

Determination 2006/103

Swimming pool fence at 33 Melchizedek Place, Dairy Flat, Auckland (to be read in conjunction with determination 2005/125)

1. Preliminary notes

1.1 Determination 2005/125

1.1.1 Determination 2005/125 concerns the same swimming pool as this Determination. However, after Determination 2005/125 had been issued the owner told me that the door D104 on Figure 1 of Determination 2005/125 was in fact a single sliding-folding door and not the double swing doors shown on Figure 1. The owner asked me to issue a clarification under section 189 of the Building Act 2004 (“the Act”). The owners did not give any explanation of why they had not pointed out that error when they acknowledged the receipt of the application for Determination, which was accompanied by that drawing.

1.1.2 However, the territorial authority was reluctant to agree on a clarification, and the 20 working days mentioned in section 189 elapsed so that I no longer had the power to make such a clarification. Accordingly, the owner applied for this second Determination.

1.1.3 I emphasise that I still consider Determination 2005/125 to be correct in respect of the facts, as I understood them at the time.

1.2 This Determination

1.2.1 Application accepted

1.2.1.1 Under section 179(2)(c) I “may”, not “must”, refuse an application for a Determination if I have already made a Determination on the same matter. In the circumstances, I decided not to refuse the application for this second Determination.

1.2.1.2 That decision is not to be taken as a precedent. In most cases, if the parties fail to point out matters relevant to a Determination then they must expect to have to live with the consequences of that failure.

1.2.2 The submissions and the draft determination

1.2.3 The owner made no specific submissions for this second Determination apart from pointing out the error about D104.

1.2.4 The territorial authority did make specific submissions, which I took into account together with the territorial authority's original submissions in respect of Determination 2005/125.

1.2.5 In the light of those submissions, I prepared a draft determination ("the draft") which I sent to the parties.

1.2.6 The owner and the building certifier accepted the draft.

1.2.7 The territorial authority requested various changes to the draft on the basis of its interpretation of the Building Code.

1.2.8 I amended the draft to produce this revised draft which discusses the points raised by the territorial authority, see in particular 5.3 and 5.4 below.

2. The matter to be determined

2.1 This is a Determination under Part 3 Subpart 1 of the Act made under due authorisation by me, John Gardiner, Determinations Manager, Department of Building and Housing ("the Department"), for and on behalf of the Chief Executive of that Department. The applicants are the previous owners, N and K Speakman ("the previous owners") and the other party is the Rodney District Council ("the territorial authority"). During the course of this determination it is my understanding that the property changed ownership. I have not been advised of the names of the new owners but they are now parties to this determination.

2.2 The application arises from the issuing by City Certifiers Ltd ("the building certifier") of a code compliance certificate in respect of building work including a new swimming pool.

2.3 The question to be determined is whether the code compliance certificate should have been issued, and specifically whether the safety barriers to the swimming pool comply with the requirements of clause F4 of the Building Code (the First Schedule to the Building Regulations 1992).

2.4 In making my decision I have not considered any other aspects of the Act or of the Building Code.

3. The building

- 3.1 The relevant parts of the house and the swimming pool are shown in Figure 1. The only access to the swimming pool from the house is through a sliding-folding door (“D104”) between the house and a covered area in which there is a spa pool. The covered area opens directly onto the swimming pool. Double doors (“D103”) open outward from the covered area into a changing room.
- 3.2 Neither set of doors is self-closing.

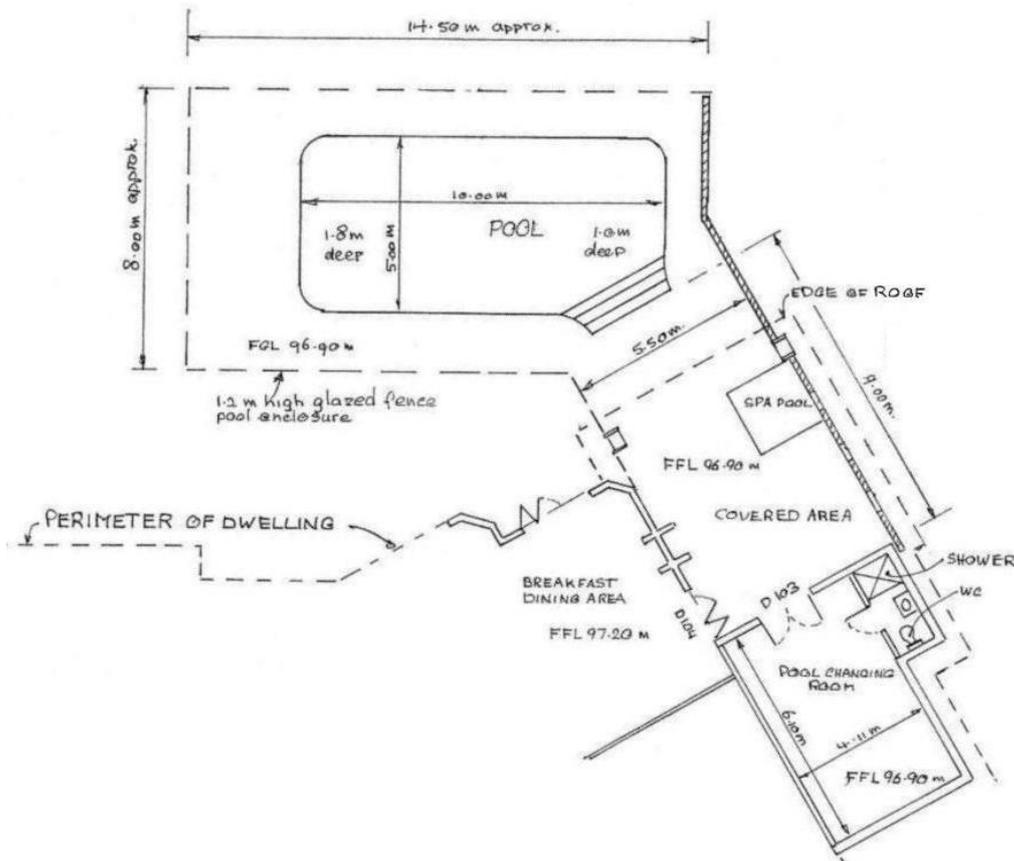


Figure1: The swimming pool and associated facilities

4. The legislation

- 4.1 The relevant provisions of the Building Code are:

Provisions	Limits on application
F4.3.3 Swimming pools having a depth of water exceeding 400 mm, shall have barriers provided.	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:

- | | |
|---|--|
| <p>(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.</p> | <p>Performance F4.3.4(f) shall not apply to any pool exempted under section 5 of the Fencing of Swimming Pools Act 1987.</p> |
| <p>(g) Restrict the passage of children under 6 years of age when provided to guard a change of level in areas likely to be frequented by them.</p> | |

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

4.2 The acceptable solution F4/AS1 says:

“3.1 Fencing for swimming pools shall be constructed to no lesser standard than is required by the Fencing of Swimming Pools Act 1987, to restrict the access of children.”

4.3 Section 13B of the Fencing of Swimming Pools Act 1987 provides in effect that fencing in accordance with the Schedule to that Act shall be deemed to comply with the Building Code. Relevant requirements of that Schedule are:

- “8. Every gate or door shall be . . . so mounted that—
- “(a) It cannot open inwards towards the immediate pool area . . .
- “9.(1) Every gate or door shall be fitted with a latching device.
- “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.
- “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.”

5. Discussion

5.1 General

- 5.1.1 Neither the owners nor the building certifier made specific submissions in respect of Determination 2005/125 or this Determination.
- 5.1.2 The territorial authority's submissions in respect of Determination 2005/125 are discussed in that Determination. In effect, I decided that the changing room was part of the immediate pool area so that doors D103 were not part of the safety barrier, but doors D104 (which at the time I understood to be swinging doors opening into the immediate pool area) were part of the safety barrier and should open the other way and should automatically close and latch.
- 5.1.3 In this Determination, the only difference is that door D104 is identified as a folding sliding door. Thus the only matter that I need to determine is whether that door complies with the Building Code even though it does not automatically close and latch. The territorial authority has made its submissions in that respect.
- 5.1.4 The territorial authority also made other submissions that were not relevant to this Determination or to Determination 2005/125 but were relevant to Determination 2005/124, which related to a similar matter. I cannot reconsider Determination 2005/124 and therefore take no account of those other submissions.

5.2 The acceptable solution

- 5.2.1 The acceptable solution F4/AS1 cites the Schedule to the Fencing of Swimming Pools Act. The territorial authority argued, as I understand it, that sliding-folding doors that do not automatically close and latch as required by clause 10 of that Schedule cannot be used unless the territorial authority is satisfied under clause 11 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." The territorial authority was not satisfied under clause 11 in respect of the sliding-folding door D104 that did not automatically close and latch. The territorial authority therefore queried whether sliding and sliding folding doors that did not automatically close and latch could be used without the territorial authority needing to be satisfied as to the criteria set out in clause 11 of the schedule.
- 5.2.2 I take the view that under section 23 of the Act, compliance with an acceptable solution is not the only means of complying with the corresponding provision of the Building Code. I agree that if sliding or sliding-folding doors are used in an alternative solution then clause 11 cited in the acceptable solution F4/AS1 does not apply, although the territorial authority still needs to be satisfied that the doors concerned comply with clause F4 of the Building Code.

5.2.3 In response to those passages in the draft, the territorial authority said:

“If this Council was to approve this alternative (or performance based) solution it would have typically imposed the following conditions to ensure compliance with F4.3.4(f) as follows:

“Tower bolts to be fitted out of reach of children under the age of 6 years

“Notice to be fixed to the door that stated ‘This door is part of the pool fence and needs to be kept closed when not being used’ (or words similar to this)”

5.2.4 Because F4/AS1 does not specify any other means, any means that are used to make sliding or sliding-folding doors comply with clause F4.3.4(f) will be classed as an alternative solution. The means suggested by the territorial authority, see 5.2.3 above, are discussed in 5.4 below.

5.3 Performance criteria

5.3.1 The territorial authority said in effect that those clauses of the Building Code headed “performance” should not be “referred to and interpreted as provisions rather than as performance criteria”.

5.3.2 The word “provision” is defined in the Concise Oxford Dictionary as “a legal or formal statement providing for something”. I therefore consider I can use the word in respect of sections of the Act, clauses of the Building Code, paragraphs of a compliance document, or other similar “formal statements”.

5.3.3 In response to those passages in the draft, the territorial authority said:

“The basic difference in understanding between the draft determination and the Council is based on the view as expressed in [5.3.1 and 5.3.2 above] that equates performance criteria or measures with rules (in the [draft’s] words provisions). The [draft] uses the work provision which can mean performance criteria or rules. However, rules and performance criteria are not one and the same. This Council’s view is that word ‘provisions’ has a wider meaning and not that a performance criteria can be regarded as a provision. The wider meaning of ‘provision’ confuses the interpretation and application of performance criteria specified in the NZBC.

“It is also significant how NZBC Clause F4.3.5 is drafted. The requirements in F4.3.5 are additional requirements to F4.3.4. Clause F4.3.5 states; ‘*Barriers to swimming pools shall have in addition to performance F4.3.4*’. The words ‘in addition to’ means that, the primary requirement is in F4.3.4.

“The Council interpretation above is what is referred to in the *Waitakere City Council v Hickman* judgement referred to in [5.4.2 of the draft]. Similarly the previous Determination 2003/6 raised the issue of multiple doors and the need to consider each case on its merits.”

5.3.4 My responses to the points made in that statement are:

- (a) The meaning of the word “provision”.

The territorial authority has not persuaded me that I was wrong when, for the reasons indicated in 5.3.2 above, I referred to clause F4.3.4 of the Building Code, for example, as a “provision”. In that case, the provision was a list, in its paragraphs (a) to (g) inclusive, of performance criteria for barriers.

- (b) That when considering clauses F4.3.4 and F4.3.5, the “primary requirement” is clause F4.3.4.

I disagree. I cannot read the words “in addition to” as meaning “subject to”. In my view, therefore, both clauses have equal weight.

- (c) In my view, the relevant passage in *Waitakere City Council v Hickman* (which is quoted in 5.4.2 below) does not support the territorial authority’s proposition that clause F4.3.5 is to be read as being subject to clause F4.3.4.

5.4 All performance criteria must be achieved

5.4.1 The territorial authority submitted that “. . . the performance criteria need to be met collectively and independently. This means that in terms of F4.3.4(f) there is a need to have an effective barrier and F4.3.5(a) deals with the requirement for doors. It is our opinion that both these performance criteria need to be met.”

5.4.2 I agree, taking the view that:

- (a) The matter for determination is whether D104 complies with clause F4 of the Building Code. My jurisdiction does not extend to the Fencing of Swimming Pools Act.
- (b) D104 comes within the exemption of clause F4.3.5(a) and is therefore not required to be self-closing and self-latching.
- (c) Nevertheless, D104 is required to comply with clause F4.3.4(f) and “restrict the access of children under 6”. The means of doing so cannot include self-latching and self-closing, but that does not prevent the use of other means, even if they are less effective than self-closing and self-latching.

5.4.3 In this case, there is no dispute that door D104 complies with clause F4.3.4(f) in that it is high enough, has small enough (if any) openings in it, and is sufficiently difficult for a child to climb. However, those are requirements that apply to the whole of the safety barrier and I consider that doors or gates need to include some additional means of restricting the access of children under 6.

5.4.4 The owner did not propose any additional means of restricting access. The territorial authority said that in such cases it would typically require:

“Tower bolts to be fitted out of reach of children under the age of 6 years

“Notice to be fixed to the door that stated ‘This door is part of the pool fence and needs to be kept closed when not being used’ (or words similar to this)”

5.4.5 Those requirements seem sensible except that:

- (a) Bolts are not the only acceptable means of holding the door closed.
- (b) The purpose of keeping the door closed is to prevent access by young children unless a supervising adult is in attendance. The notice needs to reflect that. Furthermore, the notice should refer not only to keeping the door closed but also keeping it fixed in the closed position.

5.4.6 However, I note that the current draft of the proposed New Zealand Standard for swimming pool fencing requires that where, as in this case, doors that are not self-closing and self-latching open directly from a house to the immediate pool area then such doors must have a lockable door latch at 1500 mm height; and in addition there must also be an automatic pool cover and a beam alarm between the pool and house. The draft Standard also gives wording for signs on doors.

5.4.7 The territorial authority’s requirements quoted above are significantly less onerous than those of the draft Standard, particularly as regards the cover and the alarm. However, a draft is only a draft, and I am reluctant to treat it as if it were a compliance document.

5.4.8 In any event, the adequacy of the territorial authority’s requirements is not a matter submitted for determination. Those matters are whether door D104 complies with clause F4 and consequently whether the building certifier’s decision to issue the code compliance certificate is to be confirmed, reversed, or modified.

6. Decision

6.1 In accordance with section 188 of the Act, I hereby:

- (a) Determine that door D104 does not comply with clause F4, and
- (b) Reverse the building certifier’s decision to issue the code compliance certificate.

6.2 I am not required to, and do not, make any decision in respect of what is to be done to bring door D104 to compliance with clause F4 so that the territorial authority may issue a code compliance certificate.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 8 November 2006.

John Gardiner
Determinations Manager