

Determination 2005/124

Swimming pool fence at 9 Mahoenui Valley Road, Coatesville, Auckland

1 THE MATTER TO BE DETERMINED

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004 (“the Act”) made under due authorisation by me, John Gardiner, Determinations Manager, Department of Building and Housing, for and on behalf of the Chief Executive of that Department. The applicant is the Rodney District Council (referred to below as “the territorial authority”), and the other parties are R and A Capon (referred to below as “the owner”). The application arises from the issuing by Compass Building Certification Ltd (referred to below as “the building certifier”) of a code compliance certificate in respect of building work including two new swimming pools.
- 1.2 The question to be determined is whether the code compliance certificate should have been issued, and specifically whether the safety barriers to the swimming pool comply with the requirements of clause F4 of the building code (the First Schedule to the Building Regulations 1992).
- 1.3 In making my decision I have not considered any other aspects of the Act or of the building code.

2 THE BUILDING

- 2.1 The relevant parts of the house and the swimming pools are shown in Figure 1. Most of the area surrounded by a “standard swimming pool fence (“the fence”) and external walls of the house is level, but it slopes downwards alongside the larger pool. Inside that area are the two pools, a barbecue area, and a significant amount of open space. Access to the pools from the house is through the sliding-folding doors D101, D102, D103, and D104. Those doors are all fitted with top-mounted tower bolts. There is also access to the pools through a gate in the fence adjacent to the guest accommodation.
- 2.2 There is no dispute that the fence and that gate comply with clause F4 of the building code.

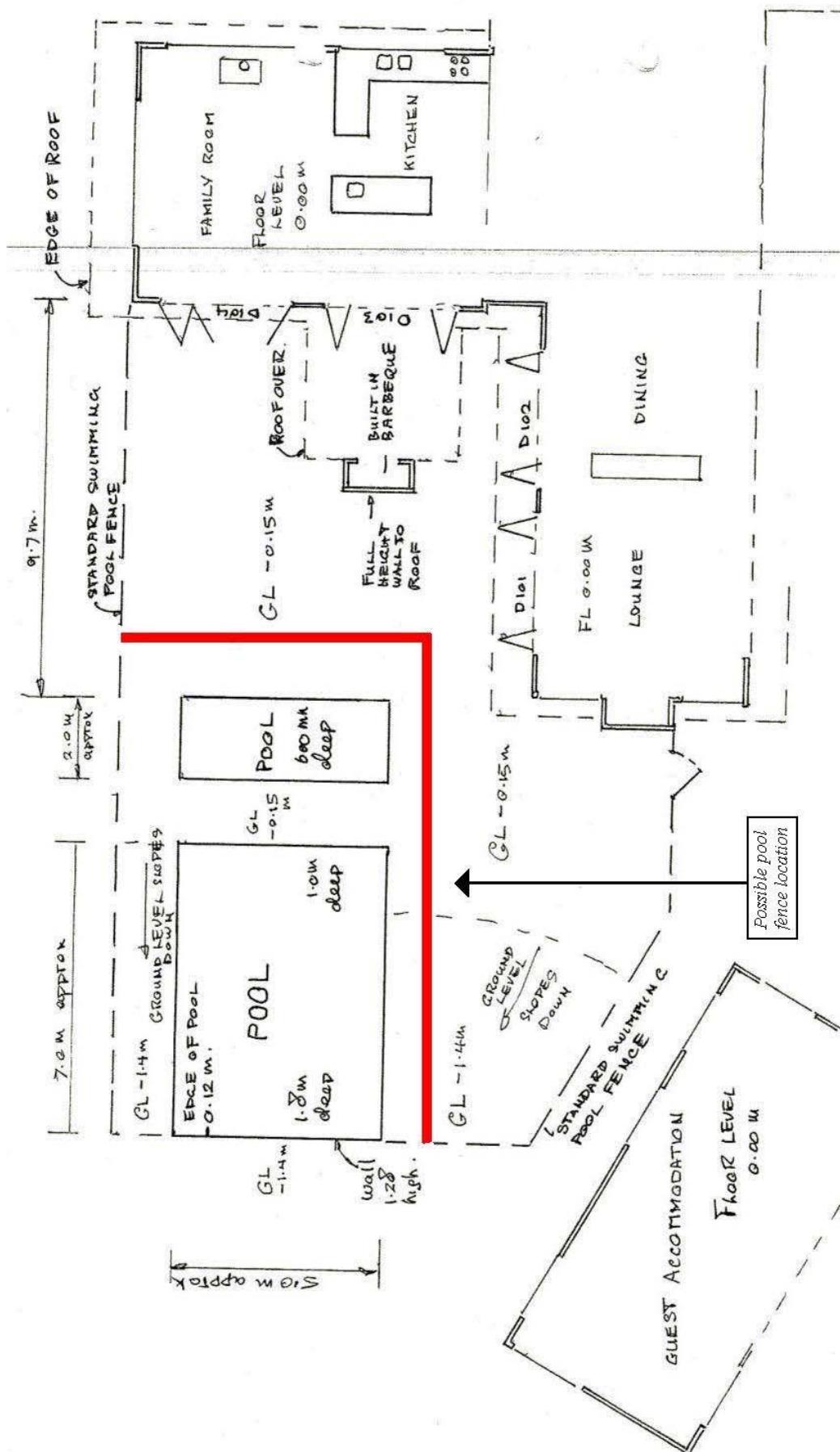


Fig.1: The swimming pools and the surround area

3 THE LEGISLATION

3.1 The relevant provisions of the building code are:

Provisions	Limits on application
F4.3.3 Swimming pools having a depth of water exceeding 400 mm, shall have barriers provided.	Performance F4.3.3 shall not apply to any pool exempted under section 5 of the Fencing of Swimming Pools Act 1987.
F4.3.4 Barriers shall: <ul style="list-style-type: none"> (f) In the case of a swimming pool, restrict the access of children under 6 years of age to the pool or the immediate pool area. (g) Restrict the passage of children under 6 years of age when provided to guard a change of level in areas likely to be frequented by them. 	Performance F4.3.4(f) shall not apply to any pool exempted under section 5 of the Fencing of Swimming Pools Act 1987.
F4.3.5 Barriers to swimming pools shall have in addition to performance F4.3.4: <ul style="list-style-type: none"> (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 150 mm 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 	

3.2 The acceptable solution F4/AS1 says:

“**3.1** Fencing for swimming pools shall be constructed to no lesser standard than is required by the Fencing of Swimming Pools Act 1987, to restrict the access of children.”

3.3 Section 13B of the Fencing of Swimming Pools Act 1987 provides in effect that fencing in accordance with the Schedule to that Act shall be deemed to comply with the building code. Relevant requirements of that Schedule are:

“8. Every gate or door shall be . . . so mounted that—

“(a) It cannot open inwards towards the immediate pool area . . .

“9.(1) Every gate or door shall be fitted with a latching device.

“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.”

4 THE SUBMISSIONS

- 4.1 The territorial authority submitted in effect that the fencing concerned did not comply with the Schedule to the Fencing of Swimming Pools Act in that doors D101 to D104 were not self-closing. It said:

“The specific issues in this case are:

- “1. Whether or not the folding/sliding doors in compliance with F4.3.5 also result in automatic compliance with the barrier F4.3.4 (the performance requirement of the NZBC). It is the Council’s view that in this instance the performance requirement in F4.3.4 are not complied with as when the doors are open there is no effective barrier as required by F4.3.4.
- “2. Whether or not the multiple folding/sliding doors in compliance with the performance requirement F4.3.5 also results in automatic compliance with the performance requirement F4.3.4 in the NZBC.”

- 4.2 The owner said:

“... at the time of designing the windows and doors to the house, we were informed that they were the approved locks for use when entering a swimming pool area. . .”

- 4.3 The building certifier said:

“The building consents for the building consent application and the code compliance certificate were issued on the grounds that [the building certifier was] satisfied on reasonable grounds compliance is achieved with the requirements of the Building Code.

“This is based on the schedule to the Fencing of Swimming Pools Act being an acceptable solution.”

5 DISCUSSION

5.1 The immediate pool area and the immediate pool surround

- 5.1.1 The territorial authority raised questions about the use of sliding-folding doors but did not raise the question of whether the area surrounded by the fence, the gate in the fence, certain external walls of the house, and the doors in those walls (“the surrounded area”) could properly be described as “the immediate pool area” for the purposes of the Fencing of Swimming Pools Act and clause F4.3.4(f) of the building code or “the immediate pool surround” for the purposes of clause F4.3.5(a) of the building code.

- 5.1.2 I take the view that under section 188 of the Act I have the jurisdiction to consider those questions in respect of the building code even though they were not specifically raised by any of the parties. However, if any of the parties had considered that I was wrong about that then I was prepared to take the necessary steps to determine those questions on my own initiative under section 181.
- 5.1.3 The building code refers to both “the immediate pool area”, in clause F4.3.4(f), and “the immediate pool surround”, in clause F4.3.5(a). The building code but does not give definitions of those terms.
- 5.1.4 In Determination 2003/6, the then Building Industry Authority discussed the provisions of the building code in respect of swimming pool fences, and took the view that:
- “ . . . the term ‘immediate pool surround’ in the building code means an area around the pool into which it would be unsafe for young children to go unless someone able to protect them is also in the same area.”
- 5.1.5 Applying that approach to this case, I consider that the surrounded area cannot properly be described as “the immediate pool surround” because it is a large space available for children to play in and its topography is such that a person in the surrounded area will not necessarily be aware if a young child is in danger.
- 5.1.6 The Fencing of Swimming Pools Act refers to “the immediate pool area”, which is defined in section 2 of that Act as meaning “the land in or on which the pool is situated and so much of the surrounding area as is used for activities or purposes carried out in conjunction with the use of the pool”.
- 5.1.7 The term “immediate pool area” in the Fencing of Swimming Pools Act was considered by the High Court In *Waitakere City Council v Hickman*¹, which was heard after Determination 2005/6 was issued. The Court held:

“ . . . the outer extent of the immediate pool area is determined by its use. It will extend only so far as the surrounding area is used for activities or purposes carried out in conjunction with the use of the pool. . . .

“Whether an activity or association is sufficiently connected with the use of the pool is a matter of degree. . . . Examples of activities which would not usually be regarded as being carried out in conjunction with the use of the pool include clothes lines, vegetable gardens, vehicle or pedestrian access ways, and planting for landscape purposes.

“On the other hand, . . . activities which would ordinarily qualify as being carried out in conjunction with the use of the pool . . . include the use of pool furniture, changing sheds, pumps or pool maintenance equipment, sunbathing areas, and diving boards or other pool equipment.

“ . . . the size of the area is not governed solely by [its use]. Some weight must be given to . . . the expression ‘immediate’ . . . for example, a fence around the

¹ *Waitakere City Council v Hickman* 1/10/2004, Randerson J, HC Auckland CIV 2003-404-7266.

perimeter of the property would not comply with the [Fencing of Swimming Pools] Act. . . . The further away one moves from the edge of the pool, the less likely it will be that an associated activity or purpose . . . will be in sufficient proximity to the pool to be properly regarded as within the ‘immediate’ pool area.”

- 5.1.8 In the light of that decision I consider that the surround area cannot properly be described as “the immediate pool area” for the purposes of that Act, and therefore for the purposes of F4/AS1, because of its size and because it is an area with multiple uses such that activities are likely to be undertaken in the surround area otherwise than in conjunction with the use of the pool.

5.2 The sliding-folding doors

- 5.2.1 Although the territorial authority submitted two “issues”, see 5.1 above, I take the view that the questions about the sliding-folding doors can be expressed as:
- (a) Are the sliding-folding doors exempted from the clause F4.3.5(a) requirement to automatically close and latch, and if so
 - (b) Is the surrounded area protected, or deemed to be protected, by a continuous barrier that will restrict the access of children under 6 years of age as required by clauses F4.3.4(a) and (f)?

- 5.2.2 I have already concluded that the doors do not open onto the immediate pool surround and therefore do not come within the clause F4.3.5(a) exclusion. That disposes of the matter, and I do not need to consider the doors themselves. In other words, sliding and folding-sliding doors in safety barriers to swimming pools are allowed only if they open on to the immediate pool surround, so that every case will need to be considered on its merits.

6 CONCLUSIONS

- 6.1 For the reasons set out above, I conclude:
- (a) That for the purposes of clause F4.3.5(a) of the building code, Doors 101 to 104 do not lead to the immediate pool surround.
 - (b) For the purposes of the Fencing of Swimming Pools Act, Doors 101 to 104 do not lead to the immediate pool area.
 - (c) A suitable but not exclusive location for a fence to define the immediate pool surround in respect of both pools would be within an area defined by an additional fence running at right angles to the standard swimming pool fence which is a continuation of the 1.28m high wall at the end of the larger pool. The fence would run parallel to the longer side of the larger pool and the shorter end of the smaller pool for a distance of 11m before turning at a right angle to run parallel to the long side of the smaller pool for approximately 8 m where it intersects the standard swimming pool fence again. This standard swimming pool fence extends from the family room. The location of this fence is shown in Fig. 1.

7 WHAT IS TO BE DONE

- 7.1 How the swimming pool barrier is to be brought to compliance with the building code is not for me to decide. That is a matter for the owner to propose and for the territorial authority to accept or reject, with any of the parties entitled to submit doubts or disputes to me for another determination.

8 DECISION

- 8.1 In accordance with section 20 of the Act, I hereby reverse the building certifier's decision to issue the code compliance certificate.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing
on 23 August 2005.

John Gardiner
Determinations Manager
