# Determination 2006/81

# Swimming pool fence at 216C St Heliers Bay Road, Auckland

## 1 The matter to be decided

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 ("the Department"), for and on behalf of the Chief Executive of the Department. The applicant is P Boyes ("the owner") and the only other party is the Auckland City Council ("the territorial authority"). The application arises from the refusal by the territorial authority to amend a building consent in respect of the safety barriers to a swimming pool.

1.2 The question to be determined is whether the building consent should be amended as requested by the owner, and specifically whether the proposed 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 I engaged a consultant to inspect the pool and provide me with sketches and photographs. Figures 1 and 2 below, together with the following description of the relevant parts of the house and the pool, are largely based on the consultant's report.

2.2 The house is on a rear allotment sloping downhill from the road approximately NW-SE. The house covers almost the whole width of the allotment. The main living areas face uphill, approximately NW. There is a detached garage on the downhill side of the house, with a driveway along one side of the allotment. An approximately 0.8 m high existing retaining wall across most of the width of the allotment above the house appears to have been installed in the creation of level building platform for the house.

2.3 The owner engaged a firm ("the contractor") to do the building work involved in installing an above-ground 9 m by 4.8 m swimming pool lying across the width of the allotment uphill of the existing retaining wall. A flat area for the pool and surrounds was to be created by the installation of three new retaining walls. One of these is parallel to the existing 0.8 m retaining wall being approximately 0.7 m high and 2 m from the top boundary, the other two are approximately perpendicular to it being of varying heights with one approximately 1 m from one end of the pool and the other approximately 2.2 m from the other end.

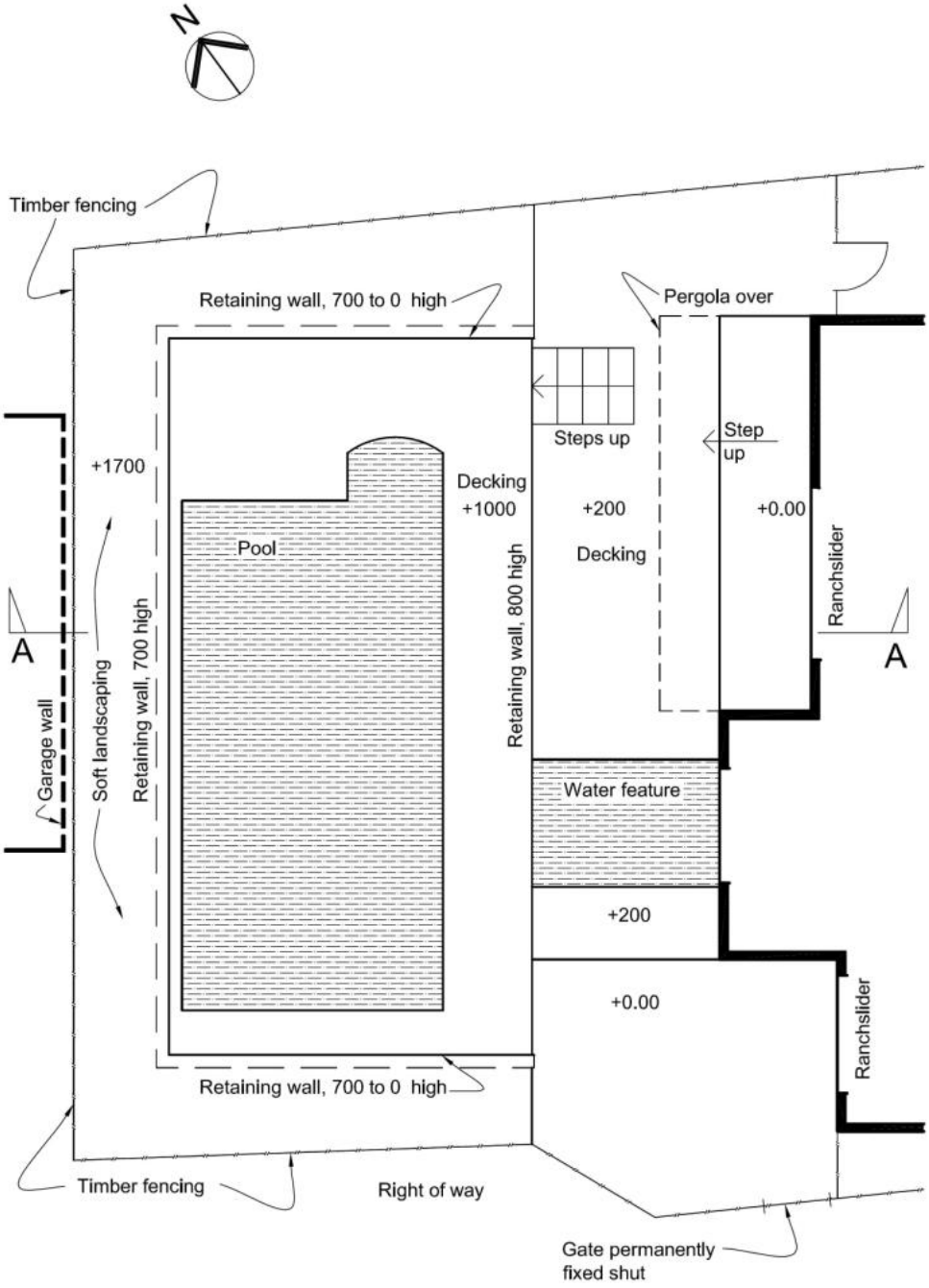


**Figure 1: Plan of the swimming pool and the adjacent area**

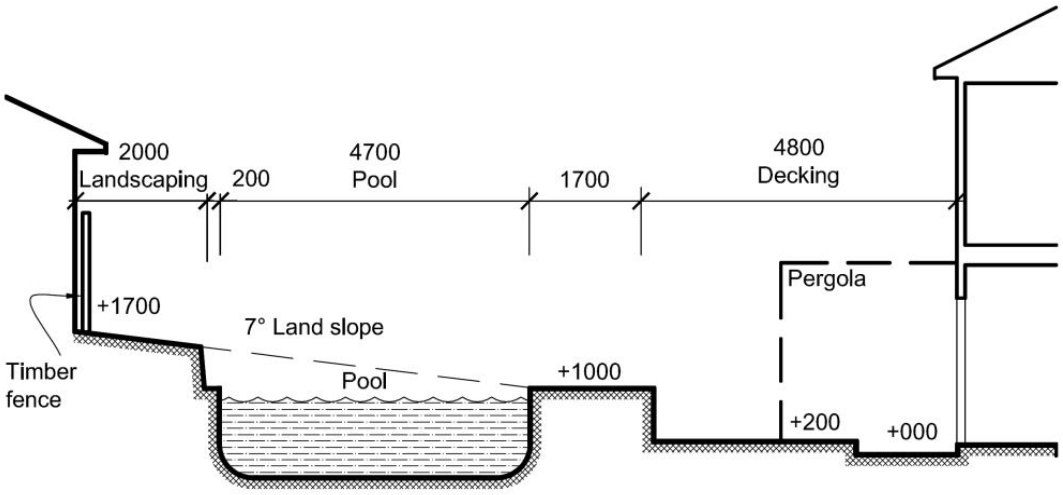


**Fig. 2: Cross-section of the swimming pool and the adjacent area**

2.4 It was the owner's intention that the house would form part of the pool fencing, and that appears to be consistent with the quotation from the contractor. However, when the contractor obtained the necessary building consent from the territorial authority the safety barriers for the pool were shown as being provided by 1.8 m fences along the side and end boundaries of the allotment uphill of the existing retaining wall and a proprietary pool fence ("the disputed fence"), incorporating a gate, along the top of that wall.

2.5 The owner advised that he was not aware that the building consent required the disputed fence. He also says that he was misled by certain conditions or endorsements attached to the building consent relating to a house wall forming a part of a pool fence.

2.6 The contractor commenced the building work but had not installed the disputed fence when the contract was terminated. The owner said that he then "had to complete the final paperwork", and was advised by the territorial authority that certain work was needed before a code compliance certificate would be issued, but was not initially advised that the disputed fence had to be installed. When he was so advised, the owner applied for an amendment to the building consent to omit the disputed fence and gate and instead install pool fencing between each end of the house and the boundary fencing.

2.7 In other words, there was to be no fence between the house and the pool and the external walls of one side of the house (including two sliding doors) were to serve as a safety barrier.

2.8 The territorial authority refused to grant the amendment. The owner then consulted an officer of the Department and, at his suggestion, provided the territorial authority with additional information. However, the territorial authority still refused to grant the amendment, and said:

"A whole back yard cannot be used as the pool fenced area when there is enough room to install a fence between the pool and the house. . . .

"If we were to allow the pool fencing to be the house wall the ranchsliders would have to be self-closing and self-latching."

2.9 The owner disputed that refusal by applying for this determination. The pool has now been completed, without the disputed fence. The owner has also installed a "water feature", as indicated in Figure 1, which is in effect a waterfall in the length of the 800 mm retaining wall over which water from the pool flows into an ornamental pool having a maximum depth of 370 mm.

## 3 The legislation and the acceptable solutions

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:<br>(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. | 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:<br>(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 6 of the Fencing of Swimming Pools Act 1987 authorises territorial authorities to

> "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 [on the exemption] that that exemption would not significantly increase danger to young children".

Section 13B 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 In correspondence with the territorial authority, the owner had said that the water feature was "designed as an integral part of the swimming pool layout" and therefore should be enclosed together with the swimming pool. "It would be iniquitous to argue that it should be separately fenced."

4.2 In submissions to me, the owner said:

(a) There would be "sufficient space . . . within the back yard for a child to play safely away from the immediate pool area". I take this to refer to a statement by the territorial authority, see 4.3 below.

(b) "The [proposed] fencing creates an area overlooked by three kitchen windows, which is in effect larger (and safer) than that which would be reserved by erecting a fence on top of the original retaining wall. [This] constitutes a realistic children's play area, where those aged six and under could play within sight of the most likely adult location."

(c) "The restrictions on space imposed by creating a steep incline into usable space mean that the space adjacent to the pool would normally only be used for activities and purposes carried out in conjunction with it and should be regarded as the immediate pool area under the Swimming Pool Fencing Act and noting [*Waitakere City Council v Hickman* 1/10/2004, Randerson J, HC Auckland CIV 2003-404-7266]."

(d) "Clearly this immediate pool surround is an area around the pool into which it would be unsafe for young children to go unless someone able to protect them was also in the same area due to the associated water feature." I take this to refer to a statement in Determination 2003/6.

(e) "There are only two sliding doors opening onto this area (one of which has been locked and which could be permanently sealed if necessary), which are exempt from self-closing under current legislation."

(f) "The enclosed area will clearly not be a thoroughfare between the house and any other area." I take this to refer to another statement in Determination 2003/6.

(g) "Relocating the pool fencing to include the house as part of the fence will not enclose an excessive area and the portion of space enclosed can reasonably be described as the immediate pool area."

4.3 In correspondence with the owner, the territorial authority had said, amongst other things:

(a) "The proposed fencing change does not allow for a realistic separate children's play area."

(b) "The water feature can be designed and constructed so that the water level does not exceed 400 mm at any time and thus be exempted from complying with the Fencing of Swimming pools Act 1987."

4.4 In submissions to me, the territorial authority said:

(a) the owner "failed to show on his plans a complying pool area adjacent to the water feature and ranch slider from the pool area, and if it were to be correctly shown, it is doubtful if it would be of sufficient size."

(b) there were "serious doubts that the area behind the garage and adjacent to the house would be used in preference to the proposed pool area, as a children's play area."

4.5 The territorial authority also made submissions about the ranch sliders in conjunction with clauses 8-10 of the Schedule to the Fencing of Swimming Pools Act 1987 and the 1999 Department of Internal Affairs publication "Guidelines for Territorial Authorities on The Fencing of Swimming Pools Act 1987", as amended in 2005. On the view I take of the matter, there is no need to describe those submissions.

4.6 Because the owner had requested a formal hearing, I sent the parties a draft determination ("the first draft"), together with the consultant's report mentioned in 2.1 above, with a request that they either accept it or identify points that they wished to raise at a hearing.

4.7 The owner did not accept the first draft and made specific comments on it.

4.8 In response to 1.3 of the first draft, to the effect that only compliance with clause F4 had been considered, the owner said:

> . . . correspondence with the territorial authority has been unfair and misleading and it is remiss of the Determination procedure not to address these matters, given that I was led to believe that this was part and parcel of

the Department's jurisdiction. If this is not the case it would seem that the process is lacking in natural justice.

4.9 In the light of the comments I revised the first draft to produce a second draft, substantively identical to this determination, which I sent to the parties as before. Both the owner and the territorial authority accepted the second draft.

# 5 Discussion

## 5.1 General

5.1.1 The owner claimed that "correspondence with the territorial authority has been unfair and misleading" and submitted that I should take that into account, see 4.8 above. The background to that claim is outlined in 2 above. I take the view that under section 177(a) of the Act, this determination must be limited to whether the pool safety barriers comply with clause F4 of the Building Code. However, I note that the owner's specific complaints, and my responses to them, are:

(a) The quotation from the contractor did not allow for the disputed fence, see 2.4 above.

That had nothing to do with the territorial authority.

(b) The owner was not aware that the building consent required the disputed fence, which was inconsistent with the conditions or endorsements to the consent, see 2.5 above.

I have been provided with a copy of the contractor's plans of the pool, as approved by the territorial authority for building consent purposes, and the disputed fence is clearly shown. I have not seen the conditions or endorsements, but as quoted by the owner they appear to be standard provisions of the type that many territorial authorities routinely attaches to building consents for swimming pools. I do not accept that they prevail over the plans showing the disputed fence.

(c) The territorial authority initially advised the owner that certain work, not including the installation of the disputed fence, needed to be done before a code compliance certificate would be issued. It was only subsequently that the territorial authority advised that the disputed fence must be installed, see 2.6 above.

That does the territorial authority no credit, but I do not consider that it amounts to being "unfair and misleading".

5.1.2 As to the disputed fence, the pool and the relevant area around it is proposed to be surrounded by the boundary fences, the wall of the house, and the fences, including a gate, between the house and the side boundaries. The question is whether that area can 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. This is not a case such as Determination 2006/22, where the pool occupies virtually all of the outdoor area on the allotment.

5.1.3 In response to the draft on that point, the owner referred to the territorial authority's statements about the pool occupying the entire back yard, see 2.8 above, and asked whether the territorial authority would now "allow the pool fencing to be the house wall subject to the ranchsliders being self-closing and self-latching".

5.1.4 I take the territorial authority's reference to self-closing and self-latching doors to relate to the Fencing of Swimming Pools Act 1987, and specifically section 6 and clause 11 of the Schedule. However, in my view a house wall cannot form part of a pool safety barrier unless the wall encloses "the immediate pool area" or "the immediate pool surround". Unless that is the case, I need not consider the requirements for doors in such walls.

5.1.5 The Fencing of Swimming Pools Act refers to "the immediate pool area". 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), but does not give definitions of those terms.

5.1.6 In Determination 2003/6, the Building Industry Authority, the antecedent to the Department, 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."

5.1.7 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".

5.1.8 The term "immediate pool area" in the Fencing of Swimming Pools Act was considered by the High Court in *Waitakere City Council v Hickman*, see 4.2(c) above, which was heard after Determination 2005/6 had been 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 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."

## 5.2 Applying those approaches

5.2.1 In response to the draft, the owner said:

"We believe the interpretation of the immediate pool area is unduly subjective and therefore unfair, both to the officers involved in making the assessment and householders, as there is no adequate guidance which can satisfactorily justify this particular decision."

5.2.2 I sympathise with that response, and accept that it is difficult to reconcile the provisions of the Fencing of Swimming Pools Act, particularly section 6 and clause 11 of the Schedule, with the provisions of the Act and the Building Code. However, some guidance on the Act and the Building Code is available from previous determinations, and guidance on the Fencing of Swimming Pools Act is available from *Waitakere City Council v Hickman*, see 4.2(c) above.

5.2.3 I also accept that decisions on the matter may be subjective to a significant extent. However, an element of subjectivity appears to be unavoidable in respect of many building safety matters. The Act requires that those decisions are to be made by territorial authorities, by the Chief Executive by way of determinations, or by a District Court on appeal. In other words, by people acting in the public interest and who have no direct personal interest in the matter.

5.2.4 Applying the approach of Determination 2003/6, the question is whether the area between the house and the swimming pool would be unsafe for children unless someone able to protect them is also present in the same area. In the draft, I said that "from the consultant's photographs I consider that people in [that] area . . . could well not be aware that a child was in difficulties in the pool". The owners disputed that, offering to supply further photographs and saying:

"I would contend that unless comatose and lying on the ground, people in the area between the house and the 0.8 m retaining wall would be aware if a child was in difficulties in the pool."

5.2.5 I do not accept that argument. The pool is no doubt visible from the area concerned, but that area contains seating, plantings, and the water feature. The area could well be used for activities not connected with the use of the pool, including gardening, maintaining the water feature, and generally enjoying what appears to be a very pleasant area. I consider that people engaged in such activities could well be unaware

of a child in difficulties, especially if he or she had fallen in and was floating in, or lying on the bottom of, the pool.

5.2.6 I am therefore not satisfied that the area concerned can properly be described as "the immediate pool surround".

5.2.7 Applying the approach of *Waitakere City Council v Hickman*, the question is whether the area concerned will be used only "for activities or purposes carried out in conjunction with the use of the pool", see 5.1.6 above. As mentioned in 5.2.5 above, I consider that the area between the house and the 0.8 m retaining wall is likely to be used for activities not connected with the use of the pool.

5.2.8 I am therefore satisfied that the area concerned cannot properly be described as "the immediate pool area".

### 5.3 The water feature

5.3.1 The owner said that the water feature should be enclosed together with the pool. However, as the water feature does not have a depth exceeding 400 mm, it is not required to be protected by a safety barrier, see Clause F4.3.3 of the Building Code.

### 5.4 The sliding doors

5.4.1 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.

## 6 Decision

6.1 In accordance with section 20 of the Act, I hereby:

(a) determine that the proposed safety barrier incorporating external walls of the house does not comply with clause F4.3.4(f) 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 29 August 2006.

John Gardiner
**Determinations Manager**