

Determination 2022/025

Regarding the compliance of an existing pool barrier that encompasses the rear yard of the property

23A Henry Street, Blenheim

Summary

This determination considers an existing swimming pool barrier, comprised partly of the south wall of a dwelling and a garage wall, and whether it complies with section 162C of the Building Act 2004. The determination discusses whether the doors on the south wall of a dwelling were included in an exemption granted under the Fencing of Swimming Pools Act 1987, and whether the area encompassed by the south wall of a dwelling (the rear yard) can be considered to comprise the immediate pool area.



The legislation discussed in this determination is contained in Appendix A. In this determination, unless otherwise stated:

- “sections” are sections of the Building Act 2004 (“the Act”)
- “sections of FOSPA” are sections of the Fencing of Swimming Pools Act 1987 (“FOSPA”)
- “clauses” are clauses in Schedule 1 of the Building Regulations 1992 (“the Building Code”)
- “clauses of the Schedule” are clauses in the Schedule to FOSPA (“the Schedule”).

The Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (eg, Acceptable Solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Peta Hird, Principal Advisor Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.¹
- 1.2. The parties to the determination are:
 - 1.2.1. A & M Girling, the owners of the property (“the owners”); and
 - 1.2.2. Marlborough District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. This determination arises from an inspection² of the residential swimming pool at the owners’ property carried out by the authority on 28 August 2020. The authority concluded the pool barrier does not comply with section 162C.
- 1.4. The authority’s concerns relate to the height of a gate and short section of fence next to the gate, which they consider forms part of the pool barrier. The owners agree the gate is non-compliant but submit this is of no consequence as the pool barrier can comprise the south wall of the dwelling and the garage wall. Therefore, this determination will consider the pool barrier (comprising the south wall of the dwelling and the garage wall) as if this section of fence and gate (“the south gate”) were never constructed.

¹ The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

² Section 162D of the Act requires territorial authorities to carry out inspections of residential swimming pools at least once every three years to ensure ongoing compliance of the pool barriers to the extent required by section 162C.

- 1.5. The matter to be determined, under section 177(1)(a) of the Act, is therefore whether the pool barrier, formed by the south wall of the dwelling and the garage wall, complies with section 162C of the Act. This matter also considers whether the rear yard can properly be considered part of the immediate pool area³.

Matters outside this determination

- 1.6. In 1997, the authority granted an exemption under section 6 of Fencing of Swimming Pools Act 1987 (FOSPA) and clause 11 of the Schedule of FOSPA (see Appendix A). The exemption relates to the sets of doors in the north and east walls of the dwelling opening into the pool area. This determination does not consider the authority's decision to grant that exemption, or whether the doors currently comply with the conditions of the exemption. This determination does, however, discuss the extent to which the exemption applies to the rear yard, as well as the laundry and garage doors located on the south wall of the dwelling.
- 1.7. The owner does not dispute the non-compliance of the windows on the north wall, or the south gate. Therefore, the determination has not considered the compliance of these features of the pool barrier.

2. The pool barrier

- 2.1. The pool is located on the north-east corner of the property. Aside from the south wall, the garage and fencing around the rear yard, the pool barrier consists of the following:
- north and east property boundary fences
 - the north and east walls of the dwelling
 - a smaller section of fencing to the west of the pool (separating the driveway).

Throughout the determination, the above will collectively be referred to as “the pool barrier”.

- 2.2. The north and east walls of the dwelling incorporate four sets of doors which open to the pool area. Two double doors and one bi-fold door on the north walls, as well as one sliding door on the east wall. All four doors open directly into the pool area (see figure 1). Although the exemption application refers to an “attached plan of pool and dwelling with 5 doors opening to the pool area”, the plan depicts only the four doors seen in figure 1 below. To the west of the pool and separating the front yard (pool area) from the driveway is a 1800mm high timber fence.

³ See paragraph 5.25 for the meaning of immediate pool area.

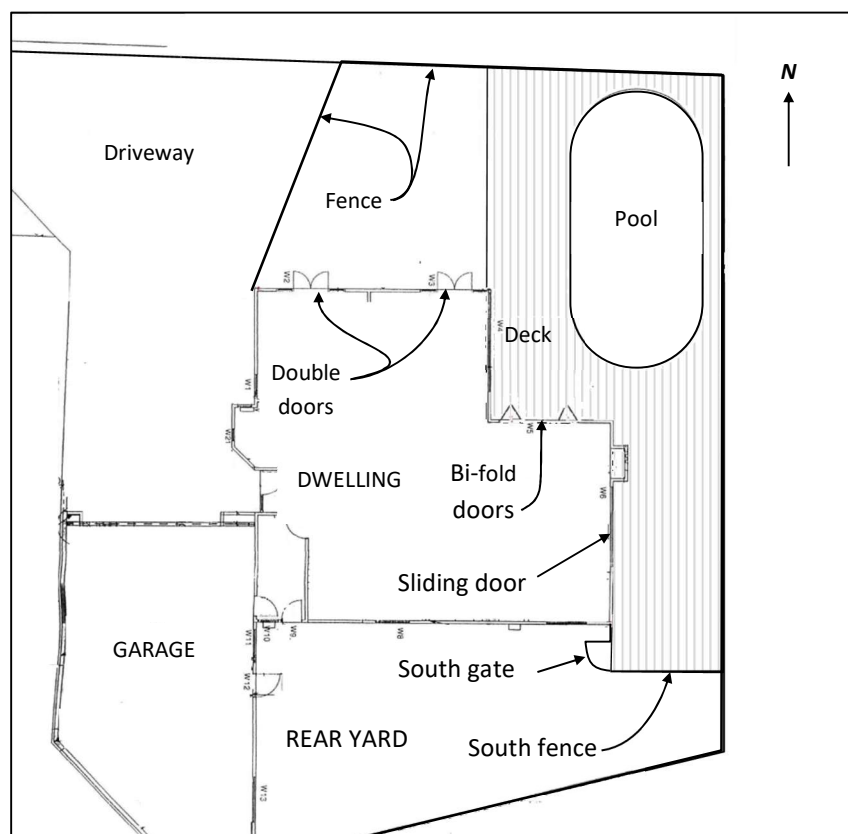


Figure 1: site plan – as built (not to scale)

- 2.3. The rear yard is separated by a fence and gate at the southeast corner of the dwelling, specifically a 1400mm high aluminium fence (south fence) and a 1040mm high metal gate⁴ with a latch (south gate) (see figures 2 and 3). The authority considers the pool barrier incorporates the south fence and the south gate. However, the owner considers the south wall of the dwelling, as well as a garage wall, incorporates the pool barrier.
- 2.4. The south wall of the dwelling includes a laundry door that opens away from the rear yard, and the garage wall has a door that opens into (towards) the rear yard. The owners advise that neither of these doors are self-closing but do contain manual closing mechanisms described as a “keyless twist-lever lock” located 1100mm above floor level. The rear yard contains a washing line, a woodshed, a seating area with a table and park bench, and a small area of lawn. The rear yard is said to be used by the occupants predominantly for hanging out washing and the storage and collection of firewood.

⁴ The south gate is 1040mm high from the deck and 1100mm high from the paving in the rear yard.



**Figure 2: south fence & south gate
(looking from the rear yard)**



**Figure 3: south fence & south gate
(looking from the deck to the rear yard)**

- 2.5. It was a recent pool barrier inspection, specifically an inspection of the south gate, which gave rise to this determination application. The south gate was marked as a “fail” for the following reasons:
- 2.5.1. the south gate (including the short section of fence constructed with the same materials as the gate) is not 1200mm high, and
 - 2.5.2. the south gate does not self-close and latch.

3. Background

- 3.1. The pool was constructed in the 1980’s on what was then a larger property.⁵ The lot was subdivided in 1997, with the existing pool included in the lot for 23A Henry Street. In January 1997, a building consent⁶ was issued for the construction of the dwelling, with the plans incorporating the existing pool. Construction of the dwelling took place between 1997 and 1999, and in January 2000, a code compliance certificate was issued.
- 3.2. In 1997, the then property owner applied for a ‘special exemption’ under section 6 of FOSPA, and so the pool barrier was not required to comply with clauses 8 to 10 of the Schedule of FOSPA (see Appendix A). A set of plans submitted with the exemption application (see figure 4) showed four sets of doors opening into the pool area and proposed new fencing in two locations:
- 3.2.1. Northwest: from the corner of the dwelling to the north boundary fence, separating the driveway and pool area; and
 - 3.2.2. Southeast: from the corner of the dwelling to the east boundary fence, separating the rear yard and pool area (no gate was marked on the plan).

⁵ A plumbing and drainage plan dated 9 February 1982 shows the pool with 1.2m high fencing and hedging around it.

⁶ Under the Building Act 1991.

The exemption application also included details of locking devices affixed to the four sets of doors opening into the pool area.

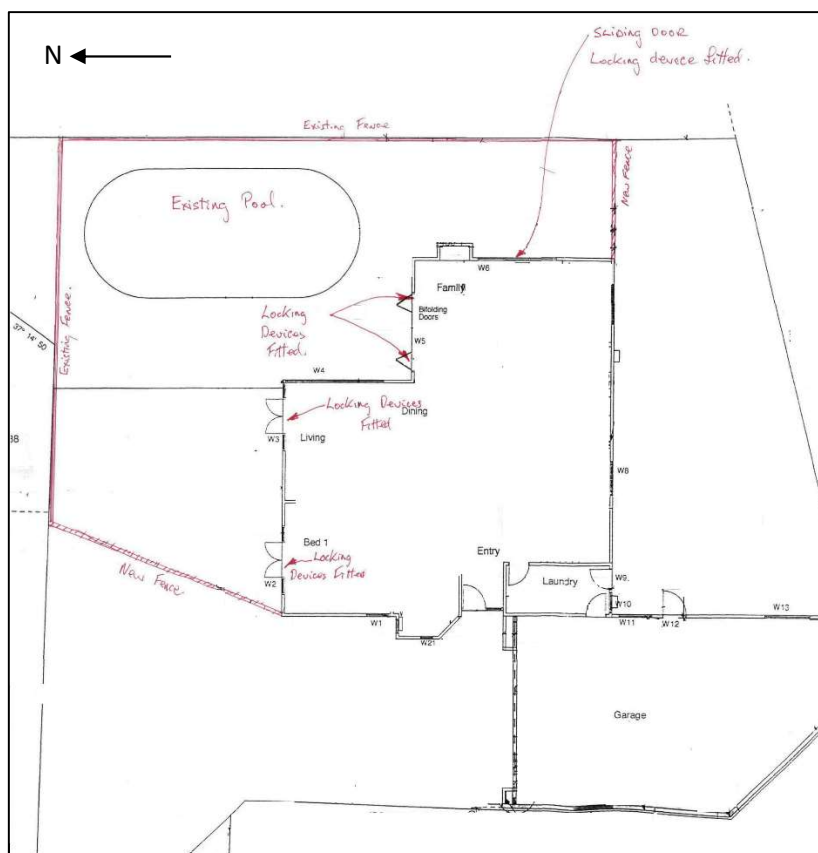


Figure 4: 1997 site plan showing proposed fencing (not to scale)⁷

3.3. On 27 November 1997, the Marlborough District Council's Resource Management and Regulatory Committee granted the exemption application under clause 11 of the Schedule of FOSPA, meaning the doors did not have to comply with clauses 8 to 10 of the Schedule. The exemption was issued with an accompanying cover letter, which stated the following:

[The exemption has] the resultant effect that the doors need not comply with the requirements set out in Clause 8 to 10 of the schedule of FOSPA. The exemption was granted with the following conditions:

- childproof locking devices affixed to all five doors opening to the pool area
- that any locking devices inspected and approved by the Pool Inspector be maintained and in good working order at all times whilst the pool contains water

⁷ Details such as dimensions and internal layout have been removed from the image of site plan for the purpose of this determination.

- that the locking devices be properly operated to prevent doors from being readily opened by children under six years whenever the pool is not being used or supervised by adults
- that the pool owner agrees to inform any subsequent owners of these requirements.

3.4. The available information shows, from 2007 onwards, the authority conducted a series of inspections resulting in varying outcomes. A summary of the inspections is set out below and discussed in more detail in the paragraphs that follow:

Date	Outcome	Notes
May 2007	Pass	All fencing and gate requirements complied
30/9/2014	Fail	Southeast fence [ie, the south gate] not 1200mm high South elevation gate not self-closing/latching
22/5/2015	Pass	Re-inspection to follow up fail – now complies with FOSPA
26/7/2017	Fail	South gate does not self-close and latch Latching device 1200mm inside – n/a; 1500mm outside – pass
5/9/2017	Pass	Gate now returns automatically Latching device 1200mm inside – pass; 1500mm outside – n/a
28/8/2020	Fail	Number of issues including latch on gate Multiple windows which open into the immediate pool area – unable to identify if restrictors on windows to prevent opening more than 100mm
9/12/2020	Fail	Fence [ie, the south gate] height just under 1200mm Latching device outside 1500mm – fail No window restrictors in the living room and family room to prevent opening greater than 100mm – fail (exemption requirements)

3.5. As set out in the table above, in May 2007⁸ the authority carried out a pool barrier inspection. During that inspection, the authority found all fencing and gate requirements complied with FOSPA. In November 2009, December 2010 and December 2011, notices of inspections were sent to the (then) owner. However, there is no record of those inspections taking place, nor is there a record of the outcome of those inspections.

3.6. According to the current owners, the previous owners of the property⁹ erected the south gate and fence to keep their dog in the rear yard.

3.7. In the 30 September 2014 inspection, the authority marked the pool barrier as a “fail” due to the south gate being less than 1200mm high and the gate not self-

⁸ The authority’s letter dated 25 May 2007 erroneously refers to an inspection date of 5/11/1997.

⁹ The original owners sold the property in 2009.

closing/latching. On 22 May 2015 the authority re-inspected the pool barrier and marked the south gate as a “pass” ie, compliant with FOSPA.

- 3.8. The current owners purchased the property in 2015.
- 3.9. On 1 January 2017, FOSPA was repealed and replaced with new provisions in the Act (sections 162A to 162E)¹⁰. However, for existing pools the schedule of FOSPA was preserved as a means of compliance with the new provisions (by way of sections 450A and 450B).
- 3.10. On 26 July 2017, the authority undertook another inspection¹¹. The authority marked the south gate as a “fail” because “gate does not self-close and latch [when released from 150mm]”. Less than two months later, on 5 September 2017, the south gate was marked as a “pass” when assessed next to the criterion of its ability to “return automatically to a closed position when released”. Finally, on 28 August 2020, the authority undertook another inspection and during this inspection, the fence and gate were marked as a “fail”.
- 3.11. On 1 September 2020 the authority wrote to the owners and advised the following in relation to the south gate:

The southern gate leading to the immediate swimming pool area has the latch accessible from the outside of the pool area at a height less than 1500mm.

- *Where the release to the latching device or the latch is located at a height less than 1500 mm above the finished floor/ground level the location of the release of the latching device [shall]:*
 - *Not be on the outside of the barrier/fencing;*
 - *Not be in such a position that to release the latching device from the outside it will be necessary to reach over or through the barrier/fencing at a height of less than 1200 mm above the finished floor level or less than 1000 mm above the top of the highest lower horizontal member; and*
 - *Be at least 150 mm below the top of the gate if a hand hole is not provided, or at least 150 mm below the edge of any hand hole opening if a hand hole is provided.*

See enclosed pages 27/28 of NZS8500:2006¹² for guidance.

¹⁰ Performance clauses of the Building Code relating to pools in clause F4 were also repealed and clause F9 – ‘Means of restricting access to residential pools’ was inserted.

¹¹ Section 162D requires inspections of residential pools at least once every three years to ensure ongoing compliance of pool barriers to the extent required by section 162C.

¹² New Zealand Standard NZS 8500:2006 *Safety Barriers Around Swimming Pools, Spas and Hot Tubs*, para 3.4.4.1. I note the excerpt quoted by the authority is based on (but not an exact reproduction of) this paragraph.

- 3.12. The authority requested the owners immediately address these as well as some other issues listed in its letter¹³, or alternatively empty the pool.
- 3.13. On 29 October 2020, the Ministry received an application for a determination.
- 3.14. On 9 December 2020, after the determination application was received, the authority conducted another inspection. The inspection resulted in a “fail” because a “portion of the fence/gate at the southern end of the property is just under 1200mm”. The inspection report went onto state the south gate height is approximately 1000mm when measured from inside the swimming pool area - or the deck side of the gate (shown in figure 3).

4. Submissions

The owner

- 4.1. The owners state the south fence was never built in the position as depicted in the exemption application plan at the southeast corner of the dwelling. This is because there is “no indication on the house-wall, decking or steel boundary fence that [a fence in this position] ever existed”. This is further supported by a verbal assurance given by the previous owner, who stated:
- 4.1.1. no wall was erected in the vicinity of the ‘new fence’ as specified in the exemption application plan, and
- 4.1.2. “during his occupation of the dwelling there was no wall or gate preventing movement around the south-eastern corner of the building”.
- 4.2. As the evidence suggests, no south fence or gate had been constructed. From 2000 to at least 2007, the authority inspected the pool barrier and “never challenged this arrangement ... as not meeting the [legislative] requirements”. In other words, even in absence of a fence and gate restricting access to the pool from the rear yard, the authority assessed and passed the pool barrier as compliant on several occasions. In May 2007, the authority sent a letter confirming that the inspection of the property found that all fencing and gate requirements complied with the Act, yet this inspection occurred prior to the installation of the south fence and gate. The owners submit this information supports a view the “southern wall of the dwelling...

¹³ ‘Other issues’ in the authority’s letter includes the following points as quoted by the authority: “There are door hooks fitted to the dwelling for holding the doors open which lead to the immediate swimming pool area” and “There are multiple windows which open into the immediate swimming pool area. At the time of inspection I was unable to identify if there were restrictors on these windows which prevent the window opening more than 100mm”.

was justifiably accepted by the council^[14] as part of the pool fence as provided for by s2 of [FOSPA]”.¹⁵

- 4.3. The owners submit, “once compliance with the Act has been established the [authority] cannot take any action in respect of that compliance unless that building is altered”. The owners submit, “the installation... of the gate does not amount to an ‘alteration’ of the building affecting its compliance under the Act”. In summary, the owners contend the authority’s acceptance of the garage wall and the south wall of the dwelling as a compliant pool barrier during previous inspections means it has no power to require a new barrier to be erected at the southeast corner of the dwelling (or it is estopped from requiring full pool barrier compliance).
- 4.4. The owners accept no exemption was granted in relation to the laundry and garage doors on the south wall of the dwelling. The owners note the north and east walls of the dwelling are adjacent to the pool in a way that the south wall is not. They submit because the exemption relates to the “doors opening into the pool area”, it is possible the laundry and garage doors did not ever require an exemption, as they do not open “into the pool area”.
- 4.5. The owners also say it is arguable the rear yard could be considered the “immediate pool area”. The owners submit the requirement to fence all “the immediate pool area” can accommodate a pool barrier which extends beyond the outer edge of it, and so the barrier may enclose areas which are “not immediate” to the pool. In this case, if the south wall of the dwelling is taken to be the pool barrier, it will incorporate the “non-immediate” rear yard within the pool fence enclosure.

The authority

- 4.6. In 1997, an exemption application was submitted alongside site plans, which show a proposed fence at the southeast corner of the dwelling to separate the pool area from the rear yard.
- 4.7. During an onsite inspection, the authority found the south fence is positioned 1400mm further south than what is depicted in the plans submitted with the exemption application, and the south gate does not comply because it is not the required height. The authority says it holds no record of a consent being issued to move the south fence 1400mm further south than the plans, and it is unclear whether the fence proposed in 1997 was built in that position either at that time or

¹⁴ The Resource Management and Regulatory Committee and/or the Marlborough District Council in its role as the territorial authority under FOSPA.

¹⁵ Section 2 Interpretation. In this Act [FOSPA], unless the context otherwise requires,—
fence— means a fence that complies with the requirements of the Schedule to this Act and includes any part of a building and any gates or doors that form part of the fence [Effective 20 July 1987 to 30 June 1992]
gates or doors does not include any door to which clause 11 of the Schedule applies.

some later date. The authority submits there is no information to suggest any other changes have been made to the pool barrier since 2000.

- 4.8. The authority provided two aerial photographs of the property taken in 2003 and 2007. The authority says the 2007 aerial photograph (see figure 5) shows the south fence to be 1400mm further south than it appears in the exemption application plans (in the same position it appears today). The authority says the 2003 aerial photograph (see figure 6) shows the south fence is positioned as it appears in the plans (the authority says the fence is indicated by a white line at the end of the dwelling) and states this information “suggests that the [south] fence and gate in question ha[s] indeed been moved since 2000”.



Figure 5 (above): 2007 aerial photograph



Figure 6 (above): 2003 aerial photograph

- 4.9. In summary, the authority submits the south fence and gate existed throughout the periods its inspections took place. The authority further submits there are “no details on the [authority’s] file that indicate the rear yard was part of the pool area”.
- 4.10. On 22 October 2021, the Ministry asked the authority to comment on the disparity between the outcome of its 5 September 2017 inspection versus its 9 December 2020 inspection. This is because the authority marked various features of the south gate as a “pass” on 5 September 2017 which were later marked as a “fail” on 9 December 2020.¹⁶ The authority responded as follows:

The level of compliance has increased since 2017. [The authority] has become more aware of specific requirements which is largely due to previous determination decisions. [The authority] has acknowledged previous determination decisions and as a result has increased its compliance monitoring.

Submissions in response to a draft determination

- 4.11. A draft determination was issued to the parties for comment on 5 May 2022.
- 4.12. The authority accepted the draft determination without comment.
- 4.13. The owners also accepted the draft determination. However, on 16 May 2022, they provided a response for the Ministry to consider before issuing the determination. The owners’ response echoed many of the points previously raised but also noted the following:
- 4.13.1. Figure 5 may establish the south fence existed in 2007. However, it does not establish the south gate existed in 2007. This is because the location of the south gate is “largely if not totally obstructed by the tree” and no shadow is seen as you would expect if a gate existed in this location. Therefore, “the photograph is not evidence for a gate existing [in 2007] and is at best inconclusive as to whether one did or not”.
- 4.13.2. The information suggests the south fence was not constructed to meet the any pool fencing requirements. Instead, the information suggests the south fence was constructed to create a ‘nook’ at the south of the property and to differentiate from (and guard against) the edge of the raised decking area located to the east of the dwelling.
- 4.13.3. The letter of exemption includes no mention of a requirement to construct a ‘new fence’, and the information suggests the new fence was not considered to be relevant to the application for an exemption. It is not

¹⁶ Features such as the height of the latching device to be no less than 1500mm above ground, and the requirement for the fence height to be no less than 1200mm.

certain the plans were submitted to the committee as anything more than to indicate the location of the doors opening into the pool area.

- 4.13.4. The exemption predates the construction of the dwelling; therefore, it is possible during construction of the dwelling the position of the laundry and garage doors were considered, and it was decided the exemption applied to them.
- 4.13.5. The facts of this case should be distinguished from the facts of *Nanden v Wellington City Council*¹⁷ because, in that case, the authority had a statutory duty to issue a resource consent, a duty which “could not be overridden by estoppel”. However, in this case, the authority had a duty to consider the exemption application and had the discretion to vary or waive the statutory requirements where it thought reasonable to do so. In 1997 the council¹⁸ exercised that discretion, and the authority should now be estopped from requiring full pool barrier compliance. The refusal of an estoppel argument means the authority can “evade its responsibility for the current mess by raising the ‘excuse’ that it failed to carry out its statutory duties”.
- 4.13.6. For a change to the legal requirements for pool barrier compliance to be valid and lawful, due process must be followed.¹⁹ As due process has not been followed in this case, the authority cannot enforce the rectification of the pool barrier.
- 4.13.7. There is no dispute the pool barrier does not comply with section 162C of the Act, but rather the authority exercised its discretion to determine what constituted compliance. Despite the authority’s poor record keeping, the authority exercised its discretion and accepted the requirements of the legislation were met by the southern wall of the property.

5. Discussion

The legislation

- 5.1. Section 162C(1) of the Act requires residential pools to have physical barriers that restrict access to the pool by unsupervised children under five years of age (see Appendix A). Section 162C(2) provides:
- (2) The means of restricting access referred to in subsection (1) must comply with the requirements of the building code –

¹⁷ *Nanden v Wellington City Council* [2000] NZRMA 526 (HC).

¹⁸ The Marlborough District Council’s Resource Management and Regulatory Committee.

¹⁹ The owner says due process constitutes, 1) a genuine change in the law, 2) identification that an issue of application has arisen and requires attention, 3) a fair assessment of the extent to which the law change requires change in any given case, 4) fair consideration of responses from parties affected by the change, and 5) formal notice to parties detailing the change and steps required to give effect to them.

- (a) that are in force; or
 - (b) that were in force when the pool was constructed, erected, or installed (after 1 September 1987) and in respect of which a building consent, code compliance certificate, or certificate of acceptance was issued (in relation to the means of restricting access to the pool).
- 5.2. In addition, there is a savings provision in the Act for pools constructed prior to 1 January 2017; section 450B (see Appendix A).²⁰ The relevant provision is in subsection (2):
- (2) An existing pool is deemed to have barriers that comply with section 162C if the barriers—
 - (a) complied with the Schedule of the Fencing of Swimming Pools Act 1987 (as that schedule was in force) immediately before 1 January 2017; and
 - (b) continue to comply with those requirements subject to—
 - (i) any exemption that was granted under section 6 or clause 11 of the Schedule of that Act and that was subsisting immediately before 1 January 2017; and
 - (ii) the conditions of any such exemption.
- 5.3. The barrier includes doors in the dwelling that do not meet the requirements of the current Building Code²¹, and so does not comply by way of section 162C(2)(a).
- 5.4. A plumbing and drainage plan, stamped as approved on 9 February 1982, suggests the pool was constructed in the early 1980s²² under a building permit (ie, before the Building Act 1991 came into force). Because the pool was constructed prior to 1 September 1987, the provision in section 162C(2)(b) is not available as a means to establish compliance with section 162C.
- 5.5. If I am wrong and section 162C(2)(b) is available, because the means of restricting access to the pool (ie, the walls and doors of the dwelling) was constructed in 1997 and is the subject of a building consent and code compliance certificate, the

²⁰ Section 450A was another means of establishing pool barrier compliance. However, on 27 April 2017 a Gazette notice was published revoking section 450A as an acceptable solution for section 162C. Therefore, section 450A was only available as a means to comply with section 162C between 1 January 2017 and 27 April 2017. As such, section 450A has not been considered in this determination.

²¹ Clause F9 – ‘Means of restricting access to residential pools’. F9.3.4 provides:
Where a *building* forms all or part of an *immediate pool area* barrier,—
(a) doors between the *building* and the *immediate pool area* must not be able to be readily opened by children, and must either—
(i) emit an audible warning when the door is open; or
(ii) close automatically after use: ...

²² All pools constructed, erected, or installed before FOSPA was enacted were required to comply with that Act from 1 May 1988. The first record of an inspection under FOSPA that has been provided is dated November 1988.

relevant clause of the Building Code in force at that time was Clause F4 – Safety from falling. Clause F4.3.4 required “Barriers shall: (f) In the case of a swimming pool, restrict access of children under 6 years of age to the pool or immediate pool area”. I have considered what constitutes the immediate pool area in paragraphs 5.23 to 5.37, which is a relevant consideration if the barrier was to comply by this means.

- 5.6. Because the pool barrier is the subject of an exemption granted under FOSPA, I will now consider the remaining available pathway for establishing compliance with 162C, section 450B.
- 5.7. First, I will consider whether the laundry and garage doors were included in the 1997 exemption. If not, then I will go on to consider whether the pool barrier, comprising the southern dwelling wall and garage wall, is a compliant pool barrier under section 162C of the Act, including whether the rear yard comprises the “immediate pool area”.

The scope of the 1997 exemption

The south fence and gate were constructed between 2005 and 2007

- 5.8. The owners consider it to be likely, after the exemption application was made in 1997, the fence appearing on the southeast corner of the building was not built. Rather, in the mid-to-late 2000s the south fence and gate were built in a position 1400mm further south than it proposed in the 1997 plans.
- 5.9. The Ministry has obtained an aerial image of the property taken between 2002 and 2004 (see figure 7 below). In my view, the image shows the south fence and gate did not exist at that time. The authority submits the image is “not clear enough to identify there is no fence separating the backyard”. I accept the photograph is not clear, but I believe if the fence and gate did exist at the time it would be seen on this aerial photograph. In my view, nothing in the image remotely depicts a fence at the southeast corner of the property. Another aerial image obtained by the Ministry (which is the same as figure 5) shows sometime between 2005 to 2008 the south fence and gate were constructed as they appear today. Based on this information, I am of the opinion no south fence and gate existed until at least 2005.
- 5.10. The owners say figure 5 is not conclusive to show the south gate existed in 2007. I agree the image is not definitive and the area of interest is obstructed. It does not depict, with certainty, the south gate existed at this time. However, the image does show the south fence existed, and I am of the view it is more likely than not the south fence and the south gate would have been erected at the same time.²³ Further, regardless of whether the south gate was erected at this time, the timeline of events supports a view the authority conducted inspections prior to 2007 and

²³ As this would accord with the owner’s claim the previous owner constructed the south fence **and gate** to keep a dog in the rear yard.

marked the pool barrier as a “pass”, at times when no south fence and/or south gate existed.



Figure 7: 2002 – 2004 aerial photograph

- 5.11. Therefore, I accept the owner’s position the authority conducted property inspections and marked the pool barrier as a “pass”, at times when no south fence and gate existed. The authority says, “it has very minimal records of the details over this time”. Therefore, the authority is unable to provide alternative information to show a fence existed prior to 2004.
- 5.12. Despite the finding the authority undertook inspections, and “passed” the pool barrier at times when no south fence and gate existed, it does not automatically follow that the laundry and garage doors were included in the 1997 exemption. It also does not automatically follow that the pool barrier, comprised partly of the south wall of a dwelling and a garage wall, in the absence of the south fence and gate, is a compliant pool barrier under the Act.

The pool barrier's compliance with the Schedule of FOSPA

- 5.13. As outlined in paragraph 5.3, due to the fact the pool was built in the 1980s, and the barrier is subject to an exemption, the applicable pathway for establishing compliance is section 450B. I will consider first whether the laundry and garage doors comply with the Schedule of FOSPA (450B(2)(a)) and, if not, whether the laundry and garage doors are subject to the exemption (450B(2)(b)).
- 5.14. The clauses of the Schedule of FOSPA relevant in the current case are clauses 8 to 10 (see Appendix A), as they relate to gates and doors and their operation.

- 5.15. In relation to the garage wall and south wall of the dwelling, the areas of concern are the laundry and garage doors opening into the rear yard. Pursuant to clause 8(a) of the Schedule, doors must not open inward towards the immediate pool area. In this case, the garage door opens inwards toward the rear yard, and therefore the garage door does not comply with clause 8(a) of the Schedule.
- 5.16. Further, pursuant to clause 9(1) of the Schedule, every gate or door shall be fitted with a latching device. According to the owners, neither the laundry nor garage doors are fitted with a latching device, but rather they contain a manual closing mechanism described as a “keyless twist-lever lock”. This is a manual system and cannot be described as a latching device which automatically triggers once the door returns to a closed position. Finally, clause 10 of the Schedule requires gates and doors to have a device that will automatically return them to the closed position. Again, the owners have confirmed both the laundry and the garage doors are not self-closing.
- 5.17. Considering the features of the doors described above, I am of the opinion the garage door does not comply with clause 8(a), and both the garage and laundry doors do not comply with clauses 9(1) and clause 10 of the Schedule of FOSPA. Accordingly, the pool barrier, comprising the southern dwelling wall and garage wall, does not comply with clauses 1 to 10 of the Schedule, and therefore is not considered compliant by way of section 450B of the Act.

The laundry and garage doors are not subject to the exemption

- 5.18. The plans associated with the exemption application detail a ‘new fence’ to be constructed separating the rear yard from the pool area. The ‘special exemption’ granted under section 6 of FOSPA specifically exempts four doors on the north and east walls of the dwelling “opening into the pool area”. The exemption makes no reference to the laundry and garage doors on the south wall, nor does it detail any requirement to affix locking devices to these doors. This indicates the ‘new fence’ was intended to prevent a person from exiting from the laundry and garage doors and accessing the pool.
- 5.19. The owners say the construction of a ‘new fence’ was not considered to be relevant for the exemption application, and that the purpose of the plan was nothing more than to indicate to the committee the location of the doors opening into the pool area. Although there is no mention of the requirement to construct the ‘new fence’ in the 3 December 1997 exemption approval letter, it is clear the details in the plan formed the basis for the committee’s decision to approve the exemption application. In my view, had the exemption intended to allow persons access to the pool from the laundry and garage doors, the exemption would have included conditions related to these doors (ie, affixed with childproof locks). It is clear the doors on the south wall of the dwelling were not contemplated by the committee during the exemption application process.

5.20. The owners claim the south fence and gate were constructed to:

5.20.1. create a “nook” at the south of the property, and

5.20.2. guard against the edge of the raise decking area.

This claim is inconsistent with the owner’s previous claim the south fence and gate were constructed to keep a dog in the rear yard. In any event, it does not change my view the ‘new fence’, as well as the installation of childproof locks on the northern doors, formed the basis of the committee’s decision to approve the exemption.

5.21. The owners also say, because the 1997 exemption application predates the construction of the dwelling, it is therefore possible the location of the laundry and garage doors were considered, and a decision was made the exemption applied to them. This is on the basis the doors do not open into the “pool area”. I do not accept the fact that the exemption was granted before (or at the same time) as the dwelling was constructed constitutes evidence the committee decided the exemption would apply to the laundry and garage doors. For the reasons set out above, the weight of the information provided does not support this view.

5.22. In conclusion, I consider the laundry and garage doors were not subject of the exemption granted in 1997.

Whether the rear yard comprises the “immediate pool area”

5.23. Notwithstanding the above, I will now consider whether the area encompassed by the southern dwelling wall and garage wall (namely the rear yard) can properly be considered the immediate pool area. If it is found the rear yard does not comprise the immediate pool area, the pool barrier would not comply with any of the three compliance pathways outlined at paragraphs 5.1 and 5.2.

5.24. The pathways of establishing compliance all require a barrier that encloses the pool or “immediate pool area”.

5.25. The “immediate pool area” was defined section 2 of FOSPA as follows:

...the land in or on which the pool is situated and so much of the surrounding area is used for activities or purposes carried out in conjunction with the use of the pool.

Section 7 of the Building Act defines 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 carried out in relation to or involving the pool.

While there are slight differences in the wording of the two definitions, I do not consider those differences to be material.

- 5.26. What constitutes the immediate pool area, and what may be included within such an area, was previously considered by the High Court in the decision *Waitakere City Council v Hickman*²⁴ (“*Hickman*”). This case considered the interpretation and application of “immediate pool area” in relation to FOSPA and saw the formation of a two-part test (or the “close nexus” test).
- 5.27. I consider the “close nexus” test as considered in the *Hickman* decision to be the correct method to determine whether an area is an immediate pool area. The “close nexus” test is outlined below. I note the owners argue it is permissible for a pool barrier to extend beyond the outer edge of the ‘immediate pool area’ and that a barrier may include areas that are “not immediate”. It will be clear from the discussion below that I consider this cannot be the case. This is also supported by *Hickman*, which states: “The location of the fence is governed by the permissible extent of the immediate pool area, assessed in the way I have described”²⁵.

The “close nexus” test

Activities sufficiently connected with the use of the pool

- 5.28. Whether an area qualifies as an immediate pool area is determined by:
- ...the extent to which that area is actually used for activities or purposes properly regarded as taking place in conjunction with the use of the pool for its usual purposes of swimming, wading, paddling or bathing²⁶.
- 5.29. The *Hickman* decision goes on to say, “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...²⁷”. Therefore, to find an area comprises an immediate pool area, “there must be a sufficiently close nexus between the activity or purpose and the use of the pool²⁸”. The question of “whether an activity or association is sufficiently connected with the use of the pool is a matter of degree”.²⁹
- 5.30. The *Hickman* decision provides examples of “activities which would not usually be regarded as being carried out in conjunction with the use of the pool [to] include clothes lines, vegetable gardens, vehicle or pedestrian access ways, and planting for landscaping purposes³⁰”. *Hickman* also provides examples of “activities which would ordinarily qualify as being carried out in conjunction with the use of the pool [to include] the use of pool furniture, changing sheds, [pool] pumps or pool

²⁴ *Waitakere City Council v Hickman* HC AK CIV 2003-404-7266, [1 October 2004].

²⁵ *Hickman*, paragraph 35

²⁶ *Hickman*, paragraph 52.

²⁷ *Hickman*, paragraph 29(f).

²⁸ *Hickman*, paragraph 29(e).

²⁹ *Hickman*, paragraph 29(f).

³⁰ *Hickman*, paragraph 29(f).

maintenance equipment, sunbathing areas, and diving boards or other pool equipment³¹”.

Activities in sufficient *proximity* to the pool

5.31. The *Hickman* decision states, “although the extent of the immediate pool area is determined in the first place by its use..., the size of the area is not governed solely by this factor³²”. *Hickman* states some weight must be given to Parliament’s use of the word “immediate”, and goes on to say:

It must be assumed that the legislature intended that the immediate pool area to be fenced would be **relatively confined** and that, for example, a fence around the perimeter of the property would not comply with the Act³³

5.32. The *Hickman* decision states, “it is not possible to define with precision the width (say in metres) of the immediate pool area ... the width will depend on the circumstances of each case”³⁴. However, it does note the further away one moves from the edge of the pool, the less likely it will be regarded as the immediate pool area. This is because it is less likely that activity:

5.32.1. can properly be said to be carried out “in conjunction with” the use of the pool, and

5.32.2. will be in sufficient proximity to the pool.

5.33. Therefore, the two-part-test outlined above emphasises the need to consider firstly, whether the area is *used* for activities taking place in conjunction with the use of the pool, and secondly, whether those activities are taking place in sufficient *proximity* to the pool.

The “close nexus” test, and rear yard in this case

5.34. In deciding whether the rear yard comprises the immediate pool area, consideration must be given to the use of the rear yard, and whether these activities are sufficiently connected to with the use of the pool. As outlined previously, the rear yard incorporates a washing line, a woodshed, a seating area with a table and park bench, and a small area of lawn. The owners state, “apart from hanging out the washing and getting in the wood we rarely use [the rear yard] for anything”.

³¹ *Hickman*, paragraph 29(g).

³² *Hickman*, paragraph 34.

³³ *Hickman*, paragraph 34.

³⁴ *Hickman*, paragraph 34.

- 5.35. I consider the rear yard is used for activities other than those directly related to the use of the pool. Use of a clothesline is specifically referenced in the *Hickman* decision as an activity not usually regarded as being carried out in conjunction with the use of a pool. I accept that to be the case here. A person would exit the laundry door in order to hang out washing on the washing line in the rear yard; this is an activity which has no connection to the use of the pool. I accept the woodshed, and the use of it, falls into this same category.
- 5.36. The rear yard, comprising the clothesline and woodshed, is also not in sufficient proximity to the pool. To access the rear yard from the edge of the pool, this would require a person to leave the vicinity of the pool and its surrounding area, walk down the path between the eastern dwelling wall and boundary fence, around the south-east corner of the dwelling and into the rear yard of the property. It cannot be said this area (on the other side of the dwelling) is within sufficient proximity to the pool edge. In addition, I consider the pool should be visible from all parts of the immediate pool area, to ensure any young children in and around the pool can be supervised. An adult in the rear yard may not be aware of a child present in the pool or in close proximity to the pool. I consider this is particularly important given the purpose of the special provisions for residential pools, as set out in section 162A:

162A Purpose

The purpose of this subpart is to prevent drowning of, and injury to, young children by restricting unsupervised access to residential pools by children under 5 years of age.

- 5.37. In this case, I consider the relationship between the pool, and the activities likely to occur in the rear yard, do not meet the “close nexus” test set out in the *Hickman* decision. Therefore, even if compliance of the barrier itself was demonstrated through clauses 1 to 10 of the Schedule of FOSPA (or any of the other compliance pathways), the rear yard cannot properly be considered the immediate pool area.

Ongoing obligation under section 162D, and estoppel argument

- 5.38. Finally, it is necessary to address the owners’ contention that because the authority previously marked the pool barrier as a “pass”, at times when no south fence and gate existed, the authority accepted the inclusion of the rear yard as part of the immediate pool area (incorporating the south wall of the dwelling and garage wall as a compliant pool barrier). The owners claim the authority’s previous acceptance of the pool barrier means it has no power to now assess the barrier as being non-compliant. The owners appear to raise an argument of estoppel; namely, the authority is prevented from now enforcing the compliance of the pool barrier due to previous “pass” inspections.
- 5.39. An argument of estoppel was considered in *Nanden v Wellington City Council* in relation to the Resource Management Act. In that case, the territorial authority issued a project information memorandum that did not state a resource consent

was needed for proposed building work. It was held this did not estop the territorial authority from subsequently requiring a resource consent. The court found a territorial authority “cannot be estopped from carrying out its statutory duty of enforcing the ... provisions of the Resource Management Act³⁵”.

- 5.40. I take the same view here in relation to the Building Act. The authority previously marking the pool barrier as a “pass” does not prevent it from later identifying compliance issues under section 162C (and section 450B) and otherwise carrying out its statutory duties. An authority must be able to identify pool barrier compliance issues, regardless of the outcome of a previous inspection. This is further supported by section 162D, which provides an ongoing obligation on territorial authorities to ensure residential pools are inspected at least once every three years to determine whether they have barriers which comply with the requirements of section 162C of the Act. The authority previously marking a pool barrier as a “pass” does not prevent (or estop) it from later assessing a pool barrier as non-compliant during a subsequent inspection.
- 5.41. The owners say the facts of this case should be distinguished from *Nanden v Wellington City Council*. This is because the authority had the discretion to vary or waive the statutory pool barrier requirements, and in the owners’ view, the authority deemed it reasonable to do so in this case in 1997 and is now estopped from requiring full compliance of the pool barrier.
- 5.42. I do not agree with the owners on this point. The authority granted the exemption on certain conditions, and on the basis that a new fence was to be built from the southeast corner of the dwelling that would separate the rear yard from the pool area. That fence was not built, and the fact that the south gate and fence were later added and that there was inconsistency in the authority’s assessment of the compliance of the south gate, does not change the conclusion that I have reached that the barrier (incorporating the rear yard) does not comply with section 162C. It is not a case of the authority being “estopped from requiring full compliance”; the authority has no choice in the matter and is required to apply the law. As discussed above, a pool owner has an ongoing obligation to ensure their pool barrier remains compliant under section 162C (and if compliance is by way of section 450B as it is in this case, in accordance with subsection (2)(b)).
- 5.43. I note that the Act is, in general terms, a permitting regime. However, the special provisions for residential pools are an ongoing obligation to have a barrier that restricts access by unsupervised young children to residential pools.³⁶ Together these provisions ensure that barriers to pools are regularly inspected and remain compliant throughout the lifetime of the pool. The matter of who is responsible for

³⁵ *Hickman*, at paragraph 58.

³⁶ Section 162C(4) lists those people who must ensure the obligation is met, and section 162D(1) requires territorial authorities must ensure residential pools within their jurisdiction are inspected at least once every three years to determine whether the pool has a barrier that complies with the requirements of section 162C.

the non-compliance of a pool barrier does not detract from the requirement for the owners' pool (if it is to remain) to have a compliant barrier restricting access of unsupervised young children.

6. Decision

- 6.1. In accordance with section 188 of the Building Act 2004, I hereby determine the pool barrier, consisting of the south wall of the dwelling and the garage wall, does not comply with section 162C of the Building Act 2004.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 15 November 2022.

Peta Hird

Principal Advisor Determinations

APPENDIX A

Fencing of Swimming Pools Act 1987

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.

8 Obligations of owner and persons in control of pool

- (1) Every owner of a pool to which this Act applied 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.

9 Offence

...

- (2) Where the owner or person entitled to possession or control of a pool to which this Act applies is not entitled to possession of the property on which the pool is situated or the immediate pool area (whether because of any tenancy agreement, agreement to occupy a hotel room, motel, or camping ground, or otherwise) it shall be a defence to any proceedings for any offence described in subsection (1) in relation to section 8 if the court is satisfied that the owner took all reasonable steps –
 - (a) to ensure that the obligation was complied with; and
 - (b) to ensure that the person in possession of the property or entitled or likely to be in the immediate pool area are made aware of the existence of the pool.

12 Delegation of powers to committees of councillors

The territorial authority may delegate its powers and functions under section 6 and clause 11 of the Schedule to any committee of the territorial authority appointed under clause 30 of Schedule 7 of the Local Government Act 2002 that comprises only members of the territorial authority; but may not delegate those powers and functions to any committee that has any members who are not members of the territorial authority or to any officer of the authority.

Schedule of FOSPA

Gates and doors

- 8 Every gate or door shall be so constructed so to comply with the relevant requirements of clauses 1 to 7, and shall be so mounted that –
- (a) it cannot open inwards towards the immediate pool area;
 - (b) it is clear of any obstruction that could hold the gate or door open and no other means of holding the gate or door open is provided;
 - (c) when lifted up or pulled down the gate or door does not release the latching device, come off its hinges, or provide a ground clearance greater than 100 mm

Operation of gates and doors

- 9
- (1) Every gate or door shall be fitted with a latching device.
 - (2) Where the latching device is accessible from the outside of the fence only by reaching over the fence, gate, or door or through a hole in the fence, gate, or door, the latching device and the lowest point of any hole giving access to it shall be at least 1.2 metres above the ground on the outside of the fence.
 - (3) Where the latching device is otherwise accessible from the outside of the fence, gate, or door, the latching device shall be at least 1.5 metres above the ground on the outside of the fence.
- 10 Every gate or door shall be fitted with a device that will automatically return the gate or door to the closed position and operate the latching device when the gate or door is stationary and 150 mm from the closed and secured position.
- 11 Where any building forms part of a fence and the pool is not contained within the building, any door that gives access to the immediate pool area need not comply with the requirements for gates and doors set out in clauses 8 to 10 to the extent (if any) that the territorial authority is satisfied that such compliance is impossible, unreasonable, or in breach of any other Act, regulation, or bylaw, and the doors is fitted with a locking device that, when properly operated, prevents the doors from being readily opened by children under the age of 6 years.

Building Act 2004

162C Residential pools must have means of restricting access

- (1) Every residential pool that is filled or partly filled with water must have physical barriers that restrict access to the pool by unsupervised children under 5 years of age.
- (2) The means of restricting access referred to in subsection (1) must comply with the requirements of the building code –
 - (a) that are in force: or
 - (b) that were in force when the pool was constructed, erected, or installed (after 1 September 1987) and in respect of which a building consent, code compliance

certificate, or certificate of acceptance was issued (in relation to the means of restricting access to the pool).

162D Periodic inspections of residential pools

- (1) Every territorial authority must ensure that the following residential pools within its jurisdiction are inspected at least once every 3 years, within 6 months before or after the pool's anniversary date, to determine whether the pool has barriers that comply with the requirements of section 162C:
- (a) residential pools other than small heated pools:
 - (b) small heated pools that have barriers that are not exempt, in terms of Schedule 1, from the requirement to have a building consent.

450B Savings provision for existing residential pools

- (1) This section applies to a residential pool that was constructed, erected, or installed before 1 January 2017 (an **existing pool**).
- (2) An existing pool is deemed to have barriers that comply with section 162C if the barriers-
- (a) complied with the Schedule of the Fencing of Swimming Pools Act 1987 (as that schedule was in force) immediately before 1 January 2017: and
 - (b) continue to comply with those requirements subject to –
 - (i) any exemption that was granted under section 6 or clause 11 of the Schedule of that Act and that was subsisting immediately before 1 January 2017: and
 - (ii) the conditions of any such exemption.

...