

Determination 2022/030

Regarding the authority's decision to refuse to issue two amendments to a building consent in respect of the location of a pool barrier

29 Kaimata Road, Bay View, Napier

Summary

This determination considers whether the authority was correct in the purported exercise of its power of decision to refuse to issue two amendments to the building consent regarding a pool barrier. The amendments were purportedly refused as compliance with clause F9 of the Building Code, *Restricting access to residential pools*, had not been demonstrated. The determination considers whether a pavilion, patio and soft landscaping area can be considered part of the immediate pool area.



Figure 1: Image of the pool complex with proposed glass fence separating the complex from the main house area (not to scale)

The legislation discussed in this determination is contained in Appendix A. 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, Katie Gordon, National Manager Building Resolution, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.¹
- 1.2. The parties to the determination are:
 - 1.2.1 B and G Speers, and BVonD Trust Ltd, the owners of the house (“the owners”), who applied for the determination; and
 - 1.2.2 Napier City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. This determination concerns the barrier restricting access to a pool/spa (“the pool”) and outdoor entertainment complex, which includes a pavilion (“the pool complex”). The dispute arises from the authority’s purported decision to refuse to issue two amendments to the building consent. The authority is of the view that the proposed amendments do not comply with Building Code Clause F9 *Restricting access to residential pools*. The dispute turns on whether the pool complex (including the pavilion, patio and soft landscaping area) can be considered to be part of the immediate pool area.
- 1.4. The matter to be determined² is the authority’s purported exercise of its power of decision to refuse to issue two building consent amendments (Amendment 3 in February 2020 and Amendment 4 in November 2020) relating to the pool barrier. In deciding this matter, I must consider whether the area encompassed within the proposed barrier in the amendment applications, which proposed to change the size and type of activities within the area, can be considered the immediate pool area.

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

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

Matters outside of this determination

- 1.5. The matter to be determined does not extend to the original building consent BC181157 issued in February 2019. Accordingly, I will not consider the area encompassed by the pool barrier in the original building consent, including the fire pit, can be considered to fall within the immediate pool area or the Building Code compliance of the physical barriers that restrict access to the existing immediate pool area as these were approved by the granting of the original building consent application.
- 1.6. In respect of Amendment 3 and Amendment 4, as the dispute centres on the immediate pool area, I will not consider the Building Code compliance of the pool barrier itself other than considering whether the entire area enclosed by the barrier can be properly considered to be within the immediate pool area.
- 1.7. In October 2021, the Ministry wrote to the parties to confirm that the determination would consider whether the area enclosed by the glass fence in Amendments 3 and 4 meets the definition of an 'immediate pool area' (refer to Figure 2). The Ministry clarified the determination would not consider the perimeter alarm system proposed in Amendment 4 (refer to paragraph 3.5), as the pool fence was the proposed outer edge of the pool barrier and the perimeter beam alarm was not proposed as the physical barrier to restrict access to the pool or immediate pool area by unsupervised children³.

2. The building work

- 2.1. The building is located on a 1.5-hectare rural lifestyle block, approximately 1 km from Kaimata Road. Access is via a private road shared with five other lifestyle blocks.
- 2.2. In 2018, the owners engaged an architectural design firm to design a pool complex to complement the existing house. The agreed design brief included a 50 square metre pavilion, which was to have glass frontage and doors that enabled full view of the pool and outdoor area. The outdoor area was to be fully enclosed and fenced off from the house; and was intended to be used and seen as a standalone entertainment area.
- 2.3. The pool complex was constructed during 2019 and 2020.

³ While the perimeter alarm may have been intended to alert other people within the area enclosed by the pool barrier when an unsupervised child in that area moves close to the pool itself, it is not a physical barrier that restricts access to the pool or immediate pool area.

3. Background

- 3.1. Building Consent BC181157 was issued by the authority in February 2019. The owners advise that the initial building consent application was submitted with only a draft fence design.
- 3.2. The consented design for the pool barrier included a glass fence located between the pool and the pool patio/soft landscaping area (“the glass fence as consented”) (as outlined in orange – see Figure 2). This design included the pool, spa, lawn, deck and fire pit within the pool barrier but excluded the pool patio, soft landscaping area and pavilion⁴.

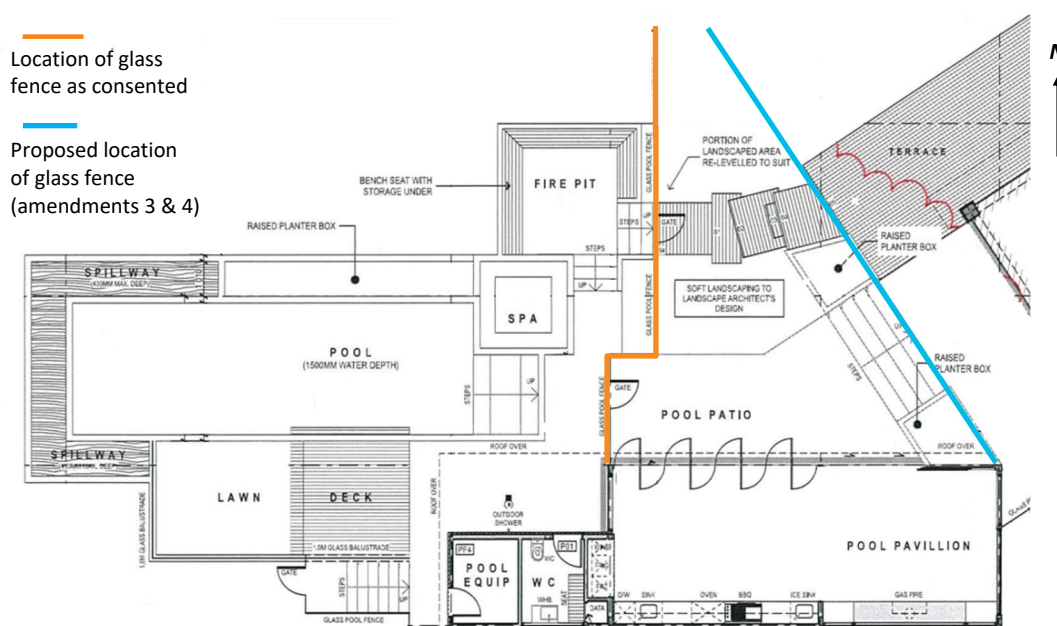


Figure 2: Indicative location of the glass fence as consented and as proposed in amendments 3 and 4 (not to scale)

- 3.3. On 5 February and 20 November 2020 respectively (following the near completion of construction), the owners made two attempts to seek an amendment to the building consent regarding the location of the glass fence, which was not yet constructed. The relevant amendments were:

⁴ Some of the information provided by the parties about the approved plans at the time the relevant amendments were sought shows an area enclosed by the pool barrier to the south of the pool beside the fire pit area, whereas this is not shown in the drawings provided by the owners. As this area has not been the focus of the submissions from the parties, the determination does not consider that area any further as it was not the subject of the dispute between the parties.

- Amendment 3: Amended positioning of pool barrier.
 - Amendment 4: The same revised pool fence location as detailed in amendment 3 with the addition of a secondary alarm system.
- 3.4. Amendment 3 proposed to install a glass fence that would separate the pool and pool complex from the existing house and surrounding property (“the proposed glass fence”, see Figure 3 – as outlined in blue). The new location of the proposed glass fence would result in the inclusion of the pool pavilion, patio, and soft landscaping area within the boundary of the pool barrier.
- 3.5. Amendment 4 proposed to install a perimeter beam alarm (“the perimeter alarm”) between the pool and greater outdoor area, in a similar location to the glass fence as consented (see Figure 3 – as outlined in red), in addition to the proposed glass fence detailed in amendment 3 .

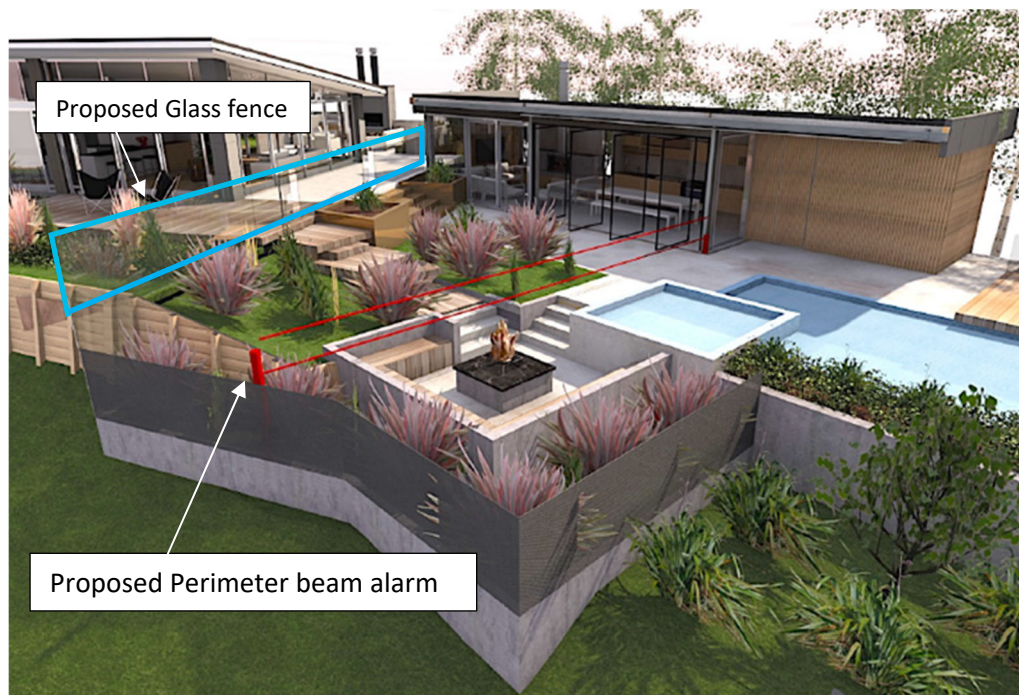


Figure 3: Image showing locations of the proposed glass fence and perimeter beam alarm (not to scale)

- 3.6. The owners state that the purpose of the amendments was to restrict access to the pool complex so that young children would only be able to be present if they were accompanied by an adult. The perimeter alarm would then result in an audible alarm sounding in the pool pavillion if young children attempted to approach the pool.

- 3.7. On 12 November 2020, the authority advised the owners that these amendments did not comply with clause F9.

4. Submissions

The owners

- 4.1. The owners are of the view that the entire area that is proposed to be enclosed by the pool barrier in amendments 3 and 4, qualifies as the immediate pool area. The owners believe the proposed glass fence (as highlighted in blue in Figure 3) will result in the immediate pool area being fenced off from the existing house and surrounding property. The pool can be supervised by adults inside the pavilion, and the proposed alarm will provide an additional layer of protection.

The authority

- 4.2. The authority purportedly refused to grant the two amendments because it is not satisfied that either proposal restricts access to the immediate pool area.
- 4.3. In a letter to the owners (dated 12 November 2020), the authority stated further information was required to ensure compliance with clause F9. Regarding both Amendments 3 and 4, the letter states:

F9.3.1 requires that residential pools be provided with physical barriers that restrict access to the pool or the immediate pool areas by unsupervised young children. The proposal does not demonstrate compliance with this provision.

Draft determination and submissions in response

- 4.4. The Ministry sent a draft of this determination to parties on 30 June 2022. The authority accepted the draft determination on 5 July 2022 without any further comment. The owners accepted the draft determination on 21 July 2022 without any further comment.

5. Discussion

Legislation

- 5.1. Section 17 of the Act provides “that all building work must comply with the Building Code to the extent required by this Act...”.
- 5.2. Section 49 of the Act states the authority must grant a building consent if satisfied on reasonable grounds that the provisions of the building code would be met if

the building work were completed in accordance with the plans and specifications accompanying the application for building consent.

- 5.3. In addition to the requirement to comply with the Building Code, the pool and pool barrier will also be subject to the ongoing compliance obligations outlined in subpart 7A of the Act (sections 162A-162E). Section 162A of the Act states the purpose of the residential pools provisions is to “prevent drowning of, and injury to, young children...”, and section 162C of the Act sets out how physical barriers for residential pools must restrict access by unsupervised children under the age of five years.
- 5.4. Under section 162C(2), residential pools 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).
- 5.5. Clause F9 states:
- 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 (i.e. under 5 years of age).
- F9.3.2 Barriers** must...
- surround the *pool* (and may enclose the whole or part of the *immediate pool area*);...
- 5.6. To establish compliance with clause F9, a barrier which encloses the pool or all or part of immediate pool area is required. Given that the dispute in this case centres on the immediate pool area, I have not considered any other aspects of the compliance of the pool barrier itself.
- 5.7. For completeness, I note the transitional and savings provisions of sections 450A and 450B of the Act do not apply in this case, because the pool was constructed in 2019.

Interpretation of immediate pool area

Definition

- 5.8. Section 7 of the Act defines ‘immediate pool area’ as:

... the land in or on which the pool is situated and so much of the surrounding area as is used for activities carried out in relation to or involving the pool.

- 5.9. The High Court in *Waitakere City Council v Hickman* (“*Hickman*”)⁵ considered the proper interpretation and application of immediate pool area. However, it did so in relation to the now repealed Fencing of Swimming Pools Act 1987 (“FOSPA”). I note the definition of ‘immediate pool area’ in FOSPA differs from that in the Act.⁶ In FOSPA, ‘immediate pool area’ is defined 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 on in conjunction with the use of the pool.

- 5.10. I am of the view that the variation between the definitions in section 7 of the Act and FOSPA has no interpretative significance; it merely reflects the change in the drafting practices of the Parliamentary Counsel Office between 1987 and 2016.
- 5.11. The Building (Pools) Amendment Bill Departmental Report (“the Bill”), which was prepared for Select Committee, supports this view, where it says:

The definition in the Bill reflects the [FOPSA] definition of ‘immediate pool area’. The way the definition has been interpreted by the courts (*Hickman v Waitakere City Council*) is consistent with the policy intention.

- 5.12. I note that the definition – as worded in the Bill – was subsequently made into law by being inserted into the Act by way of an amendment. As such, I consider the interpretative approach in *Hickman* is the correct way to determine the permissible extent of an immediate pool area⁷.

Activities carried out in relation to or involving the pool

- 5.13. Following *Hickman*, an immediate pool area is determined in the first place by *use*⁸, being the activities carried out in relation to or involving the pool⁹. It is a

⁵ [2005] NZRMA 204 (HC).

⁶ In 2017 FOSPA was repealed and the definition of ‘immediate pool area’ was inserted into the Act by way of an amendment.

⁷ As FOSPA has been repealed, the discussion below uses the wording of the definition of ‘immediate pool area’ as it appears in the Act.

⁸ *Hickman* at [52] states, “The scope of the ‘immediate pool area’ is determined in the first instance by the extent to which that area is actually **used** for activities or purposes properly regarded as taking place in conjunction with the use of the pool for its usual purposes of swimming, wading, paddling or bathing” [my emphasis].

⁹ *Hickman*, at [29](b).

matter of degree whether an activity is sufficiently related to or involves the pool¹⁰.

- 5.14. Activities which are carried out independently of the pool or which only have a remote or indirect association with the use of the pool are to be excluded from the immediate pool area¹¹. *Hickman* gives the following examples of activities that would usually be excluded: clothes lines, vegetable gardens, vehicle or pedestrian access ways, and planting for landscaping purposes¹².
- 5.15. There are activities that would ordinarily qualify as being carried out in relation to or involving a pool¹³. *Hickman* gives the following examples: the use of pool furniture, changing sheds, pumps or pool maintenance equipment, sunbathing areas, and diving boards or other pool equipment.
- 5.16. *Hickman* notes that activities such as barbeques and entertaining can be carried out, at times, in relation to or involving the pool and, at other times, independently of the pool. *Hickman* makes it clear that these qualify as activities for the purposes of the definition if the pool owner can demonstrate that they take place in the area surrounding the pool *from time to time* in relation to or involving the pool¹⁴.

Immediacy

- 5.17. While *Hickman* says an immediate pool area is determined in the first place by its use, the Court goes on to say that it is not governed solely by that factor; it is limited to an area that can properly be considered *immediate*. As stated in *Hickman*¹⁵:

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. [my emphasis]

- 5.18. *Hickman* goes on to say that the area "must be **sufficiently confined** so that it may properly be described as being in the 'immediate' area of the pool"¹⁶ [my emphasis].

¹⁰ *Hickman*, at [29](f).

¹¹ *Hickman*, at [29](f).

¹² I note that this list of activities is not exhaustive; other activities may also be excluded.

¹³ *Hickman*, at [29](g).

¹⁴ *Hickman*, at [32] and [53].

¹⁵ *Hickman*, at [34].

¹⁶ *Hickman*, at [54].

- 5.19. The actual size of an immediate pool area depends, according to *Hickman*, on the circumstances of each case. However, the further away an activity takes place from the edge of the pool, the less likely it can properly be within the immediate pool area¹⁷. This is because it becomes less likely for the pool owner to be able to demonstrate that the activity:
- can properly be said to be carried out in relation to or involving the pool; and
 - is in sufficient proximity to the pool.
- 5.20. In summary, while the immediate pool area is determined by identifying the area surrounding the pool that is used for pool-related activities¹⁸, that area is “subject to the issue of immediacy”¹⁹ and must not extend any further than can properly be considered as being *immediate* to the pool.

The proposed amendments to the building consent and the expansion of the immediate pool area

- 5.21. The proposed additions to the area encompassed by the pool barrier contain the pavilion and patio with adjacent soft landscaping (as seen in Figure 2).

Activities undertaken in pavilion and patio areas

- 5.22. *Hickman* suggests that activities such as barbequing and entertaining can be carried out within an immediate pool area. However, the pool pavilion in question contains more than a barbeque. The diagrams and images of the pavilion show it contains a gas fire, TV, chairs and tables, as well as a kitchen that includes a barbeque, oven, sink, dishwasher, fridge and freezer. I am of the view activities that may be undertaken in the pavilion, including cooking in a full kitchen and watching TV, do not have a sufficient connection with the use of the pool. Therefore, the pavilion cannot be part of the immediate pool area.
- 5.23. It appears the patio is designed to serve as an access way from the house to the pavilion, as well as an area for entertaining. *Hickman* suggests pedestrian access ways and planting for landscaping purposes have only a remote or indirect association with a pool. I have already determined the pavilion cannot be included in the immediate pool area. Therefore, it would not be logical for the principal access route from the house to the pavilion to be included. This would result in users of the pavilion having to go through the pool barrier to get there.

¹⁷ *Hickman*, at [34].

¹⁸ I use the expression “pool-related activities” to mean activities carried out in relation to or involving the pool.

¹⁹ *Hickman*, at [29](b).

- 5.24. On the other hand, I note that *Hickman* considers that the use of pool furniture and sunbathing are activities normally carried out in relation to or involving a pool. In this case, there is no evidence that suggests the owners intend to undertake these activities on the patio. The area beside the pool also contains a lawn and deck. Photographs show there are already sunbathing loungers, an outdoor table and chairs located in these areas. There is already space for these activities within the originally consented barrier. Therefore, the patio area cannot be within the immediate pool area as there are already areas adjacent to the pool area that provide space for sunbathing and entertainment.
- 5.25. Regarding the soft landscaping area, it is clear the maintenance of the planted area will not be an activity connected to the use of the pool. *Hickman*²⁰ included planting for landscaping purposes as an example of an activity which would not usually be regarded as being carried on in conjunction with the use of the pool. Considering this together with the location of the soft planted area next to the patio area, I am of the view the soft landscaping area cannot be considered part of the immediate pool area.

Proximity of the pavilion and patio to the pool

- 5.26. While I have already concluded the activities undertaken in the pavilion and patio are not sufficiently related to the pool to be included in the immediate pool area, the issue of proximity will also be considered.
- 5.27. In Determination 2008/123²¹, an outbuilding (where a gym, sauna and steam room were located) sat near the pool. The outbuilding was approximately 1.2 metres from the pool's edge, and individual rooms were around 2 square metres in size. In contrast, the pavilion in the current determination is of substantial size (50 square metres). The pavilion is also located between the house and pool, rather than directly beside the pool.
- 5.28. The owners contend "the overall design of the complete outdoor area was made around the pool/spa being the central element", and it is sufficiently confined to be described as the immediate pool area. However, given the substantial size of the pavilion and the fact it is not located adjacent to the pool, I do not consider that the pavilion is within sufficient proximity of the edge of the pool to be considered "immediate" to the pool.
- 5.29. The patio is located between the proposed glass fence and the entrance to the pool, adjacent to the pavillion. The distance from the pool steps to the proposed

²⁰ *Hickman*, at [29](b).

²¹ Dispute about the code compliance of an outbuilding to be erected in a pool area. Issued 24 Dec 2008.

barrier appears to be nine to 10 metres. I am of the view this area is too large for the entire patio to be considered proximate to the pool, particularly bearing in mind the fact that there are other areas within the immediate pool area that could be used for activities such as entertaining and sunbathing. The soft landscaping area is located adjacent to the patio and on either side of the steps leading from the terrace of the house to the fire pit (refer to Figure 3). I am not satisfied the soft landscaping is proximate to the pool. In this case, the lawn and deck area are appropriately proximate to the pool area.

Compliance with clause F9

5.30. The functional requirement of clause F9 is concerned with how pool barriers are designed and constructed to achieve the performance requirement of restricting access by unsupervised children under 5 years of age. In addition, there is a strong safety focus in the objective of clause F9 to prevent injury or death to young children.

5.31. To establish compliance with clause F9, a barrier which encloses the pool or immediate pool area is required. As the area contained within the proposed barrier cannot properly be considered the immediate pool area, this requirement has not been met.

5.32. In Determination 2008/123, it was accepted that activities associated with a gym, sauna, and steam room could take place in the immediate pool area, sometimes in conjunction with the use of the pool and sometimes not. However, it was noted that these activities were unlikely to attract children under 6 years of age and unsupervised²². The individual rooms were of a small size (approximately 2 square metres), which would also preclude activities of a different nature. The determination stated:

...a different view could have been reached if the outbuilding been larger, allowing a range of alternative activities involving greater numbers of people, including children under 6 years of age.²³

5.33. Activities undertaken in the pavilion and on the patio, such as dining, entertaining and watching television, could reasonably involve children under the age of five²⁴. I acknowledge the owners have proposed to install a perimeter beam alarm adjacent to the pool's edge, and the pavilion has been designed with glass walls, which may allow supervision of the pool. However, the pavilion is of substantial

²² It is noted that Determination 2008/123 relates to clause F4.3.4(f) of the Building Code

²³ Dispute about the code compliance of an outbuilding to be erected in a pool area, at [6.8]. Issued 24 Dec 2008.

²⁴ The relevant age under clause F9 is five years of age.

size (50 square metres) and the patio is also large (nine to 10 metres in length). The larger the immediate pool area becomes, the more likely other activities will occur there that are not directly related to the pool. This increases the chance of young children left in these areas unsupervised.

- 5.34. Therefore, the two amendments proposed by the owner (refer to paragraph 3.3) do not comply with clause F9²⁵. Accordingly, the authority was correct to purportedly refuse to issue the amendments on the basis that compliance with clause F9.3.1 had not been demonstrated.

6. Decision

- 6.1. In accordance with section 188 of the Building Act 2004, I determine the authority was correct to purportedly refuse to issue the two amendments (dated 5 February 2020 and 20 November 2020 respectively) to Building Consent BC181157, regarding the location of the pool barrier. Accordingly, I confirm those decisions.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 22 December 2022.

Katie Gordon

National Manager, Building Resolution

²⁵ In not complying with clause F9, they will also not meet the ongoing compliance obligations set out in section 162C of the Act.

Appendix A

Building Act 2004

162A Purpose

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

162C Residential pools must have means of restricting access

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

Building Regulations 1992 – Schedule 1**Clause F9—Means of restricting access to residential pools****Objective**

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

Functional requirement

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

Performance

F9.3.1 *Residential pools* must have or be provided with physical barriers that restrict access to the *pool* or the *immediate pool area* by unsupervised young children (i.e. 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.