

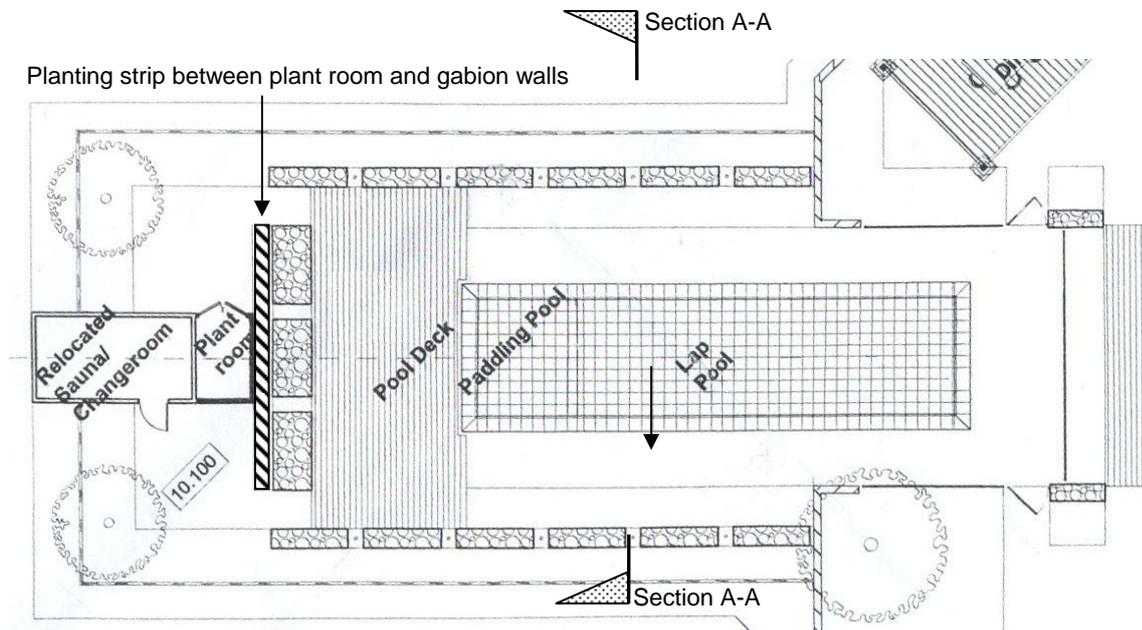
## Determination 2007/95

### Decorative elements associated with a swimming pool at 3 Skara Brae, Prebbleton

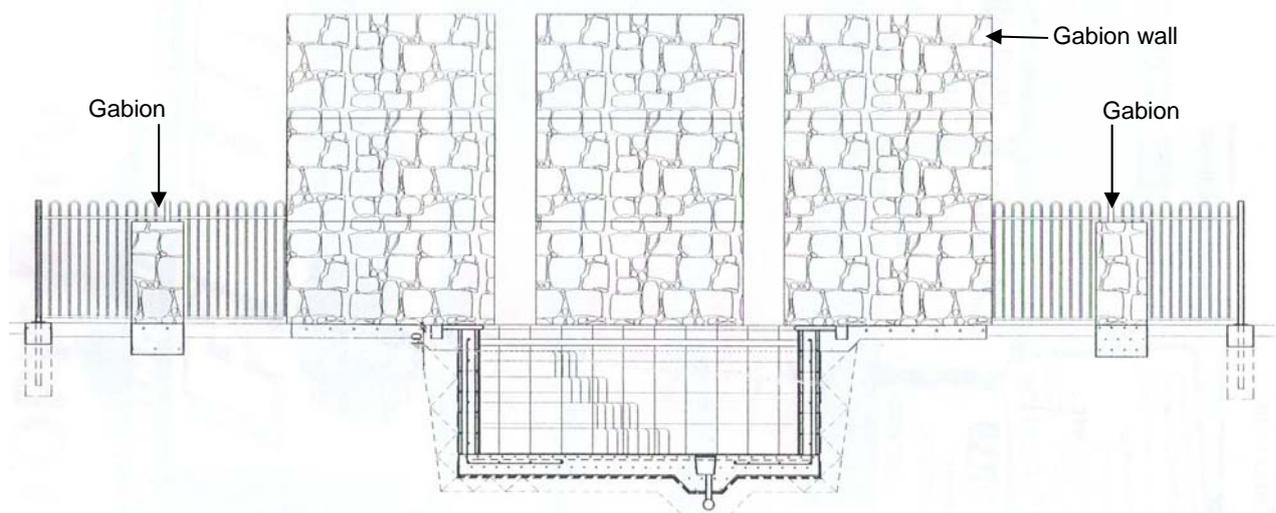
#### 1 The matter to be determined

- 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 the Department. The applicant is Mrs J Burnett (“the owner”), acting through a firm of architects (“the architect”). The only other party is the Selwyn District Council (“the territorial authority”).
- 1.2 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.
- 1.3 The application arises from the refusal by the territorial authority to issue a building consent for building work involving alterations to a swimming pool which include the installation of certain decorative elements (which the territorial authority referred to as “landscaping features”). There is also some concern about trees close to the fencing. There is no dispute that the fencing itself, including gates, complies with clause F4. Relevant details are shown in Figures 1 and 2 below.
- 1.4 As shown in Figures 1 and 2, the decorative elements inside the area enclosed by fencing (“the fenced area”) consist of river-stone filled gabion baskets 500 mm wide and either 1,000 mm high (“the gabions”) or 2,000 mm high (“the gabion walls”) plus a 6.8 m by 0.5 m planting strip behind the gabion walls.
- 1.5 I have no jurisdiction to decide whether the presence of the decorative elements means that the fenced area cannot properly be called “the immediate pool area” for the purposes of the Fencing of Swimming Pools Act. However, I do have jurisdiction to determine compliance with the Building Code, and accordingly take the view that the issue to be decided is whether the presence of the decorative elements means that the fenced area cannot properly be called “the immediate pool area” referred to in clause F4.3.4(f) or the “immediate pool surround” referred to in

clause F.4.3.5(a). In making my decision I have not considered any other aspects of the Act or the Building Code.



**Figure 1: Plan of the pool and fenced area**



**Figure 2: Cross-section A-A**

## 2 The submissions and the draft determination

- 2.1 The application for a determination was accompanied by relevant drawings and copies of the correspondence between the parties.
- 2.2 In a letter to the architect dated 29 November 2006 the territorial authority referred to the definition of "immediate pool area" in the Fencing of Swimming Pools Act

1987, quoted from the judgment of the High Court in *Waitakere City Council v Hickman*<sup>1</sup> (see 4.4 below), and said:

It appears that the inclusion of the Gabion stone walls within the immediate pool area is an “activity” which cannot be described as being closely connected with the use of the pool i.e. a landscape feature, and therefore cannot be included. Council’s concern is that a young child could “hide” behind these features and be overlooked by the supervising adult/s leaving the pool area. Also of concern are the trees within the immediate pool area for the same reason.

The tree outside the fence may provide an access route into the immediate pool area.

Therefore, an amended pool fence layout for the immediate pool area is now required excluding these items.

2.3 In subsequent correspondence, the architect quoted a pamphlet entitled *Pool Fencing* issued by the Christchurch City Council and the then draft New Zealand Standard (now NZS 8500:2006 “Safety Barriers and Fences Around Swimming Pools, Spas and Hot Tubs”, referred to below as “NZS 8500”). The territorial authority responded that those documents had no statutory force and maintained its position. The matter was then submitted to the Department for determination.

2.4 In response to the application, the territorial authority said:

The Council takes the view that the legitimate requirement for compliance at this time centres around the requirements of the Fencing of Swimming Pools Act 1987.

. . . the issue that needs clarification is the interpretation of the definition of Immediate Pool Area, of “land in which the pool is situated and so much of the surrounding area as is used for activities or purposes carried out [*sic*] on or [*sic*] in conjunction with the use of the pool”.

The Council’s view is that the gabion walls are not related to the activities carried out [*sic*] on or [*sic*] in conjunction with the pool.

Therefore as they are located within the immediate pool area, they are non-complying with the requirements of the Fencing of Swimming Pools Act 1987.

2.5 I prepared a draft determination (“the draft”) which I sent to the parties so as to give them an opportunity to check the accuracy of the facts and note any errors or omissions. The owner accepted the draft.

2.6 The territorial authority accepted the draft in a letter to the Department dated 16 August 2007 “*subject to [the Department’s] consideration of attached information*”. I have amended the draft to take account of that information and to correct certain editorial errors.

2.7 The owner responded to the territorial authority’s letter in a letter dated 17 August 2007. The owner agreed with the decision on the draft determination but questioned the territorial authority’s approach to the matter.

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

### 3 The legislation, the acceptable solution, and NZS 8500

3.1 The relevant provision of the Act are:

#### 17 All building work must comply with building code

All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work. [Provisions for granting waivers or modifications of the Building Code are not relevant to this determination.]

#### 19 How compliance with building code is established

- (1) A building consent authority must accept any or all of the following as establishing compliance with the building code:
- (b) compliance with the provisions of a compliance document:
  - (c) a determination to that effect made by the chief executive . . .

#### 23 Effect of compliance documents

A person may comply with a compliance document in order to comply with the provisions of the building code to which the document relates, but doing so is not the only means of complying with those provisions.

3.2 The relevant provision of the Fencing of Swimming Pools Act are:

#### 2 Interpretation

In this Act, unless the context otherwise requires,—

**Immediate pool area** means 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 on in conjunction with the use of the pool:

#### 8 Obligations of owner and persons in control of pool

- (1) Every owner of a pool to which this Act applies shall ensure that, except as provided in any exemption granted under section 6 of this Act, the pool, or some or all of the immediate pool area including all of the pool, is fenced by 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 at all times when this Act applies in respect of the pool.

3.3 The relevant provisions of the Building Code are:

Provisions	Limits on application
<p><b>F4.3.4</b> Barriers shall:</p> <p>(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.</p> <p><b>F4.3.5</b> Barriers to swimming pools shall have in addition to performance F4.3.4:</p>	<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>

(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, and	
(b)	No permanent objects on the outside of the barrier that could provide a climbing step.	

3.4 The relevant provision of the acceptable solution F4/AS1 are:

**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.

3.5 As provided by section 23, compliance with F4/AS1 is not the only means of complying with clause F4. It is open to the territorial authority to accept compliance with NZS 8500 as an alternative solution. I recognise that NZS 8500 has no statutory force, and in particular that it is not, or not yet, cited in F4/AS1. Nevertheless, NZS 8500 was approved under the Standards Act 1988 and must command respect as representing the consensus of the major national bodies concerned arrived at after a process of public consultation. Relevant provisions of NZS 8500 are:

#### **1.2 Definitions**

**IMMEDIATE POOL AREA** 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. . . .

#### **2.2 General**

The immediate pool area could include the pool, its decking, changing sheds, an ornamental garden or landscaped area and a barbecue and outdoor furniture, but not a vegetable garden, clothes line, children's play areas or equipment, as these are not used in conjunction with the pool.

. . . equipment not associated with the use of the pool shall be located outside the pool area to reduce the likelihood of self-closing gates or doors being propped open in order to gain access.

Whenever a young child is inside a pool area, constant adult supervision is essential. . .

The activities within the immediate pool area must be closely connected or associated with the use of the pool and may, but do not have to be carried out exclusively with use of the pool. It does not matter that the particular activity can be carried out independently of the use of the pool.

### 3.3.1 Barrier and fence dimensions and proximity requirements

The effective barrier/fencing height shall be not less than 1200 mm . . .

There shall be no climbable objects on the outside within 1200 mm of the top of the barrier/fence (see figure 3.2).

## 4 Discussion

4.1 The question is whether the presence of the decorative elements means that the fenced area cannot properly be called “the immediate pool area” referred to in clause F4.3.4(f) or the “immediate pool surround” referred to in clause F.4.3.5(a). Neither of those terms is defined in the Building Code.

4.2 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.

4.3 I have accepted and applied that approach in several subsequent determinations. Applying that approach:

- (a) I do not share the territorial authority’s concern about a child hiding behind a gabion basket or a gabion wall (or, for that matter, within the changing shed). On the contrary, I consider that an adult who is in the fenced area of a domestic pool such as this one is likely to be well aware of how many children are also in the area so that a hiding child is most unlikely to be overlooked.
- (b) I consider that there is no significant danger that an adult in the fenced area who was working on the planting strip between the gabion walls and the plant room would not be aware that a child had fallen into the pool. That is not to say that such a danger might not arise in other pools with larger fenced areas and more extensive planting.
- (c) Similarly, I consider that the presence of that small planting strip does not raise the likelihood of a self-closing gate being propped open as contemplates in NZS 8500.

I therefore conclude that despite the presence of the decorative elements, the fenced area can properly be called the immediate pool area.

4.4 The correspondence between the parties was largely concerned with the interpretation of the Fencing of Swimming Pools Act. I have no jurisdiction in respect of that Act, but I note that its section 8(1) requires that fencing must comply with the Building Code. However, I cannot close my eyes to the Fencing of

Swimming Pools Act's definition of "immediate pool area" and the discussion of that definition in *Waitakere City Council v Hickman*<sup>2</sup>. In particular, 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.

4.5 I have deliberately avoided referring to the decorative elements as "landscape features". The word "landscape" is defined in the *Concise Oxford Dictionary* as:

Natural or imaginary scenery as seen on a broad view.

Similarly, *Wikipedia* says:

A landscape comprises the visible features of an area of land, including physical elements such as landforms, living elements of flora and fauna, abstract elements such as lighting and weather conditions, and human elements, for instance human activity or the built environment. Landscape may also signify the objects around one in a building.

Accordingly, I consider the term "landscape features" to be inappropriate for the decorative elements within the approximately 25 m by 12 m fenced area.

4.6 I note that "planting for landscape purposes" is specifically mentioned in *Hickman* as something "which would not usually be regarded as being carried out in conjunction with the use of the pool". I also note that NZS 8500 says that the immediate pool area could include a "landscaped area". The apparent contradiction can perhaps be explained by the fact that NZS 8500 refers to the danger that self-closing gates or doors to the immediate pool area might be propped open to gain access for equipment not associated with the use of the pool. That might well be the case if planting or lawns within a fence in area were extensive enough to be properly described as being "for landscaping purposes". I do not consider it is likely to be the case for the gabion baskets and gabion walls (for which no maintenance equipment is likely to be required), or for the 6.8 m by 0.5 m planting strip.

4.7 Furthermore, I consider that the gabions and the gabion walls are decorative elements which cannot properly be described as being "used for activities" in terms of the Fencing of Swimming Pools Act.

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<sup>2</sup> *Ibid.*

4.8 The territorial authority's concern about trees close to fencing has not been discussed because the plans and specifications that I have been given do not show the locations of such trees in sufficient detail to enable me to come to any conclusion on the point. However, I note that the matter is covered in NZS 8500, which is a useful tool to ascertain whether the trees impact on the compliance of the fence.

## **5 Decision**

5.1 In accordance with section 188(1) of the Act, but subject to confirmation that the locations of any trees near the fences comply with NZS 8500, I hereby:

- a) determine that, despite the presence of decorative elements, the fenced area can properly be called the immediate pool area or the immediate pool surround and that therefore the pool fencing complies with clause F4
- b) reverse the territorial authority's decision to refuse to issue a building consent in respect of the alterations to the pool.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 24 August 2007.

John Gardiner  
**Manager Determinations**