

Determination 2007/76

Refusal of a code compliance certificate for a swimming pool at 68 Scanlan Street, Grey Lynn, 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, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department. The applicants are Mr and Mrs Spence (“the applicants”), acting through their architect (“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 issue a code compliance certificate for building work involving the construction of a new swimming pool and its associated safety barriers.
- 1.3 I take the view that the matter to be determined is whether the safety barriers to the swimming pool which have been amended in the course of additions and alterations

to an existing house and adjoining back yard would comply with the requirements of clause F4.3.4 of the Building Code¹ (First Schedule, Building Regulations 1992).

- 1.4 In making my decision I have not considered any other aspects of the Act or the Building Code.
- 1.5 In this determination, unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

2 The building work

- 2.1 The safety barriers or fence for which an initial building consent was issued closely surrounded the swimming pool. As part of the building work covered by a subsequent consent, the applicants have removed this fence and enclosed the entire rear yard area, including the pool, with a boundary fence.
- 2.2 I have not been notified that the compliance of the boundary fence with clause F4 is in dispute as a barrier for a swimming pool.

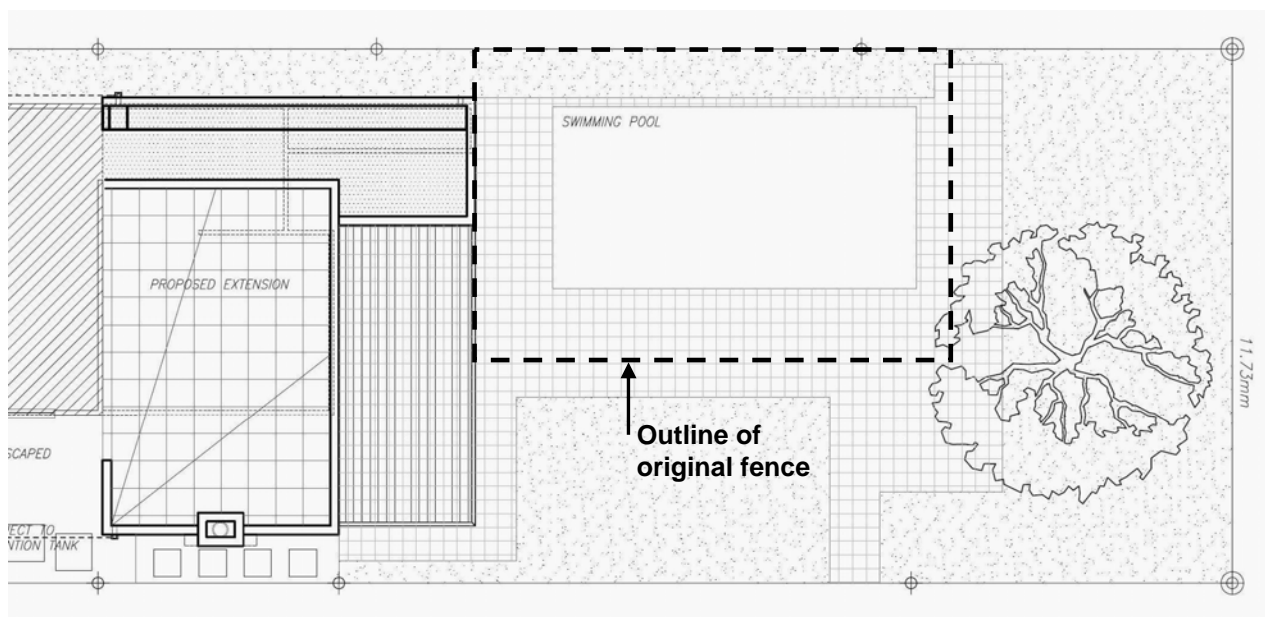


Figure 1: Plan of building work covered by the subsequent consent

3. Sequence of events

- 3.1 The territorial authority issued building consent BLD3602085701 (“the initial consent”) for the swimming pool and the fencing of the immediate pool area on 11 November 2002. The consent was based on a certificate from Compass Building Certifiers Ltd (“the building certifier”).

¹ The Building Act 2004 is available from the Department’s website at www.dbh.govt.nz.

- 3.2 The pool and its associated fencing were constructed following the issue of this consent. It appears that there was no application made for a code compliance certificate and I note that one was not issued for the initial consent.
- 3.3 A second consent BLD20041593601 (“the subsequent consent”), again based on a certificate from the building certifier, was issued in October 2004 for “proposed additions” to the house and back yard area. The plans submitted to me relating to this consent do not show any pool fencing, nor do they show or refer to any demolition of existing pool fencing. It is not clear to me that the territorial authority considered the matter of the immediate pool area when issuing this consent.
- 3.4 The architect has confirmed that the pool fencing shown on the initial consent and subsequently installed was removed during the construction of the work covered by the subsequent consent.
- 3.5 The territorial authority carried out an audit inspection at the property on 9 March 2006. The territorial authority’s inspector observed that the pool might comply with the legislation if locks were fitted to the house doors. The “Swimming and Spa Pool Fencing Inspection Form” relating to this inspection stated that “all complies as of this date 9 March 2006”.
- 3.6 Subsequent to this inspection, the territorial authority discovered that a code compliance certificate had not been issued for the initial consent. In a letter dated 5 July 2006, the territorial authority advised the architect that it required the pool to be fenced as shown on the initial approved plans before a code compliance certificate could be issued.

4. The legislation

- 4.1 The relevant provisions of the Building Code are:

Provisions

F4.3.4 Barriers shall:

- (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.

Limits on application

Performance F4.3.4(f) shall not apply to any pool exempted under section 5 of the Fencing of Swimming Pools Act 1987.

5 The submissions

- 5.1 In a letter to the Department dated 11 September 2006, the architect made a number of submissions that are summarised below:

- The boundary of the property has pool fencing that is code-compliant.
- The openings from the rear of the house comply with the territorial authority's requirements for openings into a pool area.
- As the house opens directly onto the immediate pool area, it is unreasonable to further divide a small back garden.
- Only pool-related activities are contemplated or allowed in the back garden.
- The current fencing complies in all respects with the building consent, the Act, and the Fencing of Swimming Pools Act 1987 (the "FOSP Act"). According to the architect, the territorial authority had verbally approved the amended layout and had signed it off. (But see paragraph 3.3).
- If activities other than those relating to the pool are envisaged in the future, the applicants will alter the layout accordingly.
- The original consent included pool fencing because the house had non-compliant openings and non-pool related activities took place in the back yard. The building work covered by the subsequent consent included the demolition of the rear of the house. Non-pool related activities would no longer take place. The removal of the initial pool fencing was shown on the consented plans, which had been approved by the territorial authority.

5.2 Following a query from the Department, the architect, in a letter to the Department dated 13 October 2006, stated that the boundary fence to the property is in accordance with the territorial authority's published details. Doors from the house are all now fitted with closers and have handles at the prescribed height.

5.3 The architect forwarded copies of:

- the plans
- some consent documentation
- the correspondence with the territorial authority.

5.4 In a letter to the Department dated 29 November 2006, the territorial authority set out the background to the dispute and stated that the territorial authority was unable to issue a code compliance certificate for the original consent.

5.5 In an email to the Department of 29 November 2006, the territorial authority noted that the building certifier had contacted the territorial authority with concerns that the pool was not adequately fenced. The territorial authority stated that the subsequent consent dealt with the addition of doors to the house but did not show any fencing details.

5.6 The territorial authority forwarded copies of:

- some of the plans
- some of the consent documentation
- a set of photographs showing aspects of the site layout.

5.7 Copies of a draft determination were forwarded to the parties on 5 March 2007 and the territorial authority accepted the draft on 9 March 2007.

5.8 In a letter to the Department dated 3 May 2007, a legal advisor to the applicants provided an opinion that responded to the draft. The legal advisor submitted that the decision in *Waitakere City Council v Hickman* made it clear that the “immediate pool area” included areas used for pool activities. The small size of the backyard means that only these activities can be included in the pool area. The opinion also stated that the determination should be made on the property as it currently exists and not on future use. The current legislation makes no explicit statement that “future unforeseen and as yet occurred events” should be taken into account in the determination process. In the opinion of the legal advisor, the cited case was not authority for the proposition that a fence around the perimeter of the property would never comply with the Act. Taking into account the surface areas of the pool and the backyard, the fence is sufficiently close to come within the meaning of “immediate” set out in the judgement.

6 Discussion

6.1 While the matter of dispute between the parties relates to the original fencing of the immediate pool area, I am of the opinion that I have to determine whether the safety barriers as now amended are code compliant. This leads me to consider 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.

6.2 The Building Code refers to “the immediate pool area” in clause F4.3.4(f), but does not give a definition of that term.

6.3 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”.

6.4 The term “immediate pool area” in the Fencing of Swimming Pools Act was considered by the High Court in *Waitakere City Council v Hickman*². 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. . . .

² *Waitakere City Council v Hickman* 1/10/2004, Randerson J, HC Auckland CIV 2003-404-7266

“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.”

- 6.5 Also, I refer to NZS 8500: 2006 “Safety Barriers and Fences around Swimming Pools, Spas and Hot Tubs”. The intention in developing this recently issued Standard is set out in its “Foreword”, which states:

“Government will be able to consider it as a replacement for the Schedule in the... FOSP Act.

The Standard has not yet been adopted. Clause 2.2 of the Standard discusses the “immediate pool area”. Its interpretation could have a bearing on future similar determinations issued by the Department if the Standard is cited in the FOSP Act.

- 6.6 The correspondence from the architect and the territorial authority indicate that the doors from the house adjoining the pool are fitted with closers and handles. I have not received any information whether the doors are self-locking, as would be required if the pool fencing remained in its present form. The territorial authority should satisfy itself as to the compliance of the doors in any future decision that it might make regarding the pool and its environs. However, if the fence is replaced in accordance with the original consent, then the doors do not open directly onto the pool area and do not need to be self-closing.

6.7 Applying the approach of previous determinations

- 6.7.1 Applying the approach of Determination 2003/6 and other previous determinations, the question is whether the back yard would be unsafe for children unless someone able to protect them is also present.
- 6.7.2 As I noted in Determination 2006/22, on average, houses in New Zealand change ownership with relative frequency, of the order of every 7 years or so. I take the view that in considering what activities are likely to be undertaken in the back yard I must take account of both present and future owners of the house.
- 6.7.3 The pool is no doubt visible from most of the back yard, except the areas that seem likely to be landscaped and which would make supervision of the entire backyard difficult for one adult. In addition, this is the only area where children would be expected to play. I note also, that the area enclosed by the original fenced pool area

occupies some 37% of the back yard. Whatever the intentions of the present owners, future owners are likely to install facilities such that the entire backyard will not be used solely for activities associated with the use of the pool. Accordingly, people engaged in them could well be unaware of a child in difficulties in the pool.

6.8 The legal opinion made on behalf of the applicants

- 6.8.1 The applicants' legal advisor has raised two main issues, namely the activities that can be conducted in the immediate pool area and the question of future use.
- 6.8.2 With due respect, I cannot accept that the size of the backyard means that the space is restricted to pool activities such as the placement of pool furniture, pumps, sunbathing and so forth. It is clear from the plans that gardening activities will also take place and the backyard area is of a size to accommodate clothes lines, barbeques and the like.
- 6.8.3 As to the question of taking into account future events, I am of the opinion that there are many aspects of the Act and the Building Code that do just that. Section 7 defines that the intended use in relation to a building includes "any reasonable foreseeable occasional use that is not incompatible with the intended use". In addition, the B2 "Durability" clauses of the code require assessments taking place for 5, 15 and the life of the building, being not less than 50 years. One of the purposes of the Act as set out in section 3(a) is to ensure that people who use buildings can do so safely and without endangering their health. Again, I consider that this purpose requires me to consider the future use of the areas surrounding the pool.

6.9 Applying the approach of *Waitakere City Council v Hickman*

- 6.9.1 Applying the approach of *Waitakere City Council v Hickman*, the question is whether the back yard will be used only "for activities or purposes carried out in conjunction with the use of the pool", see paragraph 6.4. For the reasons given in paragraph 6.7.3, I consider that the back yard is likely to be used for activities not connected with the use of the pool. 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.
- 6.9.2 I am therefore satisfied that the back yard cannot properly be described as "the immediate pool area". For the reasons set out in paragraph 6.8.2, I did not accept the arguments submitted by the applicants' legal advisor in this regard.

7 Decision

- 7.1 In accordance with section 188(1) of the Act, I hereby:
- a) determine that the existing fence to the swimming pool does not comply with the requirements of clause F4 Safety from Falling of the Building Code in regard to preventing access to the immediate pool area

- b) confirm the territorial authority's decision to refuse to issue a code compliance certificate in respect of the initial building consent (BLD3602085701) issued in November 2002.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 17 July 2007.

John Gardiner
Manager Determinations