



Determination 2010/104

Safety barriers to a swimming pool and spa pool at 130 Wharf Road, Pigeon Bay

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 pool and surrounding property, Mr M Palmer (“the applicant”), acting through his architect and agent (“the architect”)
 - the Christchurch City Council (“the authority”) carrying out its duties and functions as a territorial authority and a building consent authority.
- 1.3 I take the view that the matter for determination² is whether the proposed pool barrier for the applicants’ swimming and spa pool, as set out in the plans originally submitted for building consent approval (“the original plans”) and in the amended plans of 19 May 2010 (“the amended plans”) comply with Clause F4 of the Building Code (Schedule 1, Building Regulations 1992).
- 1.4 In this determination, I will refer to the following legislation and standards, the relevant parts of which are set out in Appendix A.
- The Building Act 2004 with its sections referred to as sections of the Act.
 - Clause F4: Safety from Falling of the Building Code, referred to as Clause F4.
 - The Fencing of Swimming Pools Act 1987 (“the FOSP Act”), with its sections referred to as sections of the FOSP Act.
 - The Schedule to the FOSP Act (“the Schedule”), with its clauses referred to as clauses of the Schedule.
 - NZS 8500: 2006: Safety Barriers and Fences around Swimming Pools, Spas and Hot Tubs.

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 terms of sections 177(a) of the Act (prior to 7 July 2010)

- 1.5 In making my decision, I have also considered the submissions of the parties and the other evidence in this matter. I have not considered any other aspects of the Act or of the Building Code.

2. The background

- 2.1 The applicant applied for a building consent for his swimming pool, spa pool and associated pool building on 25 February 2010. Work began on the pool in May 2010 before the consent had been issued.

- 2.2 While the consent was being processed, there were discussions between the parties about the inclusion of ‘non-pool related activities’ within the area enclosed by the proposed swimming pool fence and whether this would mean that the fence did not comply with the FOSP Act.

- 2.3 On 7 May 2010, the authority confirmed by email that it would not issue a building consent, as:

...there is an issue with the “non pool related activities” within the fenced area. Any activity which is not related to the use of the pool must be accessible without having to go through the fenced area. In this case it is the Gym/Cinema/Lounge and the BBQ.

The email then specified the steps that the applicant would need to take to ensure that the swimming pool barrier complied with the FOSP Act.

- 2.4 Later that day, the architect responded to the authority in an email stating that ‘the building is intended to function as a “pool building” and has been designed for swimming pool and spa pool related activities’.

- 2.5 Various email correspondence subsequently passed between the parties with the authority confirming that from its perspective there was no issue with the gates and fences that made up the swimming pool barrier. Instead, it was ‘the activity within the “immediate pool area” which is the problem’.

- 2.6 On 11 May 2010, the architect contacted the Department for advice on the matter. Following receipt of that advice, the architect wrote to the authority on 12 May 2010 requesting that it ‘review [its] decision on this matter’. The letter raised the possibility that the pool was exempt under section 5 of the FOSP Act and that therefore the requirement in NZS 8500 to fence the immediate pool area did not apply:

In ‘NZS8500: 2006 Safety and Fences around Swimming Pools’ the term ‘immediate pool area’ discussed in section 2.2 is not applicable to this particular pool because it is not associated with a house. The pool and associated structure are 80 metres away from the nearest dwelling and has been designed to be used independently. Therefore, the facilities that are located within the swimming pool fence need not be restricted to the same extent.

The pool and associated structure are to be fully fenced as per the NZS 8500: 2006 with 1200mm high fences and gates to be self-closing with latches 1500mm above ground level. As this area is independent from other buildings and fully fenced, it is not possible for a child to enter the pool area without the assistance of an adult and it is unlikely that a child would be left unsupervised in this situation. This spa and swimming pool is therefore fully compliant with the NZ Building Code “F4 Safety from Falling” Section 4.3.4...

The architect’s letter also made reference to an earlier determination (Determination 2008/123) where it was decided that a gym, steam room and sauna could be included within the immediate pool area.

- 2.7 Further email correspondence then passed between the parties, mainly concerning 'the overall intended use of the building'. The authority remained concerned that:
- there were activities included in the immediate pool area that were not related solely to the pool (namely the lounge and cinema) and that accessing these activities would create a thoroughfare through the pool area, which would pose a danger for children
 - there would be no guarantee that there would be continuous adult supervision while children were enjoying these unrelated activities in the pool area
 - the gym and barbecue area would be used in isolation from the pool, especially during winter, and should therefore have separate access
 - the size of the immediate pool area was too large and needed to be reduced so that it could not be used for activities unrelated to the pool.
- 2.8 On 14 May 2010, the architect emailed revised plans to the authority, which 'clarified the intended use of the building' as being 'for swimming and spa pool related activities only'. In particular, the reference to the cinema and lounge was removed from the plans, so that the building was now to be used solely as a gym and pool room. Despite these revisions, the authority still declined to issue a building consent.
- 2.9 The applicant applied for a determination on the matter on 8 June 2010.

3. The swimming pool and pool barrier

- 3.1 The swimming pool, spa pool and associated building are new building works. They are being built on the applicant's property, which already has several buildings on it, including a homestead, stables and several sheds.
- 3.2 The pool complex is to be situated in the northeast of the property at a distance of approximately 90m, in a straight line, from the homestead. It includes an outside swimming pool, outside spa pool, patio area with fireplace, storage sheds and a pool building. The pool building incorporates changing rooms, bathroom facilities, a combined gym and pool room, and a small bar.
- 3.3 The internal floor area of the proposed pool building is stated, on the plans, as being 112m² and the surrounding patio is 195m².
- 3.4 In the original plans, the whole complex was to be surrounded by a 1200mm high fence. Access was via two self-closing and self-latching gates on the western and southern sides of the complex. The plans state that both the fence and the gates will comply with the FOSP Act, and this was not disputed by the authority.
- 3.5 In addition to the pools and building, the fence would encompass a substantial area of land made up of rocky areas and lawn of approximately 1100m².
- 3.6 The pool complex, as show in the original plans, is shown in Figure 1.

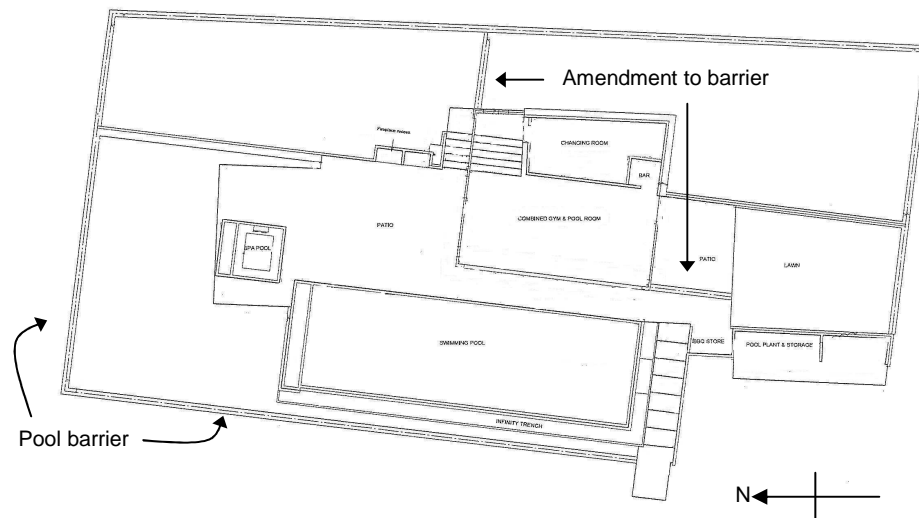


Figure 1: The pool complex showing pools, patio area, pool building and fencing

4. The submissions

4.1 In a letter accompanying the application for a determination, the architect outlined the matters that had passed between the parties and stated that the applicant was seeking a determination as to:

whether the proposed swimming pool and associated building sufficiently meets the requirements of the Fencing of Swimming Pools Act 1987 and can be included in the 'immediate swimming pool area'.

4.2 The applicant also provided copies of:

- the correspondence between the parties
- the original plans dated 22 February 2010, which formed the basis for the building consent application
- the amended plans dated 14 May 2010 reflecting the revised uses for the pool building.

4.3 The authority did not make a submission in response to the application.

4.4 The first draft determination

4.4.1 The first draft determination was issued to the parties for comment on 20 July 2010.

4.4.2 The authority accepted the first draft determination, and made a submission received on 2 August 2010. In particular, the authority advised that the applicant had submitted a further set of plans for the swimming pool complex on 19 May 2010. The authority accepted that the amended plans showed a compliant solution and the authority consequently issued a building consent for the work on 25 May 2010.

4.4.3 The amended plans incorporated changes to the swimming pool barrier which enclosed a reduced immediate pool area. The pool barrier was designed so that the pool building is able to be accessed independently of the immediate pool area. The

authority advised that it is now satisfied that the revised plans ‘meet the requirements of clause F4 of the Building Code (and the Fencing of Swimming Pools Act 1987)’.

4.4.4 However in my view, while the immediate pool area has been reduced, the size of the area within the pool barrier and the activities that are likely to take place within it, mean the barrier still does not yet comply with Clause F4 of the Building Code. My reasons for this are set out in paragraph 6.4.

4.4.5 The authority questioned the nature of the dispute as it was described in the draft determination. The authority submitted that it had not formally declined to issue the consent under section 50 of the Act.

4.4.6 The applicants accepted the first draft determination but disputed the authority’s contention that the application for consent had not been declined saying:

... it was made clear to us [by the authority] that the consent would not be issued unless we amended the proposed plans to the point that they were satisfied that the proposal complied with F4 of the Building Code.

4.4.7 I consider this a refusal by the authority to issue the consent. However, the building consent has now been issued and I have amended the determination to limit its findings to the code compliance of the pool barrier.

4.4.8 The nature of the dispute between the parties, and hence the matter to be determined, was not clarified until after submissions had been received by the Department in response to the draft determination. Neither party had disclosed the full details of the case until this point. This approach is not helpful. The absence of such disclosure can throw doubt on the accuracy and relevance of any decision made.

4.5 The second draft determination

4.5.1 The second draft determination took account of the submissions received on the first draft determination and was issued to the parties for comment on 18 August 2010. The authority accepted the draft without comment.

4.5.2 The applicants did not accept the second draft determination. The applicants made a submission which included email correspondence with the authority. The submission stated that:

... the client wished to have an alternative, compliant plan approved for Building Consent to allow construction to proceed. ... amended plans were provided, and approval was given ... followed by approval of the Building Consent. These plans were not in dispute ...

The ... owner has proceeded in accordance with the Building Consent approved by the [authority] and the building is currently under construction.

The applicant ... request[s] that the [Department] proceed as per the First Draft [determination] dated 20 July 2010 as accepted by all parties ...

4.5.3 In response to the request made in the applicant’s submission I do not believe I can make a decision on compliance based upon an incorrect decision of the authority to approve the amended plans.

5. The relationship between the FOSP Act and the Building Code

5.1 I accept that I have no jurisdiction under the FOSP Act. However, it is helpful to look at the relationship between the FOSP Act and the Building Code.

- 5.2 I note that the FOSP Act 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.
- 5.3 Section 6 gives authorities a general power to grant exemptions from ‘some or all of the requirements of the FOSP Act’, provided that such an exemption ‘would not significantly increase danger to young children’. Section 6(2) allows authorities to impose conditions on such exemptions.
- 5.4 The FOSP Act also provides, in effect, that fencing that complies with the Schedule is deemed to also comply with the Building Code, giving the Schedule the status of a compliance document with respect to the Building Act. Sections 22 and 23 of the Act provide, in effect, that building work that complies with a compliance document must be accepted as complying with the relevant provision of the Building Code. However, compliance documents are not the only means of establishing compliance.
- 5.5 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 such a case there would be no need for an exemption under section 6 of the FOSP Act.

6. Discussion

6.1 General

- 6.1.1 The applicant has asked for a determination as to whether the proposed pools and buildings, as set out in the original plans, comply with the FOSP Act. As noted above, I have no jurisdiction under that Act. However, the proposed swimming pool fencing must also comply with the Building Code, including Clause F4.3.4(f), which states that:

F4.3.4(f) Barrier 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.

6.2 The immediate pool area

- 6.2.1 At the heart of the dispute is whether the proposed swimming pool barrier would serve to restrict access to the immediate pool area as required by Clause F4.
- 6.2.2 Although the Building Code refers to ‘the immediate pool area’ and ‘the immediate pool surround’, it does not define these terms. However, 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 2004 *Waitakere City Council v Hickman* case³, 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.

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

- 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.

[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.

6.2.3 In addition, the Building Industry Authority (the predecessor to the Department) took the view, in Determination 2003/06, 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.

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

6.2.5 It is also appropriate at this stage to refer to NZS 8500⁴, which defines the immediate pool area as '[t]he land in, or on which the pool is situated and so much of the surrounding area as is used for activities or purposes carried on in conjunction with the use of the pool'. Although NZS 8500 is not currently cited as a compliance document for Clause F4, it was approved by the Standards Council and must command respect as representing the consensus of the major national bodies represented, arrived at after a process of public consultation. As such, it can provide guidance in this matter.

6.3 The code compliance of the pool barrier as described in the original plans

6.3.1 From the applicant's plans it is apparent that substantial landscaped areas, including lawns, rocky areas and a paved patio would be included in the proposed immediate pool area. The significance of this is that, as set out in *Hickman*, the greater the area of land that is encompassed within the immediate pool area the more likely it becomes that activities in that area will not be 'carried on "in conjunction with" the use of the pool' and so should not be included within the area.

6.3.2 In addition, given the extensive nature of the facilities provided in the pool building and the large size of the building, it appears probable that, at times, activities in the building would be 'carried on independently of the use of the pool'. Indeed, it seems likely that the building would be used as an all-weather facility for exercise and

⁴ New Zealand Standard NZS 8500, 2006 Safety Barriers and Fences around Swimming Pools, Spas and Hot Tubs.

recreation, including at times when it is too cold or inclement to use the swimming pool. At these times, the only access to the facilities in the pool building would be through the pool area, posing a risk to children as, if the pool is not in use, it is unlikely to be supervised. The building's size also makes it possible that children would accompany their parents or other adults while they exercise or use the barbecue and again may not be adequately protected from the pool while the adults are otherwise occupied.

- 6.3.3 I note that in their correspondence the parties have referred to Determination 2008/123, in which it was decided that a small gym, sauna and steam room could be included within the immediate pool area. I am not bound by the decisions made in previous determinations. Each determination is decided on its own facts; however, it may be useful to consider 2008/123 in this context.
- 6.3.4 In Determination 2008/123 a significant factor was the size of the building where the activities would take place. Each of the rooms in that case measured only approximately 2 x 2 metres. This made it unlikely that a child under 6 years of age would be present while an adult was using the facilities in the room. It also precluded the rooms being used for 'activities of a differing nature'. In allowing the activities in the immediate pool area, the determination stressed that 'a different view could have been reached if the outbuilding had been larger, allowing a range of activities involving greater numbers of people, including children under 6 years of age.'
- 6.3.5 The building in the current case is substantially larger than that considered in Determination 2008/123. There seems little question that, if desired, the rooms could be used for purposes other than as a gym or pool room, and that these activities could include ones where children are present. For example, the applicant's original plans saw the gym and pool room as also being capable of housing a lounge and home cinema.
- 6.3.6 I note in this regard that the applicant has stated that the pool building would only be used as a gym and for uses associated with the pool, and that there will be adult supervision whenever children are present. While I accept the applicant's intentions, this would mean that the continued safe use of the swimming pool complex would be a management practice and reliant on the behaviour of the people using the complex. In Determination 1992/1102, the Building Industry Authority stated:
- . . . the Building Act does not cover the management of buildings in that respect, and assurances as to future management practices will rarely be enforceable under the Act.
- 6.3.7 In Determination 2006/22, I took the view that I must take account of both present and future owners of the house, who may not adopt the same management practices. I consider these views are relevant and I therefore consider that, as management practices are not enforceable, in making a decision I cannot rely on the behaviour of people using the swimming pool, or its associated facilities.

6.4 The code compliance of the pool barrier as described in the amended plans

- 6.4.1 The parties have advised that the building consent has been issued on the basis of the amended plans, a copy of which was received by the Department on 2 August 2010 (refer paragraph 4.4.2).

6.4.2 As noted in paragraph 4.4.4 I do not believe the amended plans provide a code compliant solution. The immediate pool area as described in the amended plans encloses an area of approximately 450m², which includes two significant areas of landscaping and the bulk of the 195m² patio. In my opinion these areas by virtue of both their size and nature cannot reasonably be considered to be areas solely 'used for activities or purposes carried out in conjunction with the use of the pool'. The arguments that apply in paragraph 6.3.1 apply equally in this instance.

6.5 Conclusion

6.5.1 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 requirements for the 'immediate pool area', have not been met. With respect to the original and amended plans I conclude that the requirements of the Building Code are not met in either instance, as the areas enclosed within the barriers to the pool do not meet the requirements of an immediate pool area.

6.6 Other matters

6.6.1 The applicant has stated that he considers that the swimming pool complex may be exempt under section 5 of the FOSP Act because it will not be used in 'association with any house'. If the pool was in fact exempt, then the requirements in Clause F4 would not apply to it.

6.6.2 While I have already noted that I do not have any jurisdiction under this Act, I agree with the authority in this case that the pool cannot be considered not to be associated with the house, purely due to the distance that the pool is located from it. The pool is clearly intended to be used by the occupants and guests of the homestead and so is associated with it.

6.6.3 In addition, there seems to be no question that the pool is 'intended to be used, for swimming, wading, paddling, or bathing'. The remaining condition of the exemption under section 5 only applies if the pool is not to be used for these purposes.

7. The decision

7.1 In accordance with section 188 of the Act, I hereby determine that the proposed pool barriers, as set out in both the original plans and the amended plans, do not comply with Clause F4 of the Building Code.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 1 November 2010.

John Gardiner
Manager Determinations

Appendix A: The legislation, the Acceptable Solution, and NZS 8500

A1 The relevant clause of the Building Code

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

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: (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, (g)	Performance F4.3.4 (f) shall not apply to any pool exempted under section 5 of the Fencing of Swimming Pools Act 1987.

A2 The relevant clause of the Acceptable Solution, F4/AS1 (second edition):

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.

A3 The relevant sections of the FOSP Act:

2 Interpretation

In this Act, unless the context otherwise requires,—

Fence—

- (a) means a fence that complies with the requirements of the building code in force under the Building Act 2004 in respect of swimming pools subject to this Act; and
- (b) includes any part of a building and any gates or doors that form part of the fence

Swimming pool and pool mean an excavation, structure, or product that is used or is capable of being used for the purpose of swimming, wading, paddling, or bathing; and includes any such excavation, structure, or product that is a spa pool

5 Exempted pools

Nothing in this Act shall apply in respect of—

- (c) Any excavation, structure, or product,—
 - (i) That is not used in association with any house, home unit, apartment building, school, hospital, hotel, motel, camping ground, or other similar premises; and
 - (ii) That is not modified for use, or intended to be used, for swimming, wading, paddling, or bathing:

8 Obligations of owner and persons in control of pool

- 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 in respect of swimming pools subject to this Act at all times when this Act applies in respect of the pool.

13B Fencing in accordance with Schedule must be treated as means of compliance

Any provision that is made for the fencing of swimming pools that is in accordance with the Schedule must, in respect of —

- (a) matters subject to the Building Act 2004, be treated as a compliance document establishing compliance with the building code for the purposes of section 19 of that Act, and the requirements of this Act

The Schedule**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) of this clause, 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.

2

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

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.

A4 New Zealand Standard NZS 8500, 2006 Safety Barriers and Fences around Swimming Pools, Spas and Hot Tubs

The standard 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 on in conjunction with the use of the pool.