



Determination 2008/113

Safety barriers to a swimming pool at 2 Rawene Avenue, Westmere, Auckland

1. The matters for determination

- 1.1 This is a Determination under Part 3 Subpart 1 of the Building Act 2004¹ (“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 applicant is the building owner Gary Butler, acting through a firm of architects (“the applicants”) and the other party is the Auckland City Council carrying out its duties and functions as a territorial authority or a building consent authority (“the authority”).
- 1.2 The application arises from the authority’s refusal to issue an amendment to a building consent in respect of a pool area and its associated safety barriers.
- 1.3 For the reasons set out below, I take the view that the matters for determination, in terms of sections 177(a), and 177(b)(vi)², are:
- (a) Whether the proposed amendment to the pool area and its associated safety barriers complies with clause F4 of the Building Code (The first Schedule to the Building Regulations 1992).
 - (b) The authority’s decision to refuse to issue an amendment to the original building consent. I consider that this matter to be determined falls under section 177(b)(vi) of the Act, namely:
 - A party may apply to the chief executive for a determination in relation to 1 or more of the following matters:
 - (b) a building consent authority’s decision to –

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

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.

- (vi) amend a building consent, notice to fix, or code compliance certificate; or

1.4 In this context I consider section 177(b)(vi) can be read as including a “decision to amend or refuse to amend” a building consent, notice to fix, or code compliance certificate.

1.5 In making my decision I have not considered any other aspects of the Act or of the Building Code.

2. The background

2.1 The authority issued a building consent (No AC/03/07582) for a new 3-level house and pool on 17 November 2003, under the Building Act 1991 (“the previous Act”).

2.2 On 7 November 2003, the applicant’s architects faxed to the authority a “revised pool fencing strategy” that was intended to ensure compliance with the authority’s interpretation of the fencing of Swimming Pools Act 1987. This “strategy” was in the form of a plan that showed the pool completely surrounded by either solid house walls or fencing.

2.3 On 12 May 2005, the applicants applied for an amendment to the consent with regard to the pool fencing. According to the authority, a second application was made in June 2005 but I have not seen that application. The authority has informed me that neither application was accepted by them.

2.4 The application for a determination was received by the Department on 8 September 2008.

2.5 Copies of a draft determination were forwarded to the parties on 20 November 2008 so as to give them an opportunity to check the accuracy of the facts and note any errors or omissions.

2.6 Both parties accepted the draft without comment.

3. The pool area

3.1 The relevant parts of the house and the pool area, as detailed in the building consent amendment application, are shown in Figure 1.

3.2 As shown, the pool area is enclosed by the external walls of the house and by 1800 mm high boundary block walls and contains the following elements:

- A swimming pool size 10.5m long x 3.0m wide, fitted with an automatic sliding cover.
- A living court and adjacent pool access area totalling approximately 68m².
- Two entry passages totalling approximately 92m².
- An approximately 17m² garden bed.

- 3.3 The external access to the pool area is via a 1600mm high pivoted gate at the road, which is self-closing and automatically latched with an electro-magnetic lock fixed 1500mm above floor level. Access is controlled by a security keypad/intercom.
- 3.4 Internal access is via the following doors, none of which are self-closing or self-latching. The doors have locks that are fixed 1500mm above floor level:
- One pivoting door on a closer lock.
 - One single non-self-closing or latching sliding door with a lock.
 - Two sets of three non-self-closing or latching sliding doors with locks.
 - One pair of pivoting doors on closer locks.
 - A sliding door giving access to the office from entry passage 2.
- 3.5 In addition to the above, there is to be installed:
- A security motion sensor covering the outdoor and pool area and connected to an alarm system.
 - A 100db automatic immersion sensing pool alarm.

4. The submissions

- 4.1 In a covering letter to the Department dated 6 August 2008, the applicant's architects stated that the amendments were requested on the grounds of the onerous interpretation of the Building Code by the authority. The applicant has cited NZS 8500³ and the review of the Fencing of Swimming Pools Act to support this contention. The architects described the pool area and the security measures that were to be put in place. They were of the opinion that the "level of security and access afforded at the entry gate position actively restricts unauthorised access to both the immediate pool area and the house proper".
- 4.2 The applicants supplied copies of:
- the revised pool area plan
 - the application for an amendment to the original building consent
 - the "revised pool fencing strategy" of 7 November 2003
 - a set of photographs showing views of the pool area.
- 4.3 The authority forwarded a submission to the Department dated 17 September 2008, describing some of the background to the matters in question. The authority also stated that the applications for amendments to the original consent were lodged prior to the introduction of NZS 8500. In terms of this standard, it was noted by the authority "that automatic pool covers and door alarms were acceptable only in lieu of

³ New Zealand Standard NZS 8500: 2006 Safety Barriers and Fences around Swimming Pools, Spas and Hot Tubs

house doors giving access to the pool area that are not self-closing or self-latching”. The authority stated that access to the house from outside the property should not be through the pool area.

4.4 The authority was of the opinion that the installation of a pool fence separating the main entry from the pool area was “both possible and reasonable”. In addition, it was considered that the elongated entry did not meet the requirements of Clause 2.2 of NZS 8500. The authority stated that additional matters relating to NZS 8500 were:

- The doors required a lockable door latch rather than just a lock.
- How the door latches on the pivoting doors and gate will function?
- Alarms on the house doors had to comply with U12017.
- Details of the motion sensor were lacking.

The authority was of the opinion that the applicant should specifically state that NZS 8500 was being used as an alternative solution in order to meet compliance with the Building Code.

5. The legislation, the acceptable solution, and NZS 8500

5.1 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: (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: (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	

5.2 The acceptable solution F4/AS1 says:

1.2.7 The Schedule to the Fencing of Swimming Pools Act 1987 is a means of establishing compliance with NZBC Clause F4.

5.3 Relevant provision of the Fencing of Swimming Pools Act are:

(a) Section 6(1):

A territorial authority may, by resolution, 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 under subsection (2) of this section, that such an exemption would not significantly increase danger to young children

(b) Section 8(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.

(c) Section 13B provides in effect that fencing in accordance with the Schedule to the Fencing of Swimming Pools Act ("the Schedule") shall be deemed to comply with the Building Code.

5.4 Clauses 8 to 11 of the Schedule say:

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.

11. Where any building forms part of a fence and the pool is not contained within the building, any door that gives access to the immediate pool area need not comply with the requirements for gates or doors set out in clauses 8 to 10 of this Schedule to the extent (if any) that the territorial authority is satisfied that such compliance is impossible, unreasonable, or in breach of any other Act, regulation, or bylaw, and the door is fitted with a locking device that, when properly operated, prevents the door from being readily opened by children under the age of 6 years.

5.5 Relevant provisions of NZS 8500 are:

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. . . .

2.3.2 Specific requirements for pools

For new . . . pools at least one of the following requirements shall be met:

- (f) The pool shall be enclosed by an isolation barrier where a wall of a house contains doors opening from the house to the immediate pool area (regardless of direction of door swing). Should the doors not be self-closing and self-latching, then a lockable door latch 1500 mm above finished floor level shall be provided on every opening door-set. In addition there shall also be:

- (i) An automatic pool cover that complies with ASTM F1346-91⁴, and
- (ii) An alarm complying with UL 2017⁵ capable of detecting unauthorised access from the house into the immediate pool area, and that when activated emits a sound of 85 decibels or more to be heard from the house.

2.9 Access to the house through the pool area

Access to the house from outside the property shall not be through the pool area.

Where compliance is impossible, unreasonable or in breach of any other Act, regulation or bylaw, then a special exemption or determination may be sought from the TA or the DBH. Considerations may include additional layers of protection incorporating at least one of the following:

- (a) Automatic pool covers that comply with ASTM F1346-91;
- (b) Alarms complying with ASTM F2208, with warning signage required in accordance with section 5; or
- (c) Any barrier/fence approved by the TA or the DBH through the special exemption/determination process.

6. The pool area

6.1 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”. That term was considered in the *Waitakere City Council v Hickman*, 1/10/04 case⁶, which was heard after Determination 2003/6 was issued.

6.2 I consider that the following extracts from the *Hickman* case decision are relevant to this determination:

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- e) . . . There must be sufficiently close nexus between the activity or purpose and the use of the pool.
- f) Whether an activity or association is sufficiently connected with the use of the pool is a matter of degree. Activities which are carried on independently of the use of the pool or which have only a remote or indirect association with the use of the pool are to be excluded from the immediate pool area which must be fenced. Examples of activities which would not usually be regarded as being carried on in conjunction with the use of the pool include clothes lines, vegetable gardens, vehicle or pedestrian access ways, and planting for landscape purposes.
- g) On the other hand, there are activities which would ordinarily qualify as being carried on in conjunction with the use of the pool. Examples include the use of pool furniture, changing sheds, pumps or pool

⁴ American Society for Testing and Materials Standard F13646-91(2003) *Standard performance specification for safety covers and labelling requirements for all covers to swimming pools, spas, and hot tubs.*

⁵ provisions that would restrict the access of children given that the doors were not self-closing and self-latching.

⁶ Randerson J, HC Auckland CIV 2003-404-7266.

maintenance equipment, sunbathing areas, and diving boards or other pool equipment.

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...It is not possible to define with precision the width (say in metres) of the immediate pool area. The width will depend upon the circumstances of each case. The further away one moves from the edge of the pool, the less likely it will be that an associated activity or purpose can be properly be said to be carried on “in conjunction with” the use of the pool and the less likely it is that the activity will be in sufficient proximity to the pool to be properly regarded as within the “immediate” pool area.

6.3 I accept that “outdoor entertaining” could take place in the area, sometimes in conjunction with the use of the pool and sometimes not. I am also of the opinion that *Hickman* establishes that such activities “are not to be excluded from the immediate pool area merely because they are capable of occurring independently of the use of the pool”.

6.4 However, as described in paragraph 3, the main access way to the property passes through or adjoins the pool area. This situation does not qualify as an “immediate pool areas” as defined in the *Hickman* decision. In addition, as set out in section 2.9 of NZS 8500, “access to the house from outside the property shall not be through the pool area”. As previously described, the house access is through the pool area, so in this respect, the pool area does not meet the requirements of the standard, in this case.

7. The pool cover and alarm systems

7.1 I note that the main emphasis of the Fencing of Swimming Pools Act is in relation to fences. A pool cover is not a fence, partly because it is readily removable.

7.2 In Determination 2007/87, the Department considered the protection afforded by an automatic closing pool cover and associated alarm systems. The following extracts from that determination relate to the current matter.

5.2.1 I agree with [Determination 2002/10] and accordingly recognise that the [pool] cover, when it is in place, can be regarded as a safety barrier for the purposes of restricting the access of children to a swimming pool as required by clause F4.3.3. However, when the cover is not in place the proposed alarm system is not a safety barrier and can be considered only in the context of a waiver or modification of clause F4, see 5.3 below.

5.2.2 I read clause F4.3.4(a) as requiring that a safety barrier must remain in place. However, people must be able to pass through such a safety barrier so as to use the pool. With a fence-type barrier, they pass through gates or doors which are required by clause F4.3.5(a) to automatically close and latch (the exemption for sliding and sliding-folding doors is irrelevant to this determination). The cover, however, is intended to be completely removed before bathers enter the pool. Because the cover is not self-closing and self-latching, I conclude that the cover does not comply with clauses F4.3.4(a) and F4.3.5(a).

- 7.3 Accepting that the considerations set out in Determination 2007/87 are still relevant in terms of this determination, I conclude that the pool cover does not comply with Clauses F4.3.4 and F4.3.5.

8. Exemption under the Fencing of Swimming Pools Act

- 8.1 The Fencing of Swimming Pools Act provides that a territorial authority has a general power of exemption under section 6, provided that such an exemption “would not significantly increase danger to young children”. There has been no suggestion of the territorial authority granting any such exemption in this case.
- 8.2 As mentioned in 4.1 above, the owner made certain proposals in terms of NZS 8500. I have not considered those proposals for the reasons set out in paragraph 10 below. However, I observe that if and when the territorial authority considers those proposals it will need to take account of “whether the proposals would not significantly increase danger to young children”. In assessing what degree of additional danger is “significant”, the territorial authority might well compare the owner’s proposals with clause 2.3.2(f) of NZS 8500, which addresses the same situation and requires an automatic pool cover plus door alarms.

9. Conclusion

- 9.1 For the reasons set out above I conclude that the proposed amendment to the building consent does not comply with the Building Code. I must therefore confirm the territorial authority’s decision to refuse to issue the amendment.

10. What is to be done?

- 10.1 It is not for me to say how the pool is to be brought to compliance with the Building Code. That is for the owner to propose and for the territorial authority to accept or reject. In particular, the parties will need to agree on means for restricting the access of children given that the doors were not self-closing and self-latching, and access to the house is through the pool area.
- 10.2 One such means is specified in NZS 8500, see 5.5 above. NZS 8500 was approved by the Standards Council on 3 November 2006 to be a New Zealand Standard under the Standards Act 1988. As such, NZS 8500 must command respect as representing the consensus of the major national bodies concerned, arrived at after a process of public consultation.
- 10.3 If the owner does decide to apply for a new building consent and an exemption incorporating the relevant provisions of NZS 8500, then it will need to ensure that the plans and specifications accompanying the application establish that the particular pool cover and the particular alarm proposed to be used comply with ASTM F1346-91 and UL 2017 respectively.

11. The decision

11.1 In accordance with section 188 of the Act, I hereby:

- (a) determine that the swimming pool and its associated safety barriers, as specified in the proposed amendment, do not comply with clause F4, and
- (b) confirm the territorial authority's decision to not to issue an amendment to the building consent.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 9 December 2008.

John Gardiner
Manager Determinations