



Determination 2018/017

Regarding compliance of an indoor swimming pool without a barrier at 76 Paetawa Road, Peka Peka



Summary

This determination considers the compliance of a pool that is wholly enclosed within a dwelling but that doesn't have a physical barrier to restrict access by unsupervised children. The determination discusses the exemption from the requirement to have a barrier that was granted under the Fencing of Swimming Pools Act, and the relationship with the current provisions for barriers to residential pools under the Building Act.

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ ("the Act") made under due authorisation by me, Katie Gordon, Manager Determinations, Ministry of Business, Innovation and Employment ("the Ministry"), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The parties to the determination are:
 - the owners of the house, F and H Eisenhofer ("the owners")
 - Kapiti Coast District Council ("the authority"), carrying out its duties as a territorial authority or building consent authority.
- 1.3 This determination arises from a failed inspection of a residential swimming pool. The authority is of the view that the pool without a barrier does not comply with section 162C of the Act². The pool, which is wholly enclosed within the house, was given an exemption under section 5(e) of the Fencing of Swimming Pools Act 1987 ("the FOSPA") when the house was constructed.

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 In this determination unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

- 1.4 The Act was amended on 1 January 2017 to incorporate a set of special provisions relating to residential pools. Section 162C of the Act requires that residential pools have physical barriers that restrict access to the pools by unsupervised children under five years of age, and 162D requires territorial authorities to carry out inspections at least once every three years to determine whether the pool has a barrier that complies with the requirements of section 162C.
- 1.5 The matter to be determined³ is whether the pool without a barrier complies with section 162C or whether a barrier is now required.
- 1.6 In making my decision I have taken into account the submissions of the parties and the other evidence in this matter. The relevant sections of the Building Act 2004 and the FOSPA discussed in this determination can be found in Appendix A.

2. The building and the background

- 2.1 The pool that is the subject of this determination is contained within an 18m diameter dome-shaped, earth-covered house and an adjacent 8m diameter dome. The house is constructed from ferro-cement with a 33.5m² north-facing glass wall to regulate the temperature, and on the north side is an indoor swimming-pool and tropical garden.

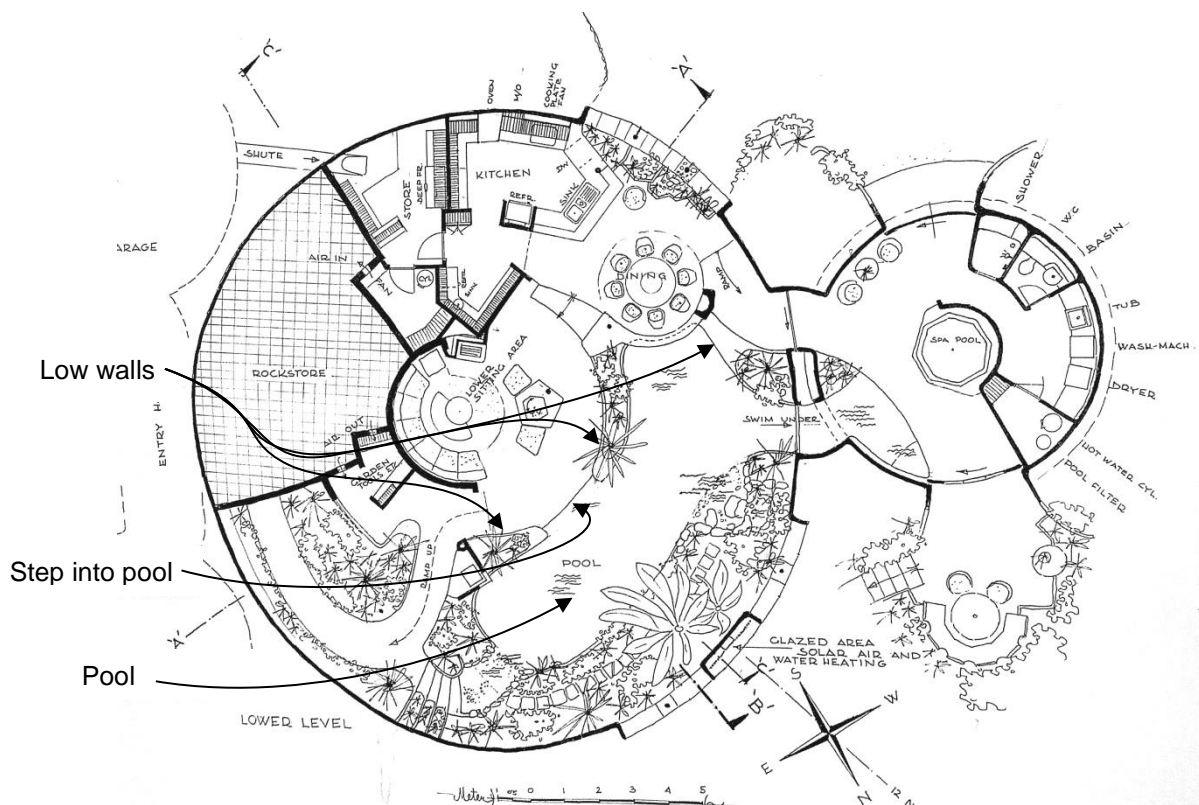


Figure 1: Ground floor plan (not to scale)

- 2.2 The pool is approximately 11m long and part of it is adjacent the living and dining area (see Figure 1). The pool is bound by low walls in some places, low gardens in others, and can be accessed directly from the living area where there is a step into the pool.

³ Under section 177(1)(a) of the Act

- 2.3 The north-facing glazed area and pool are positioned so that most of the midday sun is directed onto the pool, the concrete paths and concrete block walls, which act as heat sinks (see Figure 2). There are no opening windows in the dome, and air exchange is controlled by a series of automatic shutters controlling the volume and direction of air movement produced by fans.

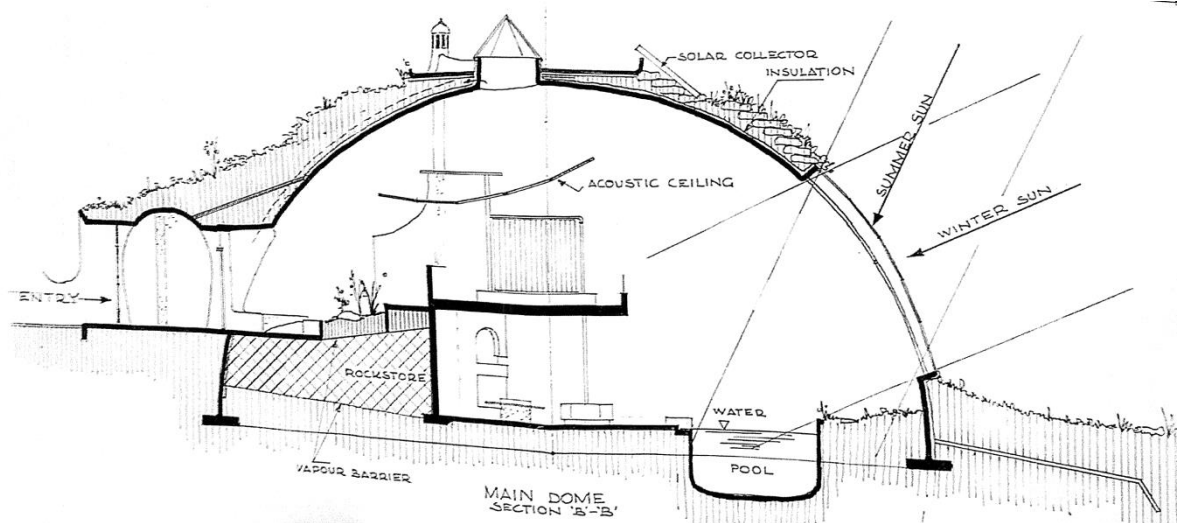


Figure 2: Typical section (not to scale)

- 2.4 The building was constructed over an extended period after the commencement of the FOSPA under a building permit issued before the Building Act 1991 came into force. The building was substantially completed by approximately 1994.
- 2.5 On 28 November 2011, the authority wrote to the owners⁴ to confirm that as the pool was 'wholly enclosed within a building that is principally used for purposes other than the use of the pool' it was exempt under section 5(e) of the FOSPA.
- 2.6 The FOSPA was repealed on 1 January 2017, and special provisions for residential pools (sections 162A to E of the Building Act) came into force.
- 2.7 The 2017 failed pool inspection**
- 2.7.1 On 3 May 2017 the authority carried out an inspection of the property under section 162D of the Act.
- 2.7.2 On 29 August 2017 the authority wrote to the owners, observing that the pool did not have a barrier and a barrier was now required in order to comply with section 162C of the Act.
- 2.7.3 The owners did not agree with the authority's interpretation and considered section 162C(2)(b) meant that the pool could remain without a barrier; the parties then agreed to make a joint application for a determination on the matter.
- 2.7.4 The Ministry has provided guidance⁵ for territorial authorities on the residential pool provisions of the Act. Under section 164 of the Act, if an authority considers on reasonable grounds that a specified person is contravening or failing to comply with section 162C of the Act, the authority must issue a notice to fix to the specified person.

⁴ The letter was in relation to a pool at an adjacent property under the same ownership, designed in a similar style with the pool inside, and it appears that the exemption was applied to both pools.

⁵ See <https://www.building.govt.nz/building-code-compliance/f-safety-of-users/pool-safety/residential-pool-provisions-of-the-building-act-2004-guidance-for-territorial-authorities/>

2.7.5 Based on the information provided, it is my understanding that the authority has given the owners a “failed inspection notice” as a means of providing them the opportunity to remedy the issues that the authority considers do not comply, but the authority has not issued a notice to fix.

3. The submissions

3.1 The Ministry received the application for determination on 28 November 2017. The owners set out the background to the construction of the building. The owners provided a copy of the failed inspection notice, the letter of exemption, and made a submission (in summary):

- The owners cannot fill in the pool and turn it into a garden as they would lose an integral part of the climate control within the dome.
- To fence the area would be ‘prohibitively expensive’, and would destroy the aesthetics and atmosphere of the living environment.

3.2 The authority made no submission.

3.3 A draft determination was issued to the parties for comment on 13 February 2018.

3.4 On 16 March 2018 the owners sought clarification of some aspects of the draft determination, and provided further information regarding the timing of construction. The Ministry responded to the request for clarification on 19 March 2018.

3.5 Further correspondence dated 22 March 2018 was received from the owners, and the owners made a further submission which was received on 28 March 2018 (in summary):

- The pool is situated in an area where the principle purpose is a living area and the pool is essential for solar heat store. Section 5(e) of the FOSPA is still valid and the pool is exempt from the requirement to have a barrier.
- The pool is only accessible when the owners are present and they would always be in close proximity to the pool.
- The dome itself is the barrier to the pool. Access is through two sets of locked doors from the front of the dome and heavy sliding panels from the back. The inner doors are always closed, and there are no opening windows.
- Children would not be present in the immediate pool area without an adult present as they would all be in the same communal area. The pool is visible from all living areas and in the owners’ view is safer than pools which are out of sight and where there is less supervision and where safety of young children is reliant on self-closing safety gates.
- The Regulations that came into force on 1 January 2017 ‘clearly refers to pools constructed after this date otherwise the words “existing” or “constructed before this date” would have been included...’ .
- It was noted in the draft determination that Parliament’s intention in amending the Act and Building Code would not have been to require upgrading of barriers if the building work was carried out in compliance with the bylaws of the time. The pool in this case was constructed after 1 September 1987 and was in compliance with the regulations in force at that time.

- Enforcing the requirement for all new interior pools to have a 1.2m high barrier would make it aesthetically undesirable to have the pool structure integrated within the view of living areas.

3.6 The authority did not provide any submission or response to the draft determination.

4. Discussion

4.1 The legislation

4.1.1 Prior to 1 January 2017, the rules relating to pool barriers were governed by the FOSPA and the requirement under the Building Act to comply with Clause F4 (Safety from Falling) of the Building Code.

4.1.2 The FOSPA was repealed on 1 January 2017, at which time the Building Act was amended to incorporate a set of special provisions relating to residential pools (sections 162A to E) and Clause F9 – Means of restricting access to residential pools was inserted into the Building Code. The purpose of the provisions is to prevent drowning of or injury to young children by restricting unsupervised access to residential pools by children under five years of age.

4.1.3 The provisions of the Act relating to residential pools include: section 162C, which requires residential pools have physical barriers that restrict access to the pools by unsupervised children under five years of age; and 162D, which requires territorial authorities carry out inspections at least once every three years to determine whether the pool has a barrier that complies with the requirements of section 162C.

4.1.4 I note the provisions under section 162C(2) concern existing barriers and the level of compliance of those barriers that must be maintained. In this case, as the pool does not have a barrier, 162C(2) does not apply. However I have included the following discussion for completeness.

4.1.5 Section 162C applies to every residential pool, and subsection (1) provides:

Every residential pool that is filled or partly filled with water must have physical barriers that restrict access by unsupervised children under 5 years of age.

The requirement for a physical barrier to restrict access applies to all residential pools regardless of when the pool was constructed.

4.1.6 Section 162C(2) sets out the means by which compliance with section 162C(1) is established. Under section 162C(2), the physical barrier that restricts access to the pool must comply with the requirements of the Building Code –

- (a) that are in force; or
- (b) that were in force when the pool was constructed, erected, or installed (after 1 September 1987) and in respect of which a building consent, code compliance certificate, or certificate of acceptance was issued (in relation to the means of restricting access to the pool).

4.1.7 Subsection (2)(b) describes the pool barriers and the level of compliance those pool barriers must maintain. For this subsection to apply:

- the pool must have been constructed, erected or installed after 1 September 1987, and
- the barrier to the pool must have been subject to a building consent, code compliance certificate, or a certificate of acceptance.

If those two criteria are met, then 162C(2)(b) applies and the barrier must continue to comply with the requirements of the Building Code that were in force when the pool was constructed.

- 4.1.8 For the construction of a barrier to have been granted a building consent, code compliance certificate or certificate of acceptance, it must have been subject to the relevant sections of the Building Act 1991 which came into force on 1 July 1992. Section 162C(2)(b) is drafted in such a way that it does not include pools constructed after 1 September 1987 but before 1 July 1992. A narrow reading of that provision would require barriers to pools constructed between those dates to comply with the requirements of the Building Code that are currently in force.
- 4.1.9 However, section 5(1) of the Interpretation Act 1999 provides “the meaning of an enactment must be ascertained from its text and in light of its purpose”. Taking into account the wording of section 162C(2)(b) in regards to pools constructed after 1 September 1987, and the transitional and savings provisions for residential pools in sections 450A and 450B, I am of the view that it was not Parliament’s intention to require upgrading of the barriers if the building work was compliant with the bylaws of the time but was constructed in the period after 1 September 1987 but before 1 July 1992 and so was not subject to a building consent, code compliance certificate or certificate of acceptance. Accordingly I conclude that section 162C(2)(b) applies to pools constructed after 1 September 1987 but before 1 July 1992 where construction was permitted and complied with the bylaws at that time.

4.2 The exemption under the FOSPA

- 4.2.1 In this case the pool was constructed under a building permit issued before the Building Act 1991 came into force, and although the building was not substantially complete until approximately 1994, there was no requirement to comply with the Building Code which came into effect on 1 July 1992⁶.
- 4.2.2 The owners were granted an exemption under section 5(e) of the FOSPA as the pool was ‘wholly enclosed within a building that is used principally for a purpose or purposes not related to the use of the pool’. The effect of the exemption was that no barrier was required to restrict access by children to the pool or immediate pool area⁷.
- 4.2.3 The owners are of the view that as the pool was granted an exemption under section 5(e) of the FOSPA and was constructed in compliance with the bylaws of the time, the requirement in section 162C for a physical barrier cannot now be applied; i.e. the requirement under section 162C(1) for the pool to have a physical barrier cannot be applied retrospectively, or alternatively that section 162C(2)(b) is satisfied as the pool complied at the time by way of the exemption.
- 4.2.4 I disagree with this view. Section 162C(1) of the Act requires every residential pool (my emphasis) must have physical barriers that restrict access by unsupervised children under 5 years of age – there are no transitional or savings provisions that would mean pools exempt under section 5(e) of the FOSPA are not required to comply with section 162C(1). An interpretation that pools without a barrier that were granted exemption under section 5(e) of the FOSPA now meet the requirements

⁶ Under section 8 of the Building Act 1991, existing buildings where construction was completed or commenced before part 6 of that Act came into force were not required to be upgraded.

⁷ Section 2 of the FOSPA: “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.

of section 162C would be inconsistent with the purpose of the Building Act and inconsistent with the purpose of the provisions concerning residential pools.

- 4.2.5 I note that other exemptions provided for under section 5 of the FOSPA have been addressed through amendments to the Act, the Building Code or are in some way incorporated into the Acceptable Solutions F9/AS1 and F9/AS2. For example:
- pools with a maximum depth of water not exceeding 400mm were exempt under section 5(b) of the FOSPA – this has been carried through into section 162B of the Act which establishes that the provisions for residential pools only apply to ‘pools with a maximum depth of water of 400 mm or more’ and this is also echoed in Clause F9.3.1 of the Building Code
 - pools with walls no less than 1.2m above ground that met the criteria for an exemption under section 5(a) of the FOSPA would be considered compliant by way of the Acceptable Solution F9/AS1.
- 4.2.6 For completeness I note the transitional and savings provisions for existing residential pools in sections 450A and 450B concern existing barriers and maintaining the level of compliance of those barriers, and reflects the requirements for exemptions under section 5(a) of the FOSPA and the requirements for fences set out in the Schedule to the FOSPA. In this case, as the pool does not have a barrier, those sections of the Act do not apply.

4.3 The house as the barrier to the pool

- 4.3.1 The owners have also put forward the view that as the pool is visible from the majority of the living spaces (with the exception of some small interior spaces), and therefore children are able to be supervised, the house itself constitutes the immediate pool area and the external walls of the dome, in conjunction with some interior doors, form the physical barrier to the immediate pool area.
- 4.3.2 This raises the question of what can properly be considered the “immediate pool area” for the purpose of restricting access by children to the pool. The term “immediate pool area” is defined in the Act as ‘the land in or on which the pool is situated and so much of the surrounding area as is used for activities carried out in relation to or involving the pool’.
- 4.3.3 The Court considered the term “immediate pool area” in relation to the extent of the area and activities carried out in conjunction with the use of the pool in *Waitakere City Council v Hickman*⁸ (refer Appendix B for extracts from that judgement). While that case considered the term in the context of the FOSPA, the definition under the Building Act is little different and I consider the case law remains relevant in relation to establishing what is the immediate pool area for the purpose of the relevant sections of the Building Act.
- 4.3.4 In this case the dome contains all of the household spaces: a mezzanine bedroom, sitting area and office; and sitting, dining, kitchen, and the pool on the ground level, with interior doors leading to a bathroom and storeroom. While it may be the case that the pool is visible from a large proportion of those household spaces, the activities carried out in those spaces are not activities carried out in relation to the use of the pool. In this regard I consider the household spaces within the dome cannot properly be included in the immediate pool area and accordingly the external walls of

⁸ Randerson J, HC Auckland CIV 2003-404-7266.

the dome in conjunction with internal doors to the bathroom, storeroom and guest dome, do not comply as physical barriers to the immediate pool area.

- 4.3.5 The statutory intention is to promote the safety of young children and the requirement for a physical barrier is to ensure that access to the pool by young children cannot take place without the assistance of a supervising adult. In this case, the pool without a physical barrier between it and the rest of the household spaces within the dome that are used for other activities does not achieve the requirement of restricting access to the pool. A young child within the dome is able to access the pool without assistance.

4.4 Conclusion

- 4.4.1 I conclude that the pool does not comply with section 162C(1) of the Act as it does not have a physical barrier that restricts access by unsupervised children under five years of age.

5. The decision

- 5.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the pool wholly enclosed within the house at 76 Paetawa Road, Peka Peka, does not comply with section 162C of the Act.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 30 April 2018.

Katie Gordon
Manager Determinations

Appendix A: The legislation

- A.1 The relevant sections of the Building Act 2004 discussed in this determination.
(The Building Act 2004 can be accessed online at <http://www.legislation.govt.nz>)

162C Residential pools must have means of restricting access

- (1) Every residential pool that is filled or partly filled with water must have physical barriers that restrict access to the pool by unsupervised children under 5 years of age.
- (2) The means of restricting access referred to in subsection (1) must comply with the requirements of the building code—
 - (a) that are in force; or
 - (b) that were in force when the pool was constructed, erected, or installed (after 1 September 1987) and in respect of which a building consent, code compliance certificate, or certificate of acceptance was issued (in relation to the means of restricting access to the pool).
- (3) In the case of a small heated pool, the means of restricting access referred to in subsection (1) need only restrict access to the pool when the pool is not in use.
- (4) The following persons must ensure compliance with this section:
 - (a) the owner of the pool:
 - (b) the pool operator:
 - (c) the owner of the land on which the pool is situated:
 - (d) the occupier of the property in or on which the pool is situated:
 - (e) if the pool is subject to a hire purchase agreement (as that term is defined in the Income Tax Act 2007), the purchaser of the pool:
 - (f) if the pool is on premises that are not subject to a tenancy under the Residential Tenancies Act 1986 but the pool is subject to a lease or is part of premises subject to a lease, the lessee of the pool or the premises.

162D Periodic inspections of residential pools

- (1) Every territorial authority must ensure that the following residential pools within its jurisdiction are inspected at least once every 3 years, within 6 months before or after the pool's anniversary date, to determine whether the pool has barriers that comply with the requirements of section 162C:
 - (a) residential pools other than small heated pools:
 - (b) small heated pools that have barriers that are not exempt, in terms of Schedule 1, from the requirement to have a building consent.
- (2) A territorial authority may accept a certificate of periodic inspection from an independently qualified pool inspector for the purpose of subsection (1) in lieu of carrying out an inspection under section 222.
- (3) If a territorial authority decides not to accept a certificate of periodic inspection from an independently qualified pool inspector under subsection (2), the territorial authority must, within 7 working days of making that decision, give notice to the chief executive of the decision and the reasons for the decision.
- (4) If an independently qualified pool inspector inspects a pool for the purpose of this section and decides that the pool does not have barriers that comply with the requirements of section 162C (subject to any waiver or modification granted under section 67A or 188), the inspector must, within 3 working days of the date of inspection, give written notice to the relevant territorial authority of the decision,

attaching any information that the chief executive requires to accompany the notice.

(5) In this section,—

anniversary date, in relation to a pool, means—

- (a) the date of issue of the code compliance certificate or the certificate of acceptance in respect of the pool; or
- (b) in the case of a pool that did not require a building consent,—
 - (i) the date on which notice was given under section 7 of the Fencing of Swimming Pools Act 1987; or
 - (ii) if subparagraph (i) does not apply, the date on which the existence of the pool came to the knowledge of the territorial authority

certificate of periodic inspection means a certificate that—

- (a) is issued by an independently qualified pool inspector; and
- (b) is in the prescribed form (if any); and
- (c) certifies that a pool has barriers that comply with the requirements of section 162C (subject to any waiver or modification granted under section 67A or 188).

450B Savings provision for existing residential pools

- (1) This section applies to a residential pool that was constructed, erected, or installed before 1 January 2017 (an existing pool).
- (2) An existing pool is deemed to have barriers that comply with section 162C if the barriers—
 - (a) complied with the Schedule of the Fencing of Swimming Pools Act 1987 (as that schedule was in force) immediately before 1 January 2017; and
 - (b) continue to comply with those requirements subject to—
 - (i) any exemption that was granted under section 6 or clause 11 of the Schedule of that Act and that was subsisting immediately before 1 January 2017; and
 - (ii) the conditions of any such exemption.
- (3) Alternatively, an existing pool is deemed to comply with section 162C if all of the following apply:
 - (a) the outside surface of the side walls of the pool is constructed so as to inhibit climbing; and
 - (b) no part of the top of any side wall of the pool is less than 1.2 m above—
 - (i) the adjacent ground level; and
 - (ii) any permanent projection from the ground outside of the pool and within 1.2 m of the walls of the pool; and
 - (iii) any object standing on the ground outside of the pool and within 1.2 m of the walls of the pool; and
 - (c) any ladder or other means of access to the interior of the swimming pool—
 - (i) can be readily removed or made inoperable; and
 - (ii) is removed or made inoperable whenever the pool is not intended to be in use.

Sections 162C, 162D, 450A and 450B were inserted, on 1 January 2017, by section 17 of the Building (Pools) Amendment Act 2016 (2016 No 71).

A.2 The Fencing of swimming pools act 1987 (*repealed on 1 January 2017 by section 19 of the Building (Pools) Amendment Act 2016 (2016 No 71)*)

(This Act can be viewed online at <http://www.legislation.govt.nz>)

2 Interpretation

In this Act, unless the context otherwise requires,—

fence—

- (a) means 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; and
- (b) includes any part of a building and any gates or doors that form part of the fence

gates or doors does not include any door to which clause 11 of the Schedule applies

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

5 Exempted pools

Nothing in this Act shall apply in respect of—

...

- (e) any pool that is wholly enclosed within a building that is used principally for a purpose or purposes not related to the use of the pool:

...

8 Obligations of owner and persons in control of pool

- (1) Every owner of a pool to which this Act applies shall ensure that, except as provided in any exemption granted under section 6, 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.

Appendix B: *Waitakere City Council v Hickman*⁹

B.1 Relevant extract from *Waitakere City Council v Hickman*

[29] Considered in conjunction with s8(1), I reach the following conclusions as to the scope of the immediate pool area:

a) There are several meanings of the term “immediate” in the New Shorter Oxford Dictionary at p 1315 but the most apt is “Nearest, next, or close, in space or order”. The use of that expression indicates that Parliament intended a limited area commencing adjacent to the pool edge. The definition is expressed exhaustively and does not support an expansive reading. The existence of the exemption power in s 6 also indicates a Parliamentary intention to limit the scope of the immediate pool area.

b) Subject to the issue of immediacy I discuss below, the other extent of the immediate pool area is determined by its use. It will extend only so far as the surrounding area is used for activities or purposes carried on in conjunction with the use of the pool.

c) Although the term “use of the pool” is not defined, it is evidence from the definition of “pool” in s 2 that the use of the pool contemplated in the definition of immediate pool area is for swimming, wading, paddling, or bathing.

d) It follows that the activities or purposes carried on “in conjunction with the use of the pool” are activities or purposes carried on in conjunction with swimming, wading, paddling, or bathing or similar.

e) Again by reference to the New Shorter Oxford English Dictionary at p480, the expressing “in conjunction with” connotes activities or purposes which are closely connected, associated or combined with the use of the pool. There must be a 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 plating 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] Although the extent of the immediate pool area is determined in the first place by its use in terms of the definition, the size of the area is not governed solely by that factor. Some weight must be given to Parliament’ use of the expression “immediate”. It must be assumed that the legislature intended that the immediate pool area to be fenced would be relatively confined and that, for example, a fence around the perimeter of the property would not comply with the Act. 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 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.

⁹ Randerson J, HC Auckland CIV 2003-404-7266.