



## Determination 2021/015

### Regarding the compliance of an existing pool barrier at 1373 Eighty Eight Valley Road, Wakefield



#### Summary

This determination considers the compliance of an existing pool barrier that incorporates a number of sliding wall panels and for which a code compliance certificate had previously been issued. The determination describes various pathways to establishing compliance for the purpose of section 162C of the Building Act 2004, and considers whether the pool barrier complies by any of those means. The determination also considers whether an exemption had been granted under the Fencing of Swimming Pools Act 1987.

## 1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004 (“the Act”) made under due authorisation by me, Katie Gordon, National Manager Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.<sup>1</sup>
- 1.2 The parties to the determination are:
  - the owners of the house, K Marshall and L Buchanan (“the applicants”), who applied for the determination
  - Tasman District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

<sup>1</sup> The Building Act and Building Code (Schedule 1 of the Building Regulations 1992) are available at [www.legislation.govt.nz](http://www.legislation.govt.nz). Information about the legislation, as well as past determinations, compliance documents and guidance issued by the Ministry, is available at [www.building.govt.nz](http://www.building.govt.nz)

- 1.3 This determination arises from an inspection<sup>2</sup> of the pool barrier carried out by the authority that concluded the pool barrier does not comply with section 162C of the Act.<sup>3</sup>
- 1.4 The matter to be determined<sup>4</sup> is therefore whether the existing pool barrier complies with the Building Code to the extent required by section 162C of the Act. In deciding this matter, I have also considered whether the area enclosed by the pool barrier can be considered the immediate pool area.
- 1.5 In making my decision, I have considered the submissions of the parties and other evidence in this matter. I have not considered any other building work carried out under the same building consent, nor have I considered other aspects of the Act or Building Code beyond those required to decide on the matter.
- 1.6 Relevant extracts from the Building Act, the Building Code, and the Fencing of Swimming Pools Act 1987 (“FOSPA”) are contained in Appendix A.

## 2. The pool barrier

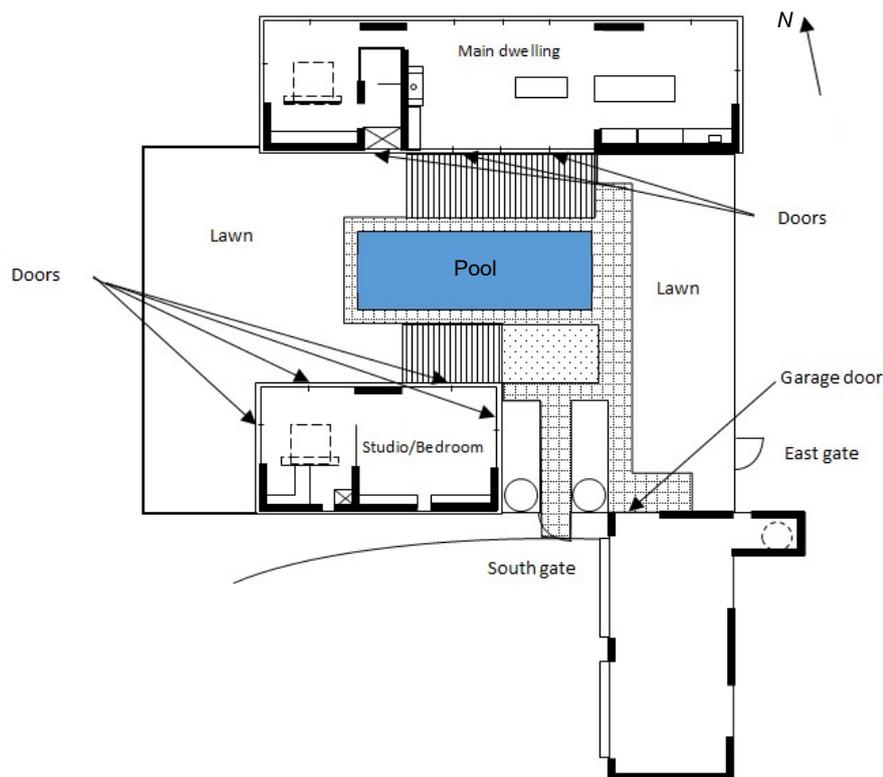
- 2.1 The pool is located in the centre of a courtyard, and the pool barrier, which is the subject of this determination, is made up of:
- the walls of the main dwelling north of the pool, and the walls of the studio and garage to the south;
  - boundary fences to the east and west, with a gate in the east fence;
  - small sections of fencing to the north and south, with an entry gate in the south fence between the garage and studio.
- I refer to these collectively as “the pool barrier”, and describe their features in more detail below.
- 2.2 The walls of the main dwelling and the studio incorporate numerous sliding glass wall panels – the dwelling has five of these and the studio has eight. For simplicity I will refer to these sliding panels as “doors”. All of these doors slide to open, and allow the dwelling and studio to be opened to the courtyard (see photograph on title page).
- 2.3 The doors that open immediately into the immediate pool area include those on the south face of the dwelling, the northeast and northwest of the studio, and a garage door (refer Figure 1). It appears the doors on the north face of the dwelling open in the same manner, meaning that access from the garden area north of the dwelling through to the immediate pool area is possible if doors are open on both the north and south face of the dwelling.
- 2.4 The doors are all 2.4 m x 2.4 m and weigh ‘something over 50 kg’, with handles approximately 900 mm above floor level. There are manually operated locking mechanisms on the doors to secure them in place. The applicants provided information on the locking mechanism, including the height above floor level, the means of operation, and how the locks secure the panels in the frames.

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<sup>2</sup> Section 162D of the Act requires territorial authorities carry out inspections at least once every three years to ensure ongoing compliance of pool barriers to the extent required by section 162C.

<sup>3</sup> In this determination, unless otherwise stated, references to sections are to sections of the Act, and references to clauses are to ‘Clauses’ of the Building Code.

<sup>4</sup> Under section 177(1)(a) of the Act



**Figure 1: Site plan (not to scale)**

2.5 Other key features of the pool barrier are as follows.

North

- A 2000 mm high corrugated steel north fence between the main dwelling and the west fence.

East

- A 1225 mm high corrugated steel fence between the main dwelling and the garage. On the inside of this fence is a 990 mm high brick wall.
- The gate in this fence opens away from the pool and is 1900 mm in length and 1225 mm high (“the East gate”). The gate has no handles on either side, with one sliding bolt on the outside at 1075 mm above ground and another on the inside at 75 mm above ground.

South

- A small section of fence and the main entrance gate (“the South gate”). The South gate is 2000 mm high, opens away from the pool, and is fitted with self-closing mechanism. There is a catch lock at the top of the gate and a handle on the outside of the gate.
- A 2000 mm high steel corrugated fence that meets the west fence.

West

- A 2000 mm high fence steel corrugated fence (“the west fence”) that meets at the junctions of the short sections of fencing at the south and north. There is a hedge on the inside of the fence that is around the same height as the fence.

### 3. Background

- 3.1 The authority issued building consent BC 041070 under the Building Act 1991<sup>5</sup> for the construction of a “new dwelling, separate garage, swimming pool and log burner” on 13 September 2004.
- 3.2 The authority carried out an inspection of the pool and the barrier on 10 October 2006. The notice of inspection detailed checkboxes for the swimming pool, and the authority had ticked the following as inspected: fencing, self-closing gates and self-closing doors, patio bolts to doors, window restraints, discharge/backwash, and backflow preventer. The notes accompanying the checklist said “Please issue [code compliance certificate] as at 18/10/06”.
- 3.3 A code compliance certificate was issued for the building work on 19 October 2006.
- 3.4 The applicants purchased the property in 2008. The pool was recorded on the authority’s register and was inspected on 4 August 2009 under FOSPA. The inspection note recorded that the pool was compliant, with the statement that “all areas comply”.
- 3.5 On 24 January 2012 the authority carried out another inspection of the pool under FOSPA, noting “after inspection of your pool ... your swimming pool fence continues to comply with The Fencing of Swimming Pools Act 1987”.
- 3.6 On 1 January 2017, FOSPA and some performance clauses of the Building Code relating to pools were repealed and replaced with new provisions in the Act (sections 162A to 162E) and the Building Code (Clause F9 – Means of restricting access to residential pools). For further discussion about these changes see paragraph 5.1 of this determination.
- 3.7 On 13 November 2019, the authority carried out a swimming pool inspection in accordance with section 162D of the Act. On 14 November 2019, the authority sent an email to the applicants expressing the view that “the pool barriers at Eighty Eight Valley Road are non-complaint with [FOSPA]”. The failed items were listed as –
- (1) Doors that open into the immediate pool area from the dwelling, studio and garage do not self-close/self-latch. Requirement as per FOSPA Schedule item 10
  - (2) Gate within side fence does not self-close/self-latch. Requirement as per FOSPA Schedule item 10
- 3.8 In a letter accompanying the 14 November 2019 email, the authority noted options for the pool barrier to comply. These were to comply with either –
- a) The requirements in the Fencing of Swimming Pools Act 1987 (as this was the legislation under which the pool and associated barriers were installed); or
  - b) s 162C of the Building Act 2004 and F9 of the NZ Building Code.
- 3.9 The authority further mentioned in the email that “the use of a high latch/lock is by itself not an appropriate measure to restrict access to young children” and provided a copy of the Acceptable Solution F9/AS1 *Residential pool barriers*<sup>6</sup> (“F9/AS”1).
- 3.10 The Ministry received an application for determination on 11 December 2019.
- 3.11 On 20 December 2020, the Ministry asked the applicants to confirm whether any there had been any building work or alterations made to the pool barrier since the

<sup>5</sup> The building consent was granted in September 2004. Some sections of the Building Act 2004 came into force on 30 November 2004 and the remaining sections on 31 March 2005.

<sup>6</sup> Acceptable Solutions and Verification Methods are published by the Ministry and, if complied with, must be accepted by a building consent authority as establishing compliance with the Building Code (refer section 19 of the Act).

code compliance certificate had been issued for it. The Ministry also sought confirmation of the height of the locking mechanisms on the doors, the dimensions of the immediate pool area and photographs.

- 3.12 In response to this request, the applicants provided the requested information and confirmed that no building work had been done, or alterations made, to the pool barrier since the code compliance certificate was issued.
- 3.13 The Ministry requested further information on 24 January 2020 in regard to the East gate and its closing mechanism. In response, on 30 January 2020, the applicants provided the requested information and a further submission.
- 3.14 On 6 April 2020 the Ministry requested clarification of details relating to the pool barrier and discrepancies in the site plan documents. In this request the parties were invited to comment on the immediate pool area.
- 3.15 The authority clarified on 8 April 2020 that a bridge had not been built at the east end of the pool (as per the approved consent documents) and a rock garden was in its place. There was also a gate built into the east fence (the east gate) that was not included in the original site plan.

## 4. The submissions

### 4.1 The applicants' submission

- 4.1.1 The applicants provided a submission with the application for determination. The applicants also provided copies of the following:
- code compliance certificate
  - site plan of the house and pool
  - photographs of the pool area, doors and gates
  - correspondence between the authority and applicants.
- 4.1.2 The applicants contend that either the pool barrier was compliant with Clause F4, whether or not by way of compliance with FOSPA, when the authority issued the code compliance certificate and therefore it still is; or the pool barrier has never been compliant.
- 4.1.3 The applicants do not dispute that the pool barrier does not comply with Clauses 9 or 10 of the Schedule to FOSPA (“the Schedule”), and do not seek to dispute the specific aspects of compliance under FOSPA.
- 4.1.4 Instead, the applicants put forward two views as to how the authority could have reached its original decision that the pool barrier was compliant: either the authority considered that the pool barrier met the performance criteria in Clause F4; or the pool barrier was exempt under clause 11 of the Schedule<sup>7</sup>.
- 4.1.5 The applicants submitted that a note by the architect on the approved site plan dated June 2004 had ‘identical’ wording to Clause 11, namely: “doors fitted with locks that when properly operated prevent the door from being readily opened by children under the age of six years”. In the applicants’ opinion, if the authority had originally used FOSPA as the means to assess the pool barrier’s compliance, then this must have been by way of a Clause 11 exemption, as the doors between the

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<sup>7</sup> Refer to paragraphs 5.6.1 – 5.6.11 for further discussion.

studio and house and the immediate pool area do not comply with Clauses 9 and 10.

4.1.6 The balance of the applicants' submission is summarised as follows.

- The pool barrier was deemed to be compliant and gained a code compliance certificate. The pool barrier remains unaltered since the code compliance certificate was issued.
- Clauses 8 to 10 of the Schedule could not have been used to reach a compliance decision, and it is likely in the absence of any records otherwise that an exemption was granted for the pool barrier under Clause 11.
- The East gate is difficult to open as someone would have to reach over to unlatch the lower inside latch. The gate can be easily made self-closing by fitting a heavy duty return spring or it could be welded shut permanently.
- The doors cannot be made self-closing because they are too heavy. They are difficult to open.
- The fitting of pool barrier alarms to all of the doors would be impracticable and unreasonable given the number of alarms that would be required, and their operation "would make for fraught access to and from the courtyard to the house/studio/garage on every single occasion we used our 'front doors'." The applicants noted they use the front doors more than 30 times a day due to the layout and design.

4.1.7 In regard to the immediate pool area, the applicants submitted that as they purchased the property sometime after the building consent was granted, they are unsure what the authority considered in relation to the immediate pool area during the consenting stages and invited the authority to comment on this aspect.

4.1.8 The applicants also noted that the term 'immediate pool area' was defined in section 2 of FOSPA and section 7 of the Building Act, which were in force over the time the pool was designed and consented.<sup>8</sup> The applicants submitted that the 'later refinement' in 'the understanding of pool safety' and what constituted the 'immediate pool area', made by the High Court decision of *Waitakere City Council v Hickman*<sup>9</sup> ("*Hickman*"), was 'clearly not incorporated into the design of the immediate pool area'. That judgement was issued on 1 October 2004 after the plan for the pool and its barrier was approved (on 13 September 2004). Similarly, NZS8500 - Safety barriers and fences around swimming pools was published in November 2006, after the code compliance certificate was issued for the swimming pool.

4.1.9 The applicants are of the view the changes made to the legislation on 1 January 2017 do not require 'retrospective compliance' and that Ministry guidance to authorities is 'clear that pools that were previously considered to be compliant could be considered to continue to be so'.

4.1.10 The applicants relied on the code compliance certificate as evidence of the pool's compliance with the Building Code when they purchased the property in 2008. The applicants have made no changes to the pool barrier or immediate pool area since

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<sup>8</sup> The term "immediate pool area" was not defined in the Building Act until 1 January 2017. Section 2 of FOSPA defined "immediate pool area" as meaning "the land in or on which the pool is situated and so much of the surrounding area as is used for activities or purposes carried on in conjunction with the use of the pool".

<sup>9</sup> *Waitakere City Council v Hickman* [2005] NZRMA 204 (HC)

they purchased the property, other than to replace the previous owner's vegetable garden with a large table and bench.

## 4.2 The authority's submission

4.2.1 The authority provided a submission on 21 January 2020, and also provided copies of:

- building consent for the pool and consented plans
- inspection records
- the authority's letters to the applicants, dated 24 January 2012 and 14 November 2019
- relevant photographs and correspondence.

4.2.2 In its submission the authority said (in summary) the pool barrier, in particular the doors to the main dwelling, studio/bedroom, garage and the East gate, do not satisfy any of the four compliance pathways under the Act (that is, Clause F9 of the current Building Code; Clause F4 of the Building Code, as it was in force when the pool was consented; Clauses 1 to 10 of the Schedule; or any exemptions under the Schedule.)

4.2.3 The authority is of the view that the latching mechanisms on the doors and the closing functionality of the East gate do not achieve compliance by any of the compliance pathways under the Act and therefore do not comply as required by section 162C.

4.2.4 The authority believes the immediate pool area at present, where one has to pass from the north side of the house past the pool to the south side of the property or garage, is at odds with the purpose of the pools provisions of the Act introduced on 1 January 2017.

4.2.5 The authority states that the relevant Building Code clause in force when the building consent was issued was Clause F4, and the associated Acceptable Solution was F4/AS1, second edition, amendment 4. Clause F4 did not expressly state that there were any restrictions on accessing a building through an immediate pool area. The authority also considered that NZS 8500 was not applicable in this instance, as it was published after the building consent was granted.

## 4.3 Submissions in response to the draft determination

4.3.1 A draft determination was issued to the parties for comment on 6 December 2020.

4.3.2 In responding to the draft, the authority "generally agrees" that the pool barrier does not comply with section 162C and noted that consideration of the immediate pool area in any proposed solution "would seem very sensible".

4.3.3 The applicants provided clarification about the doors and locking mechanisms in their response. The applicants noted there were no conventional windows and ventilation for the dwelling and studio is only achieved by opening the doors, and that this was apparent to the authority at the time the building consent was granted. The applicants stated it was not possible to install self-latching mechanisms or alarms on the doors.

4.3.4 The applicants reiterated that the building work had all been consented and issued with a code compliance certificate, no changes had been made to the pool barrier since construction, and noted that as the determination concludes the pool barrier is

not compliant, this means that it never was. The doors that make up a large section of the walls of the buildings were a key feature of integrating the courtyard within the overall design.

4.3.5 I have taken account of the submissions and amended the determination as I consider appropriate.

## 5. Discussion

### 5.1 The legislation

5.1.1 On 1 January 2017, the Fencing of Swimming Pools Act 1987 was repealed and new provisions relating to residential pools were added to the Building Act (sections 162A to 162E, 450A and 450B).

5.1.2 At the same time, the provisions in the Building Code relating to barriers for swimming pools, Clause F4 – Safety from falling, were revoked and Clause F9 – Means of restricting access to residential pools was inserted in their place.

5.1.3 Section 162C(1) of the Act requires residential pools to have physical barriers that restrict access to the pool by unsupervised children under five years of age. Section 162C(2) states that the means of restricting access to a residential 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).

5.1.4 Section 162D requires territorial authorities to inspect residential pools at least once every 3 years to determine whether the pool barriers comply with the requirements of section 162C.

5.1.5 Sections 450A and 450B contain the transitional and savings provision for residential pools. Section 450A provides:

- (1) Fencing of a residential pool in accordance with clauses 1 to 10 of the Schedule of the Fencing of Swimming Pools Act 1987 (as that schedule was in force immediately before 1 January 2017) is an acceptable solution for establishing compliance with the building code for the purpose of section 162C.

5.1.6 Further, for existing residential pools constructed before 1 January 2017 – as is the case for the applicants' pool – section 450B(2) provides that barriers are deemed to comply with section 162C if they:

- (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.

5.1.7 In summary:

- the applicants must comply with the requirement in section 162C(1) for their pool to have a physical barrier that restricts access to the pool by unsupervised children under five years of age

- this means of restricting access must comply with the Building Code requirements either in force now, *or* in force when the pool was constructed and for which a building consent or code compliance certificate was issued (in relation to the means of restricting access to the pool) – section 162C(2)
- Clauses 1 to 10 of the Schedule can be used as an Acceptable Solution for establishing compliance with the Building Code for the purpose of section 162C – section 450A
- as the applicants' pool is an existing pool, its barrier will be deemed to comply with section 162C if it complied with the Schedule immediately before the new legislation came into force, and continues to comply with the schedule's requirements, subject to any exemption that may have been granted in respect of the pool barrier – section 450B.

## 5.2 Pathways for establishing compliance

5.2.1 Accordingly, for the purpose of section 162C, there are four possible pathways by which the applicants can establish that the pool barrier complies with section 162C. These are:

- the pool barrier complies with the current requirements in Clause F9 of the Building Code, either by way of the Acceptable Solution F9/AS1 or as an alternative solution
- the pool barrier complies with the requirements in Clause F4 of the Building Code that were in force at the time that the pool barrier was constructed, either by way of the Acceptable Solution F4/AS1 current at that the time or as an alternative solution
- the pool barrier complies with Clauses 1 to 10 of the Schedule as an Acceptable Solution
- the pool barrier complies with the Schedule, subject to any exemption under Clause 11.

5.2.2 In making this determination, I will consider whether the applicants' pool barrier achieves compliance with the requirements in section 162C by any of these four pathways.

5.2.3 I will consider first the question of whether an exemption had been granted, either under section 6 or clause 11 of the Schedule. I will then consider each of the remaining three pathways, to establish whether compliance has been achieved, irrespective of the existence of any exemption.

5.2.4 I will also consider the question of whether the pool barrier encloses the immediate pool area, as this is a common requirement of all four of the pathways.

## 5.3 Whether the pool barrier was subject of an exemption under FOSPA

5.3.1 The applicants consider it likely that when the building consent was granted the pool barrier was subject to a "special exemption" granted under section 6 of FOSPA or an exemption under clause 11 of the Schedule, and so the barrier was not required to comply with clauses 8 to 10 of that Schedule.

5.3.2 The applicants have reached this view because they consider it clear that the gates and doors that provide access to the immediate pool area do not comply, and have never complied, with clauses 8 to 10 of the Schedule. Yet, the authority issued a

code compliance certificate for the work carried out under the building consent including the pool barrier.

5.3.3 The applicants consider it likely that the authority felt able to issue the code compliance certificate because it had already granted an exemption under clause 11 of the Schedule (from this point on I refer to this simply as “clause 11”). In their view, there is support for this conclusion in the wording of a note by the architect on the plan lodged for the building consent, which is similar to the wording in clause 11, namely: “doors fitted with locks that when properly operated prevent the door from being readily opened by children under the age of six years”.

5.3.4 Determinations are limited to matters relating to the Building Code and Act. As such I am not able to consider whether the authority had grounds for granting an exemption pursuant to section 6 or clause 11. I am, however, able to consider whether there is evidence that the authority granted such an exemption (as it is necessary to know this, if compliance with section 162C by way of section 450B is to be pursued).

5.3.5 Section 6 of FOSPA provides exemptions at the authority’s discretion:

6 Special exemptions

(1) A territorial authority may, by resolution, grant an exemption from some or all of the requirements of this Act in the case of any particular pool where the territorial authority is satisfied, having regard to the particular characteristics of the property and the pool, any other relevant circumstances, and any conditions it imposes under subsection (2), that such an exemption would not significantly increase danger to young children.

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5.3.6 Clause 11 concerns doors in the walls of buildings that form part of the pool barrier and provides:

Where any building forms part of a fence and the pool is not contained within the building, any door that gives access to the immediate pool area need not comply with the requirements for gates or doors set out in clauses 8 to 10 to the extent (if any) that the territorial authority is satisfied that such compliance is impossible, unreasonable, or in breach of any other Act, regulation, or bylaw, and the door is fitted with a locking device that, when properly operated, prevents the door from being readily opened by children under the age of 6 years.

Where the criteria in clause 11 are satisfied, the authority has the discretion to grant an exemption, so that the requirements in clauses 8 to 10 of the Schedule do not apply.

5.3.7 Furthermore, section 12 of FOSPA provides for the delegation of powers to a committee of councillors where an exemption under section 6 or clause 11 is considered –

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

5.3.8 Had the authority granted an exemption for the applicants’ pool barrier under either section 6 or clause 11, this would have been done by resolution of a delegated committee of elected authority members, with the decision made by a quorum of members.

- 5.3.9 The question of whether or not to grant an exemption was for territorial authorities to consider on a case by case basis. Government guidelines<sup>10</sup> issued to territorial authorities, stated with regard to exemptions under clause 11 that “It is important that councils consider carefully all applications for exemption and, if any are granted, ensure that appropriate locks are fitted to doors.”
- 5.3.10 The only evidence supporting the existence of an exemption for the applicants’ pool barrier is the wording of the note on the site plan. While I acknowledge that this wording is similar to the wording used in clause 11, this is not, in my opinion, sufficient to establish that the pool barrier was subject to a clause 11 exemption.
- 5.3.11 The authority has stated that no exemptions under either section 6 or clause 11 were applied for or granted for the pool. From the information before me, there is only evidence that the authority considered Building Code Clause F4.3.4(f) in an early pool inspection of July 2004 and then later, in 2019, considered clause 10 of the Schedule. There is no evidence that clause 11 was considered or applied.
- 5.3.12 In my opinion, if an exemption was considered in relation to the applicants’ pool barrier, the decision and the reasons for it would have been recorded, and the owner at the time would have been notified of the decision and a copy placed on the property file. Given the circumstances in which exemptions of this type would have been considered (carefully by committee deliberation) and the absence of evidence to suggest that any such consideration occurred, I conclude there was no exemption granted for this pool.
- 5.4 Compliance of the pool barrier by way of an Acceptable Solution or as an alternative solution**
- 5.4.1 Having found that the applicants’ pool barrier was not the subject of an exemption, the question then becomes whether it achieves compliance with section 162C by any of the other three pathways available. As outlined in paragraph 5.2, these pathways are compliance with Clause F9 (being the current Building Code in force); compliance with the Clause F4 (being the Building Code in force at the time the pool and barrier were constructed); and compliance with the Schedule to FOSPA.
- 5.4.2 The first of these two options (Clauses F9 and F4) themselves each offer two potential routes for establishing compliance; namely by way of an Acceptable Solution or as an alternative solution.
- 5.4.3 Each clause of the Building Code has an associated Acceptable Solution, which if conformed with, must be taken as demonstrating compliance with the clause it relates to. However, the Building Code is a performance-based code, and Acceptable Solutions provide just one means of establishing compliance. It is open to pool owners to demonstrate that their pool barriers achieve compliance with the code clause in question by another means: known as an “alternative solution”. For an alternative solution, what is being assessed is the proposed solution’s compliance with the performance criteria in the clause itself.
- 5.4.4 When evaluating alternative solutions, it can be useful to compare them with the Acceptable Solution. This is because, in general, if a particular provision of the Acceptable Solution has not been included or conformed with, it may be necessary to add one or more other provisions to the proposed alternative solution to compensate for this and ensure compliance is achieved.

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<sup>10</sup> Fencing of swimming pools act 1987 - guidelines for territorial authorities published in 1999 by the Department of Internal Affairs

- 5.4.5 For the clauses in question, the relevant Acceptable Solutions are:
- for Clause F9 – Acceptable Solution F9/AS1<sup>11</sup>
  - for Clause F4 – Acceptable Solution F4/AS1<sup>12</sup>.
- 5.4.6 As discussed in paragraph 5.1, clauses 1 to 10 of the Schedule are to be treated as an Acceptable Solution in their own right, with respect to compliance with section 162C. The clauses that are relevant to the areas of concern in the current case are clauses 8 to 10 of the Schedule, as they relate to gates and doors and their operation.
- 5.4.7 Turning now to the applicants' pool barrier, the elements of the pool barrier that the authority is most concerned with and that it considers render the pool barrier non-compliant, are the two gates in the east and south pool fences and the doors leading from the house, studio, and garage into the immediate pool area.
- 5.4.8 In tables 1 to 4, I have recorded my observations about the performance of these gates and doors against the relevant Building Code clauses and Acceptable Solutions, in order to form a view as to the pool barrier's compliance.

### Clauses 1 to 10 of the Schedule

- 5.4.9 I have summarised my observations regarding the compliance of the pool barrier with clauses 1 to 10 of the Schedule, as an Acceptable Solution, in Table 1.

**Table 1: Assessment of the pool barrier against clauses 8 to 10 of the Schedule**

Requirements	My observations
Cl 8 Every gate or door shall be so constructed as to comply with the relevant requirements of clauses 1 to 7, and shall be so mounted that—	
(a) it cannot open inwards towards the immediate pool area:	<ul style="list-style-type: none"> <li>• Both gates open outwards.</li> <li>• All doors slide.</li> </ul>
(b) it is clear of any obstruction that could hold the gate or door open and no other means of holding the gate or door open is provided:	<ul style="list-style-type: none"> <li>• From the information provided, all the doors slide to open and are clear from obstructions or objects that may hold the doors open.</li> <li>• Both of the gates are also clear from obstructions or objects that may hold them open.</li> <li>• All of the doors and the East gate will remain open unless some action is taken to close them.</li> </ul>
(c) when lifted up or pulled down the gate or door does not release the latching device, come off its hinges, or provide a ground clearance greater than 100 mm.	<ul style="list-style-type: none"> <li>• I have seen no evidence to suggest that the doors and gates will not comply with this requirement.</li> </ul>
Cl 9 (1) Every gate or door shall be fitted with	<ul style="list-style-type: none"> <li>• The doors are fitted with a manually operated locks.</li> </ul>

<sup>11</sup> Acceptable Solution F9/AS1 for New Zealand Building Code Clause F9 Means of Restricting Access to Residential Pools (1<sup>st</sup> ed. 27 April 2017).

<sup>12</sup> Acceptable Solution F4/AS1 Compliance document for New Zealand Building Code Clause F4 Safety from falling (2<sup>nd</sup> ed., amendment 4, September 2003).

a latching device.	<ul style="list-style-type: none"> <li>• The East gate is fitted with two sliding bolts.</li> <li>• The South gate has a gate latch.</li> </ul>
(2) Where the latching device is accessible from the outside of the fence only by reaching over the fence, gate, or door or through a hole in the fence, gate, or door, the latching device and the lowest point of any hole giving access to it shall be at least 1.2 metres above the ground on the outside of the fence.	<ul style="list-style-type: none"> <li>• The doors all have locking mechanisms located above 1.2 metres.</li> <li>• The bolt on the inside of the East gate is located 75 mm above ground level. In order to open it from the outside, a person would have to lean over the 1225 mm high gate and almost down to ground-level.</li> <li>• The latching device on the South gate is located on top of the gate, at 2000 mm high.</li> </ul>
(3) Where the latching device is otherwise accessible from the outside of the fence, gate, or door, the latching device shall be at least 1.5 metres above the ground on the outside of the fence.	<ul style="list-style-type: none"> <li>• The doors all have locking mechanisms located above 1.5 metres.</li> <li>• The East gate has a bolt on its outside located 1075 mm above ground level.</li> </ul>
<p>CI 10</p> <p>Every gate or door shall be fitted with a device that will automatically return the gate or door to the closed position and operate the latching device when the gate or door is stationary and 150 mm from the closed and secured position.</p>	<ul style="list-style-type: none"> <li>• None of the doors are fitted with a self-closing and latching device.</li> <li>• The locking levers on the doors are manually operated. Once the lever is moved up to release the door, the lever does not automatically return to the locked position when the door closes.</li> <li>• The East gate is not fitted with a self-closing and latching device.</li> <li>• The South gate is fitted with a self-closing and latching mechanism.</li> <li>• All of the doors and the East gate will remain open unless some action is taken to close them.</li> </ul>

5.4.10 Taking into account the features of the doors and gates as described above, I am of the opinion that the East gate does not comply with clause 9(2) and clause 10 of the Schedule, and the doors do not comply with clause 10 of the Schedule. In particular, neither the East gate nor the doors are fitted with a self-closing and locking mechanism, and all need to be manually closed and locked after being opened. Accordingly, the pool barrier does not comply with clauses 1 to 10 of the Schedule and therefore is not considered compliant by way of section 450A of the Act.

5.4.11 I note for the sake of completeness that the sliding bolt on the inside of the East gate does not meet the height requirement in clause 9(2) of the Schedule, as it is located 75 mm above ground level. However, I am of the view that because of its location and that a person outside the fence would have to reach over and almost down to ground level, it is not “accessible from the outside of the fence”; for this reason it would comply with clause 9(2) of the Schedule.

#### **Clause F4 of the Building Code**

5.4.12 I turn now to the pool barrier’s compliance with the provisions of the Building Code that were in force when the pool was ‘constructed, erected or installed’ and in respect of which a code compliance certificate was issued, namely: Clause: F4 –

Safety from falling<sup>13</sup>. Not all of the performance requirements in Clause F4 are relevant to swimming pool barriers. Those that are relevant to the applicants' barrier are F4.3.3, F4.3.4(f) and F4.3.5 (see Table 2 below).

- 5.4.13 The Acceptable Solution for Clause F4 at the time was F4/AS1 (second edition, amendment 4). The provisions relating to swimming pool barriers were in paragraph 3.0, which merely stipulated that fences around swimming pools shall be constructed "to no lesser standard than is required by the [Schedule], to restrict the access of children".
- 5.4.14 This, in effect, made the Schedule the Acceptable Solution for Clause F4 as far as it relates to swimming pools.
- 5.4.15 I have already concluded that the applicants' pool barrier does not comply with the Schedule; accordingly the pool barrier does not comply with Clause F4 by way of the Acceptable Solution. I must now consider whether it otherwise complies with Clause F4 as an alternative solution. My observations in this regard are summarised in Table 2 against the relevant performance clauses.

**Table 2: Assessment of the pool barrier against Clause F4 as an alternative solution**

Requirements		My observations
<b>F4.3.3</b>	Swimming pools having a depth of water exceeding 400 mm, shall have barriers provided.	<ul style="list-style-type: none"> <li>The pool barrier includes the walls of the garage, studio and house and the windows and doors within them, as well as fencing and gates.</li> </ul>
<b>F4.3.4</b>	Barriers shall: <ul style="list-style-type: none"> <li>(a) Be continuous and extend for the full extent of the hazard,</li> <li>(b) Be of appropriate height,</li> <li>...</li> <li>(f) In the case of a swimming pool, restrict the access of children under 6 years of age to the pool or the immediate pool area.</li> </ul>	<ul style="list-style-type: none"> <li>When the doors and gates are closed, the barrier is continuous. (See also F4.3.5 regarding self-closing doors)</li> <li>The parts of the pool barrier made up of fencing and gates are of sufficient height.</li> <li>When closed and locked, the East gate and the doors will restrict the access of children to the pool area.</li> <li>The issue of what constitutes the immediate pool area is discussed separately in paragraph 5.6.</li> </ul>

<sup>13</sup> The version of Clause F4 Safety from falling that was in force from 31 March 2005 to 21 June 2007.

Requirements		My observations
<b>F4.3.5</b>	<p>Barriers to swimming pools shall have in addition to performance F4.3.4:</p> <p>(a) All gates and doors fitted with latching devices not readily operated by children, and constructed to automatically close and latch when released from any stationary position 150 mm or more from the closed and secured position, but excluding sliding and sliding-folding doors that give access to the immediate pool surround from a building that forms part of the barrier</p>	<ul style="list-style-type: none"> <li>• All of the doors are sliding doors and are therefore excluded from the requirements in this clause.</li> <li>• The latch on the South gate is at a height that means they are not readily operated by young children.</li> <li>• The East gate latch on the outside is accessible and may be readily operated by children. However the latch on the inside is not accessible from the outside and therefore is not readily operated by young children.</li> <li>• The South gate is fitted with a self-closing and latching mechanism.</li> <li>• The East gate is not fitted with a self-closing and latching device.</li> </ul>

5.4.16 Taking into account the features of the doors, East gate and pool barrier as a whole, as described above, I am of the opinion that the applicants' pool barrier does not comply with Clause F4 as an alternative solution.

5.4.17 The East gate is required to comply with the requirement in Clause F4.3.5 and be constructed so that it automatically closes and latches when released, which it does not.

5.4.18 As the doors that form part of the pool barrier are all sliding doors, they were excluded from this requirement to automatically close and latch. However, they were still required under Clause F4.3.4(f) to 'restrict the access of children under 6 years of age' to the pool or immediate pool area. If any of the doors are unlocked, and left open, the pool barrier would no longer restrict access of young children.

5.4.19 A manual locking mechanism requires a person to always take positive steps to close and latch the doors, with the compliance of the pool barrier depending solely on the vigilance of the supervising person. This creates a significant risk, given the diverse situations in which the doors may be opened and people who may open the doors.

5.4.20 This risk is exacerbated with respect to the applicants' property, given that the doors that open into the pool area are the main way to access the buildings on the property, and also provide the only means of ventilation. Together, the three buildings (dwelling, studio and garage) and the pool create a compound, which can be accessed through the South gate from the driveway and parking area. I note also the applicants have estimated that they use their 'front doors' more than 30 times a day.

5.4.21 Although the pool barrier may restrict the access of young children to the pool area when all the doors and gates are closed, for it to continue to comply, the doors must be manually closed and locked every time they are opened, by whoever opens them, and cannot be left open. It will not be enough to simply close the doors, as their handles are located at 900mm above floor level, easily within reach of many 5 year old (and younger) children.

5.4.22 In my opinion, given the number of doors that open into the pool area, the layout of the applicants' property and the impact this has on the function of these doors

(making them a primary means of access to all of the buildings on the property), and the fact that the doors must be manually closed and locked every time they are opened, means there is a significant risk of one or more of the doors being left open or unlocked. As soon as this happens, there is a related risk of unsupervised young children not being restricted from entering the pool area.

5.4.23 In conclusion, the applicants' pool barrier does not comply with the requirements of Clause F4, either by means of an Acceptable Solution or as an alternative solution.

## 5.5 Clause F9 of the Building Code

5.5.1 The final way in which the applicants' barrier can be shown to comply with section 162C is through demonstrating its compliance with Clause F9 of the current Building Code, either as an Acceptable Solution or an alternative solution.

5.5.2 The relevant Acceptable Solution is F9/AS1<sup>14</sup>, which sets out detailed requirements for pool barriers, and the gates, windows and doors within them.

5.5.3 I consider it clear that the applicants' pool barrier will not comply with several of these provisions, and that there is little to be gained from discussing them in depth here. For example, the doors will not satisfy paragraph 4.2.1 of F9/AS1, which requires all doors within walls that form part of the pool barrier to be "single leaf doors that are not more than 1000 mm in width"; whereas the applicants' doors are all 2400 mm wide<sup>15</sup>. Paragraph 4.2.2(b) of F9/AS1 requires these doors to be fitted with a self-latching device, which the applicants' are not. Likewise, paragraph 3.0 of the Acceptable Solution requires any gates in pool barriers to be fitted with "a self-closing device that will return the gate to the closed and latched position from any position with a stationary start". The applicants' East gate is not self-closing.

5.5.4 Accordingly, I conclude that the applicants' pool barrier does not comply with Clause F9 by way of the Acceptable Solution. This means I must consider the pool barrier's compliance with Clause F9 as an alternative solution. I have summarised my observations in this regard in Table 3.

**Table 3: Assessment of the pool barrier against Clause F9, as an alternative solution**

Requirements		My observations
<b>F9.3.1</b>	Residential pools must have or be provided with physical barriers that restrict access to the pool or immediate pool area by unsupervised young children (ie, under 5 years of age).	<ul style="list-style-type: none"> <li>When closed and locked, the East gate and the doors will form part of a barrier that restricts the access of children to the pool area. However, if the gate or doors were left open, this would no longer be the case, as they must be manually closed and locked.</li> <li>The issue of what constitutes the immediate pool area is discussed separately in paragraph 5.6.</li> </ul>
<b>F9.3.2(a)</b>	Barriers must either— (a) surround the pool (and may enclose the whole or part of the immediate pool area); ...	<ul style="list-style-type: none"> <li>The pool barrier surrounds the pool and other land on the applicant's property.</li> <li>The issue of what constitutes the immediate pool area is discussed separately in paragraph 5.6.</li> </ul>

<sup>14</sup> There is a second Acceptable Solution F9/AS2, but this relates to covers for small heated pools.

<sup>15</sup> With the exception of the garage door, which the applicants described as being 3/4

Requirements		My observations
<b>F9.3.3</b>	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.	<ul style="list-style-type: none"> <li>• The East gate opens away from the pool, and with the inside latch in position is not able to be readily opened by children, but the latches are manually operated.</li> <li>• The East gate is not self-closing.</li> <li>• The South gate opens away from the pool, and with the latch in position is not able to be readily opened by children.</li> <li>• The South gate is fitted with a self-closing and latching mechanism.</li> </ul>
<b>F9.3.4</b>	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:	<ul style="list-style-type: none"> <li>• The doors slide open and are fitted with handles located at 900 mm above floor level.</li> <li>• The locking mechanisms on the doors are at a height not easily reached by young children. However they do not automatically return to the locked position when the door closes.</li> <li>• None of the doors are fitted with pool barrier alarms.</li> <li>• None of the doors are fitted with a self-closing device.</li> </ul>

- 5.5.5 In my opinion, the applicants’ pool barrier does not comply with Clause F9 as an alternative solution either.
- 5.5.6 Turning first to the East gate, this is required by clause F9.3.3 to be fitted with a self-closing mechanism; which it isn’t. In its submission, the authority expressed the view that the gate was also able to be opened by young children from outside the pool area. In my opinion, this is not the case if the inside latch is in the locked position. The gate is 1225 mm high and has two slide latches (one at 1075 mm above the ground on the outside of the gate and one at 75 mm above the ground on the inside). A young child may be able to reach the latch on outside of the gate but would not be able to reach over the gate to the latch on the inside near the ground.
- 5.5.7 However, as the East gate does not have a mechanism to return it to a closed and latched position, if it was left unlocked or open, it would not restrict the access of young children to the pool area. Therefore, the East gate does not comply with either clause F9.3.1 or F9.3.3(c).
- 5.5.8 For similar reasons, and as already discussed in paragraphs 5.4.18 to 5.4.22, I do not consider that the doors within the pool barrier comply with the requirement in clause F9.3.1 to restrict access to the pool by unsupervised young children. The doors are an integral part of the pool barrier, but their number, their function as a primary means of access and ventilation, and the lack of a self-closing mechanism mean that in my view there is a very real risk that they will be left open and unlocked, thereby breaching the pool barrier’s integrity.
- 5.5.9 In addition, the doors are required by clause 9.3.4 to either emit an audible warning when the door is opened or to be self-closing; the doors do neither. There is also the issue of whether or not they are “able to be readily opened by children”, as prohibited by this clause. The Building Code does not prescribe what is meant by this requirement; in the Acceptable Solution, it is partially addressed through the

requirement for doors to be self-locking, with the lock release mechanism located at least 1500 mm above the inside floor (paragraph 4.2.2(c) of F9/AS1).

- 5.5.10 The lock mechanism on the doors are located above the height set out in the Acceptable Solution, and at sufficient height to make them difficult for a young child to access. However, the doors do not automatically lock, and if left unlocked, the handles for the doors are within a child’s reach at 900 mm.
- 5.5.11 The applicants have provided evidence that the doors are relatively large and heavy. However, this in itself will not mean that they are difficult to open. A sliding door of this size and weight may be difficult for a child under six years of age to open, but with high quality and well maintained sliding gear, doors of this size and weight could well be easily opened, and I have not been presented with any evidence in that regard.
- 5.5.12 I consider that insufficient evidence has been provided that the doors meet the requirement in clause F9.3.4 that they “must not be able to be readily opened by children”, especially in situations where the doors have been left unlocked. Given the doors’ function as a primary means of access on the main thoroughfares within the property and also as the means of ventilation, there is a very real risk of them being left open or unlocked.
- 5.5.13 In summary, I conclude that the applicants’ pool barrier does not comply with Clause F9 of the Building Code, as an alternative solution. In particular:
- the pool barrier does not restrict access of young children to the pool or immediate pool area when the doors are open or unlocked, because the doors require manual closing and locking – F9.3.1
  - the East gate does not automatically return to the closed position after use – F9.3.3(c)
  - the doors do not automatically close after use and no audible warning is emitted when they are open. There is also insufficient evidence to conclude they are not able to be readily opened by children– F9.3.4(a).

## 5.6 Immediate pool area

5.6.1 In their correspondence and submissions, the parties have focussed on the doors and gates within the pool barrier, and the impact that these have on compliance. In my view, an equally big issue is whether the pool barrier encloses the immediate pool area.

5.6.2 Section 8 (1) of FOSPA, which was in force at the time that the applicants’ pool was built, provided:

### 8 Obligations of owner and persons in control of pool

(1) Every owner of a pool to which this Act applies shall ensure that, except as provided in any exemption granted under section 6 of this Act, the pool, or some or all of the immediate pool area including all of the pool, is fenced by a fence that complies with the requirements of the building code in force under the Building Act 1991 in respect of swimming pools subject to this Act at all times when this Act applies in respect of the pool.

5.6.3 The relevant Building Code clause that the pool had to comply with when the building consent and code compliance certificate were granted was Clause F4.<sup>16</sup>

<sup>16</sup> The version of Clause F4 Safety from falling that was in force from 31 March 2005 to 21 June 2007.

- Clause F4.3.4 (f) is specific in requiring swimming pool barriers to “restrict the access of children under 6 years of age to the pool or the immediate pool area”.
- 5.6.4 This requirement is carried over in the current clause F9, which likewise (in Clause F9.3.1) requires residential pools to have “physical barriers that restrict access to the pool or immediate pool area by unsupervised young children (i.e. under 5 years of age”.
- 5.6.5 The term “ immediate pool area” was defined in section 2 of FOSPA as:  
     the land in or on which the pool is situated and so much of the surrounding area as is used for activities or purposes carried out on in conjunction with the use of the pool.
- 5.6.6 This definition is very similar to the current definition in section 7 of the Act, which defines “immediate pool area” as meaning “the land in or on which the pool is situated and so much of the surrounding area as is used for activities carried out in relation to or involving the pool”.
- 5.6.7 Guidance as to what constituted the “immediate pool area” in FOSPA was provided in *The Fencing of Swimming Pools Act 1987 Guidelines for Territorial Authorities*, published in 1999<sup>17</sup>:  
     In the Department’s view the “*immediate pool area*” could include the pool, its decking, and any changing sheds, but not a vegetable garden, a clothes-lines (sic), a barbecue area, a children’s sand-pit, or a slide or swing. The most important factor is the location of the fence in relation to the rest of the property. The fence should prevent young children moving directly to the pool from the house, other buildings, garden paths, or other areas of the property normally open to them.
- 5.6.8 Further guidance became available with the release of the High Court decision in *Hickman* on 1 October 2004.
- 5.6.9 The *Hickman* decision provided substantive analysis about the interpretation of the phrase “immediate pool area” and set a precedent as to how to interpret section 7 of the Act in conjunction with section 2 of FOSPA. The decision was released in 2004, well before the authority made its decision to issue a code compliance certificate for the applicants’ pool on 19 October 2006.
- 5.6.10 In my opinion, the principles discussed in *Hickman* in relation to the meaning of “immediate pool area” apply to the applicants’ pool. At paragraphs [26] and [27] Justice Randerson J provided that “every pool owner shall ensure that the pool... is fenced .... There are two options for the location of the fence. The first is to fence the pool itself. The second is to fence some or all of the immediate pool area including all of the pool itself. As the pool itself is not fenced in this case it is then appropriate to consider the extent of immediate pool area.”
- 5.6.11 The following extracts from the *Hickman* decision are also relevant to this determination:  
     [29]  
     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 existings of the exemption power in s 6 [of FOSPA] also indicates a Parliamentary intention to limit the scope of the immediate pool area.

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<sup>17</sup> Published by the Department of Internal Affairs Te Tari Taiwhenua

b) Subject to the issue of immediacy, I discuss below, 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) Again by reference to the New Shorter Oxford English Dictionary at p 480, the expression “in conjunction with” connotes activities or purposes which are closely connected, associated or combined with the use of the pool. 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 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.

5.6.12 At paragraphs [34] Justice Randerson J commented further on the issue of “immediacy”:

[34] ... 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.

5.6.13 For the applicants’ pool, the area enclosed by the pool barrier is a large area, measuring approximately 16.2m x 26.5m, which encompasses a tiled courtyard, a deck on either side of the pool, trees and lawn spaces. The tiled courtyard runs from the South gate past the pool to the doors to the main dwelling, and is used as a path by both residents and visitors, as it is the main access way between the South gate or garage door and the main dwelling. Likewise, guests or family members staying in the studio would be required to walk past the pool on their way to either the main dwelling or to the garage and South gate. There is no entrance to the studio that is external to the area enclosed by the pool barrier. In other words, anyone wishing to access the studio, for whatever reason, has to first enter the immediate pool area in order to do so.

5.6.14 At paragraph [29], the *Hickman* decision states that activities that are carried on independently of the use of the pool, or which have only a remote or indirect association with it, should not be included within the immediate pool area, with “pedestrian access ways” given as an example of such an activity. Another example provided was vegetable gardens, which I note the previous owners had constructed within the area enclosed by the pool barrier.

5.6.15 For the applicants’ property, I consider the relationship between the pool and the activities that are likely to occur within the area do not meet the ‘close nexus’ test set out in *Hickman*. I consider it material that the area enclosed by the pool barrier

encompasses a sizable outdoor area; is used (and on the applicants' account, used frequently) as the access way between the dwelling, the studio, the garage and the South gate, and is the sole means of access to the studio. As such, I consider that it will, by necessity, be used for activities that are not carried out in conjunction with the use of the pool.

- 5.6.16 Based on the discussion set out above, I am of the opinion that the area enclosed by the pool barrier as shown in Figure 1 in this determination does not constitute the immediate pool area. A means of restricting the access of children under the age of five years to an area that can properly be considered the immediate pool area is required in order to achieve compliance to the extent required under section 162C of the Act.

## 5.7 Conclusion

- 5.7.1 I conclude that the pool barrier does not comply with Clause F9, Clause F4 or clauses 1 to 10 of the Schedule, and was not subject to an exemption under FOSPA. Furthermore the area enclosed by the pool barrier does not constitute the immediate pool area.

## 6. What is to be done?

- 6.1 The consequences of this determination finding the pool barrier does not comply unfortunately now fall on the owner. The owner has ongoing obligations under the Act to ensure the pool has a barrier that restricts access by unsupervised young children.
- 6.2 The applicants can propose to the authority possible options for making the pool barrier compliant; this can be in the form of an Acceptable Solution or an alternative solution. Any proposal should take into account this determination and consider the extent of the immediate pool area and what may be included within that area.

## 7. The decision

- 7.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the pool barrier does not comply with the Building Code to the extent required by section 162C of the Act.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 19 July 2021.

Katie Gordon  
National Manager, Determinations

## Appendix A

Relevant extracts from the Building Act, the Building Code, and the Fencing of Swimming Pools Act 1987 follow.

### A1 Building Act 2004

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).

...

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.

...

450A Transitional and savings provision for residential pools

(1) Fencing of a residential pool in accordance with clauses 1 to 10 of the Schedule of the Fencing of Swimming Pools Act 1987 (as that schedule was in force immediately before 1 January 2017) is an acceptable solution for establishing compliance with the building code for the purpose of section 162C.

(2) Sections 22(2) and (3), 23, 24, and 25A apply to the acceptable solution in subsection (1) as if it had been issued by the chief executive under section 22(1) of this Act.

(3) In this section and the Schedule of the Fencing of Swimming Pools Act 1987,—

**fence** includes any part of a building, and any gate or door, that forms part of a fence

**fencing** means any barrier or barriers used to enclose a pool (or an immediate pool area) so as to restrict or prevent access to the pool.

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.

...

## A2 The current Building Code – Clause F9

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<sup>18</sup>

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

(b) in the case of a *small heated pool*, cover the *pool* itself.

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) windows opening from a building into the *immediate pool area* must be constructed or positioned to restrict the passage of children.

<sup>18</sup> The limits on application only apply to *small heated pools*

**A3 Building Code - Clause F4**

*(Clauses F4.2.2, F4.3.4 (f) and F4.3.5 were revoked from 1 January 2017)*

**Clause F4—Safety from falling**

Objective

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

Functional requirement

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

Performance

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

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

*Limits on application*

Performance F4.3.3 shall not apply to any pool exempted under section 5 of the Fencing of Swimming Pools Act 1987.

**F4.3.4** Barriers shall:

...

(f) In the case of a swimming pool, restrict the access of children under 6 years of age to the pool or the immediate pool area,

...

*Limits on application*

Performance F4.3.4 (f) shall not apply to any pool exempted under section 5 of the Fencing of Swimming Pools Act 1987.

**F4.3.5** Barriers to swimming pools shall have in addition to performance F4.3.4:

(a) All gates and doors fitted with latching devices not readily operated by children, and constructed to automatically close and latch when released from any stationary position 150 mm or more from the closed and secured position, but excluding sliding and sliding-folding doors that give access to the immediate pool surround from a building that forms part of the barrier

## **A4 Fencing of Swimming Pools Act 1987 (repealed 1 January 2017)**

### 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

### Schedule 1

#### Means of compliance for fences under FOSPA

##### Gates and doors

**8** Every gate or door shall be so constructed as to comply with the relevant requirements of clauses 1 to 7, and shall be so mounted that—

- (a) it cannot open inwards towards the immediate pool area:
- (b) it is clear of any obstruction that could hold the gate or door open and no other means of holding the gate or door open is provided:
- (c) when lifted up or pulled down the gate or door does not release the latching device, come off its hinges, or provide a ground clearance greater than 100 mm.

##### Operation of gates and doors

**9(1)** Every gate or door shall be fitted with a latching device.

(2) Where the latching device is accessible from the outside of the fence only by reaching over the fence, gate, or door or through a hole in the fence, gate, or door, the latching device and the lowest point of any hole giving access to it shall be at least 1.2 metres above the ground on the outside of the fence.

(3) Where the latching device is otherwise accessible from the outside of the fence, gate, or door, the latching device shall be at least 1.5 metres above the ground on the outside of the fence.

**10** Every gate or door shall be fitted with a device that will automatically return the gate or door to the closed position and operate the latching device when the gate or door is stationary and 150 mm from the closed and secured position.

##### Doors in walls of buildings

**11** Where any building forms part of a fence and the pool is not contained within the building, any door that gives access to the immediate pool area need not comply with the requirements for gates or doors set out in clauses 8 to 10 of this Schedule to the extent (if any) that the territorial authority is satisfied that such compliance is impossible, unreasonable, or in breach of any other Act, regulation, or bylaw, and the door is fitted with a locking device that, when properly operated, prevents the door from being readily opened by children under the age of 6 years.

## Appendix B

### Paragraph 4.2 from Acceptable Solution F9/AS1 – Means of Restricting Access to Residential Pools

#### 4.2 Doors in the building wall

**4.2.1** Doors in a building wall that provide access into the immediate pool area shall be single leaf doors that are not more than 1000 mm in width. These doors shall be side hinged or sliding.

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

- a) Either a self-closing device or an audible alarm, and
- 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

**4.2.4** A door alarm shall:

- a) Produce an alarm tone of 75dBAL<sub>10</sub> when measured at a distance of 3000 mm that commences 7 seconds after the door's self-latching device is released, and
- b) Automatically return to a state of readiness when the door is closed and latched, and
- c) Have a low battery charge warning that may be visual or audible.

**4.2.5** Door alarms may be provided with a deactivation switch placed not less than 1500 mm above floor level that silences the alarm for not more than 15 seconds.

**Comment:** A deactivation switch can be useful when maintenance materials or pool furniture needs to be moved through a door.