



## Determination 2016/044

# Regarding the code-compliance of pool barriers to a swimming pool and including a pool room at 66 Bell Road, Te Puke

### Summary

This determination discusses the Building Code obligations in Clause F4 for a proposed pool barrier that would include a pool room. The determination considers the area enclosed by the proposed barrier in respect of restricting access of children under the age of six to the immediate pool area as required by Clause F4.3.4(f).

### 1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“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, D Syme (“the applicant”), acting through a designer as an agent
  - Western Bay of Plenty District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 This dispute relates to the applicant’s desire to increase the size of the area enclosed by the pool barrier (“the immediate pool area”) beyond that which has been approved by the authority in a building consent granted for the construction of the pool.
- 1.4 The matter for determination<sup>2</sup> is whether the proposed pool barrier, including the immediate pool area it encloses, would 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 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.

<sup>1</sup> The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at [www.building.govt.nz](http://www.building.govt.nz) or by contacting the Ministry on 0800 242 243.

<sup>2</sup> Under section 177(1)(a) of the Act

- New Zealand Standard NZS 8500:2006 Safety barriers and fences around swimming pools, spas and hot tubs (“NZS 8500”).

1.6 In making my decision I have also considered the submission of the applicant and the other evidence in this matter. I have not considered any other aspects of the Act or of the Building Code.

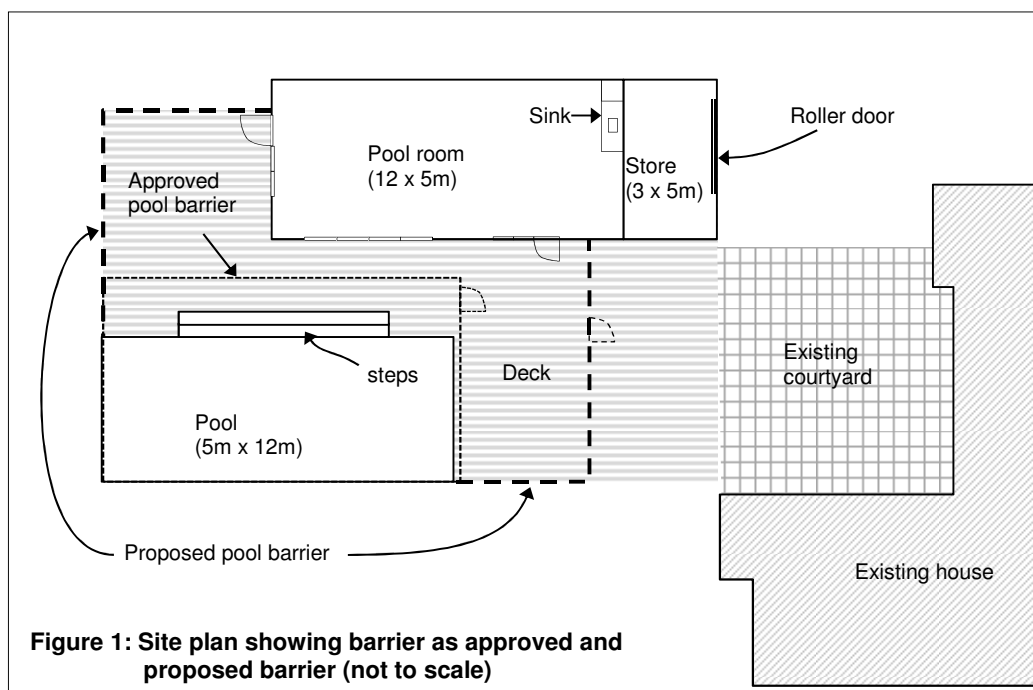
## 2. The swimming pool and pool barrier

2.1 The applicants’ property is accessed by a driveway leading to the property’s western aspect. The property contains the applicants’ existing house and garages, and a courtyard.

2.2 A building consent has been granted by the authority for the construction of a pool, new timber decking, and a detached outbuilding (see figure 1 below)<sup>3</sup>. The outbuilding consists of a store room, accessed via a roller door from the rear of the house, and a 12m x 5m room described on the plans as a ‘pool/games room’ which contains kitchen facilities. The applicant’s submission describes this section of the outbuilding as a “cabana” and a “changing room”; for ease of reference I will use the term “pool room”. The pool room has access to and from the deck area via two single leaf self-closing doors and a set of bifold or stacking doors (approximately 4m in length). There is no direct access between the pool room and the store room.

2.3 I have not seen a copy of the consent documents, or any correspondence relating to the applicant’s wish to extend the immediate area to include the pool room. I have no information on the type of barrier proposed or the windows to the pool room or the doors providing access from the pool room to the deck other than as described above. The applicant has not provided a submission on the use of the pool room or the reason the applicant considers the proposed barrier would comply in regards to the immediate pool area.

2.4 The applicant has requested I determine whether the proposed pool barrier, as shown in figure 1 below, will comply with the requirements of the Building Code.



<sup>3</sup> Figure 1 is based on sheet 4 of a set of drawings dated 22 February 2016, with the addition of the proposed barrier. The drawing is not stamped as approved, however it is my understanding the drawings are representative of what has been consented.

### **3. The submissions**

- 3.1 The application for a determination was received on 2 June 2016. The covering letter dated 23 May 2016 noted that the proposed barrier was the original request and that this was ‘altered by [the authority]’. No submission on the matter was included in the application, but copies were provided of three drawings showing the overall site plan, and the approved and proposed barriers.
- 3.2 The authority did not acknowledge the application nor make any submission on the matter.
- 3.3 A draft of the determination was issued to the parties for comment on 4 July 2016. Neither party responded to the draft, and no further submissions were received.

### **4. The relationship between the FOSP Act and the Building Code**

- 4.1 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.
- 4.2 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.
- 4.3 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.
- 4.4 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.
- 4.5 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. Discussion: the code-compliance of the proposed barrier**

- 5.1 The matter at issue 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. In addition to the swimming pool, the proposed pool barrier encloses an outbuilding (the pool room) and would enclose a larger area of decking than that which was consented.
- 5.2 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.

5.3 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’.

5.4 That term was considered in *Waitakere City Council v Hickman case*. 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.

5.5 In addition, in Determination 2003/06<sup>4</sup> the Building Industry Authority (a predecessor to the Ministry) 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.

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

5.7 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’.

<sup>4</sup> Determination 2003/6 Sliding and sliding-folding doors giving access to a swimming pool (*Building Industry Authority*) 7 April 2003

5.8 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.

## 5.9 The immediate pool area

5.9.1 In previous determinations<sup>5</sup> I have considered whether an ancillary building can be included within the immediate pool area. I am of the view that the evaluation of such circumstances should take account of:

- the size of the building
- the nature of the activities undertaken in the building, and whether they are likely to be carried out “in conjunction” with the use of the pool (such as entertaining or exercising)
- whether there is anything to preclude the building being put to an alternative use
- whether possible alternative activities not related to the use of the pool could include children under 6 years of age
- proximity and visibility to the pool from within the building to ensure any children can be adequately supervised in and around the pool.

5.9.2 In this case the pool room is approximately 60m<sup>2</sup>, which is larger than that considered in determinations 2008/123 and 2011/013. The information from the applicant as to the use of the pool room has been limited, and I note that there is nothing to preclude the room being put to a variety of uses.

5.9.3 In Determination 2008/123, in which it was decided that a small gym, sauna and steam room could be included within the immediate pool area, 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.’

5.9.4 The building in the current case is also substantially larger than that considered in Determination 2008/123. There seems little question that, if desired, the pool room in this case could be used for a variety of purposes unrelated to the use of the pool, such as a lounge or home cinema, and that these activities could include having children present. It is also likely that the room would be used as an all-weather facility for 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 room would be through the pool area, posing a risk to children if the pool is not in use as it is unlikely on those occasions to be supervised.

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<sup>5</sup> See for example Determinations 2011/013, 2010/104 and 2008/123

5.9.5 For these reasons, I conclude that the area indicated as being enclosed by the proposed pool barrier and including the pool room, does not fall within the definition of an immediate pool area. Accordingly I consider the proposed pool barrier does not comply with Clause F4.3.4(f) of the Building Code.

## **6. The decision**

6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the proposed pool barrier does not comply with Clause F4.3.4(f) of the Building Code.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 19 September 2016.

John Gardiner  
**Manager Determinations and Assurance**

## 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:

...

(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.

...

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

...

### 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.

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.

...