



## Determination 2021/014

# Regarding compliance with the Building Act of an existing pool barrier at 542 Remuera Road, Auckland



Figure 1: The gate

### Summary

This determination considers the compliance of an existing pool barrier that incorporates brick columns and walls and sections of metal fencing, and hedges. The determination describes various pathways to establishing compliance for the purpose of section 162C of the Building Act 2004, and considers whether the pool barrier complies by any of those means. The determination also considers the status of an exemption granted under the Fencing of Swimming Pools Act 1987.

## 1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004 (“the Act”) made under due authorisation by me, Katie Gordon, National Manager Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.<sup>1</sup>
- 1.2 The parties to the determination are:
  - the owner of the property, Nuo Yan Management Limited (“the owner”), and
  - Auckland Council (“the authority”) carrying out its duties as a territorial authority or building consent authority, and who applied for the determination

<sup>1</sup> The Building Act and Building Code are available at [www.legislation.govt.nz](http://www.legislation.govt.nz). The Building Code is contained in Schedule 1 of the Building Regulations 1992. Information about the Building Act and Building Code is available at [www.building.govt.nz](http://www.building.govt.nz), as well as past determinations, compliance documents and guidance issued by the Ministry.

- 1.3 I have included J Koeman (“the tenant”), as a person with an interest in this determination. The tenant initially made an application for determination on this matter, but is not a party under section 176 of the Act.
- 1.4 The determination arises from a residential pool inspection<sup>2</sup> carried out by the authority in June 2019, which concluded an existing pool barrier; in particular the gate at the south end of the pool (“the gate”), the fences on either side of the gate (“the adjacent fencing”) and the wall at the southwest end of the pool (“the southwest wall”), does not comply with section 162C. The owner disputes that the barrier does not comply with section 162C.
- 1.5 The matter to be determined<sup>3</sup> is therefore whether at the time the application was made for this determination the gate, the adjacent fencing, and the southwest wall comply with section 162C. In deciding this matter, I must consider whether the existing pool barrier complies as a physical barrier that restricts access to the pool by unsupervised children under five years of age as required by section 162C.
- 1.6 Unless otherwise stated, references in this determination to sections are to sections of the Act, and references to clauses are to clauses of the Building Code.

### **Exclusions**

- 1.7 I have not considered any other parts of the barrier than those described in paragraph 1.3 above, and I have not considered any other aspects of the Act or Building Code beyond that required to decide on the matter to be determined.
- 1.8 I note that photos of the gate latching mechanism are included in the documentation provided by the parties. Submissions did not specifically raise the latching mechanism as an issue and for this reason it is not considered in detail in the determination. However, I note if a child were to be able to climb on the gate, consideration should be given to whether the latching mechanism could be operated and the gate “readily opened” (refer Clause F9.3.3(b)).

## **2. The existing pool barriers**

- 2.1 The existing barrier surrounding the pool is a mixture of metal fencing, brick columns, brick walls and hedges of various heights.

### **The gate and the adjacent fencing**

- 2.2 The pool is accessed through the gate at the south end of the pool (shown on the cover page of this determination). The opening section of the gate is approximately 800 mm wide with a height of approximately 2000 mm. An ornate crown valence caps the frame. The gate consists of vertical bars and three horizontal bars (refer figure 2). The gate has a lower section and an upper section. The horizontal rail between these sections is approximately 700 mm above the bottom rail, and the bottom rail is 100 mm above the ground level.
- 2.3 In the opening section of the gate, the spacing between the vertical bars is approximately 60 – 70 mm in the lower section and approximately 120 – 140 mm in the upper section. Some of the vertical bars of the lower section continue to the upper section, with approximately half of the bars ending in metal “spikes” which extend approximately 150 mm vertically. Metal scroll decorations surround the “spikes”. There is what appears like a small bollard, 250 mm high, on the outside of the gate

---

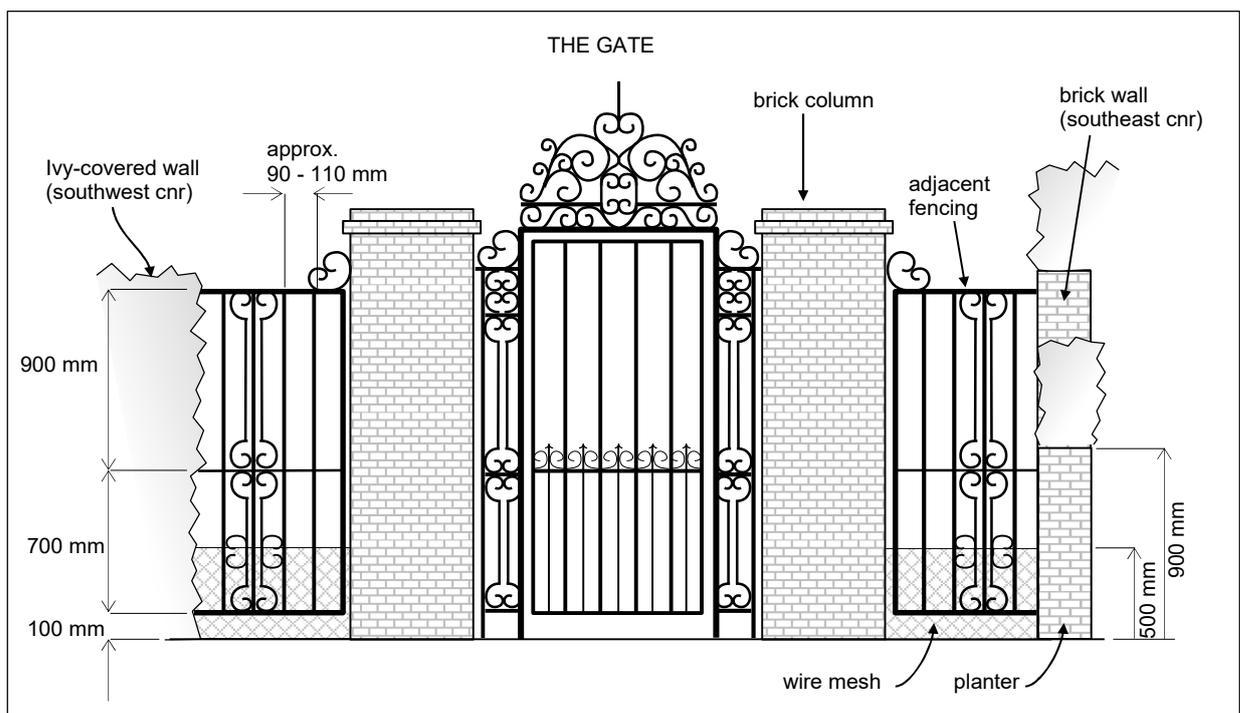
<sup>2</sup> Section 162D of the Act requires territorial authorities carry out inspections at least once every three years to ensure ongoing compliance of pool barriers to the extent required by section 162C.

<sup>3</sup> Under sections 177(1)(b) and 177(2)(d) of the Act

that the owner states is used to ‘prop the gate open when temporarily necessary’. The owner has not confirmed whether the bollard is movable or fixed, nor the distance of the bollard from the gate (if it is fixed).

- 2.4 The gate is bordered by two brick columns and sections of metal fence approximately 800 mm wide and 1700 mm high. These sections are in a similar style to the gate with the bottom and middle rails at the same heights. The top rail is approximately 900 mm above the middle rail, and the width between the vertical members of the gate is approximately 90 – 110 mm. Metal scroll decorations are located in the centre of the fences and on the top rail next to the brick columns. In some, but not all, of the photographs provided there is a panel of wire mesh in the bottom section, approximately 500 mm high. It is not clear from the information provided to me whether this mesh is on the pool-side or outside of the fence and whether it is currently or permanently affixed.
- 2.5 A high ivy-covered brick wall completes the fencing on the southwest corner of the barrier, and a brick wall completes the southeast corner (see figure 3). A lower section of brick wall containing some vegetation (“the planter”) is incorporated in the southeast wall; the planter is approximately 900 mm above the ground level.

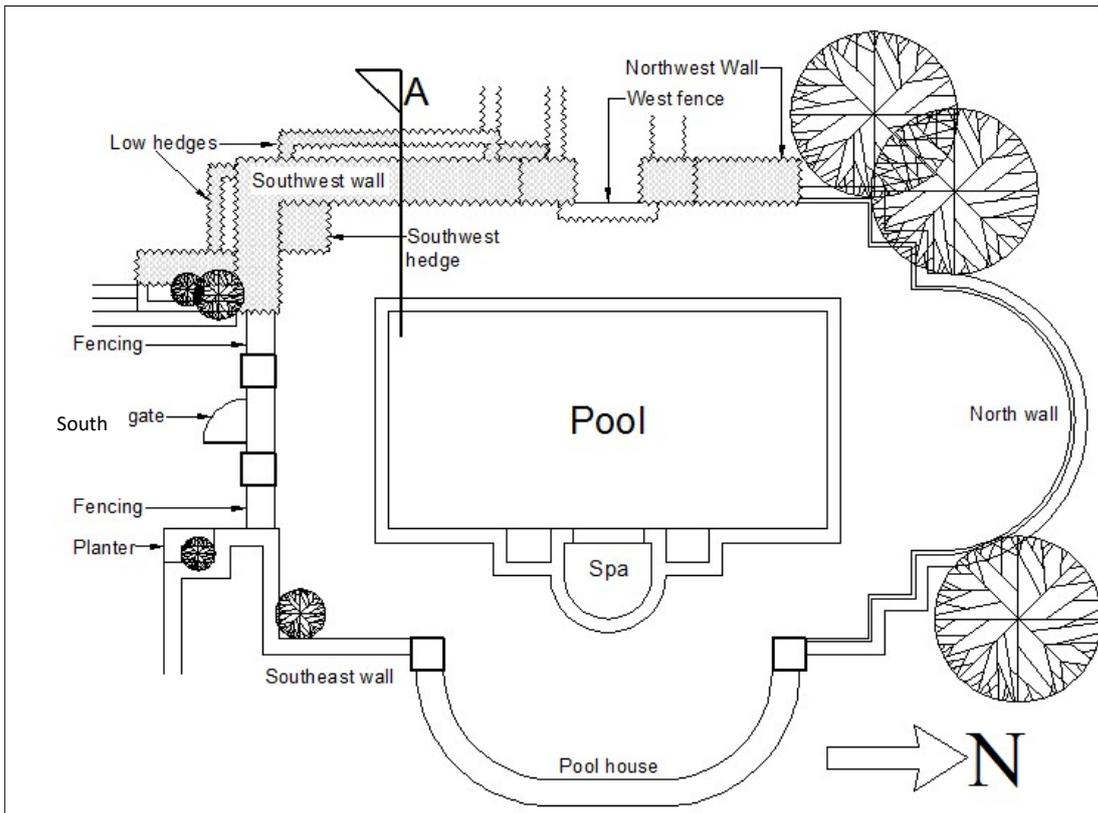
**Figure 2: Sketch of gate and adjacent sections of barrier (not to scale)**



### The southwest wall

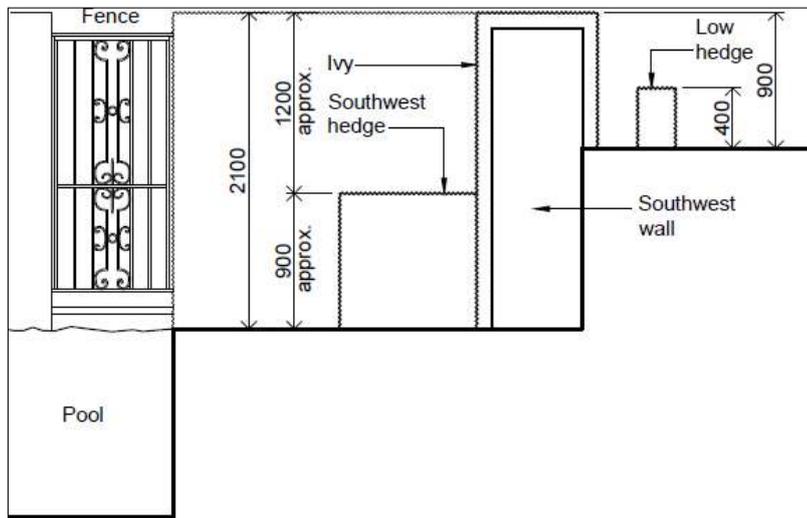
- 2.6 The southwest wall (refer Figure 3) is approximately 2100 mm above the level of the immediate pool area<sup>4</sup> and the non-pool side ranges in height between approximately 800 – 900 mm (refer Figure 4). At its highest point the southwest wall is approximately 800 mm wide. Covering the southwest wall is a dense ivy.
- 2.7 On the non-pool side of the southwest wall is a hedge approximately 400 mm high which spans most of the length of the southwest wall.

<sup>4</sup> The “immediate pool area” is defined in F9 as: 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.



**Figure 3: Indicative plan (not to scale)**

2.8 In the southwest corner on the pool side (i.e. in the immediate pool area) is a hedge approximately 900 mm high (“the southwest hedge”). It is roughly 1200 mm from the top of the southwest wall (refer Appendix for photos).



**Figure 4: Section A through the southwest wall (not to scale)**

### 3. Background

- 3.1 The pool, including the walls surrounding the pool, was constructed under a building permit issued on 29 January 1987.
- 3.2 The Fencing of Swimming Pools Act 1987 (“FOSPA”) came into force on 20 July 1987 and applied to all pools regardless of when the pool was constructed. FOSPA required all pool barriers to comply, on an ongoing basis, with Building Code Clause F4 *Safety from falling*.
- 3.3 On 18 March 2002 the authority carried out an inspection to ascertain whether the barrier surrounding the pool complied. On 21 March 2002 a meeting was held on site between the authority and a previous owner of the property. The site meeting record noted the barrier did not comply with FOSPA due to “climb points” and the “fence height”.
- 3.4 The site meeting record also noted the previous owner was “reluctant to improve the situation” and would apply for an exemption under section 6<sup>5</sup> of FOSPA.

### 3.5 FOSPA exemption

- 3.5.1 The previous owner applied for a special exemption under section 6 of FOSPA. On 29 July 2002 a committee concluded the surrounding pool barrier “would not significantly increase the danger to small children”.
- 3.5.2 On 9 September 2002 the authority advised the previous owner a swimming pool fencing exemption was granted on 16 August 2002. The exemption had several conditions that were required to be complied with:
- (1) The swimming pool gate is required to comply with (clauses 8-10) of the schedule to the 'Fencing of Swimming Pool Act 1987'
    - (a) It should be self closing and latching from a distance of 150mm
    - (b) The latch should be out of reach from children (1.5m)
  - (2) This exemption only applies to the [previous owner<sup>6</sup>, who was named in the exemption].
  - (3) ...

### 3.6 Subsequent FOSPA Inspections

- 3.6.1 Between 26 August 2002 and 30 October 2015 the authority carried out further FOSPA inspections, during which the authority identified several areas of non-compliance such as:
- potential climb points from the garden and a retaining wall over the barrier
  - climbable metal fence and a gate
  - low fencing.
- 3.6.2 An inspection record dated 30 October 2015 noted the gate, metal fence and the low wall had been assessed as “low risk areas” where a child could not safely gain access into the pool area. The record included a photograph showing fencing covered with plastic as previously requested by the authority. It also stated “[p]ool fencing complies as at today’s date (30 October 2015)”.

---

<sup>5</sup> Section 6 of FOSPA provided for discretionary exemptions to be granted by territorial authorities, where such an exemption would not significantly increase the danger to young children.

<sup>6</sup> I have not received information about the date the property was sold.

### 3.7 The 2017 amendments to the Act

- 3.7.1 On 1 January 2017 FOSPA was repealed and the Act was amended to incorporate a set of special provisions for residential pools (sections 162A to 162E, and savings and transitional provisions 450A and 450B). At the same time the relevant Building Code criteria in Clause F4 *Safety from falling* were revoked and a new Clause F9 *Means of restricting access to residential pools* was inserted.
- 3.7.2 Section 162C(1) requires residential pools to have physical barriers to restrict access to pools by unsupervised children under five years of age, and section 162C(2) sets out the means by which pool barriers 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.

### 3.8 The 2019 failed pool inspection

- 3.8.1 On 27 June 2019 the authority carried out a swimming pool inspection in accordance with section 162D. The inspection summary noted the “pool fencing inspection has failed” and gave the following reasons:
1. Pool fencing minimum 1.2m height above and away from (in an arc) ground level or any permanent projections ( Fail ) Please raise the low pool barrier to the correct height.
  2. Fencing horizontal rails and climbable features are at least 900mm apart (i.e barrier has 900mm no climb zone) ( Fail ) Gate and side panels to be covered to eliminate climb points
  3. Latch 1.5m above ground/permanent projection. Or only accessible by reaching at least 1.2m and over or through the gate ( Fail )  
By eliminating number 2 above will make [this] issue comply.
- 3.8.2 Photographs were attached to the inspection summary showing the areas the authority considered did not comply, which included the gate and adjacent fencing, and the southwest wall.
- 3.8.3 The Ministry received an application for determination on 18 November 2019.

## 4. The submissions

### 4.1 The owner

- 4.1.1 In its covering letter the owner submitted the following (in summary):
- The 2100 mm height of the southwest wall to the immediate pool area is a “daunting obstacle” to any child under five years old.
  - The characteristics of the southwest wall are comparable to the pool barrier on a property boundary provided for in Acceptable Solution F9/AS1<sup>7</sup>. The southwest wall is 300 mm higher than the 1800 mm minimum height requirement prescribed by F9/AS1 paragraph 2.2.1(a) with no climbing points anywhere on the inside of the wall. So the southwest wall exceeds the property boundary provisions in F9/AS1 and is therefore a suitable pool barrier.
  - The heights of the south gate (2500 mm), side columns (2300 mm) and the metal fences (1900 mm) provide an obstacle to young child.

<sup>7</sup> Acceptable Solution F9/AS1 for New Zealand Building Code Clause F9 Means of Restricting Access to Residential Pools.

- The ornate metalwork in the gate and adjacent fencing consists of upward spikes, and steeply curved non-horizontal accents which are extremely difficult to climb. There are no horizontal rails or handholds within the ornate metalwork.
- Multiple inspections have confirmed that the gate is a low risk area for a child to gain access to the pool.

4.1.2 The owner did not accept the conclusion reached in the draft determination and made a further submission (in summary):

- Ivy has since been removed from the inside of the wall in the southwest corner.
- Acrylic sheet has been added to the side panels and the gate.

4.1.3 I note for completeness that this determination considers the compliance of the gate, the adjacent fencing and southwest wall as it was at the time the application for this determination was made. It is for the authority to reassess the barrier and make a new decision on its compliance taking into account the changes that have been made since.

## 4.2 The authority

4.2.1 The authority did not provide a submission in response to the application for determination. I have taken the authority's 2019 inspection record as representing the authority's view on this matter.

4.2.2 The authority accepted the draft determination without further comment.

## 4.3 The tenant

4.3.1 The tenant did not make any submissions.

## 5. Discussion

### 5.1 Legislative requirements

5.1.1 The matter to be determined is whether the existing pool barrier complies with section 162C, specifically the gate, adjacent fencing, and the southwest wall. In deciding this matter, I must consider whether the pool barrier restricts access to the pool by unsupervised children under five years of age.

5.1.2 Under subsections 162A and 162B, the purpose of the special provisions for residential pools is to prevent drowning of, and injury to, young children under five years of age by restricting unsupervised access to residential pools with a maximum depth of water of 400 mm or more.

5.1.3 Section 162C(1) states 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 five years of age. Additionally, section 162C(2) states the means of restricting access to a residential pool 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).

5.1.4 The transitional and savings provision for residential pools under section 450A are applicable in this case. Section 450A(1) states:

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.

5.1.5 The savings provision under section 450B also applies because the pool was constructed before 1 January 2017:

- (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.

...

## 5.2 Pathways for achieving compliance for the purpose of section 162C

5.2.1 In the following paragraphs I discuss the four possible compliance pathways to achieve compliance with section 162C:

- compliance with the current Building Code clause F9 (section 162C(2)(a)).
- compliance with Clause F4 of the Building Code that was 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) (section 162C(2)(b)).
- compliance with clauses 1 to 10 of the Schedule of FOSPA as an Acceptable Solution (section 450A(1)).
- compliance with the Schedule of FOSPA, subject to any exemption under section 6 or clause 11 and any conditions of any such exemption (section 450B(2)).

5.2.2 I note the owner's pool was subject to an exemption under section 6 of FOSPA. However, one of the conditions of the exemption was that it only applied to a former owner. Therefore, section 450B(2) does not need to be considered in this case.

5.2.3 Furthermore, the pool was constructed in 1987 and not subject to a building consent, code compliance certificate, or certificate of acceptance (in relation to the means of restricting access to the pool). So, section 162C(2)(b) does not need to be considered in this case.

5.2.4 Therefore, there are two possible compliance pathways for complying with section 162C in this case:

- compliance with the current Building Code Clause F9 (section 162C(2)(a)), or

- compliance with clauses 1 to 10 of the Schedule of FOSPA as an Acceptable Solution (section 450A(1)).

### 5.3 Clause F9 and the Acceptable Solutions

5.3.1 The objective of Clause F9 is “to prevent injury or death to young children involving residential pools”. The relevant performance clauses are:

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

**F9.3.2** Barriers must either—

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

**F9.3.3** A barrier surrounding a *pool* must have no permanent objects or projections on the outside that could assist children in negotiating the barrier.

5.3.2 One way of achieving compliance with the Building Code is by way of an Acceptable Solution<sup>8</sup>.

5.3.3 The applicable Acceptable Solutions in this case are F9/AS1 and the Schedule of FOSPA. Both set out prescriptive design solutions for restricting the access of young children to a pool. F9/AS1 refers to a ‘barrier’ and the Schedule refers to a ‘fence’; in this determination I use the term ‘barrier’ unless I am describing specific parts of the barrier, such as the ‘metal fence’ or ‘brick wall’.

5.3.4 The relevant provisions of F9/AS1 and the Schedule that are applicable to the gate and adjacent fencing are outlined below:

#### **F9/AS1**

- 2.1.1 A pool barrier can be a fence but may also take other forms of construction...
- 2.1.2 Pool barriers not on a property boundary shall have a height of not less than 1200 mm from the finished floor or ground level outside the pool barrier.
- 2.1.3 ... Any rails, rods or wires forming a part of a pool barrier that are not themselves vertical shall be at least 900 mm apart vertically to restrict climbing. There shall be no openings in the pool barrier that a 100 mm diameter sphere could pass through.
- 2.1.6 There shall be no ground features or objects outside a pool barrier within 1200 mm of the top of the barrier that would assist a child in climbing.
- 2.1.7 Any projections or indentions on the outside face of a pool barrier shall not have a horizontal projection from the face of the pool barrier greater than 10 mm unless they are at least 900 mm apart vertically.

#### **The Schedule**

- 1(1) The fence shall extend-
  - (a) at least 1.2 metres above the ground on the outside of the fence;
  - (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.
- 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.

<sup>8</sup> Refer section 22(2) of the Act.

- 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.

5.3.5 In summarising the relevant applicable provisions of F9/AS1 and the Schedule, to achieve compliance with section 162C, the barrier shall have:

- a minimum height of 1200 mm from the finished floor or ground level outside the pool barrier
- no openings that a 100 mm diameter sphere could pass through
- any members that are not vertical and are accessible for use for climbing from the outside to be spaced at least 900 mm apart vertically
- no horizontal projections or indentions on the outside face of a pool barrier greater than 10 mm unless they are spaced at least 900 mm apart vertically.
- no permanent ground features or objects outside a pool barrier within 1200 mm of the top of the barrier that would assist a child in climbing.

5.3.6 However, satisfying an Acceptable Solution is one way, but not the only way, of achieving compliance with the Building Code. The Building Code is performance-based and allows for the use of design solutions other than the prescriptive requirements detailed in an Acceptable Solution – these are commonly referred to as an ‘alternative solution’. An alternative solution is assessed directly against the relevant performance criteria of the Building Code.

5.3.7 In the following paragraphs I assess the compliance of the barrier both by way of the Acceptable Solutions and as an alternative solution.

## 5.4 Compliance of the gate and adjacent fencing

5.4.1 There is no doubt the gate is a substantial height at 2000 mm. However, the small sections of fence between the opening section of the gate and the brick columns, and the adjacent fencing (1700 mm high) on the other side of the brick columns have horizontal members spaced closer than 900 mm apart vertically<sup>9</sup> and gaps between vertical members that would provide a footing for a young child climbing the barrier. I note also some of the gaps may be greater than 100 mm. I have insufficient information about the bollard to assess whether it impacts on the compliance of the barrier, but the planter in the southeast corner is a permanent feature within 1200 mm of the top of the brick wall that could assist a child in climbing.

5.4.2 Therefore, the gate and adjacent fencing and the sections of brick wall at the southeast corner do not satisfy either the Schedule or Acceptable Solution F9/AS1.

<sup>9</sup> The information I have received does not confirm whether the wire mesh installed to the adjacent sections of metal fencing has been installed on the outside of the pool fence to prevent the lowest horizontal member being used as a foothold. Regardless, the top of the scroll detail would also provide a footing that is accessible from outside the barrier and is closer than 900 mm to the next horizontal member.

- 5.4.3 Despite the presence of horizontal rails and climbable features, which are less than 900 mm apart, the owner contends the gate and adjacent fencing provide a “daunting” and “extremely difficult” obstacle for young children to climb.
- 5.4.4 A study<sup>10</sup> on child safety barriers provides some useful insight into children’s climbing techniques and the effectiveness of different designs of barriers. The study noted children are curious and climbing is a natural behaviour for them.
- 5.4.5 The study also noted the total height of a barrier is not a sufficient specification for a child safety barrier. Hand or footholds on a barrier help children to climb and only a small area is required to use as a foothold. Designs that make it possible to grip with hands or feet will make climbing easier and make it possible to climb to higher heights.
- 5.4.6 The underlying principle behind the criteria in the Acceptable Solutions is that, in order to restrict access to an immediate pool area, the pool barrier should not have features that provide hand and footholds that would help a young child negotiate the barrier. I am of the view that same principle must apply for an alternative solution to achieve compliance with Clause F9.
- 5.4.7 Children only require a small area to use as a foot or handhold. I am of the view the climbable features, which include the horizontal rails and the metal scroll decorations in both the sections between the opening part of the gate and the brick columns, and the adjacent fencing on the other side of the brick columns (as described in paragraph 5.4.1) provide hand and footholds that would assist young children in negotiating the barrier. The barrier also does not comply with regard to the planter in the southeast corner, which is a permanent object on the outside of the barrier that could assist children in negotiating the barrier.

### **Conclusion**

- 5.4.8 I am of the view the height of the gate and adjacent fencing is not a sufficient mitigating feature to compensate for the climbable features. I consider there is a lower level of protection than is required by Clause F9.3.1 of the Building Code for a physical barrier that restricts access to the pool by unsupervised children under five years of age.

## **5.5 Compliance of the southwest wall**

- 5.5.1 I will first assess the southwest wall against the Acceptable Solutions. F9/AS1 paragraph 2.1.2 notes:

**2.1.2** Pool barriers not on a property boundary shall have a height of not less than 1200 mm from the finished floor or ground level outside the pool barrier.

And clause 1(1) of the Schedule of FOSPA states:

- 1(1) The fence shall extend-
- (a) at least 1.2 metres above the ground on the outside of the fence;

- 5.5.2 The height of the southwest wall on the outside is less than 1200 mm. Therefore, the southwest wall does not meet the criteria in F9/AS1 or the Schedule of FOSPA as an Acceptable Solution. I will now consider whether it complies as an alternative solution.
- 5.5.3 The owner is of the view the southwest wall is comparable to a pool barrier on a property boundary in F9/AS1, in that if a child was able to reach the top of the

<sup>10</sup> [Child safety barriers](#) - Study commissioned by: ANEC (European Association for Consumer Representation in Standardisation).

barrier from outside the pool the distance to the ground on the pool side would prevent them from climbing or dropping down into the immediate pool area.

5.5.4 The relevant paragraph in F9/AS1 that concerns barriers on a property boundary is:

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

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

(Refer paragraph 5.3.4 for F9/AS1 paragraphs 2.1.3 and 2.1.7)

I note here the comment on page 11 of F9/AS1 states the following:

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

5.5.5 The height of the southwest wall on the pool side is 2100 mm, which would satisfy F9/AS1 paragraph 2.2.1(a) if it were a boundary fence. Additionally, the southwest wall has no openings that a 100 mm diameter sphere could pass through, and is located further than 1000 mm horizontally from the water's edge. Therefore, the requirements of F9/AS1 paragraph 2.2.1(b) and (c) are met.

5.5.6 However, at the time the application for this determination was made, dense ivy covered the southwest wall and there was an approximately 900 mm high hedge in the southwest corner that would present a less daunting pathway into the immediate pool area from the top of the southwest wall. I am of the view the ivy and hedge could assist a young child to climb or clamber down into the immediate pool area in a similar manner to a rail, rod or wire that is not vertical or a horizontal projection or indentation (neither permitted under F9/AS1 paragraphs 2.1.3 and 2.1.7).

5.5.7 The specific criteria for pool barriers on property boundaries in paragraph 2.2 have been included in the Acceptable Solution to address the fact that owners of residential pools cannot control what occurs on an adjacent property. So for example, an owner cannot prevent the owner of the neighbouring property from changing the ground level next to the barrier (thereby changing the barrier's height), or building or placing structures or objects close to the barrier (thereby making it easier for children to climb to the top of the barrier).

5.5.8 Where pool barriers are constructed entirely within a pool owner's property, the owner can prevent these things happening, and in this way ensure the ongoing compliance of the barrier.

### **Conclusion**

5.5.9 I am of the view, taking into account the features that would assist a young child negotiating the barrier on the poolside, the height of the southwest wall on the pool side is not a sufficient mitigating feature to compensate for the lower height of the barrier from the outside. Therefore, the southwest wall does not comply with Clause F9.3.1 as a physical barrier that restricts access to the pool by unsupervised children under five years of age.

## **5.6 The northwest and the north wall**

5.6.1 While I have not been asked to consider the northwest wall or the north wall, based on the information provided to me, there are features of those sections of the barrier that I consider may also provide a means of access to the pool by unsupervised young children. I leave this for the parties to resolve in due course.

## **6. The decision**

6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that at the time the application was made for this determination the gate, the adjacent fencing, and the southwest wall did not comply with section 162C.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 16 July 2021.

Katie Gordon  
**National Manager, Determinations**

## Appendix: photographs of the barrier



Photo 1: Panel adjacent to gate



Photo 2: Southwest corner - outside



**Photo 3: Southwest corner – pool side**



**Photo 4: West side showing low hedges and plastic panel on west gate**