

Determination 2008/123

Dispute about the code compliance of an outbuilding to be erected in a pool area at 82 Glandovey Road, Christchurch

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, Mr T Reid, (“the applicant”), acting through an architect (“the architect”). The other party is the Christchurch City Council (“the authority”) carrying out its duties and functions as a territorial authority or a building consent authority.
- 1.2 The application arises from the authority’s refusal to issue a building consent in respect of the construction of a small single-storey building (“the outbuilding”) within a swimming pool area.
- 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)(i) are:
- (a) Whether the pool area, with the addition of a proposed outbuilding, would comply with Clause F4 of the Building Code (the First Schedule to the Building Regulations 1992), and
 - (b) Whether the authority’s decision to refuse to issue a building consent is correct.
- 1.4 In making my decision I have not considered any other aspects of the Act or of the Building Code.

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

2. The background

2.1 Following the application for a building consent, the authority wrote to the architect in a letter dated 14 October 2008, requesting further information. Amongst other matters the letter said:

The Gym should not be included within the confines of the pool fence.
Amend plans to show only related facilities accessed from the pool enclosure.

2.2 The architect responded in a letter to the authority dated 23 October 2008. The architect noted that the gym, sauna, and steam room are located in the pool compound “because they are part of the general exercise area of which the pool is part”. The architect submitted that:

- From a practical point of view, there was no difference between the gym and the sauna or steam rooms.
- The house and pool were quite separate.
- As the gym is for adults, and has adult-orientated equipment installed, children under 6 years old are extremely unlikely to be in the gym alone and unsupervised.

2.3 The authority wrote to the architect on 29 October 2008, and repeated its earlier comments. The authority said:

Your comments are noted but the gym is still not seen as part of the wet pool activity.

2.4 The architect faxed the authority a copy of one page from a discussion document “Evaluation of the Fencing of Swimming Pool Act 1987”. Handwritten notes by the architect stated that the pool was protected by a fence and that activities such as “sunbathing, exercise (in and out of the pool) are allied to use of the pool for any age of person”. Children under the age of 6 cannot use either the sauna and steam room, which had already been accepted are part of the area, or the gym on their own as they cannot get into the pool enclosure. As the gym is closely associated with the sauna and steam room, it is closely associated with the pool.

2.5 Following an exchange of emails on 3 November 2008, the authority confirmed that it now considered that entire outbuilding within the pool enclosure presented an unacceptable risk.

2.6 The Department received the application for a determination on 11 November 2008.

3. The pool area

3.1 The swimming pool area is shown in Figure 1. The outbuilding consists of a single storey light timber-framed building, containing four separate rooms. The rooms comprise:

- store / gymnasium

4.2 The architect supplied copies of:

- the plans
- the correspondence with the authority
- the certificate of title.

4.3 A draft determination was sent to the parties for comment on 16 December 2008. The authority accepted the draft without comment, the architect accepted the draft, but noted that the pool is new (the draft had described it as existing). I have amended the determination accordingly.

5. The legislation and the New Zealand Standard

5.1 The relevant provisions of the Building Code include:

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

5.2 The relevant provisions of the Fencing of Swimming Pools Act include:

(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

5.3 The relevant provisions of NZS 8500² include:

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. . . .

6. Discussion

6.1 I note that the pool area appears to be properly fenced. The pool enclosure is separate from the house and no doors open from the house into the pool area.

6.2 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

² New Zealand Standard NZS 8500:2006 Safety Barriers and Fences Around Swimming Pools, Spas and Hot Tubs

carried out in conjunction with the use of the pool”. That term was considered in the *Waitakere City Council v Hickman, 1/10/04 case*³.

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

[29]

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

[34]

...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.

6.4 I accept that activities associated with the gym, sauna, and steam room could take place in the immediate pool area, sometimes in conjunction with the use of the pool and sometimes not. I am also of the opinion that the *Hickman* decision 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”. These activities are carried out in the outbuilding that is in close proximity to the pool edge, being approximately 1.2 metres distance from it.

6.5 I am of the opinion that none of the activities associated with the gym, sauna, and steam room are of the type described in paragraph 29(f) of the *Hickman* decision as those “which would not usually be regarded as being carried on in conjunction with the use of the pool”. I note that these activities would pose a risk to children if carried out in the pool area where children would be more likely to enter the area unnoticed.

6.6 I am also of the opinion that the plant room, which houses machinery and equipment, would certainly fall within the activities listed in paragraph 29(g) that are carried on in conjunction with the use of the pool.

³ Randerson J, HC Auckland CIV 2003-404-7266.

- 6.7 I note that paragraph 29(g) from the *Hickman* decision accepts “changing sheds” and “sunbathing areas” as qualifying areas. I am of the opinion that the sauna and the steam room could be classified as activities similar to these. Likewise the gym, while encompassing more active pursuits, could be similarly categorised. There is no reason to suppose that the small number of people intending to use the activities in the outbuilding would make entrance to the pool area by a child any easier.
- 6.8 Due to the small size of the individual rooms (approximately 2 x 2 metres), it is unlikely that large numbers of people will be using the outbuilding. The activities (being the gym, sauna, and steam room) are also unlikely to attract children under 6 years of age and unsupervised. The small size of all individual rooms would also preclude activities of a differing nature. I note that a different view could have been reached if the outbuilding been larger, allowing a range of alternative activities involving greater numbers of people, including children under 6 years of age.
- 6.9 In view of the above observations, I conclude that the pool area including the outbuilding will comply with Building Code Clause F4. I emphasise that this is on the basis that the activities intended to be undertaken in the immediate pool area involve low numbers of people engaged in activities including those unlikely to involve children under 6 years of age. It is unlikely that the use of the outbuilding will change from that proposed.

7. The decision

- 7.1 In accordance with section 188 of the Act, I hereby:
- (a) determine that the swimming pool and its associated outbuilding complies with Clause F4, and
 - (b) reverse the 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 24 December 2008.

John Gardiner
Manager Determinations