

Determination 2005/125

Swimming pool fence at 33 Melchizedek Place, Dairy Flat, Auckland

1 THE MATTER TO BE DETERMINED

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004 (“the Act”) made under due authorisation by me, John Gardiner, Determinations Manager, Department of Building and Housing, for and on behalf of the Chief Executive of that Department. The applicant is the Rodney District Council (referred to below as “the territorial authority”), and the other parties are N and K Speakman (referred to below as “the owner”). The application arises from the issuing by City Certifiers Ltd (referred to below as “the building certifier”) of a code compliance certificate in respect of building work including a new swimming pool.
- 1.2 The question to be determined is whether the code compliance certificate should have been issued, and specifically whether the safety barriers to the swimming pool comply with the requirements of clause F4 of the building code (the First Schedule to the Building Regulations 1992).
- 1.3 In making my decision I have not considered any other aspects of the Act or of the building code.

2 THE BUILDING

- 2.1 The relevant parts of the house and the swimming pool are shown in Figure 1. The only access to the swimming pool from the house is through double doors (“D104”) that open outwards from the house into a covered area in which there is a spa pool. The covered area opens directly onto the swimming pool. Double doors (“D103”) open outward from the covered area into a changing room.
- 2.2 Neither set of doors is self-closing. A territorial authority report says that one set of doors (presumably D104) has a “top bolt”.

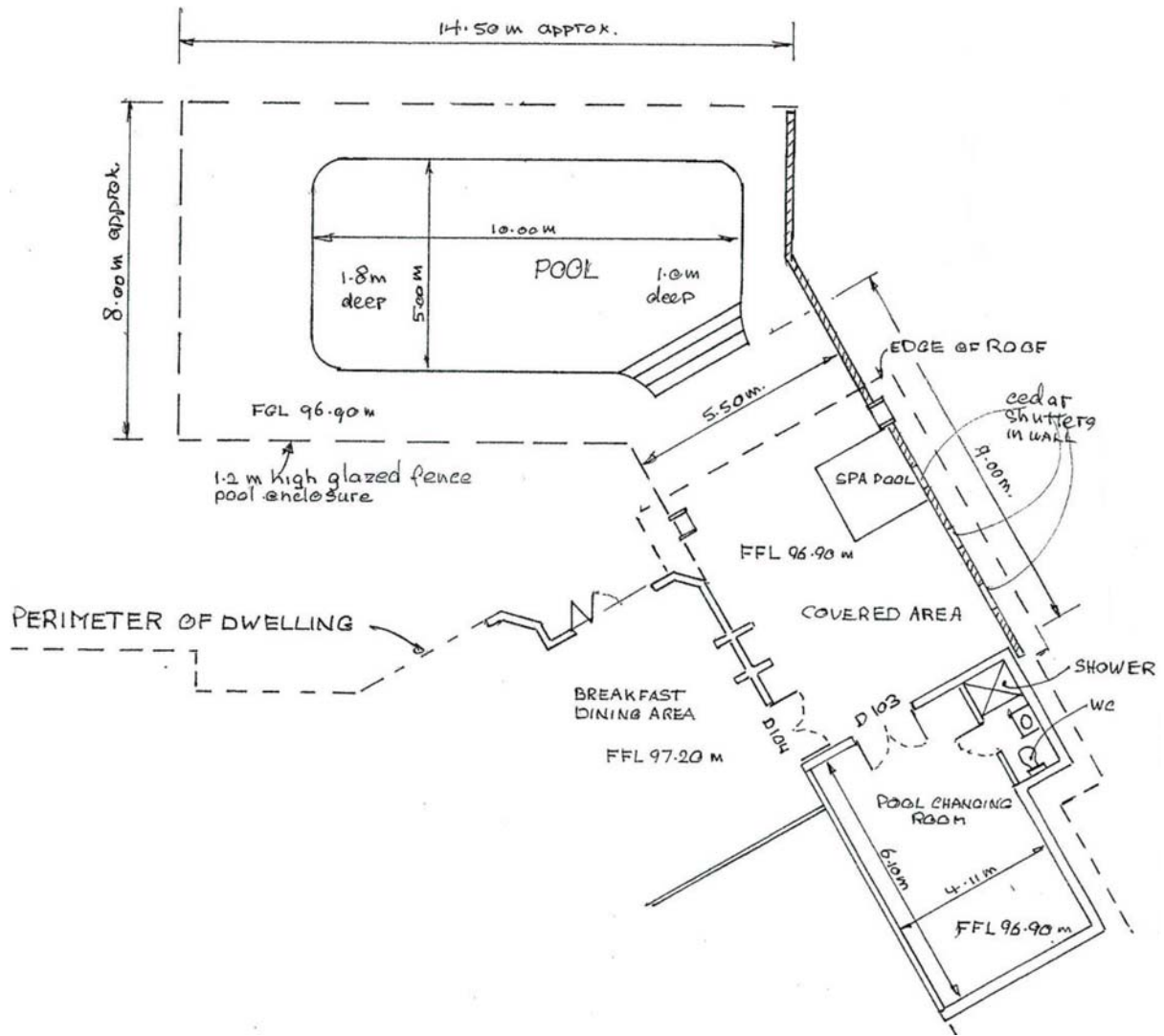


Fig.1: The swimming pool and associated facilities

3 THE LEGISLATION

3.1 The relevant provisions of the building code are:

Provisions	Limits on application
F4.3.3 Swimming pools having a depth of water exceeding 400 mm, shall have barriers provided.	Performance F4.3.3 shall not apply to any pool exempted under section 5 of the Fencing of Swimming Pools Act 1987.
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.	Performance F4.3.4(f) shall not apply to any pool exempted under section 5 of the Fencing of Swimming Pools Act 1987.

<p>(g) Restrict the passage of children under 6 years of age when provided to guard a change of level in areas likely to be frequented by them.</p>	
<p>F4.3.5 Barriers to swimming pools shall have in addition to performance F4.3.4:</p> <p>(a) All gates and doors fitted with latching devices not readily operated by children, and constructed to automatically close and latch when released from any stationary position 150 mm or more from the closed and secured position, but excluding sliding and sliding-folding doors that give access to the immediate pool surround from a building that forms part of the barrier</p>	

3.2 The acceptable solution F4/AS1 says:

“**3.1** Fencing for swimming pools shall be constructed to no lesser standard than is required by the Fencing of Swimming Pools Act 1987, to restrict the access of children.”

3.3 Section 13B of the Fencing of Swimming Pools Act 1987 provides in effect that fencing in accordance with the Schedule to that Act shall be deemed to comply with the building code. Relevant requirements of that Schedule are:

“8. Every gate or door shall be . . . so mounted that—

“(a) It cannot open inwards towards the immediate pool area . . .

“9.(1) Every gate or door shall be fitted with a latching device.

“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.”

4 THE SUBMISSIONS

4.1 The territorial authority submitted in effect that the fencing concerned did not comply with the Schedule to the Fencing of Swimming Pools Act in that doors D103 and D104 opened inward to the pool area and were not self-closing. It said:

“The first issue in this case is whether the pool changing room can be considered to be a part of the immediate pool area. It is Council’s view that it cannot as the exterior wall of the house [i.e. the wall between the covered area and the changing room] in Councils view is a barrier.

“The second specific issue is whether the French doors [doors D104 and D104] are inherently no different to the sliding/folding doors in section F4.3.5 and hence would be automatically exempt from any requirement from self closing and latching under the [building code]. It is Councils view that French doors cannot be considered to be the same as folding/sliding doors and that in any case the performance criteria F4.3.5 need to be complied with.”

4.2 Neither the owner nor the building certifier made specific submissions.

5 DISCUSSION

5.1 The immediate pool area and the immediate pool surround

5.1.1 The territorial authority submitted that the changing room is not part of the “immediate pool surround” because the wall between the changing room and the covered area is a barrier.

5.1.2 The building code refers to both “the immediate pool area”, in clause F4.3.4(f), and “the immediate pool surround”, in clause F4.3.5(a), but does not give definitions of those terms.

5.1.3 In Determination 2003/6, the then Building Industry Authority took the view that:

“ . . .the term ‘immediate pool surround’ in the building code means an area around the pool into which it would be unsafe for young children to go unless someone able to protect them is also in the same area.”

5.1.4 Applying that approach to this case, I consider that because children near the pool must have come through door D104 with someone, then that person will be aware of their presence and able to protect them whether or not he or she is in the changing room. Accordingly, I consider that the changing room is part of the immediate pool surround for the purposes of the building code.

5.1.5 The Fencing of Swimming Pools Act refers to “the immediate pool area”, which is defined in section 2 of that Act as meaning “the land in or on which the pool is situated and so much of the surrounding area as is used for activities or purposes carried out in conjunction with the use of the pool”.

5.1.6 The term “immediate pool area” in the Fencing of Swimming Pools Act was considered by the High Court In *Waitakere City Council v Hickman*¹, which was heard after Determination 2005/6 was issued. The Court held:

“ . . . the outer extent of the immediate pool area is determined by its use. It will extend only so far as the surrounding area is used for activities or purposes carried out in conjunction with the use of the pool. . . .

¹ *Waitakere City Council v Hickman* 1/10/2004, Randerson J, HC Auckland CIV 2003-404-7266.

“Whether an activity or association is sufficiently connected with the use of the pool is a matter of degree. . . . Examples of activities which would not usually be regarded as being carried out in conjunction with the use of the pool include clothes lines, vegetable gardens, vehicle or pedestrian access ways, and planting for landscape purposes.

“On the other hand, . . . activities which would ordinarily qualify as being carried out in conjunction with the use of the pool . . . include the use of pool furniture, changing sheds, pumps or pool maintenance equipment, sunbathing areas, and diving boards or other pool equipment.

“ . . . the size of the area is not governed solely by [its use]. Some weight must be given to . . . the expression ‘immediate’. . . . for example, a fence around the perimeter of the property would not comply with the [Fencing of Swimming Pools] Act. . . . The further away one moves from the edge of the pool, the less likely it will be that an associated activity or purpose . . . will be in sufficient proximity to the pool to be properly regarded as within the ‘immediate’ pool area.”

5.1.7 In the light of that decision, I consider that the changing room appears to be part of the “immediate pool area” for the purposes of that Act and therefore for the purposes of F4/AS1.

5.2 Doors D103 and D104

5.2.1 The territorial authority submitted that “the French doors” D103 and D104 cannot be considered to be the same as folding/sliding doors excluded from the clause F4.3.5(a) requirements for automatic closing and latching.

5.2.2 On the view I take as to the immediate pool surround and the immediate pool area, see 5.1 above, doors D103 are not part of the safety barrier around the pool and are therefore not required to comply with clause F4.3.5 of the building code.

5.2.3 However, doors D104 are part of the safety barrier and must comply with clause F4.3.5. I agree with the territorial authority that those doors cannot be described as “sliding” or “sliding-folding” doors and therefore do not come within the exemption of clause F4.3.5(a) of the building code. Accordingly, the building code requires doors D104 to be “constructed to automatically close and latch”.

5.2.4 Furthermore, doors D104 open inwards towards the immediate pool area contrary to clause 8(a) of the Schedule to the Fencing of Swimming Pools Act. I recognise that the Schedule is not mandatory and that there are other means of complying with the building code. However, the importance of clause 8(a) is that if the automatic latch malfunctions, a gate or door opening inwards towards a pool does not restrict the access of children as required by clause F3.4.4(f) of the building code. In the absence of other safeguards I consider that doors D104 need to open outwards from the pool in order to comply with the building code.

6 CONCLUSIONS

6.1 For the reasons set out above, I conclude:

- (a) That for the purposes of clause F4.3.5(a) of the building code, the changing room is part of the immediate pool surround.
- (b) For the purposes of the Fencing of Swimming Pools Act, the changing room is part of the immediate pool area.
- (c) Doors D104 do not come within the description “sliding and sliding-folding doors” and are therefore not exempted from the requirements of clause F4.3.5(a) of the building code.
- (d) Doors D104 do not comply with clause F4.3.5(a) because they do not automatically close and latch as required by that clause.
- (e) Doors D104 do not comply with clause F4.3.4(f) of the building code because they open inwards towards the pool.

7 WHAT IS TO BE DONE

7.1 How the swimming pool barrier is to be brought to compliance with the building code is not for me to decide. That is a matter for the owner to propose and for the territorial authority to accept or reject, with any of the parties entitled to submit doubts or disputes to me for another determination.

8 DECISION

8.1 In accordance with section 20 of the Act, I hereby reverse the building certifier’s decision to issue the code compliance certificate.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 23 August 2005.

John Gardiner
Determinations Manager
