



Determination 2010/036

Proposed amendments to safety barriers surrounding a swimming pool area at 24 Burwood Crescent, Remuera, Auckland

1. The matters to be determined

- 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.
- 1.2 The parties to this determination are:
- the owner of the house, Mr M Weston (“the applicant”)
 - the Auckland City Council (“the authority”) carrying out its duties and functions as a territorial authority and a building consent authority.
- 1.3 The dispute between the parties relates to the decision of the authority not to issue an amendment to a building consent in respect of a house with an adjoining swimming pool. The reason given by the authority for this decision was because the proposed pool barrier (“the barrier”) detailed in the amendment was not in accordance with the Building Code.
- 1.4 I therefore take the view that the matters for determination, in terms of sections 177(a), 177(b) and 188², are whether:
- the barrier as proposed complies with Clause F4 of the Building Code
 - the decision of the authority to refuse to issue an amended building consent was correct.
- 1.5 In making my decision, I have considered the submissions of the parties and the other evidence in this matter. I have not considered any other aspects of the Building Act or of the Building Code (Schedule 1 of the Building Regulations 1992).

¹ The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Department are all available at www.dbh.govt.nz or by contacting the Department on 0800 242 243

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.

- 1.6 In this determination, for the purposes of discussing the legislation, the Compliance Document, and Standards relevant to this determination, I will refer to the following, documents, of which the relevant parts are set out in Appendix A.
- The current Building Act with its sections referred to as sections of the Act.
 - The Fencing of Swimming Pools Act 1987 (“the FOSP Act”), with its sections referred to as sections of that Act.
 - Clause F4 “Safety from Falling” of the Building Code, referred to as Clause F4.
 - NZS 8500: 2006 “Safety Barriers and Fences around Swimming Pools, Spas and Hot Tubs”.

2. The background

- 2.1 The applicant’s architects applied for a building consent (No. BLD20052771601) in November 2005 for a house and a refurbished existing swimming pool.
- 2.2 The authority faxed the applicant’s architects on 25 November 2005, requesting further information regarding the pool and its barriers. The letter also noted that the pool area was “too excessive” and required revision.
- 2.3 The architects responded in a letter also dated 25 November 2005, which stated that the ‘plans had been amended to show the existing pool fence location’. The authority issued the building consent for an ‘existing house to be removed and replaced with [a] new single dwelling’. The approved consent showed the barrier as set out in Figure 1.
- 2.4 The applicants applied for an amendment to the original building consent (the amendment being No. BLD20052771602). The amendment proposed to use the boundary fence and the adjoining house walls as the pool barrier, as set out in Figure 2.
- 2.5 The authority wrote to the applicant’s architects on 24 July 2008 in relation to the amendment to the building consent, stating that it was unable to issue the consent until certain matters were addressed. The authority noted that the proposed change now included the whole back yard as the immediate pool area. There was also concern regarding the proposal to provide alarms to the house doors in lieu of self-closing doors.
- 2.6 During the processing of the building consent application, and prior to the building consent being issued, a plan was produced by the architects that revised the size of the immediate pool area by providing a glass barrier around the pool.
- 2.7 The authority then issued building consent number BLD20052771602 on 21 October 2008 under the current Building Act.
- 2.8 The applicant wrote to the authority on 10 March 2009 and again on 1 May 2009 referring to correspondence with a government minister. The applicant requested that the current building consent, which had ‘yet to be enacted’, be suspended until the current law covering swimming pool fencing had been reviewed and new legislation enacted.

2.9 Following an inspection on 27 May 2009, the authority wrote to the applicant on 27 November 2009, stating that the pool had been non-compliant since 26 May 2008. The authority attached a copy of a notice to fix to the correspondence.

2.10 The notice to fix, which was also dated 27 November 2009, stated:

Particulars of contravention or non-compliance

- That the swimming pool fence to the swimming pool does not comply with the requirements of the Fencing and Swimming Pools Act 1987, Section 8(3) (the Act) and as such does not comply with Clause F4/AS1 3.1.1 of the NZ Building Code 1992 (the Code)
- The Building Work was not done in accordance with the Building Consent...

To remedy the contravention or non-compliance you must:

3.1 The pool must be built as per plan, according to BLD 20052771602

Or

3.2 Apply for a determination from the Department of Building and Housing,

Or

3.3 Apply for a Building Consent to fill or remove the pool.

2.11 I note that this notice to fix has been amended to correct the building consent reference.

2.12 In a letter dated 14 December 2009, the applicant wrote to the authority stating that the applicant believed that the pool was compliant. The applicant also referred to a nearby property that had a pool area with the same configuration and which had been passed by the authority as being compliant.

2.13 The application for a determination was received by the Department on 5 January 2010.

3. The barrier

3.1 The relevant parts of the house and the swimming pool as proposed in the application for an amendment to the building consent are shown in Figure 2. The barrier as originally approved is shown in Figure 1.

3.2 The proposed immediate pool area includes an area of lawn and landscaping that is enclosed by a 1200mm high glazed fence and one of the walls of the house. There are three self-closing gates in the fence giving access to the proposed immediate pool area. This configuration appears to mirror the applicant's original building consent proposal regarding the barrier.

3.3 There is one sliding door from the family room of the house that also gives access to the proposed immediate pool area and this is fitted with a latch set situated 1500mm above the finished floor area and an alarm system that is activated when the door is opened. An alarm system has also been fitted to the pool which, from the information that I have received, appears to comply with NZS 8500.

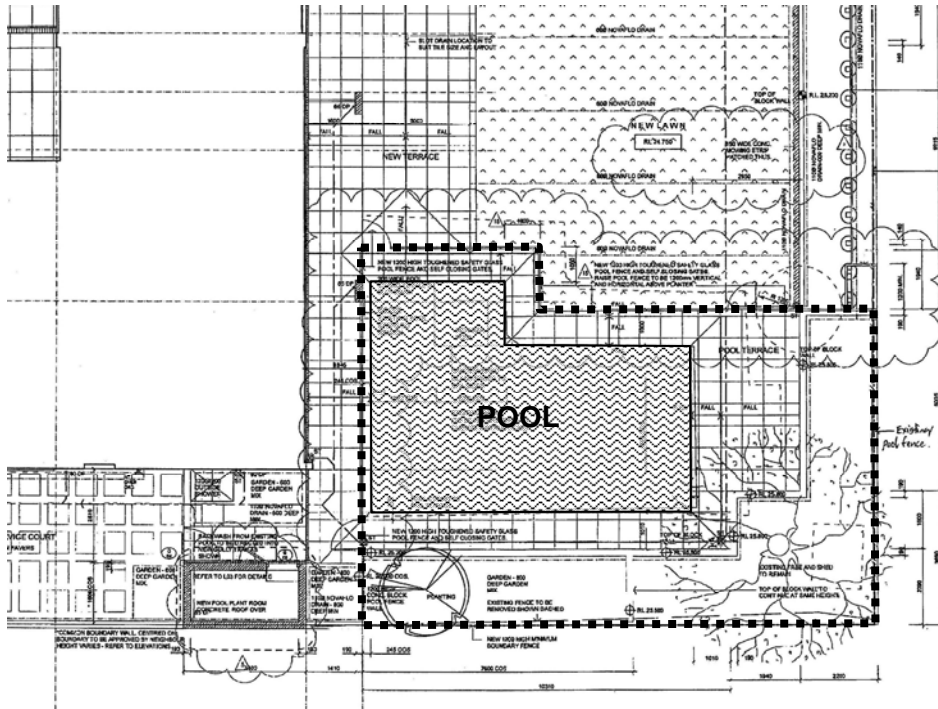


Figure 1: The barrier to the pool as originally approved (the barrier shown as dashed line)

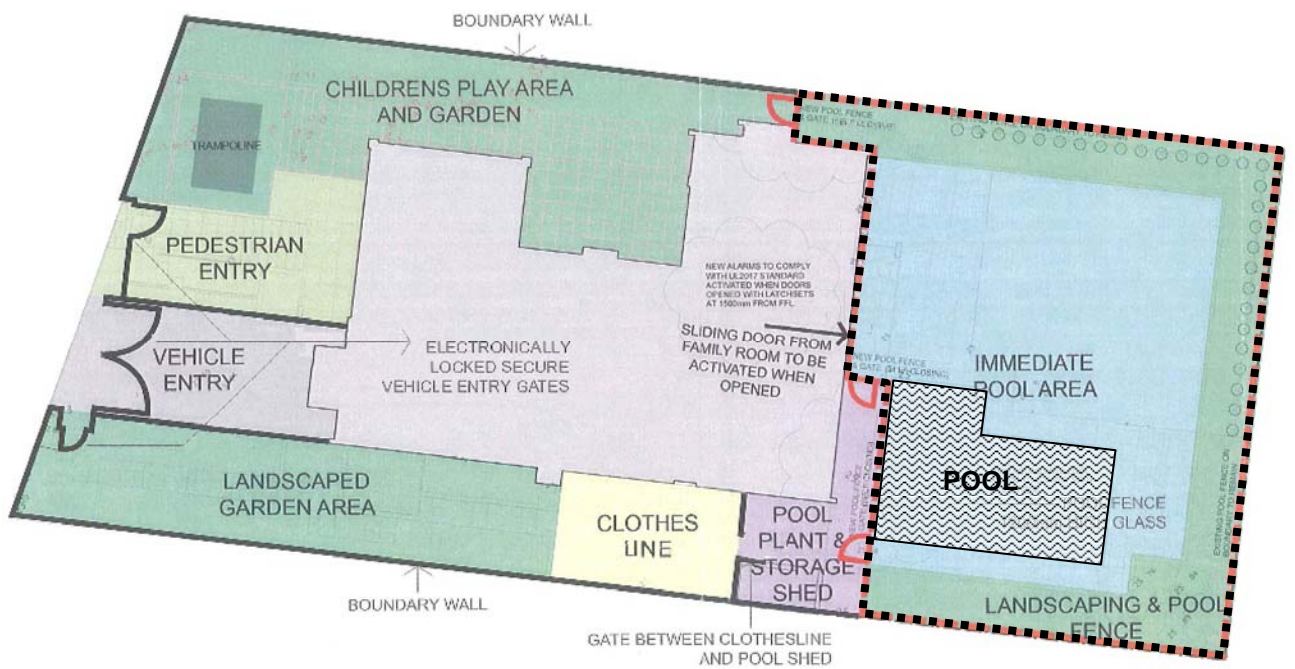


Figure 2: The house and swimming pool as detailed in the building consent application (the proposed immediate pool area shown as dashed line)

4. The submissions

- 4.1 In a covering note to the application, the applicant set out the background to the matter in dispute. It was noted that there were adequate alternative play areas for young children on the north and west sides of the property. The applicant did not agree with the authority's contention that children's equipment could be placed in the proposed immediate pool area, 'as no responsible parent would contemplate that in any pool area, irrespective of its size, without adequate pool fencing in place'.
- 4.2 The applicants supplied copies of:
- a plan of the overall property showing the house and pool layouts
 - the notice to fix
 - the correspondence with the authority and the government minister
 - manufacturers' details of the alarm and security systems
 - two sets of photographs showing the pool area layout and that of a nearby property.
- 4.3 In an email to the Department sent on 6 April 2010, the authority set out the background to the dispute.
- 4.4 The authority supplied copies of:
- the notice to fix
 - the correspondence with the applicant and the applicant's architects
 - the applicant's letter to the government minister of 9 December 2008.
- 4.5 The draft determination was issued to the parties for comment on 9 April 2010. The draft was accepted by both parties without comment.

5. The FOSP Act considerations

5.1 The relationship between the FOSP Act and the Building Code

- 5.1.1 I accept that I have no jurisdiction under the FOSP Act, but I note that it does not specifically require that fencing (including gates and doors) must comply with the Schedule. What is required under section 8(1) of the FOSP Act is that fencing must comply with the Building Code subject to any exemption granted under section 6 of the FOSP Act. The FOSP Act also provides in effect that fencing complying with the Schedule is deemed to comply with the Building Code. Exemptions granted under section 6 of the FOSP Act are exemptions 'from some or all of the requirements of' the FOSP Act.
- 5.1.2 In a case considered by the High Court, *Waitakere City Council v Hickman*³, the Court held:

Under the Schedule to the [FOSP] Act for gates and doors in buildings forming part of the fence, the requirements of clauses 8 to 10 apply unless and to the extent they are exempted and the required locking device is fitted. There is no specific exemption under the Schedule for sliding doors. All doors are treated alike and may be subject to exemption under clause 11.

³ *Waitakere City Council v Hickman* 1/10/2004, Randerson J, HC Auckland CIV 2003-404-7266

5.1.3 Sections 22 and 23 of the Act provide, in effect, that building work complying with a compliance document must be accepted as complying with the relevant provision of the Building Code; however that is not the only means of establishing compliance. Accordingly, if pool fencing complies with the Building Code, then it complies with the requirements of the FOSP Act even if it does not comply with the Schedule. In that case there would be no need for an exemption under section 6 of the FOSP Act.

5.2 Exemption under the FOSP Act

5.2.1 An exemption from clause 11 of the Schedule can be granted if the territorial authority is satisfied that compliance with clauses 8 to 10 of the Schedule is 'impossible, unreasonable, or in breach of any other Act...'. The FOSP Act provides that an authority has a general power of exemption under section 6, provided that such an exemption 'would not significantly increase danger to young children' and section 6(2) allows the authority to impose conditions.

5.2.2 I repeat that, as I have no jurisdiction under the FOSP Act, the above remarks are not binding.

6. Discussion

6.1 The barrier, including any doors forming a part of the barrier, must comply with Clause F4 of the Building Code. In this respect, the construction must also be code-compliant by affording protection to children under 6 years of age from entering the pool area unaccompanied.

6.2 The Building Code refers to '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. In addition, section 2 of the FOSP Act defines 'the immediate pool area' 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 case⁴, and I consider that the following extracts from that decision are relevant to this determination:

[29]

- e) . . . There must be sufficiently close nexus between the activity or purpose and the use of the pool.
- f) Whether an activity or association is sufficiently connected with the use of the pool is a matter of degree. Activities which are carried on independently of the use of the pool or which have only a remote or indirect association with the use of the pool are to be excluded from the immediate pool area which must be fenced. Examples of activities which would not usually be regarded as being carried on in conjunction with the use of the pool include clothes lines, vegetable gardens, vehicle or pedestrian access ways, and planting for landscape purposes.
- g) On the other hand, there are activities which would ordinarily qualify as being carried on in conjunction with the use of the pool. Examples include the use of pool furniture, changing sheds, pumps or pool maintenance equipment, sunbathing areas, and diving boards or other pool equipment.

⁴ Randerson J, HC Auckland CIV 2003-404-7266.

[34]

...It is not possible to define with precision the width (say in metres) of the immediate pool area. The width will depend upon the circumstances of each case. The further away one moves from the edge of the pool, the less likely it will be that an associated activity or purpose can be properly be said to be carried on "in conjunction with" the use of the pool and the less likely it is that the activity will be in sufficient proximity to the pool to be properly regarded as within the "immediate" pool area.

6.3 In Determination 2003/06, the then Building Industry Authority (the precursor to the Department) 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.

6.4 I have adopted the above approaches in subsequent determinations, and I consider it appropriate to apply them to this case.

6.5 From the documents that I have received, I note that there is a relatively large area of lawn that would be enclosed by the proposed amended barrier,. The greatest distance from the pool edge to the proposed barrier is approximately 12.4 metres. There are also landscaped sections situated around the perimeter. Therefore, based on these observations, I am of the opinion that the tests for compliance as set out in the Hickman decision and the previous relevant determination decisions regarding the 'immediate pool surround' requirements, have not been met.

6.6 In addition, I comment that family rooms are used frequently by families for general living (In this regard I note that Resource Consent Plans RC01, 02 and 04 describe the area outside the Family Room accessed by the door and immediately adjacent to the pool as a "Living Courtyard"). As the doors will be open much of the time allowing access to the back yard and the outside space, I do not think it credible to suggest that the doors will only be used in conjunction with pool activities. Even if it was believed the current owners would keep the area exclusively for pool activities, there is no guarantee that future owners would.

6.7 The applicant has also noted that there is 'a very adequate alternative play area for young children on the north and west sides to the property'. However, I am of the opinion that this does not of itself prevent young children from playing in the proposed immediate pool area itself, which is of sufficient size to allow such activities to take place.

6.8 The applicant has expressed the opinion that no responsible parent would contemplate [placing children's play equipment] in any pool area, irrespective of its size, without adequate pool fencing in place. While accepting that this would be true for owners such as the applicant, I must bear in mind that a change of ownership could possibly lead to a different conclusion.

6.9 In line with my observations set out in paragraphs 6.5 to 6.8, I am of the opinion that the proposed immediate pool area as constructed at present does not meet the requirements of the Act.

6.10 The applicant has referred to an adjacent property that has a similar pool area to that proposed, but according to the applicant has been consented to by the authority. This is not a matter that I can consider in this determination and is one that the applicant should take up with the authority itself. Of course, the authority having

been alerted to the situation can choose to check for itself and take any action that it deems to be appropriate.

- 6.11 The authority has raised concerns regarding the sliding door from the family room to the proposed immediate pool area, that is not self-closing. The resolution of this matter will need to be considered should any sliding doors remain in what is to be agreed as the immediate pool area to the pool.

7. What is to be done now?

- 7.1 It is not for me to say how the barrier is to be brought into compliance with the Building Code. That is for the owner to propose and for the authority to accept or reject.

8. The decision

- 8.1 In accordance with section 188 of the Act, I hereby determine that:
- the proposed barrier does not comply with Clause F4 of the Building Code
 - the authority's decision to refuse to issue an amendment to the building consent is confirmed.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 5 May 2010.

John Gardiner
Manager Determinations

Appendix A

A1. The legislation, the Acceptable Solution, and NZS 8500

A1.1 The provisions of the Building Code Clause F4 are:

CLAUSE F4—SAFETY FROM FALLING

OBJECTIVE

F4.1 The objective of this provision is to safeguard people from injury caused by falling.

FUNCTIONAL REQUIREMENT

F4.2 Buildings shall be constructed to reduce the likelihood of accidental fall.

PERFORMANCE

F4.3.1 Where people could fall 1 metre or more from an opening in the external envelope or floor of a building, or from a sudden change in level within or associated with a building, a barrier shall be provided.

F4.3.4 Barriers shall:

- (a) Be continuous and extend for the full extent of the hazard,
- (b) Be of appropriate height,
- (c) Be constructed with adequate rigidity,
- (d) Be of adequate strength to withstand the foreseeable impact of people and, where appropriate, the static pressure of people pressing against them,
- (e) Be constructed to prevent people from falling through them, and
- (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.

Provisions	Limits on application
<p>F4.3.3 Swimming pools having a depth of water exceeding 400 mm, shall have barriers provided.</p>	<p>Performance F4.3.3 shall not apply to any pool exempted under section 5 of the Fencing of Swimming Pools Act 1987.</p>
<p>F4.3.4 Barriers shall:</p> <ul style="list-style-type: none"> (a) Be continuous and extend for the full height of the hazard, (b) Be of appropriate height, (c) Be constructed with adequate rigidity, (d) Be of adequate strength to withstand the foreseeable impact of people and, where appropriate, the static pressure of people pressing against them, (e) Be constructed to prevent people from falling through them, and (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. 	<p>Performance F4.3.4(f) shall not apply to any pool exempted under section 5 of the Fencing of Swimming Pools Act 1987.</p>

A1.2 The Acceptable Solution for Building Code Clause F2, F4/AS1 includes:**3.0 Swimming pool barriers****3.1 Fencing**

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

A1.3 New Zealand Standard NZS 8500, 2006 Safety Barriers and Fences around Swimming Pools, Spas and Hot Tubs includes the following definition:

IMMEDIATE POOL AREA. 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.