



## Determination 2019/052

# Regarding the compliance of a pool barrier to the extent required by section 162C of the Building Act for an indoor pool at 83 Roland Road, Auckland

### Summary

This determination considers the compliance of an indoor pool barrier to the extent required by section 162C of the Building Act. The barrier incorporates bi-fold doors and a sliding door. The determination discusses the compliance requirement in relation to an indoor pool that was exempt from having a barrier under the former Fencing of Swimming Pools Act and the means by which compliance can be established.

## 1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“the Act”) made under due authorisation by me, Katie Gordon, Manager Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The parties to the determination are:
  - R Wordsworth, the owner of the house (“the applicant”)
  - Auckland Council carrying out its duties as a territorial authority or building consent authority (“the authority”<sup>2</sup>).
- 1.3 This determination arises from a failed inspection<sup>3</sup> of a residential pool which is wholly enclosed within a room of the applicant’s house. The pool was constructed in about 2006, before major changes to the legislation governing residential pools were introduced on 1 January 2017.
- 1.4 In the authority’s view the barrier to this pool does not comply with the Building Code to the extent required by section 162C of the Act. However, the applicant considers the pool still satisfies the relevant Building Code requirements; in particular, that doors forming part of the barrier restrict access by young children to the extent required.
- 1.5 The applicant applied for a determination with respect to the compliance of the bi-fold door between the pool room and the rest of the house. However, the authority considers that the external pool room doors are also at issue.

<sup>1</sup> The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at [www.building.govt.nz](http://www.building.govt.nz) or by contacting the Ministry on 0800 242 243.

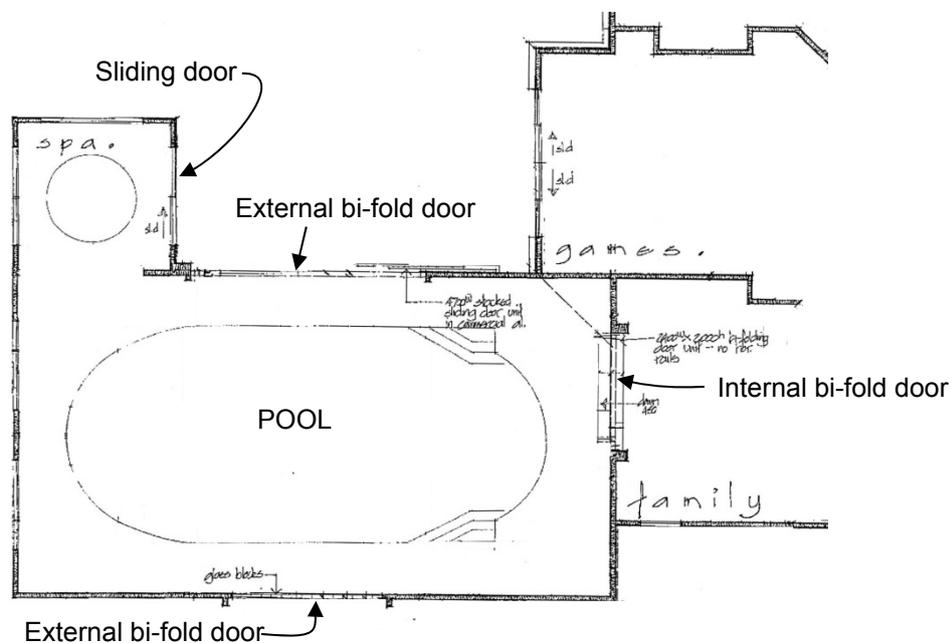
<sup>2</sup> The building consent and code compliance certificate were issued by North Shore City Council, which was later transitioned into the Auckland Council. The term authority is used for both.

<sup>3</sup> Under section 162D of the Act.

- 1.6 Accordingly, I consider the matter to be determined<sup>4</sup> is whether the physical barrier to the pool, in particular, the three sets of bi-fold doors and one sliding door forming part of this barrier, complies to the extent required by section 162C of the Act.
- 1.7 I have not considered the compliance of the pool room windows, which also form part of the barrier, as this has not been called into question.
- 1.8 In making my decision I have considered the parties' submissions and the other evidence in this matter. The relevant sections of the Act and the (now repealed) Fencing of Swimming Pools Act 1987 ("FOSPA"), and the relevant clauses of the Building Code can be found in Appendix A.

## 2. The pool and barrier

- 2.1 The applicant owns a two-storey house on Auckland's North Shore. The pool which is the subject of this determination is on the ground floor and is enclosed within a dedicated pool room at the house's southwestern end (refer to Figure 1). The pool is approximately 9.5m<sup>2</sup> by 4.5m<sup>2</sup> and takes up most of the pool room. There is also a spa in one corner of the room.



**Figure 1: Plan indicating type and location of pool room doors<sup>5</sup>**

- 2.2 The walls, doors and windows of the pool room form a physical barrier surrounding the immediate pool area<sup>6</sup>. From the authority's 31 January 2019 pool inspection checklist<sup>7</sup>, details provided by the applicant and the other information supplied to me, it appears there are four doors in the pool room as follows (images of these are provided in Figure 2):

- one set of bi-fold doors at the end of the pool room ("the internal bi-fold door") providing access to/from the rest of the house (also refer to sketch in Figure 3). This door has four leaves and is approximately 2300mm wide. According to the applicant, it can be opened from the living area/family room by releasing

<sup>4</sup> Under section 177(1)(a) of the Act.

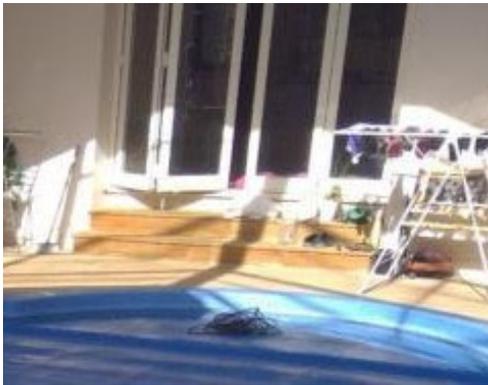
<sup>5</sup> Adapted from consented ground floor plan. Note bi-fold doors were installed in place of glass blocks.

<sup>6</sup> As this term is defined in the Act: section 7 Interpretation.

<sup>7</sup> Swimming and spa pool fencing inspection checklist SWP20031971 dated 31 January 2019.

four manually operated flush bolts (two upper and two lower) that secure its leaves and then pulling on two D-shaped handles<sup>8</sup>. This opens the outer leaves and the door can then be pushed into a fully open, stacked position. The lowest points of the lower bolt levers are about 260mm above floor level, while the lowest points of the upper bolt levers are about 1620mm above floor level.

- two sets of bi-fold doors located on opposite sides of the pool room (“the external bi-fold doors”) which open up fully to the outside. These doors have latches top and bottom on the inside of the door, with the top latches set about 1700mm above floor level. From the photographs supplied, they have six leaves that can be folded outward and then slid back.
- a sliding door next to the spa. This door has a single latch and lock at approximately 900mm above floor level on the inside face of the door. The door opens to a maximum of 1000mm wide.



(a) The internal bi-fold door viewed from the pool room



(b) One external bi-fold door viewed from the pool room



(c) The sliding door (visible through the external bi-fold door)



(d) The other external bi-fold door viewed from outside

**Figure 2: Images of the pool room doors (from photographs taken by the authority)**

2.3 The pool room also has four windows. In the checklist following its 31 January 2019 inspection the authority described the window next to the spa as “restricted”, and the three other windows (on the southwestern side) as “much higher and inaccessible”.

<sup>8</sup> I note that the photographs appear to show the internal bi-fold door opens inward toward the pool and accordingly it would be a pushing action to open this door from the living/family area.

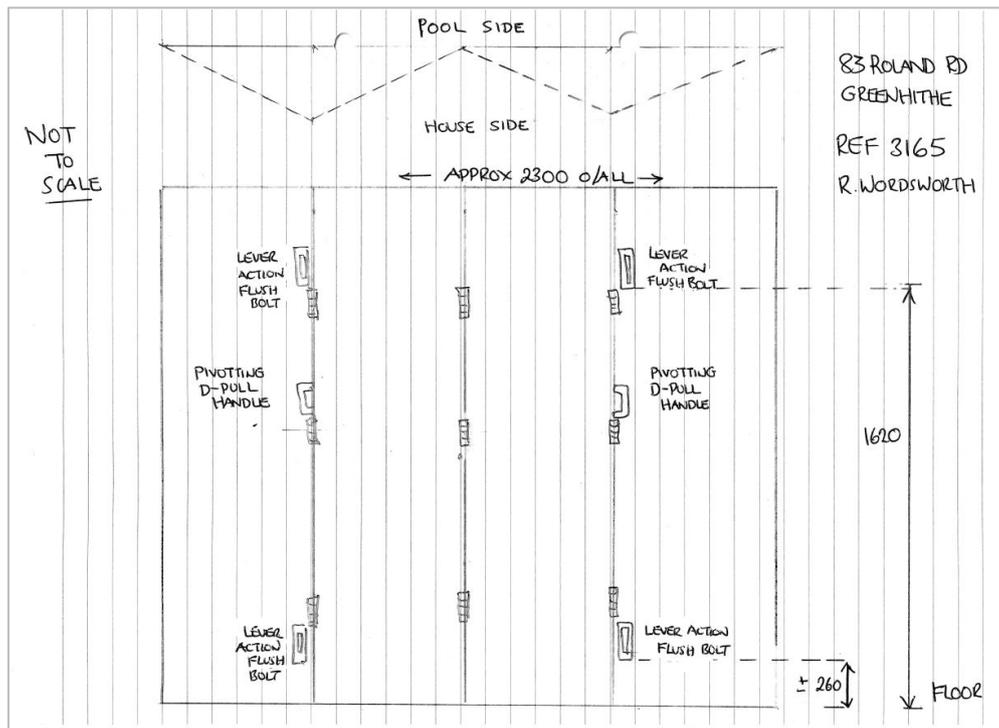


Figure 3: The internal bi-fold door<sup>9</sup> (sketch by applicant, not to scale)

### 3. Background

- 3.1 The authority issued building consent BC 1027851 under the Building Act 1991 for the construction of the house and its indoor pool in early 2004; I have not been provided with a copy of the consent as issued. The building work was completed and a code compliance certificate was issued on 14 March 2007. Under the relevant legislation and regulations in effect at that time (FOSPA and Building Code Clause F4 Safety from falling), indoor pools such as this were exempt from the requirement to have a barrier<sup>10</sup>.
- 3.2 On 1 January 2017 FOSPA was repealed and the Act was amended to incorporate a set of provisions relating to residential pools. These provisions included section 162C, which requires all residential pools to have physical barriers restricting access by unsupervised children under five years of age, and section 162D, which requires residential pools to be inspected at least once every three years to make sure they have barriers that comply with the Building Code to the extent required by section 162C. The Building Code itself was also amended, deleting the specific provisions relating to pools from Clause F4 and adding a new Clause F9 Means of restricting access to residential pools.
- 3.3 On 31 January 2019 the authority carried out an inspection of the pool as required by section 162D of the Act. The completed one-page checklist marked this inspection as failed and said remedial work would be inspected on or after 25 March 2019. The checklist questions included the following entries:
- “Do all doors open away from pool?” – this was marked as both “N/A” (I assume for the sliding door) and “No” (without specifying which of the bi-fold doors this applied to).

<sup>9</sup> Based on the photograph shown in figure 2(a), it appears the doors fold toward the pool side rather than toward the house side.

<sup>10</sup> This is explained more fully in the Discussion section 5 of this determination.

- “Are all latches, tower bolts and security bolts fitted a minimum of 1.5m above floor level?” – this was marked “No” for the sliding door.

3.4 The authority’s comments on this checklist included that the legislation had changed since the pool was last inspected in November 2014, and indoor pools now had to “comply under Clause F9”, and “retrospective action applies”. The authority also said:

... your bifold doors with their top locks can only work if you fit them with an audible (70 decibel) alarm that would go off after 7 seconds open (as bifolds can’t be made self closing doors), or you fit a pool compliant (1.2m) glass fence in front of them (on the inside of your pool area), or you will need a fence around the outside of your bifold doors.

The sliding door, which does only open 1m, will need to have a self-closing device fitted to it and have a latch at 1.5m.

3.5 On 1 May 2019 the authority carried out another pool inspection which also failed, as recorded on the accompanying inspection report<sup>11</sup>. Entries of note on this report are shown in the following table:

1 May 2019 pool inspection - checklist items	Entries by the authority
Choose method of determining compliance	FOSPA
FOSPA – type of pool as per Council records	Pass
...	...
Doors self latch and self-close with latch at 1500mm height?	Fail
Doors self latches and fitted with an audible warning device	Fail
...	...
Fencing subject to FOSPA section 5e “exemption” or F9 modification	N/A

3.6 The authority’s comments on this report included that the pool inspection failed due to the two issues identified with the doors (i.e. the two failed items), a recheck would be arranged in about 21 days, and:

(Bi Fold door to be fitted with [an alarm] system

... you can fit a self closing and latching mechanism)

3.7 In response to this inspection the applicant wrote to the authority to ask for a re-assessment. Further correspondence between the parties followed until 11 June 2019 as set out below.

3.8 In the authority’s view (in summary):

- As the applicant’s pool was an indoor pool, under FOSPA section 5(e) it had been exempt from requiring a barrier. However, there were no transitional or savings provisions that meant the pool continued to be exempt from having a compliant physical barrier.
- The authority initially advised the applicant that the pool was required to comply with the current Clause F9.3.4, and that the pool room doors (which

<sup>11</sup> SWP20031971 Swimming pool fencing inspection checklist outcome statement, dated 1 May 2019.

ones were not identified) either had to be fitted with a self-closing device or an alarm, and with a self-latching device at 1500mm above ground level.

- The authority subsequently advised that the applicant must provide a barrier that complied, either by complying with Clause F9, the Schedule of FOSPA (“the Schedule”) Clauses 1-10, the Acceptable Solution<sup>12</sup> for Clause F9, or as an alternative solution proposal.

3.9 In the applicant’s view (in summary):

- The pool had passed all pre-2017 inspections, no applications for alterations to the pool or to the building that affected the pool barrier had been made so nothing had changed, the Act was not retrospective, and the internal bi-fold door continued to be compliant under the current legislation.
- Section 162C(2), which provided for compliance with the Building Code requirements in force when the pool was constructed, was relevant (the applicant provided an extract from Determination 2018/017<sup>13</sup> in support of this view).
- Acceptable Solutions F9/AS1 and F9/AS2<sup>14</sup>, which the authority had supplied to the applicant, were not mandatory.

3.10 On 5 July 2019 the Ministry received the application for determination with respect to the compliance of the internal bi-fold door (as part of the pool barrier). The Ministry wrote to the applicant on 12 July 2019 to suggest the matter could be resolved without recourse to a determination. The Ministry referred to the recent Determination 2019/026<sup>15</sup> which considered a similar matter, explained the legislative requirements for the pool barrier and the four possible compliance pathways provided under section 162C(2), and discussed what the authority could take into account when considering compliance.

3.11 On 17 July 2019 the applicant replied asking which of the four compliance pathways was relevant in this case, submitted that compliance with Clause F4 as it was at the time the pool was constructed was relevant, and asked the Ministry to confirm that accordingly the pool and barrier were compliant.

3.12 On 25 July 2019 I accepted the application for determination.

## 4. Submissions

### 4.1 The applicant

4.1.1 The applicant included a submission dated 18 June 2019 with the application for a determination (in summary):

- The authority may have misunderstood the application of the Act – the applicant considered that in this case section 162(2) and not section 162(1)

<sup>12</sup> Acceptable Solutions and Verification Methods are produced by the Ministry and, if followed, must be accepted by a building consent authority as evidence of compliance with the Building Code. In general terms, design in accordance with an Acceptable Solution or Verification Method for a particular Building Code clause provides one way, but not the only way, to demonstrate compliance with that clause. Another option is to provide an alternative solution proposal, which is a design that departs partially or completely from the Acceptable Solution or Verification Method. In considering an alternative solution proposal, a building consent authority will require further evidence to be satisfied that the design meets the Building Code’s functional requirements and performance criteria.

<sup>13</sup> Determination 2018/017: Regarding compliance of an indoor swimming pool without a barrier (30 April 2018).

<sup>14</sup> F9/AS1 Residential pool barriers, and F9/AS2 Covers for small heated pools.

<sup>15</sup> Determination 2019/026: Regarding the compliance of a pool barrier to the extent required by section 162C of the Building Act (21 June 2019).

applied; the Act was not retrospective; and following the Acceptable Solutions was not mandatory.

- The pool has a barrier that appeared to provide compliance under section 162C(2)(b); this barrier had received previous approvals (i.e. the building consent and code compliance certificate) and passed pool inspections. No plans had been lodged to make any building alterations that would make compliance with “the current pool safety guidelines” a requirement of a new building consent.
- 4.1.2 The applicant also summarised key events and provided copies of correspondence with the authority (a letter disputing the failed pool inspection of 1 May 2019, and emails 5-11 June 2019), a photograph of the pool area, and an extract from Determination 2018/17.
- 4.1.3 On 25 July 2019 the Ministry asked the applicant for more information about the internal bi-fold door and its locking mechanisms and any other features the applicant considered assist in restricting access by young children to the immediate pool area.
- 4.1.4 On 2 August 2019 I received a sketch of the internal bi-fold door (seen in Figure 3) and a letter from the applicant dated 30 July 2019. In this letter the applicant described the door’s action and bolts saying that, as the upper bolt levers were at least 1625 mm above floor level, these were considered out of reach of a small child “and obviously exceed the minimum guideline<sup>[16]</sup> height of 1500[mm]”. The applicant also considered the dead weight of the door leaves plus the surface friction of the door sliders made opening the door too difficult for a small child. “Likewise, the stiff operation of the lock levers themselves is considered beyond the strength capacity of said child.”
- 4.1.5 On 22 August 2019 I asked the parties to confirm that the internal bi-fold door was the only aspect of the barrier in dispute and, if not, to provide further details. I also asked for confirmation that the consented plans were a fair representation of the building as constructed with regard to the layout of the immediate pool area and adjacent spaces, and the doors and windows that form part of the barrier to the immediate pool area.
- 4.1.6 The applicant replied on 25 August 2019 that the internal door appeared to be the only item for consideration (I note that this is not the authority’s view) and the “points of fail” following the authority’s inspection related to it being neither self-closing nor having an audible alarm. The applicant considered both these points came from Acceptable Solution F9/AS1 and were not applicable in this case.

## **4.2 The authority**

- 4.2.1 On 25 July 2019 the Ministry asked the authority to submit its views on the compliance of the barrier with regard to the Building Code requirements in place when the pool was consented and to the fact the building work was issued with a code compliance certificate.
- 4.2.2 On 12 August 2019 the authority sent a submission and copies of :
- the building consent application form dated 18 November 2003 (stamped received 14 January 2004) for construction of the applicant’s house and pool

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<sup>16</sup> Refer to Clause 9(3) of the Schedule to FOSPA and paragraph 4.2.2 (c) of the Acceptable Solution F9/AS1.

- six pages of drawings dated November 2003 and other documents associated with the building consent approved in 2004.
- 4.2.3 The authority said it was sympathetic to the position of the applicant and that there had been definite intent to comply with the provisions of the Building Code in force when the pool was constructed and approved.
- 4.2.4 The authority also submitted:
- In granting the building consent, the authority<sup>17</sup> appears to have required compliance with FOSPA, as per its stamp on the consented plans: “This pool is to be fenced in accordance with the [FOSPA] before the pool can be filled”.
  - There was no mention of an exemption under section 5(e) within “either document” (which I take to mean the building consent application and consented plans) so the authority did not believe that was the intended means of compliance. There were no specific details in the building consent about how the “stacker/slider door” (the internal bi-fold door) was to close or latch. However, as the door was installed during construction, compliance with FOSPA was likely to have been considered as the compliance method at the time (including when the authority issued the code compliance certificate).
  - Compliance with the Building Code in force at the time had been demonstrated by compliance with the Schedule. However, the authority’s quandary now was to assess whether the requirements of the Clause F9 and the Ministry’s recent interpretation<sup>18</sup> of what made an effective barrier took precedence over the previous authority’s decision that the barrier as constructed met the requirements of the Building Code at the time by way of the Schedule.
 

If the previous code compliance decision made was appropriate then we could see that the pool today would comply with the savings provisions of section 450B [of the Act]. If that decision is not found to be appropriate by [the Ministry] then it does follow that [the applicant] will be required to upgrade the barrier protection for the pool to current compliance methods.
  - The authority also said recent determinations such as Determination 2019/026 had provided some clarity about pools exempt under section 5(e) of FOSPA. However, further guidance would assist with consistency in applying the Act, especially with regard to existing indoor pools.
- 4.2.5 On 22 August 2019 I asked the authority for the 1 May 2019 pool inspection report and its confirmation that the internal bi-fold door was the only item of concern regarding the barrier to the pool.
- 4.2.6 On 27 August 2019 the authority sent copies of the inspection report; a checklist from an earlier inspection on 31 January 2019; and what it said was all the other relevant information it had, being the material supplied earlier (refer paragraph 4.2.2), a specification for the pool, and a record of an amendment to the building consent received 23 January 2004 for the pool footing.
- 4.2.7 With regard to the items of concern regarding the barrier the authority said it had asked “for the bi-fold door (1) to be fitted with an alarm and the other doors (2) to be fitted with self-closing and latching mechanisms”.

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<sup>17</sup> Then North Shore City Council.

<sup>18</sup> No references to guidance, publications, or previous determinations from the Ministry were cited.

### **4.3 Draft of the determination and submissions received in response**

- 4.3.1 A draft of this determination was issued to the parties for comment on 2 September 2019.
- 4.3.2 The authority responded on 16 September 2019, accepting the draft and noting some minor typographical errors.
- 4.3.3 The applicant responded on 17 September 2019. The applicant did not accept the findings of the draft, submitting (in summary):

#### ***FOSPA exemption***

- In relation to interpreting an exemption under section 5(e) of FOSPA, the “building” in this case is the room in which the pool is housed, and as this is used wholly for the purpose of using the pool (i.e. the pool room is self-contained) it does not fall within the exemption. The applicant considers the authority’s inspection record of 1 May 2019 supports this view.
- FOSPA exemption 5(e) applies in instances when there is no barrier between the pool space and the residential space (for example the pool considered in Determination 2018/017) and does not apply in this case.

#### ***Method of achieving compliance***

- The method of achieving compliance was recorded as by way of FOSPA and the authority did not consider an exemption under section 5(e) of FOSPA.
- The doors comply by means of Clause 11 of the Schedule and do not need to comply with Clauses 8 through 10 of the Schedule.

#### ***Compliance***

- The authority has previously accepted the barrier as compliant and altering the barrier now would be impractical, unreasonable and financially prohibitive.
- The pool area is inaccessible to children from outside by way of the external bi-fold doors or sliding door – based on the direction of movement, weight, and the latches being on the inside of the doors.

## **5. Discussion**

### **5.1 General**

- 5.1.1 The matter to be determined is whether the barrier to the applicant’s residential pool complies with the Building Code to the extent required by section 162C of the Act.
- 5.1.2 As the requirements and means of compliance for indoor pools constructed prior to 1 January 2017 are complex, I have explained the legislative framework in some detail below.

### **5.2 The requirement for a pool barrier**

- 5.2.1 Section 162C(1) of the Act requires all residential pools to have a physical barrier that restricts access by unsupervised children under 5 years of age. This requirement applies regardless of when the pool was constructed and whether or not it was exempt from the requirement to have a barrier at the time of its construction.

- 5.2.2 When the applicant's pool was constructed it did not require a barrier because it was an indoor pool, i.e. the pool was located within a building used for another purpose, that being a dwelling. This meant the requirement under FOSPA (the legislation in force at the time) for a pool barrier did not apply, as is made clear in section 5(e) of that Act –
- 5 Exempted pools
- Nothing in this Act shall apply in respect of –
- ...
- (e) Any pool that is wholly enclosed within a building that is used principally for a purpose or purposes not related to the use of the pool.
- 5.2.3 In addition, the relevant Building Code clauses at the time, Clauses F4.3.3 and F4.3.4(f), had limits on application which meant that the requirements of those clauses did not apply to pools exempt under section 5 of FOSPA.
- 5.2.4 The applicant contends that the pool was not exempt under section 5(e) of FOSPA, on the basis that the pool is wholly contained within a room that is used principally for purposes related to the use of the pool, and rather than the pool being exempt the means of compliance was by way of the Schedule to FOSPA. With regard to section 5(e), the applicant is of the view that the term “within a building” can be interpreted as meaning within a self-contained space, and contrasted this with a pool within an open-plan dwelling<sup>19</sup>.
- 5.2.5 I do not accept that the term “within a building” in section 5(e) can be interpreted in the way the applicant suggests. FOSPA clearly distinguishes between pools that are located outside of a building and those that are within a building, and further it exempts those pools located within a building when that building is used principally for purpose not related to the use of the pool. The distinction between indoor and outdoor pools is apparent in the prescribed “means of compliance for fences” in the Schedule, alongside the definition of “fence” in section 2 of FOSPA, when compared with the provision in section 5(e). Clauses 1 through 10 of the Schedule describe features of a fence in terms of height and ground clearance, materials, gates and doors and the operation of those gates and doors – features that are relevant to an outdoor pool with the pool area contained within a fence. Clause 11 describes the requirements for doors in the wall of a building that form “part of a fence”, but specifically excludes pools “contained within the building”. Accordingly, in my opinion the term “building” in section 5(e) in relation to the pool considered in this determination means the dwelling, and does not mean only the room in which the pool is housed.
- 5.2.6 When the 2017 legislative changes took effect (as described in paragraph 3.2), the exemption under section 5(e) of FOSPA concerning indoor pools was not brought forward into the new provisions. As discussed in Determination 2018/017<sup>20</sup>, other exemptions provided for under section 5 of FOSPA were addressed through amendments to the Act or Building Code, or were incorporated in some way into the Acceptable Solutions F9/AS1 and F9/AS2.
- 5.2.7 There are no transitional or savings provisions that would mean pools exempt under section 5(e) of FOSPA are not required to comply with section 162C(1) of the Act; meaning that a pool that was exempt under section 5(e) of FOSPA must now have a physical barrier that restricts access by unsupervised children under five years of age.

<sup>19</sup> See Determination 2018/017: Regarding compliance of an indoor swimming pool without a barrier (30 April 2018).

<sup>20</sup> See paragraphs 4.2.4 to 4.2.6 of Determination 2018/017.

- 5.2.8 The function of the physical barrier is to prevent injury or death to young children by restricting their access to the pool, and exempting indoor pools from this requirement would be inconsistent with the purpose of the Act<sup>21</sup> and with the special provisions concerning residential pools. The objective of the provisions in the Act and Building Code are to prevent injury or death to young children, and to achieve this objective section 162C of the Act requires all residential pools must have physical barriers that restrict access to the pool by unsupervised children under 5 years of age.
- 5.2.9 The authority submitted that the pool was not “granted” an exemption under section 5(e) of FOSPA, and that this means the pool was required to comply with FOSPA, (although I note that an officer of the authority had previously stated that as the applicant’s pool is an indoor pool it was exempt under section 5(e)<sup>22</sup>). The applicant is also of the view that an exemption was not “granted”. In support of this view the authority points to a stamp by the authority on the consented plans stating there was a requirement for the pool to be fenced in accordance with FOSPA.
- 5.2.10 I disagree with the authority with regard to the “granting” of the exemption. Section 5 of FOSPA states: “Nothing in this Act shall apply in respect of [an indoor pool]”. This amounts to a limitation of FOSPA’s scope – meaning that the authority was not required to “grant” an exemption, but rather the exemption applied as long as the pool was wholly enclosed in a building used principally for another purpose, as is the case here. I note that the exemption provided for under section 5 of FOSPA is in contrast to the wording used in the next section of FOSPA, section 6 Special exemptions, which makes it clear that specific action by the relevant authority is required:

6 Special exemptions

A territorial authority may, by resolution, grant an exemption from some or all of the requirements of this Act ...

### 5.3 Demonstrating compliance for the purpose of section 162C

- 5.3.1 There are various ways the barrier to the applicant’s pool can demonstrate compliance with the Building Code to the extent required by section 162C. As the applicant correctly notes, the authority cannot require that a specific means of compliance such as an Acceptable Solution is followed. Notwithstanding this, it is for the authority to decide whether sufficient evidence of compliance has been provided.
- 5.3.2 The means by which a physical barrier restricting access to a residential pool can be established are specified in section 162C(2). This section of the Act states the barrier must comply with the Building Code requirements either:
- (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).
- 5.3.3 In other words, section 162C(1) requires residential pools to have appropriate barriers, while section 162C(2) specifies the means by which compliance of the barrier can be ascertained.

<sup>21</sup> Specifically section 3(a)(i) of the Act: “...to ensure that— people who use buildings can do so safely and without endangering their health”.

<sup>22</sup> Email from Auckland Council to the applicant dated 6 June 2019.

- 5.3.4 With regard to section 162C(2)(a), the relevant Building Code requirements currently in force are contained in Clause F9. Clause F9.3.4 sets out the performance criteria for doors:
- F9.3.4** Where a building forms all or part of an immediate pool area barrier,—
- (a) doors between the building and the immediate pool area must not be able to be readily opened by children, and must either—
- (i) emit an audible warning when the door is open; or
- (ii) close automatically after use:
- 5.3.5 With regard to section 162C(2)(b), the relevant Building Code requirements in force when the applicant’s pool and barrier were consented and constructed were described in Clause F4<sup>23</sup>:
- 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, and
- (b) No permanent objects on the outside of the barrier that could provide a climbing step.
- 5.3.6 However, there were limits on the application of Clauses F4.3.3 and F4.3.4(f) at the time which meant these clauses did not apply to any pools that were exempt from requiring a barrier under section 5(e) of FOSPA (as discussed in paragraph 0).
- 5.3.7 The limits on application mean, in effect, that no barrier was required for pools that were exempt under section 5 of FOSPA by virtue of the pool being wholly enclosed within the building. On that basis it could be argued that this pool is compliant with section 162C without any need for a barrier simply on the grounds that the pool is wholly enclosed within the building. However, as already discussed above I do not agree with this view.
- 5.3.8 It could also be argued that the building consent and code compliance certificate for the applicant’s house and pool were not issued “in relation to the means of restricting access to the pool” (the wording used in section 162C(2)(b)).
- 5.3.9 Taking into account the discussion at paragraphs 5.2.6 and 5.2.7 of this determination, and that the pool barrier was exempt from the requirements of FOSPA and the Building Code at the time of its construction, I am of the view the compliance option in section 162C(2)(b) is not available as a means to establish compliance for the purpose of section 162C.
- 5.3.10 However, as the barrier to the pool was constructed before 2017, there are some additional pathways to achieve compliance with section 162C, and these are set out in sections 450A and 450B of the Act (the transitional and savings provisions). These include ways to demonstrate compliance via the Schedule to FOSPA, even though it has now been repealed, and I discuss these further in paragraph 5.4.

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<sup>23</sup> The version of Clause F4 Safety from falling that was in force from 31 March 2005 to 21 June 2007.

5.3.11 In summary, there are three pathways for this barrier for the purpose of establishing compliance with section 162C:

1. Compliance with Clauses 1 to 10 of the Schedule as an Acceptable Solution (under section 450A).
2. Compliance with the Schedule, subject to any exemption under section 6 or Clause 11 of the schedule and compliance with the conditions of any such exemption (under section 450B).
3. Compliance with Clause F9 of the Building Code currently in force.

#### **5.4 Compliance of the barrier**

5.4.1 The applicant has argued that, as the pool has already been consented and a code compliance certificate has been issued for the completed building work, the barrier has been approved as code-compliant.

5.4.2 The building consent for the applicant's house and pool was issued under the Building Act 1991<sup>24</sup>. Therefore, before granting the code compliance certificate the authority was required to consider whether the completed building work complied with the Building Code<sup>25</sup>. (I note that this is different from code compliance certificates for building consents issued under the current Act, which requires authorities to consider compliance with the consented plans<sup>26</sup>).

5.4.3 However, as already discussed, the pool was not required to have a barrier at the time the building consent was granted in 2004. Therefore, in my view the components of the barrier (the pool room walls, doors and windows) cannot be said to have been explicitly considered for compliance in terms of restricting access to the immediate pool area at the time the code compliance certificate was issued.

#### ***Compliance via FOSPA***

5.4.4 I now consider the two compliance pathways listed in paragraph 5.3.11, which are via the Schedule.

5.4.5 Starting with the first pathway, under section 450A, this is via Clauses 1 to 10 of the Schedule. Clauses 8 to 10 are the most relevant here as they relate to gates and doors, the operation of gates and doors, and doors in walls of buildings.

5.4.6 Clause 8 of the Schedule requires:

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:

5.4.7 In regard to the requirement that doors be clear of obstructions or other means of holding them open, I note that all of the doors will remain open unless some action is taken to close them.

<sup>24</sup> The building consent was granted in January 2004. Some sections of the Building Act 2004 came into force on 30 November 2004 and the remaining sections on 31 March 2005.

<sup>25</sup> Refer to section 436 of the Act: Transitional provision for code compliance certificates in respect of building work carried out under building consent granted under former Act.

<sup>26</sup> Under section 94 of the Act: Matters for consideration by building consent authority in deciding issue of code compliance certificate.

- 5.4.8 Regarding whether the doors open inwards, this is not relevant to the sliding door and the applicant has confirmed that both of the external bi-fold doors open outward. However, based on the photograph taken by the authority of the internal bi-fold door (refer to Figure 2(a)), it appears that the leaves of this door open inwards towards the immediate pool area, i.e. the force used in opening the doors includes pushing towards the pool rather than pulling away from the pool. I note also the completed checklist for the authority's pool inspection on 31 January 2019 recorded that not all doors opened away from the pool (refer to paragraph 3.3). In my opinion the internal bi-fold door does not meet all the criteria in Clause 8 of the Schedule.
- 5.4.9 Clause 9(3) of the Schedule requires the doors to be fitted with a latching device. Further, if this device is accessible from outside the pool area (other than by reaching over or through a hole in the barrier), the device must be at least 1500mm above floor level. This criterion appears to be met by the bi-fold doors, which all have bolt levers above 1500mm that must be released before the doors can be opened. However, they are not met by the sliding door, which has a latch and lock below this height.
- 5.4.10 Clause 10 of the Schedule requires:
- 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.
- 5.4.11 None of the doors have self-closing devices fitted, and so cannot be said to meet Clause 10 as they do not "automatically return ... to the closed position". I note also the bi-fold doors are fitted with top bolts that require manual operation – meaning that once the bolt is moved to release the door to allow a person to move through the door, it does not return to the "locked" position when the door closes. In other words, when the doors are open there is no mechanism to return the doors automatically to a closed and secured position. While I accept the applicant's statement at paragraph 4.1.4 that the doors will not be readily opened by young children, for the doors to comply by way of section 450A of the Act the doors must also close automatically and self-latch.
- 5.4.12 Taking into account the features of the doors as described above, for more than one reason I conclude the barrier is not in accordance with Clauses 1-10 of the Schedule and therefore is not considered compliant under section 450A.
- 5.4.13 Turning to the second compliance pathway, section 6 of FOSPA provided for discretionary exemptions to be granted by territorial authorities where such an exemption would not significantly increase the danger to young children. However, an exemption under section 6 was not considered in this case; rather, the pool was exempt from requiring a barrier under section 5(e) of FOSPA. Further, an exemption could not be granted under Clause 11 of the Schedule as this exemption did not apply to indoor pools.
- 5.4.14 In summary, the barrier to the applicant's pool cannot comply to the extent required by section 162C by way of either section 450A or 450B.

### ***Compliance with the current Building Code – Clause F9***

- 5.4.15 I now consider the final compliance pathway listed in paragraph 5.3.11, which is whether the barrier complies with the requirements of Clause F9, and in particular with Clause F9.3.4. I note that compliance could be demonstrated directly with the requirements of this clause (i.e. as a proposed alternative solution) or via the relevant Acceptable Solution, which is F9/AS1.
- 5.4.16 As the three bi-fold doors and the sliding door form part of this barrier, they must each comply with the performance requirements of Clause F9.3.4. This means:
- each door must not be readily opened by children (F9.3.4(a)), and
  - each door must either admit an audible warning or close automatically after use (F9.3.4(a)(i) or (ii)).
- 5.4.17 The first step is to consider whether these doors are “able to be readily opened by children”. The Building Code does not prescribe the features of a barrier that is not ‘readily opened’ by children. In this matter I have referred to Acceptable Solution F9/AS1 for guidance:
- 4.2.2 Doors in a building wall providing access into the immediate pool area shall have:
- ...
- b) A self-latching device that automatically operates on the closing of the door and that must be released manually, and
- c) The release for the latching device located not less than 1500 mm above the inside floor, and
- ...
- 5.4.18 One way the requirements of Clause F9.3.4(a) can be met is through appropriate “self-latching” devices. Self-latching devices hold the door closed even if the door hardware is operated to open the door, preventing young children opening a door by themselves to gain access to the immediate pool area. In order to be effective in preventing young children from opening a door, the devices should be installed at a height that young children cannot easily reach. Also, the devices should be designed in a way that makes the release not easily manipulated by young children. Other features of door sets that can assist in achieving this performance requirement can include the direction of the swing or direction of force applied to open the door, and the weight of the door.
- 5.4.19 First considering the sliding door, I understand the lock and latch for this door are well below 1500mm, a height typically accepted as being easily accessible by young children (as reflected in F9/AS1). As no self-latching device or other preventative mechanism appears to be fitted, I do not consider this door complies with Clause F9.3.4(a).
- 5.4.20 Now turning to the three bi-fold doors, these cannot be opened unless the upper bolts are released. The levers for these bolts are above the 1500mm height typically accepted as not easily accessible by young children. Further, when one leaf is latched the adjacent leaf is unable to be opened. I also accept the applicant’s view that the weight of the internal bi-fold doors would make them difficult for young children to move and therefore to access the immediate pool area.

- 5.4.21 Accordingly, taking into account the mechanics of opening the bi-fold doors, which includes operating upper bolt levers which are not easily accessible by young children, and the size and weight of these doors, I do not consider these doors would be “readily opened by children” from outside the pool area.
- 5.4.22 However, the doors must also meet the requirements of Clause F9.3.4(a)(i) or (ii) to comply. The doors to this pool area are not self-closing and do not have an audible alarm.
- 5.4.23 Further, I am not aware of any other features of these doors that would serve to demonstrate compliance with Clause F9.3.4(a) as an alternative means of compliance.
- 5.4.24 Therefore, I consider that the barrier does not currently comply with section 162C by way of the current Clause F9.

## **5.5 Conclusion regarding compliance**

- 5.5.1 As I consider the barrier does not demonstrate Building Code compliance by any of the available compliance pathways, I conclude that it does not comply with the Building Code to the extent required by section 162C.
- 5.5.2 It is not for me to say how the pool barrier is to be brought to compliance with the Building Code. That is for the applicant to propose and for the territorial authority to accept or reject.

## **6. The decision**

- 6.1 In accordance with section 188 of the Building Act 2004 I hereby determine that 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 17 October 2019.

Katie Gordon  
**Manager Determinations**

## Appendix A: The legislative framework

Relevant extracts from the Building Act, the Building Code, and the Fencing of Swimming Pools Act 1987 (repealed on 1 January 2017) follow.

### A1 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).

...

#### **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.

...

#### **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.

...

A2 The current Building Code

**Clause F9—Means of restricting access to residential pools**

**Objective**

**F9.1** The objective of this provision is to prevent injury or death to young children involving *residential pools*.

**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<sup>27</sup>**

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*); or
- (b) in the case of a *small heated pool*, cover the *pool* itself.

F9.3.3

A barrier surrounding a *pool* must have no permanent objects or projections on the outside that could assist children in negotiating the barrier.

Any gates must—

- (a) open away from the *pool*; and
- (b) not be able to be readily opened by children; and
- (c) automatically return to the closed position after use.

F9.3.4

Where a *building* forms all or part of an *immediate pool area* barrier,—

- (a) doors between the *building* and the *immediate pool area* must not be able to be readily opened by children, and must either—
  - (i) emit an audible warning when the door is open; or
  - (ii) close automatically after use;
- (b) windows opening from a building into the *immediate pool area* must be constructed or positioned to restrict the passage of children.

<sup>27</sup> The limits on application only apply to *small heated pools*

- A3 The Building Code Clause F4 (in force when the pool was constructed and the code compliance certificate was issued)

**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.

*Limits on application*

Performance F4.3.3 shall not apply to any pool exempted under section 5 of the Fencing of Swimming Pools Act 1987.

**F4.3.4** Barriers shall:

...

(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,

...

*Limits on application*

Performance F4.3.4 (f) shall not apply to any pool exempted under section 5 of the Fencing of Swimming Pools Act 1987.

**F4.3.5** Barriers to swimming pools shall have in addition to performance F4.3.4:

(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

## A4 Fencing of Swimming Pools Act 1987 (repealed 1 January 2017)

**2 Interpretation**

In this Act, unless the context otherwise requires,—

**fence—**

(a) means a fence that complies with the requirements of the building code in force under the Building Act 2004 in respect of swimming pools subject to this Act; and

(b) includes any part of a building and any gates or doors that form part of the fence

**gates or doors** does not include any door to which clause 11 of the Schedule applies

**immediate pool area** means the land in or on which the pool is situated and so much of the surrounding area as is used for activities or purposes carried on in conjunction with the use of the pool

**5 Exempted pools**

Nothing in this Act shall apply in respect of—

...

(e) any pool that is wholly enclosed within a building that is used principally for a purpose or purposes not related to the use of the pool:

**6 Special exemptions**

(1) A territorial authority may, by resolution, grant an exemption from some or all of the requirements of this Act in the case of any particular pool where the territorial authority is satisfied, having regard to the particular characteristics of the property and the pool, any other relevant circumstances, and any conditions it imposes under subsection (2), that such an exemption would not significantly increase danger to young children.

(2) In granting an exemption under subsection (1), the territorial authority may impose such other conditions relating to the property or the pool as are reasonable in the circumstances.

(3) Any exemption granted or condition imposed under this section may be amended or revoked by a territorial authority, by resolution.

**Schedule 1****Means of compliance for fences under FOSPA***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*

**9(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 of this Schedule to the extent (if any) that the territorial authority is satisfied that such compliance is impossible, unreasonable, or in breach of any other Act, regulation, or bylaw, and the door is fitted with a locking device that, when properly operated, prevents the door from being readily opened by children under the age of 6 years.