

Determination 2023/032

Regarding the compliance of a pool barrier with a shade sail pole on the outside with Building Code Clause F9 to the extent as required by section 17 of the Building Act 2004.

462 Bruntwood Road, Tamahere, Cambridge

Concerns whether a pool barrier with a shade sail pole on the outside of, and within close proximity to, the pool barrier complies with Building Code Clause F9.3.3 and the matter will turn on whether the shade sail pole is a 'permanent object or projection on the outside of the pool barrier' that could 'assist young children in negotiating the barrier'. This determination also includes an assessment of the pool barrier with Acceptable Solution F9/AS1.



Figure 1: The shade sail pole and the pool barrier

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 parties and the matter to be determined

- 1.1. This is a determination made under due authorisation by me, Charlotte Gair, Manager Advisory, Building Resolution, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.
- 1.2. The parties to the determination are:
 - 1.2.1. L and M Williams, the owners of the property (“the owners”) and applicants, represented by their agent.
 - 1.2.2. Waikato District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. The matter to be determined, under section 177(1)(a) of the Act, is whether the owners’ pool barrier with a shade sail pole on the outside of, and within close proximity to, the pool barrier complies with Building Code Clause F9.3.3. to the extent required by section 17 of the Act, including by way of acceptable solution F9/AS1.
- 1.4. To make a decision, I have considered the parties’ submissions and the other evidence in this matter.

Matters outside this determination

- 1.5. I am only considering the compliance of the pool barrier in respect of the disputed pole in this determination. I do not consider any other aspects of the pool barrier, the compliance of the barrier as a whole, or the immediate pool area.

2. The building work

- 2.1. A pool barrier consisting of thin vertical metal bars with horizontal top and bottom rungs was constructed under building consent number BLD1096/21, issued on 29 March 2021.

- 2.2. A shade sail supported by poles is located adjacent to the pool barrier. The shade sail and supporting poles were not included in the building consent. From the plans provided by the owners, the disputed pole is 900mm away from the pool fence. The circumference of the disputed pole is 440mm and its diameter is 140mm. (See Figure 1).
- 2.3. Figure 2 below was provided by the owners and depicts the pool, the pool barrier, the location of the shade sail and its supporting poles including the disputed pole, and the surrounding areas.

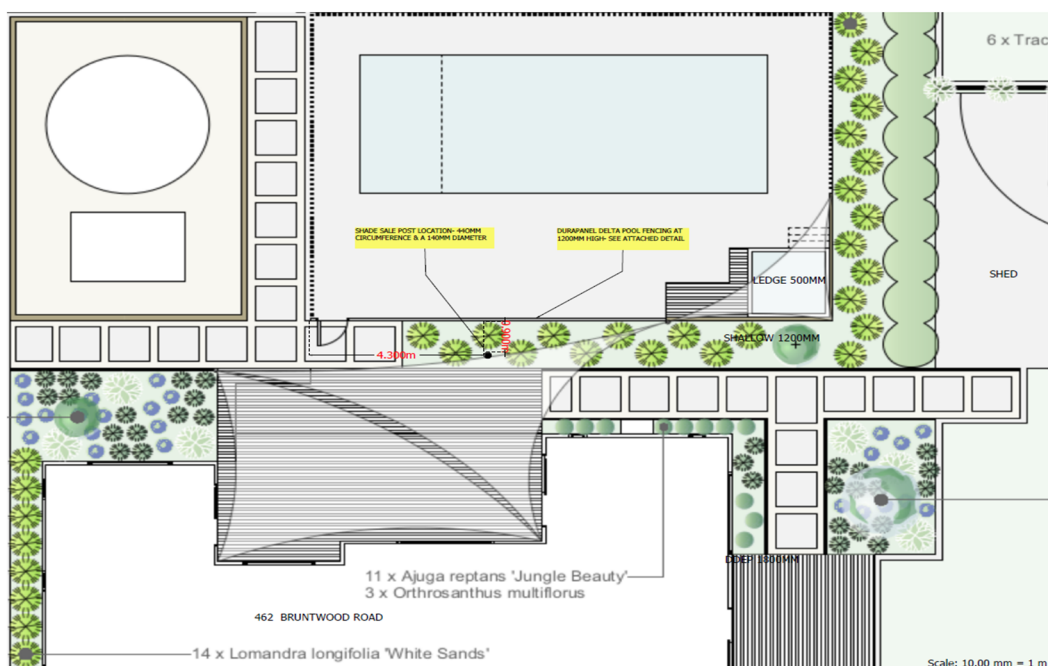


Figure 2: The owners' pool, pool barrier and disputed poles

3. Background

- 3.1. At the inspection on 23 June 2021, the inspector completed the authority's standard "Residential Pool Inspection" checklist which flagged the basis for the failure of the inspection of the owners' pool barrier as "there shall be no ground features or objects outside a pool barrier within 1200mm of the top of the barrier that would assist a child in climbing (#2.1.6)".
- 3.2. The authority considers that a pole adjacent to the pool barrier which supports a shade sail could assist a young child in negotiating the barrier due to it being located within 1200mm of the pool barrier. For this reason, the authority considers the pool barrier would not comply with Clause F9 of the Building Code.
- 3.3. On 12 August 2021, the owners wrote to the authority requesting that the authority reconsider their decision regarding the failure of the pool barrier due to the

disputed pole located adjacent to the barrier.

- 3.4. The authority responded to the owners on 2 September 2021 stating that they still did not believe the pool barrier complied as “the inspection failed due to a climbable object within 1200mm of the outside of the pool fence as shown in F9/AS1 (Figure 2) 2.1.6.”.

4. Submissions

The owners

- 4.1. The owners sent a submission, summary of events and copies of:
- 4.1.1 The Residential Pool Inspection checklist containing the failure, namely “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. (#2.1.6)”;
 - 4.1.2 A plan of the pool and surrounding area including the disputed pole with its proximity to the pool barrier;
 - 4.1.3 manufacturer drawings/details of the pool barrier construction;
 - 4.1.4 Relevant photographs; and
 - 4.1.5 Correspondence with the authority.
- 4.2. The owners submit that the disputed pole complies with to Acceptable Solutions F9/AS1 Residential Pool Barriers clause 2.1.6 (Appendix A). The owners submit that “the shade sail pole is not scalable by a child under the age of 6 due to its large diameter, and then secondly should a young child scale the pole, leaping the 900mm gap to access the pool would be impossible.”
- 4.3. In correspondence with the authority dated 12 August 2021, the owners referred to Determination 2019/031, regarding the compliance of a pool barrier with adjacent palm trees. The owners made note of the decision in Determination 2019/031 that despite the presence of palm trees within 1.2m of the pool barrier, the pool barrier complied with the Building Code.

The authority

- 4.4. The authority provided a submission, summary of events, and a copy of the inspection checklist.
- 4.5. In its submission, the authority stated that “the inspection failed due to a climbable

object within 1200mm of the outside of the pool fence as shown in F9/AS1 2.1.6. This shows a smooth tree trunk with no branches up to 1200mm high as non-compliant”.

- 4.6. The authority also referred to the Residential Pool Inspection checklist which indicated the pool inspection failed as “there shall be no ground features or objects outside a pool barrier within 1200mm of the top of the barrier that would assist a child in climbing”.

5. Discussion

Relevant Legislation

- 5.1. Section 17 of the Act establishes that all building work must comply with the Building Code to the extent required by the Act¹.

Compliance with the current Building Code

- 5.2. As the consent for the construction of the owners’ pool was issued in 2021, the means of restricting access to the pool must comply with the requirements of the current Building Code. Building Code Clause F9 lays down the means of restricting access to residential pools, with the relevant performance clause for this application being Clause F9.3.3.

Clause F9 – Means of restricting access to residential pools

Objective

- F9.1** The objective of this provision is to prevent injury or death to young children involving *residential pools*.

Functional requirement

- F9.2** *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.

Performance

- 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

¹ I note the provisions in Subpart 7A (Special provisions for residential pools) of the Act. These are not considered by this determination as they provide for the on-going compliance and periodic inspection of existing residential pool and pool barriers.

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.

- 5.3. It is important to note that compliance assessments are made in relation to particular matters. A decision made on one particular set of facts may provide guidance on points of assessment for a similar case, however a prior decision shouldn't be taken as an absolute precedent, particularly when there are distinguishing characteristics.
- 5.4. There is a multi-part assessment required to determine if a pool barrier meets the performance requirements of the Building Code Clause F9, in summary:
- 5.4.1. residential pools must have physical barriers that restrict access to the pool, and
- 5.4.2. the barrier must not have:
- permanent objects or projections on the outside,
 - that could assist children in negotiating the barrier
- 5.5. In relation to the current matter, it is accepted the pool has a physical barrier that restricts access. It is also accepted that the disputed pole is a permanent object outside the barrier. The aspect which must be considered is whether the object (the pole) could assist children in negotiating the barrier.
- 5.6 The disputed pole which is holding up and supporting the owners' shade sail is 400mm in circumference, with a 140mm diameter. The disputed pole is smooth and has no features (eg no toe or hand grips, indentations, or notches (this list is not exhaustive)). I consider that the attributes of the disputed pole contribute significantly to preventing a child under the age of 5 years old being able to climb the pole and negotiate the barrier.
- 5.7 I note that the disputed pole is 900mm away from the barrier. In the highly unlikely event that a child under five years was able to climb the disputed pole in an attempt to negotiate the barrier, as there are no objects or projections to stabilise their position the child would need to use both their hands and/or their legs to maintain their position on the disputed pole.
- 5.8 I note that the position needed to maintain the position of a child on a pole would in effect reduce their reach. The child would then need to simultaneously pivot, twist, or turn their body and extend their torso and arms to cover the 900mm distance to the pool barrier. In order to attempt to negotiate the barrier.
- 5.9 I do not consider that a child under the age of 5 years old would have the strength, dexterity, or comprehension to be able to concurrently climb the disputed pole and

use the pole as an aid to negotiate the pool barrier.

- 5.10 Taking all of the above into consideration, it is my view that the disputed pole will not assist a child in negotiating the barrier. Even in the highly unlikely event that a child has climbed the disputed pole, they would still require the comprehension, strength and ability to maintain their grip of the pole at an elevation and simultaneously reach out and transfer themselves to the pool barrier.

Means of demonstrating compliance - Acceptable Solution

- 5.13. There are various means by which building work can be shown to comply with the Building Code and each clause of the Building Code has an associated Acceptable Solution which, if conformed with, must be taken as demonstrating compliance with the clause it relates to.

- 5.14. I will now look to identifying if the barrier complies as an Acceptable Solution. The Acceptable Solution for Building Code Clause F9 is F9/AS1 and again I note that where a pool barrier complies with the Acceptable Solution, an authority must accept it as also complying with Building Code Clause F9.

- 5.15. The relevant paragraph of the Acceptable Solution F9/AS1 is as follows:

2.1 Pool barriers

There shall be no ground features or objects outside of a pool barrier within 1200mm of the top of the barrier that would assist a child in climbing. Figure 2 provides acceptable methods for evaluating this requirement.

- 5.16. In assessing the compliance of the pool barrier against F9/AS1 I will consider a multi part assessment, in summary:

- are there ground features or objects
- within 1200mm of a pool barrier
- that would assist a child in climbing

- 5.17. In relation to the current matter, it is accepted that the disputed pole is a ground feature or object within 1200mm of the pool barrier. Accordingly, the point I must consider is whether the disputed pole would assist a child in climbing.

- 5.18. It is my view that Acceptable Solution F9/AS1 does not require that there be no features within 1200mm of a pool barrier. Rather it is required that no features or objects within 1200mm of a pool barrier could assist a child in climbing.

- 5.19. Figure 2² of Acceptable Solution F9/AS1 shows a smooth tree trunk with no projections, located within 1200mm of the pool barrier as being non-compliant with Acceptable Solution F9/AS1. I note that the tree trunk depicted contains a fork in the branches at the same height as the pool barrier, the tree is also described as *climbable object*.
- 5.20. The figure in F9/AS1 is provided for guidance. Full information on the object (in this case a tree) is not provided. This ensures that the guidance information does not become prescriptive. Each matter requires a case-by-case assessment of the merits of the situation.
- 5.21. As noted above, the disputed pole is supporting the owners' shade sail, it is 400mm in circumference, with a 140mm diameter and approximately 900mm away from the pool barrier.
- 5.22. The disputed pole is smooth and has no features, indentations, projections, or notches which could be used to assist a child to climb the pole. I consider that the attributes of the disputed pole, namely the dimension, the surface and the lack of features would not allow a child to climb.
- 5.23. In light of the above it is my view that the disputed pole is not an object (or projection on the outside) that would assist a child in climbing. Accordingly, I consider the criteria of Acceptable Solution F9/AS1 are met.

6. Decision

- 6.1 In accordance with section 188 of the Act, I determine that the owners' pool barrier including with respect to the disputed pole, located outside of and within close proximity to the pool barrier, complies with the Building Code Clause F9.3.3 by way of Acceptable Solution F9/AS1.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 9 November 2023.

Charlotte Gair

Manager Advisory, Building Resolution

² See Appendix A

APPENDIX A: F9/AS1 FIGURE 2

