



Determination 2015/012¹

Compliance of pool barriers in relation to the immediate pool area for a proposed swimming pool at 2a Finch Street, Morningside, Auckland

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004² (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The parties to this determination are:
 - The owner of the house and pool, The Arabella Family Trust (“the applicant”), acting through one of the Trustees as its agent.
 - Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 The dispute arises from the authority’s decision to suspend processing of the building consent application and require the applicant to reduce the size of the area enclosed by the pool barrier (“the immediate pool area”), and to remove a gate to the pool barrier from the driveway.
- 1.4 The matters for determination³ are whether the immediate pool area and the gate to the pool barrier from the driveway as proposed in the application for building consent comply with Clause F4 of the Building Code (First Schedule, Building Regulations 1992).
- 1.5 In this determination, I will refer to the following legislation and standard, 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.
 - Building Code Clause F4- Safety from Falling.
 - 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.
 - New Zealand Standard NZS 8500:2006 Safety Barriers and Fences Around Swimming Pools, Spas and Hot Tubs (“NZS 8500”).

¹ Subject to a clarification under section 189 of the Building Act 2004

² The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.dbh.govt.nz or by contacting the Ministry on 0800 242 243.

³ Under section 177(1)(a) of the Act

1.6 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 proposed swimming pool and pool barrier

2.1 The applicant's property is a rear section which is accessed by a driveway and right of way leading from the north eastern corner of the main area of the property. The property contains a recently constructed two storey dwelling.

2.2 The net site area is shown as 529 square metres and house area as 183 square metres.

2.3 The main access to the dwelling is via an entry door immediately adjacent to the garage.

2.4 The proposed swimming pool is located in the north western corner of the site.

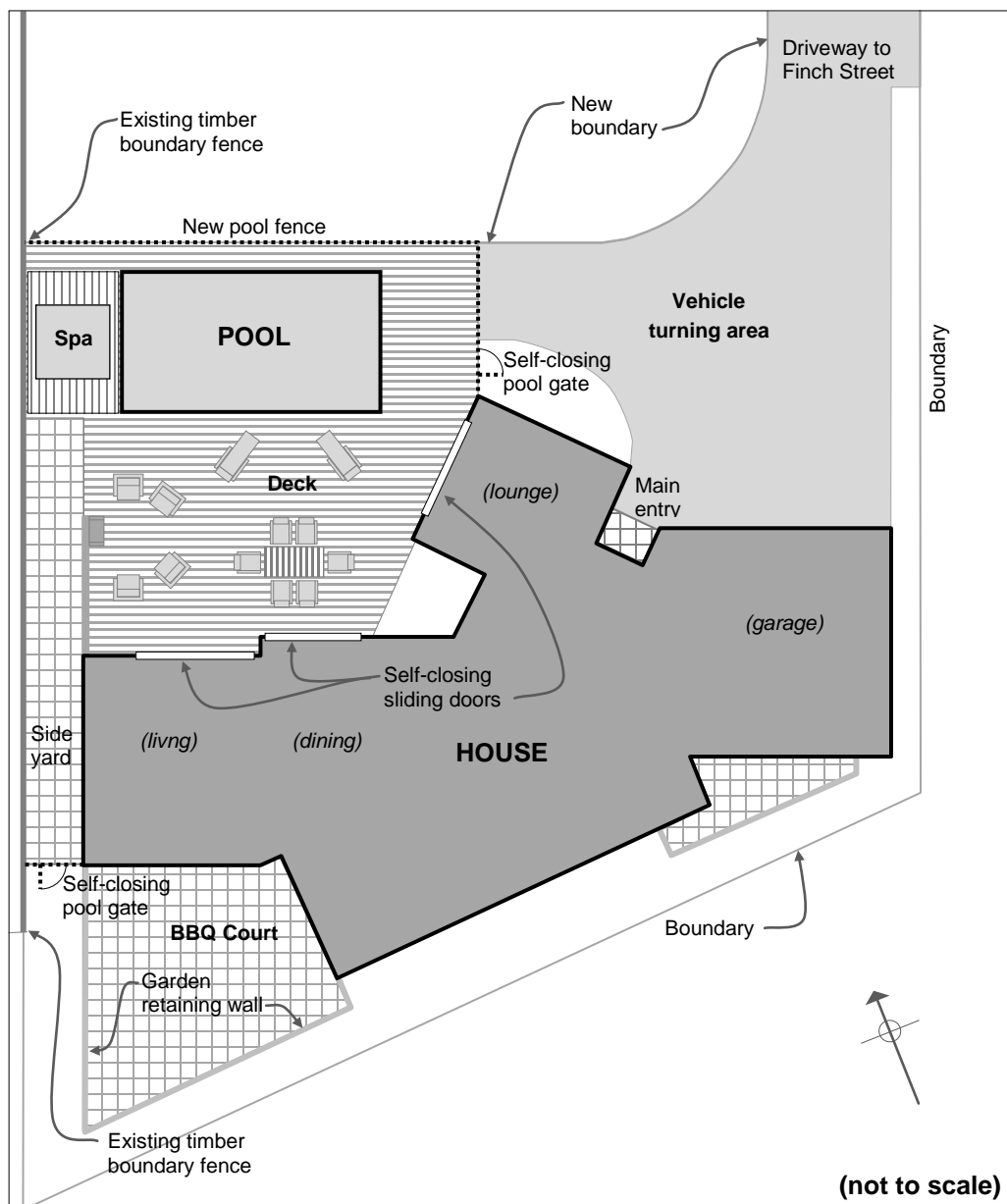


Figure 1: Site plan showing proposed pool and the outdoor spaces

- 2.5 The consent documentation indicates that the pool barrier on the western side is formed by an existing 1.6m high timber fence, and a new section of fencing closing off the gap between this existing boundary fence and the dwelling. This new section of fence contains an outward opening gate.
- 2.6 On the northern side, and the eastern side returning to the new dwelling, new fencing is proposed. This return fencing, which separates the proposed pool area from the driveway, is to contain an outward opening gate.
- 2.7 The wall of the existing dwelling is to form the main barrier on the southern side and a large portion of the barrier on the eastern side of the pool area.
- 2.8 Three sets of sliding doors provide access from lounge, dining and living spaces. The sliding door panels are 2.3m high with each panel weighing between 93kg to 112kg. The fully open widths are 1.2m to the lounge, 2.9m to the dining area and 3.0m to the living room. The doors are fitted with self-closing and self-latching mechanisms.
- 2.9 The pool area is shown as containing a 7m x 3.5m pool, a spa pool, decking, an area of paving, a brazier, a small area of planting, four planters, and outdoor seating and dining furniture.
- 2.10 A further patio area denoted as barbecue court is provided in the south western corner of the property. The barbecue court has internal access from family space, gated access from the swimming pool area, and access from the garage/laundry.

3. The background

- 3.1 The applicant applied for a building consent for an in-ground concrete pool and ancillary work in an application dated 14 July 2014. Receipt of the application was acknowledged in a letter from the authority dated 27 August 2014.
- 3.2 This letter also requested the following further information:
- The immediate pool area includes the main outdoor living area. As such this is not isolated and would allow for activities not associated with the use of the pool within this area which is not permitted under the [FOSP] Act. Please review the fence locations to reduce the area included.
- Provide a floor plan showing ALL points of entry from the house to the pool area. The elevation provided incorrectly references doors not shown.
- Provide specific design and statement from [the supplier] to confirm the specific mechanism that is appropriate for large stackers / sliders. Confirm latching heights, alarms and other measures that may be included to show compliance with the [FOSP] Act.
- 3.3 In a letter dated 5 September 2014 to the pool supplier, the authority, referred to decisions in Hickman^[4] and Osborne^[5], and advised that:
- Pedestrian access ways are specifically excluded as an activity within the pool area.
- With particular regard to the proposal submitted, the area is obviously going to include activities not associated with the pool as this is the main outdoor living with direct access from the lounge, living and dining areas. Further, the gate proposed to the deck / driveway would provide an access-way which ... is specifically excluded.
- In relation to the total site, the [immediate pool area] is too large and needs to be reduced. Thus, while the owner may wish to include the deck area ... this area should be excluded and the fence relocated to the edge of the original deck as discussed.

⁴ *Waitakere City Council v Hickman* 1/10/2004, Randerson J, HC Auckland CIV 2003-404-7266

⁵ *Waitakere CC v Osborne* 3/2/06 DC Auckland CRI-2005-090-5830, Judge Taumanu

The compliance of the sliding doors opening from the house into the immediate pool area did not appear to be in dispute.

3.4 The authority noted in a covering email that ‘while the owner may have a preferred option for the fence, it is ultimately the [authority] that decides what will be accepted. If they are unhappy with that, they can apply to [the Ministry] for a determination.’

3.5 An application for determination was received on 25 September 2014.

4. The submissions

4.1 In a letter accompanying the application for a determination, the owners advised that the glass pool fence between the house and the boundary shown on the building consent drawing was meant to be a 1.9m wooden fence with a keypad locked gate.

4.2 The applicant provided copies of:

- a drawing showing an example of outdoor furniture elements
- the building consent application form and lodgement checklist
- photos of the boundary fence and the walls of the house that are proposed as the barrier
- producer statements for the structural design of the pool, glass balustrading and pool fencing
- a drawing labelled Specification Site Plan Sections and Details
- correspondence from the authority dated 27 August 2014 and 5 September 2014
- email correspondence between the pool and hardware suppliers, and the applicant
- product literature, pool safety pamphlet and a letter from the hardware supplier dated 27 March 2014.

4.3 On 29 September 2014 and 10 October 2014 I requested further information from the applicant. On 1 October and 14 October 2014 the applicant provided the following:

- the fully open size of the doors
- floor plans for the house
- confirmation that:
 - the pool will have a pool cover
 - no alarms are proposed
 - keypad locks are proposed to the 1.9/2.0m high gates.

4.4 On 18 October 2014 the applicant advised that revised plans showing a pool fence in a position that the authority will accept would be resubmitted for consent to enable work to commence. The applicant also stated that this does not mean the need for the fence is accepted and confirmed the requirement to continue with the determination. This determination considers the plans as originally provided to the authority.

4.5 A draft determination was issued to the parties for comment on 13 November 2014.

- 4.6 The applicant acknowledged the draft on 15 January 2015 and confirmed that they would revise their approach to ensure there is no access between the house and the western boundary fence.
- 4.7 The authority responded on 23 January 2015 confirming the view that the fence as currently proposed by the applicant is not acceptable and that the fence shown on the plan stamped 'Approved 21 October 2014', which separates the pool from the deck, is acceptable. The authority also submitted:
- (4) [The authority's] position is that the [a]pplicant's current proposal does not meet the sufficiently close nexus test. The vast majority of the activity likely to take place on the deck is unlikely to be associated with the use of the pool... [When the activity is likely to be associated with the use of the pool, the activity can take place (without detriment to the activity concerned)] without the [whole] deck being enclosed within the pool [barrier].
- (5) Further, [the authority] contends that to include the deck area within the immediate pool area will inevitably promote unacceptable lapses of pool security, as the maintenance of [barrier] security of its very nature inconveniently restricts the indoor-outdoor flow through the sliding doors between the house and deck. It is perhaps for this reason that the Department of Internal Affairs said in 1999 ... at paragraph 10 of [the FOSP Act] Guidelines for Territorial Authorities '... The [barrier] should prevent young children moving directly to the pool from the house, or other areas of the property normally open to them.'
- 4.8 I therefore take the authority's view to be:
- the deck area adjacent to the house should not be included in the immediate pool area
 - by providing access from the driveway to the pool area, and access from the pool area to the barbecue court, the pool area will be used as a pedestrian access way.

4.9 The clarification

- 4.9.1 Following the issue of the determination on 2 April 2015, the authority sought a clarification under section 189 of the Act on 21 April 2015. The authority expressed its view that the dispute concerns the owner's obligations under the FOSP with regard to the location of the swimming pool fence, as opposed to compliance with Clause F4 of the Building Code as required under the Building Act.
- 4.9.2 The authority considers that some aspects of the determination were 'unclear/ambiguous' and requested clarification of paragraph 6.3.4 of the determination, in particular what was meant by the statement that the deck 'falls within the definition of an "immediate pool area" for the purpose of Clause F4.3.4(f)', and whether the intent of that sentence was that the entirety of the deck between the pool and the house is within 'the permissible extent of the immediate pool area for the purpose of the location of the pool fence'. The authority holds the view that such a statement falls outside my jurisdiction.
- 4.9.3 On 5 May 2015 I wrote to the parties, noting that the issue raised by the authority had not be canvassed in previous determinations and clarification may be of benefit to others. In responding to the parties I proposed to clarify the determination in accordance with section 189 of the Act as follows:
- Insert new paragraph at 6.1.2 to address the issues raised regarding my jurisdiction in defining the immediate pool area for the purpose of this determination.

- Addition in paragraph 6.2.1 of paragraphs 32 and 33 of the judgement referred to.
- 4.9.4 The applicant responded on 14 May 2015, making no submission regarding the proposed clarification but reiterating the applicant's view on compliance.
- 4.9.5 The authority responded on 21 May 2015, stating it had 'no particular comments' on the proposed clarification but noting that the determination acknowledges that it would be prudent for the deck to be excluded from the immediate pool area (refer paragraph 6.4.1), and that the outcome seems to the authority to 'directly contradict the fundamental purpose of the FOSP Act'.

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 Section 13B of the FOSP Act provides that the Schedule must be treated as an Acceptable Solution or Verification Method. Sections 22 and 23 of the Act provide that building work that complies with an Acceptable Solution or Verification Method must be accepted as complying with the relevant provision of the Building Code, although an Acceptable Solution or Verification Method 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 barriers to the swimming pool are required to comply with Clause F4 of the Building Code. Clause F4.3.4(f) states that the barriers shall:
- restrict the access of children under 6 years of age to the pool or the immediate pool area.
- In order to determine whether Clause F4.3.4(f) has been complied with, it is therefore necessary to establish what 'the immediate pool area' is.
- 6.1.2 The authority's request for clarification (refer paragraph 4.9) was on the basis that the role of interpreting what is the 'immediate pool area' falls outside the jurisdiction of what may be determined under section 177 of the Act. I disagree with the authority on this point. In order that a matter regarding compliance with the Building Code be determined, it is not uncommon that I must first consider the definition of

words or phrases used in the Building Code and then go on to consider their application in the particular circumstances⁶. In forming my view as to what constitutes the immediate pool area in this case and in previous determinations considering compliance of pool barriers, I have taken into account the definition of that phrase set out in the FOSP, NZS8500, and considered in the *Hickman* judgement. In addition, given the relationship between the FOSP and the Building Code and the common objective of those enactments in terms of restricting access for safety reasons, I am also of the view that when considering what would be an immediate pool area for the purposes of Clause F4.3.4(f) of the Building Act it is appropriate to draw on the definition of that phrase in the FOSP and relevant case law interpreting that phrase.

6.2 The definition of ‘immediate pool area’

6.2.1 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* case⁷, 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.

[32]

... So long as it can be demonstrated as a matter of fact that the area surrounding the pool is used for the relevant activity or purpose from time to time and that such activity or purpose is carried out in conjunction with the use of the pool, it does not matter that the activity might also be capable of being carried on independently of the use of the pool. So, for example, if the pool owner is able to demonstrate that barbecues or entertaining take place in the area surrounding the pool from time to time in conjunction with the use of the pool as described, then the area so used may be included within the immediate pool area.

[33] In modern society, barbecues and entertainment frequently occur in the vicinity of a pool and in conjunction with the use of it for swimming and similar activities. There is a sufficiently close nexus between the two to fulfil the statutory definition and I do not view the inclusion of such activities as compromising the safety of children. Provided

⁶ See for example: 2015/004 (*Ministry of Business, Innovation and Employment*) 24 February 2015; Determination 2014/062 (*Ministry of Business, Innovation and Employment*) 17 December 2014

⁷ *Randerson J, HC Auckland CIV 2003-404-7266.*

there is a complying fence, young children should not be able to enter the area except in the presence of an adult or adults.

[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.

6.2.2 In addition, the Building Industry Authority (a predecessor to the Ministry) 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.

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

6.2.4 It is also appropriate at this stage to refer to NZS 8500, which defines the immediate pool area as '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'.

6.2.5 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 immediate pool area in this case

6.3.1 The disputed activities in this case are those such as outdoor living and entertainment which could be carried out separately from the use of the pool. I accept that outdoor living and entertainment can take place in the area, sometimes in conjunction with the use of the pool and sometimes not. However, I am also of the opinion that *Hickman* established that such activities "are not to be excluded from the immediate pool merely because they are capable of occurring independently of the use of the pool" (refer also Determination 2008/113⁸).

6.3.2 Further, the separate west-facing barbecue court, opening from the family space, is proposed as an alternative outdoor living space.

6.3.3 The proposed inclusion of the 1.7 x 9.0m north-west side yard (refer Figure 1) within the immediate pool area needs to be considered further. The only apparent function of this yard is to provide access for maintenance purposes and access between the pool and the barbecue court. It is also an area where anyone in it is not easily able to be observed from the main pool area, and I do not consider it should be included in the immediate pool area.

6.3.4 I therefore consider the area proposed by the applicant, but excluding the side yard as noted in paragraph 6.3.3 above, falls within the definition of an 'immediate pool area' for the purposes of Clause F4.3.4(f). I consider that any adults in the immediate pool area, excluding the side yard, will be aware of children and their

⁸ Determination 2008/113: Safety barriers to a swimming pool

activities. Notwithstanding this position, I consider the size of the immediate pool area in this case is at the limit of what might be considered acceptable.

6.4 The doors opening from the house into the immediate pool area

- 6.4.1 I acknowledge the authority's concerns in regard to the potential for 'unacceptable lapses of pool security' and agree that it would be prudent for the deck to be excluded from the immediate pool area, however I do not have the authority to direct that this occur if barriers comply with the Building Code.
- 6.4.2 These concerns arise from the potential for any of the doors to three large openings to be held open to facilitate indoor and outdoor flow, the effect this could have on compliance and the risk this may have for children under six. Nevertheless I accept that the doors to these openings are fitted with self-closing and self-latching mechanisms which are intended to provide for compliance.
- 6.4.3 I also note that it is for the authority to confirm that the self-closing mechanisms, as they are installed, comply with the Building Code. I also consider the applicant is responsible for ensuring that the barrier remains in place. Furthermore, the FOSP Act defines the obligations of the owner and persons in control of the pool and provides consequences for failing to comply with these obligations.
- 6.4.4 Notwithstanding this there is a natural tendency to want to hold open doors in this situation. While the applicant has confirmed that a pool cover will be provided I note that no alarms are proposed. To further mitigate risk for children under six I recommend that the applicant consider providing additional protection. This could include the additional barrier sought by the authority, a pool alarm, or an intruder alarm.

6.5 The gates to the pool barrier and pedestrian access

- 6.5.1 The authority contends that the gate to the pool barrier from the driveway would provide an access way which it says is specifically excluded as an allowable activity in pool area.
- 6.5.2 Paragraph 2.9 of NZS 8500 states that access to the house from outside of the property shall not be through the pool area. This is not a requirement of the Building Code, however, I take paragraph 2.9 to mean that the primary access to the house should not be through the pool area. In this case the direct and primary access to the main entry to the house is from the driveway to the north east of the house: this access is separate from the pool area. This opinion is supported by Figure 2.1(e) in NZS 8500: this diagram shows fence gate and door configurations similar to that proposed.
- 6.5.3 There is no dispute that the provision of a gate from the driveway to the pool area plus the gate from the pool area to the side yard allows the pool area to be used as an access route. While it is possible to move through the immediate pool area when moving around the house it is not the principal access route intended to be used to access the barbecue court, nor is it the only route: a number of other routes are readily available.

7. The decision

7.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:

- the immediate pool area, excluding the side yard, complies with Clause F4 of the Building Code, and
- the inclusion of the gate to the pool barrier providing access from the immediate pool area to the drive way complies with Clause F4 of the Building Code.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 27 May 2015.

John Gardiner
Manager Determinations and Assurance

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

A1. Clause F4 of the Building Code requires:

F4.3.3 Swimming pools having a depth of water exceeding 400mm, shall have barriers provided.

F4.3.4 Barriers shall:

- (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 the age of 6 years to the pool or the immediate pool area.
- (g) restrict the passage of children under the age of 6 years of age when provided to guard a change of level in areas likely to be frequented by them.
- (h) be constructed so that they are not readily able to be used as seats.

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 150mm 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, and
- (b) no permanent objects on the outside of the barrier that could provide a climbing step.

A2. The Fencing of Swimming Pools Act 1987 says:

Section 2 Interpretation

immediate pool area means 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

Section 6 Special exemptions

- (1) A territorial authority may, by resolution, grant an exemption from some or all of the requirements of this Act in the case of any particular pool where the territorial authority is satisfied, having regard to the particular characteristics of the property and the pool, any other relevant circumstances, and any conditions it imposes under subsection (2), that such an exemption would not significantly increase danger to young children.
- (2) In granting an exemption under subsection (1), the territorial authority may impose such other conditions relating to the property or the pool as are reasonable in the circumstances.
- (3) Any exemption granted or condition imposed under this section may be amended or revoked by a territorial authority, by resolution.

Section 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, 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.

A3. NZS 8500: 2006 Safety Barriers and Fences Around Swimming Pools, Spas and Hot Tubs, says:

Paragraph 1.2 Definitions

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. For further clarification, including examples, see 2.2 .

Paragraph 2.2 General

...

The immediate pool area could include the pool, its decking, changing sheds, an ornamental garden or landscaped area and a barbecue and outdoor furniture, but not a vegetable garden, clothes line, children's play areas or equipment, as these are not used in conjunction with the pool.

Tool sheds, garages, children 's sand pits, vegetable gardens, clothes lines and other children's play equipment not associated with the use of the pool shall be located outside the pool area to reduce the likelihood of self-closing gates or doors being propped open in order to gain access.

The activities within the immediate pool area must be closely connected or associated with the use of the pool and may, but do not have to be carried out exclusively with use of the pool. It does not matter that the particular activity can be carried out independently of the use of the pool.

...

2.3.2 Specific requirements for pools

- (f) The pool shall be enclosed by an isolation barrier where a wall of a house contains a child- resistant window and/or child-resistant doorset or doorsets, regardless of the direction of door swing ...

2.9 Access to the house through the pool area

Access to the house from outside the property shall not be through the pool area.