

Determination 2022/011

Regarding the authority's decision to issue a code compliance certificate for a pool barrier

23 Devine Drive, Rolleston

Summary

This determination considers the authority's decision to issue a code compliance certificate for a pool barrier. The determination considers whether the area enclosed by the pool barrier should be included within the immediate pool area.



Figure 1: Immediate pool area

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.

Further to the above labels, this determination includes references to the Fencing of Swimming Pools Act 1987 (“the FOSPA”), with its sections referred to as sections of the FOSPA and to the Schedule to the FOSPA (“the Schedule”), with its clauses referred to as clauses of the Schedule.

The Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (e.g., 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 Ministry¹.
- 1.2. The parties to the determination are:
 - Selwyn District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority, which applied for this determination; and
 - The owner of the property, J Anderson (“the owner”).
- 1.3. This determination was sought by the authority to reverse a code compliance certificate because it is of the view the building work was not compliant with the building consent.
- 1.4. The matter to be determined² is whether the authority was correct in issuing a code compliance certificate for the pool barrier. In deciding this matter, I must consider whether the immediate pool area complies with the building consent and with the Building Code in force at the time the building consent was issued.

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

² Section 177(1)(b) and (2)(d) of the Building Act 2004.

Matters outside this determination

- 1.5. I have not considered the physical barrier itself, including the compliance of the sliding doors or the additional gates, as the authority is primarily concerned with the area enclosed by the pool barrier.
- 1.6. I have not considered any other aspects of the Act or of the Building Code.

2. Background

- 2.1. A building consent (BC132190) was issued on 22 November 2013 for the construction of the swimming pool and pool barrier.
- 2.2. The approved plan showed the pool barrier was to consist of a 1200mm high fence, 1200mm high concrete block wall, and the walls of a new pool shed. There was to be one point of access to the pool through a gate, with a closing and latching device fitted at 1500mm above ground level. The immediate pool area was shown as approximately 420m².
- 2.3. In 2016, the authority contacted the owners regarding the progress of the building work.
- 2.4. The owner informed the authority the work was nearly complete, and most of the work had been inspected by engineers as required by the building consent.
- 2.5. On 1 May 2017, a final inspection was carried out by an officer of the authority. The only issues identified were the request for a Producer Statement (PS4) from the engineer and a back flow was to be fitted to a tap.
- 2.6. The inspection notes stated:

Dwelling ranch sliders opening into pool area have dead locks fitted to top of doors into reveal. All gates have self-closing hinges except for back left which is not used for personal access and has a locked latch. External door to pump shed is locked from the inside with no external access. Pool fencing to exterior completely surrounds pool. Both block walls and pool style fencing are non-climbable with adequate rigidity. Small shrubs surround pool but none rigid enough to support climbing at time of inspection. Advised owners that will probably need pruning before next 3 yearly inspection.
- 2.7. On 14 June 2017, all requested outstanding information was provided to the authority, the final inspection report was completed, and the code compliance certificate was issued.

2.8. On the 13 May 2021, the owner was contacted by the authority advising the pool barrier was due for its routine three-year inspection as per section 162D.

2.9. The inspection was carried out on the 14 May 2021 and the barrier was found to be non-compliant. In a letter dated 14 May 2021 the following non-compliances were identified:

- Five gates need to be retractable and either permanently locked or opening outward from the pool area.
- The double gate needs to have one side locked in place with a concrete pad and padlock on the deadbolt.

2.10. On the 29 June 2021, the authority followed up on its request for more information. The authority included another item that was deemed non-compliant:

Any sliding door in a pool barrier needs to have a double locking system requiring two hands to open and ideally a retracting system or an alarm system installed.

2.11. An inspection note made by an officer of the authority dated 30 June 2021 stated:

These designs were consented under [the FOSPA], section 6 however NZS8500:2006 (see 3.6 & 3.7) was in effect when vetted Oct 2013. Inspection program mentions gates and barriers but there's no mention to F9³ clause which was in effect May 2017 when Compliance was achieved...I have advised if there are young children visiting that they ensure the sliders are locked and gates are used for access.

2.12. Another inspection note also stated:

Access to pool area is from 4 compliant gates around the large pool area. Access from the house to pool area is [through] sliding doors with deadbolts in the top track which must be unlocked. We have failed to bring up essential details up until now to ensure compliance with...Building Code [Clause] F9. It does fulfill [functional] requirements of [the FOSPA], however this was superseded when this design was vetted. Once window stays are installed, [the authority] is satisfied on reasonable grounds that the barriers are compliant with section [162C of the Act]...

2.13. During an email discussion between the owner and the authority, the owner noted that doors to the pool were checked when the pool was originally constructed. The authority explained it needed to inspect the doors to ensure compliance but was unable to do this at the previous inspection. The authority

³ Clause F9 – Means of restricting access to residential pools.

had noted the doors as non-compliant to ensure they were inspected on the next occasion.

- 2.14. Another inspection was carried out on 30 June 2021. The authority noted in its “pool register” the pool barrier complied with section 162C.
- 2.15. During an audit of inspections carried out on pool barriers, an officer of the authority investigated the file and realised it was unclear on how compliance of the doors was considered. The photographs taken during the inspection on 30 June 2021 identified the pool barrier had not been constructed in accordance with the approved building plans.
- 2.16. The pool barrier now includes the outdoor living area and additional gates have been added around the pool barrier, which is not in accordance with the approved building plans. The area currently surrounded by the pool barrier can be seen in Figure 2 below.
- 2.17. The Ministry received an application for a determination on 14 September 2021.

3. The building work

- 3.1. The pool is located in the northeast corner of the property to the north of the dwelling. The pool is 15 x 4.5m in size, with a spa pool located on an adjacent deck.
- 3.2. The pool barrier consists of steel fences, the walls of the dwelling, concrete block wall, and several sliding doors. The fencing makes up most of the barrier to the north and western sides, with concrete block walls to the east side, and the walls and doors of the building forming the southern part of the barrier.
- 3.3. There are two sliding doors that lead to the immediate pool area from two rooms in the house. The lock to the sliding doors is typical for this type of door. There are also several windows adjacent to the sliding doors, which have window stays installed to restrict access.
- 3.4. The pool barrier encloses the main outdoor living area, which is a deck and concrete tiled area on the north side of the dwelling. The area enclosed by the pool barrier, including the pool, is approximately 500m². From the photographs provided, this area includes a pool shed, an outdoor dining set, other outdoor furniture, a trampoline, lawn and garden areas, several deck areas, and decorative rocks, as well as several gabion walls.

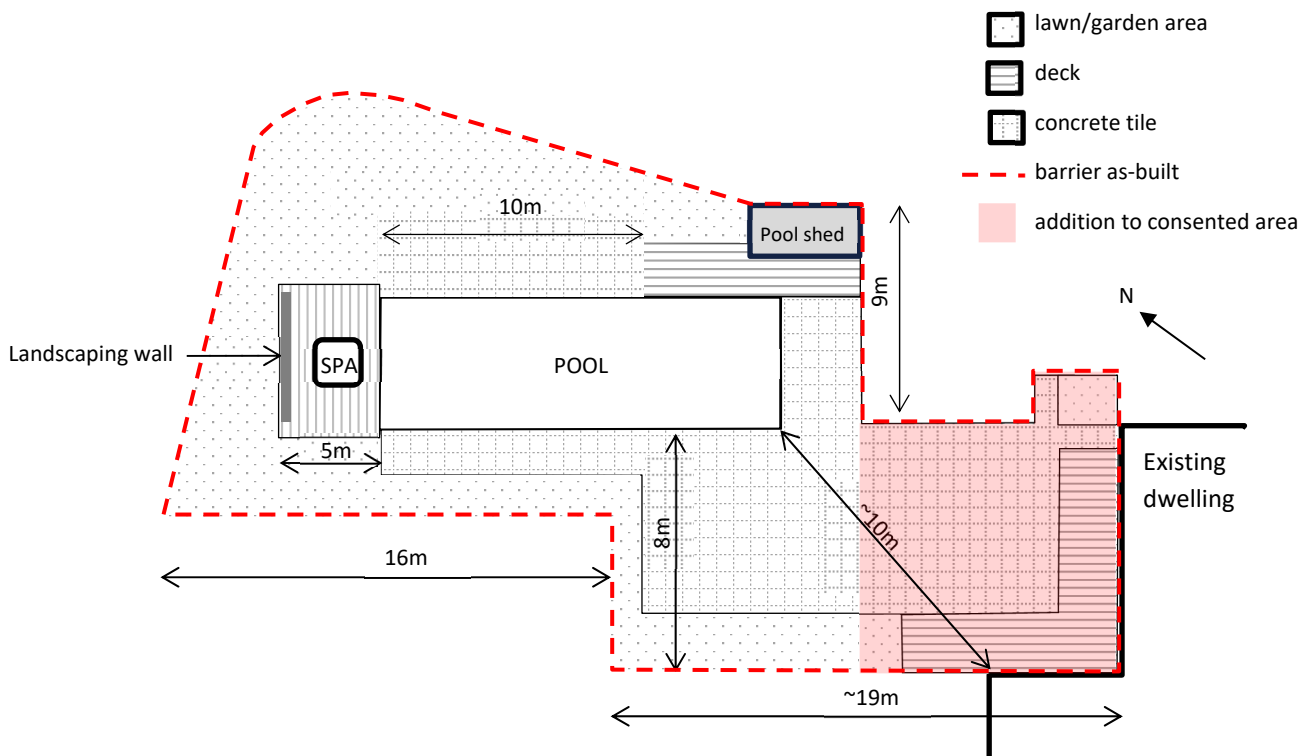


Figure 2: Plan of immediate pool area (not to scale).

3.5. Figure 2 shows the area enclosed by the pool barrier outlined in dotted-red, with the area that was additional to that in the approved building consent documents shown in shaded red whist Figure 3 shows the area with the trampoline and spa pool.

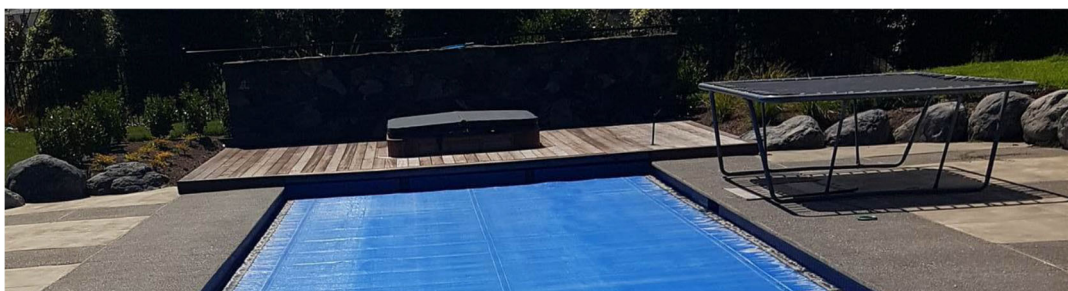


Figure 3: Image of the pool area, showing the spa pool, and the trampoline.

4. Submissions

Authority

4.1. The authority’s comments regarding its view that the pool barrier does not enclose the immediate pool area are summarised below.

- 4.2. The original application was approved because there was separation between the building and the swimming pool. This allowed for people to move through the building without having to go into or through the immediate pool area. However, the relocation of the pool barrier to include the walls of the building has meant there is access to move through the immediate pool area from the building.
- 4.3. The building consent application was assessed against the FOSPA and Clause F4 of the Building Code. The Schedule provided compliance solutions for doors giving access to the pool area and section 6 of the FOSPA allowed for territorial authorities to provide exemptions to all or part of the FOSPA. However, the doors were never assessed under the FOSPA. Therefore, the doors should have been assessed under Clause F9 of the Building Code at the time of the latest inspection.
- 4.4. The sliding doors do not comply with clauses 1-10 of the Schedule as they are not fitted with devices that will automatically close and latch the door shut after use and were not granted an exemption under section 6 of FOSPA. However, the sliding doors to the immediate pool area are not of concern as they are outside the area the authority considers to be the immediate pool area.

Owner

- 4.5. The owner has stated they have completed all remedial work requested by the authority when issues were raised. They have also completed remedial work to install the window stays and fix a gate that had been broken.
- 4.6. The owner relied upon the authority's statement that the building work complied with the building consent.

Draft determination

- 4.7. A draft of this determination was issued to the parties on 17 December 2021.
- 4.8. The authority responded on the 20 December 2021 and accepted the draft determination with no further comments.
- 4.9. The owners replied on the 8 February 2022 and accepted the draft.

5. Discussion

Reversing a code compliance certificate

- 5.1. In terms of section 94(1)(a) of the Act, an authority can only issue a code compliance certificate if it is satisfied, on reasonable grounds, that the building work complies with the building consent.

- 5.2. It is clear in this case that the building work did not comply with the building consent. The barrier was extended to the north face of the building to include approximately an additional 80m² outdoor area. There were several gates added, which differed from the consent that only showed one gate.
- 5.3. When considering the issue of a code compliance certificate for a building consent where the as-built construction differs from that consented, or where there is conflicting detail in the consent that was not picked up when the consent was granted, it is important for me to consider whether the completed building work complies with the Building Code (to the extent required by the Act). This will allow me to consider whether it is most appropriate to confirm, reverse or modify the authority's decision to issue the code compliance certificate.
- 5.4. I will now outline the relevant legislative requirements relating to the pool barrier, before considering whether the area encompassed by the pool barrier can properly be considered to be the immediate pool area, and therefore whether this aspect of the building work complies with the Building Code to the extent required by the Act.

Legislation

- 5.5. Section 17 of the Act provides "that all building work must comply with the Building Code to the extent required by this Act...".
- 5.6. The Building Code that applied when the pool was installed in this case was the version of the Building Code in place when the building consent was issued in 2013.
- 5.7. The objective of Clause F4 was to safeguard people from injury caused by falling. The functional requirement, outlined in Clause F4.2 was that buildings shall be constructed to reduce the likelihood of accidental fall, and specific performance requirements concerned safety from falling into pools.
- 5.8. Clause F4.3.3 required that swimming pools having a depth of water exceeding 400mm shall have barriers provided⁴, 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.

⁴ Clause F4.3.4 and F4.3.4(f) did not apply to any pool exempted under section 5 of the Fencing of Swimming Pools Act 1987. I have received no evidence to suggest that an exemption was in place for this pool.

5.9. Although the Building Code refers to ‘the immediate pool area’, it does not define this term. Nor was it defined in the version of the Building Act that was current at that time. However, section 2 of FOSPA, which was in force at the time the building consent was issued, 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 on in conjunction with the use of the pool.

5.10. Section 8 of FOSPA required that “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...”.

5.11. I note that section 13B of FOSPA provided that the Schedule of FOSPA was deemed to be one of the documents establishing compliance with the Building Code for the purposes of section 49 of the Act (concerning the granting of a building consent). Equally, paragraph 1.2.7 of the Acceptable Solution⁵ for Clause F4 Safety from Falling that was current in 2013, F4/AS1⁶, stated:

The Schedule to the Fencing of Swimming Pools Act 1987 is a means of establishing compliance with [Building Code] Clause F4.

5.12. In the case of residential pools, the Act also contains ongoing compliance obligations. Section 162C sets out these ongoing compliance obligations for residential pools, requiring that they must have physical barriers that restrict access by unsupervised children under the age of five years. Under section 162C(2) of the Act, residential pools must comply with either:

- the current Building Code; or
- the Building Code that applied when the pool was installed (if a building consent, code compliance certificate or certificate of acceptance was issued).

5.13. 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 An Acceptable Solution is a document issued by the Ministry that is one way to demonstrate compliance with the Building Code.

⁶ The Third Edition.

- 5.14. I have outlined the relevant requirements of the Building Code that applied when the pool was installed above (refer paragraphs 5.6 to 5.11). I will now consider the requirements of the current Building Code.
- 5.15. On 1 January 2017, the provisions in Clause F4 *Safety from falling* relating to restricting access by young children to residential pools were repealed and Clause F9 *Means of restricting access to residential pools* introduced. The provisions of Clause F9 have not been amended since they were introduced, so remain current today.
- 5.16. The objective of Clause F9 is to prevent injury or death to young children involving residential pools. Other provisions relevant to the immediate pool area are:

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 (ie, 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);...

- 5.17. 'Immediate pool area' is defined in the Act⁷ as follows:

...means 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

Transitional and savings provisions

- 5.18. For pools constructed prior to 27 April 2017, the transitional and savings provisions of the Act may also apply.
- 5.19. Section 450A Transitional and savings provision for residential pools of the Building Act, which was inserted into the Act on 1 January 2017, states that 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

⁷ See section 7. I note that meanings given in the Act apply equally to the Building Code (see Clause A2).

immediately before 1 January 2017) is an acceptable solution for establishing compliance with the Building Code for the purpose of section 162C.

- 5.20. A Gazette notice was published on 27 April 2017 that revoked the acceptable solution for s162C provided for in s450A of the Building Act 2004.⁸ This means that section 450A is no longer available as a means to establish compliance for the purpose of s162C and it was only available between 1 January 2017 and 27 April 2017. The building consent for this work was issued in 2013 and the code compliance certificate for this building work was issued in July 2017. This means that s450A is not relevant to this building work.
- 5.21. Section 450B Savings provision for existing residential pools of the Building Act 2004 states that a residential pool that was constructed, erected, or installed before 1 January 2017 (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...
- 5.22. A building consent was issued in 2013 for the construction of the pool. While the code compliance certificate was not issued until June 2017, I understand from the authority's submission that the construction of the pool and pool barrier was completed in 2015/2016.
- 5.23. This means that section 450B is available as a means to satisfy section 162C, but only if the barrier complied with the Schedule of FOSPA immediately before 1 January 2017. In this determination, the aspect of compliance that is relevant is whether the barriers to the pool can be considered to enclose the pool or immediate pool area.
- 5.24. In summary, this means that both in terms of compliance with the Building Code that applied at the time the pool was installed, and ongoing compliance with section 162C, a barrier that encloses the pool or immediate pool area is required.

Definition of immediate pool area

- 5.25. In deciding this matter, I must consider whether the area surrounding the pool that is within the pool barrier, as shown in Figure 2, can be included in the immediate pool area. Given the dispute centres on the inclusion of the outdoor

⁸ <https://gazette.govt.nz/notice/id/2017-go2003>

area in the immediate pool area, I have not considered the compliance of the pool barrier itself.

- 5.26. I note the definition of ‘immediate pool area’ in section 2 of FOSPA differs from that in the Act.
- 5.27. The High Court in *Waitakere City Council v Hickman* (“Hickman”)⁹ considered the proper interpretation and application of ‘immediate pool area’. However, it did so in relation to the now repealed FOSPA.
- 5.28. I am of the view that the variation between the definitions of ‘immediate pool area’ in FOSPA and in the Act has no interpretative significance; it merely reflects the change in the drafting practices of the Parliamentary Counsel Office between 1987 and 2016. The Building (Pools) Amendment Bill Departmental Report, which was prepared for Select Committee, supports this view:

“The definition in the Bill reflects the [FOSPA] 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.”¹⁰

- 5.29. I note 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 area’.¹¹

Activities carried out in relation to or involving the pool

- 5.30. Following *Hickman*, an immediate pool area is determined in the first place by *use*¹², being the activities carried out in relation to or involving the pool.¹³ It is a matter of degree whether an activity is sufficiently related to or involves the pool.¹⁴
- 5.31. Activities that are carried out independently of the pool or only have a remote or indirect association with the use of the pool are to be excluded from the immediate pool area.¹⁵ *Hickman* gives the following as examples of activities that

⁹ [2005] NZRMA 204 (HC).

¹⁰ Building (Pools) Amendment Bill (63-3) – Departmental report, 10 March 2016, page 27.

¹¹ As FOSPA has been repealed, the discussion below uses the wording of the definition of ‘immediate pool area’ as it appears in the Act.

¹² *Hickman* at [52] says, “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].

¹³ *Hickman*, at [29](b).

¹⁴ *Hickman*, at [29](f).

¹⁵ *Hickman*, also at [29](f).

would usually be excluded: clothes lines, vegetable gardens, vehicle or pedestrian access ways, and planting for landscaping purposes.¹⁶

- 5.32. There are activities that would ordinarily qualify as being carried out in relation to or involving a pool.¹⁷ *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.
- 5.33. There are other activities that can be carried out, at times, in relation to or involving the pool and, at other times, independently of the pool (for example, barbecues or entertaining). *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 pool.¹⁸

Immediacy

- 5.34. While *Hickman* says that 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 *immediate*. As stated in *Hickman*:¹⁹

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].

- 5.35. *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”²⁰ [my emphasis].
- 5.36. 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 area’.²¹ This is because it becomes less likely for the pool owner to be able to demonstrate that the activity:

¹⁶ *Hickman*, at [29](f). I note that this list of activities is not exhaustive; other activities may be excluded.

¹⁷ *Hickman*, at [29](g).

¹⁸ *Hickman*, at [32] and [53].

¹⁹ *Hickman*, at [34].

²⁰ *Hickman* at [54].

²¹ *Hickman*, at [34]. [We don’t use *Ibid* (also as a referencing mechanism it is no longer used)].

- can properly be said to be carried out in relation to or involving the pool; and;
 - is in sufficient proximity to the pool.
- 5.37. In summary, while the ‘immediate pool area’ is determined – in the first instance – by identifying the area surrounding the pool that is used for pool-related activities²², that area is “subject to the issue of immediacy”²³; it must not extend any further than can properly be considered as being *immediate* to the pool.
- 5.38. The following section of this determination assesses the area enclosed by the as-built pool barrier in this case against the definition of immediate pool area in the Act (refer paragraph 5.17), using the guidance provided in *Hickman*.

Compliance of the as-built pool area

- 5.39. It is not unusual to enclose some land – whether lawn or paved areas or otherwise – inside a pool barrier as a place where people can, for example, sit or sunbathe while using the pool. It is also not unusual to include seating or tables beside a pool. These uses have been considered in a number of determinations²⁴.
- 5.40. Firstly, I will assess the additional area that was not included in the immediate pool area in the building consent. This area is encompassed by the extension of the barrier to include the north wall of the house. The additional area is approximately 80m² and, due to the distance from the pool and size, is likely to be used for activities other than those directly related to the use of the pool. There is a distance of approximately 10m from the pool to the southern edge of the house. The further away from the pool, the less likely the area will be used for activities in relation to or involving the pool. There are also a number of other areas around the pool that can be used for sitting or sunbathing, as there are two decks, concrete tile surround, and a large lawn area available. Accordingly, I consider this additional area does not fall within the immediate pool area.
- 5.41. I also consider the area behind the wall to the north of the pool to be outside the immediate pool area. It is not immediately clear from the photographs whether there is pool equipment on the deck behind the landscaping wall. However, the immediate pool area extends past the deck to include the lawn area as well. There is an indirect association between this area and the pool due to the landscaping

²² I use the expression ‘pool-related activities’ to mean activities carried out in relation to or involving the pool.

²³ *Hickman*, at [29](b).

²⁴ Determination 2015/039: Regarding the refusal to issue a code compliance certificate and the issue of a notice to fix in respect of compliance of pool barriers to a swimming pool at 74 Penrose Street, Lower Hutt.

wall separating the area from the pool. I do not consider the area to the north of the landscaping wall will be used for activities in relation to or involving the pool, again considering there are a number of areas closer to the pool for related activities.

- 5.42. The photographs provided by the authority show a trampoline within the immediate pool area. It could be argued, just like with a bbq or a dining area, that a trampoline may sometimes be used in association with the pool (for recreation). However, a trampoline will also often be used independently from the pool. I do not consider the use of a trampoline is sufficiently related to the use of the pool to conclude that it is an activity carried out in conjunction with the pool.
- 5.43. I have also considered NZS 8500 when coming to the conclusion that a trampoline should not be included within an immediate pool area. NZS 8500:2006²⁵ relates to safety barriers and fences around swimming pools, spas and hot tubs. Options for the location of effective safety barriers that will restrict the access of young children to swimming pools are provided. While, it is not a cited standard, the underlying principles are still relevant (my emphasis):

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. It is essential that a separate outdoor safe play area for children is available directly from the house.

...

The immediate pool area could include, but not a vegetable garden, clothes line, **children's play areas or equipment**, as these are not used in conjunction with the pool

- 5.44. In conclusion, 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 *Hickman*. The large area surrounded by the pool barrier cannot be said to be the immediate pool area. Therefore, the as-built immediate pool area does not comply with the Building Code to the extent required by the Act.

Reversing the code compliance certificate

- 5.45. Accordingly, and by its own admission, the authority was incorrect in deciding to issue a code compliance certificate under section 94(1) of the Act as it could not have been satisfied on reasonable grounds that the building work complied with the building consent. I have concluded the area enclosed by the pool barrier does

²⁵ NZS 8500:2006. Safety barriers and fences around swimming pools, spas and hot tubs (Date published: 23/11/06)

not meet the definition of an immediate pool area. Because of this, the pool barrier is also not in accordance with the ongoing compliance obligations outlined in section 162C.

- 5.46. In accordance with section 188(1)(a), I must now consider whether it is appropriate to confirm, reverse or modify the code compliance certificate. Under this power, a decision to issue a code compliance certificate can be reversed by the Chief Executive, which effectively means the code compliance certificate will be withdrawn.
- 5.48. Reversing a code compliance certificate can have significance for a building owner as it could impact funding and insurance contracts. For this reason, the decision to reverse the issuing of one should be carefully considered.
- 5.49. In this case, I consider it is appropriate to reverse the code compliance certificate, taking the following into account.

- The scope of the building consent. In this case the building consent, and therefore the code compliance certificate, covered only the pool and barrier.
- The significant departure from the building consent, including the incorporation of external walls, doors and windows of the house.
- The extent and consequence of non-compliance.
- The purposes of the Building Act, including:

Section 3:

(a) to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—

(i) people who use buildings can do so safely and without endangering their health...

- The principles of the Act, including:

Section 4: Principles to be applied in performing functions or duties, or exercising powers, under this Act

(2) (a) when dealing with any matter relating to 1 or more household units,—

(i) the role that household units play in the lives of the people who use them, and the importance of—

(A) the building code as it relates to household units; and

(B) the need to ensure that household units comply with the building code....

6. Next steps for parties

- 6.1. The authority should ensure that that the property records show that the code compliance certificate has been reversed and the owner asked to return their copy of the code compliance certificate.
- 6.2. I note that the authority has already discussed the way forward with the owner and their preferences for resolving this issue. Once the authority is satisfied the relevant building work complies with the building consent, it can issue a new code compliance certificate.

7. Decision

- 7.1. In accordance with section 188 of the current Act, I determine the authority was incorrect to issue a code compliance certificate as the building work does not comply with the building consent. Because the building work also does not comply with the Building Code to the extent required by the Act, I reverse the decision to issue the code compliance certificate.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 1 July 2022.

Katie Gordon
National Manager, Building Resolution