

Determination 2026/037

An authority's decision to issue a notice to fix in relation to the height of part of a pool barrier on a property boundary

313 Riversdale Road, Riversdale Beach, Masterton

Summary

This determination concerns a notice to fix issued in respect of an existing pool barrier for a contravention of section 162C of the Building Act because of its height. The part of the barrier in dispute is located on the boundary of the property. The determination considers the requirements of Building Code Clause F9 *Means of restricting access to residential pools* and the form and content of the notice to fix.



Figure 1: The part of the pool barrier along the southeast boundary¹

¹ Image reproduced from a photograph provided to the Ministry by the owners on 15 July 2026.

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”).²
- 1.2. The parties to the determination are:
 - 1.2.1. C de Groot, and Independent Trust Company (2007) Limited, the owners of the property and recipients of the notice to fix, and the applicants for this determination (“the owners”)
 - 1.2.2. Masterton District Council, carrying out its duties as a territorial authority or building consent authority (“the authority”).
- 1.3. The matter to be determined, under section 177(1)(b) and (3)(e), is the authority’s decision to issue notice to fix SW1159-26-01 dated 20 March 2026 (“the notice”) for a contravention of section 162C, in respect of the item relating to the height of part of a swimming pool barrier on the southeast boundary of the owners’ property.
- 1.4. In determining the matter I will consider, in relation to this part of the pool barrier, the performance criteria of Clause F9 *Means of restricting access to residential pools*, as well as the particulars stated in the notice.
- 1.5. The determination does not consider the part of the pool barrier on the northeast boundary, any of the other items specified in the notice or the authority’s decisions to issue the building consent or code compliance certificate in respect of construction of the pool and pool barrier.

2. Building work and background

- 2.1. In July 2021, the owners obtained a building consent for “Installation of inground swimming pool” which included a barrier to restrict access. The pool and barrier were subsequently constructed, and a code compliance certificate was issued by the authority in April 2023.

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

- 2.2. The part of the barrier considered in this determination is on the southeast boundary of the owners' property. It is a double-sided timber fence constructed with flush-butt palings (see Figure 1).
- 2.3. The barrier is 1800mm high on the outside (ie the neighbour's side) and 1500mm high on the pool side³ for a length of approximately 14.5m.⁴
- 2.4. On 4 March 2026, the pool barrier was inspected by the authority.⁵ The 'Pool Inspection Notice' of the same date notes the outcome as "Fail", and states: "The boundary fence is less than 1800mm high (1500mm) when measured from the ground level on the pool side". The authority sent this inspection record to the owners on 20 March 2026.

The notice

- 2.5. Also on 20 March 2026, the authority issued the notice to the owners. The relevant parts of the 'Particulars of contravention or non-compliance' section of the notice states:

On Wednesday, 4 March 2026 a warranted officer visited the above listed property and found the pool barrier was non-compliant. The item(s) of non-compliance include:

...

- New Zealand Building Code Clause F9/AS1^[6] 2.2.1(a) requires a pool barrier located on the property boundary to be no less than 1800mm high measured from the ground level on the pool side of the fence. The barrier currently measures 1500mm high, as shown in Figure 2 and Figure 3.

...

This is a breach of **Section 162C** of the Building Act 2004.

To remedy the contravention or non-compliance you must: Fully remediate the non-compliance item(s) listed above

This notice must be complied with by: 15/05/2026

- 2.6. The 'further particulars' section of the notice states:

The Ministry of Business, Innovation and Employment (MBIE) has further guidance around pool barrier legislation which can be found here: ...

Before undertaking the remedial work, please discuss the intended solution with [the authority] for guidance on whether this satisfies the requirements.

³ The parties have said that this part of the barrier is 1500mm high on the pool side. However, a photograph in the authority's pool inspection notice (dated 4 March 2026) of a tape measure appears to show the height as 1470mm at the point of the barrier photographed.

⁴ The barrier extends for a further 5m at a height of 1800mm on the pool side.

⁵ Section 162D requires inspections of residential pools at least once every three years to ensure ongoing compliance of pool barriers to the extent required by section 162C.

⁶ Acceptable Solution F9/AS1 *Residential Pool Barriers* (first edition, effective 27 April 2017).

You must contact [the authority] on completion of the required work. Due to the nature of the non-compliance, [the authority] will be required to reinspect the pool barrier in person to confirm remediation has occurred.

If you have been advised to empty or choose to empty an inground pool this is at your own risk. Consult with a professional and follow proper precautions to avoid structural damage and safety hazards

As per the requirements of the Building Act 2004, enforced by the Ministry of Business Innovation and Employment (MBIE), if you do not comply with this notice, you commit an offence under **Section 168(1AA)** of the Building Act 2004 and may be liable to a fine of up to \$20,000 (in the case of an individual) or \$60,000 (in the case of a body corporate).

- 2.7. The owners entered discussions with the authority regarding the notice, and on 22 April 2026 the authority wrote to the owners, stating:

... Under NZBC Clause F9/AS1 2.2.1(a), where a pool barrier is located on a property boundary, it must be not less than 1800mm high when measured from the ground level on the pool side.

As this is a prescribed requirement of the Acceptable Solution, [the authority] does not have discretion to vary or waive this measurement, and we are therefore required to enforce the provision as written. ...

- 2.8. The parties exchanged further correspondence but were unable to resolve the matter, and the owners subsequently applied for this determination.

3. Submissions

- 3.1. The owners submit (in summary):

3.1.1. The pool was built three and a half years ago; “The drawings were done and after the pool and fence were finished the inspector from the [authority] came over to check it all out. Everything was signed off ...”

3.1.2. “... so we were very surprised when 3.5 years later the pool fence failed the inspection. The pool boundary fence wasn’t measured from the inside of the pool. It was 1.80[m] from outside but only 1.50[m] from the inside”.

3.1.3. “... [T]he only section of fencing that requires an increase in height is the southeastern boundary shared with 315 Riversdale Road. The boundary side with the neighbour, who have a swimming pool as well and there is no reason to climb the fence.”

- 3.2. The authority did not make a submission.

4. Discussion

- 4.1. Notices to fix are governed by sections 163 to 168. Section 164(1)(a) provides for an authority to issue a notice to fix if it considers, on reasonable grounds, that a specified person is contravening or failing to comply with the Act or its regulations.⁷
- 4.2. First, I will consider whether there was a contravention of the Act or its regulations, and therefore grounds for the issue of the notice, followed by whether the notice meets the requirements of section 165.

Whether there were grounds to issue the notice

- 4.3. The notice alleges a contravention of section 162C. Section 162C is one of the ‘special provisions for residential pools’ in subpart 7A of the Act, which the barrier must continue to comply with for the duration of its life.
- 4.4. As stated in section 162A, the purpose of subpart 7A is “to prevent drowning of, and injury to, young children by restricting unsupervised access to residential pools by children under 5 years of age”.
- 4.5. Section 162C(1) provides:

“Every residential pool that is filled or partly filled with water must have physical barriers that restrict access to the pool by unsupervised children under 5 years of age.”

- 4.6. Section 162C(2) sets out various ways for pool barriers to comply. It states:
- (2) The means of restricting access referred to in subsection (1) must comply with the requirements of the building code—
 - (a) that are in force; or
 - (b) that were in force when the pool was constructed, erected, or installed (after 1 September 1987) and in respect of which a building consent, code compliance certificate, or certificate of acceptance was issued (in relation to the means of restricting access to the pool).

Clause F9

- 4.7. The relevant clause of the Building Code currently in force is clause F9 and this has not been amended since the pool and barrier were constructed.
- 4.8. One means of establishing compliance with the provisions of the Building Code is compliance with an Acceptable Solution – in this case F9/AS1. However, compliance can also be achieved by other means, known as alternative solutions.

⁷ Section 163 defines a ‘specified person’ to whom a notice can be issued, and this includes the owner of the building.

- 4.9. There is no dispute between the parties that the part of the barrier does not comply by way of F9/AS1, because it does not measure at least 1800mm from the ground level on the pool side as per paragraph 2.2.1(a). This is despite the code compliance certificate having been issued by the authority on the basis that the barrier complied with F9/AS1 at the time of the final inspection.⁸ Regardless, there is an ongoing obligation on pool owners to comply with section 162C.
- 4.10. In considering the compliance of the part of the barrier as an alternative solution, I must be satisfied that it meets the applicable performance criteria of clause F9.
- 4.11. The relevant performance criteria in clause F9 in this case are:
- 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).
 - F9.3.3 A barrier surrounding a pool must have no permanent objects or projections on the outside that could assist children in negotiating the barrier...
- 4.12. As previously discussed in Determination 2026/013 owners cannot control what occurs on a neighbouring property.⁹ In that regard, the pool barrier needs to be constructed in such a way that it restricts access of unsupervised young children from outside the property regardless of any objects on that adjacent property that may assist a child in climbing the barrier.
- 4.13. The criteria in paragraph 2.2.1 of F9/AS1 address this by having specific requirements for barriers on a property boundary. They must:
- 4.13.1. be at least 1800mm high (measured from ground level on the pool side)
 - 4.13.2. be at least 1000mm away from the water's edge
 - 4.13.3. have a 900mm 'non-climbable zone' at the top of the barrier.
- 4.14. This results in a barrier of significant height for the child to climb, and should they gain access the top of the barrier reduces the likelihood of a child jumping from the top of the boundary fence and avoids potential hand- and footholds that would assist a child in climbing down into the pool area.
- 4.15. Turning now to the part of this barrier, I have considered whether the pool side of the barrier would restrict children from accessing the pool area should they gain

⁸ In response to a question from the Ministry, the authority provided a 'processing report' which it stated "reveals the pool is assessed against F9/AS1. This aligns with [the building consent application in] which the [owners] identified F9/[AS1] as the compliance pathway". I have not seen a copy of the approved plans, however I note that responses to the authority's requests for information during processing of the building consent indicated the timber fence was to be 1800mm high and that the deck was existing.

⁹ Determination 2026/013 *The compliance of part of a pool barrier with Building Code Clause F9* (7 April 2026), at paragraph 4.6.

access to the top of the barrier from the outside. The profile of the barrier on the pool side presents a 1470-1500mm surface with no toe or foot holds that would assist a child in climbing down. However, there is limited restriction on access in terms of the height to the deck to deter children from climbing or dropping down the inside, being some 300mm less than that set out in F9/AS1.

- 4.16. Consequently, I consider that the barrier on the southeast boundary of the owners' property does not comply with clause F9.3.1, as it does not restrict access to the pool by unsupervised young children.

Form and content of the notice

- 4.17. Section 165 sets out the requirements for the form and content of a notice to fix. A notice to fix must be in the prescribed form¹⁰, which provides a space to specify the "particulars of contravention or non-compliance", and "further particulars".
- 4.18. The courts and previous determinations have discussed the requirement that the recipient of a notice to fix be "fairly and fully informed" by the particulars in a notice, so they can address the identified issues.¹¹
- 4.19. The notice in this case is for a contravention of section 162C and within the particulars of the notice, the authority has stated that there is a non-compliance with "Building Code Clause F9/AS1 2.2.1(a)". This was reiterated in correspondence on 22 April 2026, in which the authority noted it did not have discretion to "waive this measurement".¹²
- 4.20. However, as discussed above, section 162C does not require compliance with F9/AS1, rather for this case, it requires compliance with the requirements of the Building Code that are in force, being clause F9. F9/AS1 is one way to comply with the Building Code but not the only way and therefore, failure to comply with F9/AS1 is not a contravention in terms of section 164. It follows that it is not appropriate to allege non-compliance with an Acceptable Solution in a notice to fix.
- 4.21. The form requires authorities to describe as a remedy "any building work that must be carried out ...". I consider remedy specified in the notice is inadequate. Rather than stating that the "non-compliance [sic] items" must be "fully remediate[d]", the notice should require the building work be brought into compliance with clause F9 as required by section 162C(2).

¹⁰ Form 13 of the Building (Forms) Regulations 2004.

¹¹ See *Andrew Housing Ltd v Southland District Council* [1996] 1 NZLR 589 (which related to a 'notice to rectify', the equivalent of a notice to fix in the predecessor to the Act, the Building Act 1991); *Marlborough District Council v Bilsborough* [2020] NZDC 9962 at [106]-[107]; and Determination 2024/029 *An authority's decisions to issue a series of notices to fix* (27 May 2024) at [4.2]-[4.3].

¹² Section 67A provides for territorial authorities to grant waivers or modifications of section 162C(1) or (2) if the territorial authority is satisfied that the waiver or modification would not significantly increase danger to children under five years of age.

- 4.22. It is also an option in a case involving pool safety for a notice to fix to *direct* that the pool be drained and kept empty, as provided for in section 165(1)(g), until it is made compliant or otherwise remediated. The notice was not clear in whether such a direction was being made, with the comment included in the notice seemingly more advisory in nature.
- 4.23. The notice appropriately requires the owners to contact the authority once the contravention has been remedied, as set out in section 165(1)(e). However, the notice should also inform the owners that a building consent may be required for any building work (section 165(1)(d)).
- 4.24. Finally, the reference in the notice to the Ministry as the enforcement agency is incorrect as it is the territorial authority's role to enforce compliance.

Conclusions

- 4.25. The part of the pool barrier on the southeast boundary of the owners' property does not comply with clause F9. Therefore, there were grounds to issue the notice for a contravention of section 162C.
- 4.26. However, the notice refers to non-compliance with F9/AS1 rather than non-compliance with the Building Code, and I have also identified issues with the form and content of the notice. For those reasons I am reversing the authority's decision to issue the notice to fix.

5. Decision

- 5.1. In accordance with section 188 of the Building Act 2004, I reverse the authority's decision to issue notice to fix SW1159-26-01.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 14 October 2026.

Peta Hird
Lead Determinations Specialist