

Determination 2024/033

The decision to issue a notice to fix for an existing pool without a physical barrier and the consideration of a waiver of the requirement for a barrier.

Motukawaiti Island, Kaeo

Summary

This determination considers the authority's decision to issue a notice to fix for an existing pool on an offshore private island that does not have a physical barrier to restrict access by unsupervised young children. The determination considers whether the owner is required to comply with section 162C of the Building Act 2004 and whether a waiver is appropriate in the circumstances.



Figure 1: The pool

In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”) and references to “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

References to “FOSPA” are to the Fencing of Swimming Pools Act 1987, with its sections referred to as sections of the FOSPA. The Schedule to the FOSPA is referred to as “the Schedule”, with its clauses referred to as clauses of 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, Andrew Eames, Principal Advisor Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.
- 1.2. The parties to the determination are:
 - 1.2.1. Trustee Services Limited, the owner (the “owner”)
 - 1.2.2. B Newby, the person issued with the notice to fix and caretaker of the island who is also representing the owners in this determination
 - 1.2.3. Far North District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. The matter to be determined, under section 177(1)(b) and (2)(f), is the authority’s decision to issue a notice to fix for a contravention of section 162C because there is no physical barrier to restrict access to the swimming pool.
- 1.4. I have also considered whether to grant a waiver of section 162C.¹ This involves an assessment of whether a waiver would significantly increase the danger to children under five years of age.

2. The background and building work

- 2.1. The property is situated on the northern end of Motukawaiti/Step Island, approximately 3.5 kilometres off the mainland of New Zealand. The island is privately owned and features three residential dwellings, each with shared access to and use of the swimming pool when the occupants are in residence.
- 2.2. The swimming pool is situated at the high tide line on the property. It is set into a deck and has no barrier or fencing to restrict access to it.

¹ Under section 188(3) (aa) and (3A) of the Act.

- 2.3. The swimming pool, estimated to have been constructed between 2003 and 2007, was built without building consent.
- 2.4. Plans submitted for a building consent to construct a nearby spa and gym building show the outline of the deck but did not include the pool.² However, a set of drawings dated March 2005 (see Figure 2) included the location of the pool.³ This suggests the pool may have been installed around the same time as the building work carried out under this building consent, though the authority has advised the pool was not noted on any inspection records.⁴

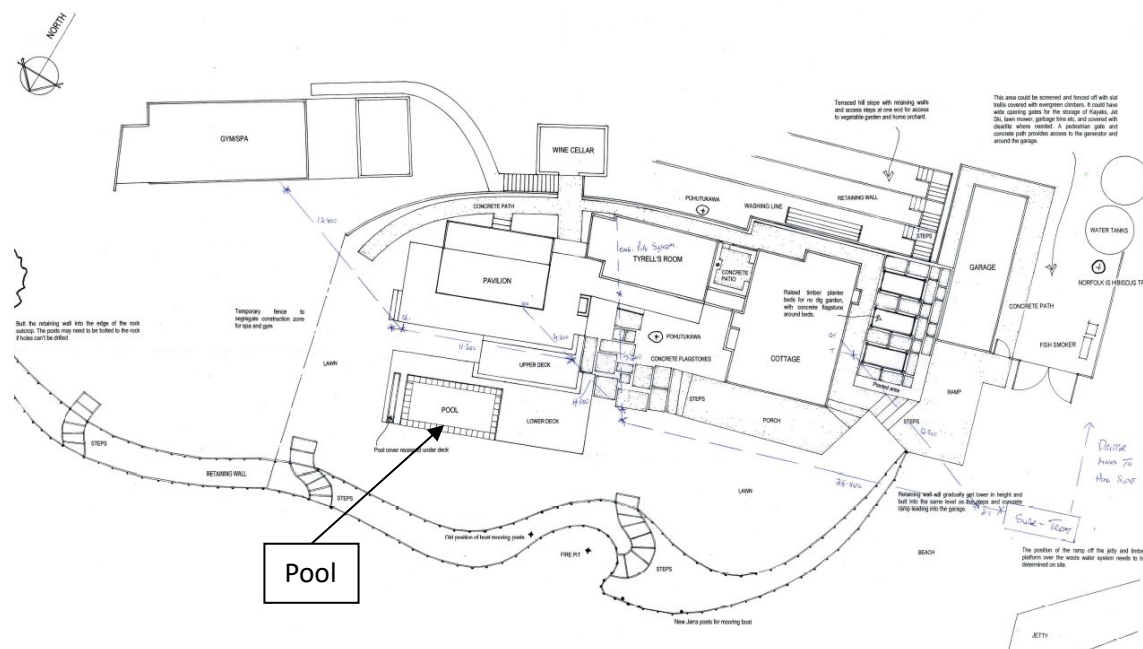


Figure 2: The layout of the property and pool

- 2.5. The authority states the pool was “found through a Land Information Memorandum in 2020” but had not previously been listed on the authority’s pools register. A site visit was conducted in November 2020 which confirmed there was no physical barrier to restrict access to the pool.
- 2.6. On 17 April 2024, the authority issued a notice to fix, NTF-2024-206/0. The particulars of contravention or non-compliance were stated as:

Contrary to s.162C of the Building Act, the following building works are non-complying:

- (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 Building consent number 2005-2187.

³ The as-built plans show a recessed pool cover installed under decking. The District Court has considered the use of pool covers for the purpose of restricting access by unsupervised young children in *Rowe v Marlborough District Council* [2022] NZDC 18505.

⁴ A code compliance certificate for the building consent was issued on 14 February 2006.

(2) The means of restricting access referred to in subsection (1) must comply with the requirements of the building code.

3. Submissions

The owner

- 3.1. The owner requested I consider an “exemption” of the requirement for a pool barrier on the basis that it is “impractical at this unique location”. I have taken this as a request to consider a waiver of the requirement for a pool barrier.
- 3.2. The owner submitted (in summary):
 - 3.2.1. There is no indication that the pool has ever had a barrier since construction, which has been in place for approximately 20 years without incidents.
 - 3.2.2. The location of the pool is on a remote offshore island with no unannounced visitors, and visitors are minimal.
 - 3.2.3. “99.9%” of the time there are only two occupants of the island, being the caretaker and their partner. The owners have only visited once in two years, and they have teenage children.
 - 3.2.4. Durability issues arise for any barrier if erected because the pool is below the high tide line. Previous swells have filled the pool with seawater, on both of these occasions the “pool fencing would have been completely destroyed.”
 - 3.2.5. The pool is a holding tank as part of the fire protection plan and fencing around it could potentially be a major inhibitor if a fire event ever happened.
 - 3.2.6. Having the sea right next to the pool would pose a similar or arguably greater risk to children.

The authority

- 3.3. A summary of the authority’s submission follows:
 - 3.3.1. Although there is an as-built plan within BC 2005-2187 that shows the swimming pool, there is no pool noted on any inspection paperwork.
 - 3.3.2. This is a swimming pool that has no fencing or safety barrier to reduce the risk of drowning.

- 3.3.3. The authority requested the Ministry determine whether fencing complying with clause F9 is required due to the location of the swimming pool on an offshore island.

4. Discussion

- 4.1. The matter to be determined is the authority's decision to issue a notice to fix for contravention of section 162C. The decision will turn on:

- (1) whether a barrier is required to restrict access to the pool
- (2) whether a waiver of the provisions in section s162C that require a barrier should be granted.

Legislation

- 4.2. Section 162C of the Act requires:

- (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.

- 4.3. The requirement for a physical barrier to restrict access applies to all residential pools regardless of when the pool was constructed.

- 4.4. Section 162C (2) provides that the physical barrier restricting access to the pool 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).

- 4.5. Because there is no means of restricting access to the pool, subsection (b) above does not apply. The transitional and savings provisions in sections 450A and 450B do not apply for the same reason, and because there is no suggestion that an exemption had been granted under section 6 of FOSPA.

Is a pool barrier required?

- 4.6. The requirement in section 162C(1) applies to every residential pool, regardless of when the pool was constructed.

- 4.7. The legislation is clear that “**every** residential pool” must have physical barriers (my emphasis).
- 4.8. Section 7 of the Act states:
- residential pool means a pool that is—
- (a) in a place of abode; or
- (b) in or on land that also contains an abode; or
- (c) in or on land that is adjacent to other land that contains an abode if the pool is used in conjunction with that other land or abode
- 4.9. The pool falls within the definition because there are three residential dwellings on the island in proximity to the pool and the pool is used by the occupants of the dwellings. That being the case, it is required to have physical barriers that restrict access by unsupervised children under five years of age.

Availability of a waiver or modification

- 4.10. The Act, in making provision for waivers or modifications recognises that the Building Code cannot cover all possible situations and provides the flexibility for authorities to address unusual sets of circumstances. Waivers and modifications may be considered by a territorial authority at the building consent stage, and by the Chief Executive in a determination.
- 4.11. Under section 188(3)(aa) of the Act, a determination may incorporate a waiver or modification of section 162C(1) or 162C(2), along with any conditions that a territorial authority is able to grant or impose. In this case the owner has not proposed a solution that would require a modification, but rather has requested a waiver from the requirement to have a barrier.
- 4.12. Under section 188, the overarching test which must be satisfied for me to grant a waiver of section 162C(1) or (2) is that I must be satisfied that the waiver would not significantly increase danger to children under five years of age. I must also consider the principles to be applied in exercising this power under the Act. Of particular relevance being the prevention or minimisation of any harmful effect on human health resulting from building work.⁵
- 4.13. Previous determinations have discussed waivers and modifications and set out factors for consideration in granting them.⁶ These established that a waiver or modification may be granted when compelling reasons exist to support the view that it is appropriate and reasonable to do so in the circumstances.
- 4.14. In deciding whether to grant a waiver, I have considered the following:

⁵ Section 4(2)(b).

⁶ See for example Determination 2015/010 Regarding the authority’s refusal to grant a modification of Clause C3.4(a) of the Building Code in respect of materials used for internal surface linings at a new school hall (31 March 2015)

- the purposes and principles of the Act
 - the extent and consequence of non-compliance
 - any special and unique circumstances
 - any mitigating features
 - the availability of reasonably practicable solutions.
- 4.15. If a waiver were granted as requested, a primary purpose of the Act, that being safety of people using buildings,⁷ and the specific purpose of the provisions concerning residential pools⁸ (ie to prevent drowning of or injury to young children), would not be met because the lack of a barrier would allow unsupervised access.
- 4.16. I consider that a waiver of the requirement to have a barrier would be inconsistent with the purposes and principles of the Act.
- 4.17. The absence of a pool barrier on a residential property would allow children under five to access the pool without supervision, and the resulting consequence would be to significantly increase the risk of injury or death.
- 4.18. I appreciate that the location is somewhat unique, being an offshore privately owned island with the pool very close to the sea.⁹
- 4.19. I consider the proximity of the pool to the sea is irrelevant to the requirement to provide a barrier to the pool. The Building Act concerns regulation of building work, not the management of natural features such as the sea, rivers, ponds, and lakes nearby residential properties that may also present a risk to young children.
- 4.20. I also acknowledge the current owners do not have children under the age of five, and the property may have less visitors than the average residential house due to its remote location. However, I am of the view children are likely to frequent any household at some time in the life of the building. Though current occupants may not have any young children or be likely to have friends or family with young children visit, I do not consider the current ownership situation is a sufficiently compelling reason to consider a waiver.

⁷ Section 3 Purposes: This Act has the following purposes: (a) to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that— (i) people who use buildings can do so safely and without endangering their health; ...

⁸ Section 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.

⁹ I also note that there is no fencing on the property that delineates property boundaries. As such, it is unclear where the “immediate pool area” extends to for the purposes of supervision.

- 4.21. Regarding the use of the pool as a holding tank as part of the fire protection plan, this is not a relevant factor in considering whether a waiver of the requirement for a pool barrier would significantly increase the danger to young children. I also note the property's proximity to the sea as an alternative source.
- 4.22. The owners have submitted that installing a barrier is not practicable due to concerns about durability of a barrier given the likelihood of corrosion is high and considering that any pool fencing could be destroyed if sea swells surge.
- 4.23. Any pool barriers erected at this location may have specific requirements for strength and durability, and possibly higher maintenance requirements to ensure continued compliance with the Building Code. However, this is not sufficient justification to void the requirement to have a barrier.
- 4.24. I am not satisfied a waiver of the requirement to have a barrier to restrict access to the swimming pool would not significantly increase danger to children under five years of age.

5. Decision

- 5.1. In accordance with section 188 of the Building Act 2004, I determine section 162C requires the pool to have a barrier and I confirm the authority's decision to issue the notice to fix.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 04 July 2024.

Andrew Eames

Principal Advisor Determinations