

## Determination 2010/098

### The code compliance of pool barriers with respect to the area with the swimming pool enclosed by the barriers at 90 Schnell Drive, Palmerston North



#### 1. The matters to be determined

- 1.1 This is a Determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“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.
- 1.2 The parties to this determination are:
  - the Palmerston North City Council (“the authority”) carrying out its duties and functions as a territorial authority and a building consent authority. The authority is the applicant
  - the owners of the house and pool, Mr A and Mrs C Hawley (“the owners”), acting through their solicitor as their agent (“the solicitor”).
- 1.3 The dispute between the parties relates to the authority’s decisions to refuse to issue a code compliance certificate and to issue a notice to fix in respect of the fencing of the swimming pool. The reason given by the authority for this decision was because

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<sup>1</sup> The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Department are all available at [www.dbh.govt.nz](http://www.dbh.govt.nz) or by contacting the Department on 0800 242 243

‘the adjoining back yard does not comply with the requirements of Clause F4.3.4 of the Building Code (Schedule 1 of the Building Regulations 1992)<sup>2</sup>.

1.4 Therefore, I take the view that the matters for determination<sup>3</sup> are:

**1.4.1 Matter 1: the code compliance of the pool barriers**

Whether the pool barriers comply with Clause F4 of the Building Code with respect to the area enclosed with the swimming pool by the barriers.

**1.4.2 Matter 2: the code compliance certificate and notice to fix**

Whether the authority’s decisions to refuse to issue a code compliance certificate and issue a notice to fix were correct.

1.5 In this determination, I will refer to the following legislation and standards, the relevant parts of which are set out in Appendix A.

- The Act (the Building Act 2004) with its sections referred to as sections of the Act.
- The Fencing of Swimming Pools Act 1987 (“the FOSP Act”), with its sections referred to as sections of the FOSP Act.
- Clause F4: Safety from Falling of the Building Code, referred to as Clause F4.
- The Schedule to the FOSP Act (“the Schedule”), with its clauses referred to as clauses of the Schedule.
- NZS 8500: 2006: Safety Barriers and Fences around Swimming Pools, Spas and Hot Tubs.

1.6 In making my decision, I have also considered the submissions of the parties and the other evidence in this matter. I have not considered any other aspects of the Act or of the Building Code.

## **2. The swimming pool and pool barriers**

2.1 The swimming pool is located at the back of the section, adjacent to a patio area adjoining the house. A spa pool is located within the patio area. The pool, spa and patio are all located on a lower level where there is also a small lawn. Beyond this there is an upper terraced area of garden, which has been landscaped. The upper and lower levels are separated by a one metre high retaining wall. Access to the upper level is via a small flight of stairs. The pool and pool barriers are shown in Figure 1 below.

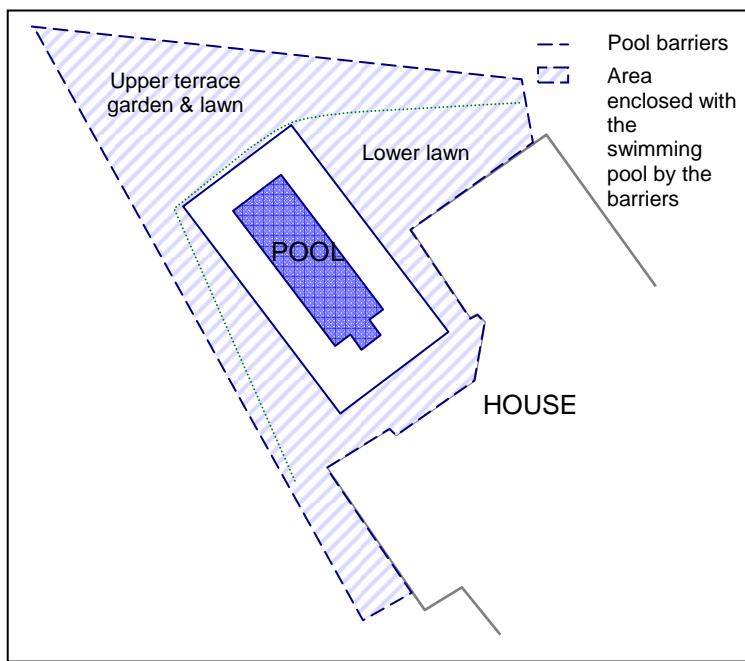
2.2 The pool barriers are formed by a combination of:

- the boundary fence for the property, which is a 1.8 metre high timber post and rail fence
- the wall of the house, including the three doors
- two metal fences, which have self closing and self latching gates, that run between the western corner of the house and the boundary fence, and the northern corner of the house and the boundary fence.

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<sup>2</sup> 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.

<sup>3</sup> In terms of sections 177(a), 177(b)(i) and 177(b)(iv) of the Act (prior to 7 July 2010)



**Figure 1: Plan layout of the house and pool**

- 2.3 The pool barriers enclose within it the entire back garden, the lower level where the pool is situated and the upper terrace (“the area enclosed by the barriers with the swimming pool”). Access from the front of the section to the back is only possible through either of the metal gates, or though the house.
- 2.4 The three doors have been fitted with deadbolts and self-latching and self-closing devices (as required by the committee and have been passed by the authority as compliant, refer to paragraph 3.6).

### **3. The background**

- 3.1 The building consent (number 63953) was granted on 9 November 2006 for the construction of the swimming pool, subject to the condition that ‘All work in relation to the pool shall comply with the Fencing of Swimming Pools Act 1987’. The approved plan showed the location of the pool, and the details of the barriers.
- 3.2 A separate building consent was granted for the construction of the house, which adjoins the pool, and a code compliance certificate was issued in respect of this consent on 21 April 2009.
- 3.3 The authority carried out an inspection of the pool on 12 November 2008. The authority did not issue a code compliance certificate because it was noted that certain doors giving access to the area enclosed with the swimming pool by the barriers did not comply with the FOSP Act. The owners were advised of this in a letter dated 20 November 2008, and of their option of applying for an exemption under the FOSP Act.
- 3.4 The owners applied for an exemption for the doors on 28 November 2008 and the application was referred to the Hearings Committee of the Council (“the committee”) for consideration. In a letter dated 4 May 2009, the owners were advised that:

a real concern is that a major portion of your large backyard is included in the pool fenced area. The Committee is obliged to follow strict rules in approving the size of the "immediate pool area" and permitted activities within that area. At present the rear part of your property surrounding the pool is too large and therefore does not comply. The Committee will be obliged to make orders reducing its size

- 3.5 A further hearing was held on 25 May 2009. The owners submitted that the swimming pool fencing should remain as it was because both the house and pool had been completed in accordance with the consented plans. A report from the authority was presented that recommended that an exemption be granted to allow the area enclosed by the barriers with the swimming pool to remain as it was for so long as the owners continued to own the property.
- 3.6 In a letter dated 17 August 2009, the owners were advised of the committee's decision. The committee stated that it was satisfied that the area enclosed by the barriers with the swimming pool must be reduced. The committee declined to make a time-limited exemption allowing the fencing arrangements to remain as they currently were. The committee granted a special exemption for the pool from the requirements of the FOSP Act, subject to area enclosed by the barriers with the swimming pool being reduced by a new complying fence. The committee then went on to describe how this new fence should be constructed. It also set requirements for the doors that opened onto the pool area.
- 3.7 The authority carried out a further inspection of the pool on 18 November 2009. The authority noted that the owners had complied with the committee's requirements with respect to the doors. However, the owners had not made any changes to the fencing around the pool, and indicated at the inspection that they were not willing to do this.
- 3.8 The authority issued a notice to fix with respect to the pool on 15 December 2009. The notice said:

**Particulars of contravention or non-compliance**

- The current fencing of the swimming pool does not comply with the [Building Code] F4 section 4.3.1 and section 3.1.1 [sic] – Fencing for swimming pools shall be constructed to no lesser standard than is required by [the Schedule], to restrict the access of children.

**To remedy the contravention or non-compliance you must:**

- That a temporary fence be erected immediately by the 23<sup>rd</sup> December 2009 to reduce the existing immediate pool area...The new temporary fence is to be installed as outlined in the hearings committee decision...
- Following the installation of the temporary fence the following options listed below be considered as a permanent fence reducing the size of the existing immediate pool area:
  - For the upper terrace from the south-westerly common boundary fence and continuing in a north-easterly direction until it meets the steps to the lower area and excluding such steps; and
  - Thence in a vertical direction until it meets the lower ground level and then continuing diagonally to the house wall at a point along that wall not more than 1 metre beyond the corner of the house adjacent to and including the spa pool;
  - All new complying fencing, any new gates are to be constructed and completed in accordance with the [FOSP Act] to the approval of the [authority].

- Or another option suggested by the owner is put in writing to [the authority] ...
- 3.9 The owners sought legal advice and in a letter to the authority dated 16 December 2009 the solicitor raised concerns that the plans for the pool supplied to the authority had been approved and that ‘the fencing that is now deemed to be required does not appear on that plan’ and ‘[the owners] reject in its entirety the purported notice to fix as being without authority...’.
- 3.10 On 18 January 2010 the authority advised the solicitor that it would be applying for a determination. The solicitor subsequently agreed to this approach in a letter dated 24 February 2010.
- 3.11 The Department received the application for a determination on 1 April 2010.

## 4. The submissions

- 4.1 In its application, the authority stated that it had issued the notice to fix because ‘The adjoining back yard does not comply with the requirements of clause F4.3.4 of the Building Code’ and that it was seeking to reduce the size of the area enclosed by the barriers with the swimming pool.
- 4.2 The authority supplied copies of:
- the building consent and associated plans
  - correspondence between the parties
  - file notes and site inspection records
  - the application for an exemption, and papers associated with this, including the written decision
  - photographs of the property as it now is
  - the notice to fix.

4.3 The owners acknowledged the application in a letter dated 15 April 2010.

4.4 A draft determination was issued to the parties for comment on 13 May 2010.

### The submissions in response to the draft determination

- 4.5 The authority accepted the draft determination without comment.
- 4.6 The owners, through a submission from the solicitor did not accept the draft determination and made the following points:
- 1) ‘The issue that falls for jurisdiction is whether or not the “immediate pool area” as a matter of fact and as a matter of law complies with the [FOSP Act]. If it does so then the [authority] has no jurisdiction to require new fencing. The [Department] does not have jurisdiction to determine matters under the [FOSP Act].’
  - 2) ‘The [authority] endeavoured or purported to issue a notice to fix with respect to the pool, requiring new fences. The [authority] does not have power to do that in that there is no suggestion at all that the fencing that is on the property is anything less than adequate. What the [authority] purposed to do by issuing its notice is requiring new fences erected.’

- 3) ‘In any event, should the fencing not be adequate, the [authority] is estopped from taking that matter further in that it has granted consents based on plans provided to the [authority], inspected the work whilst in progress, and has allowed the owners to drastically change their position in reliance upon the [authority’s] approval of the plans and works as inspected.’
- 4) ‘The owners agreed to a determination on the basis that the [authority] suggested it was a quick and easy way to receive a ruling for both parties. The [authority] however has failed to take into account the lack of jurisdiction the Department has with respect to the [FOSP Act] and purported to issue a notice to fix to ensure a new fence was erected to reduce the immediate pool area. It is submitted that there cannot be a notice to fix in respect of a fence that does not exist. For the fence to exist there needs to be a determination as to the size of the immediate pool area. For there to be a determination as to the size of the immediate pool area there needs to be either the [authority] revisits the matter, which it has the power to do, or the matter goes to the High Court by way of Judicial Review.
- 5) ‘The Department acknowledged that it does not have jurisdiction under the [FOSP Act]. The determination therefore of the Department is irrelevant and ultra vires and must be set aside. The Department should refuse jurisdiction to de facto purport to give a ruling under legislation it has no jurisdiction to do so i.e. to determine what is the “immediate pool area” and refer the matter back to the parties for determine [sic] through the High Court. As the Department has no jurisdiction, the owners cannot and are not bound by any purported determination it makes.’

### **My response to these submissions**

- 4.7 In paragraphs 5.1 to 5.4 I have discussed the relationship between the FOSP Act and the Building Code. Further to the issue of jurisdiction raised by the solicitor, I note the following:
- Under sections 177 and 188 of the Act, the Chief Executive has the power to determine whether particular matters comply with the Building Code.
  - Building Code Clause F4.3.3 requires that ‘Swimming pools having a depth of water exceeding 400mm shall have barriers required.’ Clause F4.3.3 requires that barriers shall ‘restrict the access of children under 6 years of age to the pool or immediate pool area’.
  - While I note I do not have jurisdiction under the FOSP Act, section 8(1) of the FOSP Act requires compliance with the Building Code (subject to any exemption granted under section 6 of the FOSP Act). I therefore consider I have jurisdiction to make a determination about the Building Code compliance of the pool barriers and the area enclosed with the swimming pool by the barriers.
- 4.8 In response to the other points raised by the solicitor about the draft determination, I have addressed these points in paragraph 5 in respect of the owners’ reliance on the building consent and the authority’s issue of the notice to fix.

## 5. Discussion

### **The relationship between the FOSP Act and the Building Code**

- 5.1 I note that I have no jurisdiction under the FOSP Act. However, it is helpful to look at the relationship between the FOSP Act and the Building Code in terms of the Building Code requirements for swimming pools and barriers to swimming pools.
- 5.2 I note that the FOSP Act does not specifically require that fencing (including gates and doors) must comply with the Schedule. What is required under section 8(1) of the FOSP Act is that fencing must comply with the Building Code, subject to any exemption granted under section 6 of the FOSP Act.
- 5.3 The FOSP Act also provides, in effect, that fencing that complies with the Schedule is deemed to also comply with the Building Code, giving the Schedule the status of a compliance document with respect to the Building Act. Sections 22 and 23 of the Act provide, in effect, that building work that complies with a compliance document must be accepted as complying with the relevant provision of the Building Code. However, compliance documents are not the only means of establishing compliance.
- 5.4 Accordingly, if pool fencing complies with the Building Code, then it complies with the requirements of the FOSP Act, even if it does not comply with the Schedule. In such a case there would be no need for an exemption under section 6 of the FOSP Act.

### **The code compliance of the pool barriers with respect to the area enclosed with the swimming pool by the barriers**

- 5.5 The barriers to the swimming pool are required to comply with Clause F4 of the Building Code. Clause F4.3.4(f) states that the barriers shall ‘restrict the access of children under six years of age to the pool or the immediate pool area’.
- 5.6 In order to determine whether Building Code Clause F4.3.4(f) has been complied with, it is therefore necessary to establish what the “immediate pool area” is.
- 5.7 I note there is no dispute that the details of the pool barriers to the area enclosed with the swimming pool by the barriers, such as the height, rigidity and strength of the barriers, and the adequacy of the latching devices on the gates and doors comply with Clause F4. It is the location of the pool barriers, in terms of the size of the area enclosed with the swimming pool by the barriers that is in dispute.

### ***Meaning of the immediate pool area***

- 5.8 I note that although the Building Code refers to ‘the immediate pool area’ and ‘the immediate pool surround’, it does not define these terms.
- 5.9 However, section 2 of the FOSP Act defines ‘the immediate pool area’ 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 2004 Waitakere City Council v Hickman case<sup>4</sup>, and I consider that the following extracts from that decision are relevant to this determination:

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<sup>4</sup> Randerson J, HC Auckland CIV 2003-404-7266.

[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.

5.10 In addition, the Building Industry Authority ("the BIA") (the predecessor to the Department) took the view, in Determination 2003/06, 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.

5.11 I have adopted the above approaches in subsequent determinations, and I consider it appropriate to apply them to this case.

5.12 It is also appropriate at this stage to refer to NZS 8500<sup>5</sup>, which defines the immediate pool area as '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'.

5.13 Although NZS 8500 is not currently cited as a compliance document for Clause F4, it was approved by the Standards Council and must command respect as representing the consensus of the major national bodies represented, arrived at after a process of public consultation. As such, it can provide guidance in this matter.

#### ***The area enclosed with the swimming pool by the barriers***

5.14 From the documents that I have received, I note that the area enclosed with the swimming pool by the barriers is a relatively large area of lawn and landscaped gardens, including a self-contained upper terrace. The majority of the garden area for the house, where activities other than those directly related to the use of the pool are likely to be carried out, is contained within the barriers.

5.15 Although I do not have measurements for all the dimensions, I note that on the plans the closest distance between the northern side of the pool and the boundary fence is

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<sup>5</sup> New Zealand Standard NZS 8500, 2006 Safety Barriers and Fences around Swimming Pools, Spas and Hot Tubs.

stated to be 16m. The distance between the pool and the fence around the upper terrace is much more.

- 5.16 Based on these observations, I am of the opinion that the tests for compliance, as set out in the Hickman decision and the previous relevant determination decisions, regarding the requirements for the ‘immediate pool area’, have not been met by the area enclosed with the swimming pool by the barriers. Accordingly, I am of the opinion that the requirements of Clause F4.3.4(f) of the Building Code are not met, as the barriers do not ‘restrict the access of children under six years of age to the pool or the immediate pool area’.

### **The code compliance certificate and notice to fix**

- 5.17 I acknowledge the owners’ intention to build the pool barriers to comply with the building consent. However, given my findings in relation to the compliance of the barriers with respect to the area enclosed with the swimming pool by the barriers, I consider that the building consent was incorrectly granted as the Building Code was incorrectly applied and therefore the building consent was predicated on an incorrect test of law. This is because in this case, the area enclosed with the swimming pool by the barriers is larger than the area that can be considered the immediate pool area and hence the barriers do not comply with Clause F4.
- 5.18 Given that the building work has now been completed and the authority’s decision to issue the building consent relied upon, I consider it would be impractical to reverse that decision. In the circumstances, the authority has now adopted the correct approach by refusing to issue a code compliance certificate and issuing a notice to fix.
- 5.19 The consequences of the authority wrongly issuing the building consent for the pool, unfortunately now fall on the owners. The owners have ongoing obligations under the FOSPA Act to ensure that the pool is properly fenced. To bring the pool barriers with respect to the area enclosed with the swimming pool by the barriers into compliance with the Building Code, they will now need to apply for an amendment to the building consent.
- 5.20 I accept that the task of achieving compliance at this stage is more difficult than it might have otherwise been. However, the fact that the work has been completed can not, of itself, change my view of how the Building Code should have been applied to the situation.

## **6. What is to be done now?**

- 6.1 A means of restricting the access of children under the age of six years old to the area that can properly be considered the immediate pool area is required. The owners should propose a means of restricting the access of children under the age of six years old to the area that can be properly considered the immediate pool area, in compliance with the Building Code, and should seek an amendment to the building consent.

## 7. The decision

7.1 In accordance with section 188 of the Act, I hereby determine that:

- the pool barriers, with respect to the area enclosed with the swimming pool by the barriers, do not comply with Clause F4 of the Building Code
- the decisions of the authority to refuse to issue a code compliance certificate and to issue a notice to fix are confirmed.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing  
on 22 October 2010.

John Gardiner  
**Manager Determinations**

## Appendix A

### A1. The legislation, the Acceptable Solution, and NZS 8500

A1.1 The relevant provisions of the FOSP Act are:

#### 6 Special exemptions

- (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.
- (2) In granting an exemption under subsection (1) of this section, the territorial authority may impose such other conditions relating to the property or the pool as are reasonable in the circumstances.

#### 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.

#### 12 Delegation of powers to committees of councillors

The territorial authority may delegate its powers and functions under section 6 and clause 11 of the Schedule to any committee of the territorial authority appointed under clause 30 of Schedule 7 of the Local Government Act 2002 that comprises only members of the territorial authority; but may not delegate those powers and functions to any committee that has any members who are not members of the territorial authority or to any officer of the authority.

#### 13B Fencing in accordance with Schedule must be treated as means of compliance

Any provision that is made for the fencing of swimming pools that is in accordance with the Schedule must, in respect of –

- (a) matters subject to the Building Act 2004, be treated as a compliance document establishing compliance with the building code for the purposes of section 19 of that Act, and the requirements of this Act

A1.2 The relevant provisions of the Building Code Clause F4 are:

#### CLAUSE F4—SAFETY FROM FALLING

##### OBJECTIVE

**F4.1** The objective of this provision is to safeguard people from injury caused by falling.

##### FUNCTIONAL REQUIREMENT

**F4.2** Buildings shall be constructed to reduce the likelihood of accidental fall.

##### PERFORMANCE

**F4.3.1** Where people could fall 1 metre or more from an opening in the external envelope or floor of a building, or from a sudden change in level within or associated with a building, a barrier shall be provided.

**F4.3.4** Barriers shall:

- (a) Be continuous and extend for the full extent of the hazard,
  - (b) Be of appropriate height,
  - (c) Be constructed with adequate rigidity,
  - (d) Be of adequate strength to withstand the foreseeable impact of people and, where appropriate, the static pressure of people pressing against them,
  - (e) Be constructed to prevent people from falling through them, and
- (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.

A1.3 The relevant provisions of Acceptable Solution for Building Code Clause F4 are:

**3.0 Swimming pool barriers**

**3.1 Fencing**

**3.1.1** Fencing for swimming pools shall be constructed to no lesser standard than is required by the Schedule to the Fencing of Swimming Pools Act 1987, to restrict the access of children.

A1.4 The 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.