



Determination 2008/103

19 November 2008

Safety barriers for a swimming pool at 25 Picton Street, Auckland

1. The matters for determination

- 1.1 This is a Determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department. The applicants are Mr and Mrs Nash, acting through a designer (“the applicants”) and the other party is the Auckland City Council carrying out its duties and functions as a territorial authority or a building consent authority (“the authority”).
- 1.2 The application arises from the authority’s refusal to issue a building consent in respect of an amendment to a swimming pool area and its associated safety barriers.
- 1.3 For the reasons set out below, I take the view that the matters for determination, in terms of sections 177(a), 177(b)(vi) and 188², are:
- (a) Whether the proposed amendment to the pool area and its associated safety barriers comply with clause F4 of the Building Code (the First Schedule to the Building Regulations 1992).
 - (b) The authority’s decision to refuse to issue an amendment to the original building consent. I consider that this matter to be determined falls under section 177(b)(vi) of the Act, namely:

¹ The Building Act 2004 is available from the Department’s website at www.dbh.govt.nz.

² In this determination unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

Section 177 Application for determination

A party may apply to the chief executive for a determination in relation to 1 or more of the following matters:

- (b) a building consent authority's decision to –
 - (vi) amend a building consent, notice to fix, or code compliance certificate . . .

In this context I consider section 177(b)(vi) can be read as including a “decision to amend or refuse to amend” a building consent, notice to fix, or code compliance certificate

- 1.4 In making my decision I have not considered any other aspects of the Act or of the Building Code.

2. The background

- 2.1 The authority issued a building consent (2006/1343701) for a major addition to an existing house, which included the pool in question in MID-2006. A code compliance certificate has not been issued for this work.

- 2.2 The applicants applied for an amendment to the consent on 27 March 2008.

- 2.3 On 7 April 2008, the authority wrote to the designer regarding the consent application. As set out in the letter, the authority:

- had concerns regarding the view of the pool from the house
- noted that the bi-fold doors did not open directly onto the pool
- did not accept that bi-fold doors could be fully self-closing and accordingly, this solution still raised doubts
- could only approve an amendment with a pool fence running from the south east corner of the house.

- 2.4 The application for a determination was received by the Department on 14 August 2008.

- 2.5 Copies of a draft determination were forwarded to the parties on 29 October 2008 and both parties accepted the draft without comment.

3. The safety barriers

- 3.1 The relevant parts of the house and the swimming pool as detailed in the building consent application are shown in Figure 1.

- 3.2 As shown, the pool is enclosed by either the external walls of the house or standard swimming pool fencing at the site boundary and at each end of the pool area. The two end fences have self-closing gates. All the windows adjacent to the pool area are fitted with restrictors that prevent the sashes from opening more than a maximum of 100mm. I have been informed by the applicants' designer that it is intended that

the pool area will be accessed directly from the house by a set of self-closing, self latching sliding doors, fitted with an alarm system.

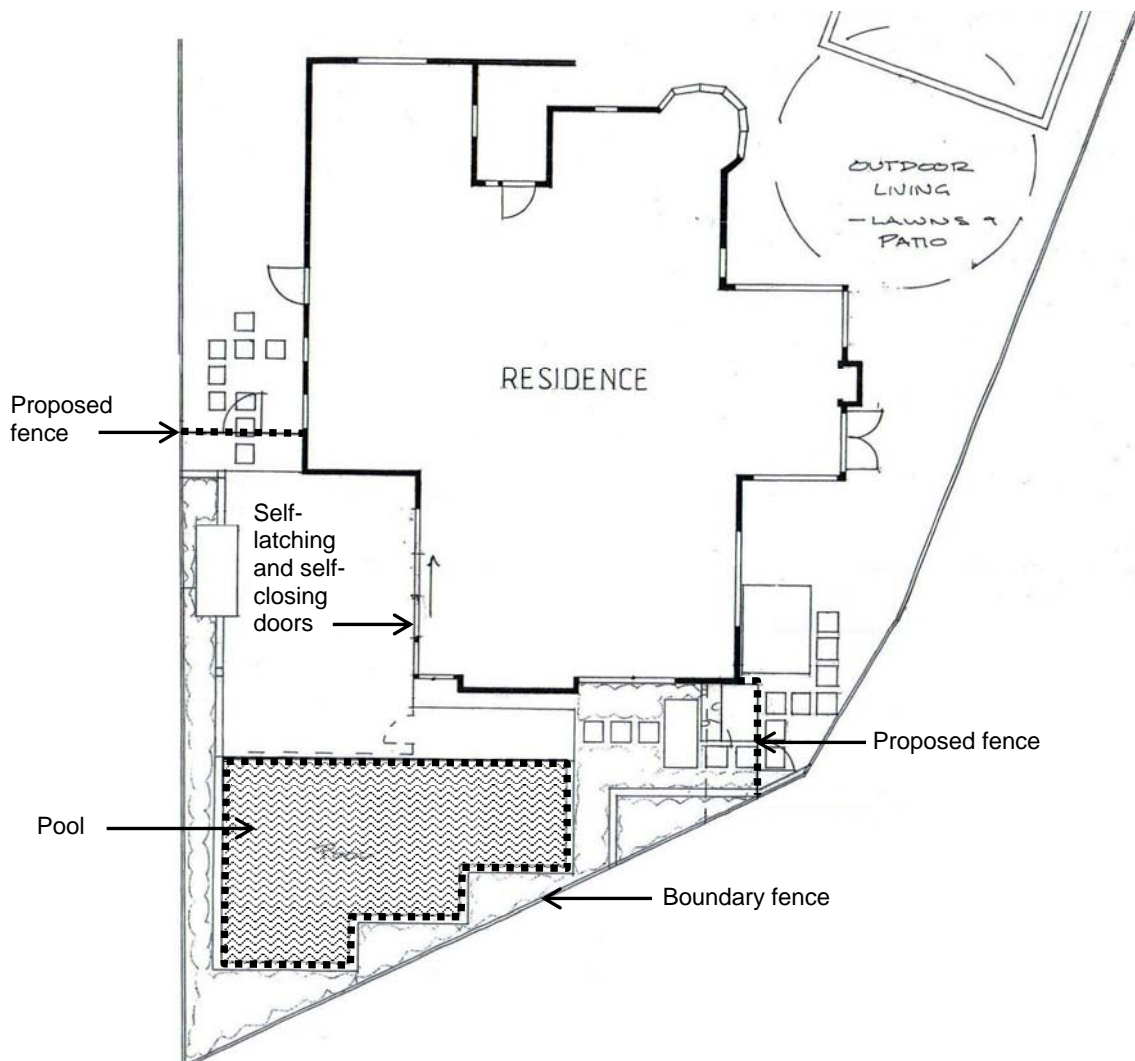


Figure1: The swimming pool as detailed in the building consent application

3.3 The applicants have also stated that a splash alarm will be installed in the pool

4. The submissions

4.1 In a covering letter to the Department, the designer raised the following matters:

- The original proposed pool area was restricted.
- There are other alternative outdoor space areas.
- The pool is clearly visible from the house living area.
- The only set of access doors from the house to the pool area are to be amended from bi-fold to sliding and are to be fitted with a proprietary self-closing and latching devices.

- A splash alarm is to be installed in the pool and alarms can be installed on the doors if necessary.
- All the windows have restrictors on them and can only open to a maximum of 100mm.

4.2 The applicants supplied copies of:

- the plans
- the correspondence from the authority dated 7 April 2008
- a set of photographs showing views of the pool from the house
- correspondence and sliding door system details from the system manufacturer.

4.3 In a submission to the Department dated 11 August 2008, the authority noted that the applicants had modified their proposal to change the existing bi-fold doors into self-closing ranch-sliders and had proposed that a pool alarm be installed. The authority was of the opinion that, as the house doors were not facing the pool, the revised additional area could not be considered as being an “immediate pool area”. In addition, the restrictive window area facing the pool area would significantly obstruct the visual supervision of children using the pool area.

5. The legislation and the acceptable solution

5.1 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. (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.	Performance F4.3.4(f) shall not apply to any pool exempted under section 5 of the Fencing of Swimming Pools Act 1987.
F4.3.5 Barriers to swimming pools shall have in addition to performance F4.3.4: (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	

5.2 The acceptable solution F4/AS1 says:

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

5.3 Clauses 8 to 11 of the Schedule to the Fencing and Swimming Pools Act say:

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.

6. The issues

6.1 I take the view that the issue arising in this determination are:

(a) The relationship between the Building Code and the Fencing of Swimming Pools Act. That issue is discussed in paragraph 7 below.

(b) Whether the sliding-folding doors from the house to the fenced area comply with clause F4.3.4. That issue is discussed in paragraph 8 below.

7. The fenced-in area

7.1 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.

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

. . . the purpose of swimming pool fencing (including gates) is to prevent small children from going near swimming pools unless someone deliberately opens a gate to let them inside the fence. That someone must be big enough to open the gate and may therefore be assumed to be capable of protecting the child against the risk of falling into the pool with the possible consequences of injury or death. It necessarily follows that when both the person and the child are inside the fence, and therefore in “the immediate pool surround”, the person will be close enough to the child to be aware of the child’s activities and to protect the child if necessary. It also follows that the person will be inside the fence for the specific purpose of protecting the child whatever other purposes that person also has for being inside the fence, such as swimming, sunbathing, and so on.

... The Authority accordingly takes 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.

- 7.3 I have adopted the same approach in subsequent determinations. Applying that approach to this case, I consider that an adult who is in the fenced area in the course of “outdoor entertaining” will be aware of the presence of any children and able to protect them.
- 7.4 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”. That term was considered in the *Waitakere City Council v Hickman*, 1/10/04 case³, which was heard after Determination 2003/6 was issued.
- 7.5 I accept that “outdoor entertaining” could take place in the area, which is of a relatively small size, sometimes in conjunction with the use of the pool and sometimes not. I am also of the opinion that *Hickman* establishes that such activities “are not to be excluded from the immediate pool area merely because they are capable of occurring independently of the use of the pool”.
- 7.6 I also note that the applicant has stated that there are alternative areas available on the property where other activities can take place. In addition, the applicants intend to install a pool alarm as an additional safeguard.
- 7.7 The authority have stated that the “issue is the house doors are not facing the pool”, which meant that the enclosed area cannot be considered as being “the immediate pool area”. The authority also notes that “the restrictive window area directly facing the pool” would obstruct the supervision of children. However, neither clauses 8 to 11 of the Schedule nor the definition in section 2 of the Fencing of Swimming Pool Act refers to the location of doors opening onto a pool area. In addition, there is nothing in the latter Act that refers to visual supervision of children from the house (see paragraph 7.4).
- 7.8 Based on the observations made in paragraphs 7.2 to 7.7, I conclude that the fenced area under the proposed amendment can properly be called “the immediate pool area”.

8. The sliding doors

- 8.1 As to whether the sliding doors from the house to the fenced area (“the doors”) comply with the Building Code, I take the view⁴ that:
- (a) The doors come within the exemption of clause F4.3.5(a) and are therefore not required to be self-closing and self-latching. However, if the doors were not

³ Randerson J, HC Auckland CIV 2003-404-7266.

⁴ See Determination 2006/103 for a more extended discussion of this point.

self-closing, the authority would need to give an exemption under the Fencing of Swimming Pools Act.

- (b) Nevertheless, the doors are required to comply with clause F4.3.4(f) and “restrict the access of children under 6”.

8.2 The applicants have informed me that it is now intended that the doors leading from the house to the pool will be self closing and self latching and will also be provided with an alarm system. I have also received information as to the type of door systems that are to be installed.

8.3 Based on the information that I have received, I conclude that the doors, if installed as the applicants have described, will comply with the Building Code.

8.4 I also note that the bi-fold windows have restrictors installed that limits their opening to 100mm, which, in my opinion, would comply with the general requirement to restrict the passage of children as set out in F4/AS1

9. Conclusion

9.1 For the reasons set out above I conclude that the proposed amendment to the building consent, including the revised sliding doors, complies with the Building Code. I must therefore reverse the territorial authority’s decision to refuse to issue the amendment.

10. Decision

10.1 In accordance with section 188 of the Act, I hereby:

- (a) determine that the swimming pool and its associated safety barriers, as finally specified in the proposed amendment, do comply with Clause F4, and
- (b) reverse the territorial authority’s decision to refuse to issue the building consent amendment.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 19 November 2008.

John Gardiner
Manager Determinations