



Determination 2017/078

Regarding compliance of a physical barrier to a residential swimming pool and spa pool at 54 Albert Street, Hamilton

Summary

The determination considers whether the barrier to a swimming pool and spa pool complies with the Building Code to the extent required under section 162C of the Building Act. The barrier was considered to be compliant with the Fencing of Swimming Pools Act at the time of construction and a code compliance certificate had been issued, but it later failed an inspection carried out under new provisions in the Building Act for residential pools.



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, Katie Gordon, Manager 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:
 - the owner of the house, S Muller (“the applicant”)
 - Hamilton City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 This determination arises from a failed inspection of a residential swimming pool and spa pool. The authority is of the view that the barrier does not comply with section 162C of the Act² (refer paragraph 2.8.1).
- 1.4 The matter to be determined³ is whether the physical barrier to the pools complies with the Building Code to the extent required by section 162C. I note here that there is no dispute between the parties that the barrier complies with the Fencing of Swimming Pools Act 1988 (“FOSPA”) and I do not consider that matter further in this determination.

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 In this determination, unless otherwise stated, references to clauses are to clauses of the Building Code and references to sections are to sections of the Act.

³ Under section 177(1)(a) of the Act

1.5 In making my decision I have taken into account the submissions of the parties and the other evidence in this matter.

2. The background and the barrier

2.1 On 24 August 2011 the authority issued building consent no. 2011/26461 for 'new garage and ensuite addition and swimming pool'. Attached advisory notes set out the inspections required, which included an inspection of 'the pool complex' with 'pool fencings to be in place before the pool is filled with water'.

2.2 The approved consent drawings show the barrier to the pools consisting of:

- the existing boundary fence on two sides
- short sections of fence between the northeast boundary fence and the existing house, and between the northwest boundary fence and the proposed garage, with the latter including a gate
- a fence around the deck, with gates to the proposed swimming pool and to the spa pool
- a fence to the remaining two sides of the spa pool.

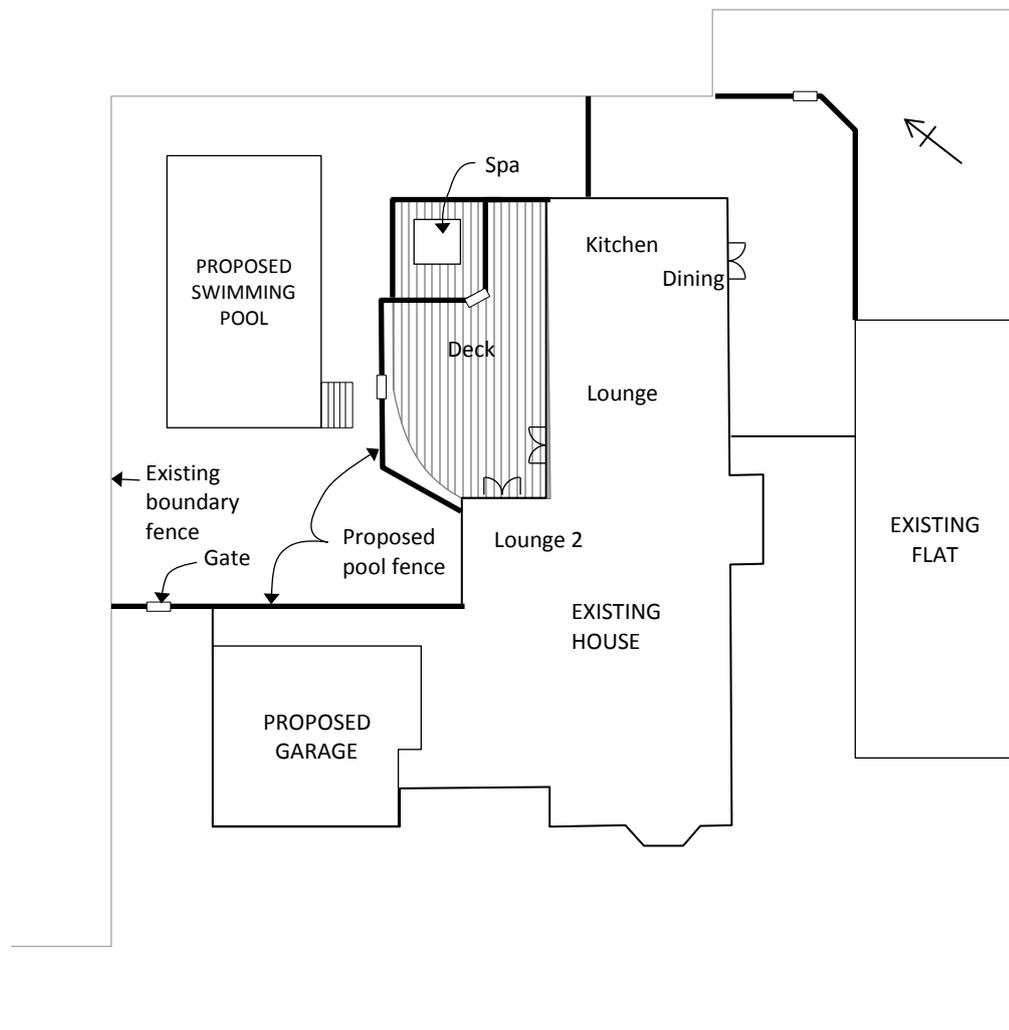


Figure 1: Site plan showing key features (based on approved pool plan drawing) (not to scale)

- 2.3 The building work was carried out in stages between 2011 and 2014, with the swimming pool constructed before the garage.
- 2.4 The pool and the barrier were not constructed in accordance with the plans. The fencing around the deck and spa pool was not installed, meaning that the external wall of the house formed part of the barrier (see Figure 2 below). Changes were also made to the steps to the swimming pool and the design of the deck.

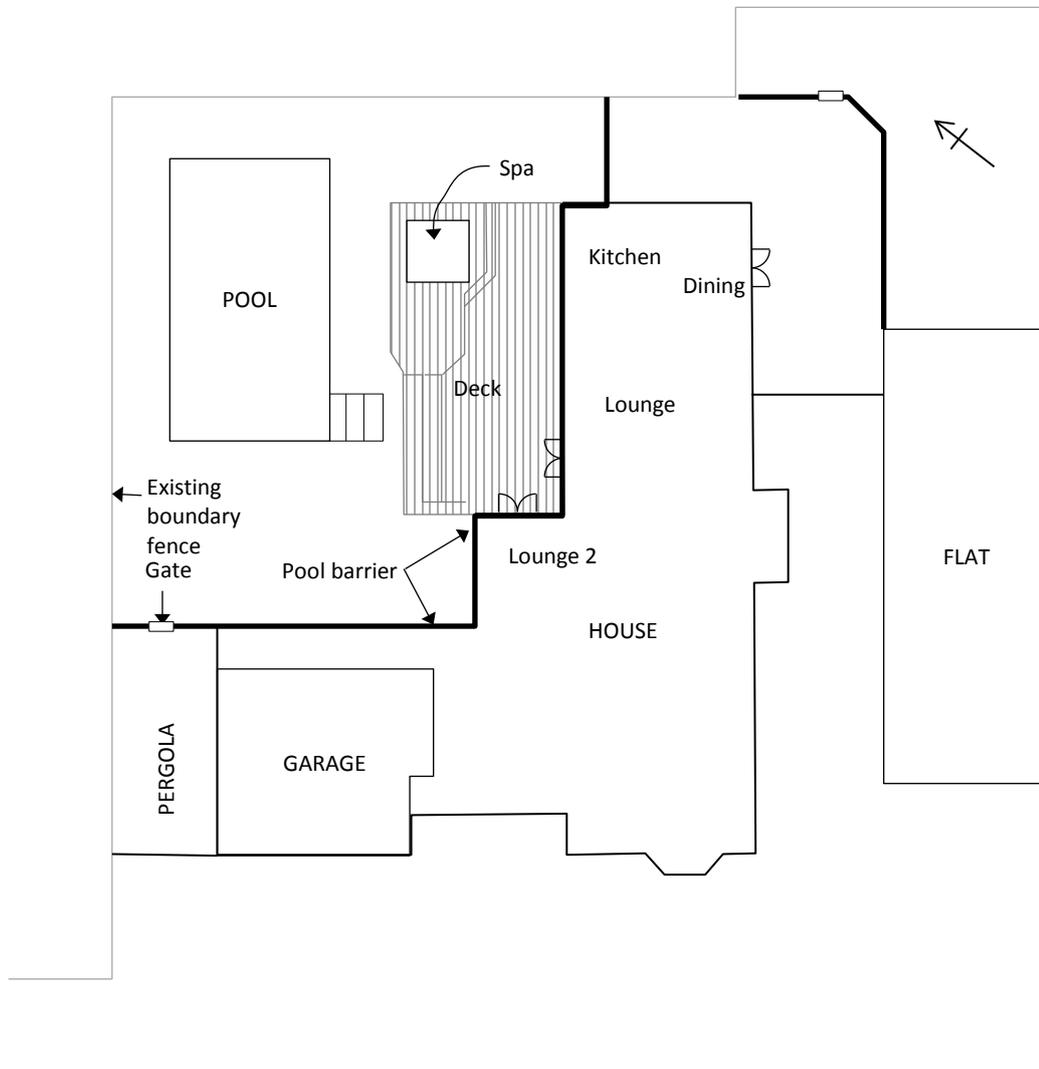


Figure 2: Site plan showing key features as constructed (not to scale)

- 2.5 It appears from the photographs provided that the area marked as “pergola” between the garage and boundary fence has been closed in to provide a conservatory or the like.
- 2.6 The applicant stated that the doors from the lounge areas to the immediate pool area are self-closing and locking, and windows opening out to the immediate pool area are compliant. The authority confirmed those details in a site visit carried out on 19 September 2017.
- 2.7 Final building and final plumbing/drainage inspections were carried out on 18 November 2014; both inspection records state that the building work complied with the building consent. No amendments were made to the building consent in respect of the changes to the pool barrier, and a code compliance certificate was issued on 4 December 2014.

2.8 The 2017 failed pool inspection

- 2.8.1 In April 2017 the applicant requested the authority carry out a residential pool inspection. The authority carried out the inspection on 27 April 2017, and wrote to the applicant the same day stating that the barrier to the pools did not comply with section 162C. The letter referred to the area encompassed by the pool barrier, stating that the definition of the term “immediate pool area”⁴ excluded the whole of the outdoor living space and thoroughfares within it. The authority also noted that the requirements for a barrier also applied to the spa pool.
- 2.8.2 The parties entered into correspondence regarding the variation from the approved plans at the time the pools were installed, the authority’s inspections during construction and subsequent issue of the code compliance certificate, and the recent failed inspection. The applicant provided the authority with revised drawings showing the barrier as constructed.
- 2.8.3 On 2 June 2017 the authority emailed the applicant, noting that the barrier as constructed was not in accordance with the approved plans, and confirming its view that the whole of the backyard could not be included within the immediate pool area.
- 2.8.4 The applicant responded the same day accepting that the barrier was not in accordance with the plans, but stating that the variation was approved by the authority’s inspector at the time and prior to the swimming pool being filled. The applicant also noted that a code compliance certificate had been issued. The applicant stated there were other yards and areas around the house used for activities to be undertaken that do not relate to the use of the pools, such as clothes drying and gardening.

3. The submissions

- 3.1 The Ministry received the application for a determination on 9 August 2017. The applicant set out the background to the dispute and provided copies of the following documents:
- Photographs showing the swimming pool, spa pool and deck area, marked with locations of the consented fence.
 - Approved plans and revised plans.
 - The notification from the authority of the failed pool inspection and relevant correspondence between the parties.
 - Building consent documentation.
 - The authority’s submission to the Ministry in consultation under section 29 on the then proposed Acceptable Solutions for residential pool barriers.
 - The code compliance certificate and LIM.
- 3.2 The applicant submitted (in summary):
- Although the barrier design was altered at the time of construction from the approved plans and no amendment of the building consent was sought, the barrier complied with the requirements of the Act and the FOSPA. Acceptance of the variation from the approved plans by the authority was, in the applicant’s

⁴ Refer Appendix A.2, Clause F4.3.4(f) that was current at the time the barrier was constructed

view, evident from the passed inspections (including the final inspection in November 2014) and the issue of the code compliance certificate.

- The entire yard is used for pool related activities, and other areas are available for activities unrelated to the use of the pool such as gardening and clothes drying.
- The spa is included in the immediate pool area and therefore is adequately fenced.
- Both doors leading from the house into the immediate pool area are self-latching.

3.3 The applicant set out the following reasons for the changes to the fencing:

- The fence between the spa and the pool was redundant as it was a fence between two pool areas.
- The fence between the deck and the pool could not be installed due to the design changes resulting in a smaller distance from the deck steps, and the fence on the deck between the spa and the house would have left a narrow strip that would be redundant.

3.4 As a result of the fencing changes, restrictors were added to the kitchen windows.

3.5 On 15 August 2017 the authority was contacted by the Ministry informing it of the acceptance of the determination application and requesting additional information. The applicant confirmed on 21 August 2017 that the application had been sent to the authority. On 13 September 2017 the authority advised that it would carry out an inspection of the property on 19 September and would provide a submission by 22 September.

3.6 The authority's submission was received on 26 September 2017 and states (in summary):

- The authority confirmed that it had agreed to modifications of the barrier to the immediate pool area during the installation of the pool, and no amendment was sought for the consent nor were as-built drawings provided before the code compliance certificate was issued.
- At the time the authority was of the view that the modified barrier complied with the FOSPA – the barrier included high-level locks on two sets of doors opening into the pool area and security stays on windows.
- Self-closing latches have been fitted to the double doors and during the authority's site visit on 19 September 2017 it confirmed these were working satisfactorily.
- The authority's concerns regarding the barrier came about as a result of the changes imposed by the Building (Pools) Amendment Act 2016, and the authority suggested the resulting test to be considered was whether the pool and fencing complies with 'the current Act'.
- The authority seeks guidance in the determination that it can apply in similar circumstances where a pool barrier may comply with the FOSPA or any approved alternative solutions and have a code compliance certificate but the authority believes does not comply with the current legislation.

- 3.7 The applicant made a further submission on 26 September 2017. While the applicant refuted some of the details set out by the authority, I have not summarised those details here as the matter turns on the authority's interpretation of the requirements under section 162C and the application of section 450B⁵.
- 3.8 A draft determination was issued to the parties for comment on 27 September 2017.
- 3.9 The applicant and the authority responded on 1 and 6 October respectively. Both accepted the draft determination subject to minor non-contentious amendments.

4. Discussion

- 4.1 The Act was amended with effect from 1 January 2017 to incorporate a set of special provisions relating to residential pools. The provisions include section 162C which requires residential pools to have physical barriers that restrict access to the pools by unsupervised children under five years of age, and 162D which requires inspections at least once every three years to determine whether the pool has a barrier that complies with the requirements of section 162C.
- 4.2 Under section 162C(2), the means of 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).
- 4.3 Section 450B sets out the savings provisions as they relate to residential pools that were constructed before 1 January 2017. Subsection (2) provides existing pools are 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.
- 4.4 The Ministry has provided guidance⁶ for territorial authorities on the provisions of the Act relating to residential pools. Under the title “Requirements for residential pool barriers” the guidance states:

Residential pool barriers must comply with either:

- the current Building Code; or
- the Building Code that applied when the pool was installed (if a building consent, code compliance certificate or certificate of acceptance was issued).

This requires owners to maintain their residential pool barriers **to at least the standard that applied when those barriers were originally approved.** (my emphasis)

⁵ Section 450B sets out the savings provisions for existing residential pools

⁶ See <https://www.building.govt.nz/building-code-compliance/f-safety-of-users/pool-safety/residential-pool-provisions-of-the-building-act-2004-guidance-for-territorial-authorities/>

Existing pools deemed to comply with the barrier requirements for residential pools

Existing pools installed before 1 January 2017 are deemed to comply with the residential pool barrier requirements if they complied with the Schedule to Fencing of Swimming Pools Act 1987 (FOSPA). Valid exemptions granted under the FOSPA continue to apply, including the conditions of those exemptions.

- 4.5 Despite the fact that the barrier to the pool was not constructed in accordance with the approved building consent, and no amendment to the building consent had been sought nor had as-built drawings been provided, the authority issued a code compliance certificate. The authority has advised that it gave its approval for the variation of the pool barrier from the approved plans; so in this matter there is no dispute between the parties that the pool barrier complied with the FOSPA at the time the authority issued the code compliance certificate and I have not considered that matter in this determination.
- 4.6 While the lack of amendment of the building consent was a serious oversight, it is an administrative step that confirms the authority has approved the variation from previously approved plans. Given that the authority has confirmed it approved the variations at the time, albeit these were not recorded, I am of the view that the owner cannot now be required to carry out new building work to “revert” the design of the barrier back to the approved building consent.
- 4.7 As the authority has confirmed its view that the pool barrier as constructed complied with the FOSPA, under section 405B it is deemed to comply with section 162C. For clarity, there is no requirement to upgrade the pool barrier if it complied with the FOSPA at the time it was installed. I reiterate that this determination does not consider whether the barrier as constructed complies with the FOSPA.

5. The decision

- 5.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the physical barrier to the pool complies with the Building Code to the extent required under section 162C of the Building Act.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 24 October 2017.

Katie Gordon
Manager Determinations

Appendix A: The legislation

A.1 The relevant sections of the Building Act 2004 discussed in this determination:

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).
- (3) In the case of a small heated pool, the means of restricting access referred to in subsection (1) need only restrict access to the pool when the pool is not in use.

...

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.
- (3) Alternatively, an existing pool is deemed to comply with section 162C if all of the following apply:
 - (a) the outside surface of the side walls of the pool is constructed so as to inhibit climbing; and
 - (b) no part of the top of any side wall of the pool is less than 1.2 m above—
 - (i) the adjacent ground level; and
 - (ii) any permanent projection from the ground outside of the pool and within 1.2 m of the walls of the pool; and

(iii) any object standing on the ground outside of the pool and within 1.2 m of the walls of the pool; and

(c) any ladder or other means of access to the interior of the swimming pool—

(i) can be readily removed or made inoperable; and

(ii) is removed or made inoperable whenever the pool is not intended to be in use.

Sections 162C, 162D, 450A and 450B were inserted, on 1 January 2017, by [section 17 of the Building \(Pools\) Amendment Act 2016 \(2016 No 71\)](#).

A.2 The relevant clauses of the Building Code current at the time the pool was constructed:

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, ...

A.3 The Fencing of Swimming Pools Act 1987 (repealed on 1 January 2017):

2 Interpretation

In this Act, unless the context otherwise requires,—

fence—

(a) means 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; and

(b) includes any part of a building and any gates or doors that form part of the fence

gates or doors does not include any door to which clause 11 of the Schedule applies

13B Fencing in accordance with Schedule must be treated as means of compliance

Any provision that is made for the fencing of swimming pools that is in accordance with the Schedule must, in respect of—

(a) matters subject to the Building Act 2004, be treated as an acceptable solution or a verification method establishing compliance with the building code for the purposes of section 19 of that Act, and the requirements of this Act:

(b) building and premises not subject to the Building Act 2004, be treated as a reasonable and adequate provision for the purposes of this Act.

Schedule**Means of compliance for fences under this Act*****Gates and doors***

- 8 Every gate or door shall be so constructed as 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.

Doors in walls of buildings

- 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 or 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 door is fitted with a locking device that, when properly operated, prevents the door from being readily opened by children under the age of 6 years.