

# Determination 2025/037

## Refusal to issue a code compliance certificate and compliance of a pool, deck and pool barrier

**124 Tiffin Hill Road, RD2, Parkvale, Carterton**

### Summary

This determination considers an authority's decision to refuse to issue a code compliance certificate for the construction of a new house with a pool. The determination considers compliance of the as-built construction of a swim / spa pool with an adjoining timber deck and glass safety barrier in relation to safety from falling (clause F4) and restricting access to the pool by unsupervised young children (clause F9).



**Figure 1: View looking northwest towards the pool, timber deck and glass barrier<sup>1</sup>**

<sup>1</sup> Photograph reproduced from a letter from the owners to the authority (26 May 2025).

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](http://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](http://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”).<sup>2</sup>
- 1.2. The parties to the determination are:
  - 1.2.1. S and C Cornelius, the owners of the property who applied for this determination (“the owners”)
  - 1.2.2. Carterton District Council, carrying out its duties as a building consent authority or territorial authority (“the authority”)
  - 1.2.3. M Davidge, the licenced building practitioner concerned with the relevant building work (“the builder”).
- 1.3. The matter to be determined, under section 177(1)(b) and (2)(d), is the authority’s decision to refuse to issue a code compliance certificate for building consent no. 230052. The issue in dispute between the parties relates to the construction of a proprietary residential swim / spa pool (“the pool”) with an adjoining timber deck and glass safety barrier (collectively referred to as “the building work”). See figure 1.
- 1.4. In deciding this matter, I consider the authority’s decision with regard to the compliance of the building work with Clauses F4 *Safety from falling* and F9 *Restricting access to residential pools* and whether there were grounds for the refusal.
- 1.5. The owners and the authority agree the building work to construct the pool, the adjoining timber deck and the glass safety barrier, does not comply with the building consent, which is a requirement of section 94(1)(a) for the purpose of issuing a code compliance certificate.<sup>3</sup> Therefore, I have only considered the narrow issue in dispute between the parties concerning compliance, as described above.

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<sup>2</sup> The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

<sup>3</sup> For example, the extent of the construction of the as-built deck and barrier is not as detailed in the building consent plans.

## 2. The building work

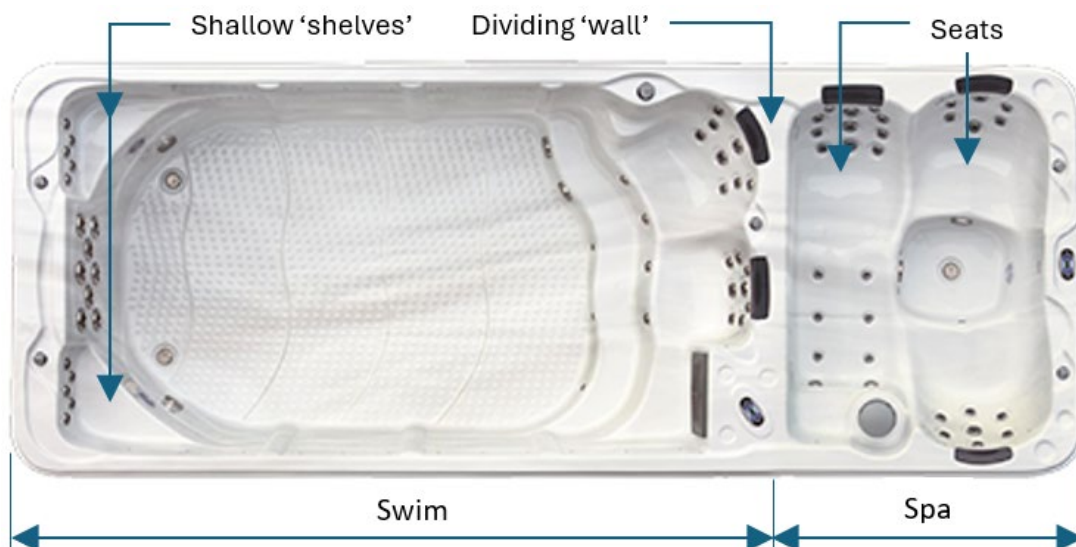
- 2.1. The building work is the construction of the pool with an adjoining timber deck and a 1.2m high glass safety barrier. The pool is located towards the northwest end of the house.
- 2.2. The pool is approximately 5.8m long, 2.2m wide, and 1.3m high (1.4m high with the 100mm thick lockable covers in position).<sup>4</sup> The pool sits approximately 310mm above the surrounding deck and is supported on a 300mm thick reinforced concrete foundation. The land currently slopes down away from the foundation, but the owners intend to build this up to be level with the foundation.
- 2.3. The pool consists of an acrylic insulated shell over a galvanized steel frame. It includes six seats, and two shallow 'shelves' to one end. The pool allows for varying depths of water across the spa and swim areas (both greater than 400mm deep). The upper perimeter edges and dividing 'wall' between the swim and spa areas vary in width and profile and include areas of flat surfaces.<sup>5</sup> See figures 2 and 4.
- 2.4. Towards the southwest end of the pool are two small diameter pipes (see figure 3) that pass through the external shell at approximately 150mm high at about 600mm or less from the end of the pool.<sup>6</sup> Vertical sections of the pipes are located under the deck.
- 2.5. The 1010mm high deck wraps around three sides of the pool, leaving the northwest side of the pool open along the approximate 5.2m length. The glass barrier fixed to the deck encloses an area around the pool on three sides and overhangs the deck approximately 340mm at the southwest corner of the pool and 280mm at the northeast, with a gap of 140mm between the barrier and the pool (see figure 4).

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<sup>4</sup> The size of the pool in this case means it does not meet the definition of a 'small heated pool' in section 7 and so Building Code clauses F9.3.2(b) and F9.3.5 which provide for the use of covers as a physical barrier to restrict access do not apply.

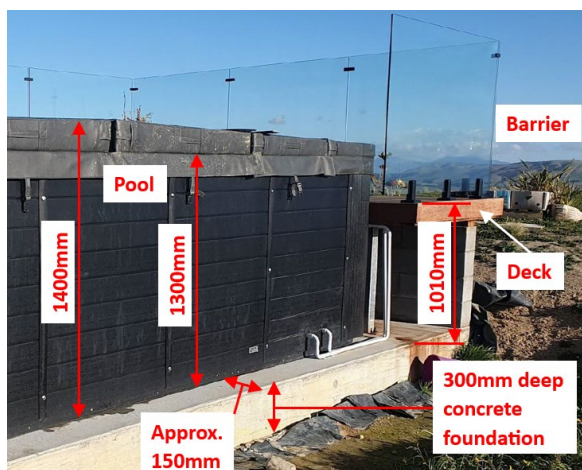
<sup>5</sup> I have not been provided with information that confirms the range of widths of the perimeter edges and dividing 'wall'. I have relied on photographs provided by the owners and information available on the pool supplier's website (<https://happykiwishop.co.nz/> accessed on 15 July 2025).

<sup>6</sup> Based on a visual assessment of figure 3.

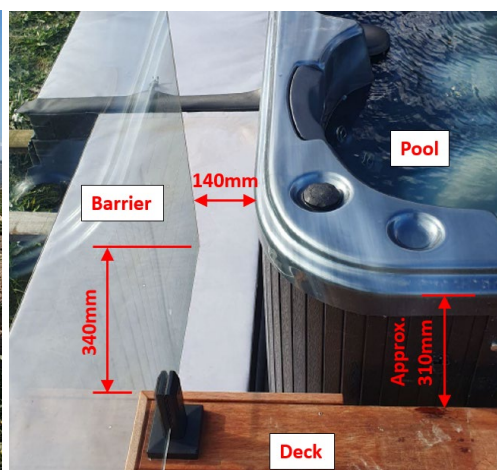


**Figure 2: Plan view of the pool (not to scale)<sup>7</sup>**

- 2.6. The approximate dimensions of the as-built construction of the pool, deck and barrier are shown in figures 3 and 4 below.<sup>8</sup>



**Figure 3: View looking south**



**Figure 4: View of southwest corner**

### 3. Background

- 3.1. On 30 March 2023, the owners applied for a building consent to construct a '[three] bedroom new dwelling with open plan living and attached garage...'. The plans included a timber deck around two sides of the pool with the pool to be installed by the owners. The proposed pool barrier was a combination of the walls of the pool and a glass barrier fixed to the deck. The application for building consent stated

<sup>7</sup> Reproduced in part from a picture available on the supplier's website (<https://happykiwishop.co.nz/> accessed on 15 July 2025).

<sup>8</sup> The as-built dimensions have been provided by the owners. Where conflicting or a range of dimensions have been provided, I have relied on the average measurements.

means of compliance with the Building Code for clause F4 was Acceptable Solution F4/AS1<sup>9</sup>, and Acceptable Solution F9/AS1<sup>10</sup> for clause F9.

- 3.2. On 26 May 2023, the authority granted and issued the building consent 230052.<sup>11</sup>
- 3.3. Between September 2023 and May 2025, the authority conducted several site inspections while the building work was being carried out. It is not clear when the pool, deck and barrier were constructed. However, on 19 May 2025 a 'final' building inspection failed due to non-compliances associated with F4.3.1, with the authority noting "There is a fall height of over 1m from the side of the Pool/Spa" and "Fence...Gaps less [than] 100mm".
- 3.4. Between May and June 2025, the owners, the authority and the builder exchanged correspondence about the as-built construction of the pool, deck and barrier.
- 3.5. On 17 June 2025, the owner applied to the authority for a code compliance certificate.
- 3.6. On 18 June 2025, the authority sent a written notice to the owners refusing to issue the code compliance certificate.<sup>12</sup> The notice stated:

... in [the authority's] view the pool edge provides a fall height over 1m. No barrier is provided to protect users from that fall. In addition there are gaps in the pools barriers that may allow an unsupervised child to gain access to the pool.

In regards to the pool edge [the authority] considers this is in breach of Building Code clause F4 Safety from falling. In particular as it relates to performance requirement F4.3.1...

In addition, [the authority] consider that there are gaps in the pool fencing that may allow a child under the age of 5 to access the pool unsupervised. This is in [b]reach of Code clause F9, in particular F9.3.1...

Acceptable solution F9/[AS]1 provides that there shall be no openings in the pool barrier that a 100mm diameter sphere could pass through.

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<sup>9</sup> Acceptable Solution F4/AS1 Safety from falling (third edition, amendment 2, effective from 1 January 2017). Acceptable Solutions are one way (but not the only way) to establish compliance with the Building Code.

<sup>10</sup> Acceptable Solution F9/AS1 Residential pool barriers (first edition, unamended, effective from 27 April 2017).

<sup>11</sup> The owners made submissions concerning the reliance on the building consent, but the authority's decision to issue the building consent is outside the scope of this determination.

<sup>12</sup> Section 95A(a).

## 4. Submissions

### The owners

- 4.1. The owners explained the reasons for changes to the deck and barrier. The owners believe the as-built construction of the pool and its barrier “meets the intent of Clause F9 ... and Clause F4...” and ensures that access is restricted and fall prevention is maintained.
- 4.2. Regarding the restriction of access to the pool by young children, the owners submit (in summary):
  - 4.2.1. The pool area is a supervised safe space where children only gain access through adult supervision.
  - 4.2.2. Because the height of the pool is greater than 1200mm, no fencing is required along the open side.
  - 4.2.3. “No child could gain a foothold to squeeze up” in the 140mm space between the deck barrier and the pool.
  - 4.2.4. The pool has lockable lids that are secured when the pool is not in use. The lids are placed on the ground to the northwest side of the pool when the pool is in use
- 4.3. Concerning safety from falling, the owners submit (in summary):
  - 4.3.1. The design of the pool edge precludes any possibility of climbing or unintended use. The edge of the pool “is not able to be sat on, pulled up on or stood up on”.
  - 4.3.2. “No child could fall” from the areas where the barrier extends out from the deck.
  - 4.3.3. The internal water level is maintained at 140mm below the top of the pool.
  - 4.3.4. With the pool lids on the ground along the open side of the pool the fall height is reduced to 940mm.

### The authority

- 4.4. With regard to clause F9, the authority confirmed that it considered the pool barrier did not comply with the performance clause F9.3.1 and noted that the authority “will always seek a level of safety for children to the full extent provided for in the Acceptable Solution as it relates to the [relevant] code clause”.
- 4.5. The authority submitted it accepts “that the Building Code being performance based does not provide explicit dimensions in relation to any gaps around or associated with a pool barrier. In this case when measuring or assessing the level of



safety in so far as it relates to the gaps we have relied on section [2.1.3 of F9/AS1]”.<sup>13</sup>

## The builder

- 4.6. The builder did not make a submission but provided copies of documents associated with the building consent and the pool.

## 5. Discussion

- 5.1. The matter to be determined is the authority’s decision to refuse to issue a code compliance certificate for building consent no. 230052.

### Legislation

- 5.2. Section 94 provides an authority must issue a code compliance certificate if it is satisfied on reasonable grounds that the building work complies with the building consent. The obligation in section 94, in combination with the scheme formed by sections 17 and 49<sup>14</sup>, has been considered in the High Court and ‘is to ensure compliance with the building consent issued *so as* to achieve compliance with the Building Code’.<sup>15</sup>
- 5.3. Section 188(1) of the Act provides a determination can confirm, reverse or modify an authority’s decision relating to a code compliance certificate. Previous determinations<sup>16</sup> have established a process where the first step is to consider whether the building work concerned was completed in accordance with the building consent. If the building work, or some elements of the building work, does not comply with the building consent then the second step is to consider whether it nonetheless complies with the Building Code.
- 5.4. There is no dispute that the building work to construct the deck and the barrier differs from the plans approved in the building consent. The dispute between the parties is whether the as-built pool and its barrier comply with clauses F4 and F9, and the determination considers only this aspect of the building work with regard to the authority’s decision to refuse to issue the code compliance certificate.

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<sup>13</sup> The submission referred to paragraph 2.2 in F9/AS1. However, because 2.2 concerns barriers on property boundaries, I have assumed the authority was meaning paragraph 2.1.3 which states for barriers surrounding the immediate pool area, ‘There shall be no openings in the pool barrier that a 100 mm diameter sphere could pass through’.

<sup>14</sup> Section 17 provides that all building work must comply with the Building Code to the extent required by the Act. Section 49 requires a building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the Building Code would be met if the building work is completed in accordance with the plans and specifications that accompanied the application.

<sup>15</sup> Refer *Body Corporate 366567 v Auckland Council* [2024] NZHC 32 at [92 - 94].

<sup>16</sup> For example, Determination 2021/008 *Regarding the authority’s decision to issue a code compliance certificate for a new dwelling* (dated 4 May 2021) at paragraph 6.1.2.

## Compliance

### Clause F4 *Safety from falling*

5.5. The objective of clause F4 ‘is to safeguard people from injury caused by falling’, and the functional requirement is ‘buildings shall be constructed to reduce the likelihood of accidental fall’.<sup>17</sup>

5.6. For this determination the relevant performance clauses are F4.3.1 and F4.3.4:

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

**F4.3.4:** Barriers shall:

(a) be continuous and extend for the full extent of the hazard’

...

5.7. At issue is the change of level from the pool edge to the ground along the northwest side of the pool, where the fall height is greater than 1m<sup>18</sup> and no barrier has been constructed along approximately 5.2m.

5.8. The owners propose to lay the covers on the ground along the northwest side of the pool when the pool is being used, thus reducing the fall height to less than 1m. However, this requires human intervention or management practices of the owners or occupiers; it is not associated with the construction of a building (being the pool and deck).

5.9. Reliance on management practices has been considered by the Courts in *Palmerston North City Council v Brian Green Properties (1971) Limited*<sup>19</sup> and *Rowe v Marlborough District Council (“Rowe”)*.<sup>20</sup> Put simply, the scheme of the Act and the Building Code is concerned with how a building is designed and constructed to achieve its functional requirements and performance criteria. It is not measured against the likelihood of human error or how persons who use a building will act. As a result, management practices are not a means to achieve compliance.

5.10. Therefore, the proposal to use pool covers on the ground to reduce the fall height to 1 metre or less is not a relevant consideration in determining compliance of the pool with clause F4.

5.11. In considering the ‘likelihood of accidental fall’, the functional requirement is to reduce that likelihood, not eliminate the occurrence of all falls. The term “likely” has been considered by the courts to mean that ‘what is alleged must be “a reasonable

<sup>17</sup> Clauses F4.1 and F4.2 respectively.

<sup>18</sup> I note the fall height would be the same if the landscaping is raised to be level with the top of the concrete foundation as the owners intend.

<sup>19</sup> *Palmerston North City Council v Brian Green Properties (1971) Limited* [2020] NZDC 1828, [57] and [58].

<sup>20</sup> *Rowe v Marlborough District Council* [2022] NZDC 18505, [36], [68] – [72].



consequence” or “could well happen””<sup>21</sup> or ‘that having regard to the circumstances of the case it could well happen’.<sup>22</sup>

5.12. Regarding the ‘likelihood of accidental fall’ from the open pool edge, I have taken into consideration, that:

5.12.1. the top edge of the pool is above the level of the deck, requiring people to step over the lip to get in and out of the pool or to sit on the edge of the pool or the deck and swivel

5.12.2. the pool edge has variable flat or slightly undulating surfaces and these, in addition to the dividing wall (see figures 2 and 4), are in my opinion wide enough in some places for a person to perch, sit, or stand

5.12.3. it is reasonable to expect that a person getting into or out of the pool will step on the pre-formed seats and ‘shallow shelves’ in the pool.

5.13. When the pool covers are in place the fall height is increased. The covers themselves provide a flat surface, and while I have no information to confirm whether the lids are designed to carry the weight of someone sitting or walking on them, it is reasonable to assume they have sufficient rigidity and strength where there is support from below, such as at the corners and edges, and the ‘dividing wall’ between the spa and swim areas.

5.14. Further, the deck is also more than 1m in height and there are 140mm wide gaps between the glass barrier and the pool at either end. While a person may not fall through the 140mm wide gap, it is wide enough to allow a person’s foot or lower limb to pass through and is at the end of the barrier where a fall may not be arrested.

5.15. The barrier is not continuous for approximately 5.2m along the northwest side of the pool in the area where, for the reasons outlined above, there is a likelihood of accidental fall from the at the change in level.

5.16. I am of the view the as-built construction does not satisfy the requirements of clauses F4.3.1 and F4.3.4 where the fall height is 1m or more to the ground below the pool edge along the northwest side and the deck where the glass barrier ends.

#### ***Clause F9 Means of restricting access to residential pools***

5.17. The objective of clause F9 ‘is to prevent injury or death to young children involving residential pools’, and the functional requirement is ‘residential pools with a maximum depth of 400mm 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’.<sup>23</sup>

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<sup>21</sup> *Auckland City Council v Weldon Properties Ltd* [1996] DCR 635.

<sup>22</sup> *Rotorua District Council v Rua Developments Ltd* [1999] NP 1327/97.

<sup>23</sup> Clauses F9.1 and F9.2 respectively.

5.18. The relevant performance clauses in this case are F9.3.1, F9.3.2 and F9.3.3:

**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<sup>[24]</sup> the pool (and may enclose the whole or part of the immediate pool area); ...

**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. ...

5.19. The covers, when extend over the edges of the pool and down the outside face, surround the pool when they are in place. However, the use of covers for the purpose of compliance with F9 was rejected by the court in *Rowe* for the reasons discussed above in relation to management practices.<sup>25</sup>

5.20. The glass barrier and the pool wall form the physical barrier to the pool. These two elements surround the majority of the pool, with the exception being at either end of the pool where there is a small section between the pool and the glass barrier. At these two points there is a discontinuation of the physical barrier to the pool, and I consider this does not comply with clause F9.3.2(a).

5.21. In addition, I am of the view that, in light of the combined as-built vertical and horizontal distances involved at either end of the pool, the deck being approximately 1010mm high and accessible from the northwest side of the pool would assist a child under 5 years of age to negotiate the pool barrier formed by the pool wall. In this regard I consider the pool barrier does not comply with clause F9.3.1 or F9.3.3.

5.22. There are also two permanent pipes near the southwest corner that intersect the pool wall. The pipes are approximately 150mm in height above the top surface of the concrete foundation (refer to figure 3) and appear to be sufficiently close to the edge of the deck that they could provide a step up or toehold for a young child.

5.23. The pipes are small in diameter, and I have insufficient information to determine whether they would, either individually or together, be of sufficient rigidity and strength that they would assist a young child in negotiating the barrier. For that reason, I make no finding on the compliance of the pool barrier with clause F9.3.3 with regard to the pipes.

5.24. The owners have advised that when the pool covers are removed, they are put on the ground along the northwest side of the pool. This further reduces the height to the deck and the pool from this area. The temporary storage of the pool lids is a

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<sup>24</sup> See *Rowe v Marlborough District Council* [2022] NZDC 18505, [59], [60] and [75], which involved a pool cover that sat on top of the water.

<sup>25</sup> Ibid [36], [68] – [72].

management practice (discussed above) and so I have not considered this in making my decision on compliance. However, I urge the owners to consider other options for the temporary storage of the pool lids where the effectiveness of the barrier is not impacted should the pool be unsupervised for even a short time.

- 5.25. In conclusion, the physical barrier to the pool does not comply with clause F9 in that it does not surround the pool and does not restrict unsupervised access by a child under five years of age to the immediate pool area or the pool.

## **6. Conclusion**

- 6.1. Notwithstanding the building work has not been completed in accordance with the building consent 230052 (refer to paragraph 1.5), I conclude the as-built construction of the pool, barrier and deck does not comply with clauses F4 and F9 for the reasons described above. Therefore, there were grounds for the authority to refuse to issue the code compliance certificate.

## **7. Decision**

- 7.1. In accordance with section 188 of the Building Act 2004, the authority's decision to refuse to issue the code compliance certificate for building consent no. 230052 is confirmed.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 6 August 2025.

**Peta Hird**

**Lead Determinations Specialist**