



Determination 2015/053

Regarding the refusal to issue a building consent in respect of barriers to a swimming pool at 26 Sunrise Valley Road, Upper Moutere

Summary

This determination discusses the Building Code obligations in Clause F4.3.5 for a proposed dwelling forming part of a pool barrier. The determination also considers the area enclosed by the proposed building work and an existing pool fence in respect of restricting access of children under the age of six to the immediate pool area as required by Clause F4.3.4.

1. The matters to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to this determination are:

- Tasman District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority – the authority is the applicant in this determination
- the owners of the pool and proposed house, J De Becker and M Janssens (“the owners”).

1.3 The dispute relates to the authority’s decision to refuse to grant a building consent for proposed building work, on the grounds that the swimming pool barrier, which forms part of the proposed building work, will not comply with Clause F4 of the Building Code (First Schedule, Building Regulations 1992). There is an existing pool barrier on the owners’ property, and the authority is of the opinion that this also does not comply with Clause F4.

1.4 I therefore take the view that the matters for determination² are:

- whether the pool barrier, as altered by the proposed building work, and including the immediate pool area it encloses, complies with Clause F4 of the Building Code
- whether the authority correctly exercised its powers of decision in refusing to grant a building consent for the proposed building work.

¹ The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.building.govt.nz or by contacting the Ministry on 0800 242 243.

² Under section 177(1)(a), 177(1)(b) and 177(2)(a) of the Act

1.5 In this determination, I will refer to the following legislation and New Zealand Standard, the relevant parts of which are set out in Appendix A:

- the *Building Act 2004* (“the Act”), with its sections referred to as sections of the Act
- Building Code Clause F4 – Safety from Falling
- the *Fencing of Swimming Pools Act 1987* (“the FOSP Act”), with its sections referred to as sections of the FOSP Act
- the Schedule to the FOSP Act (“the Schedule”), with its clauses referred to as clauses of the Schedule
- New Zealand Standard NZS 8500:2006 Safety barriers and fences around swimming pools, spas and hot tubs (“NZS 8500”).

1.6 In making my decision, I have 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 building work and background

2.1 The owners’ property is a 4 hectare lifestyle section in a largely rural setting. There was an existing dwelling and shed on the property when the owners purchased the property in 1998.

2.2 The swimming pool and barrier

2.2.1 On 7 August 2013, the owners applied to the authority for a building consent to construct an in-ground lap pool and swimming pool barrier in a part of the property at some distance from the existing dwelling. (See figure 1 below)

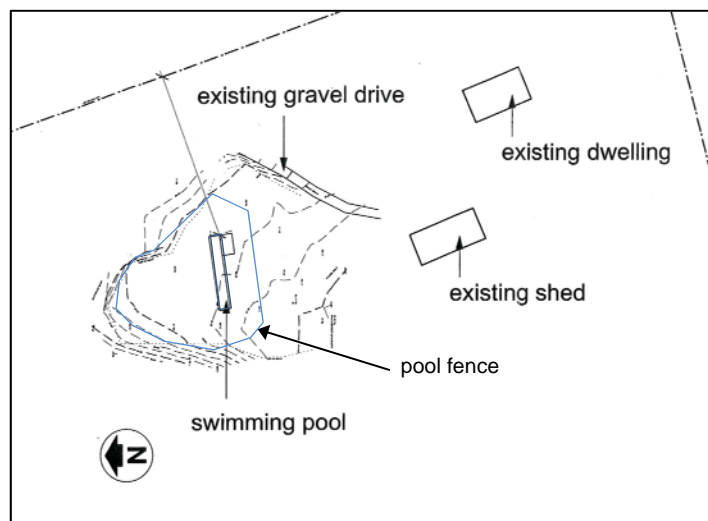


Figure 1: Site plan showing existing structures & location of pool and barrier (Not to scale)

2.2.2 The authority issued building consent no. 130961 (“the first consent”) for construction of the pool and barrier on 21 August 2013, and the owners subsequently had the pool and pool barrier built. To date, no code compliance certificate for this work has been applied for or granted in respect of this work, so the issue of whether the building work was conducted in accordance with the consented plans has not been tested.

- 2.2.3 The completed pool is 60m², measuring 18m x 2.5m, and is a uniform 1.2m deep. It is naturally filtered by a 3m x 5m plant filtration zone located at the pool's eastern end.
- 2.2.4 The pool barrier is formed by two different types of fencing, described as "Timber Fence Type 1" and "Windbreak Fence Type 2" in the consent application. The timber fencing is used for the majority of the barrier and is constructed from wooden posts with wooden rails, and vertical palings, and measures at least 1.2m high. The consented plans show that there are two self-closing and latching pool gates set in this part of the fence.
- 2.2.5 The windbreak fencing, Type 2, was erected along the pool enclosure's southern side, and is formed from metal posts at 3m intervals, with tensioned wires running between their tops and bottoms. The bottom wire is fixed to the ground. A windbreak fabric is secured between the two wires to form the body of the fence. In the consented drawing this is described as 'high-quality windbreak mesh securely fixed to top and bottom wire'. From the photos it appears to be green open weave windbreak fabric, of the type commonly used in orchards. The section of the barrier formed from this second type of fencing measures approximately 28m long. It also stands 1.2m high.
- 2.2.6 The area enclosed by the pool barrier is roughly an oval, except along its northern side, where the barrier forms a straight edge. It appears that this area is the same as that shown on the consented plans. The parties estimate that the area enclosed by the barrier is between 800 sq. m and 1000 sq. m. There is a large level area immediately around the pool, and the land slopes down towards the west and the north with the fence placed at the base of slope so as to make it not visible from the pool area. There are substantial plantings around the fence, particularly on the west side.

2.3 The proposed building work

- 2.3.1 On 8 May 2015, the owners, through their builder acting as their agent, applied for a second building consent (No. 150468) to construct a residential dwelling on their property, on the area adjacent to the south side of the pool. Part of the proposed building work involves altering the pool barrier on its southern side, taking down the section of the pool barrier formed by the windbreak fencing and replacing it with a new barrier, formed in part by the northern side of the house.
- 2.3.2 The final plans submitted for the proposed building work show a single-level north-facing dwelling, with the existing pool fence extended and altered so that it meets up with the dwelling on its north-western corner. On the other side of the dwelling the fence would be brought in front of the dwelling, and join the wall on the eastern side of the living room doors. A self-closing pool gate would sit in the barrier at this point, in front of the living room doors. (See figure 2 over page)

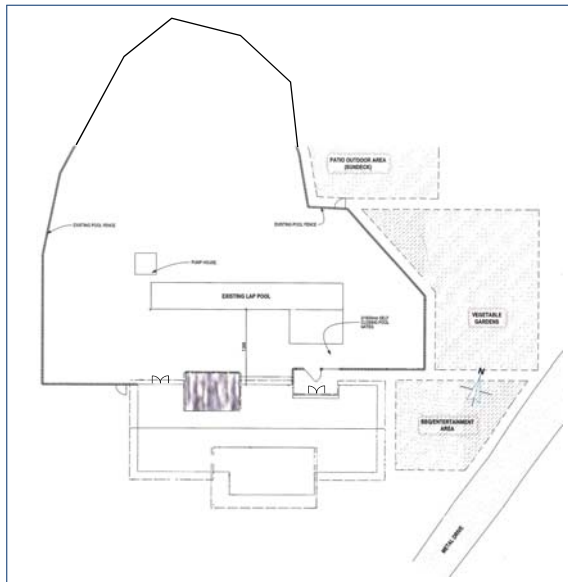


Figure 2: Site plan of proposed dwelling and the existing pool (Not to scale)

- 2.3.3 The remainder of the pool barrier on the Northern side of the house would be formed from the house walls. There are two sets of double-doors and several windows within this section of the wall. One set of doors leads out from the master bedroom; the other from a living area designated on the plan as a weaving room. The plans show that the doors would be fitted with self-closing mechanisms and raised handles set at 1.5m above ground. The owners advise they would also be self-latching. The four windows in this section of the wall, which are capable of being opened, are shown on the plans to be fitted with restrictor stays.
- 2.3.4 From the parties' submissions, I understand that the authority was concerned about the number of doors and windows leading directly from the house into the immediate pool area in the plans that were originally submitted for this second building consent. I also understand that the parties subsequently held several meetings and exchanged correspondence in an effort to agree on a design that the authority would consider compliant. As a result, the original plans were changed, so that a lesser section of the wall, with only the two sets of doors and four opening windows in it, was left as part of the pool barrier. The doors and windows in this section of wall were all fitted with devices to restrict their opening, as described in paragraph 2.3.3.
- 2.3.5 Following a meeting between the parties on 2 June 2015, the owners sent the authority a letter, also dated 2 June 2015, setting out their position and responding to various compliance-related concerns raised by the authority in the meeting. The owners sent an updated version of this letter (to replace the earlier version) on 10 June 2015.
- 2.3.6 In the 10 June 2015 letter, the owners assert that the pool and pool barrier have been constructed in accordance with the first building consent (No. 130961) and comply with the requirements in the FOSP Act. They state that 'The consented fence design had the southern section as temporary fence, later to be replaced by the house.' They also say they believe that the pool barrier, as altered by the second building consent application, will also meet the requirements in both the FOSP Act and NZS 8500, and that 'a building consent should therefore be issued'.
- 2.3.7 However, the authority was still not satisfied that the pool barriers were compliant and on 10 June 2015 it applied for a determination about whether the 'construction of a new dwelling to form part of a swimming pool fence' complied with Clause F4 of the Building Code and Section 8 of the Act.

3. The submissions

3.1 The authority made a submission dated 10 June 2015 with its application for a determination. The submission sets out the background to the situation, and details the authority's concerns with respect to the proposed building work. These include that none of the plans for the first building consent for the construction of the pool and fence 'indicate any future intention of constructing a new detached residential dwelling on the property (including one that would otherwise form part of the barrier around the swimming pool area)'.

3.2 The authority summarises its concerns as:

[The authority's] concerns currently relate to the extent of the immediate pool area (Section 2 of the Fencing of Swimming Pools Act 1987), the other activities within the fenced area that aren't associated with the swimming pool...plus the multiple entry points from the dwelling. Further, although we acknowledge that the Designer has incorporated some measures to aid the closing and latching of the entry point doors from the dwelling into the swimming pool area, the orientation of the building, the amount of the glazing, and use of the internal living space, might encourage the occupants to prop the doors open during hot periods...

In summary, [the authority] is seeking a determination to establish if the design proposals submitted as part a part of Building Consent 150468, for a new detached dwelling to be incorporated into an existing swimming pool enclosure, meets the performance requirements of the NZ Building Code, and the Fencing of Swimming Pools Act 1987.

3.3 With its submission, the authority provided copies of:

- the original application for a building consent for the pool and its barrier
- the first building consent (No. 130961), and its consented plans
- the second application for a building consent (No. 150468) to construct a residential dwelling next to the pool area, and a selection of the plans submitted with the application
- correspondence between the parties
- photos of the owners' property and the area currently enclosed by the pool barrier.

3.4 The owners made a submission dated 15 June 2015 in response to the application for a determination. In this they explain that the pool barrier has been constructed so as to maximise the view from the pool area; and detail the activities that currently take place inside the area surrounded by the pool barrier, and those that occur elsewhere on their property. They state that:

...the consent application for the pool clearly shows the difference between the permanent fence and the temporary fence, later to be replaced by the house. A lot of sweat (and money) has gone into that fence, thinking we were doing the right thing. All done to the [authority's] approved plan.

3.5 They also state that the reason they have not yet applied for a code compliance certificate in relation to the first building consent (as raised in the authority's submission) is because they were advised by the authority to wait until the house had been constructed before doing so.

3.6 A draft determination was issued to the parties for comment on 3 August 2015.

3.7 The owners provided a response by email on 3 August 2015, noting that although the outcome was not as hoped for they would reduce the size of the pool area and amend the consent application.

3.8 The authority initially responded by email on 3 August 2015 accepting the draft. The authority also made reference to its obligations under section 93 in respect of the first building consent.

4. The relationship between the FOSP Act and the Building Code

4.1 Both parties have raised the question of whether the pool barrier, and the area enclosed by it, complies with the FOSP Act.

4.2 I accept that I have no jurisdiction under the FOSP Act: my powers are restricted to considering whether certain matters comply with the Building Code. However, it is helpful to look at the relationship between the FOSP Act and the Building Code.

4.3 I note that the FOSP Act does not specifically require that fencing (including gates and doors) must comply with its 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.

4.4 Section 6 gives authorities a general power to grant exemptions from ‘some or all of the requirements of [the FOSP] Act’, provided that such an exemption ‘would not significantly increase danger to young children’. Section 6(2) allows authorities to impose conditions on such exemptions.

4.5 Section 13B of the FOSP Act provides that its Schedule must be treated as a compliance document. Sections 22 and 23 of the Building Act 2004 provide that building work that complies with a compliance document must be accepted as complying with the relevant provision of the Building Code, although compliance documents are not the only means of establishing compliance.

4.6 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. Likewise, if pool fencing complies with the Schedule of the FOSP Act, it complies with the relevant provisions in Clause F4 of the Building Code, although it is not the only means of doing so.

5. Discussion

5.1 The authority has questioned whether the pool barrier, as altered by the proposed building work, will comply with the Building Code in two respects: the wall of the proposed dwelling and the doors and windows within it, which will form part of the pool barrier; and the area that will be enclosed by the pool barrier, and the activities that occur within it.

5.2 The relevant provisions of the Building Code are:

	Provisions	Limits on application
F4.3.3	Swimming pools having a depth of water exceeding 400mm, 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,...	Performance F4.3.4(f) shall not apply to any pool exempted under section 5 of the Fencing of Swimming Pools Act 1987.

<p>F4.3.5 Barriers to swimming pools shall have in addition to performance F4.3.4:</p> <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 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</p>	
---	--

5.3 The pool barrier, including the doors and windows

- 5.3.1 The pool barrier, including the wall of the proposed dwelling and the doors and windows within it, must comply with Clause F4 of the Building Code. In particular, they must comply with Clause F4.3.4(f) to restrict the access of children under 6 years of age, and Clause F4.3.5 with respect to the gates and doors in them. Clause F4.3.5 sets out the specific performance requirements, in terms of closing and latching that apply to any doors forming part of a pool barrier.
- 5.3.2 As noted in paragraphs 4.5 and 4.6, the Schedule of the FOSP Act has the status of a compliance document with respect to the relevant clauses of the Building Code. The relevant clauses of the Schedule are:
- 9 Operations of gates and doors**
- (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 that latching device when the gate or door is stationary and 150mm from the closed and secured position.
- 11 Doors in walls of buildings**
- 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.
- 5.3.3 There does not appear to be any dispute between the parties about the adequacy of the construction of the main section of the existing pool fence (see paragraph 2.2.4), which will make up the majority of the barrier. Likewise, all of the windows that lead from the house into the pool area are to be fitted with restrictive stays to prevent them being opened further than 100mm and these windows do not appear to be in dispute between the parties.
- 5.3.4 The doors are shown on the plans as self-closing, and the owners assert they will also be self-latching. They are to be fitted with door handles at 1.5m of height to make them difficult for small children to operate. The doors are not sliding doors, and so do not come within the exemption in Clause F4.3.5.
- 5.3.5 I note that as an additional safeguard the internal door leading between the two rooms where the external doors leading into the pool area are located (the master bedroom and the weaving room) are also to be fitted with raised handles and self-closing mechanisms.
- 5.3.6 In the current case, the proposed doors will meet the requirements in Clauses 9 and 10 of the Schedule. Accordingly, they will also comply with the performance requirements in Clause F4.3.5 of the Building Code. There is no need for the exception, as set out in Clause 11 of the Schedule, as the doors have been designed to

comply. The windows and doors, as shown on the proposed plans for the application for a second building consent, comply with those requirements.

- 5.3.7 In its submission, the authority has raised the concern that, because of the design of the proposed dwelling, the owners will be tempted to prop open the self-closing doors during hot weather. In my opinion, this is not a matter that can be taken into account in assessing the compliance of the barrier. The behaviour of the people using the pool and its barrier constitutes a management practice. I have considered the status of management practices in numerous other determinations, and the Ministry's approach to them is now well-established. Just as a party cannot rely on management practices (which will vary between owners) to establish compliance, likewise they cannot use them to claim that a building (or barrier) that is otherwise compliant, may fail to remain so under future owners. There is no more threat that the current owners will prop open the doors and thereby breach the pool barrier, than there is that any other owner or user of a pool barrier will fasten open a pool gate. Such practices, although dangerous and undesirable, cannot be safeguarded against by withholding building consent.
- 5.3.8 In their submission, the owners have asserted that the proposed doors also comply with NZS 8500. While this may well be the case, NZS 8500 is not currently cited as an acceptable solution for Clause F4 and cannot be relied on as such. It can, however, be put forward as an alternative solution. However, there is no need to do so in the current case, as I have found that the doors come within the Schedule of the FOSP Act and as such comply with Clause F4 of the Building Code.

5.4 The area enclosed by the pool barrier

- 5.4.1 The second aspect of the pool barrier that the authority is concerned about is the area that the barrier encloses; the size of the area and the activities that will occur here, and whether this area constitutes the "immediate pool area" for the purposes of Clause F4.3.4 of the Building Code.
- 5.4.2 I note that the area enclosed by the barrier will not change significantly as a result of the proposed new building work – the wall of the dwelling will merely replace the existing southern side of the barrier and the remaining windbreak fencing will be replaced. The area enclosed by the barrier is generally as shown on the consented plans for the original building consent (No. 130961) and was initially agreed to by the authority. However, the authority is now of the view that the barrier does not comply in respect of the area that it encloses.
- 5.4.3 As stated in paragraph 5.3.1, 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 6 years of age to the pool or the immediate pool area.
- 5.4.4 In order to determine whether Clause F4.3.4(f) has been complied with, it is therefore necessary to establish what 'the immediate pool area' is.
- 5.4.5 Although the Building Code refers to 'the immediate pool area' and 'the immediate pool surround', it does not define these terms. 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'.

5.4.6 The term was also considered by the High Court in the case of *Waitakere City Council v Hickman*³. I consider that the following extracts from that 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.

[32]

...So long as it can be demonstrated as a matter of fact that the area surrounding the pool is used for the relevant activity or purpose from time to time and that such activity or purpose is carried out in conjunction with the use of the pool, it does not matter that the activity might also be capable of being carried on independently of the use of the pool. ...

[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.

5.4.7 In addition, the Building Industry Authority (a predecessor to the Ministry) took the view, in Determination 2003/06⁴, 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.

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

5.4.9 It is also appropriate at this stage to refer to NZS 8500, 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'.

5.4.10 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.

³ *Waitakere City Council v Hickman* 1/10/2004, Randerson J, HC Auckland CIV 2003-404-7266

⁴ Determination 2003/06 Sliding and sliding-folding doors giving access to a swimming pool (*Building Industry Authority*) 7 April 2003

- 5.4.11 In several previous determinations I have considered situations where pool owners have sought to include relatively large areas of land within pool barriers. In many of those determinations, I have reached the conclusion that the barriers are non-compliant (see, for example, Determinations 2010/035, 2010/036, 2010/098 and 2010/104).
- 5.4.12 Although determinations are decided on the facts of each case, the reasoning that led me to conclude that the barriers were non-compliant in those cases applies equally here. The significance of the area enclosed within a pool barrier is, as set out in *Hickman*, the greater the area, the more likely it becomes that activities in that area will not be ‘carried on “in conjunction with” the use of the pool’.
- 5.4.13 I note that in this case the area enclosed by the barrier is on the north side of the house. The living spaces and doors all opening out to the north with just the entrance on the south elevation. The area is significant in terms of its physical size, its location immediately adjacent to the house, and also in that it contains a large flat area.
- 5.4.14 The enclosed area currently contains pool plant equipment housings, a spa pool and some paved areas for sitting and sunbathing, and I consider these to be examples of activities that will be carried out in conjunction with the use of the pool. From the photos it appears that, at present, the owners also have a removable volley ball net set up on the grass area next to the pool, and that a court has been marked out on the grass. This is an example of the use of the area for activities that I consider are not carried out in conjunction with the use of the pool.
- 5.4.15 I acknowledge that the owners have elected to have the BBQ, vegetable garden, and sunbathing area outside the barrier. However I consider that the physical size, (which the parties place at between 800 sq. m and 1000 sq. m) and the distance at its furthest of the barrier from the perimeter of the pool, along with the relationship to the site and the dwelling, and the activities likely to occur within the proposed enclosed area mean that the ‘close nexus’ test as set out in the *Hickman* decision and subsequent determinations is not being met. In addition the land at north and west perimeter slopes downhill, such that an adult may be present in those areas and not be aware of a child present in the pool or in close proximity to the pool.
- 5.4.16 I note also that there are a number of mature trees along the fence line and it appears that the owners are in the process of putting in more plantings. It is important for the owners to be aware of the requirements under Clause F4.3.5 that there be ‘no permanent objects on the outside of the barrier that could provide a climbing step’, and the authority must be satisfied that the planting does not compromise the compliance of the barrier.

5.5 The consented barrier and immediate pool area

- 5.5.1 Although it did not form part of the current determination, I have some reservations as to whether the consented pool barrier, as it is currently constructed, would comply with Clause F4 in other respects, due to the nature of the materials used to construct the windbreak fence (see paragraph 2.2.5).
- 5.5.2 The parties disagree as to whether this section of the pool fence was meant to be temporary or not; it was not clear on the plans provided for the construction of the fence that the windbreak fence was a temporary measure and a dwelling was planned. However, given the differences in the types of fencing constructed it would have been reasonable for the authority to raise that question. Irrespective of its intended permanence, the barrier must still comply with Clause F4.3.4, which

requires barriers to be constructed with adequate rigidity and strength, and so as to be capable of preventing people from falling through them. I note that this issue was never tested by the parties, as a code compliance certificate was not applied for.

5.5.3 I note that in constructing the pool barrier the owners have relied on the issuing of the original building consent by the authority, with the inherent approval of the immediate pool area.

5.5.4 While this determination does not consider that consent, I note here that the dwelling marked on the plans in that consent was a considerable distance from the pool area, and it is arguable that there were other outdoor areas adjacent to and north of the existing dwelling in which activities other than those associated with the use of the pool would be likely to occur.

5.6 Conclusion

5.6.1 I conclude that the section of the proposed pool barrier that incorporates two sets of doors and four opening windows, as shown on the plans submitted for the second building consent, complies with Clause F4 of the Building Code. However, given the area enclosed by the barrier, the location with respect to the dwelling and the remaining property, and the activities likely to occur on the large flat area, I conclude the barrier does not comply with the requirement in Clause F4.3.4 to restrict the access of children under 6 years of age to the immediate pool area.

5.6.2 Given my conclusion on the non-compliance of the barrier in respect of the immediate pool area, I consider the authority correctly exercised its powers of decision in refusing to issue a building consent for the proposed building work.

6. What is to be done?

6.1 The owners have ongoing obligations under the FOSP Act to ensure the pool is properly fenced and that the fence complies with the Building Code. It is not for me to say how the pool barrier is to be brought into compliance with the Building Code; that is for the owners to propose and for the authority to accept or reject.

6.2 The owners have stated that they have invested substantial resources in building the existing fence. It may be that parts of it may be salvaged and incorporated within a new design of fence that encloses a smaller area.

6.3 I suggest that the parties liaise to agree on the area that would be appropriately encompassed by the barrier, taking into account my comments in this determination and the rural nature of the owners' property. The owners should then then apply for an amendment to building consent 130961 to reflect the compliant design and the intended location of the dwelling in order that a code compliance certificate be issued.

7. The decision

7.1 In accordance with section 188 of the Building Act 2004, I hereby determine that

- the area enclosed within the pool barrier does not comply with Clause F4 of the Building Code in respect of the immediate pool area
- as the proposed pool barrier does not comply in respect of the immediate pool area, I consider the authority correctly exercised its powers of decision in refusing to issue a building consent, and I confirm that decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 18 August 2015.

John Gardiner
Manager Determinations and Assurance

Appendix A: The legislation, the Acceptable Solution, and NZS 8500

A1. The relevant clauses of the Building Code:

F4.3.3 Swimming pools having a depth of water exceeding 400mm, shall have barriers provided.

F4.3.4 Barriers shall:

- (a) be continuous and extend for the full height 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
- (f) in the case of a swimming pool, restrict the access of children under the age of 6 years to the pool or the immediate pool area.
- (g) restrict the passage of children under the age of 6 years of age when provided to guard a change of level in areas likely to be frequented by them.
- (h) be constructed so that they are not readily able to be used as seats.

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 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.

A2. The Fencing of Swimming Pools Act 1987:

Section 2 Interpretation

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

A3. NZS 8500: 2006 Safety Barriers and Fences Around Swimming Pools, Spas and Hot Tubs:

Paragraph 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 on in conjunction with the use of the pool. For further clarification, including examples, see 2.2 .

Paragraph 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.

Tool sheds, garages, children 's sand pits, vegetable gardens, clothes lines and other children's play 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. Increasing the area and utilities inside the pool area may increase this responsibility. It is essential that a separate outdoor safe play area for children is available directly from the house.

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.

...

2.3.2 Specific requirements for pools

- (f) The pool shall be enclosed by an isolation barrier where a wall of a house contains a child- resistant window and/or child-resistant doorset or doorsets, regardless of the direction of door swing ...

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.