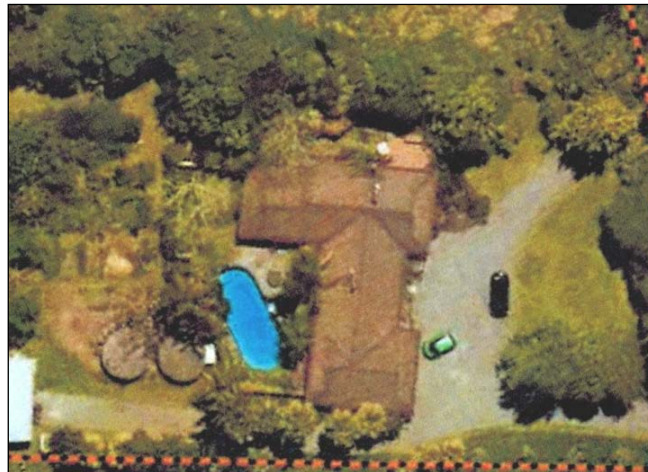




## Determination 2019/038

### Regarding the compliance of a 23-year-old pool fence at 66 McCullough Road, Mangapai, Whangarei



#### Summary

This determination considers the compliance of a trellis fence with the provisions of the Building Act that require the restriction of access by unsupervised young children to the swimming pool or immediate pool area. The trellis has gaps up to 45mm high x 40mm wide and was installed with the horizontal slats on the outside face of the fence.

#### 1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“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:

- Whangarei District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority, which applied for the determination.
- the owners of the property, D and L Collie (“the owners”)

1.3 This determination arises from a failed inspection<sup>2</sup> of a residential swimming pool. Despite the fact that the barrier was constructed under a building consent and the authority issued a code compliance certificate, the authority is now of the view that the pool barrier does not comply with section 162C of the Act. The owner is of the

<sup>1</sup> The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at [www.building.govt.nz](http://www.building.govt.nz) or by contacting the Ministry on 0800 242 243.

<sup>2</sup> Section 162D requires territorial authorities carry out inspections at least once every three years to ensure ongoing compliance of pool barriers to the extent required by section 162C. In this determination, unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

view that as the fence was previously inspected and confirmed by the authority as being compliant and it has been maintained since, it cannot now be non-compliant.

1.4 The matter to be determined<sup>3</sup> is whether the pool barrier (“the trellis fence”) complies as required by section 162C of the Act. In deciding this matter, I must consider whether the trellis fence complies with the requirements of the Building Code<sup>4</sup> that were in force when the pool was constructed.

1.5 In making my decision, I have considered the submissions of the parties and other evidence in this matter. The legislation discussed in this determination is appended to this determination as follows:

- Appendix A: relevant sections of the Act
- Appendix B: relevant parts of the Building Code in 1996 and the current Building Code
- Appendix C: relevant sections of the Fencing of Swimming Pools Act 1987. (“FOSPA”).

## 1.6 Matters outside this determination

1.6.1 In its correspondence with the owners, the authority also identified concerns regarding the compliance of the pool gate hinges and hardware fitted to sliding doors and windows that open onto the immediate pool area. The owner has advised that hardware has been fitted to sliding doors and restrictors fitted to windows to achieve compliance, and I leave this matter to the authority to inspect and confirm in due course.

1.6.2 The particular matter identified in the authority’s application for determination was the compliance of the trellis fence. The authority’s concerns relate to the size of the gaps in the trellis and whether the trellis will restrict access to the immediate pool area by unsupervised young children. This determination is therefore limited to the code-compliance of the existing trellis fence. I refer to the area current encompassed by the barrier as the immediate pool area herein simply for ease of reference; I have not considered whether the area encompassed by the barrier properly constitutes an “immediate pool area”, nor have I reviewed other features of the barrier fencing, but I have brought those matters to the parties’ attention.

1.6.3 Although the authority’s decision to issue the code compliance certificate in 1996 is not included in the matter to be determination, I have commented on the authority’s decisions in paragraph 7.1. I have no jurisdiction under any other Act, and the adequacy of inspections carried out under FOSPA between 1996 and 2017 are outside the ambit of this determination.

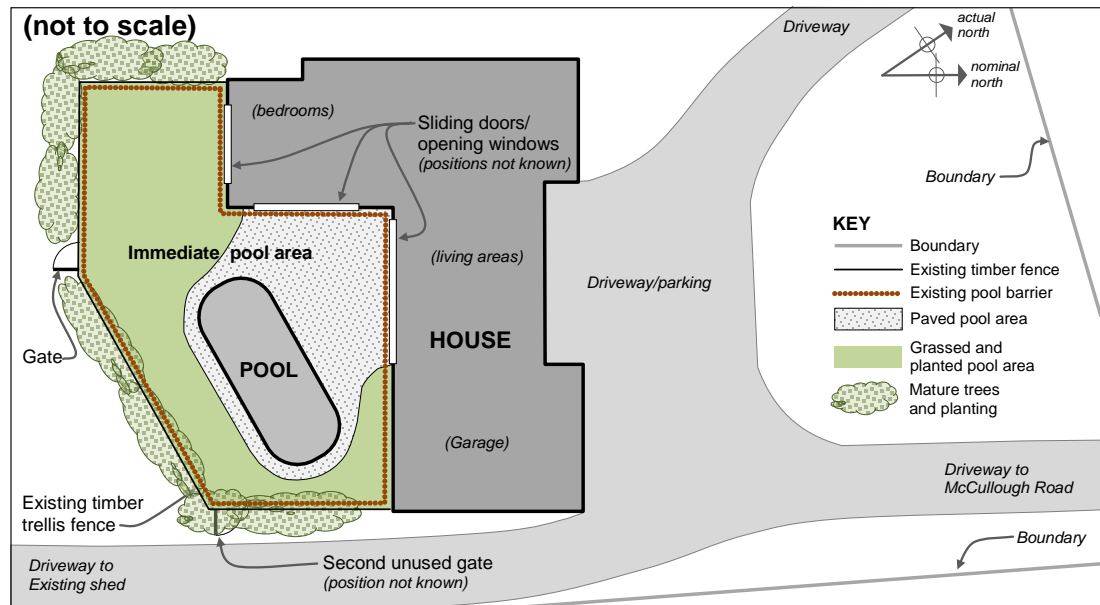
## 2. The building work

2.1 The house is a single-storey L-shaped 1980s building situated on a large rural site. As shown in Figure 1, the swimming pool is situated to the rear of the house, with the backyard pool area extending across the south elevation (for simplicity, I have taken the front street side of the house as facing north).

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<sup>3</sup> Under section 177(1)(a) of the Act

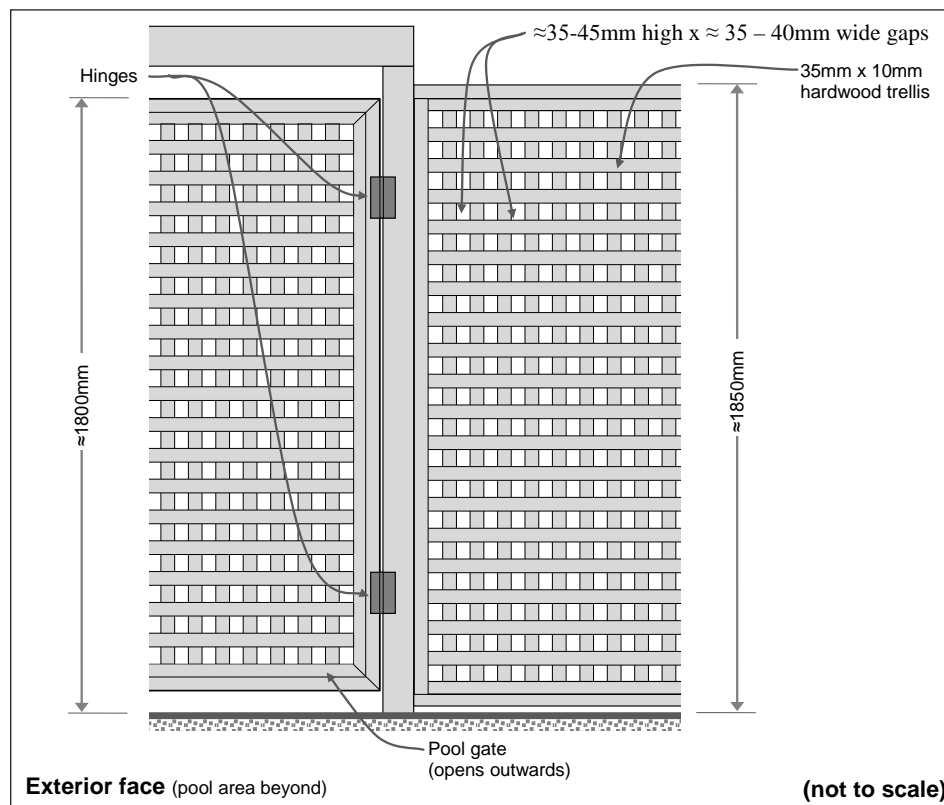
<sup>4</sup> First Schedule, Building Regulations 1992



**Figure 1: Approximate site plan**

- 2.2 As shown in Figure 1, the immediate pool area is fenced to the west, south and east, with the southern elevation of the house providing the remaining barrier. The area includes pool paving, grassed areas, a number of mature trees and extensive areas of shrubs, climbers and other planting (both inside and outside the existing trellis fence).
- 2.3 Access to the immediate pool area is possible through sliding doors from the house, or through gates in the fence. According to the inspection records, a second gate was constructed but is apparently fixed shut. The sliding doors were apparently fitted with top bolts only and the owner has stated that restrictors are fitted to the outward opening windows (see paragraph 1.6.1).
- 2.4 The existing pool fence**
- 2.4.1 Building consent documentation did not include drawings showing the proposed location of the pool and fences, or details of the fence and gates. Based on the site photographs and descriptions included within the authority's submission, the fence and gate design appears to be as shown in Figure 2 (over page).
- 2.4.2 The fence and gate are constructed from timber trellising supported by timber posts. Photographs show horizontal trellis slats installed on the outside face of the fence, with gaps that vary from about 35mm high x 35mm wide to about 45mm high x 40mm wide. The authority describes the fence as being:

...a trellis or lattice type barrier constructed out of a hardwood material 35mm wide x 10mm thick, which has been stapled together to [provide] approximately 50mm square gaps throughout the entire barrier which is approximately 1800mm high with a strong capping.



**Figure 2: The existing fence and gate**

### 3. Background

#### 3.1 Construction of the pool

- 3.1.1 On 29 May 1995 resource consent was issued for a swimming pool on the subject property. On the same date, a landscaping company applied for a building consent on behalf of the owners for installation of a proprietary pool. The authority issued a building consent on 19 June 1995 (No.11589) under the Building Act 1991 (“the former Act”) for construction of the pool and associated elements.
- 3.1.2 The consent documents included an engineering drawing of the standard proprietary pool fixture and a site plan dated 1985<sup>5</sup> from construction of the existing house, which showed property boundaries, the outline of the existing house and some other existing features. However the location of the proposed pool and associated fencing was not shown and no details were provided for the pool fence and gate.
- 3.1.3 It appears that construction had already commenced when the building consent was issued, because the authority recorded an inspection of the pool excavation on 19 June 1995 (the same day that the consent was issued). A final inspection was carried out on 13 October 1995, which noted ‘both gates to have return springs changed to the outside’. The authority re-inspected the fences on 20 March 1996 and the record noted ‘completed OK, issue [code compliance certificate].’
- 3.1.4 On 25 March 1996, the authority issued a code compliance certificate under section 43(3) of the former Act in respect of ‘all of the building work approved under the building consent’ on the grounds that the authority considered the building work complied with the Building Code that was in force at that time.

<sup>5</sup> Stamped as the ‘permit’ site plan for the original construction of the house in the late 1980s

### **3.2 Ongoing pool inspections**

- 3.2.1 When the pool was issued with a code compliance certificate in 1996, the continuing compliance of the pool barrier fell under the FOSPA, an 'Act to promote the safety of young children by requiring the fencing of certain swimming pools'. The FOSPA required authorities to 'take all reasonable steps to ensure' provisions were complied with in their district.
- 3.2.2 Regular swimming pool inspections 'of the pool and surrounds' were apparently carried out over the following years, with no concerns about the pool fencing identified. According to the owners, 'requests for bolts on ranchsliders and restrictors on windows were actioned immediately'.
- 3.2.3 The authority has accepted that it 'has carried out a number of inspections since construction and has passed [the compliance of the barrier] on each occasion'. For completeness I note I have seen no inspection records in the form of certificates or correspondence that notes compliance with the fencing requirements under FOSPA at the times of the inspections.

### **3.3 The 2017 amendments to the Act**

- 3.3.1 On 1 January 2017 the FOSPA was repealed and the Act was amended to incorporate a set of special provisions for residential pools.
- 3.3.2 As shown in Appendix A1.2, section 162C requires residential pools to have physical barriers to restrict access to pools by unsupervised children under five years of age, and sets out the extent to which existing pools must comply. Section 162D requires territorial authorities to carry out inspections at least once every three years to ensure ongoing compliance with the requirements of section 162C.
- 3.3.3 Following the 2017 amendments to the Act, the authority commenced 'an audit program to check every pool on its register' to ensure they comply with the requirements of the Act.

### **3.4 The 2019 inspection of the pool barrier**

- 3.4.1 On 27 February 2019 the authority inspected the subject pool barrier and the inspection check list marked the following elements as 'fail':
- gates and latching
  - fencing (in regard to child access by climbing over)
  - opening windows above and within 2.4m vertically above the pool area
  - doors in the building wall.
- 3.4.2 On 28 February 2019, the authority wrote to the owners attaching the inspection record and informing them that the pool barrier 'must now be brought up to standard and re-inspected'. The authority stated:

The following areas were non-compliant

1. Lattice fence not compliant as swimming pool barrier. Restriction required for compliance.
2. Gate should open out from the immediate pool area and self close 150mm away from closed position. (Back gate locked, could not check function)
3. Windows require restrictor fitted 100mm maximum at the fully opened position. (Not sure if already fitted).

4. Sliding doors fitted with top lock only not compliant after legal advice sought by [the authority]. Either a self closing and self latching device with the latch 1.5m measured up from floor level, or audible [alarm] fitted and used in conjunction with top locks.
  5. Hose tap used for pool maintenance requires a backflow prevention device fitted.
- 3.5 Despite the owners' objections about the trellis fence, the dispute remained unresolved and the Ministry received the application for determination from the authority on 29 April 2019. Following discussion with the Ministry, the authority agreed the particular matter for determination was the code-compliance of the trellis fence with regard to the trellis being "climbable" by young children, and the application was accepted on 3 May 2019.

## 4. The submissions

### 4.1 The authority's submission

4.1.1 The authority set out the background to the dispute, including the following (in summary):

- The 1995 building consent included no detail of the barrier fence construction.
- The timber fence and gates were inspected during construction of the pool, with a code compliance certificate issued in 1996.
- The owners had confirmed that nothing had changed since construction, with a number of satisfactory inspections carried out since that time.
- The current audit program to check pool compliance included the subject pool, which 'failed the inspection for a couple of items', including the trellis fence.
- The trellis fence 'would be easily climbable by a 5-year-old child and should not have been passed' as compliant in 1996.

4.1.2 The authority concluded that:

...although the swimming pool and swimming pool fence were constructed and approved under a Building Consent, the fence is constructed as a lattice with 50mm square openings, out of 35mm x 10mm hardwood timber, just over 1800mm high with a timber capping.

[The authority] contends that the fence did not comply with Schedule 1 of the Fencing of Swimming Pools Act 1987 or the Building Act 1991 and its associated Regulations and Codes. And should not have been approved, as [the authority] believes the fence to be climbable by a 6<sup>[6]</sup> year old child.

4.1.3 The authority provided copies of :

- the application for building consent
- the building consent dated 19 June 1995
- the inspection records during construction
- the code compliance certificate dated 25 March 1996
- the record of the pool inspection dated 27 February 2019

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<sup>6</sup> Clause F4.3.4(f) of the Building Code that was current at the time and Schedule 1 of the Fencing of Swimming Pools Act concerned access of children under 6 years of age; whereas section 162C(1) of the Building Act and Clause F9 of the Building Code require barriers to restrict access by unsupervised children under 5 years of age.

- photographs of the pool fence
- the letter to the owners dated 28 February 2019.

## 4.2 The owners' submission

4.2.1 In their submission, the owners stated that they could not understand what has changed that meant the barrier which had previously been approved, consented and inspected over the years was now not compliant. The owners objected to the authority's position and included the following comments about the pool fence (in summary):

- At the time of construction, this type of trellis fence was manufactured and sold as suitable for pool fencing, and was apparently widely used for this purpose in the district. The fence was installed by 'a professional landscaping company' and was inspected and approved in 1996.
- The fence remains unchanged and has been maintained since completion, with regular inspections raising no concerns about its design. 'Requests for bolts on ranchsliders and restrictors on windows were actioned immediately.'

## 4.3 The draft and submissions in response

4.3.1 A draft determination was issued to the parties for comment on 31 May 2019.

4.3.2 The owners and the authority both responded on 26 June 2019. Both accepted the findings of the draft determination without making further submissions on the matters.

## 5. The legislation

5.1 Until 1 January 2017, swimming pools were subject to the Fencing of Swimming Pools Act 1987. Section 8 of that Act required pools to be fenced by a barrier that complied with the Building Code. The relevant clause of the Building Code at that time was Clause F4 Safety from falling, which contained specific performance requirements for pool barriers. Appendix B2.2 lists the performance requirements F4.3.3, F4.3.4 and F4.3.5 that were in force when the code compliance certificate was issued in 1996.

5.2 Compliance with an Acceptable Solution is one way of establishing compliance with the Building Code, and the relevant Acceptable Solution at the time, F4/AS1<sup>7</sup>, cited the Schedule to FOSPA as a means of compliance (see Appendix B2.3).

### 5.3 The 2017 pool provisions

5.3.1 On 1 January 2017, the Fencing of Swimming Pools Act was repealed and new residential pool provisions were incorporated into the Act under section 162A to 162E. At the same time a new clause was added to the Building Code: Clause F9 Means of restricting access to residential pools as shown in Appendix B3.1.

5.3.2 Section 162C(1) requires 'physical barriers that restrict access to the pool by unsupervised children under 5 years of age', and section 162C(2) provides the physical barrier restricting access to the pool must comply with the requirements of the Building Code:

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<sup>7</sup> Acceptable Solution F4/AS1 for New Zealand Building Code Clause F4 Safety from falling.

(a) that are in force; or

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

5.3.3 The intention is that barriers must continue to perform at the standard applicable when installed and approved, and are not required to be upgraded if there are later changes to Building Code requirements.

5.3.4 I note that under section 164 of the Act, if an authority considers on reasonable grounds that a specified person is contravening or failing to comply with section 162C of the Act the authority must issue a notice to fix to the specified person. For the subject pool, the authority has delayed issuing a notice to fix pending resolution of this matter by way of this determination.

## 5.4 The transitional provisions

5.4.1 For the purpose of this discussion, and given the date of construction of the pool, the transitional and savings provisions in sections 450A and 450B are also relevant (see Appendix A1.3).

5.4.2 Section 450A of the Act sets out the transitional and savings provision for residential pools, and subsection (1) provides:

(1) Fencing of a residential pool in accordance with clauses 1 to 10 of the Schedule of the Fencing of Swimming Pools Act 1987 (as that schedule was in force immediately before 1 January 2017) is an acceptable solution for establishing compliance with the building code for the purpose of section 162C.

5.4.3 Section 450B sets out the savings provision for existing residential pools that were constructed before 1 January 2017, which this pool was. Subsection (2) provides:

(2) An existing pool is deemed to have barriers that comply with section 162C if the barriers—

(a) complied with the Schedule of the Fencing of Swimming Pools Act 1987 (as that schedule was in force) immediately before 1 January 2017; and

(b) continue to comply with those requirements subject to—

(i) any exemption that was granted under section 6 or clause 11 of the Schedule of that Act and that was subsisting immediately before 1 January 2017; and

(ii) the conditions of any such exemption.

5.4.4 Accordingly, there are four possible compliance pathways available to establish compliance for the purpose of section 162C:

- compliance with Clause F9 of the Building Code as it is currently in force
- compliance with Clause F4 of the Building Code as it was in force at the time the pool was consented
- compliance with Clauses 1 to 10 of Schedule 1 of FOSPA as an Acceptable Solution to Clause F4
- compliance with Schedule 1 of FOSPA, subject to any exemption under section 6 or Clause 11 of the Schedule and compliance with the conditions of any such exemption.



## 6. The code compliance of the trellis fence

6.1 Features such as height, rigidity and the strength of the trellis fence are not disputed and the authority apparently accepts that the trellis is a ‘perforated material’ as that term is used in the Schedule to the FOSPA. However, despite having issued a code compliance certificate in 1996, the authority now maintains that the trellis fence does not comply with the Schedule or with Clause F4 requirements to restrict access of young children to the immediate pool area.

### 6.2 Compliance with the 1996 requirements

- 6.2.1 At the time the pool was constructed the barrier was required to comply with Clause F4 of the Building Code, which had the objective to safeguard people from injury caused by falling, with specific performance requirements F4.3.3, F4.3.4 and F4.3.5 related to safety from falling into pools (see Appendix B2.2).
- 6.2.2 Clause F4.3.5 required automatic gate latching devices ‘not readily operated by children’. However as noted in paragraph 1.6.1, this determination does not consider the adequacy of pool gate latching devices and hardware fitted to sliding doors and windows opening onto the immediate pool area.
- 6.2.3 Clause F4.3.4 set out relevant physical requirements for pool barriers, and included the requirement to restrict ‘the entry of children under 6 years of age’ (F4.3.4(f)).
- 6.2.4 The schedule to the FOSPA (shown in Appendix C2.1) sets out prescriptive means of compliance for fences. As the Schedule was cited in the Acceptable Solution as a means of establishing compliance, I have assessed the various features of the trellis fence against the relevant parts of the Schedule and my observations are summarised in Table 1 below.

**Table 1: Assessment of relevant features of trellis fence against Schedule of FOSPA**

	Clauses of FOSPA Schedule	My comments
	Classification of type of fence	<ul style="list-style-type: none"> <li>Trellis can be classified as “perforated material” as that term is used in the Schedule</li> </ul>
<b>1(2)</b>	Fence using perforated material with openings greater than 10mm, height to be over 1.8m minimum	<ul style="list-style-type: none"> <li>Trellis has openings greater than 10mm</li> <li>Fence and gates over 1.8m high</li> </ul>
<b>2</b>	Clearance under fence 100mm maximum	<ul style="list-style-type: none"> <li>Clearances less than 100mm</li> </ul>
<b>3</b>	Durable materials	<ul style="list-style-type: none"> <li>Constructed from hardwood trellis</li> <li>Fence still appears durable</li> </ul>
	Constructed to inhibit child under 6 from climbing over from outside	<ul style="list-style-type: none"> <li>Horizontal slats spaced at 35mm to 45mm</li> <li>Vertical slats spaced at 35mm to 40mm</li> <li>Horizontal slats fixed on outside of fence</li> </ul>
<b>4</b>	Spacing between vertical pales <sup>8</sup> shall not exceed 100mm	<ul style="list-style-type: none"> <li>Vertical spacing of trellis slats 50mm maximum</li> </ul>
<b>5</b>	Non-vertical rails to be inaccessible for climbing from outside	<ul style="list-style-type: none"> <li>Horizontal spacing of slats 50mm maximum</li> <li>Horizontal slats fixed on outside of fence</li> <li>Accessible for climbing from outside (refer above)</li> </ul>
<b>6</b>	Openings in perforated material to be 50mm maximum in height	<ul style="list-style-type: none"> <li>Trellis includes gaps no greater than 50mm x 50mm</li> <li>Spacing between slats no greater than 50mm horizontally and vertically</li> </ul>

<sup>8</sup> A slat of wood for a fence

Clauses of FOSPA Schedule		My comments
7	Perforated material to be firmly attached to top and bottom rails or similar	<ul style="list-style-type: none"> <li>Trellis fixed to robust top and bottom rails</li> <li>Gate trellis fixed within robust frame</li> </ul>

6.2.5 With regard to the size of the openings in the trellis and whether the trellis fence is climbable, I note that although the slats are less than 50mm apart and are therefore in accordance with Clause 6 of the Schedule, the fact that the horizontal slats are fixed on the outside of the face means they provide hand- and toe-holds that assist in climbing. In this respect I consider the trellis does not meet the criteria in Clause 3 of the Schedule.

6.2.6 Compliance with an Acceptable Solution (in this case the Schedule) is one way but not the only way of achieving compliance. Accordingly I have also assessed the trellis fence against the relevant performance criteria in Clause F4 that were current at the time of construction, and my comments are summarised in Table 2 below.

**Table 2: Assessment of relevant features of trellis fence against Clause F4**

1996 Requirements		My comments
F4	Performance requirements of Clauses	
F4.3.4(a)	Continuous barrier for full length of hazard	<ul style="list-style-type: none"> <li>Barrier continuous to immediate pool area</li> </ul>
F4.3.4(b)	Barrier to be of appropriate height	<ul style="list-style-type: none"> <li>Fence and gates greater than 1.8m high</li> <li>Appropriate height for perforated material</li> </ul>
F4.3.4(c)	Barrier to be constructed with adequate rigidity	<ul style="list-style-type: none"> <li>Constructed from hardwood trellis</li> <li>Trellis fixed to robust top and bottom rails</li> <li>Gate trellis fixed within robust frame</li> </ul>
F4.3.4(f)	Barrier to restrict access of children under 6 years of age to the immediate pool area	<ul style="list-style-type: none"> <li>Gaps in trellis about 45mm</li> <li>Horizontal slats fixed on outside of fence</li> <li>Mature trees/planting both sides of fence</li> </ul>

6.2.7 In considering the size of the gaps in the trellis, I have also considered the New Zealand Standard NZS 8500 Safety barriers and fences around swimming pools, spas and hot tubs. Paragraph 3.3.2 of that standard sets out standards for perforated materials, mesh or trellis used in pool fencing and states:

For barriers/fences 1800 mm and above in total height, the aperture size of the fencing materials shall be no greater than 35 mm in diameter.

6.2.8 The fact that the horizontal slats are fixed on the outside of the face in conjunction with the size of gaps in the trellis means they provide hand- and toe-holds that assist in climbing, and I do not consider there to be any mitigating features of the fencing that would compensate for this.

6.2.9 In addition, I note that photographs show mature trees/planting on both sides of the fence, and that this may also aid a young child to ascend and descend the trellis fence and may conceal a child doing so.

6.2.10 Taking account of my comments above and in Tables 1 and 2, I consider that the construction of the trellis fence with the horizontal slats fixed to the outside has resulted in a fence being able to be climbed by a young child. I therefore conclude that the existing pool barrier fence as constructed did not comply with the Schedule to FOSPA cited in F4/AS1 nor with performance criteria in Clause F4.3.4(f) to restrict access of children under 6 years of age to the immediate pool area.

### 6.3 Compliance with the current requirements

- 6.3.1 Under section 162C(2)(a), if the existing pool barrier were to comply with the current requirements of the Building Code then it would also comply for the purpose of section 162C of the Act, even if not accordance with the Schedule of FOSPA in various respects.
- 6.3.2 For completeness, I have therefore also considered the compliance of the existing trellis fence with the current provisions in Clause F9 and against the current Acceptable Solution F9/AS1, and my observations are shown in Table 3 below.

**Table 3: Assessment of relevant features of trellis fence against Clause F9**

Current Requirements		My comments
<b>Acceptable Solution F9/AS1</b>		
<b>2.1.5 Figure 1</b>	Perforated material restricted to steel wire mesh with openings 35mm max and height of 1.8m min	<ul style="list-style-type: none"> <li>Fence formed from timber trellis, not from steel wire mesh</li> <li>Fence also does not accord with Figure 1 of F9/AS1</li> </ul>
<b>Figure 1 2.1.5</b>	Clearance under fence 100mm maximum	<ul style="list-style-type: none"> <li>Clearances below 100mm</li> </ul>
<b>2.1.3</b>	Non-vertical rails to be 900mm apart vertically to restrict climbing	<ul style="list-style-type: none"> <li>Horizontal spacing of slats 50mm max.</li> <li>Horizontal slats fixed on outside of fence</li> <li>Accessible for climbing from outside (refer above)</li> </ul>
<b>2.1.6 Figure 2</b>	No ground features outside barrier within 1200mm of top that would assist a child in climbing	<ul style="list-style-type: none"> <li>Mature trees/planting both sides of fence</li> <li>Planting could conceal child climbing fence</li> <li>Planting could also aid ascent and descent</li> </ul>
<b>2.1.7</b>	Projections to outside face of barrier to be 10mm max. unless 900 mm minimum apart vertically	<ul style="list-style-type: none"> <li>Horizontal trellis slats 10mm thick and spaced at 35mm to 45mm</li> </ul>
<b>F9</b>	<b>Performance requirements of Clauses</b>	
<b>F9.3.1</b>	Must have barrier to restrict access of unsupervised children under 5 years of age immediate pool area	<ul style="list-style-type: none"> <li>Gaps in trellis, horizontal slats on the outside assist in climbing</li> <li>Mature trees/planting may aid climbing</li> </ul>
<b>F9.3.2(a)</b>	Barrier must surround the pool and may enclose whole or part of immediate pool area	<ul style="list-style-type: none"> <li>Barrier encloses immediate pool area</li> </ul>
<b>F9.3.3</b>	Barrier must have no permanent projections on outside that could assist children in negotiating barrier	<ul style="list-style-type: none"> <li>Gaps in trellis about 45mm</li> <li>Horizontal slats fixed on outside of fence</li> <li>Mature trees/planting both sides of fence</li> <li>Planting may also aid ascent and descent</li> <li>Above features assist children in climbing</li> </ul>

- 6.3.3 Taking those comments into account, I am satisfied that the design and materials used for the existing fence together with the proximity of mature planting and trees do not comply with the current requirements of Clause F9 or accord with various parts of the current Acceptable Solution F9/AS1.

### 6.4 Conclusion

- 6.4.1 Taking account of the above, I am satisfied that the existing timber trellis fence does not comply with the performance criteria in the Building Code that was in force at the time the pool was constructed, and also does not comply with the performance requirements of Clause F9 of the current Building Code.

## **7. What happens next?**

- 7.1 I concur with the authority's view that the documentation was inadequate when the building consent was issued in 1995, and also that some features of the trellis fence did not comply with the Building Code when a code compliance certificate was issued in 1996. Although this now calls past decision-making into question, it does not prevent the authority from making a new decision under section 162C of the Act and to issue a notice to fix should this be considered necessary.
- 7.2 In order for the fence to be brought into compliance with section 162C, the features that assist a child in climbing the trellis fence must be addressed. I suggest that the parties discuss practical options (such as, for example, metal mesh or netting or similar fixed to the outside) in order that the fence can be brought into compliance with the requirements under section 162C as an existing pool fence. Consideration should also be given to the need to reduce the additional hazard posed by the mature trees and heavy planting adjacent to the trellis fence.

## **8. The decision**

- 8.1 In accordance with section 188 of the Building Act 2004, I hereby determine the existing trellis fence does not comply with the Building Code to the extent required by section 162C of the Act.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 1 August 2019.

Katie Gordon  
**Manager Determinations**

## Appendix A: The Building Act 2004

### A.1 Relevant provisions of the Building Act 2004

A1.1 General sections of the Act discussed in this determination include:

#### **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 an acceptable solution or a verification method establishing compliance with the building code for the purposes of section 19 of that Act, and the requirements of this Act;
- (b) building and premises not subject to the Building Act 2004, be treated as a reasonable and adequate provision for the purposes of this Act

#### **18 Building work not required to achieve performance criteria additional to or more restrictive than building code**

- (1) A person who carries out any building work is not required by this Act to—
  - (a) achieve performance criteria that are additional to, or more restrictive than, the performance criteria prescribed in the building code in relation to that building work; or
  - (b) take any action in respect of that building work if it complies with the building code

#### **164 Issue of notice to fix**

- (1) This section applies if a responsible authority considers on reasonable grounds that—
  - (a) a specified person is contravening or failing to comply with this Act or the regulations ...
- (2) A responsible authority must issue to the specified person concerned a notice (a notice to fix) requiring the person—
  - (a) to remedy the contravention of, or to comply with, this Act or the regulations; ...

A1.2 The special provisions relating to residential pools in section 162 include:

#### **162C Residential pools must have means of restricting access**

- (1) Every residential pool that is filled or partly filled with water must have physical barriers that restrict access to the pool by unsupervised children under 5 years of age.
- (2) The means of restricting access referred to in subsection (1) must comply with the requirements of the building code—
  - (a) that are in force; or
  - (b) that were in force when the pool was constructed, erected, or installed (after 1 September 1987) and in respect of which a building consent, code compliance certificate, or certificate of acceptance was issued (in relation to the means of restricting access to the pool).
- (3) In the case of a small heated pool, the means of restricting access referred to in subsection (1) need only restrict access to the pool when the pool is not in use.
- (4) The following persons must ensure compliance with this section:
  - (a) the owner of the pool:

- (b) the pool operator:
- (c) the owner of the land on which the pool is situated:
- (d) the occupier of the property in or on which the pool is situated:
- (e) if the pool is subject to a hire purchase agreement (as that term is defined in the Income Tax Act 2007), the purchaser of the pool:
- (f) if the pool is on premises that are not subject to a tenancy under the Residential Tenancies Act 1986 but the pool is subject to a lease or is part of premises subject to a lease, the lessee of the pool or the premises.

#### **162D Periodic inspections of residential pools**

- (1) Every territorial authority must ensure that the following residential pools within its jurisdiction are inspected at least once every 3 years, within 6 months before or after the pool's anniversary date, to determine whether the pool has barriers that comply with the requirements of section 162C:
  - (a) residential pools other than small heated pools:
  - (b) small heated pools that have barriers that are not exempt, in terms of Schedule 1, from the requirement to have a building consent.
- (2) A territorial authority may accept a certificate of periodic inspection from an independently qualified pool inspector for the purpose of subsection (1) in lieu of carrying out an inspection under section 222.
- (3) If a territorial authority decides not to accept a certificate of periodic inspection from an independently qualified pool inspector under subsection (2), the territorial authority must, within 7 working days of making that decision, give notice to the chief executive of the decision and the reasons for the decision.
- (4) If an independently qualified pool inspector inspects a pool for the purpose of this section and decides that the pool does not have barriers that comply with the requirements of section 162C (subject to any waiver or modification granted under section 67A or 188), the inspector must, within 3 working days of the date of inspection, give written notice to the relevant territorial authority of the decision, attaching any information that the chief executive requires to accompany the notice.

A1.3 Section 450 of the Act sets out the transitional and savings provision for residential pools, and includes:

#### **450A Transitional and savings provision for residential pools**

- (1) Fencing of a residential pool in accordance with clauses 1 to 10 of the Schedule of the Fencing of Swimming Pools Act 1987 (as that schedule was in force immediately before 1 January 2017) is an acceptable solution for establishing compliance with the building code for the purpose of section 162C.
- (2) Sections 22(2) and (3), 23, 24, and 25A apply to the acceptable solution in subsection (1) as if it had been issued by the chief executive under section 22(1) of this Act.
- (3) In this section and the Schedule of the Fencing of Swimming Pools Act 1987,—

**fence** includes any part of a building, and any gate or door, that forms part of a fence

**fencing** means any barrier or barriers used to enclose a pool (or an immediate pool area) so as to restrict or prevent access to the pool.

**450B Savings provision for existing residential pools**

- (1) This section applies to a residential pool that was constructed, erected, or installed before 1 January 2017 (an existing pool).
- (2) An existing pool is deemed to have barriers that comply with section 162C if the barriers—
  - (a) complied with the Schedule of the Fencing of Swimming Pools Act 1987 (as that schedule was in force) immediately before 1 January 2017; and
  - (b) continue to comply with those requirements subject to—
    - (i) any exemption that was granted under section 6 or clause 11 of the Schedule of that Act and that was subsisting immediately before 1 January 2017; and
    - (ii) the conditions of any such exemption.
- (3) Alternatively, an existing pool is deemed to comply with section 162C if all of the following apply:
  - (a) the outside surface of the side walls of the pool is constructed so as to inhibit climbing; and
  - (b) no part of the top of any side wall of the pool is less than 1.2 m above—
    - (i) the adjacent ground level; and
    - (ii) any permanent projection from the ground outside of the pool and within 1.2 m of the walls of the pool; and
    - (iii) any object standing on the ground outside of the pool and within 1.2 m of the walls of the pool; and
  - (c) any ladder or other means of access to the interior of the swimming pool—
    - (i) can be readily removed or made inoperable; and
    - (ii) is removed or made inoperable whenever the pool is not intended to be in use.

*Sections 162C, 162D, 450A and 450B were inserted, on 1 January 2017, by section 17 of the Building (Pools) Amendment Act 2016 (2016 No 71).*

## Appendix B: The Building Code

B1.1 Relevant definitions for terms used in this determination include:

**Immediate pool area** Means 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.

**Pool**

- a) Means -
  - i) any excavation or structure of a kind normally used for swimming, paddling, or bathing; or
  - ii) any product (other than an ordinary home bath) that is designed or modified to be used for swimming, wading, paddling, or bathing; ...

**Residential pool** Means a pool that is -

- a) in a place of abode; or
- b) in or on land that also contains an abode; or
- c) in or on land that is adjacent to other land that contains an abode if the pool is used in conjunction with that other land or abode.

## B2 The Building Code in 1996

B2.1 The pool was issued with a code compliance certificate in 1996 prior to the publication of the Second Edition of Clause F4 Safety from falling on 28 February 1998. In 1995, Clause F4 of the Building Code incorporated amendments up to Amendment 3, which was issued on 1 December 1995.

B2.2 The relevant parts of Clause F4 of the Building Code that applied at the time the pool was issued with a code compliance certificate in 1996 include:

**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**

**F4.3.3** Swimming pools having a depth of water exceeding 400mm, shall have barriers provided.

**Limits on application**

*Performance F4.3.3 shall not apply to any pool exempted under section 5 of the Fencing of Swimming Pools Act 1987.*

**F4.3.4** Barriers shall:

- (a) Be continuous and extend for the full extent of the hazard,
- (b) Be of appropriate height,
- (c) Be constructed with adequate rigidity...
- (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....

**Limits on application**

*Performance F4.3.4(f) shall not apply to any pool exempted under section 5 of the Fencing of Swimming Pools Act 1987.*



- F4.3.5** Barriers to swimming pools shall have in addition to performance F4.3.4:
- (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, and
  - (b) No permanent objects on the outside of the barrier that could provide a climbing step.

B2.3 The relevant part of the Acceptable Solution F4/AS1 in 1996 was:

### **3.0 Swimming Pool Barriers**

#### **3.1 Fencing**

- 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.

## **B3 The current Building Code**

B3.1 From 1 January 2017, the Building (Pools) Amendment Act 2016 deleted clauses F4.3.3, F4.3.4(f), and F4.3.5 relating to swimming pool barriers and inserted a new clause into the Building Act 2004, which covered the provisions for pools. Clause F9 Means of restricting access to residential pools set out requirements for restricting access to residential pools. The relevant parts of Clause F9 include:

### **OBJECTIVE**

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

### **FUNCTIONAL REQUIREMENT**

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

### **PERFORMANCE**

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

**F9.3.2** Barriers must either—

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

**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.

Any gates must—

- (a) open away from the pool; and
- (b) not be able to be readily opened by children; and
- (c) automatically return to the closed position after use.

**F9.3.4** Where a building forms all or part of an immediate pool area barrier,—

- (a) doors between the building and the immediate pool area must not be able to be readily opened by children, and must either—
  - (i) emit an audible warning when the door is open; or
  - (ii) close automatically after use:
- (b) windows opening from a building into the immediate pool area must be constructed or positioned to restrict the passage of children.

## Appendix C: The Fencing of Swimming Pools Act 1987

### C1 The Fencing of Swimming Pools Act

C1.1 The relevant parts of FOSPA discussed in this determination include:

#### 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.

**immediate pool area** means the land in or on which the pool is situated and so much of the surrounding area as is used for activities or purposes carried on in conjunction with the use of the pool.

#### 8 Obligations of owner and persons in control of pool

- (1) Every owner of a pool to which this Act applies shall ensure that, except as provided in any exemption granted under section 6, the pool, or some or all of the immediate pool area including all of the pool, is fenced by a fence that complies with the requirements of the building code in force under the Building Act 1991 in respect of swimming pools subject to this Act at all times when this Act applies in respect of the pool.

#### 10 Obligation of territorial authorities

Every territorial authority shall take all reasonable steps to ensure that this Act is complied with within its district.

#### 11 Power of entry for territorial authority officers

- (1) Without limiting any other powers of any territorial authority, any officer of a territorial authority who has reasonable grounds to believe—
  - (a) that there is on any land within the district of the territorial authority a swimming pool to which this Act applies; and
  - (b) that the pool is not fenced as required by this Act, or any condition imposed under section 6(2) is not being complied with,—

may at any reasonable time enter on the land and carry out an inspection to determine whether or not there is on the land such a pool that is not fenced as required by this Act, or whether or not the condition is being complied with.

#### 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 an acceptable solution or a verification method establishing compliance with the building code for the purposes of section 19 of that Act, and the requirements of this Act...

## C2 The schedule to the Fencing of Swimming Pools Act

C2.1 The relevant parts of the Schedule transferred into the Act and discussed in this determination include:

### Schedule

#### Means of compliance for fences under this 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.
- (2) Notwithstanding subclause (1), 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.

##### *Ground clearance*

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

##### *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.
- 4 Except where the fence is horizontally close-boarded or is made of perforated material, netting, or mesh, the spacing between adjacent vertical pales, panels, or other posts shall not exceed 100 mm at any point.
- 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.
- 6 Where any perforated material, netting, or mesh is used, no opening in that material, netting, or mesh shall have any dimension (other than the circumference or perimeter) greater than 50 mm.
- 7 All perforated material, netting, or mesh material shall be firmly attached at both top and bottom to a rail, pipe, or similar firm structure, or otherwise be of such a nature that the fence cannot readily be crossed by children under the age of 6 years.

##### *Gates and doors*

- 8 Every gate or door shall be so constructed as to comply with the relevant requirements of clauses 1 to 7, and shall be so mounted that—
- (a) it cannot open inwards towards the immediate pool area;
  - (b) it is clear of any obstruction that could hold the gate or door open and no other means of holding the gate or door open is provided;
  - (c) when lifted up or pulled down the gate or door does not release the latching device, come off its hinges, or provide a ground clearance greater than 100 mm.

*Operation of gates and doors*

- 9(1) Every gate or door shall be fitted with a latching device.
  - (2) Where the latching device is accessible from the outside of the fence only by reaching over the fence, gate, or door or through a hole in the fence, gate, or door, the latching device and the lowest point of any hole giving access to it shall be at least 1.2 metres above the ground on the outside of the fence.
  - (3) Where the latching device is otherwise accessible from the outside of the fence, gate, or door, the latching device shall be at least 1.5 metres above the ground on the outside of the fence.
- 10 Every gate or door shall be fitted with a device that will automatically return the gate or door to the closed position and operate the latching device when the gate or door is stationary and 150 mm from the closed and secured position.

*Doors in walls of buildings*

- 11 Where any building forms part of a fence and the pool is not contained within the building, any door that gives access to the immediate pool area need not comply with the requirements for gates or doors set out in clauses 8 to 10 to the extent (if any) that the territorial authority is satisfied that such compliance is impossible, unreasonable, or in breach of any other Act, regulation, or bylaw, and the door is fitted with a locking device that, when properly operated, prevents the door from being readily opened by children under the age of 6 years.