

Determination 2025/036

Whether a pool barrier complies with clause F9 of the Building Code and whether to grant a waiver of section 162C(1) Building Act 2004

179 Mill Flat Road, Riverhead, Auckland

Summary

This determination considers whether a residential pool with an adjacent set of steps complies with clause F9 of the Building Code to restrict access of young children to the pool. The determination also considers whether granting a waiver under section 188(3A) of the Act would significantly increase the danger to children under five years of age.



Figure 1: The pool and steps

In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”) and references to “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

The Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (eg Acceptable Solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Peta Hird, for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment (“the Ministry”).¹
- 1.2. The parties to the determination are:
 - 1.2.1. B and W Cooper, the owners of the property (“the owners”), who applied for this determination.
 - 1.2.2. Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. The matter being determined, in terms of section 177(1)(a) of the Act, is whether the owners’ pool barrier with an adjacent set of steps adjacent complies with clause F9 of the Building Code – Means of Restricting Access to Residential Pool for the purpose of section 162C of the Act.
- 1.4. I also consider whether to grant a waiver of either section 162C(1) or 162C(2) of the Act. In doing so, as required by section 188(3A) of the Act, I must consider whether a waiver would significantly increase the danger to children under five years of age.
- 1.5. The authority’s decision to grant a minor variation and to issue the code compliance certificate are outside the scope of this determination.

2. The background and building work

- 2.1. On 19 October 2020, the authority issued a building consent (BCO 10314570) that included the installation of an above-ground swimming pool enclosed within a 1.2m high pool fence.
- 2.2. The pool is approximately 5.94m long and 2.3m wide. The height from the ground level to the top of the pool is approximately 1270mm.²

¹ The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

² Based on a photograph provided by the authority that indicates the edge of the pool (without the cover) is approximately 1270mm above ground level.

- 2.3. The pool is equipped with a cover that is opened and closed manually and has fasteners to 'lock' the cover in place when it is closed.
- 2.4. On 30 July 2021, during construction, the authority approved a minor variation to remove the pool fence from the building consent. The minor variation approved the side walls of the pool as the physical barrier restricting access to the pool, with the authority noting at the time that the pool “also has a lockable cover”. The authority subsequently issued a code compliance certificate.
- 2.5. On 05 December 2024, the authority conducted an inspection of the pool barrier under section 162D.³ This inspection was ‘failed’ due to a set of steps being adjacent to the pool wall (see Figure 1). There was no fence or other physical barriers around the pool or the steps.
- 2.6. In reaching the view the barrier was not compliant with Clause F9, the authority, in its inspection records, referred to Acceptable Solution F9/AS1 *Residential Pool Barriers*,⁴ stating that the:
- Steps are too close to the top of the pool and should have a pool compliant fence and gate around this accessway so that the steps can remain where they are [rather than] rely upon the human element of manually moving them away after each use.
- 2.7. The steps provide access into and out of the pool. They are not bolted or permanently affixed to the ground and appear to be constructed with a metal frame and timber treads.
- 2.8. The steps are approximately 750mm high and 1.2m wide, and approximately 520mm from the top of the pool.⁵
- 2.9. In response to the authority's findings, the owners expressed the view that compliance should have been assessed against the criteria of Acceptable Solution F9/AS2 *Covers for small heated pools*⁶. The authority did not agree and the owners subsequently applied for this determination.

³ Section 162D requires residential pools to be inspected at least once every three years to ensure the pool barriers continue to comply.

⁴ F9/AS1 Residential Pool Barriers (first edition, effective from 27 April 2017) is an Acceptable Solution for Clause F9 of the Building Code. Acceptable Solutions are one way (but not the only way) to establish compliance with the Building Code.

⁵ Based on the approximate height of the pool wall at 1270mm and a photograph showing the top step approximately 520mm below that.

⁶ F9/AS2 *Covers for small heated pools* (first edition, effective from 27 April 2017) is an Acceptable Solution specifically for small heated pools (like spa pools) with a surface area of 5m² or less. It allows for the use of a compliant safety cover that restricts access when the pool is not in use. The cover must meet standards for strength, secure fastening, and child safety signage.

3. Submissions

The owners

3.1. The owners submit that:

- 3.1.1. they live alone with no young children. The property is an isolated 2.5-hectare block in a rural area with no immediate neighbours. There is a security gate, dogs, and cameras to the front and forest, which all prevent unauthorised entry.
- 3.1.2. the pool cover panels weigh approximately 15kg each. They require two adults to remove them and can withstand the weight of an adult person standing on top of them when closed
- 3.1.3. they are prepared to remove the steps “and replace them with a non-permanent alternative or turn them on their side at all times when the pool is not in use”.

3.2. The owners consider that above-ground pools of this height should be treated differently to in-ground pools because the height of the pool wall is above what is required for a complying fence.

3.3. They also submitted there is “more likelihood of an unsupervised young child falling into one of the open waterways [nearby] than entering our isolated security gated secured fully fenced property undetected by cameras getting past our dogs and removing the covers from our pool”. The owners referred to examples such as a culvert, stream and “unobstructed unfenced publicly visible and accessible dams and waterways”.

The authority

3.4. The authority maintains the view that the pool barrier does not comply with section 162C(1), and submits:

- 3.4.1. the pool barrier ‘failed’ at inspection because there is a “requirement for the entry point to a pool to be fenced with a compliant barrier”
- 3.4.2. the owner’s reliance on F9/AS2 (using a lockable cover as an alternative – see paragraph 2.9) is not relevant as it only applies to small heated pools that have a surface water area of less than 5m². The owners’ pool is in excess of that size and therefore requires the entry point to be fenced.
- 3.4.3. removing a set of steps is not considered sufficient to restrict access to unsupervised under 5 years old.

4. Discussion

- 4.1. The matter to determine, in terms of section 177(1)(a), is whether the pool barrier with the adjacent set of steps complies with clause F9 of the Building Code for the purposes of section 162C.
- 4.2. The purpose of the special provisions of the Act for residential pools is to prevent drowning of, and injury to, young children by restricting unsupervised access to pools.⁷ To achieve this, section 162C(1) requires every residential pool to have a means of restricting access by unsupervised children under five years of age and section 162C(4) imposes an ongoing duty on owners to comply with this requirement.
- 4.3. Section 162C(2) of the Act specifies that this means of restricting access must comply with the Building Code, and the relevant clause of the Building Code in this instance is clause F9.

Whether the pool is a “small heated pool”

- 4.4. The owners submitted that if the pool barrier with the steps adjacent is not compliant, applying section 162C(3) the pool “should be treated as a small heated pool and only needs access restricted while not in use”. This is because their pool is equipped with a pool cover and the owners state the cover is “constantly placed over the pool when not in use due to large power consumption for heating if not done so”.
- 4.5. Section 162C(3) provides that the means of restricting access for small heated pools need only restrict access when the pool is not in use. This is reflected in Clause F9.3.2(b) of the Building Code, which for small heated pools allows the use of a cover as the physical barrier to restrict access.
- 4.6. ‘Small heated pool’ is defined in section 7 of the Act as “a heated pool (such as a spa pool or a hot tub) that– (a) has a water surface area of 5m² or less; and (b) is designed for therapeutic or recreational use”.
- 4.7. The surface area of the pool is over 13.m², so it does not fall within the definition of a ‘small heated pool’ for the purpose of the Act.
- 4.8. It follows that the provisions of section 162C(3) and clause F9.3.2(b) of the Building Code are not relevant and do not apply.

⁷ Refer sections 162A to 162E.

Compliance assessment

4.9. The relevant performance criteria in clause F9 states:

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
- (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.

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.

4.10. In this case the physical walls of the pool itself (which exceed 1.2 metres in height measured from the ground level to the pool lip) are intended to serve as the barrier to the pool.

4.11. The steps adjacent to the pool are used to gain access into and out of the pool. However, with the steps adjacent to the pool wall, they provide a means for young children to negotiate the barrier and gain access into the pool. The walls of the pool then no longer act as a barrier to restrict unsupervised access to the pool by young children.

4.12. With regard to clause F9.3.3, the owners contend that the steps are not permanently affixed to the ground, in that they are not bolted down and consequently are ‘readily removable’ and not a ‘permanent object or projection’.

4.13. For the pool wall to serve the function of restricting access to the pool, it relies on the owners to remove the steps any time the pool is unsupervised, even if momentarily.

4.14. This reliance on human behaviour was considered in *Rowe v Marlborough District Council*⁸ (“*Rowe*”), which concerned a pool cover used as the barrier to restrict access to a residential pool. The court in *Rowe* confirmed the Ministry’s view in the appealed determination, ie that the Act does not regulate people’s behaviour but is

⁸ *Rowe and others v Marlborough District Court* [2022] NZDC 18505 at [71]

concerned with the performance requirements of building elements to ensure that a person can use a building safely, and not necessarily that they will.

- 4.15. In this case, the reliance on human behaviour means the pool wall as the barrier to restrict access fails to meet the performance criteria of clause F9.3.1, because it is only effective if the steps are removed. This differs from a compliant barrier with, for example, a self-closing gate, which is compliant without requiring user action.
- 4.16. The owners also suggested they could simply turn the steps on their side. I consider this no different to the reliance on removing the steps. I am also of the view the steps on their side would still offer hand and foot holds for a child to negotiate the barrier and gain access into the pool. Therefore, the pool wall with the adjacent steps, even if turned on their side, fails to provide a compliant physical barrier for clause F9.3.1.

A waiver

- 4.17. The owners have requested a waiver from the requirement to have a compliant barrier. While the Act allows for a waiver to be granted under section 188, it sets a high threshold. I can only grant a waiver of sections 162C(1) or 162C(2) if I am “satisfied that the waiver or modification **would not significantly increase danger to children under five years of age**” (my emphasis).
- 4.18. In applying this test, I must consider the Act’s purpose of ensuring that people who use buildings can do so safely and without endangering their health.⁹ I must also consider the principles to be applied in exercising the power to grant such a waiver – in particular the role that household units play in the lives of the people who use them, and the importance of the Building Code as it relates to household units and the need to ensure that household units comply with the Building Code.¹⁰
- 4.19. Previous determinations concluded that a waiver is an exception, not an alternative, and is only justified when there are compelling reasons specific to the case. My assessment will therefore focus on whether such compelling reasons exist in this case to waive the requirements of the Building Code and the Act to have a physical barrier that restricts access by a child under five years of age.
- 4.20. In deciding whether to grant a waiver, I have considered the extent and consequence of non-compliance, any special and unique circumstances or mitigating features, and the availability of reasonably practicable solutions to achieve compliance.
- 4.21. To waive the requirement to have a compliant barrier, would mean accepting the increased risk of injury or death of an unsupervised young child. The purpose of the special provisions for residential pools and the objective of clause F9 would not be

⁹ Section 3(a)(i).

¹⁰ Section 4(2)(a).

met. In the absence of a physical barrier that restricts access by a child under five years of age, it would significantly increase the risk of injury or death of unsupervised young children.

- 4.22. In requesting a waiver, the owners have highlighted a number of factors they believe constitute special or unique circumstances pertinent to their situation, including that:
- 4.22.1. children do not live at the property and the property is remote and not readily accessible
 - 4.22.2. constructing a gate and fence barrier around the pool is impractical and unaffordable, and would “render the pool inaccessible and largely unusable”
 - 4.22.3. to construct a fence retrospectively is “not possible due to the very narrow concreted space between the pool and the sloped garden area”
 - 4.22.4. installing a barrier around the pool would interfere with the aesthetic and functional aspects of their landscaping design.
- 4.23. I do not accept that constructing a fence, whether that is around the entire pool or around an area where one gains access to the pool, is impracticable. The approved building consent plans included construction of a fence around the pool, which indicates that at least one solution is feasible and practicable. Further, while there will inevitably be costs associated with the installation of a compliant barrier at this later stage, and it may impact the owners’ aesthetic preferences, this is not sufficient justification for increasing the danger to young children.
- 4.24. Regarding the likelihood of children being present on the property, previous determinations¹¹ have considered circumstances where current owners do not have children under the age of five, and properties in remote locations. I concur with the views expressed in those determinations.
- 4.25. It is a reasonable expectation children will visit or reside at a residential property at some point during the building's lifespan. Therefore, although the present owners may not have young children themselves, nor anticipate frequent visits from families with young children, this does not, in my opinion, constitute a sufficiently compelling reason to warrant the granting of a waiver of the requirement to have a physical barrier restricting access to the pool.
- 4.26. As noted earlier, the pool barrier with the steps adjacent to the pool and the reliance on human behaviour to remove the steps does not meet the performance requirements of the Building Code.

¹¹ Determination 2024/033 *The decision to issue a notice to fix for an existing pool without a physical barrier and the consideration of a waiver of the requirement for a barrier* (4 July 2024), Determination 2007/087 *Use of a cover instead of a fence for a swimming pool* (15 August 2007), and Determination 2018/052 *Whether an automatic pool cover complies with Building Code Clause F9* (26 October 2018).

- 4.27. To grant a waiver for the steps to remain without a barrier that prevents access to the steps themselves would limit the extent to which the barrier (the pool wall) safeguards or prevents unsupervised young children from gaining access to the pool, and I consider this would significantly increase the risk to them of injury or death.
- 4.28. In my opinion there are no compelling reasons to justify granting a waiver that would compromise the objective of clause F9 of the Building Code and a primary purpose of the Act regarding safety of the users of buildings.
- 4.29. I am not satisfied that granting a waiver of the requirement to have a compliant pool barrier would not significantly increase the danger to children under five years of age, and accordingly I do not grant a waiver of sections 162C(1) or (2).

Comment on waterways

- 4.30. In their submissions, the owners drew comparisons between the risk posed by their pool and the greater likelihood of an unsupervised young child falling into other open waterways in their neighbourhood, such as lakes, rivers, streams, culverts, or dams.
- 4.31. The Act is concerned with the performance standards and requirements of the design and construction of building work, which includes residential pools. The Act does not extend to or regulate safety of people around other water features.
- 4.32. While I acknowledge the owners' concerns regarding other potential water-related hazards in their vicinity, the existence of such waterways or water features does not diminish or alter the statutory requirements and obligations that apply to their pool.

5. Decision

- 5.1. In accordance with section 188 of the Building Act 2004, I determine that the pool barrier with the adjacent steps does not comply with clause F9 of the Building Code.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 30 July 2025.

Peta Hird

Lead Determinations Specialist