



Office of  
Local Government

## **PRACTICE NOTE 17**

# **APPLICATION OF SECTION 22 OF THE SWIMMING POOLS ACT 1992**



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## TABLE OF CONTENTS

<b>Introduction .....</b>	<b>4</b>
1.1 <i>Purpose and scope</i> .....	4
1.2 <i>Background</i> .....	4
<b>Policy and Legislation.....</b>	<b>5</b>
2.1 <i>Policy</i> .....	5
2.2 <i>Legislation and supporting documents</i> .....	5
<b>Council responsibilities .....</b>	<b>7</b>
3.1 <i>Application of Section 22</i> .....	7
Application made by the owner. ....	8
Exempt all or any requirements of this Part (Part 2 access to swimming pools) .....	9
In particular circumstances .....	9
Impracticable or unreasonable [s. 22 (1)(a)].....	9
Special circumstances [s.22(1)(a)].....	10
No less effective [s.22(1)(b)] .....	10
Conditions considered appropriate [s.22(2)].....	10
Immunity from offences under Part 2 [s.22(3)] .....	10
Determinations.....	11
<b>Council Risk Management .....</b>	<b>11</b>
4.1 <i>Risk Management Process</i> .....	11
<b>Legal protections.....</b>	<b>12</b>
<b>Annexure 1 .....</b>	<b>133</b>

# Introduction

## 1.1 Purpose and scope

This is a guide to assist councils in NSW to assess and issue swimming pool barrier requirement exemptions under section 22 of the *Swimming Pools Act 1992* (the Act).

The *Practice Note* does not represent a minimum set of standards that all councils must apply. Rather, it is a guide to assist individual councils to develop, implement and document appropriate processes to exempt pools from the requirements of the Act because the physical nature of the premises, or because of the design or construction of the swimming pool or other special circumstances, makes it unreasonable or impractical for them to comply with the legislated barrier requirements.

It should also be noted that the Practice Note is not a comprehensive, stand-alone document and should be used in conjunction with other relevant resources about child resistant barriers.

## 1.2 Background

The Act has provided more than 20 years of regulation on the installation, maintenance and regulation of child resistant barriers. Yet every year, on average, 5 children die by drowning and over 60 suffer significant injury through immersion in pools regulated by this Act. In an effort to reduce these numbers, a review of the Act was undertaken and, in the light of coronial findings, several recommendations were made to Government in 2012. The Government made amendments to the Act that commenced on 29 October 2012, to the effect that:

- from 29 April 2013, all pools in NSW be registered on a State-wide register
- after 29 October 2013, a local authority may issue a fine to the owner of a pool that is found to be unregistered
- from 29 October 2013, all NSW councils adopt and implement a swimming pool inspection program for pools in their local government area
- the swimming pool inspection program must include the inspection of all swimming pools associated with tourist and visitor accommodation and multi-occupancy (more than two) dwellings every three years
- from 29 April 2015, a certificate of compliance or relevant occupation certificate<sup>1</sup> for the swimming pool barrier be a prescribed document for the contract for the sale of land
- from 29 April 2015, a landlord will ensure that a pool on a leased property will have a valid certificate of compliance or relevant occupation certificate.

None of the requirements for the installation and maintenance of child resistant barriers have been changed by the 2012 amendments to the *Swimming Pools Act 1992*.

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<sup>1</sup> relevant occupation certificate in respect of a swimming pool means an occupation certificate issued under the Environmental Planning and Assessment Act 1979 that is less than 3 years old and that authorises the use of the swimming pool.

# Policy and Legislation

## 2.1 Policy

Accidental drowning in swimming pools is a cause of death and serious injury in very young children. Australian research and other data show that inadequate supervision coupled with inadequate barriers are the two factors consistently associated with these drownings. This research and data also supports the view that strong, four-sided swimming pool barriers directly contribute to reductions in pool drowning rates.

The Act was introduced to better protect the safety of young children around backyard swimming pools by restricting their unsupervised access to pools. To this end, the Act requires that a swimming pool is at all times surrounded by a child-resistant barrier which separates the swimming pool from any residential building on the premises and any place adjoining the premises. The Act provides guidance to this requirement in the form of diagrams in the schedule to the Act (reproduced here as annexure 1).

## 2.2 Legislation and supporting documents

The Act and the Swimming Pools Regulation 2008 (the Regulation) apply to swimming pools located on private land: ('backyard') swimming pools, pools ancillary to multi-occupancy dwellings, pools ancillary to moveable dwellings and pools ancillary to tourist and visitor accommodation.

The Regulation cites the Building Code of Australia as the instrument through which the relevant child resistant barrier standard is called up. The relevant standard has been amended and updated over time from the original AS1926 (1986) through AS1926.1 (2007) to the current edition. The current relevant standard is Australian Standard AS1926.1-2012 Swimming Pool Safety, Part 1: Safety barriers for swimming pools<sup>2</sup>. As drafted, AS1926.1-2012 contained amendments that were inconsistent with NSW legislation. Therefore, NSW has varied the Building Code of Australia to remove from operation those clauses inconsistent with the *Swimming Pools Act 1992*.

The Regulation requires councils to ensure that a paper copy or electronic version of AS 1926.1—2007, the Building Code of Australia and the Cardiopulmonary Resuscitation Guideline are made available for public inspection at no cost during business hours.

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<sup>2</sup> This Standard is available for purchase through Standards Australia's publications distributor, SAI Global on phone: 131 242 or email: [sales@saiglobal.com](mailto:sales@saiglobal.com) or web shop: [www.infostore.saiglobal.com/store/](http://www.infostore.saiglobal.com/store/)

## ***Swimming Pools Regulation 2008***

### 21 Public access to AS 1926.1—2007, Building Code of Australia and Cardiopulmonary Resuscitation Guideline

(1) The Department must ensure that a paper copy or electronic version of AS 1926.1—2007, the Building Code of Australia and the Cardiopulmonary Resuscitation Guideline are made available for public inspection at no cost at each public office of the Department during ordinary business hours.

(2) Each local authority must ensure that a paper copy or electronic version of AS 1926.1—2007, the Building Code of Australia and the Cardiopulmonary Resuscitation Guideline are made available for public inspection at no cost at each public office of the local authority during ordinary business hours.

(3) The Department and each local authority must ensure that the Cardiopulmonary Resuscitation Guideline is available for viewing on its website.

The Act requires that the pool itself cannot form part of the pool barrier and that the owner can determine where to locate the barrier itself. This is consistent with the intent of the legislation to create a barrier between the pool and any child that may enter a property where a pool is located (See 'Annexure 1' for diagrams from the Act indicating the basic types of premises considered by the legislation). The legislation also recognises that there are circumstances where this 'default position' is not practicable or reasonable.

Where the placement of a separate child resistant pool barrier is not practicable or reasonable, the legislation allows for a local authority to grant an exemption from the default settings of the legislation, that is, the provisions of 'Part 2 of the Swimming Pools Act - Access to swimming pools.' A council should not unreasonably withhold the granting of an exemption in circumstances that satisfy the provisions of the Act and Regulation.

# Council responsibilities

## 3.1 Application of Section 22

The *Swimming Pools Act 1992* establishes a local authority as having regulatory responsibilities. For the purposes of the Act, a council, the Western Lands Commissioner and the Lord Howe Island Board are all local authorities. Local authorities have both general and specific responsibilities under the *Swimming Pools Act 1992* and supporting regulations.

One of councils' specific responsibilities is the receipt, consideration and determination of applications for exemption from barrier requirements made under section 22 of the Act. The relevant section is:

### **Swimming Pools Act 1992**

#### Section 22

#### **Local authority may grant exemptions from barrier requirements that are impracticable or unreasonable in particular cases.**

- (1) The local authority may, on application made by the owner of any premises in or on which a swimming pool is situated, or proposed to be constructed or installed, exempt the swimming pool from all or any of the requirements of this Part if it is satisfied, in the particular circumstances of the case:
  - (a) that it is impracticable or unreasonable (because of the physical nature of the premises, because of the design or construction of the swimming pool or because of special circumstances of a kind recognised by the regulations as justifying the granting of an exemption) for the swimming pool to comply with those requirements,
  - or**
  - (b) that alternative provision, no less effective than those requirements, exists for restricting access to the swimming pool.
- (2) An exemption may be granted unconditionally or subject to such conditions as the local authority considers appropriate to ensure that effective provision is made for restricting access to the swimming pool concerned or the water contained in it.
- (3) A person is not guilty of an offence under this Part:
  - (a) if the swimming pool concerned is the subject of an exemption under this section, **and**
  - (b) if the conditions (if any) to which the exemption is subject are being complied with.
- (4) For the purposes only of any appeal proceedings arising in connection with an application under this section, the local authority is taken to have refused the application if it has not finally determined the application within 6 weeks after the application was made.

### **Application made by the owner**

The operation of section 22 of the Act relies on councils having the facility to allow the owner of a property on which a pool is located to:

- lodge an exemption application,
- facilitate the assessment of that application, and
- issue a determination of the application.

Any internal appeal process should also be specified as part of this system.

Councils may design their own application form, however it must include notice of the prescribed matters which are as follows:

#### ***Swimming Pools Regulation 2008***

##### **Part 4 Clause 12 Application for exemption**

- (1) An application made to a local authority under section 22 of the Act is to be in the form approved by that authority.
- (2) That form must contain statements to the effect that:
  - (a) if the local authority fails to finally determine the application within 6 weeks after it is made, then the local authority is taken, for the purposes of any appeal proceedings, to have refused the application, and
  - (b) if the local authority refuses the application for an exemption, or is taken to have refused the application, or imposes a condition on an exemption, the owner of the premises on which the relevant swimming pool is situated is entitled to appeal to the Land and Environment Court against the local authority's refusal or against the condition.

Councils should also develop and provide information to pool owners and other interested parties such as builders, designers and architects about its approach to and procedures for assessing such applications.

Provision should be made for an owner to lodge an application at either the design phase or when the pool is completed. Required information can include, but is not limited to, site plans, specifications, and engineering details. Fees for such applications are set by the Regulation as follows:

#### ***Swimming Pools Regulation 2008***

##### **Part 4 Clause 13 Fee for application for exemption**

- (1) A local authority may impose a fee of up to \$70 on an application for an exemption under section 22 of the Act.
- (2) An application made to a local authority that has imposed a fee must be accompanied by that fee.

## **Exempt all or any requirements of this Part (Part 2 access to swimming pools)**

It is up to councils to determine, with regard to the intent of this legislation what, if any, aspects of the access requirements it is prepared to exempt under the circumstances. For example the general requirement for a swimming pool to be surrounded by a child resistant barrier may be either removed entirely or may be replaced by a specific set of performance criteria as determined by a council. The exemption may specify the location of the child resistant barrier.

### **In particular circumstances**

A council must satisfy itself that the circumstances of the application warrant the granting of an exemption. The Act provides two main circumstances for a council to consider:

That it is impractical or unreasonable for the swimming pool to comply

Or

That the alternative provisions to restrict access are no less effective than those prescribed in part 2 of the Act

### **Impracticable or unreasonable [s. 22 (1)(a)]**

The Act provides for an exemption based on impracticability (impracticable: incapable of being put into practice, not feasible, unsuitable for a desired use, unfit, not workable) or unreasonableness (unreasonable: irrational, immoderate, excessive) for the pool to comply with those requirements. The Act provides the limit of impracticability and unreasonableness;

- *physical nature of the premises*: physical factors such as contour, sub-surface conditions and relationship/impact of any other structures.
- *design or construction of the pool*: designs and constructions that do not fit the legislative general requirements for swimming pools should be considered for exemption. Such designs may include pools constructed as a physical part of the residential building, pools that extend above the finished ground level to a height exceeding 1800mm and pools built on cliff edges or waterfronts.

For example, the Act provides that a swimming pool must be at all times surrounded by a child resistant barrier that separates it from the residence and any other place. This is clearly impracticable and unreasonable where the pool sits on a cliff edge or steeply sloping ground. Any pool wall proposed as an alternative barrier solution to the general requirements of the Act, because of the physical nature of the premises and/or because of the design or construction of the swimming pool, must be of substantial construction (such as concrete, industrial marine glass or acrylic) and of sufficient structural integrity, perhaps as certified by an engineer and complies with or exceeds the prescribed dimensions and technical requirements as set out within AS1926.1 for barrier heights.

Particular consideration should be given to ensure that any design or construction is adequate to prevent children from accessing the pool or pool area at all access points (eg gates) and at all transition points (eg where, on sloping sites, the relative height of the pool wall to the ground reduces as the pool transitions from being out of the ground to being in the ground).

#### **Special circumstances [s.22(1)(a)]**

The Act references the Swimming Pools Regulation 2008 that may recognise special circumstances of a kind that may justify the granting of an exemption. There is currently only one special circumstance:

### ***Swimming Pools Regulation 2008***

#### **Clause 14 Circumstances that justify an exemption**

For the purposes of section 22 (1) (a) of the Act, the fact that an adult occupier of the premises in or on which a swimming pool is situated would (because of a physical disability or impairment of the occupier) be significantly impeded in gaining access to the swimming pool if the requirements of Part 2 of the Act were complied with is a special circumstance that justifies the granting of an exemption from those requirements.

#### **Alternative arrangements no less effective [s.22(1)(b)]**

An exemption may be granted if the alternative arrangements in place are no less effective than the requirements of the Act for limiting access. What could constitute such alternative arrangements are a matter for the professional judgement and discretion of the authorised officers and accredited certifiers and must be assessed on a case-by-case basis.

#### **Conditions considered appropriate [s.22(2)]**

An exemption may be granted unconditionally or subject to such conditions as the local authority considers appropriate to ensure that effective provision is made for restricting access to the swimming pool concerned or the water contained in it. This may include such conditions as those that would terminate the exemption if the ownership changes or if there are any works conducted at the property.

#### **Immunity from offences under Part 2 [s.22(3)]**

An exemption granted by a council provides a person with immunity for offences under 'Part 2 Means of Access' provided that the conditions of that exemption are being complied with. Moreover, pursuant to the recent amendment to the Act, if a council grants an exemption, the council then must issue a compliance certificate.

## Exemption determinations

A decision made by a council on an application by an owner must be notified to that owner in writing. It must comply with clause 15 of the Regulation and be served on the owner of the premises. For the purposes of appeal proceedings only, it is worth noting that any application not determined within 6 weeks of receipt is deemed refused and can be appealed to the Land and Environment Court. Given the appeal process, it is recommended that councils provide clear processes and maintain accurate records of how those processes are used by staff.

### ***Swimming Pools Act 1992 No 49***

#### **26 Appeals against decisions of local authority**

(1) An appeal lies to the Land and Environment Court against the following decisions of a local authority:

- (a) a decision to refuse to grant an exemption under section 22 in accordance with the terms of the relevant application,
- (b) a decision to impose a condition on an exemption under section 22,
- (c) a decision to refuse to grant a certificate of compliance under section 22D,
- (d) a decision to give a direction under section 23.

(2) Such an appeal must be made within 28 days after the date on which the decision was made or is taken to have been made.

(3) A local authority is taken to have refused to issue a certificate of compliance in relation to a swimming pool if the local authority has failed to issue either a certificate of compliance or a direction under section 23 in respect of the swimming pool, within 6 weeks (or such other period as may be prescribed by the regulations) after:

- (a) an inspection of the swimming pool is carried out under section 22B, or
- (b) a written request is made under section 22C to the local authority that stated that the inspection was required to enable the sale or lease of the premises or part of the premises on which the swimming pool is situated.

## **Council Risk Management**

### **4.1 Risk Management Process**

The adopted approach needs to be systematic and comprehensive. It should follow a clear process that:

- adequately documents the process and the basis upon which pool exemption certificate decisions are made

- adequately monitors the process of application, assessment, decision and monitoring of swimming pool exemptions to ensure that the process remains effective
- identifies the context and location in which the pool exemption certificate will operate
- identifies site specific factors considered in relation to particular contexts and locations
- identifies risks associated with those site specific factors
- analyses and evaluates the risks using a risk assessment matrix that documents the likelihood of a risk occurring and the consequences of it occurring
- determines an outcome that will treat the identified risks and that will translate into operable conditions for the granting and existence of a swimming pool barrier exemption.

Many organisations have adopted a risk management approach based on ISO 31000:2009 Risk Management - Principles and Guidelines. Councils may wish to adapt their own risk management tools for the purposes of their assessments under section 22.

## Legal protections

The Local Government Act 1993 and the Swimming Pools Act 1992 provide authorised officers with general protections in the execution of functions under those Acts, provided they are acting in good faith. The specific provisions are as follows:

### ***Swimming Pools Act 1992 No 49***

#### **37 Liability**

No matter or thing done by a member of a local authority, by an authorised officer or by a person acting under the direction of a local authority subjects the member, authorised officer or person so acting personally to any action, liability, claim or demand if the matter or thing was done in good faith for the purpose of executing this Act.

### ***Local Government Act 1993 No 30***

#### **731 Liability of councillors, employees and other persons**

A matter or thing done by the Minister, the Director-General, a council, a councillor, a member of a committee of the council or an employee of the council or any person acting under the direction of the Minister, the Director-General, the council or a committee of the council does not, if the matter or thing was done in good faith for the purpose of executing this or any other Act, and for and on behalf of the Minister, the Director-General, the council or a committee of the council, subject a councillor, a member, an employee or a person so acting personally to any action, liability, claim or demand.

# Annexure 1

## Swimming Pools Act 1992 No 49

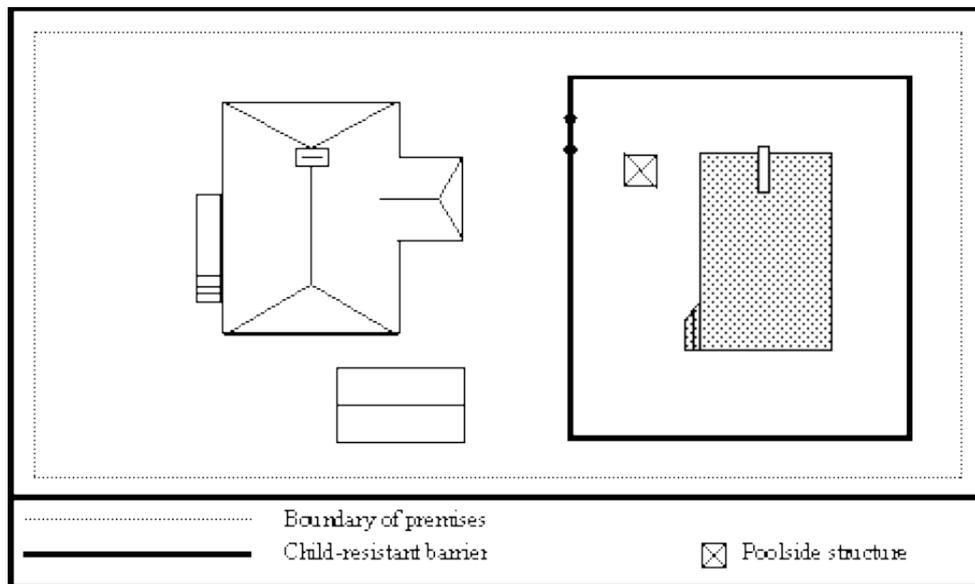
### Schedule 1 Diagrams

(Section 3)

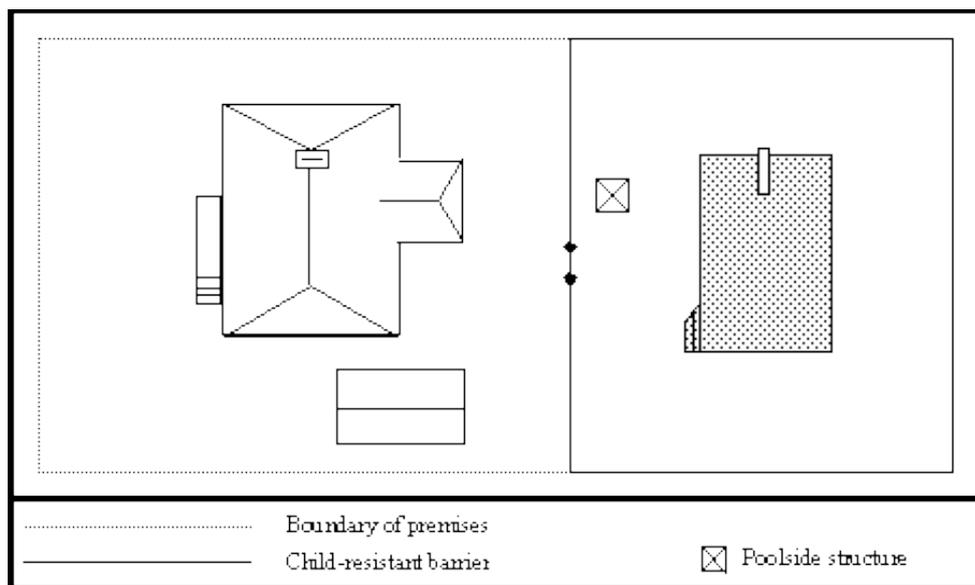
### Part 1 Outdoor pools for residential buildings

(Section 7)

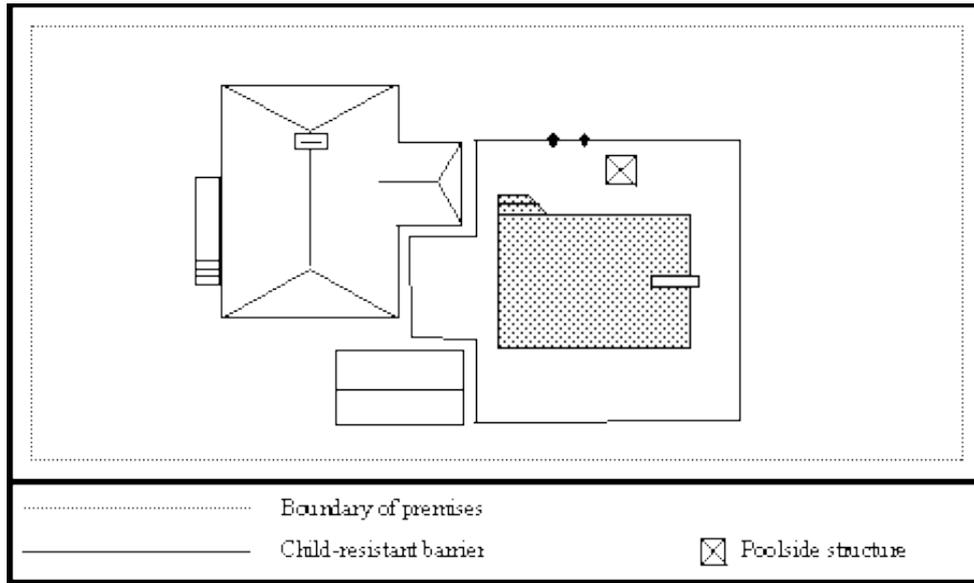
**Diagram 1**



**Diagram 2**



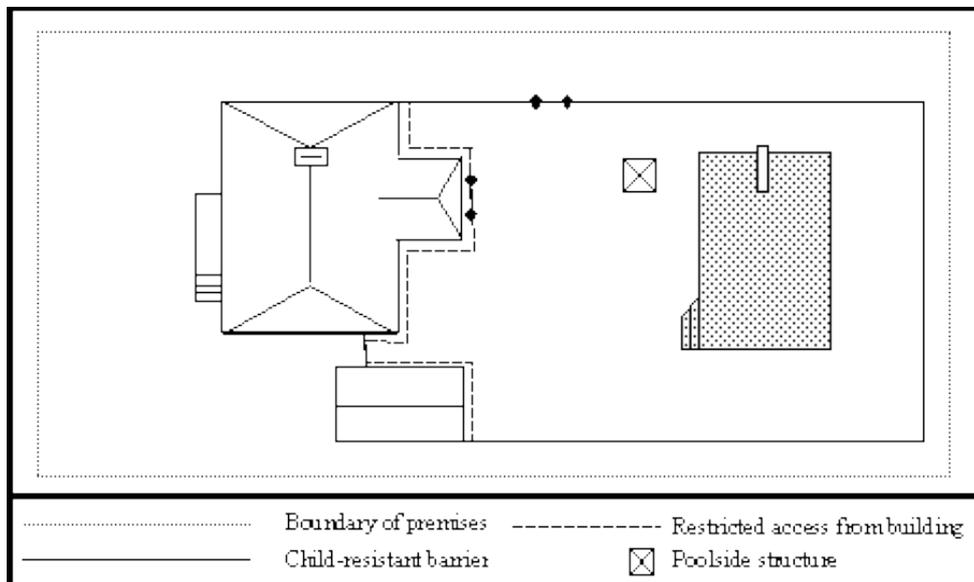
**Diagram 3**



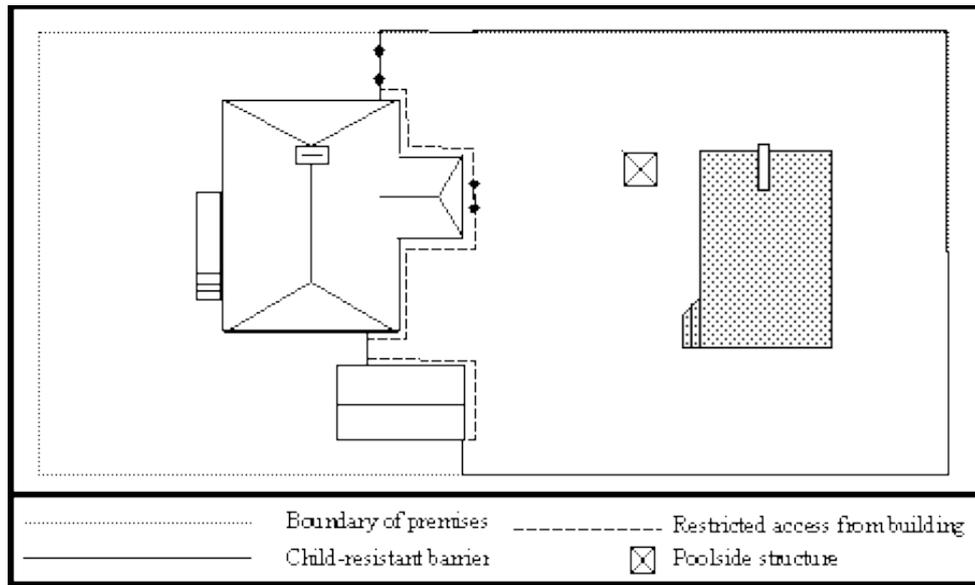
**Part 2 Swimming pools constructed before August 1990 and existing swimming pools on small properties**

(Section 8)

**Diagram 4**



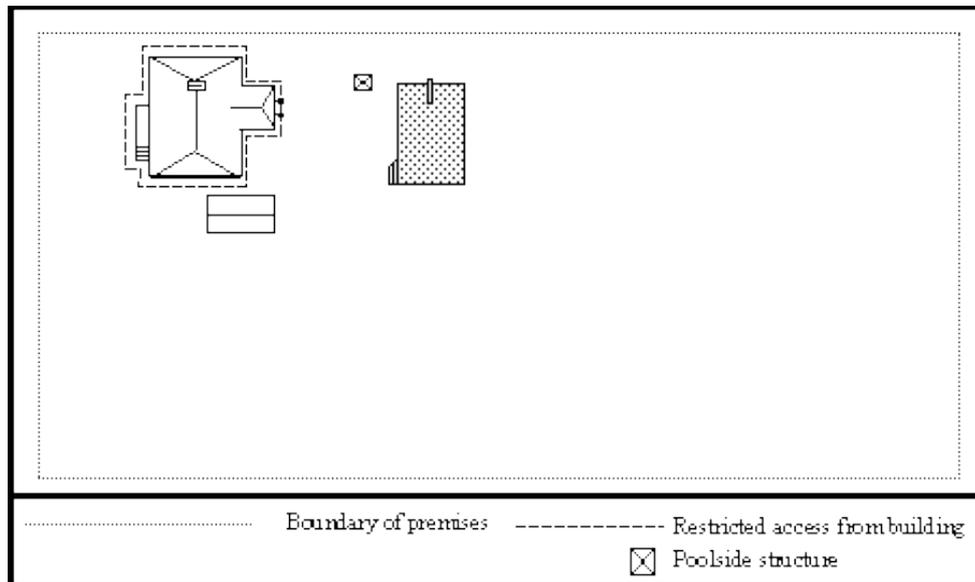
**Diagram 5**



**Part 3 Existing swimming pools on large properties**

(Section 9)

**Diagram 6**



## Part 4 Existing swimming pools on waterfront properties

(Section 10)

**Diagram 7**

