



Determination 2020/001¹

Regarding the compliance of a pool barrier to the extent required by section 162C of the Building Act at 12 St Andrews Place, Kamo, Whangarei

Summary

This determination considers the compliance of an existing pool barrier to the extent required under section 162C of the Building Act. The matter turns on whether the area enclosed by the pool barrier can properly be considered the “immediate pool area” and whether the doors opening into the immediate pool area comply.

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, Alan Clark, Acting Manager Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.²
- 1.2 The parties to the determination are:
 - the owners of the property, D and S Macdonald (“the owners”)
 - Whangarei District Council, who applied for the determination, carrying out its duties and functions as a territorial authority or a building consent authority (“the authority”).
- 1.3 This determination arises from a failed inspection³ of a residential swimming pool. The authority is of the view that the current barrier does not enclose the immediate pool area⁴ and that the pool area requires isolating from at least some of the backyard. The authority also considers the doors opening into the immediate pool area do not comply as a means of restricting access by unsupervised young children. The owners are of the view that the barrier is compliant to the extent required by section 162C of the Act and note that it had previously been accepted as compliant by the authority.

¹ This determination is subject to a clarification under section 189 of the Building Act 2004. The determination was originally issued on 13 January 2020. The clarification consists of an amendment to paragraph 4.6.8.

² The Building Act and Building Code are available at www.legislation.govt.nz. The Building Code is contained in Schedule 1 of the Building Regulations 1992. Compliance and guidance documents issued by the Ministry, as well as past determinations, are available at www.building.govt.nz.

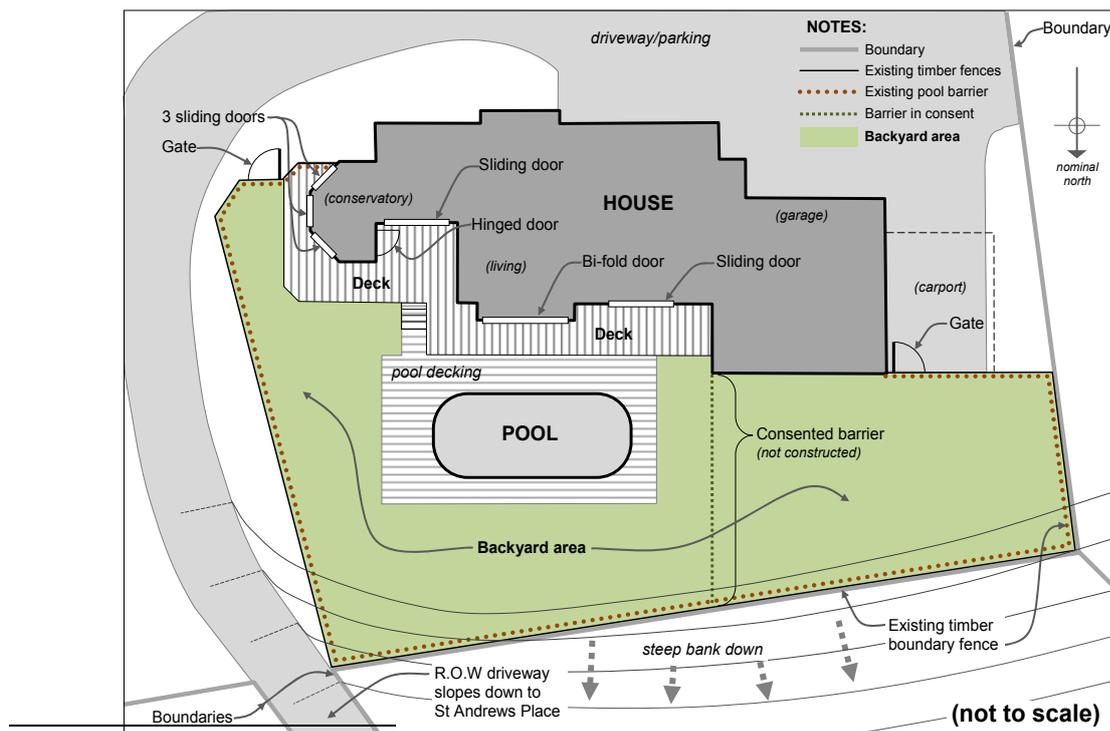
³ Section 162D of the Building Act requires that residential pools are inspected at least once every three years to ensure ongoing compliance to the extent required by section 162C.

⁴ Section 7 of the Act 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.

- 1.4 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.
- 1.5 The matter to be determined⁵ is whether the physical barrier to the pool complies to the extent required by section 162C of the Act. In deciding this matter, I must consider whether the barrier complies with the requirements of the Building Code that were in force when a code compliance certificate was issued for the pool, and whether the area enclosed by the barrier can properly be considered the immediate pool area.
- 1.6 In making my decision, I have considered the submissions of the parties and other evidence in this matter. The relevant provisions of the Act, the Fencing of Swimming Pools Act 1987 (“FOSPA”) and the Building Code that are discussed in this determination can be found in Appendix A.
- 1.7 I note that during the determination process the parties have come to a resolution regarding the compliance of the pool barrier; however the authority, who is the applicant in this case, requested that the determination proceed. This determination only considers the compliance of the barrier as it was at the time the authority applied for this determination and only in relation to the area encompassed by the barrier and the doors that form part of the barrier.

2. The building

- 2.1 The in-ground swimming pool is located on the north side of the house and property, as shown in Figure 1. The backyard, which forms the pool area considered in this determination, is fenced on the north and west property boundaries, and on the east adjacent to the driveway. The fencing forms three sides of the barrier to the pool area, and the barrier encloses the entire backyard including trees, a deck and clothesline.



⁵ Under section 177(1)(a) of the Act.

Figure 1: Approximate site plan

- 2.2 The house is a two storey building and the external north wall of the house forms the fourth side of the barrier to the pool, with living spaces on the ground floor.
- 2.3 Access to the backyard is possible through the doors that lead out from the ground floor of the house, or through either of the two gates – one at the west end of the house and one at the east end.
- 2.4 Doors from the conservatory and living area all open onto the deck leading to the pool, and include five sliding doors, one hinged door and one bi-fold door. The bi-fold door opens out to the deck from the living area. A single sliding door also leads out to the deck from the living area, and a cluster of three sliding doors open out to the yard from the conservatory. The doors are all fitted with top bolts.
- 2.5 There is also a window on the east side of the house which opens outwards toward the pool area and has a restrictor fitted.

3. Background

- 3.1 On 10 November 1994 the authority issued building consent No.7777 under the Building Act 1991 (“the former Act”) for construction of the swimming pool. The consented plans detailed a barrier dividing the backyard into two smaller sections (refer Figure 1). However, this dividing barrier was not constructed, meaning the pool area could be accessed from the entire backyard.
- 3.2 On 15 July 1998 an inspection was conducted by an independent registered building certifier contracted by the authority to perform an inspection of the building work specified in the consent. The building certifier noted on the field advice notice that fences, gates, and doors opening onto pool area complied.
- 3.3 On 16 July 1998 the authority issued a code compliance certificate in respect of ‘all of the building work approved under the building consent’.
- 3.4 On 5 March 2009 the authority issued a “Pool fence compliance certificate”⁶ accompanied by a letter which noted the pool complied fully with the fencing requirements under FOSPA at the time of the 2009 inspection.

3.5 The 2018 pool inspection

- 3.5.1 The Act was amended on 1 January 2017 to incorporate a set of special provisions relating to residential pools. Section 162C of the Act requires residential pools must have physical barriers to restrict access to pools by unsupervised children under five years of age, and sets out the extent to which existing pools must comply. Section 162D requires territorial authorities to carry out inspections at least once every three years to determine whether the pool has a barrier that complies with the requirements of section 162C.
- 3.5.2 On 25 June 2018 the authority carried out a pool inspection required under section 162D of the Act.

⁶ The pool fence compliance certificate notified the owners that the fence complied with FOSPA on the day of inspection.

- 3.5.3 On 27 June 2018, the authority wrote to the owners to inform them that the pool barrier did not comply with the Act, identifying three areas of non-compliance to be remedied and re-inspected.
- 3.5.4 The owners subsequently remedied two of the three items, removing multiple trees within 1.2m of the boundary fence and ensuring all gates were self-closing and self-latching when released from 150mm.
- 3.5.5 The remaining issue of non-compliance was noted as ‘the pool area requires isolating from the rear yard’ and to achieve compliance the authority recommended:
- return of the pool area fencing to comply with the original building consent or apply for a Building Consent to erect the fence in a new position.
- 3.5.6 The owners did not agree with the authority’s remaining compliance requirement and considered that the pool barrier was compliant when it was built and remained compliant to the extent required by section 162C.
- 3.5.7 The Ministry received the application for determination on 21 August 2018. I note that although the authority had not referred to compliance of the doors in its letter of 27 June 2018 to the owners, the authority included that issue as a matter for determination in its application.

4. The submissions

- 4.1 The authority made a submission with its application for a determination stating:
- The current fenced area does not reflect the immediate pool area and the swimming pool area should be isolated from the dwelling and most of the rear yard, with a complying swimming pool barrier.
- The doors are fitted with top bolts [as] the only means of restricting child access to the pool area. None of the doors are self-closing or have audible alarms fitted.
- 4.2 The authority provided with its submission copies of :
- the building consent and drawings
 - photographs of the pool area
 - correspondence between the parties.
- 4.3 The owners submitted the following (in summary):
- The pool barrier complied with FOSPA and remains compliant with the Building Code to the extent required by section 162C. The barrier is not required to be closer to the pool.
 - Information received from the authority in May 2018 and in a letter dated 27 June 2018 relating to the pool barrier supports the owners’ position, because the letters state “Existing pools installed before 1 January 2017 are deemed to comply...”
 - The authority’s website states that residential pool barriers must comply with the current Building Code or the requirements that applied when the pool was installed.

- The pool barrier is compliant – it received a code compliance certificate in 1998 and was subsequently issued a ‘Pool compliance certificate’ on 5 March 2009.

(For completeness I note the authority’s decision to issue the code compliance certificate in 1998 is not a matter being considered in this determination, and that compliance inspections carried out under FOSPA are outside the ambit of a determination under the Building Act.)

4.4 The owners are of the view that the pool cannot be accessed by young children for the following reasons:

- The pool is only accessible up a long steep driveway and the driveway side of the house has two doors which are locked and dead-bolted. There is a monitored security system so no one can enter the house when the owners are away. The fences as well as the gates at each end of the house ensure no young children can access the pool area.
- There are bolts on all doors which lead out onto the deck. The owners are responsible pool owners having owned a pool for 24 years and watch the pool closely to ensure children do not swim unsupervised.
- It would be difficult to build a barrier closer to the pool because the design at the time it was built did not accommodate a barrier of the proximity now contemplated by the authority. The owners would have revised the positioning of the pool, filter and overall design of the space prior to construction if the barrier had needed to be closer to the pool.

4.5 Submissions in response to the draft determination

4.5.1 A first draft of this determination was issued to the parties for comment on 19 December 2018. This first draft erred in concluding that the doors met the compliance requirements in force at the time; this conclusion had been reached on the basis that the Building Code at that time did not include specific performance criteria for doors. However, the draft also concluded that the barrier as a whole did not comply with the requirement to restrict unsupervised access by children under five years of age to the “immediate pool area”, because the area enclosed within the barrier could not be considered the “immediate pool area”. The owners were also invited to submit further information about any features that would prevent the barrier being constructed closer to the pool.

4.5.2 In a response received on 18 January 2019 the authority did not accept the draft determination and submitted (in summary):

- In the absence of a formal exemption for the doors, the authority does not consider, based on the legal framework and recent determinations, that the doors fitted with top locks comply with section 162C of the Act.
- The fact that the authority previously approved an element during the construction process does not prevent the authority on later inspection finding that same element non-compliant and requiring rectification.⁷

⁷ See Determination 2017/045 Regarding compliance of a barrier to a swimming pool (21 June 2017).

- 4.5.3 The owners responded on 15 March 2019. The owners did not accept the conclusion in the draft determination and provided submissions in support of their view. The owners submitted the following with regard to compliance (in summary):
- The existing pool fencing has performed its function and the owners are confident that the barrier will continue to keep children under five years from entering the pool area.
 - The pool fencing and doors passed all inspections, and this matter raises an issue with regard to the status of the code compliance certificate.
 - The doors comply with the Building Code, and the Building Code did not require specific compliance requirements for doors and windows. Clause F4.3.5(a) in force from 22 December 1994 specifically excluded sliding and sliding-folding doors from the requirement to automatically close and latch.
- 4.5.4 The owners raised issues relating to the accuracy of Figure 1, which has been amended as appropriate. The owners also noted:
- multiple trees were removed, all within 1.2m of the boundary
 - there is not enough space between the house deck and the pool to construct another barrier, and while it would be possible to build a barrier north to south to reduce the pool area this would be difficult and present other challenges.

4.6 The second draft and submissions in response

- 4.6.1 A second draft of this determination was issued for comment on 3 May 2019. The draft concluded that the doors did not meet the compliance requirements of the Schedule of FOSPA as an Acceptable Solution⁸ nor with the Building Code in force at the time. The conclusion in relation to the immediate pool area did not change.
- 4.6.2 In a response received on 3 June 2019 the owners did not accept the draft determination. The owners reiterated points made in response to the first draft and further submitted (in summary):
- The owners interpret the judgment in *Waitakere City Council v Hickman*⁹ to be that “the judge ruled that sliding doors are automatically exempted from the requirement of locking mechanisms provided the sliding doors were capable of restricting the access of children under 6 years of age to the immediate pool area.” Top bolts do restrict children under 6 years of age.
 - Self-closing and locking doors, which are a compliant solution, can be disabled and may not be reset by users; in the owner’s view this is comparable to doors that are not bolted.
 - Changing the design of the house and pool would not be possible.

⁸ Acceptable Solutions are a prescribed means of establishing compliance with the Building Code that must be accepted by a building consent authority (see section 19(1) of the Act).

⁹ *Waitakere City Council v Hickman* [2005] NZRMA 204.

- 4.6.3 The owners also advised that the gates were fitted with compliant latches and springs when they were built and continue to have compliant latches.
- 4.6.4 On 5 June 2019 the authority accepted the second draft without further comment.
- 4.6.5 On 27 June 2019, the authority requested additional time in which to make a submission.
- 4.6.6 On 1 July 2019, the authority's legal advisor wrote to the Ministry to reiterate the authority's view with regard to the compliance of the sliding doors, and that the effectiveness of the pool barrier with the sliding doors forming part of that barrier 'relies on the behaviour of people using the door'. The authority referenced Determination 2010/097 (paragraphs 6.3 to 6.5).
- 4.6.7 In correspondence to the Ministry on 12 July 2019 the owners provided a further submission noting:
- Clause F4.4.3 (f) states "restrict the access of children under 6 years of age" not prevent the access of young children, which is a different threshold.
 - The authority previously required top bolts to be installed and that is what they have required ever since, including in information provided to pool owners prior to the change in legislation on 1 January 2017.
 - The house and pool were constructed under a building consent and have been considered compliant since that time.
- 4.6.8 Further correspondence from the owners on 18 July 2019 referred to Determination 2018/006 and the use of motion sensors in the immediate pool area. The determination was then placed 'on hold' and the owners considered options for a proposal to put to the authority.
- 4.6.9 On 5 August 2019 the authority's legal advisor requested the determination be issued.
- 4.6.10 On 6 August 2019 the owners advised they were waiting for a response from the authority to their proposal.
- 4.6.11 On 21 October 2019 I wrote to the parties noting that no correspondence had been received since 6 August 2019, and advising the determination would be made on or shortly after 11 November 2019 and would only consider the compliance of the barrier as it was at the time the application for determination was made.
- 4.6.12 On 21 October 2019 the owners advised the Ministry that a proposal had been put to the authority and that a resolution had been reached, and provided a copy of recent correspondence with the authority.
- 4.6.13 On 22 October 2019 the authority confirmed that the compliance issues were resolved, and requested that the determination be issued as there were many other owners of existing pools with similar circumstances who were awaiting the outcome of this determination.
- 4.6.14 On 18 November 2019 the owners raised concerns that the authority was requesting that the determination proceed even though the matter of compliance had been resolved. The owners reiterated the reasons they

believed the barrier was compliant and requested a hearing be held so that they could better understand the application of the legislation in this case. The request for a hearing was declined.

5. Discussion

5.1 The legislation

- 5.1.1 Prior to 1 January 2017, the rules relating to pool barriers were governed by FOSPA and Building Code Clause F4 Safety from falling. The Act was amended with effect from 1 January 2017 to incorporate a set of special provisions in sections 162A to 162E relating to residential pools, and on this date FOSPA was also repealed. At the same time the Building Code was amended, with Clause F9¹⁰ inserted and those clauses relating to pools removed from Clause F4.
- 5.1.2 For the purpose of this discussion, the relevant section of the Act to consider is section 162C and, given the date of construction of the pool, the transitional and savings provisions in sections 450A and 450B (refer Appendix A).
- 5.1.3 Section 162C(1) requires ‘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’. Section 162C(2) sets out the means by which compliance with section 162C(1) is established. Section 162C(2) provides that the physical barrier restricting access to the 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 ... (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 The effect of these provisions for residential pools is that pool barriers must continue to perform to the standard they were intended to perform to when they were constructed. In general terms, a barrier that complies with the Building Code in force at the time of construction is not required to be upgraded when there are later changes to the requirements in the Building Code.
- 5.1.5 The relevant clause of the Building Code applicable at the time was Clause F4. However, the version of the Building Code at the time the pool was granted a building consent in November 1994 differs from the version of the Building Code that was in force when the pool was issued a code compliance certificate in July 1998. This raises the question of which version is relevant when considering the provision in section 162C(2)(b).
- 5.1.6 There are specific criteria set out in section 162C(2)(b). The pool must have been constructed after 1 September 1987, and must be the subject of a building consent, code compliance certificate or certificate of acceptance.

¹⁰ Clause F9 Means of restricting access to residential pools.

- 5.1.7 In this case, for the purpose of establishing compliance by way of section 162C(2)(b), the relevant version of the Building Code is the version that was in force at the time the code compliance certificate was issued (July 1998).

Transitional and savings provisions

- 5.1.8 Section 450A of the Act sets out the transitional and savings provision for residential pools, and subsection (1) 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.

- 5.1.9 Section 450B sets out the savings provision for existing residential pools that were constructed before 1 January 2017, and subsection (2) provides:

(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.

- 5.1.10 In conclusion, there are four pathways in this case for the pool barrier to meet the requirement in section 162C:

- Compliance with the current Building Code Clause F9
- Compliance with Clause F4 of the Building Code that was in force at the time the code compliance certificate was issued
- Compliance with Clauses 1 to 10 of the Schedule of FOSPA
- Compliance with the Schedule of FOSPA and any exemption under section 6 or Clause 11 and any conditions of that exemption.

(The authority has confirmed that no exemption under section 6 or Clause 11 was applied for or granted in relation to the pool barrier, and I note that neither party has suggested that the barrier complies with Clause F9.)

- 5.1.11 Because sections 450A and 450B of the Act provide for the saving of the FOSPA Schedule, in my view it is helpful to look at the relationship between FOSPA and the Building Code.

5.2 The relationship between FOSPA and the Building Code

- 5.2.1 At the time the pool was constructed both FOSPA and the former Act were in effect, and both required compliance with the Building Code. FOSPA did not require that barriers complied with the Schedule to that Act; rather the Schedule was cited in the Acceptable Solution F4/AS1¹¹ as a means of establishing compliance with the Building Code.

¹¹ Acceptable Solution F4/AS1 for New Zealand Building Code Clause F4 Safety from falling.

- 5.2.2 Section 18 of the Act provides that ‘building work is not required to achieve performance criteria additional to or more restrictive than the building code’. Therefore, if the pool barrier complies with the Building Code (at the time), then it complies with the requirements of the Building Act, even if not in accordance with the Schedule of FOSPA.

5.3 The Building Code requirements

- 5.3.1 The objective of Clause F4 is to safeguard people from injury caused by falling, and specific performance requirements concerned safety from falling into pools.
- 5.3.2 Clause F4.3.3 required swimming pools having a depth of water exceeding 400mm to have barriers provided, and Clause F4.3.4(f) stated that the barrier shall:
- In the case of a swimming pool, restrict the access of children under 6 years of age to the pool or immediate pool area

- 5.3.3 Additionally, Clause F4.3.5 stated:

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, and
- (b) No permanent objects on the outside of the barrier that could provide a climbing step.

5.4 Does the pool barrier comply?

The gates

- 5.4.1 Prior to the 25 June 2018 inspection, the gates were fitted with a spring and latch mechanism, and the release for the latch was at a height approximately 1.6m above the ground. Following the pool inspection of 25 June 2018 the owners adjusted the springs on the gates so that they automatically close and comply with the requirements of Clause F4.3.5.

The doors

- 5.4.2 In the following paragraphs I consider the compliance of the doors, before moving on to consider whether the area encompassed by the barrier can properly be considered the immediate pool area. With reference to the pathways set out in paragraph 5.1.10, I have considered first whether the pool barrier complies by way of the Schedule of FOSPA before moving on to consider whether the pool barrier complies with the performance criteria in Clause F4 of the Building Code in force at the time the code compliance certificate was issued.
- 5.4.3 I note there is no dispute about the details of the pool barrier in respect of Clause F4.3.4, such as height, strength etc., therefore I have not considered that clause in this determination.
- 5.4.4 In its submission, the authority raised a concern that the existing doors should be either self-closing or have audible alarms fitted.

- 5.4.5 The doors that make up part of the barrier to the pool area are fitted with top bolts. Top bolts require manual operation – meaning that once the bolt is moved to release the door, allowing a person to move through, it does not return to the “locked” position when the door closes.

Schedule of FOSPA

- 5.4.6 Clause 9(1) of the Schedule of FOSPA requires that “every ... door shall be fitted with a latching device” and outlines the minimum height of latching devices above the ground outside of the fence. Furthermore Clause 10 of the Schedule requires that “every ... door shall be fitted with a device that will automatically return the 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”.
- 5.4.7 In this instance the top bolts do provide a locking mechanism, however when the doors are open there is no mechanism to automatically return the door to a closed and secured position. I consider that the doors with top bolts do not meet the criteria in Clause 10 in the Schedule of FOSPA.
- 5.4.8 Clause 11 of the Schedule concerns doors in walls of buildings that form part of the pool barrier:

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.

- 5.4.9 The authority has confirmed that no exemption under this clause was sought or applied for, and from the information before me it would not appear that at the time building consent was sought for construction of the pool compliance with Clause 10 of the Schedule was impossible or unreasonable.
- 5.4.10 As the doors do not comply by means of the Schedule of FOSPA, which was an Acceptable Solution, I now consider whether the doors with top bolts fitted comply with the performance criteria of Clause F4.

Clause F4

- 5.4.11 At the time the pool was issued a code compliance certificate, Clause F4.3.5(a) included specific performance requirements for doors to be fitted with latching devices not readily operated by children, and constructed to automatically close and latch. Sliding and sliding-folding doors were excluded from the requirement to automatically close and latch.
- 5.4.12 However under Clause F4.3.4(f) doors of any type that formed part of a pool barrier (including sliding, sliding-folding, bi-fold doors and hinged doors) were required to ‘restrict the access of children under 6 years of age’. The means of achieving compliance with this requirement could include the door automatically closing and latching, but that does not prevent the use of other means.
- 5.4.13 In this case, the doors from the house to the pool area (including the bi-fold, hinged and sliding doors) do not self-close or self-latch. This means if any of the doors were unlocked, and left open or unlocked, the pool barrier

would no longer restrict access. The manual locking mechanism in this case requires action to return the doors to a locked and secure position. This relies on the vigilance of the supervising person to reinstate the barrier to be effective. This is a weakness that does not exist with a door that automatically returns to the closed position and latches.

- 5.4.14 Although I acknowledge that the owners intend to keep the doors closed and locked when there is no person supervising the pool area in order to restrict access to the immediate pool area by children, the effectiveness of the pool barrier will still rely on the behaviour of the people using the doors, both now and in the future. A previous Determination¹² established the principle that the Building Act does not cover the management of buildings in that respect, and assurances as to management practices by present or future owners will rarely (if ever) be enforceable under the Act.
- 5.4.15 A manual locking mechanism requires a person to always take the positive step of remembering to close and latch the doors. If this does not occur, whether deliberately or inadvertently, the barrier will be ineffective and young children would not be restricted from entering the immediate pool area.
- 5.4.16 I therefore conclude that the doors do not meet the compliance requirements of the FOSPA Schedule as an Acceptable Solution or of the Building Code that was in force at the time.

5.5 The immediate pool area

- 5.5.1 I turn now to whether the barrier encloses an area that can properly be considered the “immediate pool area”.
- 5.5.2 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.
- 5.5.3 Section 7 of the Building 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
- 5.5.4 While there are slight differences in the wording of the two definitions, I do not consider those differences to be material.
- 5.5.5 What properly constitutes the immediate pool area has previously been considered by the High Court in the leading case of *Waitakere City Council v Hickman*, in relation to the now repealed FOSPA. Various determinations¹³ have followed the approach taken by the High Court, considering the types and sizes of spaces that can constitute an immediate pool area and the amenities and the types of activities that occur within them.
- 5.5.6 I consider that the following extracts from the *Hickman* decision are relevant to this determination:

¹² Determination 1992/1102 Handrails for an Assembly Service Building (3 December 1992).

¹³ See for example: Determination 2018/017 Regarding compliance of an indoor Swimming pool without a barrier (30 April 2018), Determination 2017/045 Regarding compliance of a barrier to a swimming pool (21 June 2017), Determination 2015/039 Regarding the refusal to issue a compliance certificate and the issue of a notice to fix in respect of compliance of pool barriers to a swimming pool (15 June 2015).

[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 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.

[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.

- 5.5.7 I have considered the principles in the *Hickman* decision and the reasoning set out in determinations in relation to the meaning of "immediate pool area" as it applies in this instance.
- 5.5.8 What constitutes the immediate pool area must be considered on a case-by-case basis. There is no prescribed size limit, and it is not unusual for an immediate pool area to include an area where people can sit or sunbathe in conjunction with use of the pool.
- 5.5.9 The significance of the area enclosed within the pool barrier is, as set out in *Hickman*, that the greater the area the more likely that activities in that area will not be carried out in relation to the use of the pool. I accept that outdoor living and entertainment can take place in an immediate pool area, but sometimes this will be in conjunction with the use of the pool and sometimes not. *Hickman* found that such activities "are not to be excluded from the immediate pool area merely because they are capable of occurring independently of the use of the pool".
- 5.5.10 In this case the pool barrier encompasses a large area and 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 the *Hickman* decision. I consider it material that the area enclosed by the pool barrier encompasses the entire area of the owner's backyard, including a clothesline, lawn area and garden. This area makes up the main outdoor area of the property and by necessity will be used for other activities that are not carried out in conjunction with the use of the pool.
- 5.5.11 Based on the discussion set out above, I am of the opinion that the area enclosed by the 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 that compliance is achieved to the extent required under section 162C of the Act.

6. The decision

In accordance with section 188 of the Building Act 2004, I hereby determine the barrier to the pool does not comply 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 12 February 2020.

Katie Gordon
Manager Determinations

Appendix A

A.1 Relevant sections of the 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).
- (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.

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.
- (2) A territorial authority may accept a certificate of periodic inspection from an independently qualified pool inspector for the purpose of subsection (1) in lieu of carrying out an inspection under section 222.
- (3) If a territorial authority decides not to accept a certificate of periodic inspection from an independently qualified pool inspector under subsection (2), the territorial authority must, within 7 working days of making that decision, give notice to the chief executive of the decision and the reasons for the decision.
- (4) If an independently qualified pool inspector inspects a pool for the purpose of this section and decides that the pool does not have barriers

that comply with the requirements of section 162C (subject to any waiver or modification granted under section 67A or 188), the inspector must, within 3 working days of the date of inspection, give written notice to the relevant territorial authority of the decision, attaching any information that the chief executive requires to accompany the notice.

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.
- (3) Alternatively, an existing pool is deemed to comply with section 162C if all of the following apply:
 - (a) the outside surface of the side walls of the pool is constructed so as to inhibit climbing; and
 - (b) no part of the top of any side wall of the pool is less than 1.2 m above—
 - (i) the adjacent ground level; and
 - (ii) any permanent projection from the ground outside of the pool and within 1.2 m of the walls of the pool; and
 - (iii) any object standing on the ground outside of the pool and within 1.2 m of the walls of the pool; and
 - (c) any ladder or other means of access to the interior of the swimming pool—
 - (i) can be readily removed or made inoperable; and

(ii) is removed or made inoperable whenever the pool is not intended to be in use.

Sections 162C, 162D, 450A and 450B were inserted, on 1 January 2017, by section 17 of the Building (Pools) Amendment Act 2016 (2016 No 71).

A.2 Relevant clauses of the Building Code at the time the pool received a code compliance certificate:

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

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, ...

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

(b) No permanent objects on the outside of the barrier that could provide a climbing step.

A.3 The clauses of the Schedule of the Fencing of Swimming Pools Act 1987 relevant to doors:

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

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(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 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.