retaining wall and infilling the area between this and the pool wall. In either situation, the width of the area that is 1.2m below the top of the wall should be around 1m. This area should be not be concreted or paved, but should be maintained as a grass area or garden, provided the garden doesn't contain items that could compromise the safety of the 1.2m wall in terms of restricting the access of children under the age of six years old.
- The section of the swimming pool wall that runs alongside the steps from the terrace to the garden is to be fenced along its entire length. At present, this section of wall is only partially fenced and there is a risk that a person could fall off the wall onto the concrete steps below.
- Additional fencing is to be added so that people inside the current fencing cannot walk from the terrace onto the pool wall. This could be achieved by adding batters or wings onto the current fencing in such a way that they block access onto the wall (as described in paragraph 8.9).
- I will incorporate a modification of the Building Code in this determination to the effect that, provided the other aspects of this proposal are complied with, a barrier is only required under Clause F4.3.1 where there is a fall of more than 1.2m from the top of the swimming pool wall. Taking account of the factors in this case including the design of the pool, I consider that I would be acting reasonably in granting a modification of Building Code to Clause F4.3.1. I have considered section 4 of the Act and taken account of section 4(2)(a)(i) and 'the importance household units play in the lives of the people who use them' and the importance of Building Code compliance of household units, and note that the modification is minimal in terms of the objective, functional requirement and performance criteria of Building Code Clause F4.

9. Matter 4: The refusal to issue a certificate of acceptance

9.1 The authority has refused to issue a certificate of acceptance for the spa and swimming pools and the associated barriers, because the barriers do not comply with the Building Code. A certificate of acceptance is the appropriate regulatory mechanism for regularising the work because it was undertaken without a building consent.

9.2 I have considered certificates of acceptance in determinations 2010/006 and 2010/008. These determinations differentiated between the following types of building work:

- building work that could be inspected and confirmed as code compliant
- building work that could be inspected, but was not code compliant

- building work that could not be inspected and for which code compliance could not be determined.
- 9.3 Using this analysis, the determinations were able to consider the compliance of each element of the building work against the relevant Building Code clauses. A certificate of acceptance could then be issued for those elements of the work that did comply with the Building Code. Those matters that did not comply, or for which code compliance was not able to be determined, were to be excluded from the certificate of acceptance.
- 9.4 I consider the same approach can be applied in this instance, and the authority can make its assessment as to compliance using the analysis referred to in paragraph 9.2. In my view the authority should have considered and assessed the application against all the relevant Building Code clauses and not declined it on the basis of non-compliance with Clause F4.
- 9.5 I have only considered the compliance of the swimming pool wall with respect to Clause F4 in this determination, and as I have found the pool wall does not comply with the Building Code, I consider the authority was correct to refuse to issue a certificate of acceptance in this respect.
- 9.6 Regarding compliance of the other Building Code Clauses in respect of the swimming pool, I note that, in its written submission on the draft determination, the authority set out the reasons why it had not carried out a detailed assessment, and hence why it could not issue a certificate of acceptance. In addition to the pool barriers, these included several matters associated with the pool structure itself, including that the authority had not received a PS4 for the pool. At the hearing, the applicants stated that they now had a PS4 for the swimming pool and that they would provide this to the authority.
- 9.7 I note also that in its submission the authority stated that it ‘would be prepared to assess a new application for a certificate of acceptance in light of the final decision of the [Department] and provision of further information on the construction of the swimming pool/spa pool area.’

10. What is to be done now?

- 10.1 Although I am satisfied that the authority made an appropriate decision to issue a notice to fix, I consider that the notice to fix should be modified and reissued to take account of the findings of this determination. The re-issued notice will identify the areas of non-compliance; namely the compliance of the barrier to the spa pool and the fall from swimming pool wall. Re-issuing the notice to fix will ensure that the matter keeps moving forward and is resolved.
- 10.2 Once the barriers to the spa pool and the swimming pool have been made code-compliant, the applicants can then reapply to the authority for a certificate of acceptance in respect of the unconsented work.
- 10.3 At the hearing, the authority suggested meeting with the applicants before they reapply for a certificate of acceptance, to ensure that they have taken all the necessary steps and have to hand all the documentation that the authority will need to make its assessment. I support this approach as it will help avoid further delays in this matter.

11. The decision

- 11.1 In accordance with section 188 of the Act, I hereby determine that:
- the barrier to the spa pool that includes a sliding door does not comply with Clause F4 of the Building Code with respect to pool safety
 - the wall of the spa pool area that incorporates the Hinuera stone detail complies with Clause F4 of the Building Code, with respect to safety from falling
 - the swimming pool wall does not comply with Clause F4 of the Building Code with respect to safety from falling.
- 11.2 In accordance with section 188(3) of the Act, I incorporate a modification of Clause F4.3.1 in respect of the swimming pool wall, to the effect that a barrier shall be provided where people could fall more than 1.2m from the top of the wall, provided that the swimming pool wall is modified as set out in Determination 2010/097.
- 11.3 I confirm the decision of the authority to refuse to issue the certificate of acceptance for the pool structure in so far as it relates to the pool wall.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 22 October 2010.

John Gardiner
Manager Determinations

Appendix A: The legislation and the acceptable solution

The Building Code

CLAUSE F4—SAFETY FROM FALLING

OBJECTIVE

F4.1 The objective of this provision is to safeguard people from injury caused by falling.

FUNCTIONAL REQUIREMENT

F4.2 Buildings shall be constructed to reduce the likelihood of accidental fall.

PERFORMANCE

F4.3.1 Where people could fall 1 metre or more from an opening in the external envelope or floor of a building, or from a sudden change in level within or associated with a building, a barrier shall be provided.

Provisions	Limits on application
<p>F4.3.3 Swimming pools having a depth of water exceeding 400 mm, shall have barriers provided.</p>	<p>Performance F4.3.3 shall not apply to any pool exempted under section 5 of the Fencing of Swimming Pools Act 1987.</p>
<p>F4.3.4 Barriers shall:</p> <ul style="list-style-type: none"> (a) Be continuous and extend for the full height 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) In the case of a swimming pool, restrict the access of children under 6 years of age to the pool or the immediate pool area, (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. 	<p>Performance F4.3.4 (f) shall not apply to any pool exempted under section 5 of the Fencing of Swimming Pools Act 1987.</p>
<p>F4.3.5 Barriers to swimming pools shall have in addition to performance F4.3.4:</p> <ul style="list-style-type: none"> (a) All gates and doors fitted with latching devices not readily operated by children, and constructed to automatically close and latch when released from any stationary position 150 mm or more from the closed and secured position, but excluding sliding and sliding-folding doors that give access to the immediate pool surround from a building that forms part of the barrier 	

The Acceptable Solution, F4/AS1 (second edition)

- 3.1.1** Fencing for swimming pools shall be constructed to no lesser standard than is required by the Schedule to the Fencing of Swimming Pools Act 1987, to restrict the access of children.

The FOSP Act

2 Interpretation

In this Act, unless the context otherwise requires,—

Fence—

- (a) means a fence that complies with the requirements of the building code in force under the Building Act 2004 in respect of swimming pools subject to this Act; and
- (b) includes any part of a building and any gates or doors that form part of the fence

Swimming pool and pool mean an excavation, structure, or product that is used or is capable of being used for the purpose of swimming, wading, paddling, or bathing; and includes any such excavation, structure, or product, that is a spa pool

5 Exempted pools

Nothing in this Act shall apply in respect of—

- (a) Any pool that has no part of the top of its side walls less than 1.2 metres above the adjacent ground level or any permanent projection from or object standing on the ground outside and within 1.2 metres of the walls, where the outside surface of the side walls is constructed so as to inhibit climbing and any ladder or other means of access to the interior of the swimming pool can be readily removed or rendered inoperable and is removed or rendered inoperable whenever it is intended that the pool not be used:
- (b) Any excavation, structure, or product, in which the maximum depth of water does not exceed 400 mm:

13B Fencing in accordance with Schedule must be treated as means of compliance

Any provision that is made for the fencing of swimming pools that is in accordance with the Schedule must, in respect of –

- (a) matters subject to the Building Act 2004, be treated as a compliance document establishing compliance with the building code for the purposes of section 19 of that Act, and the requirements of this Act

The Schedule to the FOSP Act

1

- (1) The fence shall extend—
- (a) At least 1.2 metres above the ground on the outside of the fence; and
- (b) At least 1.2 metres above any permanent projection from or object permanently placed on the ground outside and within 1.2 metres of the fence.
- (2) Notwithstanding subclause (1) of this clause, where the fence is constructed of perforated material, netting, or mesh and any opening in the material, netting, or mesh has a dimension (other than the circumference or perimeter) greater than 10 mm, the fence shall extend at least 1.8 metres above the ground or the projection or object.

2

Any clearance between the bottom of the fence and ground level shall not exceed 100 mm.

3

All materials and components shall be of a durable nature and shall be erected so as to inhibit any child under the age of 6 years from climbing over or crawling under the fence from