

Determination 2006/22

Swimming pool fences at 13 John Street, Ponsonby, 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 applicants are S. Gill and C. O’Reagan (“the owners”) acting through Wingate & Farquhar Architecture Interior Design Ltd. The only other party is the Auckland City Council (“the territorial authority”).
- 1.2 The application arises from the refusal by the territorial authority to amend a building consent that it had issued for building work including the construction of a new swimming pool and its associated safety barriers.
- 1.3 I take the view that the matters to be determined are:
- (a) Whether, if the building consent was amended as the owners wish, the safety barriers to the swimming pool would comply with the requirements of clause F4 Safety from falling of the Building Code (the First Schedule to the Building Regulations 1992), and
 - (b) Whether I should confirm, reverse, or modify the territorial authority’s decision under section 49 of the Act to grant an amendment to the building consent for the work.
- 1.4 In making my decision I have not considered any other aspects of the Act or the Building Code.

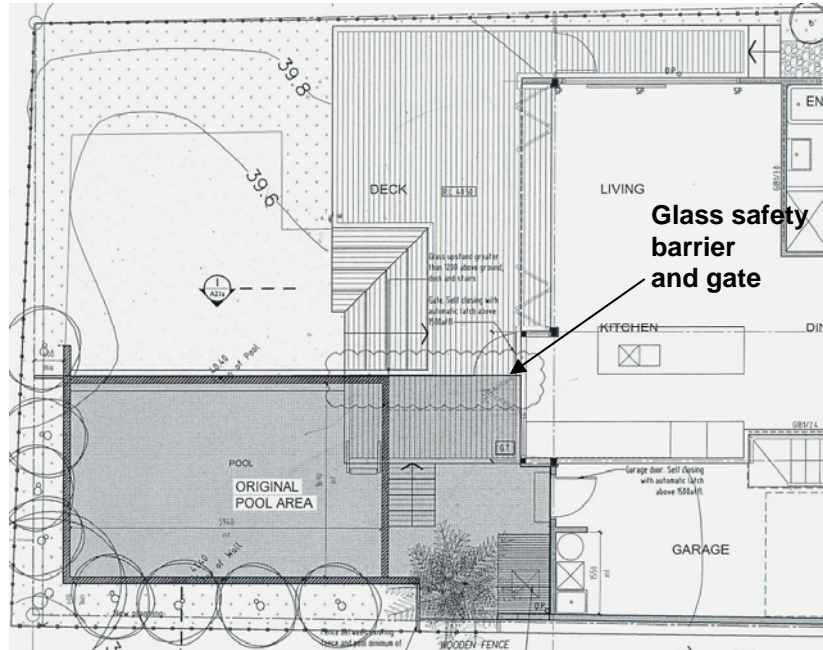


Figure 1: Plan showing the pool and the glass safety barrier

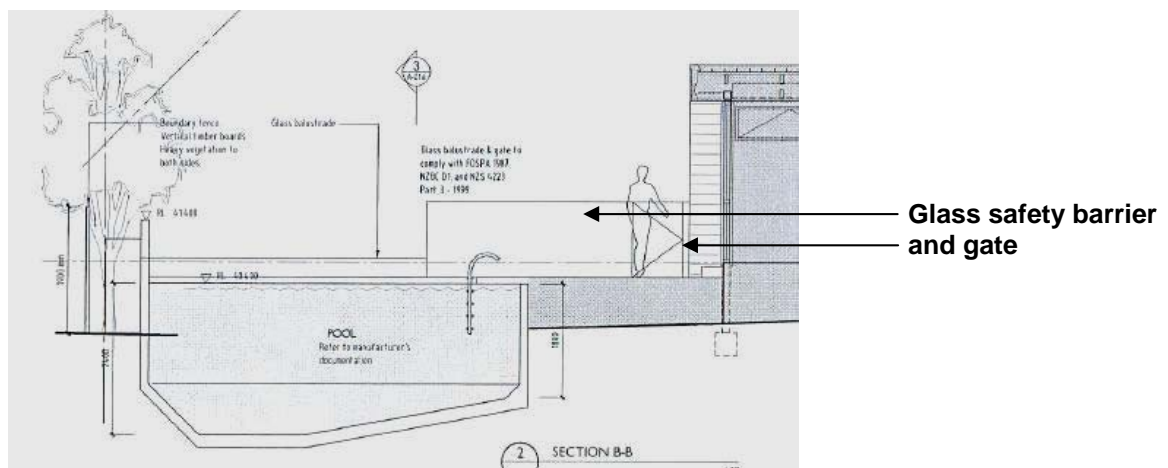


Figure 2: Section showing the glass safety barrier

2 The building

- 2.1 There is a minimal area (the front yard”) between the house and the street boundary. Behind the house there is an area (“the back yard”) of approximately 125 m² which contains the 24m² swimming pool.
- 2.2 The owners wish to amend the building consent so as to omit a safety barrier along one side of the pool (“the glass fence”), which in fact has not been installed to date. The result will be that the remaining safety barriers (800 mm from the boundary), plus boundary fences, a gate, and the house itself will surround effectively all of the back yard.

2.3 It was not disputed that the boundary fences and other items that would form the safety barrier around the pool would adequately restrict the access of children less than 6 years of age.

3 The legislation

3.1 There is no dispute that the construction of the swimming pool and its safety barriers is building work to which the Act applies, and section 17 of the Act says:

“All building work must comply with the Building Code to the extent required by this Act . . .”

3.2 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 less than 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.

3.3 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.”

3.4 The relevant provisions of the Fencing of Swimming Pools Act 1987 are:

(a) Section 5, which provided that the Fencing of Swimming Pools Act does not apply to certain pools.

(The pool concerned does not come within those exemptions.)

(b) Section 6, which provides that the territorial authority may grant further exemptions.

(The territorial authority has not granted an exemption for this pool.)

(c) Section 8, which says:

“(1) Every owner of a pool to which this Act applies shall ensure that, except as provided in any exemption granted under section 6 of this Act, the pool, or some or all of the immediate pool area including all of the pool, is fenced by a fence that complies with the requirements of the Building Code in force under the Building Act 2004 . . .”

- (d) Section 13B, which says in effect that fencing in accordance with the Schedule to that Act shall be deemed to comply with the Building Code.
- (e) The relevant requirements of that Schedule are:
- “(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. . . .
- “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.
- “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 of this Schedule 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.”
- (The territorial authority has not granted an exemption for this pool.)

4 The submissions and the hearing

- 4.1 The owners submitted that the amendment to the building consent was justified because “the glass fence . . . is not required as long as other access doors and gates are designed to prevent children under the age of six entering the area”.
- 4.2 In addition, the owners asked me to consider the following:
- “• The backyard, on which the pool is positioned, is relatively small, and is surrounded by boundary fences (1.7 m ~ 1.9 m high) on three sides. The east side of the backyard is fully blocked by the house and the garage [and a] 1.2 m high gate (with latch complying with the requirements of [the Fencing of Swimming Pools Act 1987])
 - “• Swimming, bathing, and relaxing on the deck after swimming will be the most probable activities in the area. . . . Main purpose of the pool was to dedicate the entire backyard for activities associated with the pool. Fencing

up the pool from the rest of the flat surfaces in the backyard will conflict with the very reason for constructing such a pool.

- “• There will be no cloth (sic) line, vegetable garden or sand pit in this area.
- “• All doors on the building line forming the pool enclosure will be fitted with locks and latches which will prevent children under the age of 6 entering the area.”

4.3 The territorial authority said that it had rejected the amendment because:

- “there is no separate area on the site provided for a children’s play area”
- “The pool area as per the original plans . . . can easily and practicably, be fenced off separately from the remainder of the backyard”

4.4 Because the owners requested a formal hearing, I prepared a draft determination, which I sent to the parties, and arranged for a hearing, which was held on site. The territorial authority declined to attend the hearing.

4.5 At the hearing, one of the owners and their architect pointed out relevant features of the pool and the back yard, and emphasised that the owners intended to use the back yard only for activities in conjunction with the use of the pool, including barbecues. I accept that is the case.

4.6 At the hearing I noted that the landscaping of the back yard had not been completed, but it is occupied almost entirely by a deck level with the top of the pool and suitable for sunbathing, barbecues, and the like. There is a small level area below the deck and abutting the pool and narrow planted areas that slope up to the boundaries.

5 Discussion

5.1 The question is whether virtually the entire back yard can properly be described as “the immediate pool surround” for the purposes of clause F4.3.5(a) of the Building Code or as “the immediate pool area” for the purposes of clause F4.3.4(f) of the building code and of the Fencing of Swimming Pools Act.

5.2 Although the Building Code refers to both “the immediate pool area” and “the immediate pool surround”, it does not give definitions of those terms.

5.3 In Determination 2003/6, the then Building Industry Authority discussed the provisions of the Building Code in respect of swimming pool fences, and 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.”

5.4 Applying that approach to this case, I consider that an adult in the back yard who was engaged in activities not related to the use of the pool might not necessarily be aware if a young child is in danger. Accordingly, I conclude that the back yard cannot be accepted as being “the immediate pool surround”. In other words, the proposal that the safety barriers should enclose virtually the entire back yard does not comply with F4.3.5(a) of the Building Code because the barriers would not restrict access to the immediate pool surround.

5.5 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”. I take the view that the term “immediate pool area” is to be given the same meaning in the Building Code as it is in the Fencing of Swimming Pools Act.

5.6 Since Determination 2003/6 was issued, 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. Unfortunately, Determination 2003/6 does not appear to have been drawn to the attention of the Court, which 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. . . .

“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.”

5.7 In considering what activities are likely to be carried out in the back yard, I note that, on average, houses in New Zealand change ownership with relatively frequency, of the order of every 7 years or so. I take the view that in considering what activities are likely to be undertaken in the back yard I must take account of both present and future owners of the house. That corresponds to the approach the Building Industry Authority took to management matters in various determinations

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

under the former Building Act 1991, determining that such matters had little or any relevance to compliance with the Building Code. I appreciate that taking that approach means that an owner might feel aggrieved when a determination about its building is based on the likelihood that future owners will not adopt good management practices.

- 5.8 Taking that approach in the light of the High Court decision I consider that future owners are likely to use the back yard as a children's play area or for other outdoor activities not necessarily associated with the use of the pool simply because there is no other suitable outdoor area on the allotment. I therefore consider that the backyard cannot properly be described as "the immediate pool area".
- 5.9 I conclude that in this case the entire backyard cannot be accepted as being "the immediate pool area" as defined in the Fencing of Swimming Pools Act. In other words, the proposal that the safety barriers should enclose virtually the entire backyard does not comply with F4.3.4(f) of the Building Code because the barriers would not restrict access to the immediate pool area.

6 Decision

- 6.1 In accordance with section 188(1) of the Act, I hereby:
- (a) Determine that if the building consent was amended as the owners wish, the safety barriers to the swimming pool would not comply with the requirements of clause F4 Safety from falling of the Building Code, and
 - (b) Confirm the territorial authority's decision to refuse to amend the building consent.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 22 March 2006.

John Gardiner
Determinations Manager