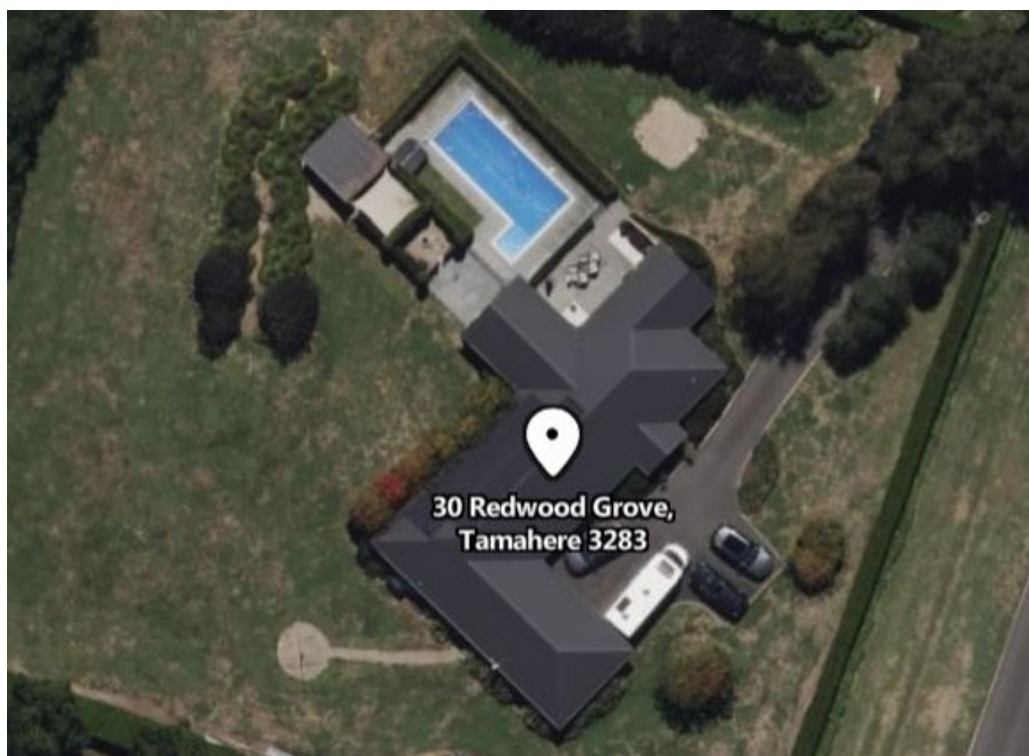


Determination 2023/022

Regarding the compliance of an existing pool barrier with section 162C and consideration of a waiver or modification at 30 Redwood Grove, Tamahere, Hamilton

Summary

This determination discusses whether a pool barrier with surrounding vegetation complies with section 162C of the Building Act. It discusses the various pathways for compliance including the Fencing of Swimming Pools Act 1987 and clauses F4 and F9 of the Building Code. The determination also considers whether a waiver or modification is appropriate in the circumstances.



In this determination, unless otherwise stated:

- “sections” are sections of the Building Act 2004 (“the Act”)
- “clauses” are clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992
- “FOSPA” is the Fencing of Swimming Pools Act 1987
- “FOSPA Schedule” is the Schedule to FOSPA.

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, Charlotte Gair, Manager Advisory, 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:
 - 1.2.1. The owners of the property, T and E Heeley (“the owners”), who applied for the determination.
 - 1.2.2. Waikato District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. This determination arose from the failed inspection of a residential swimming pool barrier in 2021. The authority is of the view that the barrier does not meet the requirements of section 162C of the Act, which aims to ensure the safety of children under five years of age around swimming pools. The dispute primarily concerns several hedges planted along the sides of the barrier, which the authority believes provide climbable projections. This determination is limited to considering the impact of those hedges on the barrier’s compliance. Other aspects of the barrier’s compliance are not considered or discussed.
- 1.4. The matter to be determined² is whether the existing pool barrier complies with section 162C of the Act.
- 1.5. The determination will also consider whether a waiver or modification of section 162C should be granted.³ This involves an assessment of whether granting a waiver would significantly increase the danger to children under five years of age.

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

² Under section 177(1)(a) of the Act.

³ Under sections 188(3)(aa) and (3A) of the Act.

1.6. In making my decision, I have considered the submissions of the parties and other evidence in this matter.

2. The building work

2.1. The owners' property consists of a lifestyle section, with a single-storey house and in-ground pool situated beside the house. Both the house and pool were constructed in 2014. The pool barrier is a mixture of glass fencing and metal bar fencing, with hedges planted within much of its perimeter (refer to Figure 1).

2.2. The side of the pool barrier closest to the house is a glass fence, with a small hedge planted on the outside of the barrier (the "external hedge"). The glass barrier extends around the corner, in front of the entrance to the pool. From there, the barrier changes to a metal bar fence, which continues around three sides to join up with the glass fencing. There is a taller hedge, *Griselinia littoralis*, planted on the inside of the metal bar fence (the "internal hedge") (see Figure 1).

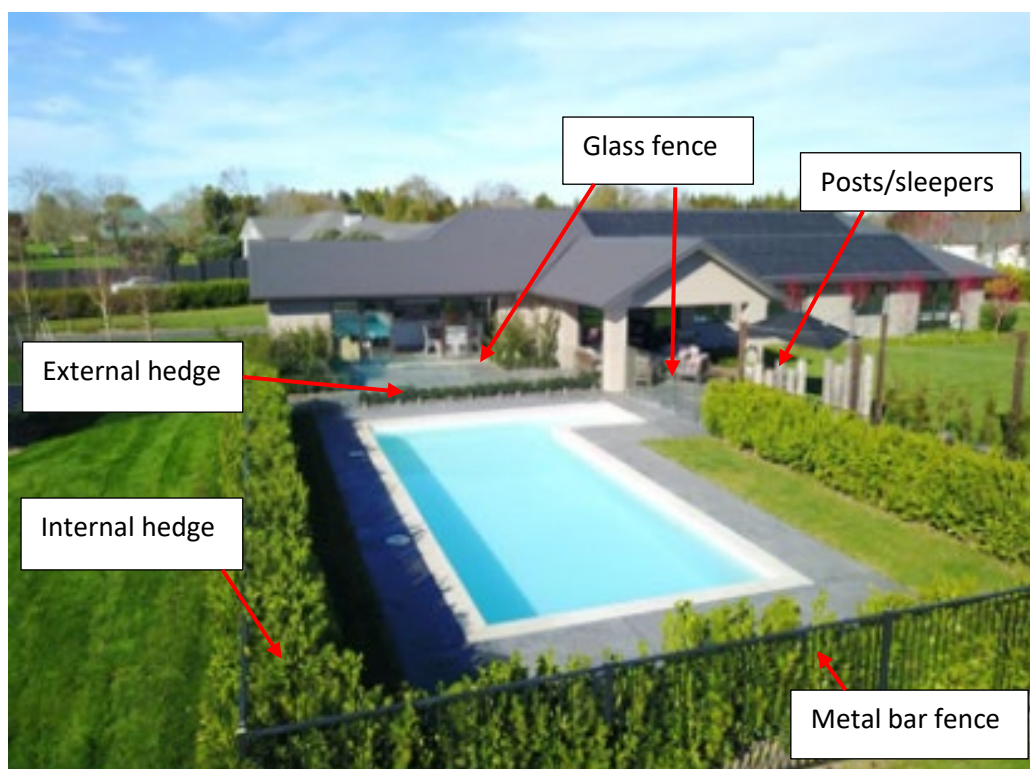


Figure 1: Photograph showing the property, pool barrier and hedging (taken approximately April 2017)

2.3. There are also several vertical timber posts and sleepers inserted into the ground near the entrance of the pool (see Figures 1 and 2).

3. Background

- 3.1. The building consent for the pool (BLD0993/14) was granted on 17 March 2014, and a code compliance certificate (“CCC”) was issued on 9 September 2014.
- 3.2. The current owners moved into the property in August 2017. The pool had not been inspected by the authority since the CCC was issued.
- 3.3. On 27 May 2021, the authority carried out an inspection of the pool barrier and identified four items which needed to be addressed. The authority sent a letter to the owners on 1 June 2021 detailing these items as:
- Vegetation within the interior and exterior clearance zones of the pool fence
 - Fixed and removable objects located on the outside of the fence
 - Timber posts located 1.2m within the pool fence exterior area
 - Low vegetation hedge located 1.2m within the pool fence exterior area
- 3.4. The letter noted that the fencing of the pool is not fully compliant with the requirements of FOSPA and requested that the above items be rectified, and the pool barrier made compliant with NZS 8500:2006⁴ before the next inspection. The letter also noted that:
- 3.4.1. the pool fence was found to be compliant at the time the CCC was issued, and that it is “the property owner’s responsibility to ensure that the compliance of the pool fencing is maintained”.
- 3.4.2. “All pools and spa pools are required to be fenced in a manner that complies with the Fencing of Swimming Pools Act 1987”.
- 3.5. The authority’s pool inspection form (completed at the time of the inspection and, I assume, also provided to the owners), showed that the barrier had been assessed for compliance against several criteria⁵. The form recorded that the barrier had failed because:
- FENCE HEIGHT – the fence shall extend:
- At least 1.2 m above any permanent projection or object permanently placed on the ground outside and within 1.2 m of the fence
- 3.6. The comments section of the inspection form also lists the failed items as set out in paragraph 3.3. and repeated that the barrier must be made compliant with NZS 8500:2006 before the next inspection.
- 3.7. The owner subsequently requested a waiver of section 162C of the Act under section 67(A)(1), which the authority declined on 17 June 2021.

⁴ New Zealand standard 8500:2006 Safety barriers and fences around swimming pools, spas and hot tubs

⁵ The authority’s inspection checklist was titled “F9 Acceptable Solution – Schedule, [FSA] 1987” and “Acceptable Solution: Schedule, [FOSPA] 1987 (Refer Building Act 2004, s450 and 450B)”.

4. Submissions

The owners

4.1. The owners provided an initial submission setting out the background to the dispute, copies of correspondence with the authority, several photos relating to the pool barrier, and a further submission as to why they believe a waiver is warranted.

4.2. The owners' initial submission (in summary):

- 4.2.1. The owners have not made any changes to the layout of the pool area since they moved in, in August 2017. The issues that were raised by the authority resulted from work undertaken by the previous owners, who built the house and pool.
- 4.2.2. The owners purchased the house 'in good faith' that the authority had issued the CCC for the pool in accordance with its duties.
- 4.2.3. As the pool was built prior to 1 January 2017, it falls under section 450B of the Act and needs to comply with the FOSPA Schedule.
- 4.2.4. The owners will remove the timber posts and sleepers (see Figure 2), but do not intend to do so until the other issues are resolved.

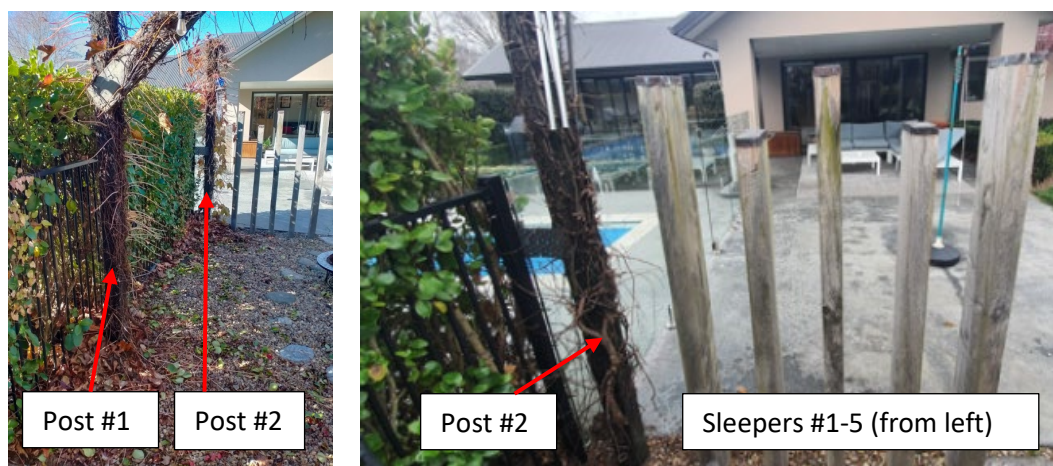


Figure 2: Vertical posts and sleepers. Sleepers 4 and 5 are outside the 1.2m radius from the top of the fence



Figures 3 and 4: Exterior hedging located outside glass fence, and interior *Griselinia littoralis* hedging protruding through metal fencing

4.2.5. The owners are seeking a waiver in regard to the vegetation as they do not consider that it significantly increases danger to children under five. They note that:

- (1) The plans that were approved by the authority in 2014 (refer to Figure 5) marked the location of the vegetation, with plants shown as small pencil circles between the grass and the fence line.
- (2) The FOSPA Schedule and the relevant inspection form used by the authority do not directly reference the requirements for vegetation inside a pool fence.
- (3) The vegetation is predominantly inside the fence. The protrusions are not hand or toe holds, and would not provide a stable or strong platform for a child to climb.

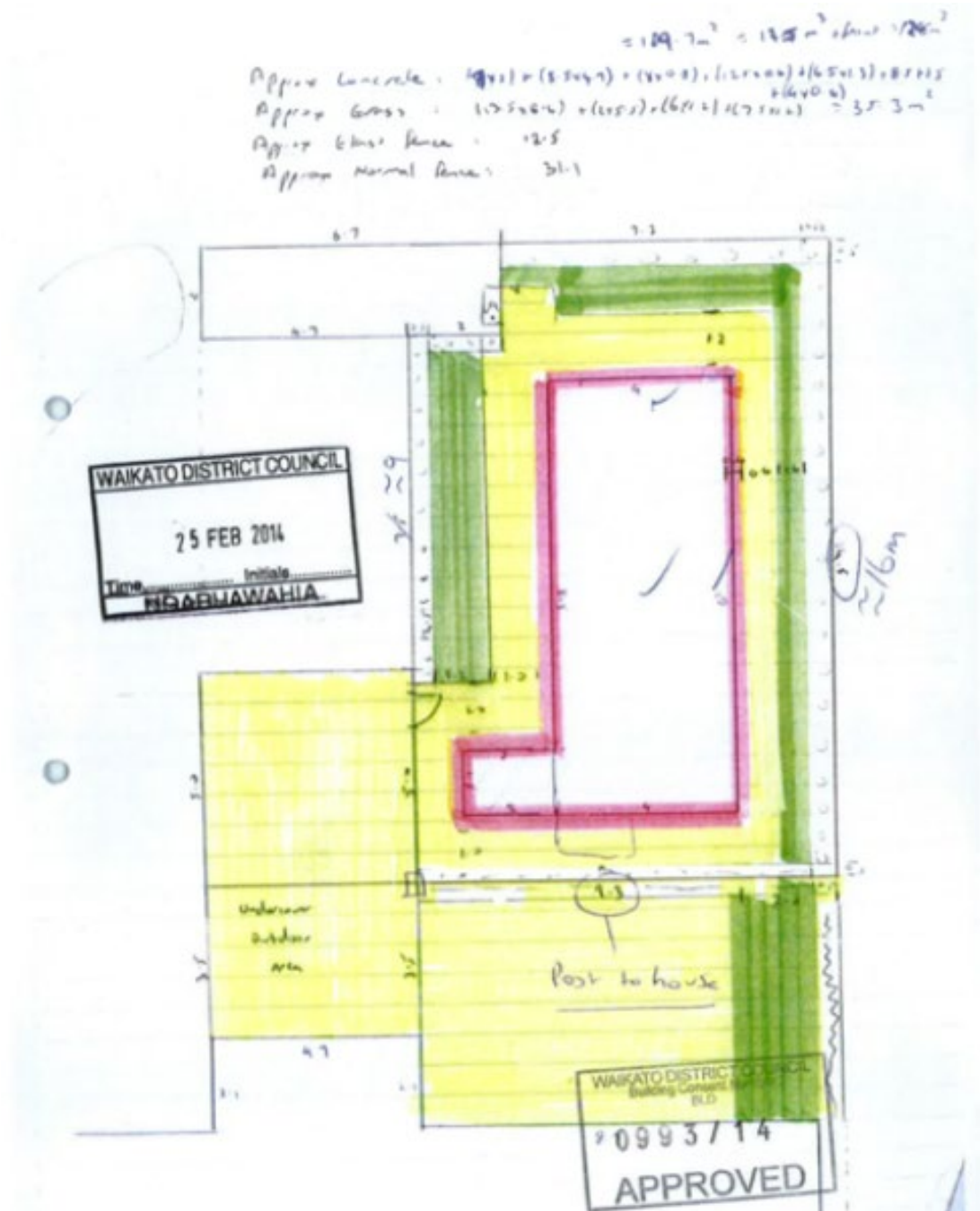


Figure 5: Approved plans showing internal vegetation location

4.3. Following a request for further information, the owners provided a subsequent submission to the Ministry on 3 August 2021 which included additional photos and schematics (see figure 6).

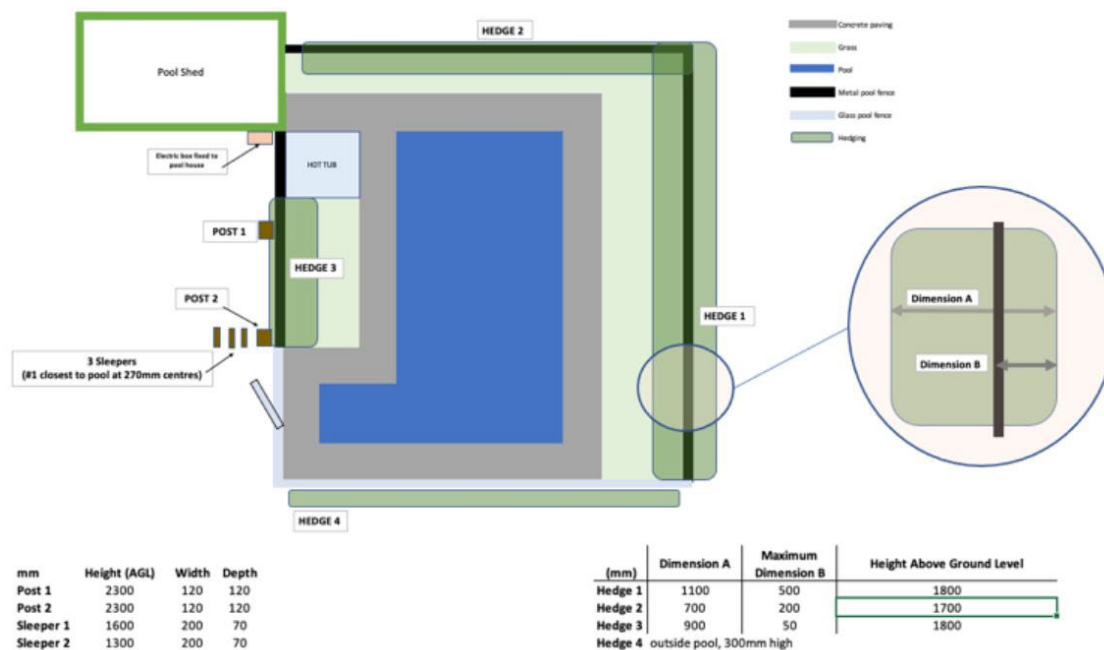


Figure 6: schematic plans showing interior and exterior vegetation around pool barrier with measurements (Aug 2021)

4.4. The owners also provided their reasoning as to why the disputed features would not significantly increase the danger to children under the age of five.

4.4.1. The owners noted the average height and weight of a child turning five and contended that the interior hedges and the posts and sleepers would present an incredibly hard obstacle for a child to climb.

4.4.2. The interior hedges are a species that forms a dense hedge with sharp and narrow branches, which are 10mm in diameter at most and predominantly grow vertically (refer to Figure 3). The owner contends that these branches would easily yield and do not present easy hand or toe holds for a child under five years old. These thicker branches constitute around 30% of the volume of the bush, with the remainder being tiny branches and leaves that would provide no assistance to climbing. The owner argues that even if a child were able to climb the hedge, they would need to climb a minimum of 1.7m above ground level and would then be caught in the depth of the hedge, which is at least 600mm.

4.4.3. The owners contend that the hedging does not increase the danger to children and is actually a major deterrent alongside the fence.

The authority

4.5. The authority submitted a file note responding to the Ministry’s request for further information, photos of the items it deems to be non-compliant, and copies of the inspection letter and form sent to the owners on 1 June 2021.

4.6. The authority's file note states that it declined to grant a waiver or modification of section 162C under section 67A, because it does not consider that the barrier with the interior hedging meets the requirements of Acceptable Solution F9/AS1. In addition, it has requested that other climbable objects within 1.2m of the pool barrier exterior be removed. The authority noted that the owner has agreed to remove the timber posts.

Draft determination

4.7. A draft determination was issued to the parties for comment on 12 April 2023.

4.8. The authority accepted the draft without comment on 10 May 2023.

4.9. On 11 May 2023 the owners also accepted the draft but provided additional comments.

4.9.1. The owners considered that some of the conclusions reached were based on qualitative risk assessments, without them being quantified or compared to other risks, and referred to Water Safety NZ's report⁶ which notes that the risk profile shifts from the ages of zero to five years, from the bath, to home pools and other bodies of water on the property for the age of two to three years, and to bodies of water outside the property for the four-year age group.

4.9.2. They also noted that there are "several reasons why children (and adults) drown, including inadequate supervision and lack of water safety education that are irrespective of pool barriers".

4.9.3. The owners disagreed with my finding that the costs and loss of amenity are not significant.⁷ They consider that while the "cost should not outweigh the risk to children's lives, the actual risk is low, and the cost of compliance is considerable⁸."

4.9.4. The owners advise they intend to extend the existing pool barrier so as to enclose the gravelled area so that the timber posts will be within the pool area.

4.10. I have considered the parties' submissions in response to the draft and amended the determination as I consider appropriate.

5. Discussion

5.1. The matter to be determined is the compliance of the existing pool barrier with section 162C of the Act. It is not the barrier itself that is in issue, but the proximity of

⁶ *Water Safety New Zealand – Preventing the Drowning of Under Fives in Aotearoa New Zealand May 2020.*

⁷ This was in relation to my assessment in the draft in table 5, considering that the costs and loss of amenity resulting from making the barrier compliant was not significant and did not outweigh the risk. This wording has been amended.

⁸ The owners are in receipt of several quotes ranging from \$9000 –\$13,000 +GST.

external and internal hedges and the effect they have on the barrier's ongoing compliance.

Section 162C and potential pathways to compliance

5.2. Section 162C is the provision in the Act that creates the obligation for residential pools to have barriers. It was enacted on 1 January 2017 and provides that 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 five years of age.

5.3. Subsection 162C(2) sets out the compliance requirements that these barriers must meet, namely:

162C Residential pools must have means of restricting access

- (1) 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.
- (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).

5.4. Accordingly, the pathways available to establish whether a particular pool barrier complies with the Building Code vary depending on when the barrier was built. For existing barriers constructed before section 162C was enacted, two potential pathways are provided: compliance with the requirements of the Building Code that is currently in force (section 162C(2)(a)), and compliance with the requirements of the Building Code that was in force at the time the pool was constructed, provided the other criteria are also met (section 162C(2)(b)).

5.5. When section 162C of the Act was enacted, other changes were also made to legislation regulating physical barriers that surround residential pools. In particular, FOSPA was repealed, and a new Clause F9 – 'Means of restricting access to residential pools' was inserted into the Building Code. The previous Clause F4 – 'Safety from falling' was also amended to no longer apply to pool barriers, as was the relevant Acceptable Solution F4/AS1. Subsequently, on 27 April 2017, acceptable solutions for the new Clause F9 were published: F9/AS1 and F9/AS2.

5.6. Sections 450A⁹ and 450B, were also enacted on 1 January 2017. Section 450B sets out the savings provisions that apply to existing residential pools constructed prior to 1 January 2017. The owners' pool was constructed in 2014, so section 450B applies. It reads:

450B Savings provision for existing residential pools

- (1) This section applies to a residential pool that was constructed, erected, or installed before 1 January 2017 (an existing pool).
- (2) An existing pool is deemed to have barriers that comply with [section 162C](#) if the barriers—
 - (a) complied with the [Schedule](#) of the Fencing of Swimming Pools Act 1987 (as that schedule was in force) immediately before 1 January 2017; and
 - (b) continue to comply with those requirements subject to—
 - (i) any exemption that was granted under [section 6](#) or [clause 11](#) of the Schedule of that Act and that was subsisting immediately before 1 January 2017; and
 - (ii) the conditions of any such exemption.

5.7. Section 450B of the Act creates a third possible pathway for establishing compliance for existing residential pools built before the new section 162C was enacted. It provides that if existing pools had barriers that complied with the FOSPA Schedule immediately before the new section 162C was enacted, and if those barriers continue to comply with that schedule, then those barriers are deemed to comply with section 162C. There is a further requirement for pools that have been granted exemptions, but this is not relevant to the owners' pool.

5.8. For completeness, I note that section 450B of the Act also sets out a fourth potential pathway for above-ground pools, but this is not relevant to the owners' pool and will not be considered further.

5.9. In summary, there are three potential compliance pathways available for the barriers around the owners' pool given the date the pool was constructed:

- 5.9.1. Compliance with the Building Code that was in force when the pool was built, as provided for in section 162C(2)(b) of the Act, either as an acceptable or an alternative solution, namely clause F4;
- 5.9.2. Compliance with the FOSPA Schedule as provided for in section 450B(2) of the Act;

⁹ Commented on in more detail at 5.11

5.9.3. Compliance with the current Building Code clause F9, as provided for in section 162C(2)(a) of the Act, either as an acceptable or an alternative solution.

5.10. I will consider each of these potential pathways further. However, before I do so, there are three preliminary matters I wish to comment on.

Preliminary matters

Status of section 450A and the Schedule of the FOSPA

5.11. The first preliminary matter I wish to address is the status of section 450A of the Act, and the acceptable solution it provided. On its inspection form, the authority cites section 450A alongside the acceptable solution it was assessing the owners' pool barrier against.

5.12. As stated above, section 450A of the Act was one of the new provisions added to the Building Act 2004 on 1 January 2017. Like section 450B, it also set out transitional and savings provisions for residential pools and specified an acceptable solution for section 162C based on the FOSPA Schedule.

5.13. However, on 27 April 2017, a Gazette notice¹⁰ revoked the acceptable solution in section 450A of the Act. This means that section 450A is no longer available as a pathway for establishing compliance for the purpose of section 162C. It was only available between 1 January 2017 and 27 April 2017, which is the date that the new acceptable solution for Clause F9 of the Building Code (F9/AS1) was published.

5.14. The outcome of this is that the FOSPA Schedule is no longer an acceptable solution for new pools for the purposes of section 162C (with certain, very limited exceptions). It is only a way for existing pool barriers that were constructed, erected, or installed before 1 January 2017 (under section 450B) to comply.

Ongoing requirement for compliance

5.15. The second preliminary matter is the owners' contention that, as the pool barrier has had a building consent and CCC issued in respect of it, and as that building consent showed the presence of vegetation, it must now be taken as compliant. This is not correct. The obligation to provide compliant pool barriers under section 162C is an ongoing one, and subsection 162C(4)(a) makes clear that responsibility for ensuring barriers remain compliant rests with owners (among others):

162C Residential pools must have a means of restricting access

...

¹⁰ "Notice of Issue of Acceptable Solutions F9/AS1 and F9/AS2 and Revocation of the Acceptable Solution Issued by Section 450A of the Building Act 2004" (27 April 2017) 45 *New Zealand Gazette* No 2017-go2003. The New Zealand Gazette is the official newspaper of the Government of New Zealand. Secondary legislation not drafted by the Parliamentary Counsel Office may be published or notified in the Gazette.

- (4) The following persons must ensure compliance with this section:
- (a) the owner of the pool:
 - (b) the pool operator:
 - (c) the owner of the land on which the pool is situated
 - (d) the occupier of the property in or on which the pool is situated
 - (e) if the pool is subject to a hire purchase agreement (as that term is defined in the Income Tax Act 2007), the purchaser of the pool:
 - (f) if the pool is on premises that are not subject to a tenancy under the Residential Tenancies Act 1986 but the pool is subject to a lease or is part of premises subject to a lease, the lessee of the pool or the premises.

5.16. The compliance of pool barriers can change over time, as they degrade or as objects are placed in proximity. The fact that a barrier is assessed at one point to be compliant does not mean that it must be taken as continuing to be so. This is the purpose of the periodic inspection regime established under section 162D; to ensure that residential pool barriers continue to comply.

5.17. Similarly, the fact that an authority has granted a building consent or CCC for a pool barrier does not mean that a pool barrier automatically complies with section 162C. It is possible to reach different views to a pool barrier's compliance when assessing it as it presents at different points in time.

5.18. I consider that the species of the internal hedging planted adjacent to the owners' pool barrier is relevant in this context. *Griselinia littoralis* is a fast-growing and dense shrub, which if left unpruned will grow into a small tree. The hedge has grown significantly since the owners took ownership of the property, as is evident from a comparison of the 2017 and 2021 photos. As far as I am aware, the consented plans did not specify the nature of the shrub or other plant to be grown in the vegetated areas shown on the plans. Even if they had, it is entirely plausible that at the time the code compliance certificate was issued in 2014 the plants were juvenile and had no impact on the barrier's compliance, but having grown since, subsequently raised concerns for the authority.

Assessment of compliance

5.19. My third preliminary point relates to the various acceptable solutions and standards that the authority has assessed the owners' pool barrier against. These include the FOSPA Schedule, NZS 8500:2006, and the acceptable solution for clause F9 – F9/AS1.

5.20. It is important to note that what is required under s162C is an assessment for compliance with the relevant provisions of the Building Code, either those that

were in force when the barrier was constructed (in the case of the owners' barrier, Clause F4) or those in force now (Clause F9). The acceptable solutions and standards referred to by the authority are a means of establishing compliance, but they are not the only means, and the authority cannot insist that they are followed. It is always open to the owners of a pool barrier to use another way to establish their barrier's compliance with the Building Code, including by way of an alternative solution.

- 5.21. As discussed at paragraph 4.6, the authority's file note stated the reason for declining a waiver or modification of section 162C was that the barrier with hedging did not meet F9/AS1. Whilst that decision is not a determinable matter under section 188, I note that meeting the requirements of an acceptable solution is not the criteria under which to assess whether a waiver or modification is appropriate.

Compliance by way of section 162C(2)(b)

- 5.22. Turning now to the three potential compliance pathways available for the owner's pool barriers, I consider that it would be most logical to begin my assessment with section 162C(2)(b) of the Act. This subsection allows pool barriers to comply with the requirements of the Building Code that were in force when the pool was built.

- 5.23. The owner's pool was constructed in 2014 (refer to paragraph 3.1). The requirements of the Building Code relating to pool barriers that were in force at that time were found in Clause F4 – *Safety from falling*. The specific provisions of Clause F4 relevant in the current case are as follows:

PERFORMANCE

F4.3.3 Swimming pools having a depth of water exceeding 400mm, shall have barriers provided.

F4.3.4 Barriers shall:

(a) ...

(f) In the case of a swimming pool, restrict the access of children under 6 years of age to the pool or the immediate pool area.

F4.3.5 Barriers to swimming pools shall have in addition to performance F4.3.4:

(a) ...

(b) No permanent objects on the outside of the barrier that could provide a climbing step.

- 5.24. These are the requirements that the owners' barrier must comply with if it is to achieve compliance via section 162C(2)(b), and the owners may establish this compliance as either an acceptable or alternative solution.

5.25. Turning first to the acceptable solution, the version¹¹ that was current at the time the pool was constructed simply stated, with respect to swimming pool barriers, that:

1.2.7 The Schedule to the Fencing of Swimming Pools Act 1987 is a means of establishing compliance with NZBC Clause F4.

5.26. The relevant provisions of the FOSPA Schedule are found in Clause 1 (see Appendix A for the text of the full schedule):

Height

1(1) The fence shall extend—

(a) at least 1.2 metres above the ground on the outside of the fence; and

(b) at least 1.2 metres above any permanent projection from or object permanently placed on the ground outside and within 1.2 metres of the fence.

5.27. I have set out my comments regarding the barrier's compliance with these provisions in Table 1.

Table 1: Assessment of relevant features of barrier against the FOSPA schedule as F4/AS1

FOSPA schedule		My comments
1(1)	The fence shall extend – (a) At least 1.2 metres above the ground on the outside of the fence; and (b) At least 1.2 metres above any permanent projection from or object permanently placed on the ground outside and within 1.2 metres of the fence	<ul style="list-style-type: none"> The pool fencing is 1.2 metres high and meets the first criteria. However, the 300mm external hedge is a permanent object planted in the ground outside and within 1.2 metres of the glass balustrade. The 1.2m high glass balustrade is only 900mm above this. The <i>Griselinia littoralis</i> hedging planted inside the metal fencing protrudes through it at various points above ground level and to varying degrees. These protrusions are considered projections¹² from the fence. The height of the fence is not at least 1.2 metres above these projections

¹¹ Department of Building and Housing. (2006). *Compliance Document for New Zealand Building Code Clause F4 Safety from Falling – Third Edition* [Amendment 1]

¹² The High Court considered the meaning of “projections” in *Spiller v Hastings District Council* [2013] NZHC 1444 at para [9], stating: “I agree ... that the struts are projections in the way that word is commonly used, as being a part or thing which extends outwards beyond a prevailing line or surface.”

5.28. Considering the above, I do not consider the pool barrier complies with the FOSPA schedule as the acceptable solution for Clause F4.

5.29. However, the barrier may still comply with Clause F4 as an alternative solution. As such, what I must evaluate is the barrier's ability to achieve compliance with the performance criteria in Clause F4 of the Building Code, as it was in force at the time that the pool was constructed. Table 2 sets out my comments.

Table 2: Assessment of barrier against clause F4 as an alternative solution

Building Code Clause F4		My comments
F4.3.3	Swimming pools having a depth of water exceeding 400mm, shall have barriers provided	<ul style="list-style-type: none"> The pool is fully enclosed within a barrier (consisting of the pool shed, glass fencing and metal fencing).
F4.3.4	Barriers shall: ... (f) In the case of a swimming pool, restrict the access of children under 6 years of age to the pool or the immediate pool area ...	<ul style="list-style-type: none"> A barrier's ability to restrict access can be affected if it has features that allow children to navigate it. The internal hedging grows through the barrier to varying degrees, so that at points, the barrier is almost in the centre of the hedge. At particular points of the barrier, the risk of children being able to climb it is significant. The area of most concern is where the hedging protrudes extensively through the barrier and where the core branches are exposed at the junction points with the glass section of the pool barrier.
F4.3.5	Barriers to swimming pools shall have in addition to performance F4.3.4: ... (b) no permanent objects on the outside of the barrier that could provide a climbing step	<ul style="list-style-type: none"> The internal hedging impacts the effectiveness of the pool barrier, given that children can reach between the vertical elements of the fence to grasp sturdier, thicker branches that have the strength to support a child's weight, and that they can use as hand holds, foot holds and leverage to navigate the barrier. The internal hedging protrudes through to the outside of the barrier to varying degrees, providing permanent objects on the outside. From the photos, I note that the strength of the protruding branches varies at different locations along the lengths of the barrier. However, in at least some of the areas I consider the branches appear thick and strong enough for a child to use as a climbing step. The exterior hedging is a permanent object on the outside of the barrier. It is hard to tell from the photos whether it is pliable and gives way easily or will hold some weight. In the absence of evidence to the contrary, I consider this hedge could provide a climbing step for children under 5 years of age.

- 5.30. Considering the above, I do not consider the pool barrier complies with Clause F4 as an alternative solution.

Compliance with the FOSPA Schedule via s450B

- 5.31. The next pathway I will consider is compliance with the FOSPA Schedule, as provided for in section 450B(2) of the Act. Section S450B deems an existing swimming pool¹³ to have barriers that comply with section 162C if the barriers complied, and continue to comply with the FOSPA Schedule immediately before 1 January 2017.
- 5.32. I have already considered this means of compliance as an acceptable solution for Building Code Clause F4 (see paragraphs 5.25 to 5.28), and concluded that the barrier does not comply with the FOSPA schedule. Accordingly, the barrier also does not comply via section 450B.

Compliance with the current Building Code

- 5.33. The final pathway is compliance with the requirements of the current Building Code, as provided for in section 162C(2)(a) of the Act. This pathway is available for all residential pool barriers, irrespective of when they were constructed.
- 5.34. The clause of the current Building Code that applies is Clause F9 – *Means of restricting access to residential pools*, and the relevant parts of that clause are as follows:

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 water 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 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.

...

¹³ Under this section, an existing pool is a residential pool that was constructed, erected, or installed before 1 January 2017

5.35. As with respect to Clause F4, the owner’s pool barrier may achieve compliance with Clause F9 as either an acceptable solution or an alternative one.

5.36. Turning first to the acceptable solution, F9/AS1. The relevant provision for the owners’ barrier is paragraph 2.1.6. (Figure 2, referred to in paragraph 2.1.6, is laid out in full in Appendix B).

2.1 Pool barriers

2.1.1 ...

2.1.6 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. Figure 2 gives acceptable methods for evaluating this requirement.

5.37. Table 3 sets out my comments and observations with respect to this provision.

Table 3: Assessment of barrier against clause F9 by way of F9/AS1

Acceptable Solution F9/AS1		My comments
2.1.6	There shall be no ground features or objects outside a <i>pool barrier</i> within 1200mm of the top of the barrier that would assist a child in climbing.	<ul style="list-style-type: none"> • The external hedge is a ground feature or object outside and within 1200mm of the glass balustrade that could assist a child in climbing. Although the features of this species of hedge is unknown, it does not appear to be so weak and pliable that it can be safely disregarded as something that could assist a child in negotiating the barrier. • I acknowledge the owner’s submissions that the majority of the internal hedge is “made up of tiny branches and leaves that would give zero assistance to climbing” but consider that there are still parts of the hedge that provide thicker branches that could assist in climbing. • Some parts of the internal hedging have comparatively minor protruding branches. The owner has submitted that these branches are ‘easily yielding’ and do not currently assist a child in climbing. However, I note that vegetation is not static, it will grow over time, and the new growth on the hedge would become more rigid growth that would assist a child in climbing. I note also that children may still grip onto more flexible branches in combination with larger branches to pull themselves up. • From the photos, the internal hedge currently has varying degrees of protrusion through the metal fencing. I consider these to be objects outside a pool barrier. Some of the protrusions

		have mass and appear strong enough to assist a child in climbing.
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5.38. Considering the above, I do not consider the pool barrier complies with F9/AS1 as the acceptable solution for Clause F9.

5.39. This leaves me to consider whether the barrier complies with Clause F9 as an alternative solution. As such, I must evaluate the barrier's compliance with the performance criteria in Clause F9 of the Building Code, as it is currently in force. My comments in this respect are set out in Table 4.

Table 4: Assessment of barrier against clause F9 as an alternative solution

Current Building Code F9		My comments
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).	As earlier discussed in Tables 1, 2 and 3: <ul style="list-style-type: none"> • The interior hedging growing through the pool barriers has an impact on the effectiveness of the barrier in restricting access to the pool. • the 300mm high external hedge would assist a child attempting to access the pool area by giving them a climbing step. • The interior hedging, in some places, grows extensively through the barrier, and the thicker, stronger branches in the centre would be accessible to a child reaching through the barrier. These branches effectively provide hand and foot holds and reduce the effectiveness of the pool barrier.
F9.3.3	A barrier surrounding a <i>pool</i> must have no permanent objects or projections on the outside that could assist children in negotiating the barrier. ...	As earlier discussed in Tables 1, 2 and 3 <ul style="list-style-type: none"> • The external hedge, and the protrusions from the internal hedge past the metal fencing provide handholds, footholds and climbing steps that could assist children in negotiating the barrier.

5.40. Considering the above, I do not consider the pool barrier complies with Clause F9 as an alternative solution.

Conclusion on compliance

5.41. I conclude that the owners' pool barrier does not comply with section 162C by any of the available means of compliance. I must now go on to consider whether granting a waiver or modification is appropriate.

Availability of a waiver or modification

5.42. The Act, in making provision for waivers or modifications recognises that the Building Code cannot cover all possible situations and provides the flexibility for

authorities to address unusual sets of circumstances. Waivers and modifications may be considered at the building consent stage, and by the Chief Executive in a determination.

5.43. I have been asked to consider whether a waiver or modification is available in this case.

5.44. Under section 188(3)(aa) of the Act, a determination may incorporate a waiver or modification of section 162C(1) or 162C(2), along with any conditions that a territorial authority is able to grant or impose. The relevant provisions of the Act are as follows:

188 Determination by chief executive

(1) ...

(3) A determination may incorporate—

(a) waivers or modifications of the building code; and

(aa) waivers or modifications of section 162C(1) or (2); and

(b) conditions that a territorial authority or regional authority, as the case may be, is able to grant or impose.

(3A) The chief executive must only grant a waiver or modification of section 162C(1) or (2) if the chief executive is satisfied that the waiver or modification would not significantly increase danger to children under 5 years of age.

5.45. Several previous determinations have discussed waivers and modifications and set out factors for consideration in granting them.¹⁴ These determinations established that a waiver or modification may be granted when compelling reasons exist to support the view that a waiver or modification is appropriate, and it is reasonable to do so in the circumstances.

5.46. Although many of these previous determinations concern waivers and modifications under section 67 of the Act, in Determination 2020/026¹⁵ the same method was adopted to assess whether it was reasonable to grant a waiver under 188(3A)¹⁶.

¹⁴ See for example 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)

¹⁵ Determination 2020/026 Regarding the compliance of a swimming pool barrier consisting of a pool cover and either of two proposed alarm systems at 2154 State Highway 1, Spring Creek, Blenheim (2 October 2020)

¹⁶ The decision in this determination (which involved a request for a waiver under section 162C for a pool without any physical barrier, but with an existing pool cover and a proposed pool alarm) was subsequently confirmed by the District Court *Rowe v Marlborough District Council* [2022] NZDC 18505

- 5.47. Each case concerning waivers and modifications must be considered on an individual basis. Therefore, I intend to adapt the methodology to assess whether it is reasonable to grant a waiver to the particulars of this case.
- 5.48. Following the issuing of the draft to parties, I received several points of submission from the owners, as outlined earlier at 4.9, which I have taken into consideration and addressed in my comments below.
- 5.49. Under section 188 the test which must be satisfied for the Chief Executive to grant a waiver or modification of section 162C(1) or (2) is *that the Chief Executive is satisfied that the waiver or modification would not significantly increase danger to children under 5 years of age.*
- 5.50. I am mindful of that the purpose of the special provisions for residential pools in the Act is for the protection and safety of young children. Consequently, what I am in fact assessing for a waiver or modification, is the extent of the additional risk created by a non-compliant barrier in these particular circumstances, as compared to a compliant one. I must then decide whether that constitutes a significant increase in danger to young children.
- 5.51. I consider a reasonable approach would be to take into account the particular circumstances of the case, summarised under the following factors:
- 5.51.1. consistency with the purposes and principles of the Act
 - 5.51.2. the extent and consequence of non-compliance
 - 5.51.3. any special and unique circumstances
 - 5.51.4. any mitigating features
 - 5.51.5. the availability of other reasonably practicable solutions.

Table 5: Assessment of barrier against factors relevant to the grant of a waiver or modification

Factors	Comment
Purposes and principles of the Act	<p>I must consider the extent to which a waiver or modification of s162C(1) or (2) will still be consistent with the purposes and principles of the Act.</p> <p>I note that the primary purpose of the Act, is expressed in section 3(a), which states that people who use buildings can do so safely. I also note the principles contained in section 4, which lays out the principles, and section 4(2)(a) considering the importance of building code compliance as it relates to household units which affect the lives of those who use them. More specifically, section 4(2)(b) requires that “any harmful effect on human health resulting from...building work, is prevented or minimised.”</p> <p>I also note the purpose of subpart 7A of the Act, which sets out the special provisions for residential pools, is “to prevent drowning of, and injury to, young children by restricting unsupervised access to residential pools by children under 5 years of age.”</p>

	<p>In this case, the matter concerns the life safety of children under the age of five. Therefore, I note a waiver or modification relating to life safety will require more justification than one based on amenity values.</p> <p>In the present case if a waiver or modification were granted as requested, a primary purpose of the Act, being safety in using buildings, would be reduced. It would compromise the effectiveness of the barrier that contributes to the health and wellbeing of young children in preventing unsupervised access to the pool.</p> <p>I consider that a waiver in this case, namely, allowing objects that make it easier for children to navigate the barrier, would be inconsistent with the purposes and principles of the Act.</p>
<p>Extent and consequence of the non-compliance</p>	<p>As earlier concluded, the pool barrier does not meet the performance requirements of the relevant building code as the internal and external hedges are objects or provide protrusions which would allow children under 5 to navigate the barrier.</p> <p>The extent of the non-compliance is quite significant. It provides objects which would allow a child to negotiate the barrier, accordingly it reduces the function of the pool barrier, to restrict access.</p> <p>Adverse consequences are more likely to result from a pool barrier with objects close by that could assist a child to negotiate it, than a compliant barrier which has no such objects compromising its performance.</p> <p>To grant a waiver or modification in this case, would limit the extent to which the barrier safeguards or prevents unsupervised children under the age of five from gaining access to the pool. I consider it would significantly increase the risk of injury or death.</p>
<p>Special or unique circumstances</p>	<p>I consider that the special or unique circumstances are not limited to the pool barrier only and could include (but not be limited to) location, users, and use of a building.</p> <p>The use of the building work is to safeguard young children, being the anticipated users of the pool and surrounding property, and who form a key part of the household unit.</p> <p>The pool barrier appears to be of standard height, using materials typical of such construction.</p> <p>The pool is located on a general residential property adjacent to a dwelling.</p> <p>Its users are likely to include various occupants and visitors, in the present and future, over the span of its lifetime.</p> <p>I do not consider that there are any special or unique circumstance about the pool barrier, the location, users or use of the building.</p>
<p>Any mitigating features</p>	<p>The owners have submitted that they consider the branches are unlikely to assist in climbing, that a child would need to climb to 1.7m above ground and</p>

	<p>that should a child achieve this they would then be caught in the 600mm hedge and not be able to get down to the pool.</p> <p>I do not consider this to be a mitigating factor. Particularly as noted above that I consider the hedges include branches which would provide hand and foot holds, which would allow children to navigate the barrier. Further I note the higher risk glass-to-metal junctions where the two types of fencing meet resulting in a break in the hedging where its sturdy, core branches are exposed from the side.</p>
Other reasonably practicable solutions	<p>There are other reasonably practicable solutions that would result in a compliant barrier, such as removing the hedging.</p> <p>While there is a cost and loss of amenity associated with this rectification, I must weigh this against the risk to children's safety and lives.</p>

5.52. Considering the above, I cannot be satisfied that granting a waiver or modification of section 162C in this case would not significantly increase danger to children under five years of age. Compelling reasons must exist for granting a waiver or modification, and I do not consider that any such reasons exist in the current case. Aesthetics, buyers' expectations, and losses of amenity are not reasons for increasing the risk of danger to young children.

5.53. Accordingly, I conclude that it is not appropriate to grant a waiver or modification of section 162C in respect of the owners' pool barrier in this case.

5.54. The pool owners have indicated a willingness to undertake actions for compliance, including removal of the hedging. I leave it to the parties to discuss the means to achieve compliance.

Other matters

5.55. The owners have referred to the fact that there are several reasons that children (and adults) may drown, including inadequate supervision and lack of water safety education, irrespective of pool barriers.

5.56. However, the Building Act is concerned with the design and construction of buildings and the Building Code seeks to accomplish the purposes and principles of the Act by setting objectives and prescribing functional requirements and performance criteria with which building elements must comply. The legislation does not manage the actions of the building users, rather, it manages building work to ensure they do not contribute unnecessarily to risks for people using buildings.

5.57. I note that this determination can only consider the compliance of the pool barrier with regards to the legislative framework, which is clear about restricting access by unsupervised children under 5 years of age.

5.58. Regardless of whether other risk factors exist for young children in relation to water safety in the wider context, I must focus on assessing whether granting a waiver or

modification of the requirements for residential pools would not significantly increase danger in this instance, and I have not found compelling reasons to support that.

6. Decision

6.1. In accordance with section 188 of the Building Act 2004, I determine that:

- 6.1.1. the existing pool barrier does not comply with Building Code to the extent required by section 162C of the Act.
- 6.1.2. it is not appropriate to grant a waiver or modification of section 162C under section 188(3)(aa) of the Act.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 22 August 2023.

Charlotte Gair

Manager Advisory

Appendix A: Schedule to the Fencing of Swimming Pools Act 1987

Means of compliance for fences under this Act

Height

- 1(1) The fence shall extend—
- (a) at least 1.2 metres above the ground on the outside of the fence; and
 - (b) at least 1.2 metres above any permanent projection from or object permanently placed on the ground outside and within 1.2 metres of the fence.
- (2) Notwithstanding subclause (1), where the fence is constructed of perforated material, netting, or mesh and any opening in the material, netting, or mesh has a dimension (other than the circumference or perimeter) greater than 10 mm, the fence shall extend at least 1.8 metres above the ground or the projection or object.

Ground clearance

- 2 Any clearance between the bottom of the fence and ground level shall not exceed 100 mm.

Materials

- 3 All materials and components shall be of a durable nature and shall be erected so as to inhibit any child under the age of 6 years from climbing over or crawling under the fence from the outside.
- 4 Except where the fence is horizontally close-boarded or is made of perforated material, netting, or mesh, the spacing between adjacent vertical pales, panels, or other posts shall not exceed 100 mm at any point.
- 5 All fencing supports, rails, rods, and wires, that are not vertical, and all bracing that is not vertical, shall be inaccessible for use for climbing from the outside.
- 5A Notwithstanding clause 5, a fence may have horizontal supports, rails, rods, or wires, that are accessible for use for climbing from the outside, and horizontal bracing that is accessible for such use, if—
- (a) the distance between any 2 of them at any point is at least 900 mm; and
 - (b) there is no other support, rail, rod, wire, or bracing (other than a vertical rail) between the same 2 at any point.
- 6 Where any perforated material, netting, or mesh is used, no opening in that material, netting, or mesh shall have any dimension (other than the circumference or perimeter) greater than 50 mm.
- 7 All perforated material, netting, or mesh material shall be firmly attached at both top and bottom to a rail, pipe, or similar firm structure, or otherwise be of such a nature that the fence cannot readily be crossed by children under the age of 6 years.

Gates and doors

- 8 Every gate or door shall be so constructed as to comply with the relevant requirements of clauses 1 to 7, and shall be so mounted that—

- (a) it cannot open inwards towards the immediate pool area:
- (b) it is clear of any obstruction that could hold the gate or door open and no other means of holding the gate or door open is provided:
- (c) when lifted up or pulled down the gate or door does not release the latching device, come off its hinges, or provide a ground clearance greater than 100 mm.

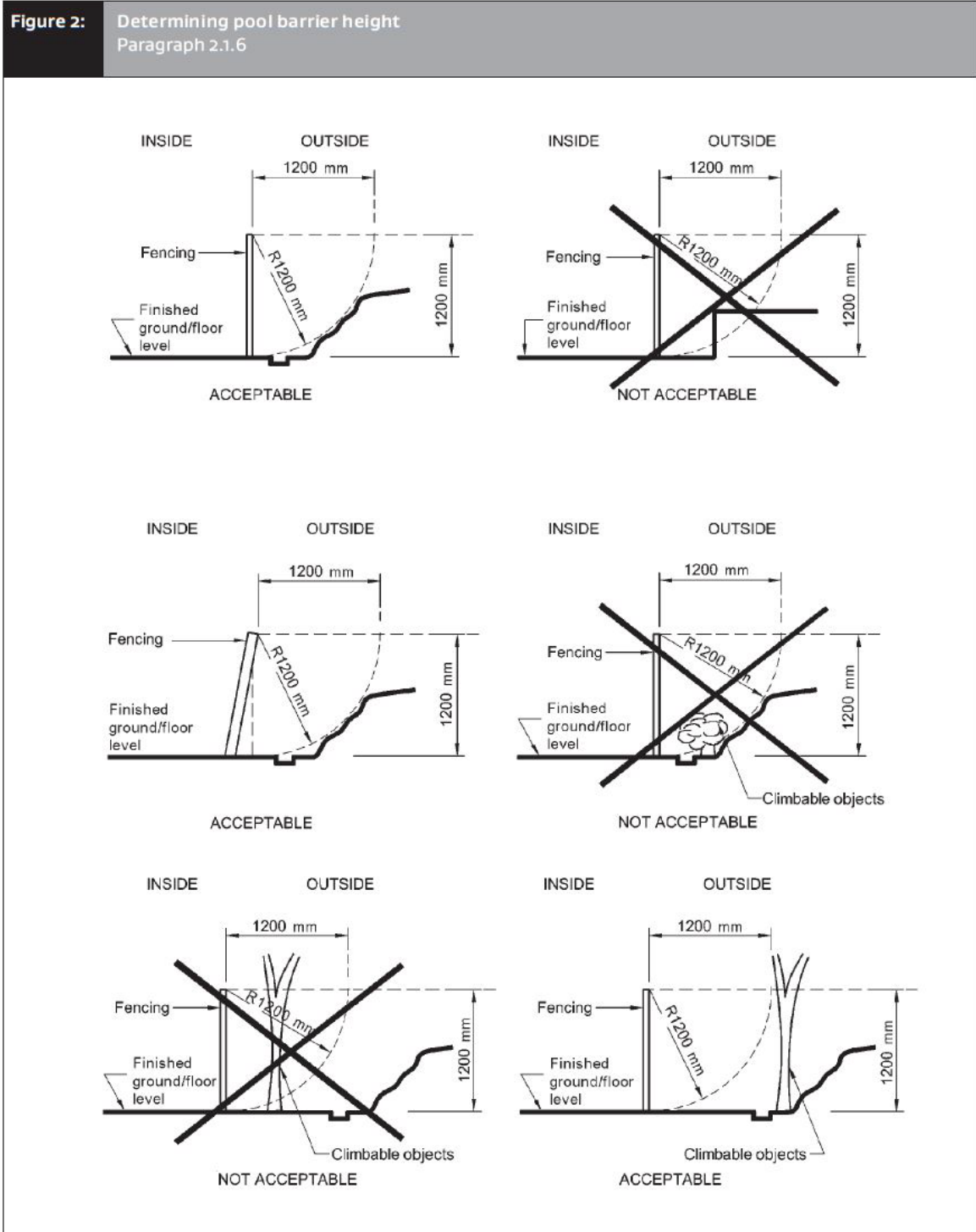
Operation of gates and doors

- 9(1) Every gate or door shall be fitted with a latching device.
 - (2) Where the latching device is accessible from the outside of the fence only by reaching over the fence, gate, or door or through a hole in the fence, gate, or door, the latching device and the lowest point of any hole giving access to it shall be at least 1.2 metres above the ground on the outside of the fence.
 - (3) Where the latching device is otherwise accessible from the outside of the fence, gate, or door, the latching device shall be at least 1.5 metres above the ground on the outside of the fence.
- 10 Every gate or door shall be fitted with a device that will automatically return the gate or door to the closed position and operate the latching device when the gate or door is stationary and 150 mm from the closed and secured position.

Doors in walls of buildings

- 11 Where any building forms part of a fence and the pool is not contained within the building, any door that gives access to the immediate pool area need not comply with the requirements for gates or doors set out in clauses 8 to 10 to the extent (if any) that the territorial authority is satisfied that such compliance is impossible, unreasonable, or in breach of any other Act, regulation, or bylaw, and the door is fitted with a locking device that, when properly operated, prevents the door from being readily opened by children under the age of 6 years.

Appendix B: Figure 2 from Acceptable Solution F9/AS1



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