



Determination 2019/008

Regarding the code-compliance of a proposed pool barrier at 43 Burwood Crescent, Remuera, Auckland

Summary

This determination considers the compliance of a proposed pool barrier with Clause F9 – Means of restricting access to residential pools of the Building Code. The determination considers whether the area enclosed by the proposed pool barrier should be included within the immediate pool area.

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 owner of the property, G James, who is the applicant in this determination (“the applicant”), acting through his architect as his agent (“the agent”)
 - Auckland Council carrying out its duties and functions as a territorial authority or a building consent authority (“the authority”).
- 1.3 This determination arises from the applicant’s application for a building consent to construct a new pool, decks and pool barrier on his property. The applicant has obtained a building consent for this building work, but now wishes to revert to an earlier set of plans dated 5 April 2018. The authority has previously refused to issue a building consent based on these plans, on the basis that it considers they do not comply with Clause F9² of the Building Code.
- 1.4 The matter to be determined³ is whether the 5 April 2018 plans for the pool, decks and pool barrier comply with Clause F9 of the Building Code.
- 1.5 In making my decision, I have considered the application, the submissions of the parties, and the other evidence in this matter. I have not considered any other aspects of the Act or Building Code, beyond those required to decide on the matter to be determined.

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, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

³ Under section 177(1)(a) of the Act.

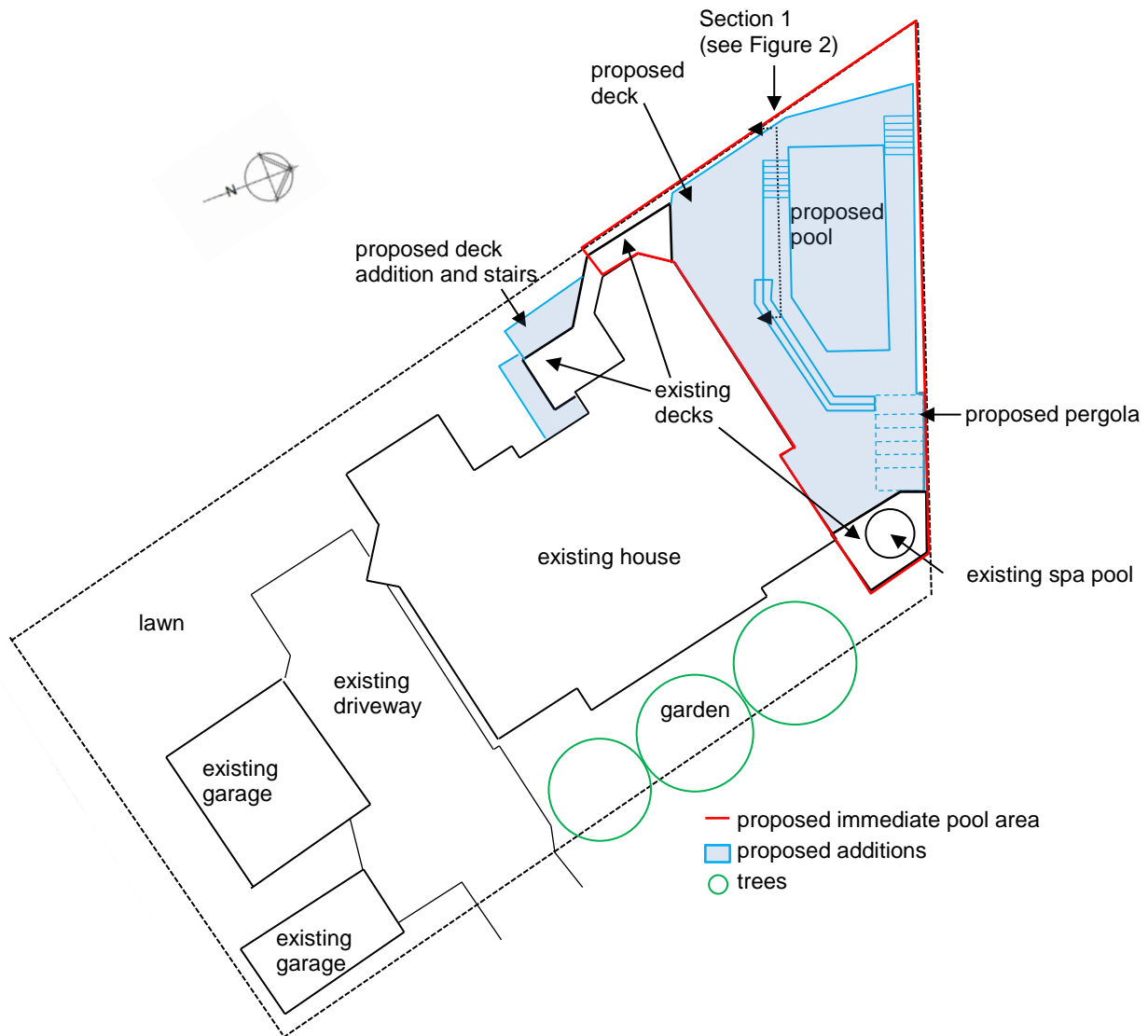


Figure 1: Site plan as April 2018 (not to scale)

2. The building work and background

- 2.1 The applicant's property is a corner section in an established residential area in central Auckland. The property slopes gradually down from its northern-eastern corner. At present the property contains the applicant's house and two garages. On the house's northern side, there is an existing kidney-shaped pool, and an area of decking containing an existing spa pool and pergola.
- 2.2 In January 2018, the agent applied for a building consent (No. BCO10260932) to build a new concrete pool in a similar location to the existing pool, plus new three-level decking with a new pool barrier. I have not seen a copy of the consent application, although I have seen a copy of the plans dated 22 January 2018 that were submitted with the consent application. The authority requested further information about these plans on 20 February 2018.

2.3 In response to the request for information, the agent submitted revised plans dated 5 April 2018 (“the April 2018 plans”). Figure 1 identifies the proposed immediate pool area. A section through the proposed decks is included in Figure 2. A simplified sketch of the April 2018 plans, showing the elements that are relevant to this determination, is included here in Figure 3.

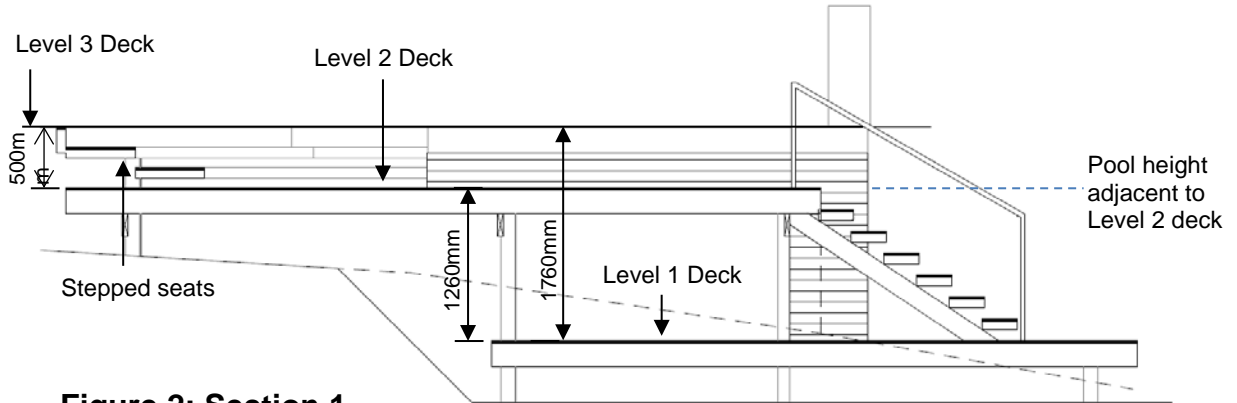


Figure 2: Section 1

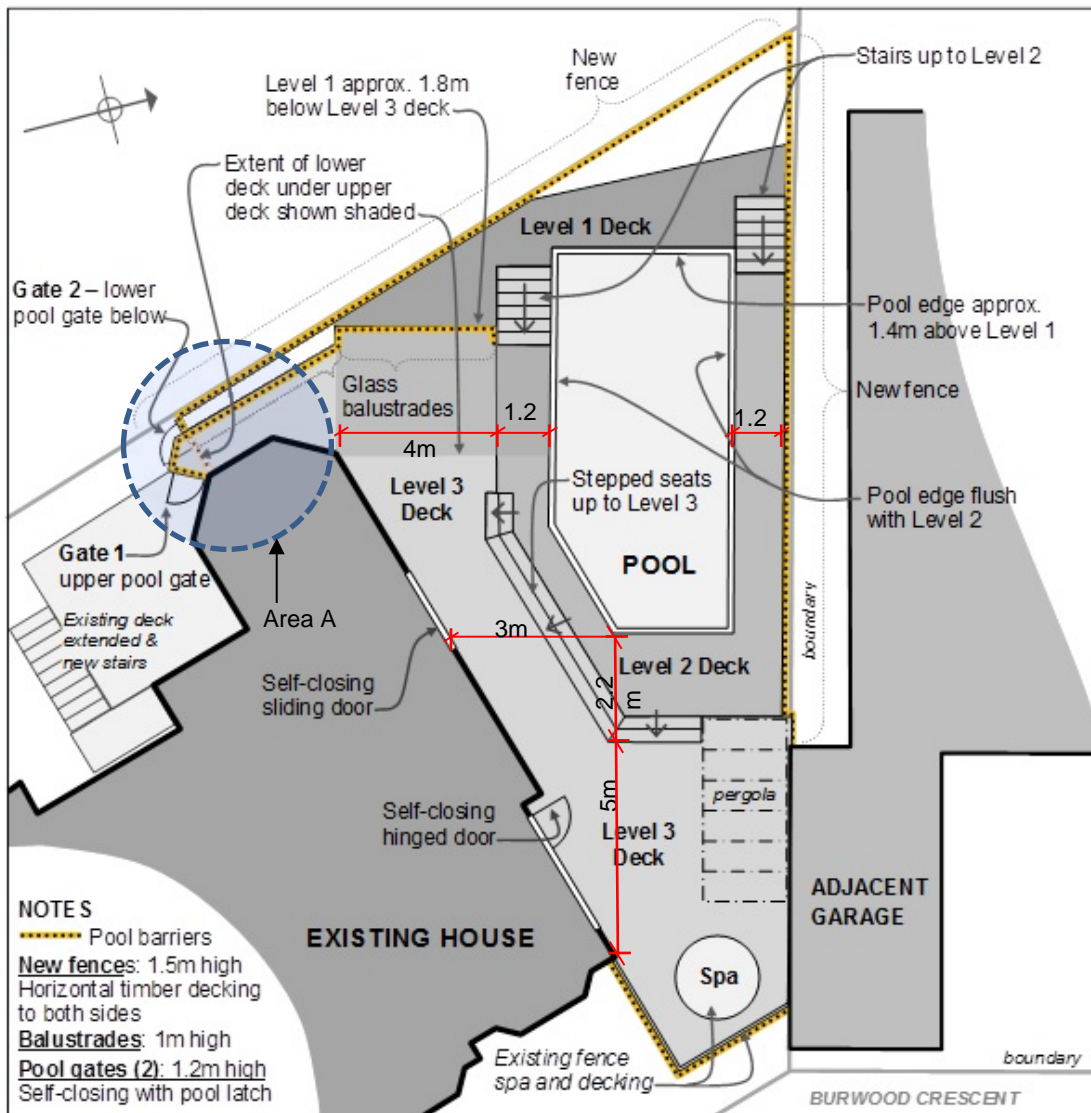


Figure 3: Site plan sketch at April 2018 (not to scale)

- 2.4 The April 2018 plans show that the pool is to be roughly rectangular, with one corner cut off at an angle. The pool is surrounded by decking on three of its sides (“the level 2 deck”). The level 2 deck is to be built at the same height as the pool’s edge. The level 2 deck is between 1.1m and 1.2m wide along the pool’s longer edges, narrowing to 0.8m wide alongside the cut-off corner. At the short north-eastern end of the pool the level 2 deck is approximately 2.2m wide.
- 2.5 At the pool’s north-western end, a flight of stairs on either side of the pool leads between the level 2 deck and the level 1 deck, which is approximately 1.3m lower⁴. The level 1 deck surrounds the north-western end of the concrete pool wall and extends for a short distance around the western end of the applicant’s house.
- 2.6 The level 3 deck is at the same level as the ground floor of the applicant’s house and connects to two existing areas of deck, including the area where the existing spa pool and pergola are located. The level 3 deck can be accessed directly from the house, via two sets of doors, one hinged and one sliding⁵. The April 2018 plans show that both these sets of doors are to be fitted with self-closing mechanisms.
- 2.7 The height difference between the level 1 deck and the level 3 deck is approximately 1.8m. In places, the level 3 deck overhangs the level 1 deck, and this area is shown on the plans as being designated for pool equipment storage.
- 2.8 The height difference between the level 2 deck and the level 3 deck is 500mm. Access between the two levels is via two rows of stepped seats. These stepped seats are 600mm wide, so that at its closest point the edge of the level 3 deck is approximately 1.2m from the pool edge.
- 2.9 On the April 2018 plans, the pool barriers are shown as formed from a combination of the existing fencing around the spa pool and the existing deck it sits on; the wall of the neighbour’s garage; 1.5m high timber fences along the property boundaries (north and north-western boundaries); the sliding and hinged doors; and 1m high glass balustrades along the western end of the level 3 deck. Two 1.2m high self-closing and latching gates are set into the pool barrier, one at the southern end of the level 1 deck (“Gate 2”), and one immediately above it on the southern end of the level 3 deck (“Gate 1”).
- 2.10 The authority requested further information in relation to April 2018 plans and correspondence passed between the parties. The agent provided most of the information requested and the majority of the outstanding matters were resolved.
- 2.11 However, the authority maintained the view that some areas of the level 3 deck were not sufficiently associated with the use of the pool and accordingly the pool barrier would need to be relocated to exclude these areas from the immediate pool area. In addition, the authority considered the pool gate on the level 1 deck was situated too far away from the pool, and would need to be bought closer. The authority referred the agent to Determination 2017/082⁶, which it stated it had based its assessment on. The authority advised the agent of this decision in an email dated 1 May 2018, which read:

1. With reference to the [level 3 deck], the [level 3 deck], will not have a strong enough relationship to the immediate pool area to be considered compatible with the use of the pool and the definition of immediate pool area.

⁴ I have not considered the compliance of the 5 April 2018 plans with Clause F4.

⁵ The compliance of the doors as part of the barrier is not in dispute, so I have not considered it as part of this determination.

⁶ Determination 2017/082 Regarding the compliance of a deck balustrade that forms part of the barrier to a swimming pool (9 November 2017).

From NZBC F9, 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 carried out in relation to or involving the pool.*

As per your response outdoor furniture will be located on that deck which has more of a link to the house, ie dining and lounging than it does to the use of the pool (being that is also one deck tier higher).

You will need to exclude the Upper deck from the immediate pool area and re-design the pool barriers and gate location to suit.

2. With reference to the lower deck in the immediate pool area I accept that the lower area will be used for pool related items- storage of pool equipment.

However you will need to move Gate 2 to the lower deck such that the pool will be in sight from every point at the pool fencing. Unless you can demonstrate why it is placed so far away from the lower deck at the side of the property to be considered as immediate pool area, the gate location will need to be moved.

2.12 The agent replied in an email dated 2 May 2018. The email referred to the commentary in Acceptable Solution F9/AS1⁷, as to the type of activities that may be carried out in the immediate pool area, and noted that these specifically included outdoor furniture.

2.13 The agent also noted the authority had raised the change in height between the level 2 and 3 decks as an issue, and stated that:

The extra height gained is appropriate to allow better supervision of children in the pool. The change in level is not a barrier but an important means of establishing a visual and physical connection with the pool. A barrier would work against this connection. The determination you refer to has a change in level of 2.4m which is almost a storey in height with a balustrade around it. The physical separation is significant. The change in level for the proposed upper deck is only 0.5m and there is no physical separation. The situations are not comparable.

2.14 The authority replied in an email dated 7 May 2018, stating that it maintained its 'earlier assessment of the immediate pool area' and that the upper deck needed to be excluded.

2.15 The agent then submitted two sets of revised plans. The second of these, dated 5 June 2018 ("the June 2018 plans"), show a portion (around half) of the level 3 deck now excluded from the immediate pool area by a glass pool barrier. These barriers are now stated to be 1.2m high and extend around the perimeter of the western portion of the level 3 deck, at the top of the stepped seats. At the eastern end of the seats the barrier turns in to join the house. A self-closing self-latching pool gate has been added to the barrier at this location, to enable access between the excluded area of the level 3 deck, and the portion that is still enclosed within the immediate pool area, namely the area where the spa pool and pergola are located.

⁷ Acceptable Solution F9/AS1 For New Zealand Building Code Clause F9, Means of Restricting Access to Residential Pools.

- 2.16 A simplified sketch of the June 2018 plans, showing the elements that are relevant to this determination, is included here as Figure 4.

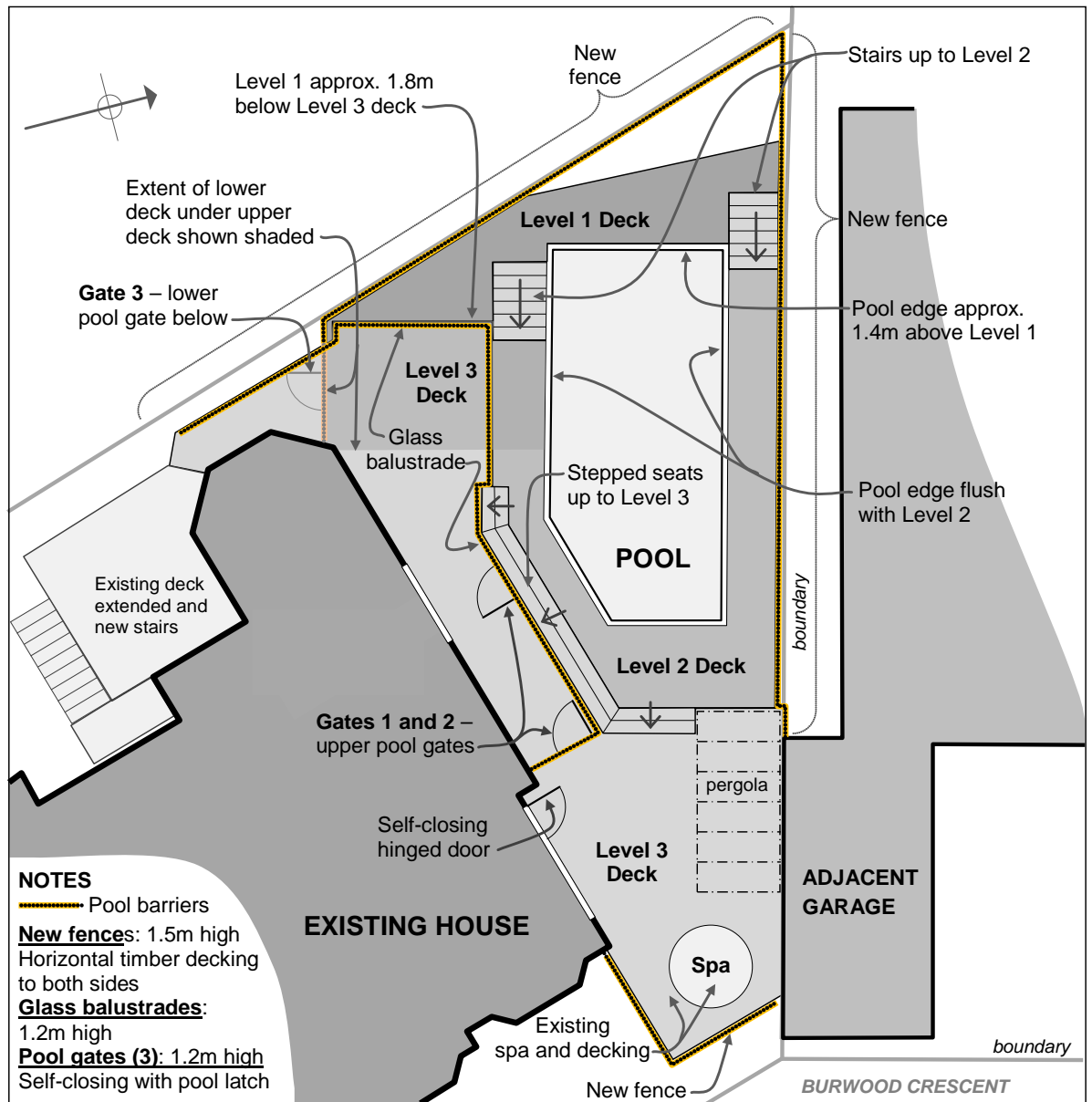


Figure 4: Site plan sketch at June 2018 (not to scale)

- 2.17 The agent advises the authority gave verbal approval for the June 2018 plans as code compliant. The applicant, who still wished to use the April 2018 plans, then applied for a determination as to whether these plans complied with Clause F9 of the Building Code. The Ministry received the application for a determination on 26 June 2018.
- 2.18 Following the application for a determination, I understand the authority issued a building consent. I have not seen a copy of the consent documentation, but the parties advise the consent has been issued based on the June 2018 plans.

3. The submissions

- 3.1 The agent made a submission dated 26 June 2018 with the application for a determination. The submission set out the background to the dispute, and the agent's opinion that 'The proposed layout as shown in the proposal dated 5 April 2018 is permitted under [F9/AS1]'.
- 3.2 In support of this opinion, the agent referred to the commentary in paragraph 2.1 of Acceptable Solution F9/AS1 about the types of activities that may be conducted within the immediate pool area, and stated:
- The [west portion of the level 3 deck] is to be used for lounging, dining and where the outdoor furniture will be located. It meets the description of a permitted activity. It is located 1.2m away from the pool. It is slightly elevated and has a good view over the pool allowing supervision. It is our view that the [west portion of the level 3 deck] has a very strong relationship with the pool.
- 3.3 With respect to the authority's concerns about the change in level between the level 2 and 3 decks, the agent stated that "There is no requirement under F9/AS1 to assess a change in level as being unpermitted." The difference in level between the decks is 0.5m, which is a 'significant' departure from the height difference discussed in Determination 2017/082, referred to by the authority, which was 2.4m. That deck was spatially excluded from the immediate pool area. The applicant's deck is '...close and slightly elevated to allow a close spatial relationship with the pool. There is immediate access to the pool from the deck'.
- 3.4 The agent provided copies of the following:
- the initial plans dated January 2018 submitted with the application for a building consent
 - the April 2018 plans
 - the June 2018 plans
 - correspondence between the parties
 - Determination 2017/082.
- 3.5 On 14 August 2018 the authority acknowledged the application for a determination but made no submission.

4. Draft determination and responses

- 4.1 The draft determination was sent to the parties on 8 August 2018.
- 4.2 On 16 August 2018, the agent responded on the applicant's behalf accepting the draft determination without any additional comments.
- 4.3 On 23 August 2018 the authority accepted the draft determination, but with the following comments regarding the placement of pool barriers in relation to activities related to the pool use (in summary):
- the word 'immediate', which emphasises close proximity, is used deliberately in Clause F9.3.1
 - more activities can take place the further the barrier is from the pool, which increases the likelihood of injury to young children
 - the authority is of the view a barrier should be placed where most effective for safety purposes.

- 4.4 On 12 February 2019 the Ministry sent out a second draft determination.
- 4.5 On 27 February 2019 the agent accepted the second draft determination without any additional comments.
- 4.6 On 8 March 2019 the authority accepted the second draft determination without any additional comments.
- 4.7 I have taken the parties' comments into account and amended the determination as appropriate.

5. Discussion

- 5.1 The agent has applied for a determination about whether the building work, if constructed in accordance with the April 2018 plans, would comply with Clause F9 of the Building Code.
- 5.2 The agent believes the April 2018 plans show a solution that is compliant with the Building Code. Although the authority has now issued a building consent, if the agent's opinion is confirmed in this determination, the agent intends to apply for an amendment to the consent, to enable the building work to be constructed in accordance with the April 2018 plans.
- 5.3 The authority has issued a building consent based on the June 2018 plans. The difference between the April 2018 plans and the June 2018 plans that is central to this dispute is the location of the glass pool barrier, and hence the extent of the level 3 deck enclosed within the immediate pool area, and the location of the level 1 (Gate 2) and level 3 (Gate 1) pool gates.
- 5.4 The authority is concerned the area enclosed within the barriers in the April 2018 plans does not have a 'strong enough relationship' with the use of the pool and therefore the immediate pool area. Part of the reason for the authority holding this opinion is the nature of the activities that the agent has said will occur there, including dining and lounging. The authority considers these activities are more closely associated with the house than the pool.
- 5.5 Further, the authority is of the opinion that the change in height between the level 2 and 3 decks has an impact on the location and boundary of the immediate pool area. The authority has referred to Determination 2017/082 to support this view.

5.6 Legislation

- 5.6.1 The relevant clause of the Building Code is Clause F9 – Means of restricting access to residential pools. The objective of Clause F9 is to "prevent injury or death to young children involving residential pools".
- 5.6.2 The relevant performance requirement is Clause F9.3.1, which reads:
- Residential pools* must have or be provided with physical barriers that restrict access to the pool or the *immediate pool area* by unsupervised young children (ie, under 5 years of age).
- 5.6.3 The dispute in the current case hinges on the term "immediate pool area", including the extent of the area encompassed.

- 5.6.4 The term “immediate pool area” is not defined in the Building Code. It is, however, defined in Section 7 of the Act⁸ as:

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 carried out in relation to or involving the pool

- 5.6.5 I note here the parties in their correspondence and submissions have referred to the need for the plans to comply with F9/AS1. In fact, what the proposed building work must comply with is Clause F9. The Acceptable Solution presents one way of achieving compliance, but not the only way. It is open for the agent to propose an alternative way, provided the performance requirements in Clause F9 are still met.

- 5.6.6 Paragraph 1 of F9/AS1 defines the Acceptable Solution’s scope:

1.0 Scope

This Acceptable Solution provides a means for restricting the unsupervised access of children under 5 years of age to *residential pools*. It describes acceptable methods of *construction* for barriers surrounding pools as well as the *construction* and operation of doors, gates and windows that provide access to an *immediate pool area*.

- 5.6.7 Paragraph 2 then provides guidance on barriers surrounding the immediate pool area. Paragraph 2.1 states:

2.1 Pool barriers

2.1.1 A pool barrier can be a fence but may also take other forms of construction, such as a concrete block wall. The wall of a house or other building may form part of the barrier to an immediate pool area or may enclose the whole immediate pool area (such as with an indoor pool).

- 5.6.8 The comment attached to paragraph 2.1 provides guidance regarding the types of activities that can occur within the immediate pool area:

Comment:

Activities that may be carried out in the immediate pool area are those that involve the pool or are in relation to it. However, an activity may also be carried out independently of the use of the pool. For example, a barbeque and outdoor furniture could be located in the immediate pool area but not a clothes line or vegetable garden.

The use of the immediate pool area as a means of accessing the house from the property boundary or to gain access to other parts of the property from the house would in most cases conflict with the definition of immediate pool area.

- 5.6.9 Both of the parties have referred to this comment in their correspondence and submissions. It should be noted that although it can be taken as guidance, the comment does not form part of the mandatory requirements of the Acceptable Solution.

5.7 Immediate pool area

- 5.7.1 I have considered the issue of what constitutes the immediate pool area and the types of activities that can occur within it in numerous previous determinations. Although many of these determinations refer to a previous version of the Building Code (when the provisions relating to swimming pool fencing were contained within a previous version of Clause F4 Safety from falling and the now repealed Fencing of Swimming Pools Act 1987), in my opinion, the reasoning established in them still applies.

⁸ The same words are used to define this term in the Acceptable Solution F9/AS1.

5.7.2 This reasoning was itself based on the High Court decision in the case of *Waitakere City Council v Hickman*⁹. I consider the following extracts from the *Hickman* decision are relevant to this determination:

[29]

- b) . . . the outer 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 out in conjunction with the use of the pool..
- e) 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 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.

5.7.3 The court considered the immediate pool area is a limited area commencing adjacent to the pool edge. The further away from the edge of the pool that an activity is located, the less likely it will be carried out in relation to or involving the pool. The court went on to discuss the types of activities that may and may not have an association with the pool. The court also acknowledged an activity should not be excluded from the immediate pool area simply because it is capable of occurring independently of the use of the pool. I note the examples given in the comment in F9/AS1 derive from this discussion.

5.7.4 Although the *Hickman* decision was made in relation to the definition of immediate pool area in the Fencing of Swimming Pool Act 1987, and this definition varied slightly from the current definition in the Building Act 2004, I consider the principles it puts forward for considering whether an area is the 'immediate pool area' still apply.

⁹ *Waitakere City Council v Hickman* 1/10/2004, Randerson J, HC Auckland CIV 2003-404-7266.

- 5.7.5 In deciding what constitutes the immediate pool area in this case, I must look at several factors, including but not limited to:
- the nature of the activities that will occur within the disputed area
 - whether the activities will be carried out in relation to and involving the pool
 - the proximity of the decks to the pool and their configuration
 - the other areas on the applicant's property where these and other activities can occur.

Immediate pool area of the April 2018 plans

- 5.7.6 The agent has stated the level 3 deck is proposed for lounging and dining activities. The authority submits the activities of lounging and dining are more closely associated with the house than the use of the pool.
- 5.7.7 People using their residential pool to entertain or relax would commonly be expected to sunbathe, lounge and eat beside the pool. This notion has been discussed in the *Hickman* judgement, which stated the fact an activity can be carried out in an alternative area does not exclude it from the immediate pool area, provided the activity is also carried out in relation to the use of the pool. This is further reflected in a comment within Acceptable Solution F9/AS1 that acknowledges these types of activities can be located within the immediate pool area. Therefore, the use of the level 3 deck for lounging and dining activities does not automatically exclude it from the immediate pool area.
- 5.7.8 There are other areas on the property, such as the garden and lawn area, which can be used for lounging and dining, and where children can play outside when not using the pool. Also, the deck on the western side is proposed to be extended and stairs added as part of the building work, which will likely increase its use.
- 5.7.9 I also consider it likely that people will alternate between the spa pool and the pool due to the close proximity between the two. This is an activity that will be carried out in relation to the pool. Therefore, I am of the view the area around the spa pool is within the immediate pool area because of the likely use of the area and its proximity to the pool.
- 5.7.10 In its submission, the authority refers to Determination 2017/082 in support of its view that the level 3 deck does not constitute part of the immediate pool area, because the level 3 deck is above the level 2 deck. However, the two decks considered in Determination 2017/082 are materially different from those being proposed in the April 2018 plans. In particular, Determination 2017/082 considers a change in height at more than 2.4 metres, while the April 2018 plans show a 0.5m change in height, which I consider to be a relatively minor change in height.
- 5.7.11 The change in height is not the determining factor of whether the level 3 deck is included within the immediate pool area. I am of the view the relatively minor height difference between the level 3 and 2 decks and the proximity of the deck to the pool does not exclude the level 3 deck from the immediate pool area.
- 5.7.12 On the other hand, while the level 2 and level 3 decks have a relatively similar height this does not mean that the level 3 deck should automatically be included, in its entirety, within the immediate pool area.

- 5.7.13 I consider Area A on the level 3 deck (refer Figure 3) to be outside the immediate pool area because it is located around the side of the building. There is an indirect association due to the deck's position in relation to the pool which means it is unlikely to be used for activities in relation to or involving the pool. The further away from the pool, the less likely the area will be used in conjunction with the pool. I accept that the remainder of the level 3 deck will be used for activities carried out in relation to the pool, such as sunbathing and dining.
- 5.7.14 Therefore, I conclude the level 3 deck, excluding Area A, can be included within the immediate pool area because of its proximity to the pool and the activities likely to occur within the area.
- 5.7.15 The level 1 deck is proposed for the storage of pool equipment, which is an activity that can be included within the immediate pool area. However, there are areas around the level 1 deck that I consider are outside of the immediate pool area. I have not seen any evidence these areas, highlighted in red in Figure 5 (it is not clear whether the dashed area is accessible from the level 1 deck), are directly associated with the pool and it is unlikely any activities occurring in these areas will involve the use of the pool. I note most of these areas are located underneath the level 2 and 3 deck.

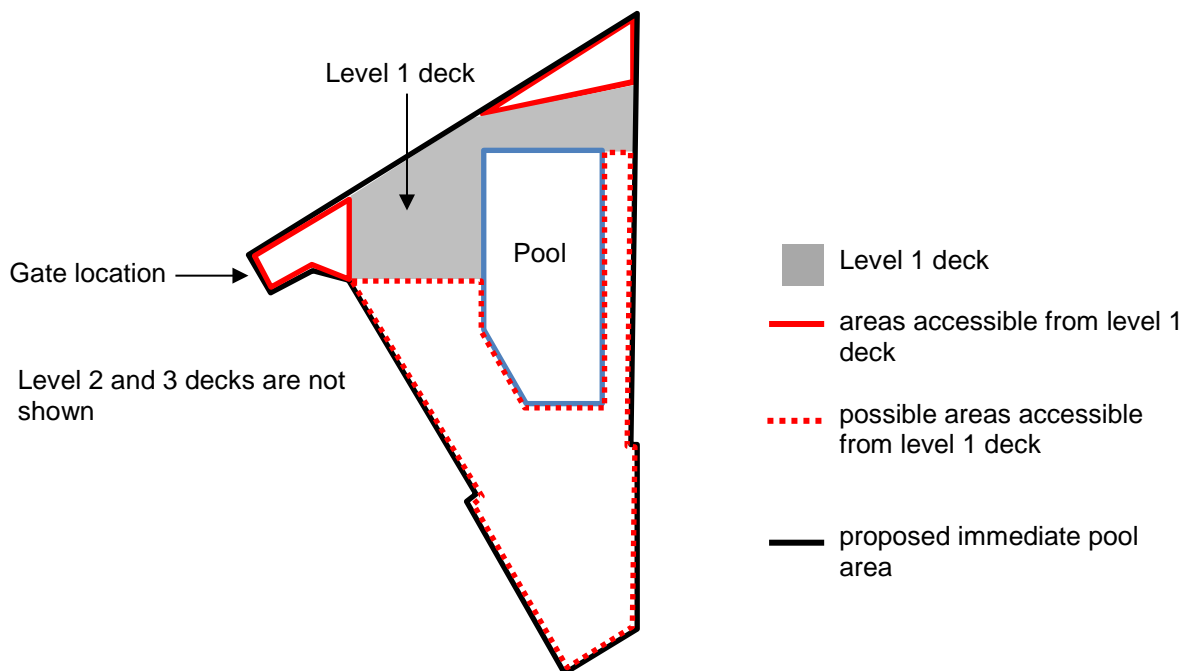


Figure 5: Level 1 deck plan (not to scale)

5.8 Conclusion

5.8.1 Taking these matters into account, I am of the opinion the area enclosed by the pool barriers on the April 2018 plans does not constitute the immediate pool area. The following areas lack a direct association with the pool, meaning it is unlikely activities occurring in those areas will be in relation to the pool:

- Area A on the level 3 deck, see Figure 3
- the areas surrounding the level 1 deck, see Figure 5.

6. The decision

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby determine the 5 April 2018 plans for the pool, decks, and pool barrier do not comply with Clause F9 – Means of restricting access to residential pools of the Building Code.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 26 March 2019.

Katie Gordon
Manager Determinations