



Determination 2021/018

Regarding the compliance of a pool with Building Code Clause F4 Safety from falling at 100 Awatere Ave, Hamilton



Figure 1: Photograph with south end of pool in foreground

Summary

This determination considers the compliance of a particular aspect of a pool with respect to Building Code Clause F4 Safety from falling. The determination also considers whether the authority was correct to refuse to issue a code compliance certificate for the work and whether a waiver or modification of Clause F4.3.1 should be granted.

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.¹
- 1.2 The parties to the determination are:
 - the owners T and A Mackie (“the owners”) acting through a designer (“the designer”)
 - Hamilton City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 This determination arises from the decision of the authority to refuse to issue a code compliance certificate for an above-ground residential swimming pool. The authority is of the view that the pool as constructed does not comply with the requirements of Building Code Clause F4 Safety from falling², specifically with regard to an area at

¹ The Building Act and Building Code (Schedule 1 of the Building Regulations 1992) are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents and guidance issued by the Ministry, is available at www.building.govt.nz.

² 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.

the south end of pool that is more than one metre high from the ground and has no barrier to reduce the likelihood of an accidental fall off it. The designer believes that it is appropriate to issue a waiver or modification of Clause F4.3.1 in relation to this part of the pool.

- 1.4 The matter to be determined³ is whether the authority was correct in refusing to issue a code compliance certificate for the pool as constructed on the grounds that it does not comply with Clause F4 Safety from falling and a waiver or modification should not be granted. In determining this matter, I must consider whether the south end of the pool complies with Clause F4.3.1. If I conclude it does not comply, I must also consider whether I should grant a waiver or modification of Clause F4.3.1 under section 188(3)(a).
- 1.5 The matter to be determined is limited to that described above. I have not considered the compliance of the pool with Clause F4 other than with respect to this area at the south end of the pool because this is the only feature of the building work for which the application was made. I have not considered the compliance of the remainder of the building work with Clause F9 Means of restricting access to residential pools, or with any other clauses of the Building Code.
- 1.6 In making my decision, I have considered the submissions of the parties. The relevant provisions of the Act and Building Code are appended.

2. The building work

- 2.1 The swimming pool is in-ground at its northern end and is 1200 mm high above ground at its southern end. The walls of the pool form part of the physical barrier to the pool along most of its east and west sides, and at the south end.
- 2.2 The width of the capping on the pool walls (“the coping”) is generally 340 mm, with the exception of the south end of the pool which houses a pool cover and is 1200 mm wide (see Figure 1). For simplicity I refer to this wider section at the south end of the pool as “the platform”. It is this feature that is the area of dispute between the parties in relation to safety from falling.
- 2.3 The building consent that was granted for the pool (No. 2018/38563) included a 900 mm high glass barrier around the platform at the south end (refer to Figure 2). The barrier was not installed during construction.
- 2.4 There is a low retaining wall 1250 mm from the pool at the south west corner, and bark gardens around three sides (east, west and south) – see Figures 2 and 3. A small concrete strip bordering a grass area runs parallel to the west side of the pool at a distance of 900 mm from the pool wall.

³ Under sections 177(1)(b) and 177(2)(d) of the Act.

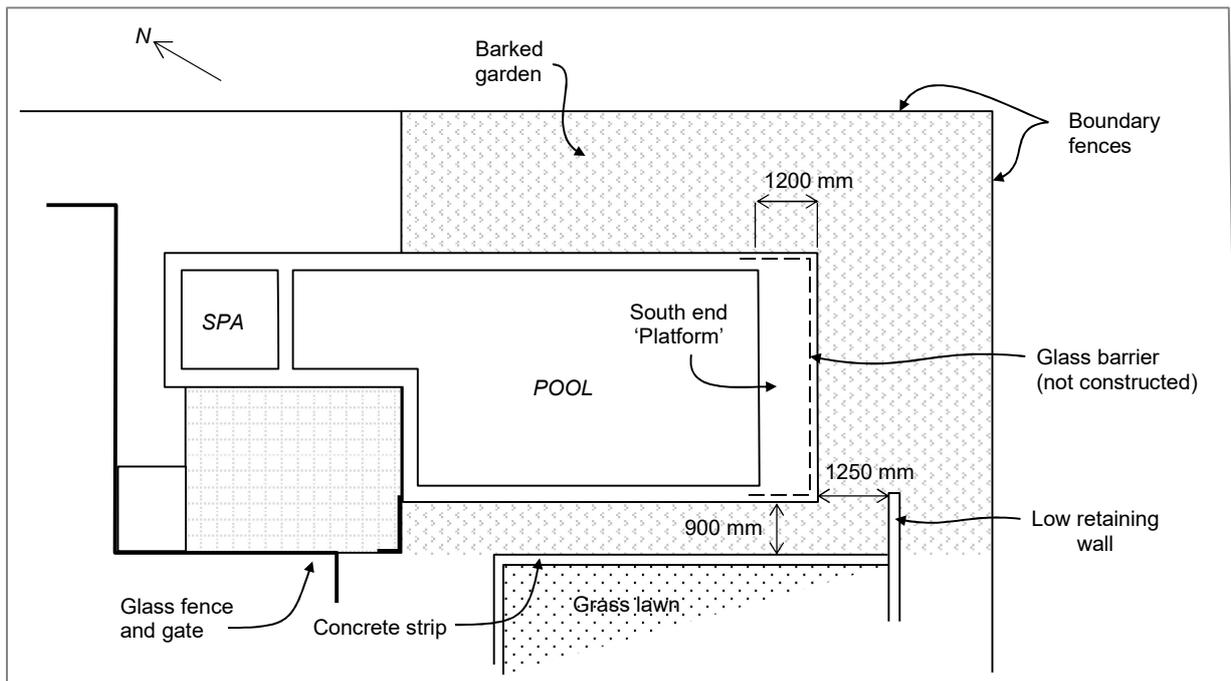


Figure 2: Sketch of pool area (Not to scale)



Figure 3: Southwest corner

3. Background

- 3.1 The building consent for construction of the pool was issued on 23 January 2019. The approved consent plans included a glass fence at the south end of the pool (“the glass barrier”).
- 3.2 The swimming pool was constructed without the glass barrier. The designer applied for a minor variation to remove it from the building consent, on the basis that the platform without the glass barrier “does not present any danger to swimmers and does not compromise the intent of the Building Act...”. The designer noted that there

was ‘soft planting’ adjacent and referred to Determination 2010/097⁴ as comparable to this case.

- 3.3 The parties discussed the proposal to remove the barrier. The designer reiterated their view that there is inconsistency between the requirements under clause F4 for a barrier where the platform is more than 1000 mm high and the use of a 1200 mm high pool wall as an acceptable means of restricting access by young children to the pool to comply with clause F9. The designer also expressed the view that due to their relative sizes the risk of an accidental fall from access along the coping was greater than the risk to a person on the platform.
- 3.4 The authority remained of the opinion that a safety barrier was necessary at the south end of the pool and, based on the information presented, it would not issue a modification or waiver to clause F4. The authority also hold the view that there is a higher chance of someone frequenting the platform for sunbathing and the like because of its width, and so there is a greater risk of falling from this part of the pool when compared with the coping.
- 3.5 On 7 November 2019 the designer requested a review of the decision not to grant a modification to Clause F4. On 11 November 2019 the authority, after an internal review, reiterated its earlier decision that a safety barrier was required at the south end in order for the pool to comply with Clause F4 and the requested modification was not granted.
- 3.6 The Ministry received an application for a determination on 11 December 2019.

4. The submissions

4.1 The owners

- 4.1.1 The owners provided a submission with the determination application as follows (in summary):
- The designer was reluctant to add a barrier to the south end of the pool noting that it “would look out of context with the rest of the design”. The barrier had been added to the plans provided for the building consent application to avoid delay in the project.
 - Querying why pool walls can be used as a barrier to comply with Clause F9 if they then fail to comply with Clause F4.3.1.
 - Noting that the designer considered the situation to be similar to Determination 2010/097, which allowed for a modification of Clause F4.3.1 to permit a 1200 mm high above-ground pool wall without a safety barrier. One of the factors the determination considered, which is similar to this case, was planting of the area next to the pool wall.

4.2 The authority’s submission

- 4.2.1 The authority did not make a submission in response to the application for determination. However, its views were contained in the correspondence between the parties dated 30 October to 21 November 2019, as outlined in paragraph 3.4.

⁴ Determination 2010/097 Regarding safety barriers to a swimming pool and spa pool (22 October 2010).

4.2.2 In response to a request for information from the Ministry the authority provided copies of the following documents:

- building consent documents
- correspondence between the parties
- processing checklist
- revised site plan.

4.3 Draft determination

4.3.1 A draft of this determination was issued to the parties for comment.

4.3.2 The authority accepted the draft without comment.

4.3.3 The designer responded on behalf of the owner on 1 September 2020. The designer expressed concerns about the regulations that apply to pools generally and in particular what the designer considers is a contradiction between clause F4 and F9. The Acceptable Solution for clause F9 (F9/AS1) provides for the use of pool walls 1200 mm high as a way to satisfy the requirement for a barrier to restrict access by young children into the pool, and yet clause F4 requires a barrier where there is a change in level of 1000 mm. The designer also referred to Determination 2010/014⁵ which the Ministry had concluded was compliant. (I note that determination considered the restriction of access by young children and not safety from falling, but also that the adjacent terrace to the pool had a change in level less than 1000 mm high and the coping of the pool was angled rather than flat.)

5. Discussion

5.1 Compliance with Clause F4

5.1.1 The objective and functional requirements of Clause F4 are provided in Clause F4.1 and F4.2 respectively:

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

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

5.1.2 The objective and functional requirements of Clause F4 reflect the first purpose of the Act⁶, which is to ensure that ‘people who use buildings can do so safely and without endangering their health’ (see Appendix A1.1).

5.1.3 In this case the relevant performance requirement is Clause F4.3.1 and the discussion is limited to this clause only insofar as it applies to the platform at the south end of the pool:

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

5.1.4 There is no dispute that people could fall 1000 mm or more from the platform, which is 1200 mm high. As constructed without a barrier the platform does not comply with Clause F4.3.1.

⁵ Determination 2010/014 Safety barriers surrounding a swimming pool area (25 February 2010).

⁶ Section 3 of the Act.

5.2 Waiver or modification of Clause F4.3.1

- 5.2.1 The owners have requested a waiver or modification of Clause F4.3.1 so that the barrier does not have to be installed. The power to grant a waiver or modification recognises that the Building Code cannot cover all possible situations, and provides the flexibility to address unusual sets of circumstances.
- 5.2.2 It is not uncommon that homeowners wish to avoid installing features around their pool, either because they perceive it may negatively impact on aesthetics or could increase building costs or for some other reason. There is a balancing act inherent in the Building Code between amenity and ensuring the safety of all occupants. Sacrifices are required when a feature that increases risk is incorporated into a building's design, or as in this case into the design of the pool.
- 5.2.3 The designer has referenced Determinations 2010/097 and 2010/014 to support their view that clause F4.3.1 should be waived or modified.
- 5.2.4 It is not clear on what basis the designer considers Determination 2010/014 is comparable to this case. That determination considered the restriction of access by young children and not safety from falling. In addition, the adjacent terrace to the pool had a change in level less than 1000 mm high and the coping of the pool was angled rather than flat. I am of the view the facts of that case are not comparable to this one.
- 5.2.5 I note also that I am not bound by decisions reached in previous determinations. However, in the following paragraphs I have summarised the factors considered in granting a modification in Determination 2010/097 and compared those with the features of the pool considered in this determination.
- 5.2.6 In deciding whether a waiver or modification of Clause F4.3.1 was appropriate, Determination 2010/097 considered specific features of the pool and its immediate surrounds. The pool coping in that case was flat and ranged in width from 270 mm to 450 mm. The determination noted the coping was easily able to be walked along or sat upon and access could be gained either from an adjacent terrace or, with the water level close to the top, from within the pool. There were concrete steps immediately adjacent the pool and it was constructed on sloping ground with the height of the pool wall above ground ranging from 1200 mm on one side to 1740 mm on the other.
- 5.2.7 The owners in that case put forward a proposal to limit access to the top of the wall. Taking into account the proposal, the determination modified clause F4.3.1 to the effect that "provided the other aspects are complied with, a barrier is only required under Clause F4.3.1 where there is a fall of more than 1200 mm from the top of the swimming pool wall." The other aspects referred to were as follows:
- The ground level below the pool was to be built up to be an even 1200 mm all the way around.
 - A 1000 mm width around the pool not to be concreted or paved, and maintained as grass or garden provided it does not contain items that could compromise the safety of the 1200 mm wall in restricting the access of children under six years of age⁷.
 - Fencing was required along the length of the pool wall where a person could fall from the pool wall onto the concrete steps below.

⁷ At that time the performance clause concerned the restriction of access to pools by young children under six years of age (Clause F4.3.3); this was amended when Clause F9 was inserted into the Building Code on 1 January 2017 and that age changed to five years.

- Additional fencing was required so people could not walk from a terrace onto the pool wall.
- 5.2.8 Every determination is considered on a case-by-case basis, and whether a waiver or modification may be appropriate in each case is based on the circumstances of that case. I do not consider Determination 2010/097 is directly comparable to this case.
- 5.2.9 The features of the pool considered in this determination include:
- Adjacent ground around the south end of the pool is bark and “soft planting”.
 - A concrete edge within 900 mm of the pool on the west side of the pool (refer Figure 3).
 - A low retaining wall 1250 mm from the southwest corner of the pool (refer Figure 3).
 - The platform is easily accessed from the coping, the coping is not designed or constructed in way that would deter people from walking along it.
 - There is no fencing or other feature to prevent people walking along the coping from the north end of the pool.
 - The 1200 mm width of the platform would allow people to occupy that space for an extended period of time.
- 5.2.10 I also note that the importance of maintaining the area around the pool as a garden with “soft planting” and to not concrete or pave it may not be apparent to future owners.
- 5.2.11 In considering waivers and modifications, previous determinations have taken the approach that a waiver or modification may be granted when “compelling reasons ... exist that support the view that a waiver is appropriate”⁸, and it is reasonable to do so in the circumstances⁹.
- 5.2.12 Determination 2015/010¹⁰ described factors to consider and balance when deciding whether it is reasonable to grant the waiver or modification, and I have used the methodology established in that and other previous determinations to assess whether it is reasonable to grant a waiver or modification in this case:

Factors	Comment
The extent and possible consequences of the non-compliance with the specific performance clause.	<p>The platform without a barrier does not comply with Clause F4.3.1.</p> <p>The design of the platform means that people are likely to access and occupy the platform, and so there is a likelihood of an accidental fall over 1000 mm.</p> <p>The potential fall height is 1200 mm and there is a likelihood of injury caused by an accidental fall. The likelihood of injury is not limited to contact with hard features or surfaces.</p>
The availability of other reasonably practicable solutions	The consented design included a barrier that would result in the platform complying with Clause F4.3.1.

⁸ Determination 2012/049: Regarding the refusal to issue a code compliance certificate for a 16 year-old house with monolithic cladding (12 July 2012).

⁹ Determination 2006/085 Refusal of a code compliance certificate for a building with a plywood cladding system at a house (4 October 2006)

¹⁰ Determination 2015/010 Regarding the authority’s refusal to grant a modification of Clause C3.4(a) of the Building Code in respect of materials used for internal surface linings at a new school hall (31 March 2015).

Factors	Comment
that would result in the building work fully complying with the Building Code.	The wish to remove that barrier appears to relate solely to aesthetics, which is not a relevant factor to be considered when deciding whether to grant a waiver or modification.
Any special and unique circumstances of the building work subject to the waiver or modification	There are no special or unique circumstances of this building work that would suggest a waiver or modification is required. It is reasonable to expect that new building work be fully compliant in this situation.
The waiver or modification complying with the relevant functional requirement of the specific clause and meeting the objective of the Building Code.	A waiver or modification in these circumstances would not be consistent with the objective and functional clauses, “to safeguard people from injury caused by falling” and for buildings to be constructed “to reduce the likelihood of accidental fall.”
The extent to which the waiver or modification will still be consistent with the purposes and principles of the Act.	A waiver or modification of Clause F4.3.1 in this case would not be consistent with the purposes and principles of the Act. These place particular emphasis on the safety of people who use buildings and the role that household units play in the lives of the people who use them.

- 5.2.13 I do not consider that there are compelling reasons for a waiver or modification of Clause F4.3.1 to be granted with respect to the lack of a barrier at the south end of the pool.
- 5.2.14 The designer has submitted the view that there is a contradiction in being able to use a 1200 mm high pool wall to satisfy Clause F9¹¹ when Clause F4 requires a barrier to safeguard people from injury caused by a fall from heights over 1000 mm.
- 5.2.15 Clause F9 and Clause F4 have separate requirements and compliance with one clause does not outweigh the need to comply with the other. Where the height of the pool wall is used as the means of achieving compliance with Clause F9 it is possible to also achieve compliance with Clause F4 without a barrier if consideration is given to features of the pool, such as the construction of the coping and the maximum water level in the pool, to reduce the likelihood of an accidental fall from the pool’s edge.

¹¹ Clause F9.3.1 requires pools to have physical barriers that restrict access to the pool or immediate pool area by unsupervised young children. One means of complying with Clause F9 is by means of the Acceptable Solution F9/AS1, and paragraph 2.3.1 of that solution provides for a 1200 mm high pool wall (subject to meeting certain criteria) as a compliant barrier.

6. The decision

- 6.1 In accordance with section 188 of the Building Act 2004 I determine that the authority was correct to refuse to issue the code compliance certificate on the basis that the platform does not comply with Clause F4.3.1 of the Building Code, and I confirm that decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 14 September 2021.

Katie Gordon
National Manager Determinations

Appendix A

A.1 Relevant provisions of the Building Act 2004

A1.1 The purpose and principles of the Act are provided in section 3:

3 Purposes

This Act has the following purposes:

- (a) to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—
 - (i) people who use buildings can do so safely and without endangering their health; and
 - (ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them...

B.1 The relevant requirements of the Building Code

B1.1 The relevant parts of Clause F4 include:

OBJECTIVE

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

FUNCTIONAL REQUIREMENT

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

PERFORMANCE

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

Limits on application

Performance F4.3.1 shall not apply where such a barrier would be incompatible with the intended use of an area... or to buildings providing pedestrian access in remote locations where the route served presents similar natural hazards.