

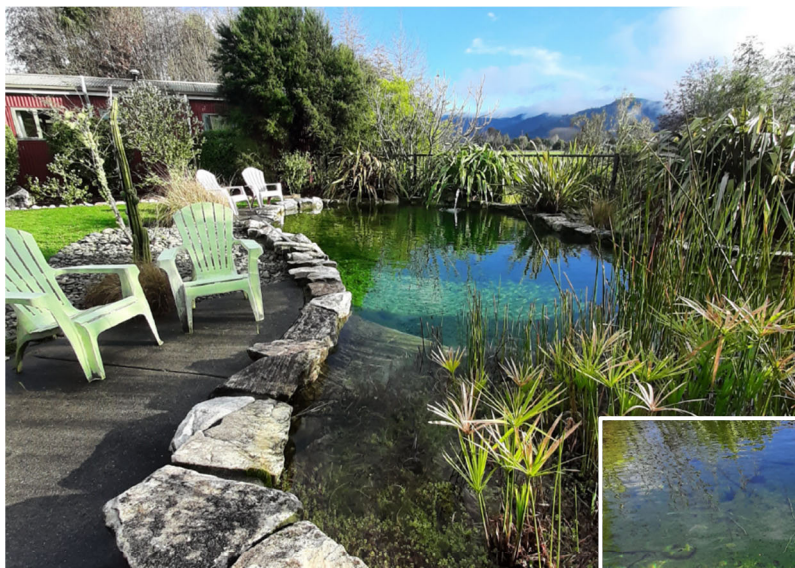
Determination 2025/045

**Whether a body of water is a pool under the Act and
whether the barrier must comply with the Building Code**

137 Lodder Lane, Riwaka, Motueka

Summary

This determination considers whether a body of water is a residential pool for the purposes of the Act, and so whether it must have a pool barrier that complies with the Building Code to the extent required by section 162C of the Building Act.



**Figure 1: The body of water on the
owners' property**



In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”) and references to “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

The Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (eg, Acceptable Solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Peta Hird, for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment (“the Ministry”).¹
- 1.2. The parties to the determination are:
 - 1.2.1. BL Joppa and EJ Rowe, the owners of the property who applied for this determination (“the owners”)
 - 1.2.2. Tasman District Council, carrying out its duties as a territorial authority or building consent authority (“the authority”).
- 1.3. The dispute arises from the authority’s inspections under section 162D in relation to a pool barrier surrounding a body of water on the owners’ property.² I use the term ‘pool barrier’ because this was the barrier’s original purpose when it was constructed, and the term ‘body of water’³ because the parties dispute whether it is a residential pool or a pond.
- 1.4. The authority considers the body of water to be a pool because it was consented as a pool when it was constructed. The owners disagree, noting they bought the property with the body of water being a pond.
- 1.5. In making this determination, I must consider first whether the body of water is a residential pool for the purposes of the Act. If it is, I will determine (under section 177(1)(a) of the Act) whether the pool barrier complies with the Building Code to the extent required by section 162C of the Act.

2. Building work and background

- 2.1. On 7 November 2008, the authority granted building consent BC081247 to the property’s previous owners under the Building Act 1991 to “Install [an] inground swimming pool: Intended Use: Swimming pool”, with the intended life of

¹ The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

² Section 162D requires territorial authorities to ensure residential pools in their jurisdiction are inspected at least once every three years to determine if they have a compliant pool barrier.

³ Except when discussing a specific historic situation or each party’s perspective on the matter.

“Indefinite, but not less than 50 years”. At that time the Fencing of Swimming Pools Act 1987 was in force, which required the pool⁴ (or some or all of the immediate pool area including all of the pool) to be fenced and comply with the requirements of the Building Code in force at the time.

- 2.2. Details within the building consent show the construction of the swimming pool as an in-ground, in-situ concrete construction in a bowl shape. A “typical pool” section details a minimum of 75mm of concrete laid beneath reinforcing steel before another minimum 75mm of concrete is laid over the top. The finish of the pool was specified as a white cement plaster, with a precast coping at the edge of the pool adjacent to a paved surface. The design was accompanied by a producer statement in relation to compliance with B1 *Structure* for “excavations, foundations, and retaining walls” associated with the swimming pool installation.
- 2.3. The building consent also included the construction of a proprietary swimming pool barrier and drainage to the pool, including a backwash soakage pit away from the swimming pool area.
- 2.4. The building work to install the swimming pool, barrier and associated drainage was completed in 2010 and the authority noted in an inspection report dated 4 March 2011:

Swimming pool constructed to high standard ... Fencing complies with Fencing of Swimming Pools Act 1987 ... All work complies.
- 2.5. On 9 March 2011, the authority issued a code compliance certificate for the building work.
- 2.6. I have no information about whether the authority inspected the pool barrier after 2001.⁵ However, on 1 January 2017 the Fencing of Swimming Pools Act 1987 was repealed and the ‘Special provisions for residential pools’ were inserted into the Building Act 2004. This included the obligation under section 162D for territorial authorities to ensure that “residential pools” are inspected at least one every three years to determine whether the pools have barriers that comply with the requirements of section 162C.
- 2.7. The current owners purchased the property later in 2017, at which time the swimming pool had been “converted to a pond several years prior” and was “sold as a pond, not a swimming pool”. The pool barrier constructed under the building consent was still in place, including the access gate.

⁴ Under section 2 of the Fencing of Swimming Pools Act, ‘swimming pool and pool’ mean an excavation, structure, or product that is used or is capable of being used for the purpose of swimming, wading, paddling, or bathing; and includes any such excavation, structure, or product, that is a spa pool. See paragraphs 4.5 and 4.6 for the definition of ‘residential pool’ and ‘pool’ for the purposes of the Building Act 2004.

⁵ Section 10 of the Fencing of Swimming Pools Act provided “Every territorial authority shall take all reasonable steps to ensure that this Act is complied with within its district”.

- 2.8. The body of water is situated adjacent to a carpark on the owners' residential property, which also provides accommodation for multiple guests. The body of water is surrounded by the original pool barrier and garden vegetation. Recent photos provided by the owners indicate vegetation is growing adjacent to and through the barrier in some places.
- 2.9. On 19 May 2021 the authority contacted the owners about an inspection to be carried out of the pool barrier under section 162D. On 14 July 2021 it inspected the barrier surrounding the body of water and noted a "Fail" in an inspection report for the following items, as well as a note made by the owners in respect of the use of the body of water:

Areas of non-compliance requiring correction

1. Climbable objects within 1200mm of the pool barrier
2. Foliage build up reducing affective [sic] height of fence to less than 1200mm

Note: Owner claims pool is a pond.

...

1. Gate not self closing

- 2.10. The inspection report required compliance by 16 August 2021. I am unaware of any discussions or correspondence between the parties in relation to the outcome of this inspection. However, the authority contacted the owners three years later on 8 April 2025 to undertake another inspection of the pool barrier, and on 8 May 2025 it again inspected the barrier surrounding the body of water, this time giving a "Fail" for the following reasons:

Areas of non-compliance requiring correction

... gaps in pool barrier exceeding 100mm

... a tree that provides a climb point that could assist a small child in gaining access to the pool area.

- 2.11. The inspection required the non-compliances with the barrier to be remedied by 8 June 2025, noting that another inspection would be required.

- 2.12. On 17 June 2025 the authority carried out "a reinspection" of the barrier surrounding the body of water and noted:

... non-compliances have not been addressed. [] walked [a]round with the owner and advised of the work that needs to be done.

- 2.13. In an email to the owners dated 27 June 2025, which appears to be a response to the owners' view that the body of water is a pond, the authority advised:

When the Swimming Pool was built at your property, it was constructed as a swimming pool ... so it will always be a swimming pool.

... it was built as a swimming pool, granted a building consent and Code of Compliance issued as a swimming pool, [therefore] it is a swimming pool.

2.14. The owners subsequently applied for a determination.

3. Submissions

The owners

3.1. The owners' view is that the body of water is not a pool, therefore does not require a barrier to restrict access to children under five years of age. They submit (in summary):

3.1.1. It was originally a pool but was converted into a pond containing vegetation and aquatic life "several years" before they purchased the property. Its use has changed and as it can no longer be considered a pool, it does not require a compliant barrier.

3.1.2. The body of water "is not suitable for swimming, wading, paddling or bathing and instead is a small artificial lake. This is evidenced by the native frogs in residence and the water plants growing [in it]".

The authority

3.2. The authority's view is that the body of water is a residential pool and therefore requires a compliant barrier to restrict access to children under five years of age. The authority submits:

3.2.1. "Regardless of its current condition or level of maintenance, [the authority] holds the view that the [body of water] possesses the requisite attributes to be considered a pool for the purposes of the [Act]".

3.2.2. "Ceasing use of a pool is not uncommon among pool owners; however, it does not absolve either the territorial authority or the pool owner of their respective obligations under the Act. These responsibilities remain in effect regardless of whether the pool is in active use".

3.2.3. The authority noted that it has not received any information from the owners following the 8 May 2025 inspection, nor has a subsequent inspection been carried out "that would provide sufficient reason to conclude remedial action has been undertaken to make the pool barrier compliant".

4. Discussion

- 4.1. The dispute arises from the authority's inspections under section 162D of a barrier that was originally constructed as a pool barrier for a pool constructed sometime between 2008 and 2010 under a building consent.
- 4.2. Subpart 7A of the Act '*Special provisions for residential pools*' includes sections 162A-E and establishes an ongoing compliance requirement for 'residential pools' to have physical barriers restricting access by unsupervised children under five years of age.
- 4.3. Section 162C sets out that the means of restricting access to a residential pool must comply with the requirements of the Building Code, either currently or in force at the time the pool was constructed, and in respect (as in this case) of which a building consent and code compliance certificate was issued.
- 4.4. To determine the matter, I must first consider whether the body of water at the owners' property is a 'residential pool' as defined by and for the purposes of the Act. If it is not, the requirements of subpart 7A do not apply
- 4.5. Subpart 7A applies to 'residential pools' that are in a 'place of abode' which the Act defines as:

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

abode or place of abode –

- (a) means any place used predominantly as a place of residence or abode, including any appurtenances belonging to or enjoyed with the place; and
- (b) includes –
 - (i) a hotel, motel, inn, hostel, or boarding house:
 - (ii) a convalescent home, nursing home, or hospice:
 - (iii) a rest home or retirement village:
 - (iv) a camping ground:
 - (v) any similar place

- 4.6. To assist in understanding the definition of a 'residential pool', the Act defines 'pool' as:

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

(b) does not include an artificial lake

- 4.7. In other words, subpart 7A creates obligations for owners of residential pools, with pools being an excavation or structure 'normally used' for swimming, paddling, or bathing that is in a place of an 'abode'.
- 4.8. The owners' property is a place of abode. It includes a residence as per (a) as well as accommodation similar to a motel or hostel as per (b)(i).
- 4.9. I consider the part of the definition of a pool in paragraph (a)(ii) is not relevant in the case as that refers to a 'product'.
- 4.10. Similarly, the second part of the definition provided in part (b), that excludes an 'artificial lake'. While not defined in the Act or Regulations, I consider this to mean a man-made and large body of water, such as those used for water supply, hydropower, and flood control or water management.
- 4.11. In considering the definition of 'pool' under the Act, neither term 'excavation' nor 'structure' is defined by the Act. However, I consider the construction as described in paragraph 2.2 meets the ordinary meanings of 'excavation' and 'structure', and I note the structure has not been altered in the years following.
- 4.12. Therefore, in considering whether the body of water is a pool, I must consider the meaning of phrase 'normally used for swimming, paddling, or bathing'.

'Normally used for swimming, paddling, or bathing'

- 4.13. The terms 'normally used' and 'swimming, paddling, or bathing' are not defined in the Act or regulations. Therefore, I need to first establish what these mean and what I must turn my mind to when considering whether the body of water at the owners' property is normally used for swimming, paddling, or bathing.
- 4.14. In my opinion, 'normally used' can be considered as the common or regular use under typical circumstances, rather than how something *could possibly be used*.

- 4.15. I consider 'swimming, paddling, or bathing' to be people entering water for recreation, relaxation and exercise, and the terms mean being in the water for any or all of these purposes.
- 4.16. Taken together, in relation to the definition of a 'pool' and whether something is 'normally used for swimming, paddling, or bathing', the critical aspect is whether the excavation or structure is intended for use by people for recreation, relaxation or exercise in water. Key considerations include physical features and functional characteristics, such as access, water quality, and maintenance intended to be carried out.
- 4.17. The owners have provided evidence demonstrating that the body of water contains vegetation, a mix of rocks/gravel and sediment, and have stated that frogs have taken up residence. Based on the opaque colour, the water quality is not being maintained for the purpose of people swimming. The gravel on the bottom would not invite paddling (ie walking through the water), and the vegetation reduces access to the water in some places and would be a hinderance to someone attempting to swim. I am of the view that the presence of these elements means people would not normally enter it for recreation, relaxation or exercise, ie it would not normally be used for swimming, paddling or bathing.
- 4.18. There is also evidence in the photos provided by both parties that since the owners purchased the property in 2017 the vegetation has become more established, and the water quality is reverting to a more natural state of a standing body of water. There is an increase in the visible presence of untreated or unfiltered water, indicating no maintenance has been carried out to support the up-keep of the water treatment system associated with a pool, such as collecting material falling into the body of water, cleaning or changing drainage filters, and back-washing of the pipes to clear any debris.
- 4.19. In this case it is not a matter of the original pool no longer being actively in use or in a state of disuse, as would commonly occur during the cooler months or for extended periods of time. Rather the body of water has been converted to a different use, being a garden feature or pond.
- 4.20. In conclusion, I consider the evidence indicates the body of water in its current state is not normally used for swimming, paddling, or bathing. Therefore, a pool barrier complying with the Building Code to the extent required by section 162C is not required.
- 4.21. Should the owners or future owners alter the body of water such that it is normally be used for swimming, paddling or bathing, it would become a 'pool' as defined by the Act, and would therefore be subject to the requirements of subpart 7A. This would include obligations of persons in section 162C to ensure that it has a compliant physical barrier that restricts access by unsupervised children under 5 years of age.

5. Decision

- 5.1. In accordance with section 188 of the Building Act 2004, I determine the body of water on the owners' property is not a pool for the purposes of the Act and therefore, a barrier is not required by section 162C of the Act to comply with the Building Code.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 16 September 2025.

Peta Hird

Lead Determinations Specialist