

Determination 2006/16

Amendment of the building consent for swimming pool fences at 45 Maungakiekie Avenue, One Tree Hill, 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 applicants are Mr and Mrs Galloway (“the applicants”), acting through the architect Mr Graeme Wrack (“the architect”). The only other party is the Auckland City Council (“the territorial authority”).
- 1.2 The application arises from the refusal by the territorial authority to amend a building consent that it had issued for building work including the construction of a new swimming pool and its associated safety barriers.
- 1.3 I take the view that the matters to be determined are:
- a) Whether, if the building consent was amended as the owners wish, the safety barriers to the swimming pool would comply with the requirements of clause F4.3.4 of the Building Code (the First Schedule to the Building Regulations 1992), and
 - b) Whether I should confirm, reverse, or modify the territorial authority’s decision under section 49 of the Act not to grant an amendment to the building consent for the work.
- 1.4 In making my decision I have not considered any other aspects of the Act or the Building Code.

2 The building

- 2.1 The safety barriers for which the building consent was issued surrounded the immediate area of the swimming pool. The owners wish to amend the safety barrier so that it will enclose the entire rear yard area, including that of the pool.
- 2.2 There is no dispute that the fence, with the exception of clause F4.3.4, complies with the requirements of clause F4 of the Building Code.

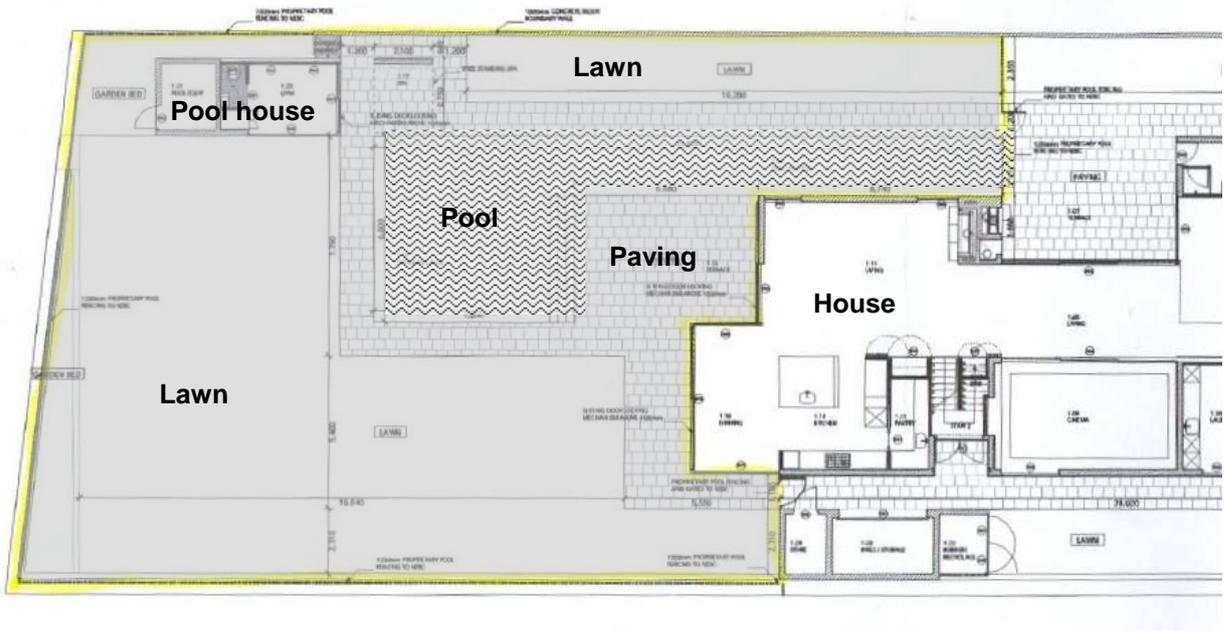


Figure 1: The swimming pool and the surround area as proposed

- Legend**
- Pool -
 - Fenced area -

3 The legislation

- 3.1 The relevant provisions of the Building Code are:

Provisions	Limits on application
<p>F4.3.4 Barriers shall:</p> <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. 	<p>Performance F4.3.4(f) shall not apply to any pool exempted under section 5 of the Fencing of Swimming Pools Act 1987.</p>

4 The submissions

4.1 In a letter to the Department dated 28 September 2005, the architect noted that the applicants wished to use the pool area and adjacent lawn as a single entertaining area without an unnecessary visual obstruction. The applicants consider that the entire rear yard area is a pool-related activity area. The applicants listed reasons why the extended area would not affect the safety of the pool enclosure. These are summarised below.

- The rear yard area can be easily monitored because it is open and clearly visible from the living spaces.
- A “Hydralux Automatic Pool Cover System” is to be installed that will cover the pool when it is not in use.
- The applicants have two teenage children and there will be no play equipment in the back yard.
- Some neighbourhood properties already have pools in their rear yards that do not have additional pool fencing.
- The proposed fencing will comply with pool fencing standards.

4.2 In a letter to the Department dated 3 October 2005, the territorial authority repeated its previous statement to the applicants that:

The proposed pool area is too expansive to be complying with the FOSA [the Fencing of Swimming Pools Act] 1987 (the pool fenced area is not to wrap around a building and must not include the whole back yard). Please revise

4.3 The territorial authority also contended that under the Fencing of Swimming Pools Act 1987, an exemption regarding a pool cover can only be granted by the territorial authority’s elected representatives and in any case the exemption only related to house doors. The territorial authority noted that consideration had to be given to visitor’s or future owner’s children and due to the yard configuration, there was no provision on the site for a children’s play-area outside of it. The territorial authority also noted that it was investigating or taking action in relation to the pool areas of 3 neighbouring properties. Based on the above issues, the territorial authority was unable to approve the proposed amendment to the building consent.

5 Discussion

5.1 The main issue concerning this determination is whether the area comprising the entire rear yard area including the pool area (“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.

- 5.2 The Building Code refers to “the immediate pool area” in clause F4.3.4(f), but does not give a definition of that term.
- 5.3 The Fencing of Swimming Pools Act refers to “the immediate pool area” 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”.
- 5.4 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. 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 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.”
- 5.5 In the light of that decision I consider that, whatever the intentions of the present owners, future owners are likely to install clothes lines, gardens, children’s play areas, or other facilities such that the entire backyard will not be used solely for activities associated with the use of the pool.
- 5.6 I conclude that in this case, the entire backyard cannot be accepted as being “the immediate pool area” as defined in the Fencing of Swimming Pools Act and as discussed in *Waitakere City Council v Hickman*. In other words, the proposal that the safety barriers should enclose the entire backyard does not comply with F4.3.4(f) of the Building Code because the barriers would not restrict access to the immediate pool area.

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

5.7 Having decided the issue on the above conclusions, it is not necessary for me to determine the questions relating to the pool cover and the neighbourhood properties.

6 Decision

6.1 In accordance with section 188(1) of the Act, I hereby:

- a) Determine that if the building consent was amended as the owners wish, the safety barriers to the swimming pool would not comply with the requirements of clause F4 Safety from Falling of the Building Code, and
- b) Confirm the territorial authority's decision to refuse to amend the building consent.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 7 March 2006.

John Gardiner
Determinations Manager