



Determination 2015/039

Regarding the refusal to issue a code compliance certificate and the issue of a notice to fix in respect of compliance of pool barriers to a swimming pool at 74 Penrose Street, Lower Hutt

1. The matter 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 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 owners of the house and pool, P and L Angus (“the applicants”)
- Hutt City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

1.3 This dispute relates to the authority’s decision to refuse to issue a code compliance certificate for the building work, and instead to issue a notice to fix requiring the applicants apply for an amended building consent to reduce the size of the area enclosed by the pool barrier (“the immediate pool area”).

1.4 I therefore take the view that the matters for determination² are:

- whether the current pool barrier, including the immediate pool area it encloses, complies with Clause F4 of the Building Code (First Schedule, Building Regulations 1992)
- whether the authority correctly exercised its powers of decision in refusing to issue the code compliance certificate and in issuing a notice to fix.

1.5 In this determination, I will refer to the following legislation and New Zealand 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 The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.building.govt.nz or by contacting the Ministry on 0800 242 243.

² Under section 177(1)(a), 177(1)(b), 177(2)(d) and 177(2)(f) of the Act

1.6 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 Act or of the Building Code.

2. The swimming pool and pool barrier

2.1 The applicants' property is a rear section which is accessed by a driveway leading to the property's north-western corner. The property contains the applicants' existing house and garages, as well as the more recently constructed swimming pool and associated pool barrier.

2.2 The house sits along the southern side of the property and is surrounded by extensive landscaped areas. As well as the area encompassed by the pool barrier there are a number of other outdoor areas including: a large asphalt area at the front of the house, a private courtyard off the applicants' bedroom, a separate deck and barbecue area at the southeast, along with lawns and gardens to the southeast that are bisected by the Opanu Stream. (I note here that on this property the stream has been fully fenced at the top of its banks.)

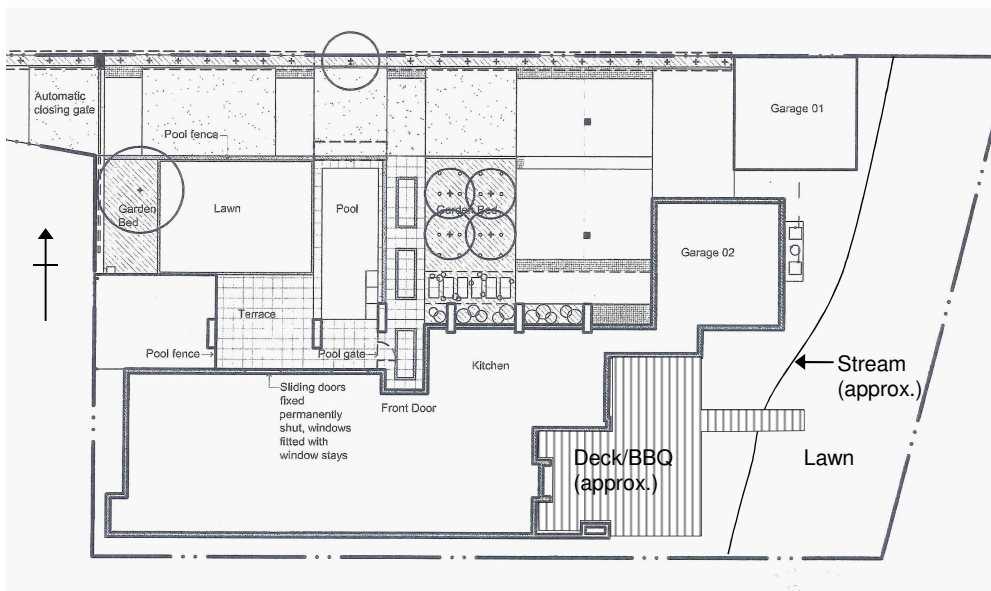


Figure 1: Site plan showing general layout (not to scale)

2.3 The pool barrier

2.3.1 The swimming pool is adjacent to the front of the house on its northern side. The pool barrier is formed by

- a 1.2–1.3m high concrete block wall on the northern and eastern sides, adjacent to the drive way and pathway to the front door respectively
- the property's 1.8m high perimeter fence on its western side.
- the northern wall of the applicants' house on the south side of the pool area and a 1.8m to 1.2m stepped plastered concrete block wall enclosing a private courtyard.

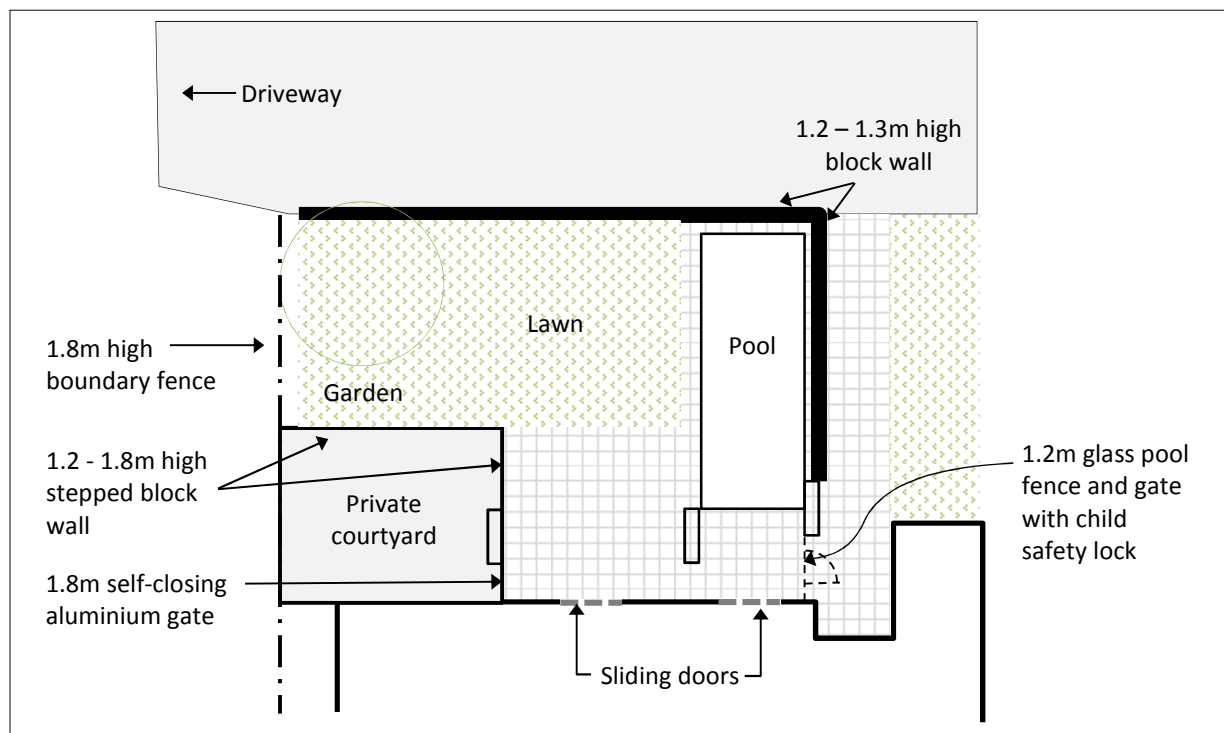


Figure 2: Plan showing elements that make up the pool barrier and the area enclosed as the immediate pool area

- 2.3.2 The wall of the house that forms part of the barrier includes two windows, and two sets of sliding doors leading to the applicants' lounge. According to the approved amendment, two of the sliding doors are permanently shut and the windows are to have stays permanently fixed to them so that they do not open more than 100mm wide.
- 2.3.3 In the southwest corner of the immediate pool area, the barrier is formed by a plastered concrete block wall, which encloses a private courtyard off the applicants' bedroom.
- 2.3.4 The pool itself is fitted with a lockable pool cover.

2.4 The immediate pool area

- 2.4.1 The area currently enclosed by the pool barrier is 121.44m². It encloses a 36m² lawn, a flower garden with an existing tree, and a small paved patio next to the house. There is a strip of paving around the pool and removable paving over the pool cover pit at the pool's northern end.
- 2.4.2 As well as the access via sliding doors from the lounge, access to the immediate pool area is through a self-closing glass pool gate set between the applicants' house and a concrete pillar supporting the roof; this is accessed from the front door of the house. There is also another 1.8m high self-closing aluminium gate leading from the private courtyard into the immediate pool area.

3. The background

- 3.1 In 2012 the applicants applied for a building consent for an in-ground pool and associated work, including a pool barrier. Building consent (BC120943) was granted by the authority on 30 November 2012. The consented plans incorporated a glass pool fence running along the pool's western and eastern sides, and separating the pool and the paved patio area from the lawn.

- 3.2 The applicants subsequently decided that they wanted to change the design of the pool barrier, and applied for an amendment to the building consent. The altered design had the effect of increasing the immediate pool area to incorporate the lawn and gardens. The authority granted the amendment to the consent on 9 May 2013.
- 3.3 On 10 December 2014, the authority granted an extension of the time for completing the work until 10 March 2015. The swimming pool and barrier were completed in February 2015 having been built in accordance with the amended building consent.
- 3.4 On 10 February 2015, the authority emailed the applicants advising that its swimming pool officer had sighted the plans for the building work and had some concerns about the area enclosed by the pool barrier. In essence, these concerns were that the barrier should enclose only the pool and the 'immediate surrounding area'.
- 3.5 On 2 March 2015, a meeting was held at the applicants' property to discuss these issues. Later that day, the authority advised the applicants in an email that their pool needed to be fenced differently. The authority referred to the FOSP Act, and stated that (emphasis is the authority's):

As a result, **the Act makes it compulsory for the fenced pool areas to include little more than the pools.**

In that are **there can only be items used in conjunction with pool activities** (for example loungers, changing shed, pump and filter room, etc.), but not unrelated items such as table and chairs, barbecue, etc.

The idea behind this is **to avoid having a thoroughfare through the pool area.**

The authority also provided plans showing options for fencing the pool so that it would, in the authority's opinion, be compliant. These options excluded the patio and lawn areas from the immediate pool area.

- 3.6 On 2 March 2015, the applicants sent the authority an email disagreeing with its view of what constitutes the immediate pool area, and stating that as the building work had been completed in accordance with the consented plans, the authority could not now 'withdraw that consent'.
- 3.7 On 3 March 2015, the applicants applied for a code compliance certificate for the completed building work.
- 3.8 On 10 March 2015, the authority sent the applicants a letter and email refusing to issue a code compliance certificate on the grounds that 'the swimming pool fence is non-compliant'.
- 3.9 The authority also attached a notice to fix relating to the swimming pool barrier. The notice described the non-compliance as:

...the pool fence does not restrict access to the immediate pool area, as there are lawn and patio areas within the pool enclosure.

The area enclosed by the pool fence must only include areas used for activities or purposes carried out in conjunction with the pool.

The pool fence is therefore in breach of clause F4.3.4(f) of the building code.

It further stated that, to remedy the non-compliance:

An application for an amendment to building consent BC120943 must be lodged and approved by [the authority], showing a solution that will demonstrate compliance with the Fencing of Swimming Pools Act 1987 and clause F4.3.4(f) of the Building Code.

This notice must be complied with by: 3 April 2015

- 3.10 In an email dated 12 March 2015, the applicants stated their opinion that the authority had ‘no basis to refuse the code of compliance certificate for this work’, because the building work had been completed in accordance with previously approved plans; the applicants requested that the certificate be issued and the notice to fix withdrawn.
- 3.11 In an email dated 17 March 2015, the authority acknowledged that it had ‘issued a building consent and amendment for building work that does not meet the requirements of the Act’, but that the situation now needed to be rectified, and that this should be done by the applicants applying for an amended consent. The authority also repeated its opinion that the barrier was non-compliant because it included the patio and lawn in the immediate pool area, and referred *Waitakere City Council v Hickman*³ to support its position.
- 3.12 On 18 March 2015, the applicants applied for a determination.

4. The submissions

- 4.1 In a submission accompanying their application the applicants set out the background to the dispute. They describe how the area currently enclosed by the pool barrier is used as an outdoor area for entertaining ‘when the pool is part of that entertainment’, sunbathing, and for their dogs. They state that various outdoor seating and a table have been placed within the enclosed area for these purposes.
- 4.2 The applicants further stated that they believe that the authority’s interpretation of the immediate pool area is incorrect, and that ‘...what is in the immediate pool area is used in conjunction with pool activities, including the tree that gives us shade in summer’. The applicants referred to *Waitakere City Council v Hickman*, and determination 2008/103⁴ in support of their position, and described other factors that they believe make the pool barrier compliant, as well as the expense and inconvenience they would be subject to if the determination concluded otherwise.
- 4.3 The applicants provided copies of:
- the original consented plans for BC120943, stamped as approved on 30 November 2012
 - the amended consented plans for BC120943, stamped as approved on 9 May 2013
 - correspondence between the parties
 - the application for a code compliance certificate, dated 3 March 2015
 - the refusal to issue a code compliance certificate and the notice to fix, both dated 10 March 2015.
- 4.4 The authority acknowledged the application and advised that it wished to make a submission on the matter. No submission was received before the draft was sent to the parties for comment on 20 April 2015.
- 4.5 In a response received on 21 April 2015 the applicant accepted the draft without further comment.

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

⁴ Determination 2008/103 Determination 2008/103 Safety barriers for a swimming pool at 25 Picton Street, Auckland (*Department of Building and Housing*) 19 November 2008

- 4.6 The authority responded by email on 12 June 2015, noting that the authority did not accept the conclusion reached in the draft and submitting (in summary):
- The gravelled or landscaping planting area has no obvious connection with the use of the pool; it is the kind of area that the High Court identified as not usually being connected with the use of the pool.
 - *Hickman* makes it clear that increasing distance from a pool will correspond to a decreasing likelihood that a space is part of the immediate pool.
 - The lawn and patio are sufficiently large that there is a reasonable doubt as to whether they would be used for activities closely connected, associated, or combined with the use of the pool. The furthest part of the lawn is approximately 7.5-8m from the edge of the pool.
 - Determination 2010/98⁵ had similar factors, though the area enclosed was much larger, and that determination concluded that access to the immediate pool area was not restricted by the fence.
- 4.7 I have taken into consideration the authority's submission and provided additional discussion on the points the authority raised in paragraph 6.12.

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 its 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 its Schedule must be treated as a compliance document. Sections 22 and 23 of the Act provide that building work that complies with a compliance document must be accepted as complying with the relevant provision of the Building Code, although 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.

⁵ Determination 2010/098: The code compliance of pool barriers with respect to the area with the swimming pool enclosed by the barriers at 90 Schnell Drive, Palmerston North, *Department of Building and Housing*, 22 October 2010

6. Discussion: the code-compliance of the pool area

6.1 The current dispute hinges on what can be included within the immediate pool area. I note that, other than this matter, there appears to be no disagreement between the parties about the adequacy of the barriers provided or any other matter relating to the consented building work.

6.2 From the file it appears that the applicants have gone to great lengths to ensure that their property is secure, including fully fencing the stream which runs through their property, and to ensure that access to their pool is restricted. I commend them for this.

6.3 The present dispute has arisen because, in addition to the swimming pool, the pool barrier encloses the paved patio area adjacent to applicants' house, and the lawn and gardens next the pool. The barrier was built in accordance with the consented amended plans but the authority now holds the view it does not comply.

6.4 From the correspondence and in the authority's submission to the draft determination, the authority's view is that the patio and lawn areas should not be included in the immediate pool area and therefore a barrier is required between the pool and these areas.

6.5 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.

6.6 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'.

6.7 The term was also considered in *Waitakere City Council v Hickman*, which has been relied on by both of the parties. 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. ...

[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.

6.8 In addition, the Building Industry Authority (a predecessor to the Ministry) took the view, in Determination 2003/06⁶, 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.

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

6.10 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'.

6.11 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.

6.12 The immediate pool area

6.12.1 The authority's advice that the immediate pool area can include 'little more than the pool' is overly restrictive in this regard. The areas enclosed in the current case are not large, and there are no special facilities or amenities incorporated in the immediate pool area that would suggest it is to be used for purposes other than those stated by the applicants.

6.12.2 It is not unusual to enclose some land, whether it be in lawn or paved areas or otherwise, inside a pool barrier where people can sit or sunbath while using the pool, and it is also not unusual to include seating or tables beside a pool; these uses have been considered in NZS 8500 and in previous determinations. The applicants have stated that the table and seating inside their pool enclosure will be used for entertaining in association with the pool, and the furniture is not fixed.

6.12.3 I accept that activities will take place in the lawn and patio areas, sometimes in conjunction with the use of the pool and sometimes not. However, I am also of the opinion that *Hickman* established that so long as it can be demonstrated 'as a matter of fact' that these activities will be carried out 'from time to time' in association with the pool 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".

⁶ Determination 2003/6 Sliding and sliding-folding doors giving access to a swimming pool (*Building Industry Authority*) 7 April 2003

- 6.12.4 Taking account of the authority's submission regarding the distance away from the pool and the Hickman case, I hold the view that the 7.5 x 8m lawn area of concern to the authority is not so substantial or extensive an area that it should be excluded from the immediate pool area; the lawn is open to view from other parts of the immediate pool area, it does not contain discrete sections, and it is not an access way to other parts of the property.
- 6.12.5 There are other areas on the property that can be used to entertain outside when not using the pool, including a large deck at the rear of the house where the barbecue is currently located, and there are ample alternative areas where people can be outside for other purposes and where children can play.
- 6.12.6 I am satisfied that in the current case there is a 'sufficiently close nexus' between the activities that are likely to occur on the lawn and patio areas, and the pool.
- 6.12.7 In regards to the authority's reference to Determination 2010/98, I note that the circumstances in that case were different in that the proposed immediate pool area:
- was larger, with a maximum distance from the pool being 16m
 - included the majority of the area likely to be used for outdoor living/entertaining (i.e. there were not alternative spaces)
 - included a terraced area of garden separated by the lower (pool) level by a retaining wall, and
 - access to the upper terrace was only via the lower (pool) level.

6.13 Conclusion

- 6.13.1 For reasons set out in the discussion above, I consider that the area currently enclosed within the pool barrier falls within the definition of an immediate pool area. Accordingly, and as there is no dispute regarding the compliance of the elements that make up the barrier, I consider the pool barrier complies with Clause F4.3.4(f) of the Building Code.
- 6.13.2 Given my conclusion on compliance of the barrier in respect of the immediate pool area, I consider the authority incorrectly exercised its powers of decision in refusing to issue a code compliance certificate for the building work and in issuing the notice to fix.

6.14 Other matters

- 6.14.1 Although it does not impact upon my decision, I think it worthwhile to comment on the authority's belief, stated in its correspondence to the applicant, that the applicant's building consent would lapse two years after the date on which it was issued. This is not in fact correct.
- 6.14.2 Section 93 does, as stated by the authority, require the authority to decide whether or not to issue a code compliance certificate within 20 days of either: the certificate being applied for; or two years after the building consent was issued; or any further period agreed between the parties. However, the fact that more than two years has passed since the building consent was issued does not cause it to lapse, nor does it preclude the authority from making a decision about the compliance of the building work at a later date.

6.14.3 This issue was canvassed at some depth in Determination 2008/40⁷. The authority may find it useful to refer to this decision should this situation arise again in the future.

7. The decision

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

- the area enclosed with the pool barrier satisfies the definition of an immediate pool area, and that as such the barrier complies with Clause F4 of the Building Code
- the authority's decisions to refuse the code compliance certificate and to issue the notice to fix are reversed.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 29 June 2015.

John Gardiner

Manager Determinations and Assurance

⁷ Determination 2008/40: Refusal to issue a code compliance certificate for a farm shed because the building consent was more than two years old at 58 Levi Road, RD 5, Christchurch, *Department of Building and Housing*, 22 May 2008.

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

A1. The relevant clauses of the Building Code:

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:

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

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

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.

Whenever a young child is inside a pool area, constant adult supervision is essential. Increasing the area and utilities inside the pool area may increase this responsibility. It is essential that a separate outdoor safe play area for children is available directly from the house.

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.