



Determination 2011/013

Pool barriers for a swimming pool including a pool room at 68 Mays Road, Christchurch

1. The matters to be determined

- 1.1 This is a Determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department.
- 1.2 The parties to this determination are:
- the owner of the pool and surrounding property, Mr L Dirkzwager (“the applicant”)
 - the Christchurch City Council (“the authority”) carrying out its duties and functions as a territorial authority and a building consent authority.
- 1.3 The dispute between the parties relates to the authority’s decision to refuse to issue a code compliance certificate for the swimming pool and pool room already constructed on the applicant’s property. The reason for this decision is that the authority is concerned that the swimming pool barriers do not comply with the requirements of Clause F4 of the Building Code (Schedule 1 of the Building Regulations 1992). The applicant has asked for a determination as to whether the pool area, including the pool room, complies with the Building Code.
- 1.4 Therefore, I take the view that the matter for determination² is whether the authority was correct in its decision to refuse to issue a code compliance certificate. In deciding this I must consider whether the pool barriers comply with Clause F4 of the Building Code, with respect to the area enclosed by the barriers as the pool area.

¹ The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Department are all available at www.dbh.govt.nz or by contacting the Department on 0800 242 243.

² In terms of sections 177(1)(b) and 177(2)(d) of the Act.

- 1.5 In this determination, I will refer to the following legislation and Standard, the relevant parts of which are set out in Appendix A.
- The Building Act 2004 with its sections referred to as sections of the Act.
 - Building Code Clause F4: Safety from Falling.
 - The Fencing of Swimming Pools Act 1987 (“the FOSP Act”), with its sections referred to as sections of the FOSP Act.
 - The Schedule to the FOSP Act (“the Schedule”), with its clauses referred to as clauses of the Schedule.
 - New Zealand Standard NZS 8500: 2006: Safety Barriers and Fences Around Swimming Pools, Spas and Hot Tubs (“NZS 8500”).
- 1.6 In making my decision, I have also considered the submissions of the parties and the other evidence in this matter. I have not considered any other aspects of the Act or of the Building Code.

2. The swimming pool and pool barrier

- 2.1 The applicant’s swimming pool is located at the rear (south) of his property. The pool is separated from the house by a lawn.
- 2.2 At the western end of the pool, is a shed for storing pool equipment. This pool shed is separated from the pool by a 1.8m high concrete-block plastered wall.
- 2.3 At the eastern end of the pool, is a 42m² building which was described on the plans as a pool room. The pool room contains a toilet, shower, sink and bench area and an area shown as containing a portable sauna and gymnasium equipment. Access from the pool room to the paved area surrounding the pool is through two sets of bi-folding sliding doors on the room’s western side. These doors are not self-closing and self-latching. The other access to the pool room is through a set of hinged double doors on the room’s northern side. One leaf of this door is fixed shut; it is unknown whether the remaining leaf is self-closing and self-latching.
- 2.4 The pool barrier on the southern side is formed by a 1.8m high timber paling boundary fence. There is a gap of approximately 800mm between the eastern and southern walls of the pool room and the boundary fence which is closed off by glazed barriers; the height of these barriers is unknown.
- 2.5 The wall of the adjacent pool shed, a 1.8m concrete-block plastered wall, forms the pool barrier at the western end. The barrier on the northern side is formed partly by the pool room, and partly by a 1.2m high fence running between the pool room and the pool shed. There is a gate in this fence.
- 2.6 The pool is fitted with a safety cover that exceeds the requirements of ASTM F1346-91³, which, when closed, is capable of holding the weight of an adult. The controls for this cover are located 1.8m above the ground and are key

³ ASTM F1346-91 (2003) Standard performance specification for safety covers and labelling requirements for all covers for swimming pools, spas and hot tubs (cited in NZS 8500).

operated. In addition, the pool area is monitored by three security cameras, which can be monitored from the house or from the pool room.

2.7 The plan for the pool, pool room and pool shed is shown in Figure 1.

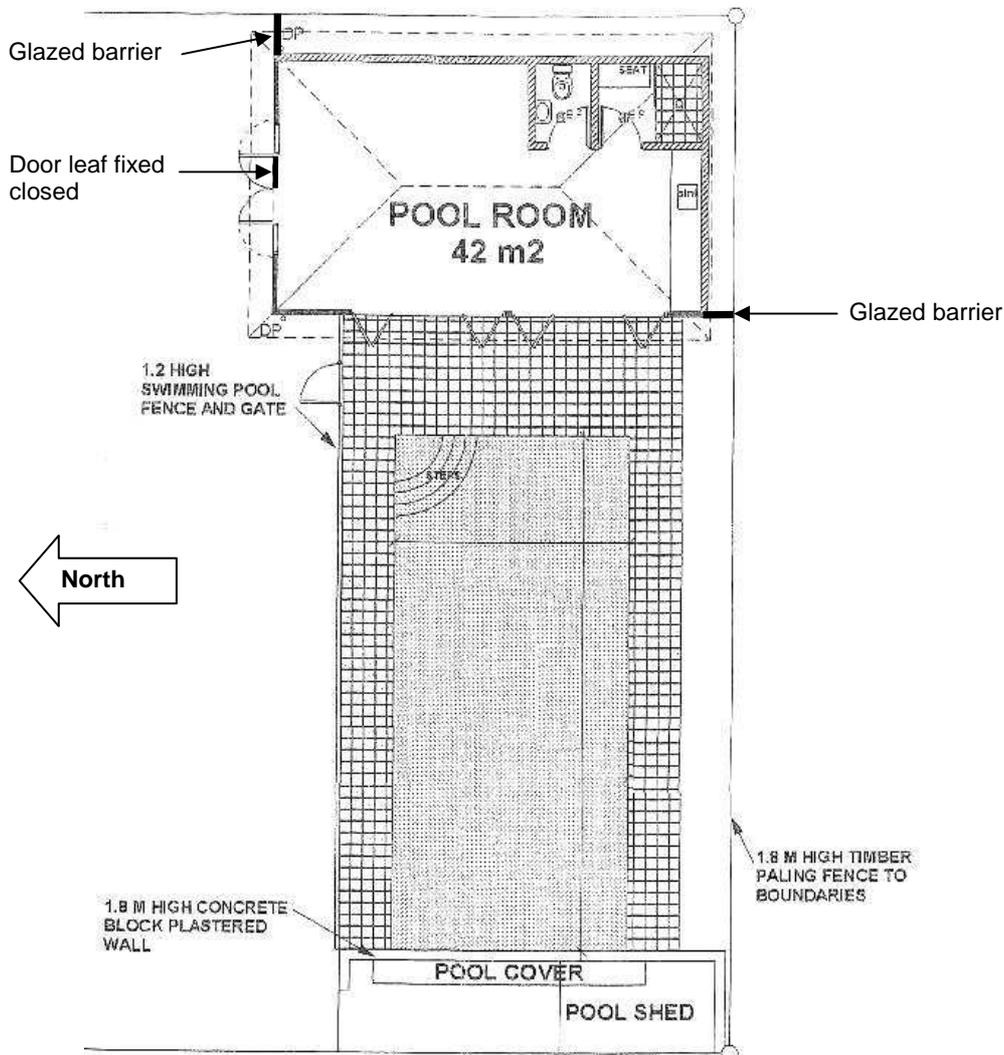


Figure 1: Plan of the pool and pool room

3. The background

3.1 The applicant applied for and was granted a building consent for a swimming pool and associated accessory buildings to be built on his property. I have not seen a copy of this consent, but a copy of the plans submitted with the consent has been date stamped 31 August 2005 by the authority. On these plans, the accessory buildings are referred to as a pool room and the pool shed.

3.2 The plans show the pool being fenced from the house and lawn on its northern side by a 1.2m high pool fence running between the pool room and the pool shed. While building the pool and pool room, the applicant found out about a cover for the pool, which he believed provided greater protection in terms of safety for children. The applicant installed the pool cover, and

- applied to the authority for an exemption under section 6 of the FOSP Act from the need to install the pool fence along the northern side of the pool.
- 3.3 Following a hearing, a committee of the authority declined this application for an exemption on 23 October 2007.
- 3.4 The applicant accordingly completed the pool fencing as set out in the building consent plans.
- 3.5 On 23 July 2010, the authority inspected the applicant's pool. On 5 August 2010, the authority wrote to the applicant advising that the pool fence did not comply, because it did not fence off the immediate pool area from the rest of the 'outdoor living space and thoroughfares'. In particular, the authority stated that, 'a complying fence is to be installed to separate the bi-fold/sliding doors from the immediate pool area', and that maintenance was required for the pool gate to ensure that it was self-closing and self-latching.
- 3.6 The applicant then requested a final inspection, for the purpose of gaining a code compliance certificate, of the pool and pool room. The authority carried out this inspection on 13 August 2010. The authority's site inspection report of the same date stated that the swimming pool fencing did not comply with the Building Code and required rectification, and recommended that the applicant 'seeks clarification/determination on DBH Determination 2008/123 ...'.
- 3.7 The applicant applied for a determination on this matter on 19 October 2010.

4. The submissions

- 4.1 In a letter accompanying the application for a determination, the applicant set out the order of events relating to the pool and pool room.
- 4.2 The applicant also provided copies of:
- the plans that the building consent was based on
 - correspondence from the authority
 - the decision of the authority's hearings committee with respect to the application for an exemption under the FOSP Act
 - documents related to the property's title
 - an excerpt from NZS 8500.
- 4.3 The authority did not acknowledge the application, and or make a submission in response to the application.
- 4.4 A draft determination was issued to the parties for comment on 15 December 2010. The authority accepted the draft without comment on 17 February 2011.
- 4.5 The applicant did not accept the draft and provided further information on the double hinged doors to the northern side of the pool room, one leaf of which was fixed shut; and photographs of glazed barriers that had been installed to close off the gap between the pool room and the boundary fence to the South and East. The glazed barriers had been installed before 13 August 2009.

- 4.6 I have amended the determination as I consider appropriate. I note the applicant's submission did not confirm the operation of the active leaf to the double doors (whether it was self-closing and self-latching), nor the height of the glazed barriers.

5. The relationship between the FOSP Act and the Building Code

- 5.1 I accept that I have no jurisdiction under the FOSP Act. However, it is helpful to look at the relationship between the FOSP Act and the Building Code.
- 5.2 I note that the FOSP Act does not specifically require that fencing (including gates and doors) must comply with the Schedule. What is required under section 8(1) of the FOSP Act is that fencing must comply with the Building Code, subject to any exemption granted under section 6 of the FOSP Act.
- 5.3 Section 6 gives authorities a general power to grant exemptions from 'some or all of the requirements of [the FOSP] Act', provided that such an exemption 'would not significantly increase danger to young children'. Section 6(2) allows authorities to impose conditions on such exemptions.
- 5.4 Section 13B of the FOSP Act provides that the Schedule must be treated as a compliance document. Sections 22 and 23 of the Act provide that building work that complies with a compliance document must be accepted as complying with the relevant provision of the Building Code, although compliance documents are not the only means of establishing compliance.
- 5.5 Accordingly, if pool fencing complies with the Building Code, then it complies with the requirements of the FOSP Act, even if it does not comply with the Schedule. In such a case there would be no need for an exemption under section 6 of the FOSP Act.

6. Discussion: the code compliance of the pool area

- 6.1 It appears from the background to the dispute that the authority's view is that the pool room should not be included in the immediate pool area and therefore the authority requires a barrier be erected between the pool room and the pool.

Definition of immediate pool area

- 6.2 The barriers to the swimming pool are required to comply with Clause F4 of the Building Code. Clause F4.3.4(f) states that the barriers shall:

restrict the access of children under 6 years of age to the pool or the immediate pool area.

In order to determine whether Clause F4.3.4(f) has been complied with, it is therefore necessary to establish what 'the immediate pool area' is.

- 6.3 Although the Building Code refers to 'the immediate pool area' and 'the immediate pool surround', it does not define these terms. However, section 2 of the FOSP Act defines 'the 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 out in conjunction with the use of the pool'.

That term was considered in the 2004 Waitakere City Council v Hickman case⁴, and I consider that the following extracts from that decision are relevant to this determination:

[29]

- e) . . . There must be sufficiently close nexus between the activity or purpose and the use of the pool.
- f) Whether an activity or association is sufficiently connected with the use of the pool is a matter of degree. Activities which are carried on independently of the use of the pool or which have only a remote or indirect association with the use of the pool are to be excluded from the immediate pool area which must be fenced. Examples of activities which would not usually be regarded as being carried on in conjunction with the use of the pool include clothes lines, vegetable gardens, vehicle or pedestrian access ways, and planting for landscape purposes.
- g) On the other hand, there are activities which would ordinarily qualify as being carried on in conjunction with the use of the pool. Examples include the use of pool furniture, changing sheds, pumps or pool maintenance equipment, sunbathing areas, and diving boards or other pool equipment.

[34]

...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.

6.4 In addition, the Building Industry Authority (the predecessor to the Department) took the view, in Determination 2003/06, that:

...the term "immediate pool surround" in the building code means an area around the pool into which it would be unsafe for young children to go unless someone able to protect them is also in the same area.

6.5 I have adopted the above approaches in subsequent determinations, and I consider it appropriate to apply them to this case.

6.6 I note also that, in its correspondence, the authority has referred to Determination 2008/123, in which it was decided that a small gym, sauna and steam room could be included within the immediate pool area. While each determination is decided on its facts and I am not bound by previous determinations, it can be useful to look at them.

6.7 In Determination 2008/123 a significant factor was the size of the building where the activities would take place. Each of the rooms in that case measured only approximately 2m x 2m. This precluded the rooms being used for 'activities of a differing nature'. In allowing the activities in the immediate pool area, the determination stressed that 'a different view could have been reached if the outbuilding had been larger, allowing a range of alternative activities involving greater numbers of people, including children under 6 years of age.'

⁴ Randerson J, HC Auckland CIV 2003-404-7266.

Can the immediate pool area include the pool room?

- 6.8 The building in the current case is larger than that considered in Determination 2008/123. Although it is currently set up as a gym, the gym equipment is all portable and there is nothing to preclude the room being put to some alternative use in the future. However, in my opinion the room is not so large that it is likely to be used as an independent venue. In other words, any activities that happen in it, such as entertaining or exercising, are likely to be carried on 'in conjunction' with the use of the pool.
- 6.9 In making this assessment, the size and layout of the pool area, including the area represented by the pool room, is crucial. This is because proximity to the pool is crucial to ensure that any children in the pool area can be adequately protected. If the supervising adult is able to move too far away, or their vision of the pool is obscured, then the risk is greater. I note here that reference is made to this in Clause 2.2 of NZS 8500, which states 'Whenever a young child is inside a pool area, constant adult supervision is essential. Increasing the area and utilities inside the pool area may increase this responsibility.' A person at the back of the pool room can be, at most, approximately 7 metres from the pool.
- 6.10 I am therefore of the view that in this case, the pool room can meet the tests for compliance as set out in the Hickman decision and the previous relevant determination decisions, in that the pool room can be a part of the immediate pool area. However, I am of the view that that the design of the sliding and folding doors (i.e. the width of mullions and transoms) and type of glazing must not affect the view from inside the pool room to the extent that there is insufficient awareness of what is happening in and around the pool.

Does the pool barrier comply with the Building Code?

- 6.11 The configuration of the pool barrier is shown in Figure 1. This takes account of the applicant's response to the draft determination noted in paragraph 4.5.
- 6.12 I note the observations of the authority (refer paragraph 3.6) that the pool area and pool room did not comply at the time the final inspection of the building work was conducted. I note the authority observed that maintenance was required for the pool gate (refer to paragraph 3.5).
- 6.13 I note that the safety precautions for the pool area in this case include a pool cover that complies with ASTM F1346-91, and the pool area is monitored by three security cameras, which can be monitored from the house or from the pool room.
- 6.14 However, I consider the following matters need to be confirmed in order for the barrier enclosing the immediate pool area to comply with Clause F4:
- whether the active leaf of the double doors in the north face of the pool room is self-closing and self-latching
 - verify the height of the glazed barrier between the pool room and the boundary fence at the SW corner of the pool room
 - ensure the bi-fold sliding doors don't significantly obscure the view from inside the pool room to the swimming pool

- ensure the pool gate is self-closing and self-latching.

Conclusion

- 6.15 In response to the draft determination the applicant has stated that all of the items listed above in paragraph 6.14 have been properly attended to. If that is the case, in my view the pool barrier will comply with Clause F4. It is now for the authority to satisfy itself that those items have been made compliant.
- 6.16 I note that the configuration of the barriers and pool area as shown in Figure 1 differs from that shown in the consented plans. The consented plans need to be amended to reflect the proposed work to the satisfaction of the authority.

7. The decision

- 7.1 In accordance with section 188 of the Act, I hereby determine that the pool barriers, with respect to the area enclosed by the barriers as the pool area, did not comply with Clause F4 of the Building Code and accordingly the authority was correct to refuse to issue a code compliance certificate.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 23 February 2011.

John Gardiner
Manager Determinations

Appendix A: The legislation and the Acceptable Solution

A1. The relevant provisions of the Building Code are:

CLAUSE F4—SAFETY FROM FALLING

PERFORMANCE

	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: <ul style="list-style-type: none"> (a) Be continuous and extend for the full height of the hazard, (b) Be of appropriate height, (c) Be constructed with adequate rigidity, (d) Be of adequate strength to withstand the foreseeable impact of people and, where appropriate, the static pressure of people pressing against them, (e) Be constructed to prevent people from falling through them, and (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, (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. 	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: <ul style="list-style-type: none"> (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 150mm or more from the closed and secure 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, and (b) No permanent objects on the outside of the barrier that could provide a climbing step. 	

A2. The relevant provisions of the Acceptable Solution F4/AS1 (second edition) are:

- 3.1.1** Fencing for swimming pools shall be constructed to no lesser standard than is required by the Schedule to the Fencing of Swimming Pools Act 1987, to restrict the access of children.

A3. The relevant provisions of the FO SP Act are:

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

Intermediate 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

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

5 Exempted pools

Nothing in this Act shall apply in respect of—

- (c) Any excavation, structure, or product,—
 - (i) That is not used in association with any house, home unit, apartment building, school, hospital, hotel, motel, camping ground, or other similar premises; and
 - (ii) That is not modified for use, or intended to be used, for swimming, wading, paddling, or bathing:

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) of this section, that such an exemption would not significantly increase danger to young children.

...

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 2004 in respect of swimming pools subject to this Act at all times when this Act applies in respect of the pool.

13B Fencing in accordance with Schedule must be treated as means of compliance

Any provision that is made for the fencing of swimming pools that is in accordance with the Schedule must, in respect of —

- (a) matters subject to the Building Act 2004, be treated as a compliance document establishing compliance with the building code for the purposes of section 19 of that Act, and the requirements of this Act

A4. The relevant provisions of the Schedule to the FOSP Act are:

- 1
- (1) The fence shall extend—
 - (a) At least 1.2 metres above the ground on the outside of the fence;
and
 - (b) At least 1.2 metres above any permanent projection from or object permanently placed on the ground outside and within 1.2 metres of the fence.
- (2) Notwithstanding subclause (1) of this clause, where the fence is constructed of perforated material, netting, or mesh and any opening in the material, netting, or mesh has a dimension (other than the circumference or perimeter) greater than 10 mm, the fence shall extend at least 1.8 metres above the ground or the projection or object.
- 2
- Any clearance between the bottom of the fence and ground level shall not exceed 100 mm.
- 3
- All materials and components shall be of a durable nature and shall be erected so as to inhibit any child under the age of 6 years from climbing over or crawling under the fence from the outside.