



Determination 2019/019

Regarding the code-compliance of a proposed residential pool barrier at 11A Hanene Street, St Heliers, Auckland

Summary

This determination considers whether the barrier to a swimming pool complies with Clause F9 – Means of restricting access to residential pools of the Building Code. This includes an assessment of the compliance of sliding doors that form part of the barrier to the swimming pool.

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 house, J Carter, who applied for this determination (“the applicant”)
 - Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 The matter arises from an application for an amendment to a building consent. The amendment proposed to remove the approved pool barrier and instead rely on three existing boundary fences and the external wall of the applicant’s house as the barrier to the immediate pool area (“the proposed barrier”). The authority is of the view the proposed barrier does not comply with Clause F9 – Means of restricting access to residential pools². As a result, the authority has refused to issue the amendment to the building consent.
- 1.4 The matter to be determined³ is therefore the authority’s exercise of its powers of decision in refusing to grant the amendment to the consent. In determining this matter, I must consider whether the proposed barrier will comply with Clause F9 of the Building Code.
- 1.5 In making my decision, I have considered the submissions of the parties and the other evidence in this matter. See Appendix A for the relevant legislation referred to in this determination. See Appendix B for relevant photographs of the property.

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

2. The building work

- 2.1 The building work that is the subject of this determination is the proposed barrier around a swimming pool the applicant is planning to build on the property. The applicant advises the total area enclosed by the proposed barrier would be around 150m². In addition to the pool, this area would contain a paved patio and a wooden terrace, some raised gardens along the fence line, and an area of lawn (see Figure 1).
- 2.2 The barrier on three sides of the pool will be formed from an existing 1.8m high close-palings wooden boundary fence around the northern, western and eastern sides of the applicant's property.
- 2.3 The plans originally submitted in the proposal for the amendment show a 1.8m high fence with a gate opening into the pool area on the western side of the house where there is an approximately 2m gap between the house and the boundary fence. The plans also show a 1.3m wide gap between the house and the boundary fence on the eastern side (see Figure 1), which was not separated from the immediate pool area.

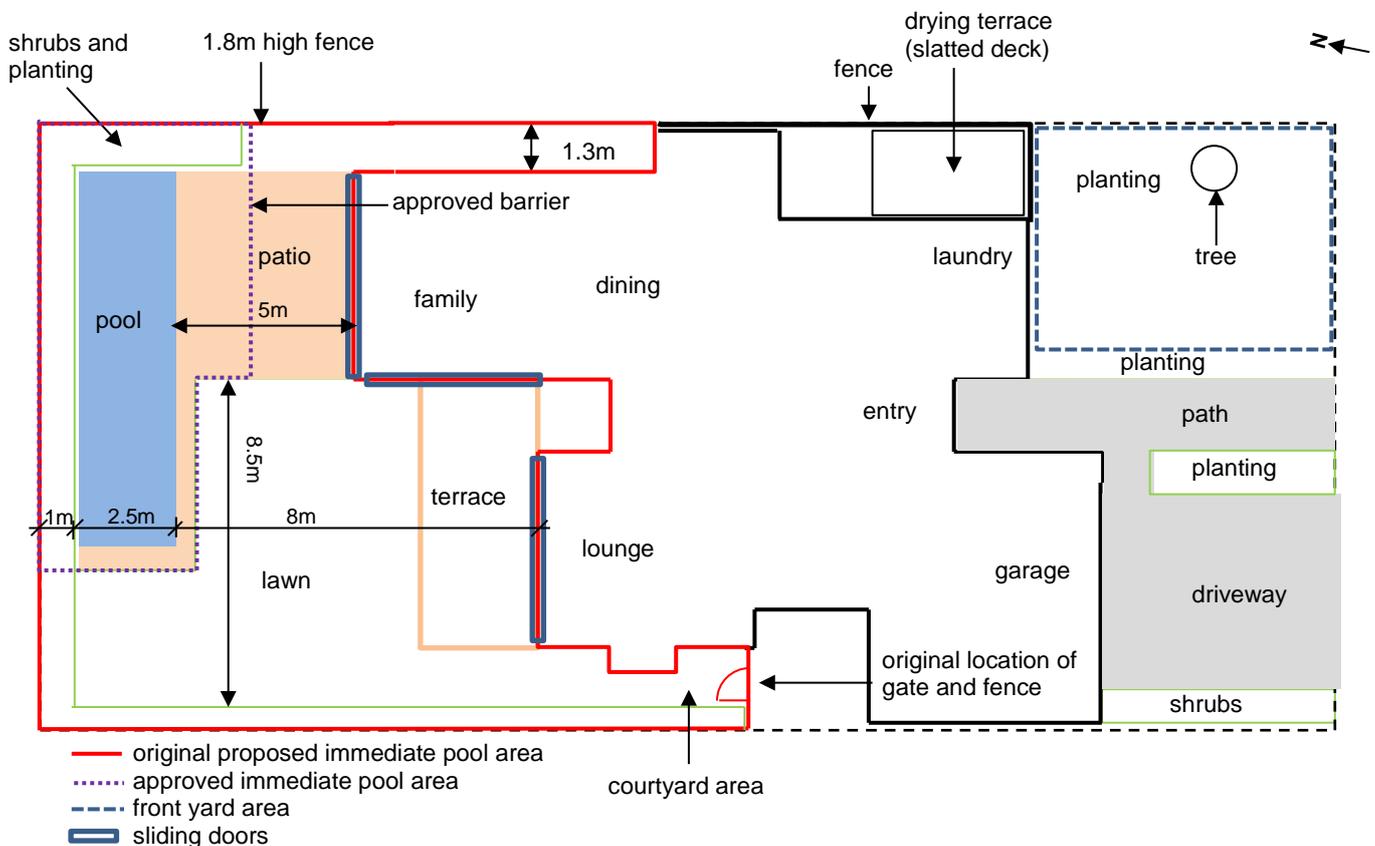


Figure 1: Site plan (not to scale)

- 2.4 The southern side of the pool barrier is proposed to be formed from the external walls of the applicant's house as shown in Figure 1. These walls have three sets of existing sliding doors within them, which as part of the proposed amendment will be fitted with a proprietary self-closing and self-latching mechanisms ("the mechanism"). Two sets of the sliding doors lead from the existing paved patio and lawn into what is described on the plans as the applicant's family room. The third sliding door leads from the existing terrace into the lounge. The sliding doors are approximately 2.6m in height, and all have two sliding leaves and one fixed leaf.

- 2.5 The mechanism's product technical statement⁴ dated 8 November 2017 indicates it can be used to modify existing door sets of all 'styles, sizes and configurations'. It describes its operation as 'manual opening of door-panel, automatic self-close and self-latch'. On 'slide door-set configurations' the mechanism acts to restrict the maximum opening of the first door panel to between 800mm and 950mm, and prevents second and subsequent panels from being moved 'under normal door operation'. The self-closing part of the mechanism automatically closes the first panel in a door-set 'from open positions greater than 150mm (to the maximum length of the closer) to the fully closed and [self-latched] position'. The self-latching part of the mechanism is to be fitted at 1500mm above the internal floor level.
- 2.6 The product technical statement asserts the mechanism is fully compliant with the Act and Building Code as an alternative solution developed in accordance with NZS 8500:2006⁵.

3. Background

- 3.1 On 19 September 2017, the applicant, acting through a builder, made an application to amend the building consent for the pool (no. B/2017/1411). The amendment involved removing the approved barrier shown on the consented plans (see Figure 1), and instead adding self-closing and self-latching mechanisms to the three sets of existing sliding doors in the walls of the applicant's house, so the walls would form part of the pool barrier, as described in paragraph 2.2.
- 3.2 On 7 November 2017, the authority wrote to the applicant requesting further information about the application for an amendment, and asking for revised plans to be submitted 'demonstrating compliance'. The letter advised the proposed amendment 'does not comply with [the Acceptable Solution] F9/AS1⁶' because:
- the proposal uses 'the whole back yard as the immediate swimming pool area', and this is 'not permitted'
 - the door with the new self-latching, self-closing door mechanism that opens out into the existing terrace 'cannot be used as an access point to the immediate pool area'
 - the proposed pool gate swings in the 'wrong direction' and 'cannot be outside the line of site from the front of the building facing the pool area'
 - the door with the new self-latching, self-closing door mechanism leading to the patio area can be used, provided the plans 'maintain the current position of the pool fence but relocate it in line with the house instead of the planter as shown on the original application'.
- 3.3 The applicant then contacted the authority, and email correspondence passed between them, setting out their respective views on the matter.
- 3.4 In summary, the applicant was of the view the area to be enclosed by the proposed barrier was the immediate pool area and the proposed barrier complied with Clause F9 of the Building Code, the Acceptable Solution F9/AS1 and relevant legislation.

⁴ A product technical statement summarises key details about a building product or system and is intended to help demonstrate compliance with the Building Code. The concept of product technical statements was developed by the Ministry.

⁵ New Zealand Standard NZS 8500:2006 Safety barriers and fences around swimming pools, spas and hot tubs.

⁶ Acceptable Solution F9/AS1 for Clause F9 – Means of restricting access to residential pools.

The applicant referred to the High Court decision of *Waitakere City Council v Hickman*⁷ (“the Hickman decision”) to support his view.

- 3.5 The authority maintained its view the ‘proposal to extend the immediate pool area is not acceptable under the requirements of [F9/AS1]’ as the ‘immediate pool area is for activities only associated with the pool’. In the authority’s opinion, the area enclosed by the applicant’s proposed barrier went beyond this and was ‘excessive’. The authority relied on its internal Swimming Pool Code of Practice⁸ and Determination 2007/076⁹ to support its view. The authority declined to grant the amendment to the consent on these grounds.
- 3.6 The applicant applied for a determination and this was received by the Ministry on 9 February 2018.

4. The submissions

4.1 The applicant made a submission with the application for a determination. The main points of that submission can be summarised as follows:

- the proposed amendment to the building consent complies with relevant legislation
- nowhere does the Act prescribe a maximum size for an immediate pool area
- Determinations 2007/95¹⁰, 2015/012¹¹ and 2015/039¹² all support the applicant’s position as they concerned similarly sized immediate pool areas and activities to his own. The immediate pool area in Determination 2007/95 was 300m², which is approximately double the size of the applicant’s proposed area of 150m².

4.2 The applicant provided a document outlining the size and uses of the various outside areas on the property. These included:

- front garden and drive area – 122m²
- drying terrace and bin storage area outside the laundry – 18m²
- courtyard outside the study and garage, used for growing herbs and potted plants – 18m²
- storage area at the side of the house, used for storing pool equipment – 9m²
- the proposed immediate pool area at the rear of the house – 150m² that encompasses:
 - the swimming pool – 25m²
 - lawn area for sitting and sunbathing – 45m²
 - ‘Open paved area in sun for sitting, sunbathing with friends and family’ – 26m²
 - barbecue area – 4m²

⁷ *Waitakere City Council v Hickman* [2005] NZRMA 204.

⁸ A guidance document written by the authority for its use when assessing pool compliance.

⁹ Determination 2007/76 Refusal of a code compliance certificate for a swimming pool (17 July 2007).

¹⁰ Determination 2007/95 Decorative elements associated with a swimming pool (24 August 2007).

¹¹ Determination 2015/012 Compliance of pool barriers in relation to the immediate pool area for a proposed swimming pool (27 May 2015).

¹² Determination 2015/039 Regarding the refusal to issue a compliance certificate and the issue of a notice to fix in respect of compliance of pool barriers to a swimming pool (15 June 2015).

- terrace – 21m²
- ‘low hedging plants in front of fence’.

The applicant noted in this document that the immediate pool area did not contain either a washing line (this was located elsewhere) or a vegetable garden.

- 4.3 The applicant also provided a further document, entitled ‘Outline of how we use our Immediate Pool Area’. This document outlines how the applicant used a pool at a previous property and they wished to continue using their new pool area in the same way:

We do not want a fence within a fence scenario in our smaller back garden. We want to be able to get out of the pool and sunbathe on the lawn or open terrace area and retreat to the shaded part of our “immediate pool area”. We just want to be able to enjoy our surroundings with our friends and family members.

We currently have a barbeque, dining table [seating for 8] in the shade under a louvre roof. A small grassed area and a small uncovered terrace with seating for 5...

The size of the “immediate pool area” is surely determined by how it’s used. We need and want the area we’ve indicated in our plans as it suits our use. At the furthest point we cannot be any further away from the pool than 9 metres most of the time it would be a lot less. We would have no trouble seeing and reaching a child that may fall in.

- 4.4 The applicant also provided copies of:

- the application for an amendment to the building consent
- plans relating to the proposed pool and immediate pool area, including the revised plan submitted on 7 November 2017
- the product technical statement dated 8 November 2017, supplied by the producer of the self-closing self-latching door mechanism
- correspondence between the parties, and between the applicant and the Ministry
- an extract from the authority’s Swimming Pool Code of Practice (undated)
- Determination 2015/012.

- 4.5 The authority acknowledged the application for a determination, and stated (in an email dated 2 March 2018) that it:

...does not consider the whole back yard should be regarded as within the ‘immediate pool area’...will accept an endorsement to the site plan providing for the pool gate to swing away from the immediate pool area’.

4.6 The first draft and submissions in response

- 4.6.1 A first draft of this determination was sent to the parties on 17 May 2018. The draft determination only considered the area encompassed by the barrier and did not consider the compliance of the barrier. The draft determination concluded the proposal to encompass entire backyard area could not be described as the “immediate pool area” and there was a lack of alternative outdoor living areas. The draft considered the authority correctly exercised its powers of decision by refusing to grant the amendment to the building consent because the proposed barrier in relation to the immediate pool area did not comply with Clause F9.

- 4.6.2 On 21 May 2018 the authority accepted the draft determination and made no further comment.

- 4.6.3 On 28 May 2018 the applicant did not accept the draft determination and provided the following comments (in summary):
- The activities fell within the “time to time” example found in the *Hickman* judgment and Determination 2015/039. The judgement included activities within the immediate pool area that might also be capable of being carried out independently of the use of the pool from time to time.
 - The possible future use of the area is not a relevant consideration.
 - There is no requirement in the legislation for an “extra alternative outdoor space”. However, the applicant considered the outdoor area (“the front yard area”) at the front of the building, which is about 80m² would be an appropriate alternative outdoor space. The front yard area is larger than the lawn next to the swimming pool.
 - The draft determination has established there is “no maximum physical size” for an immediate pool area. The application was on the basis of the immediate pool area and as there is no maximum size, it should comply.
 - The draft determination did not confirm whether the sliding doors complied with Clause F9.
- 4.6.4 From 12 June – 14 August 2018 there was ongoing correspondence between the applicant and the Ministry, in regard to the immediate pool area and the front alternative area. The applicant also requested the scope of the determination be expanded to include the compliance of the sliding doors with Clause F9.
- 4.6.5 On 22 August 2018 the authority provided marked up plans showing the approved immediate pool area and the proposed amendment to the immediate pool area. The authority provided the following comments:
- The authority considered it likely the lawn would be a play area and was not associated with the pool.
 - In regard to the proposed alternative area the authority noted there were wood chips on the ground, and a small hedge to negotiate before being able to access the furniture.
 - The authority is of the view the west-side gate should be located at the corner of the building.
 - The authority has not received any information to establish the mechanism on the sliding doors will “comply with F9/AS1”. The authority referenced that the mechanism proposed has a feature that allows the closing system to be disconnected.
 - There has been no confirmation of the width of the doors to “show compliance to F9/AS1”.
- 4.6.6 On 22 August 2018 the applicant responded with the following comments:
- The area adjacent to the terrace and up to the stone edge of the pool is a grassed area, which is for sunbathing and sun loungers. A fence along the lawn/patio border, as indicated by the authority, would hamper use of the pool.
 - The patio area is for chairs and tables and is associated with the use of the pool. The lawn area is part the immediate pool area under the Building Act.

- The applicant noted that “the homeowner had the responsibility to determine the activities involved in the use of their pool”.
- An amended plan had already been supplied to the authority showing the new location of the gate and that it opens away from the pool area.
- The technical information for the self-closing and self-latching mechanism was supplied to the authority.

4.6.7 On 3 September 2018 the authority responded, noting it would consider the revised November 2017 plan for the amendment after the determination is finalised. It also identified there was a 500mm wide strip of paving between the approved barrier location and the grassed area. The authority is of the view the area at the front of the building is an unsuitable play area and the grassed area is a play area.

4.6.8 On 3 September 2018 the applicant responded to the authority’s submission:

- the 500mm strip around the edge of the pool cannot be considered a pathway and a barrier would reduce it even further
- the sliding doors meet the criteria of preventing unsupervised children from accessing the pool area
- the hedge at the front of the building can be partially removed to allow for easy access
- the authority previously indicated the sliding door to the patio area would comply.

4.6.9 On 9 September 2018 the applicant made another submission noting the proposed front yard area was more appropriate as a “play area” when compared to Ministry of Education requirements for pre-school children play areas than the grassed area beside the pool.

4.7 The second draft and submission in response

4.7.1 A second draft was issued to the parties on 12 October 2018, which included an additional aspect regarding the compliance of the doors as part of the barriers to the pool. The second draft determination concluded the backyard area could not be described as the “immediate pool area”. The draft also concluded the use of the mechanisms on the sliding doors as part of the proposed barrier did not comply with Clause F9. Therefore, the draft concluded the authority correctly refused to issue the amendment to the building consent.

4.7.2 On 29 October 2018 the authority accepted the second draft determination without comment.

4.7.3 On 24 November 2018 the applicant responded disagreeing with the decision of the second draft determination. The applicant provided a further submission, which commented on:

- the distance from the pool edge to the immediate pool area
- a description of the other outdoor areas around the building
- the activities within the proposed immediate pool area
- the number of compliant doors that could lead to an immediate pool area
- the mechanism’s ability to be disabled and its compliance with NZS 8500

- the status of management practice in regard to keeping doors open
- 4.7.4 The manufacturer of the mechanisms provided a submission, which included the following relevant comments (in summary):
- Acceptable Solutions are non-mandatory, and NZS 8500 has been “endorsed” by the Ministry.
 - The mechanism meets the requirements of Clause F9 through compliance with NZS 8500, referring specifically to paragraphs 2.3.2, 3.7.1 and 4.6 within the Standard.
 - The manufacturer has not promoted the ability for a person to utilise the feature to disable the self-closing feature in the mechanism’s data sheet, specification, or in any correspondence.
 - A person could disconnect the mechanism in an emergency or for pool servicing.
 - The mechanism has not been designed to disconnect and it would require some effort to disable it, whereas a gate is more easily unscrewed.
 - In the 14 year history of these mechanisms being used there have been no reported child drowning deaths.

5. Discussion

5.1 The legislation

5.1.1 Swimming pools and spa pools present a risk to young children. Building Code Clause F9 aims to prevent injury or death of young children involving residential pools, by requiring physical barriers that restrict access of unsupervised young children to the immediate pool area.

5.1.2 Functional requirement F9.2 states:

F9.2 Residential pools with a maximum depth of water of 400 mm or more that are filled or partly filled with water must have means of restricting access that prevents unsupervised access by a child under 5 years of age.

5.1.3 The relevant performance criteria:

F9.3.1 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).

F9.3.2 Barriers must either—

(a) surround the pool (and may enclose the whole or part of the immediate pool area); or...

F9.3.4 Where a building forms all or part of an immediate pool area barrier,—

(a) doors between the building and the immediate pool area must not be able to be readily opened by children, and must either—

(i) emit an audible warning when the door is open; or

(ii) close automatically after use: ...

5.1.4 The authority in much of its correspondence with the applicant has referred to the need for the proposed barrier to comply with F9/AS1, which is one of the Acceptable Solutions for Clause F9. This was incorrect. It is important to note what is required is compliance with the Building Code, not the Acceptable Solution. An Acceptable

Solution provides one way, but not the only way of achieving compliance. As the Building Code is performance based, it is open to the applicant to propose an alternative means of establishing compliance.

5.2 The immediate pool area

5.2.1 Immediate pool area is defined in section 7 of the Act and in F9/AS1 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*

5.2.2 The meaning of the immediate pool area has previously been considered by the High Court in the *Hickman* decision, in relation to the now repealed Fencing of Swimming Pool Act 1987, and this judgment has been referred to by both the parties in their correspondence and submissions.

5.2.3 I have also previously considered this issue in numerous determinations, including several since the new residential pool barrier regime came into force on 1 January 2017. Following the lead set in *Hickman*, these determinations consider the types and sizes of spaces that can be considered as constituting the immediate pool area, and the types of activities and amenities that can occur within them. For simplicity I will refer to these as the “immediacy” and “close nexus” tests.

5.2.4 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 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] 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’s 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 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.

5.2.5 These two aspects of the immediate pool area, the close nexus relationship of the activities carried out in conjunction with the use of the pool and the immediacy of the pool barrier to the pool itself, were summarised in *Hickman* as follows:

[52] ... The scope of the immediate pool area is determined in the first instance by the extent to which that area is actually used for activities or purposes properly regarded as taking place in conjunction with the use of the pool for its usual purposes of swimming, wading, paddling or bathing.

[53] Activities in conjunction with the use of the pool need not occur exclusively in conjunction with such use and are not to be excluded from the immediate pool area merely because they are capable of occurring independently of the use of the pool.

[54] But to qualify as an activity or purpose in conjunction with the use of the pool, the activity or purpose must be closely connected, associated or combined with the use of the pool. As well, the area must be sufficiently confined so that it may properly be described as being in the “immediate” area of the pool.

[55] The size of the immediate pool area cannot be defined with precision and will depend on the circumstances of each case. ...

5.2.6 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. Making this assessment is a matter of considering the likely activities that will occur in the area, and whether these will be carried out in relation to and involving the pool. It also involves assessing the proximity of the barrier to the pool.

5.2.7 In the current case, the dispute has hinged not so much on the facilities or features within the area (although the applicant has helpfully described what these will be), but rather the size of the area that will be encompassed by the proposed barrier. The authority is concerned about all of the land representing the back yard of the applicant’s house being brought within the immediate pool area. In its view, this area is ‘excessive’ and accordingly compliance with Clause F9.3.1 has not been achieved.

5.2.8 The applicant has stated there is no ‘specified maximum’ size for the immediate pool area. This is correct insofar as there is no prescribed size for an immediate pool area. However, as noted in *Hickman*, the area must be sufficiently confined so as to be properly described as being in the “immediate” area of the pool. 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.

5.2.9 In the current case, the applicant has advised the only facilities within the area will be for entertaining, and the immediate pool area will be for this purpose. The proposed area encompasses an area of lawn, a paved area, a barbecue area, and the shaded terrace. The applicant described various activities including sunbathing on the lawn or patio, “retreating” to the shaded terrace, and barbecuing and dining.

- 5.2.10 I accept that outdoor living and entertainment can take place in the proposed immediate pool area, sometimes in conjunction with the use of the pool and sometimes not. *Hickman* established such activities “are not to be excluded from the immediate pool area merely because they are capable of occurring independently of the use of the pool”.
- 5.2.11 However, simply because a wide range of activities can be carried out in relation to the use of the pool, it does not necessarily follow that the immediate pool area should be expanded in order that it encompasses all of the area(s) where these activities may occur. The greater the area enclosed within the barrier to allow for a range of activities that could be carried out in conjunction with the pool, the further from the pool the barrier will be and at some point it will no longer meet the “immediacy” test as set out in *Hickman*. In addition, the greater the area enclosed within the barrier, the greater likelihood that the area will be used for activities that do not meet the “close nexus” test i.e. those that are only remotely or indirectly associated with the use of the pool.
- 5.2.12 There are a number of factors that influence the likelihood of activities being carried out in the immediate pool area that are only remotely or indirectly associated with the use of the pool. In this case these include, but are not limited to:
- that the immediate pool area consists of a large portion of the outdoor space available on the property, including the only significant section of lawn
 - the limited availability of other areas on the property that provide a suitable alternative space for activities with a remote or indirect association to the pool
 - the direct relationship between the interior living spaces of the house and the outdoor spaces for various activities. In this case all of the outdoor space off the living areas is within the proposed immediate pool area.
- 5.2.13 Taking into account these factors, I am of the opinion that the area proposed to be enclosed by the pool barrier cannot properly be described as “the immediate pool area” and for this reason the proposed barrier does not comply with Clause F9 of the Building Code.
- 5.2.14 In reaching this decision I have taken into account the applicant’s submissions regarding the use of other areas on the property.
- 5.2.15 I acknowledge the applicant has referred to previous determinations that have considered, and allowed, immediate pool areas similar in size and amenities to the one that he has proposed. However, what is material in the current case are the uses that are likely to be carried out in the proposed immediate pool.
- 5.2.16 While I am not bound by previous decisions, I consider those determinations do not support the applicant’s proposed immediate pool area. Determination 2007/095 was limited to the inclusion of gabions within the immediate pool area and did not consider the size of that area. Determination 2015/012 did not consider whether the immediate pool area met the “immediacy” test. Determination 2015/039 was limited to whether the immediate pool area could include a lawn area.
- 5.2.17 In addition, the proposed immediate pool area includes sections around the east and west sides of the building that is not easily observable from the main pool area. A supervising person in this area will not be aware of children and their activities in the immediate pool area and vice versa. I note that the applicant has indicated this concern will be addressed through the inclusion of gates to exclude these areas from the immediate pool area.

5.2.18 In conclusion, I am satisfied the proposed immediate area cannot properly be described as “the immediate pool area”, and for this reason the proposed barrier does not comply with Clause F9 of the Building Code. While I have reached this conclusion I note this does not mean the immediate pool area must be restricted to what was originally approved, but simply that the area as proposed in the amendment application encompasses more than the immediate pool area.

5.3 The sliding doors

5.3.1 The applicant has also asked that I consider the code-compliance of the existing sliding doors that act as part of the barrier to the proposed immediate pool area. The sliding doors are proposed to be fit with self-closing and self-latching mechanisms.

5.3.2 Given that I have already concluded that the area currently proposed to be enclosed by the barrier cannot properly be described as the immediate pool area, there is no need for me to go on to consider the compliance of the proposed barrier in respect of the sliding doors that form part of that barrier. However, I will consider the compliance of a barrier in respect of the incorporation of one or more of the doorsets, as an alternative proposal may yet be put to the authority that incorporates one or more sets of doors from the house.

5.3.3 Whatever form of barrier is chosen, to access the immediate pool area to use the pool the barrier must be breached. For a barrier to comply with the performance requirements in Clause F9 it must prevent the breach of the barrier continuing longer than is required for simply accessing the immediate pool area. This is clear in the requirement in Clause F9.3.3(c) that gates in pool fences must be self-closing, and Clause F9.3.4(a) that doors in external walls opening into the immediate pool area must be either self-closing or alarmed.

5.3.4 A comment in F9/AS1 notes how doors that satisfy the Acceptable Solution (my emphasis):

...enable the barrier to the pool to remain effective except when the doors are **briefly** used for access.

5.3.5 This comment illustrates the intent to minimise the length of time the barrier is open and ineffective. When the pool is in use, reinstated barriers prevent children entering the area without the knowledge of those in the immediate pool area. The requirement for a door to close automatically or have an alarm prevents the barrier from accidentally or intentionally left open.

5.3.6 I have received limited information regarding the sliding doors design. The information provided indicates the sliding doors have three leaves, of which two are openable.

5.3.7 If the sliding doors form part of the proposed barrier, they must comply with the performance requirement Clause F9.3.4, that is they must (in summary):

- not be readily opened by children (F9.3.4(a)); and
- either admit an audible warning or, close automatically after use (F9.3.4(a)(i) or (ii)).

Can the doors be opened by children under 5 years of age?

5.3.8 The Building Code does not prescribe the features of a barrier that is ‘not readily opened’. In this matter I have referred to Acceptable Solution F9/AS1 for guidance:

4.2.2 Doors in a building wall providing access into the immediate pool area shall have:

...

- b) A self-latching device that automatically operates on the closing of the door and that must be released manually, and
- c) The release for the latching device located not less than 1500 mm above the inside floor, and

- 5.3.9 The requirements of Clause F9.3.4(a) can be met through appropriate “self-latching” devices. Self-latching devices hold the door closed even if the door hardware is operated to open the door, preventing young children opening a door by themselves to gain access to the immediate pool area. In order to be effective in preventing young children from opening a door, the devices should be installed at a height that young children cannot easily reach. Also, the devices should be designed in a way that makes the release not easily manipulated by young children. Other features of door sets that can assist in achieving this performance requirement can include the direction of the swing and the weight of the door.
- 5.3.10 In this instance, the self-latching feature on the sliding doors is proposed to be installed 1500mm above floor level. This is a height typically accepted as not easily accessible by young children, which is reflected in F9/AS1. The manual release requires two hands, with one hand moving the latch up to release it, and the other hand to pull the door open. When the first leaf is latched the subsequent leaves are unable to be opened.
- 5.3.11 I consider, in relation to this feature in isolation, the sliding doors cannot readily be opened by children: it self-latches, the latch is not easily reachable by young children, and it requires two hands to release the latch and open the door.
- 5.3.12 For the doors to comply with Clause F9.3.4, they must also either close automatically or emit an audible warning. Also, I note for the self-latching feature to function, the sliding doors must return to the closed position. I now consider the self-closing function and whether the sliding doors as proposed meet the performance requirement in Clause F9.3.4(a)(ii).

5.4 The self-closing feature

- 5.4.1 When gaining access to the pool or immediate pool area the breach of the barrier should be minimised (refer paragraph 5.3.3). To comply with the performance requirements of Clause F9, doors to the immediate pool area must be closed whenever they are not being used. If a barrier complies with Clause F9, a child will not be able to enter (or re-enter) the pool area unsupervised because they would be unable to open the doors or gates.
- 5.4.2 The mechanism specified in this case is designed to allow for sliding doors to be kept open – the self-closing feature can be disabled with relative ease, either by pulling a cable down or pushing a metal rod in (depending on what mechanism is selected). The mechanism then requires active steps to reinstate the self-closing feature¹³ and in this respect relies on the vigilance of the supervising person to reinstate the barrier to be effective. This is a weakness that does not exist with a door or gate that is designed to always automatically close after a person has moved through it, and does not have a feature to prevent it automatically closing.

¹³ The manufacturer of this particular brand of self-closing and self-latching mechanisms has previously demonstrated to the Ministry their use for the purposes of Determination 2019/001.

- 5.4.3 An owner with a pool barrier that incorporates self-closing and self-latching gates or doors on the other hand does not have to do anything to ensure continuing compliance with Clause F9. The compliant door or gate will close automatically behind them when they leave the pool area (or the door alarm will remind them to close the door).
- 5.4.4 An argument could be made that a self-latching and self-closing gate could also be disabled, for example by being propped open to prevent the gate from closing. In this example of an otherwise compliant barrier, a user could place a weighted object in front of the gate or by some other means render the barrier ineffective. This could be viewed as similar to the self-closing feature of the specified mechanism being disabled, thus rendering the barrier ineffective.
- 5.4.5 Both scenarios require an active step to render the barrier ineffective. However, the significant difference with the specified mechanism in this case that is the ability to render the barrier ineffective is designed into the mechanism. To keep sliding doors fitted with this mechanism open, a person only needs to utilise the in-built feature of the mechanism to prevent the door from automatically closing.
- 5.4.6 I note the ability to disable the self-closing feature is not apparent in the supplied technical information. However, given that this ability to disable the self-close feature is inbuilt into the mechanism, I am of the opinion that users may be under the impression that electing to disable the self-closing feature forms part of the normal operation of the door.
- 5.4.7 The applicant noted the disabling feature is located 2.6m high on the sliding doors, and that this height would discourage a person from disabling the mechanism. A similar argument could be made that if the mechanism is disabled this height will discourage a person from reinstating the self-closing feature. However, the key factor is the fact the mechanism has this ability, and when utilised means it no longer automatically closes as required by Clause F9.3.4(a)(ii).
- 5.4.8 I consider there is a likelihood the doors will be kept open given the building layout and the relationship between the spaces in the property, because the sliding doors are adjacent to living areas and there is the ability to disable the mechanism.
- 5.4.9 Determination 2019/001¹⁴ concerned the same mechanism as proposed in this situation on sliding and hinged doors. The previous determination found the mechanism did not prevent the openable leaves from being manipulated to prevent the door from automatically closing. That determination also noted in certain situations the first leaf bounced after release and failed to self-latch. Although, I note this may be able to be remedied by adjusting the mechanism's settings.
- 5.4.10 I note here the applicant has stated he does not want to have a "fence within a fence". It is not uncommon that homeowners wish to avoid installing a fence around a pool, either because they perceive it may negatively impact on aesthetics or could increase building costs or for some other reason. There is a balancing act inherent in the Building Code between usability of a building and ensuring the safety of all occupants. Sacrifices are required when a feature that increases risk is incorporated into a building's design. So, when doors are the physical barrier to the pool or immediate pool area instead of a fence, the ability to keep the doors open to allow easy movement is sacrificed to prevent injury or death of young children.

¹⁴ Determination 2019/001 Regarding the code-compliance of sliding and hinged doors that form part of a barrier to a pool (31 January 2019).

- 5.4.11 In general, the Building Code places an emphasis on buildings and not management practices to achieve the performance requirements. As noted in paragraph 5.3.3, the performance requirements in Clause F9 rely on minimising the length of time compliant barriers are breached to allow for access into the pool area to use the pool.
- 5.4.12 In conclusion, I consider the sliding doors as proposed with the mechanism fitted are designed in such a way that they do not always automatically return to the closed position after use. Therefore, the sliding doors as part of the proposed barrier does not comply with Clause F9.3.4(a)(ii).

5.5 NZS 8500

- 5.5.1 The product technical statement and additional comment from the manufacturer, supplied by the owner, reiterated the view the mechanisms comply with Clause F9 because the design is based on the requirements of NZS 8500 for a child-resistant doorset.
- 5.5.2 NZS 8500 is not an Acceptable Solution for Clause F9. A part of this Standard is cited in F9/AS1, but that is in relation to designing the barrier strength. For completeness, I note any proposed solution using this Standard must be assessed by building consent authorities as an alternative solution.
- 5.5.3 NZS 8500 sets out the features a doorset must have to ensure the door will be child-resistant. NZS 8500 paragraph 3.7.1 requires doors to be fitted with a device that automatically return the door to the closed and latched position. As discussed above the doors when fitted with the mechanism will not always automatically close.

5.6 Conclusion

- 5.6.1 For the reasons outlined in this determination, I have concluded the proposed barrier does not comply with Clause F9 because:
- the proposed immediate area cannot properly be described as “the immediate pool area”
 - the sliding doors as part of the proposed barrier do not comply with Clause F9.3.4.

6. The decision

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority was correct to refuse to grant the amendment to the 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 30 May 2019.

Katie Gordon
Manager Determinations

Appendix A: The legislation

A.1 The relevant clauses of the Building Act 2004 discussed in this determination:

Section 7 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 carried out in relation to or involving the pool

pool—

(a) means—

(i) any excavation or structure of a kind normally used for swimming, paddling, or bathing; or

(ii) any product (other than an ordinary home bath) that is designed or modified to be used for swimming, wading, paddling, or bathing; but ...

residential pool means a pool that is—

(a) in a place of abode; or

(b) in or on land that also contains an abode; or

(c) in or on land that is adjacent to other land that contains an abode if the pool is used in conjunction with that other land or abode

Subpart 7A—Special provisions for residential pools

162A Purpose

The purpose of this subpart is to prevent drowning of, and injury to, young children by restricting unsupervised access to residential pools by children under 5 years of age.

162B Application of subpart

This subpart applies to pools with a maximum depth of water of 400 mm or more.

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).

A.2 The relevant clauses of the Building Code discussed in this determination:

Clause F9—Means of restricting access to residential pools

Objective

F9.1 The objective of this provision is to prevent injury or death to young children involving *residential pools*.

Functional requirement

F9.2 *Residential pools* with a maximum depth of water of 400 mm or more that are filled or partly filled with water must have means of restricting access that prevents unsupervised access by a child under 5 years of age.

Performance

F9.3.1 *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).

F9.3.2 Barriers must either—

- (a) surround the pool (and may enclose the whole or part of the immediate pool area); ...

F9.3.3 A barrier surrounding a *pool* must have no permanent objects or projections on the outside that could assist children in negotiating the barrier.

Any gates must—

- (a) open away from the pool; and
- (b) not be able to be readily opened by children; and
- (c) automatically return to the closed position after use.

F9.3.4 Where a *building* forms all or part of an *immediate pool area* barrier,—

- (a) doors between the *building* and the *immediate pool area* must not be able to be readily opened by children, and must either—
 - (i) emit an audible warning when the door is open; or
 - (ii) close automatically after use:
- (b) ...

Appendix B: Images of the property

B.1 Image from Google Street View showing the front of the property:



B.2 Images provided by the applicant of areas at the front of the property:



