



Determination 2012/052

Regarding a code compliance certificate issued in respect of a pool barrier at 32 Tullamore, Maunu, Whangarei



1. The matter to be determined

1.1 This is a Determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Ministry of Business, Innovation and Employment (“the Ministry”)², for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to the determination are:

- Whangarei District Council, the applicant for this determination, carrying out its duties and functions as a territorial authority and a building consent authority (“the authority”)
- R Evans, the owner of the property (“the owner”).

1.3 The determination arises from a dispute between the parties about the code compliance of a pool barrier at the point where a masonry and glass fence (“the masonry fence”) meets the southeast pool gate (“the pool gate”) at a 90° angle. A code compliance has been issued for the building work.

1.4 The matter to be determined³ is therefore whether the authority’s decision to issue the code compliance certificate was correct. In deciding this, I must determine

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

² After the application was made, and before the determination was completed, the Department of Building and Housing was transitioned into the Ministry of Business, Innovation and Employment. The term “the Ministry” is used for both.

³ Under section 177(1)(a), 177(1)(b) and 177(2)(d).

whether the pool barrier complies with Clause F4 Safety from Falling of the Building Code.

1.5 In this determination I refer to:

- the Building Act 2004, 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, and its schedule referred to as “the Schedule”.

1.6 Matters outside this determination

1.6.1 The authority was not able to inspect other aspects of the pool barrier (refer paragraph 3.11), such as the opening direction of the pool gates and the doors of the house that provide access to the immediate pool area; and the application for determination was restricted to the pool gate and the adjacent masonry fence. This determination does not consider any other elements of the pool barrier. I have also not considered any other aspects of the Building Act or of the Building Code.

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

2. The building work

2.1 The lap pool has been constructed adjacent to an existing deck from the house; it measures 11m long east to west, 2.4m wide, and is 1.3m deep. The pool surround appears to be concrete tiled; with a raised timber deck at the west end where a spa pool has been installed and the pump house is located.

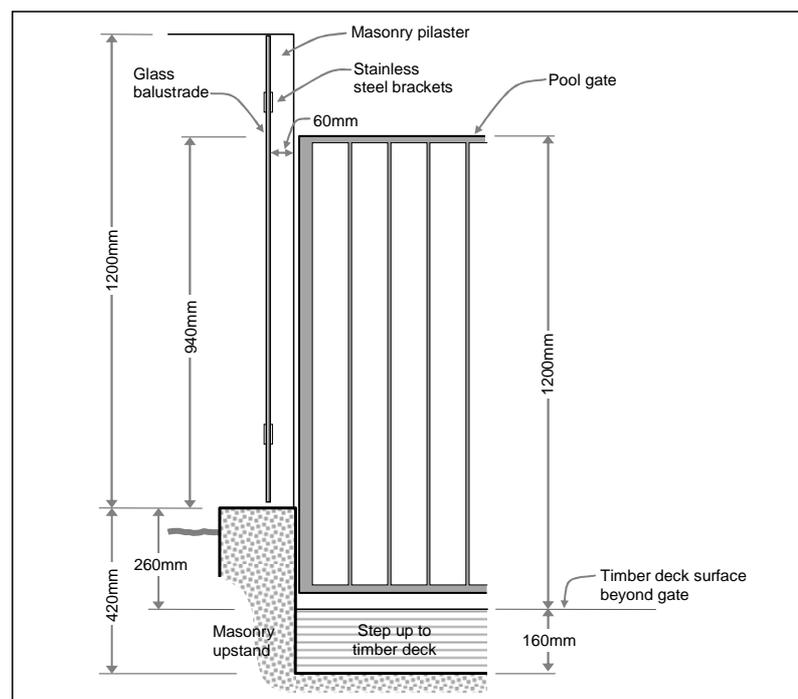


Figure 1: Junction of the masonry fence and the pool gate

- 2.2 The pool barrier is made up of a masonry and glass fence on the long sides (north and south), a solid masonry wall at the west end, and a short section of steel pool fencing to the northeast. The house forms the barrier to the east. There are three steel pool gates set into the barrier.
- 2.3 The masonry fence comprises a low masonry upstand with masonry pillars at regular intervals, with glass panels fixed between the pillars. The pillars and glass are 1.2m high above the upstand. The glass panels are set back from the face of the masonry upstand creating a step or toehold of approximately 60mm.
- 2.4 The height of the upstand varies as the ground slopes down from west to east, and is 420mm at the east end where it meets the southeast pool gate. The pool gate is 1.2m high and is fixed to the top of the deck. The distance from the toehold on top of the masonry upstand to the top of the southeast pool gate is 940mm. The junction of the masonry fence and the pool gate is shown in Figure 1 above.

3. Background

- 3.1 In April 2007, the owner applied for a building consent to build a swimming pool on the property. Plans filed with the application for a building consent showed the intended line for a pool barrier. The plans show the barrier completely enclosing the immediate pool area, so that both the pool pump house and the house deck are outside it. A note on the plans stated that 'Proposed pool fencing to comply with regulations'. There were no other details on the plans about the proposed dimensions or construction of the barrier, although manufacturer's information about a steel pool fencing system was also filed with the building consent application.
- 3.2 The authority approved the attached plans and specifications on 10 May 2007, and issued a building consent (No. 0799575) for the pool on 31 May 2007 under the Building Act 2004.
- 3.3 The plans have been annotated by hand to show a barrier running from the north and west sides of the house to meet the pool fence and incorporating the pool gate to the southeast and another gate to the north. The altered plan does not indicate the barrier between the house and pool was to be removed thereby incorporating the existing deck into the immediate pool area and a part of the pool barrier being formed by the house, nor does it show the pump house was to be enclosed in the pool area or the addition of the spa. It is not known at what stage these changes were made.
- 3.4 The authority carried out a final inspection on 22 May 2008. The pool failed the inspection. The reasons given in a field advice notice issued at the time include that there were permanent projections within 1.2m of the barrier (a timber step). A separate swimming pool checklist also completed at the same time notes 'Check sleepers, fence layout changed from plan'.
- 3.5 Both of these documents were subsequently annotated, with the items ticked and initialled to show they had been addressed. The final advice notice states 'sited step cut back'. The annotations are not dated but I assume they were made by the inspecting officer at a later inspection, and that this was also when the altered barrier line was marked on the building consent plans (refer paragraph 3.3).

- 3.6 The authority issued a code compliance certificate for the building work on 2 October 2008.
- 3.7 On 2 September 2011, the authority wrote to the owner to arrange an inspection of the pool barrier to ensure that it complied with the FOSP Act. This was to be a routine three-yearly inspection, and the first since the code compliance certificate had been issued.
- 3.8 According to the authority, the owner was of the view that as nothing had changed since the final inspection for a code compliance certificate, the pool fencing on his property remained compliant and the owner did not feel that a further inspection was warranted or necessary. The owner sent photos of the pool fencing to the authority.
- 3.9 The authority noted from these photos that there may be an issue with the barrier's compliance with both the FOSP Act and the Building Code at the southeast junction between the steel gate and the masonry fence.
- 3.10 On 18 October 2011 the authority inspected the pool barrier, confirming the height of the masonry upstand was 420mm from ground level, and the distance between the top of this and the top of the pool gate as 940mm. The authority considered the masonry upstand adjacent to the pool gate to be a 'permanent projection' in terms of paragraph 1(1)(b) of the Schedule and the height of the pool gate was therefore not compliant with the Schedule.
- 3.11 At this inspection, the authority also noted that:
Staff were unable to confirm whether the steel gates of the pool fencing were compliant, as they were all locked in the closed position, nor could they confirm that all doors and windows of the dwelling which gave access to the pool area were compliant, as no access to the dwelling was possible.
- 3.12 The parties fell into dispute as to whether the pool barrier complied with the FOSP Act and the Building Code.
- 3.13 On 26 March 2012, the authority applied to the Department for a determination on whether the pool barrier complies with Clause F4 of the Building Code and whether the authority had been correct to issue a code compliance certificate for the barrier in 2008. The application requested that the Department 'revoke the code compliance certificate if determined that [the certificate had been] issued erroneously.'
- 3.14 On 3 April 2012 the Department wrote to the authority requesting further information and this was received on 19 April 2012.

4. Submissions

- 4.1 With its application for a determination, the authority made a submission dated 26 March 2012. The submission sets out the background to the dispute and states that:

[The authority's] position ... is that the ... masonry [upstand], being constructed immediately adjacent to the pool gate, constitutes a permanent projection or object, outside of and within 1.2m of the pool fence, effectively reducing the height of the pool gate to a non compliant 940mm, and was therefore a clear breach of clause 1.1(b) of the

compliance schedule of the [FOSP] Act, and therefore a breach of the New Zealand Building Code (F4).

... due to the construction of the [masonry upstand] built immediately adjacent to and at a right angle to the pool gate, effectively reducing the height of a pool gate at that location, then the 'fence' is not constructed and erected so as to inhibit any child under the age of 6 years from climbing over the fence from the outside.

- 4.2 The authority's submission discussed the relationship between paragraphs 1, 3 and 5 of the Schedule, and the relationship between the Schedule and the Building Code, in particular the Schedule's status as a compliance document.
- 4.3 The authority also discussed the fact that it had previously issued a code compliance certificate for the building work including the swimming pool barrier, and requested guidance from the Department on (among other things) whether the code compliance certificate had been issued in error and, if so, whether it 'should now be revoked'.
- 4.4 With its submission the authority enclosed copies of:
- the application for a building consent and approved plan
 - the building consent and code compliance certificate
 - the final inspection field advice notice and checklist
 - correspondence from the authority dated 2 September 2011 regarding the inspection
 - photographs of the swimming pool barrier.
- 4.5 The authority made a further submission dated 11 April 2012 in response to the Department's request for more information. In this, the authority confirmed that the owner had supplied no plans (other than those described in paragraph 3.1) with respect to his application for a building consent, and that the authority 'holds no plans or drawings specific to the masonry and glass panel pool fencing which was ultimately constructed on the property.'
- 4.6 The owner acknowledged the authority's application for a determination on 19 April 2012, and forwarded a submission by email on 7 May 2012. The owner submitted, in summary, that:
- paragraph 1(1)(b) of the Schedule refers to objects outside and within 1.2m of the fence, not the fence itself, and in this instance the projection is a part of the fence not a separate object
 - the masonry upstand is a horizontal support for that part of the fence, and the distance between that and the top of the gate is 940mm and as such it complies under paragraph 5A of the Schedule
 - the fact that the 940mm occurs at the junction does not alter the compliance under paragraph 5A of the Schedule
- 4.7 The owner also submitted three sketches of examples of pool fence configurations to support his interpretation of paragraph 5A of the Schedule in different circumstances and in comparison to the existing construction.

- 4.8 The draft determination was issued to the parties for comment on 5 June 2012. The owner accepted the draft without comment.
- 4.9 The authority did not accept the draft and in a submission dated 18 June 2012, the authority, through its legal advisers, submitted that:
- The term “projection” was not defined. The masonry upstand was considered a “projection” and ‘represents a climbable toehold’ which was contrary to the purpose of the Schedule which was ‘to prevent ease of climbing’.
 - The draft determination was ‘patently contradictory’ in that it described the masonry wall as both a toehold that was climbable, and also a compliant horizontal member.
 - While the masonry upstand may comply with the horizontal support requirements in paragraph 5A that provision must be read subject to paragraph 1(1), which provides that the masonry upstand is a projection and so contravenes paragraph 1(1). If there was any doubt about the meaning of “projection” it was submitted that a precautionary approach should be taken given the Long Title of the Act that says:

An Act to promote the safety of young children by requiring the fencing of certain swimming pools
 - The draft determination failed to properly consider the purpose of the FOSP Act and the barrier was considered unsafe.
 - ‘The determination considered the masonry ... fence in isolation from the pool gate’ and the draft determination failed ‘to properly consider the relationship of the masonry wall (more or less at right angles) to the south-east pool gate.’
- 4.10 The owner responded to the authority’s submission by email on 13 July 2012. The owner submitted sketches of the barrier showing additional horizontal members to illustrate what the Schedule allowed him to install yet still be compliant. The sketches showed a horizontal member on the pool gate 940mm down from its top (therefore at the same height as the masonry upstand), and a horizontal member fixed to the masonry fence at the same height as the top of the pool gate.

5. Discussion

- 5.1 The authority has applied for a determination about whether the pool barrier, where the masonry fence adjoins the pool gate, complies with Clause F4; and therefore whether it correctly exercised its powers in issuing a code compliance certificate for the building work.

5.2 The means of establishing compliance

- 5.2.1 The FOSP Act requires⁴ pools to be protected by a fence that complies with the requirements of the Building Code⁵. Clause F4 of the Building Code requires that

⁴ Refer to section 8(1) of the FOSP Act.

⁵ Other than those pools exempted under section 5 of the FOSP Act.

pools⁶ have barriers, which are required to achieve the performance requirements of Clause F4.

5.2.2 There are three ways of providing a compliant solution in order to meet the requirements of the FOSP Act and the Building Code.

1. Propose a solution that meets the requirements of the Schedule.

The Schedule has the status of a compliance document⁷ so any solution that meets the requirements of the Schedule is deemed to comply with the Building Code. The Schedule is a prescriptive solution and is one way, but not the only way, of complying with the Building Code.

2. Propose an alternative solution that meets the requirements of Clause F4.

The Building Code is performance-based and sets out the minimum performance requirements. It does not specify how to achieve this performance (there are no detailed requirements for design and construction).

3. Propose a solution that requires an application for an exemption under section 6 of the FOSP Act.

Although I do not have jurisdiction under the FOSP Act, I note a territorial authority may grant a special exemption under section 6 of the FOSP Act. In considering an exemption, a territorial authority is required to be satisfied 'that such an exemption would not significantly increase danger to young children'. An exemption under section 6 of the FOSP Act is not necessary if the solution complies with the Building Code (refer to 3).

5.3 The fence's compliance as an Acceptable Solution

5.3.1 In order to comply with Clause F4 of the Building Code as an Acceptable Solution the pool fence would have to meet the requirements in the Schedule to the FOSP Act. I therefore need to consider the relationship between the toehold provided by the masonry upstand adjacent the pool gate, and whether the pool gate satisfies the requirements of the Schedule. There is no dispute that both the masonry wall and the pool gate, as separate barrier elements, are code compliant.

The projection

5.3.2 The owner has submitted that a projection under paragraph 1(1)(b) of the Schedule does not include elements of the fence itself. I note that this is consistent with the structure of the Schedule where paragraph 1 concerns the height of the fence above the ground and the height of the fence above objects on the ground that are outside the fence, and the particular materials and distances between components of a fence that are addressed subsequently at paragraphs 4 – 7 of the Schedule.

5.3.3 The term 'projection' is not a defined term in the FSOP Act, but it is described in paragraph 1(1)(b) as 'any permanent projection from or object permanently placed on the ground outside and within 1.2 metres of the fence' (my emphasis). I also note

⁶ With a depth of water exceeding 400mm under Clause F4.3.3 of the Building Code.

⁷ Under section 13B of the FOSP Act.

that Clause F4.3.5(b) of the Building Code refers to ‘no permanent objects on the outside of the barrier that could provide a climbing step’

5.3.4 In my view the term “projection” as it is used in paragraph 1(1)(b) applies in respect of permanent projections from the ground or objects permanently placed on the ground only where those projections or objects are ‘outside and within 1.2 metres of the fence’: the masonry upstand is not a permanent projection from the ground outside the fence nor is it a feature placed on the ground outside the fence, but forms part of the pool fence. I therefore consider the term “projection” does not apply to features of the pool fence itself.

5.3.5 While the masonry upstand may not be considered a “projection” it does nonetheless provide a toehold to the fence that is well in excess of the minimum 15mm dimension described in Figure 3 of Acceptable Solution F4/AS1. Under the provisions of the Schedule, it must therefore follow that the masonry upstand is a climbable horizontal rail that forms part of the pool fence.

The horizontal rail

5.3.6 Paragraph 5 says all rails, other than vertical elements, ‘shall be inaccessible for use by climbing from the outside’ of a fence. Paragraph 5A allows pool fences to have horizontal rails ‘that are accessible for use for climbing from the outside’ provided ‘the distance between any 2 of them at any point is at least 900 mm’.

5.3.7 As shown in Figure 1, the pool gate is 1200mm high has a rail at top and bottom. The horizontal rail provided by the masonry upstand is immediately adjacent the pool gate. However, the vertical distance between the masonry upstand and the top of the adjacent pool gate is 940mm, and is greater than the 900mm minimum dimension provided for in paragraph 5A. On this basis I consider the masonry upstand complies with the requirements of paragraph 5A.

5.3.8 I have considered the authority’s submission that paragraph 5A should be read subject to paragraph 1(1) but I do not agree that it is appropriate to apply the paragraphs in this way. The two paragraphs each address different aspects of a pool fence. Paragraph 1(1) concerns the height of a fence from the ground and its height from objects outside the fence. Paragraph 5A concerns the minimum distance between climbable components of a fence.

5.3.9 I have also considered the authority’s submission that the Long Title of the Act requires a horizontal support to be treated as a projection under paragraph 1(1). As I have noted above, paragraphs 1(1) and 5A address different aspects of a pool fence and there is a sound basis for the different height requirements in each provision. The words of both provisions should be given full effect. I do not consider there is any inconsistency between the provisions, nor is there any overlap.

5.3.10 As I consider the pool fence complies with paragraph 5A and the masonry upstand is not a ‘projection from the ground outside and within 1.2 metres of the fence’ under paragraph 1(1), I consider the fence complies with the Schedule to the FOSP Act. Given that the Schedule to the FOSP Act is cited as a means of complying with Clause F4, I therefore conclude that the pool barrier complies with the Building Code.

- 5.3.11 In a submission dated 13 July 2012 the owner contended that the addition of additional horizontal rails to both the gate and the masonry barrier, as described in paragraph 4.10, would still mean the fence meets the requirements of the Schedule. I consider the addition of a horizontal rail to the pool gate at the same height as the masonry upstand is compliant and clearly illustrates the point that the presence of the masonry upstand will not compromise pool safety to any greater degree than a horizontal rail positioned at the same height and location.

5.4 The issue of the building consent

- 5.4.1 An authority is to issue a building consent under section 49(1) if it is satisfied on reasonable grounds that the proposed building work will meet the requirements of the Building Code if completed in accordance with the plans and specifications that accompanied the application for the building consent.
- 5.4.2 As set out in paragraphs 3.1 and 3.3, the plans for the building consent were lacking in detail. The plans only included a manufacturer's pamphlet on steel pool fencing, and it is likely to have been inferred that the steel fencing was to be used for the entire pool barrier. It appears that the authority did not call for, nor did the owner supply, documentation that reflected the as-built barrier.
- 5.4.3 I consider that the quality of the documentation provided in support of the owner's building consent application was poor.

5.5 The code compliance certificate

- 5.5.1 The building consent was issued under the 2004 Act. Under section 94(1)(a) of the Act an authority must issue a code compliance certificate if it is satisfied, on reasonable grounds, that the building work complies with the building consent.
- 5.5.2 Changes to the layout were noted in the authority's inspection record dated 22 May 2008 and it would have been apparent at that time that the fence was significantly different to that shown on the consented plans. I conclude that the pool barrier was not completed in accordance with the building consent and the authority was incorrect to issue a code compliance certificate on that basis.
- 5.5.3 However, when considering the issue of a code compliance certificate for a building consent for which there was inadequate level of detail provided to establish compliance with the Building Code, the second step is to consider whether the completed building work complies with the Building Code.
- 5.5.4 As I have concluded that the pool barrier, with respect to the masonry wall and the southeast pool gate, complies with the Building Code I therefore consider that the authority correctly issued the code compliance certificate.

6. Decision

- 6.1 In accordance with section 188 of the Act, I determine that, in respect of the southeast pool gate and adjacent masonry wall, the pool barrier complies with Clause F4 Safety from Falling of the Building Code, and accordingly I confirm the authority's decision to issue the code compliance certificate.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 23 July 2012

John Gardiner
Manager Determinations

Appendix A: The legislation, the Schedule, and NZS 8500

A1 The Building Code:

CLAUSE F4—SAFETY FROM FALLING

PERFORMANCE

F4.3.4 Barriers shall:

- (b) Be of appropriate height,
- (f) In the case of a swimming pool, restrict the access of children under the age of 6 years to the pool or the immediate pool area,

F4.3.5 Barriers to swimming pools shall have in addition to performance F4.3.4:

- (b) No permanent objects on the outside of the barrier that could provide a climbing step.

A2 The Schedule to the FOSP Act:

Height

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.

Materials

- 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 the outside.
- 5** All fencing supports, rails, rods, and wires, that are not vertical, and all bracing that is not vertical, shall be inaccessible for use for climbing from the outside.
- 5A** Notwithstanding clause 5, a fence may have horizontal supports, rails, rods, or wires, that are accessible for use for climbing from the outside, and horizontal bracing that is accessible for such use, if—
 - (a) the distance between any 2 of them at any point is at least 900 mm; and
 - (b) there is no other support, rail, rod, wire, or bracing (other than a vertical rail) between the same 2 at any point.