

Lockable cover as a safety barrier for a spa pool

1 THE MATTER TO BE DETERMINED

- 1.1 The matter before the Authority is a dispute about whether a spa pool with a proprietary lockable cover, without a safety barrier around it, complies with the provisions of the building code (the First Schedule to the Building Regulations 1992) for safety barriers, specifically fences and gates to swimming pools.
- 1.2 The Authority takes the view that it is being asked to determine:
- (a) Whether the pool concerned, with the cover but with no safety barrier around it, complies with clause F4 of the building code, and if not
 - (b) Whether a waiver or modification of the building code should be granted to permit its use in the building concerned.
- 1.3 In making its determination the Authority has not considered any other aspects of the Building Act 1991 or of the building code.

2 THE PARTIES

- 2.1 The applicant was the territorial authority, the other party was the owner.

3 THE SPA POOL AND THE COVER

- 3.1 The pool is on a deck of a large house with a beach frontage. It is currently used at weekends and holidays, but had been constructed as a future retirement home.
- 3.2 The drawings submitted with the application show the spa pool partially set into a covered deck ("the pool deck") that is part of a larger deck around much of the house. Opening on to the pool deck are an enclosed sun porch and the main living area of the house. Photographs show that the pool is visible from the main living area and from the sun porch.
- 3.3 The pool deck is shown as being separated from the sun porch and from the living area by sets of French windows which have been annotated, presumably by a building official:

"Doors and windows in walls to be lockable in accordance with section 11 attached"

The Authority takes that to be a reference to paragraph 11 of the Schedule to the Fencing of Swimming Pools Act 1987 (set out in 4.1 below).

- 3.4 The pool deck is not shown as being separated from the main deck, but drawn between the pool deck and the main deck, presumably by the building official, is a line annotated:

Install a fence in accordance with the Fencing of Swimming Pools Act 1987

- 3.5 The Authority takes the drawings to show that the territorial authority requires the owner to:
- (a) Separate the pool deck from the rest of the house with doors and windows that are each “fitted with a locking device that, when properly operated, prevents the door from being readily opened by children under the age of 6 years”, and to
 - (b) Separate the pool deck from the rest of the deck with a “swimming pool fence”.

The owner, on the other hand, wishes to use a lockable cover, not install self-closing and automatically latching devices on the doors, and not install the “swimming pool fence”.

- 3.6 The proprietary spa pool cover concerned is reportedly strong enough to support an adult. It incorporates “childproof” locking catches and a printed warning: “This spa cover must be kept locked except when under adult supervision”.

4 THE LEGISLATION

- 4.1 The relevant provisions of the Fencing of Swimming Pools Act are:

Section 2:

“Fence” means a fence that complies with the requirements of the building code in force under the Building Act 1991 in respect of swimming pools subject to this Act; and includes any part of a building and any gates or doors forming part of the fence; and “fenced” has a corresponding meaning:

“Swimming pool” and “pool” mean an excavation, structure, or product that is used or is capable of being used for the purpose of swimming, wading, paddling, or bathing; and includes any such excavation, structure, or product, that is a spa pool:

Section 5:

Nothing in this Act shall apply in respect of—

- (a) Any pool that has no part of the top of its side walls less than 1.2 metres above the adjacent ground level or any permanent projection from or object standing on the ground outside and within 1.2 metres of the walls, where the outside surface of the side walls is constructed so as to inhibit climbing and any ladder or other means of access to the interior of the swimming pool can be readily removed or rendered inoperable and is removed or rendered inoperable whenever it is intended that the pool not be used:
- (b) Any excavation, structure, or product, in which the maximum depth of water does not exceed 400 mm:

- (c) Any excavation, structure, or product,—
 - (i) That is not used in association with any house, home unit, apartment building, school, hospital, hotel, motel, camping ground, or other similar premises; and
 - (ii) That is not modified for use, or intended to be used, for swimming, wading, paddling, or bathing:
- (d) Any pool intended to be used for wading or paddling in any place that is under the administration of a local authority:
- (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:
- (f) Any pool where—
 - (i) Persons are employed and present to provide supervision of the pool whenever the pool is available for use; and
 - (ii) Access to the pool is effectively prevented by a fence that complies with this Act or by locked gates or doors whenever the pool is not intended to be available for use.

Section 6:

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

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

Section 8(1):

(1) Every owner of a pool to which this Act applies shall ensure that, except as provided in any exemption granted under section 6 of this Act, the pool, or some or all of the immediate pool area including all of the pool, is fenced by a fence that complies with the requirements of the building code in force under the Building Act 1991 in respect of swimming pools subject to this Act at all times when this Act applies in respect of the pool.

Section 13B:

Any provision that is made for the fencing of swimming pools which is in accordance with the Schedule to this Act shall, in respect of—

- (a) Matters subject to the Building Act 1991, be deemed to be one of the documents establishing compliance with the building code for the purposes of section 49 of that Act, and the requirements of this Act:
- (b) Buildings and premises not subject to the Building Act 1991, be deemed to be a reasonable and adequate provision for the purposes of this Act.

The Schedule:

MEANS OF COMPLIANCE FOR FENCES UNDER THIS ACT

Height

1. (1) The fence shall extend—

- (a) At least 1.2 metres above the ground on the outside of the fence; and
- (b) At least 1.2 metres above any permanent projection from or object permanently placed on the ground outside and within 1.2 metres of the fence.

(2) Notwithstanding subclause (1) of this clause, where the fence is constructed of perforated material, netting, or mesh and any opening in the material, netting, or mesh has a dimension (other than the circumference or perimeter) greater than 10 mm, the fence shall extend at least 1.8 metres above the ground or the projection or object.

Materials

3. All materials and components shall be of a durable nature and shall be erected so as to inhibit any child under the age of 6 years from climbing over or crawling under the fence from the outside.

Gates and Doors

8. Every gate or door shall be so constructed as to comply with the relevant requirements of clauses 1 to 7 of this Schedule, 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.

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.

4.2 The relevant provisions of the Building Act are:

Section 20:

A determination by the Authority in relation to a matter referred to it under section 17 of this Act may incorporate waivers or modifications and conditions that a territorial authority is empowered to grant or impose . . .

Section 34:

(4) The territorial authority may grant a building consent subject to—

- (a) Such waivers or modifications of the building code, or any document for use in establishing compliance with the building code, subject to such conditions as the territorial authority considers appropriate; and
- (b) Such conditions as the territorial authority is authorised to impose under this Act or the regulations in force under this Act.

(6) Notwithstanding subsection (4) of this section, the question of whether there should be an exemption from the requirement for a fence to be provided in respect of any particular swimming pool shall be a matter to be determined in accordance with the Fencing of Swimming Pools Act 1987.

4.3 The relevant provisions of the building code are:

Provisions	Limits on application
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 of level within or associated with a building, a barrier shall be provided.	Performance F4.3.1 shall not apply where such a barrier would be incompatible with the intended use of an area, or to temporary barriers on construction sites where the possible fall is less than 3 metres.
F4.3.3 Swimming pools having a depth of water exceeding 400 mm, shall have barriers provided.	Performance F4.3.3 shall not apply to any pool exempted under section 5 of the Fencing of Swimming Pools Act 1987.
F4.3.4 Barriers shall:	
(a) Be continuous and extend for the full extent of the hazard,	
(b) Be of appropriate height . . .	
(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.	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, and

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

5. THE SUBMISSIONS

5.1 General

- 5.1.1 The Authority received written submissions from the parties and commissioned a report from a consultant with particular experience in the application of the Fencing of Swimming Pools Act and of the building code in respect of swimming pools. After considering those submissions and the report, the Authority prepared a draft determination that was sent to the parties.
- 5.1.2 The territorial authority accepted the draft, but the owner requested a formal hearing. At the hearing, additional submissions and evidence were heard from the owner in person, another member of the owner's family, an environmental planner ("the planner") engaged by the owner, and the manufacturer of the spa pool cover. The territorial authority, having seen a draft of the evidence and submissions from the planner, chose not to appear.
- 5.1.3 The Authority is satisfied that the evidence and submissions at the hearing did not raise any significant new matters that the territorial authority had not had an opportunity to consider and comment on. After the hearing, the owner sent to the Authority, and also to the territorial authority, some photographs of the building, to illustrate the house layout better than the drawings, and some additional submissions.
- 5.1.4 The discussion below does not distinguish between the owner's original submissions in response to the application and the subsequent submissions at and after the hearing.
- 5.1.5 The submissions and the consultant's report addressed the following points:
 - (a) The need for consistency. Some, perhaps most, territorial authorities, accepted unfenced spa pools with lockable covers, while others did not.
 - (b) Whether the unfenced pool concerned, with the lockable cover, complied with the building code.
 - (c) If not, whether a waiver or modification of the building code should be granted and if so on what conditions.
- 5.1.6 In addition, the owner specifically asked:
 - (a) "Are lockable spa pool covers [and in particular the proprietary cover concerned] able to comply with the requirements of Clause F4 of the Building Code, and if so under what circumstances (i.e. some form of 'blanket' approval . . .)?"

- (b) If not, then an exemption was sought in respect of the use of the proprietary pool concerned in the building concerned. “If the BIA determines that it has a lack of jurisdiction to grant an exemption, then it is requested that the BIA provide some advice to [the territorial authority] as to the suitability of the proposed spa pool cover . . .”

5.1.7 The discussion below outlines the submissions on each of those points and then gives the Authority’s view.

6 CONSISTENCY

6.1 The submissions and the consultant’s report

6.1.1 The territorial authority had received a number of applications for the use of spa pool covers instead of fences, and said:

“It is probably essential that spa pools are included in future legislation. At present Councils are being asked to sanction situations where no legislative guidelines are in place and because one Council chooses to allow such covers it is then expected that other TA’s should automatically follow suit. Where a TA allows these covers it does not necessarily follow that compliance with the Act is achieved in all cases.”

6.1.2 The report commissioned by the Authority said that of 13 selected territorial authorities, seven did not accept spa pool covers while six did. Of that six: 2 required building consents; 2 required special exemption applications; 1 had a blanket exemption procedure; and 1 required neither building consent nor special exemption.

6.1.3 The owner said that an unfenced spa pool with the type of cover concerned had been accepted by another territorial authority at another property of the owner’s. It was only at the code compliance certificate stage that the owner had learned that the territorial authority required the installation of pool fencing that would significantly alter that aspect of the design of the house.

6.1.4 The owner said that “the current legal system is a very difficult one for Councils to administer and some clarity . . . is required to be fair and effective”. The family member, who had significant experience in the building industry, emphasised the importance, to developers and builders in particular, of clear and consistent regulatory requirements.

6.1.5 The planner tabled:

- (a) A letter from a territorial authority purporting to grant a spa pool manufacturer’s request for an “exemption” in favour of that manufacturer’s products. The letter advised the manufacturer to inform anyone who purchased one of the pools concerned that the exemption was subject to certain conditions.

- (b) A circular sent to spa pool manufacturers by a water safety organisation, which carried the logos of six territorial authorities. It included the statements:

“When a portable spa is sold without an approved lockable cover it does not meet requirements under the **‘Fencing of Swimming Pools Act 1987’**.”

“Many councils in the region allow approved lockable covers as a barrier for the spa as an alternative solution or exemption, and this should be determined in accordance with the usual practice followed in the **Building Consent** process (under section 7 of the Fencing of Swimming Pools Act).”

- 6.1.6 The planner said that the districts of those six territorial authorities contained a third of New Zealand’s population. It was inequitable that people living in those districts should be able to use lockable covers instead of fences but other people could not.
- 6.1.7 The planner also pointed out that the building code specifically exempted certain sliding and sliding-folding doors from the requirement for automatic closing and latching. That exemption created a situation at least as dangerous as, if not more dangerous than, an unfenced spa pool with a lockable cover.

6.2 The Authority’s view

- 6.2.1 The Authority recognises that there appear to be discrepancies between the Fencing of Swimming Pools Act and the Building Act. It notes that the August 2001 Department of Internal Affairs discussion document on the current review of the Building Act includes a discussion on the interface with the Fencing of Swimming Pools Act. Thus the concerns expressed by the parties are being taken into account in the review, although the Authority obviously cannot forecast what, if any, legislative changes might result from it.
- 6.2.2 The Authority also recognises that there is significant uncertainty over the use of lockable covers instead of fences to safeguard children under six. That is illustrated by the consultant’s detailed information as to the different approaches taken by different territorial authorities, and by the examples tabled by the planner as described in 6.1.5 above. However, the Authority rejects any suggestion that the Authority must approve lockable covers instead of fences simply because a significant number of territorial authorities have already done so. Similarly, whether the different approaches of different territorial authorities creates inequities is not a matter that the Authority may take into account when considering whether a particular pool complied with the building code.
- 6.2.3 The Authority recognises the value of “clear and consistent regulatory requirements”. It also recognises the value of flexibility so that the particular circumstances of particular buildings can be taken into account. The proper legislative balance between those values is a matter for Parliament and not something the Authority can address in a determination. The Authority’s decision must apply the legislation as it stands.

7 COMPLIANCE WITH THE BUILDING CODE

7.1 The submissions and the report

- 7.1.1 The pool concerned has a depth exceeding 400 mm so that it was not disputed that a safety barrier is required by clause F4.3.3 of the building code.
- 7.1.2 The territorial authority essentially considered that the use of a cover relied too heavily on the human factor and “did not meet the intent of the Act in providing safety for children under six years of age”.
- 7.1.3 In the consultant’s opinion, a lockable cover to a spa pool could comply with clauses F4.3.4(a) to (f) inclusive of the building code. The consultant did not discuss clause F4.3.5, but referred to “approving a cover of a spa pool as an acceptable solution” on the basis of a “performance based evaluation”.
- 7.1.4 The consultant also said that in his experience:
- (a) Approximately 50% of existing swimming pool barriers no longer comply with the building code. “Problems include: gates that have dropped or otherwise bind, latches that no longer self-latch, gate springs ineffective, objects placed against or close to fences, trees providing climbing points etc.”
 - (b) “Having regard to my experience with the unsatisfactory level of maintenance of pool fencing . . . I believe that the use of lockable spa pool covers to meet the requirements of the Building Code is unlikely to increase the danger to children under the age of 6 years.”
- 7.1.5 The planner discussed the pool cover in terms of each of the requirements of clauses F4.3.4 and F4.3.5 of the building code.
- 7.1.6 On the view the Authority takes of the matter, there is no need to describe the discussion of clause F4.3.4 as presented by the planner, see 7.2.1 below.
- 7.1.7 Clause F4.3.5 requires that barriers to swimming pools shall have “All gates and doors fitted with latching devices not readily operated by children, and constructed to automatically close and latch”. The planner said:
- “5.13 This . . . only applies to situations where the barrier has a “gate” or a “door”. There are a number of ‘complying’ scenarios which do not involve gates or doors such as an above ground pool where the sides are at least 1.2m in height. Accordingly, there is no requirement that a barrier includes a gate or door in which case the requirement for automatic closure is not relevant in these circumstances. Lockable spa pool covers do not have, and are not in themselves, gates or doors. Therefore the requirement for automatic closure does not apply.

“5.16 The Oxford Dictionary provides the following definitions:

- A “door” is defined as: *“hinged, sliding, or revolving barrier for closing entrance to a building or room or cupboard etc.”*
- A “gate” is defined as: *“barrier, usu. hinged, used to close opening made for entrance and exit through wall, fence, etc.”*
- A lid is defined as: *“hinged or removable cover, esp at top of a container”*

“5.17 Any attempt to define a lockable spa pool cover as a gate or door (and apply the requirement of automatic closure) is, in my view, simply wrong. The proposed spa pool covers are clearly horizontal ‘covers’ or ‘lids’ (being a form of barrier) and are not gates or doors (which are generally vertical elements forming an access point in a larger structure such as a building or fence).

“5.18 There are of course situations where a door may be in a horizontal position such as a trapdoor, which is defined in the Oxford Dictionary as: *“door in floor or ceiling or roof”*. However, this does not result in a cover being a door.

“5.19 Consider the following analogy. A gate, door, fence, wall, cover, or lid are all forms of barriers. Motorbikes, cars vans, and trucks are all forms of vehicles. Their similarity in function (i.e. forming a complete or partial barrier or the ability to transport people and goods) does result [*sic*] in such features being the same thing. A motorbike is not a truck and a spa pool cover is not a gate or door. . . . [T]he requirement for automatic closure does not apply to a spa pool cover in terms of what is stated in clause F4.3.5 of the Building Code on the basis that a cover is not a gate or door.”

7.2 The Authority’s view

7.2.1 The Authority accepts that the particular proprietary cover concerned, when locked in place, complies with clause F4.3.4 in that it is a continuous barrier extending the full extent of the hazard, of appropriate height, rigidity, and strength, is constructed so as to prevent people from falling through it, and will restrict the access of children under 6 years of age to the pool. Of course, none of those factors is relevant when the cover is not locked in place.

7.2.2 The consultant’s experience of discovering that the doors or gates in many existing swimming pool fences no longer close and latch automatically is a reflection on the owners’ maintenance of those pools, but it does not mean that the Authority may ignore the building code’s requirement for automatic closing and latching.

7.2.3 The Authority accepts that the exemption of certain sliding and sliding-folding doors from the requirement for automatic closing and latching can lead to a situation comparable to an unfenced spa pool with a lockable cover (although in this case the only doors are between the pool and the house, there being nothing to separate the pool from the deck, which is open to the garden and indeed to the beach). However, the fact that the building code

includes a specific exemption does not mean that Authority may interpret the code as including other exemptions. The question is whether the unfenced spa pool complies with the building code, not whether it is comparable to a pool surrounded by a complying fence with sliding or sliding-folding doors that do not automatically close and latch.

7.2.4 The planner argued in effect that clause F4.3.5 should be read as if it said (additional words underlined):

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

(a) All gates and doors if any fitted with latching devices . . .

According to the planner, it followed that if the cover was not itself a door or gate then the clause had no application.

7.2.5 The Authority does not accept that argument because:

(a) The Authority takes the view that additional words may be read into to legislation only if they are necessarily implied by the legislation itself. In this case there is no such necessary implication.

(b) The planner's example of an above ground pool with sides exceeding 1.2 m in height not being required to have gates or doors is not relevant because such a pool is not required to have a barrier either, see clause F4.3.3 of the building code and section 5 of the Fencing of Swimming Pools Act.

(c) The Authority is not convinced that the phrase "gates or doors", in its ordinary and natural meanings, excludes removable covers.

7.2.6 Furthermore, once the cover is removed it is no longer a barrier restricting access to the pool. Clause F4.3.5 permits brief breaches of the required barrier while a door or gate is in use and before it automatically closes and latches. The only provision that permits any other breach of the barrier is the exemption for certain sliding and sliding-folding doors in clause F4.3.5(a). Whether or not the cover is a door or gate, it is certainly not a door coming within that exemption.

7.2.7 Accordingly, the Authority considers that a pool with a lockable cover but no other barrier to restrict access does not comply with clause F4.

8 WAIVER OR MODIFICATION UNDER THE BUILDING ACT OR EXEMPTION UNDER THE FENCING OF SWIMMING POOLS ACT

8.1 The submissions and the report

8.1.1 The territorial authority made no submissions as to waivers or modifications or exclusions.

8.1.2 The consultant said that considerations in approving a cover would be:

- Ease of placing, "if it is difficult to replace or unduly heavy it may not be used".

- Whether it is sufficiently strong to prevent children from falling through it.
- “Would the cover be easily and effectively fastened in place to prevent its removal or being able to be lifted . . . by a child under 6 years old?”

8.1.3 The owner undertook to ensure that:

- The cover will be locked at all times when unsupervised by an adult.
- A notice to be installed in the pool area stating that when the pool cover is removed, adult supervision is to be on hand at all times.
- The ongoing maintenance of the spa and the cover would remain the owner’s responsibility and liability.
- The pool would be empty whenever the house was not occupied.
- When the house was occupied by anyone other than the owner, the pool would be empty, the cover would be locked, and the owner would retain the key.

8.1.4 The planner said that the test for an exemption was whether the exemption “would not significantly increase danger to young children”. Characteristics of the property to be taken into account included that the house and spa pool “are located within close proximity of an unfenced natural waterbody (i.e. the Pacific Ocean) which poses a significantly greater risk to young children than the . . . spa pool (with or without the proposed cover)”. However, in response to a question by the Authority, the planner agreed that the “would not significantly increase danger” test was to be applied by the comparison between a pool with a complying safety barrier and a pool with a lockable cover but no barrier.

8.1.5 The planner also said:

“8.1 A key issue raised by [the territorial authority] was a concern about what was termed “the human factor” (i.e. the concern that the closing of a spa pool cover required active human intervention).

“8.2 The extent to which human intervention is required to achieve compliance should be assessed against what is allowed as of right. For example, this can be compared with “sliding and sliding-folding doors” being a legitimate exclusion to the requirement for automatic closure in relation to the use of doors as a barrier as provided in the Building Code.

“8.3 The propensity for a sliding door in a house to be left open and thereby provide access to an uncovered pool is far greater than the likelihood of a spa pool cover being left off when the spa pool is not in use. . . .

“8.4 In comparison to sliding doors, there is a huge incentive on the part of a spa pool owner to close the spa pool lid when the spa pool is not in use, simply to avoid the loss of heat and associated additional power costs.

“8.7 As the owner of both an unfenced spa pool equipped with a lockable cover and a new swimming pool with a standard 1.2 meter high fence, I can assure you that a fence and gate does not prevent young children from accessing the pool area on their own . . . by a variety of means, usually involving carrying some object to the fence or gate and using it as a step . . .”

8.1.6 The planner suggested that appropriate conditions for a waiver or modification would be:

- (a) Certain conditions as to the spa pool including the cover, being conditions that were in fact met by the pool concerned, see 3.4 and 7.2.1 above; and
- (b) Certain conditions as to the management of the pool by the owner, being essentially the fulfilment of the owner’s undertakings described in 8.1.3 above; and
- (c) Certain conditions to the effect that the exemption is personal to the applicant.

8.2 The Authority’s view

8.2.1 On the question of jurisdiction, the Authority clearly has the jurisdiction to determine whether or not a swimming pool and its associated safety barriers, if any, complies with the building code. However, the Authority does not have the jurisdiction to grant an exemption under section 6 of the Fencing of Swimming Pools Act, and it is not for the Authority to advise territorial authorities as to the granting of such exemptions.

8.2.2 As to its jurisdiction to grant waivers or modifications under the Building Act, the Authority sought external legal advice on the following questions:

“(a) Does Authority have the power to grant a waiver or modification under the Building Act [in respect of a swimming pool that does not comply with the building code]?”

“Section 20 of the Building Act says that a determination “may incorporate waivers or modifications and conditions that a territorial authority is empowered to grant or impose”. A territorial authority is empowered to grant waivers or modifications of the building code under section 34(4). However, section 34(7) says that “Notwithstanding [section 34(4)], the question of whether there should be an exemption from the requirement for a fence to be provided in respect of any particular swimming pool shall be a matter to be determined in accordance with the Fencing of Swimming Pools Act”. That appears to empower a territorial authority to grant exemptions from the requirement for a fence, not to waive or modify the required details of such a fence (in this case, the clause F4.3.5(a) requirement for gates and doors to be automatically self-closing and self-latching).

“(b) If the Authority does have the power to grant such a waiver or modification, what criteria is it to apply?”

8.2.3 The legal opinion provided in response to those questions included the following (legal argument largely omitted):

“In my view, the Authority does not have the jurisdiction to grant a waiver or modification in respect of matters covered by the Fencing of Swimming Pools Act 1987. That is because the territorial authority itself does not have the power to grant a waiver under s 34(4) of the Building Act and s 20 of the Building Act provides that a determination may incorporate waivers or modifications and conditions **that a territorial authority is empowered to grant**. . . .

“Although [section 6 of the Fencing of Swimming Pools Act] may on the surface appear to be similar in nature to the granting of a waiver, the term used is ‘exemption’. . . .

“If the territorial authority has decided not to grant an exemption under s 6 of the [Fencing of Swimming Pools Act], then that is the end of the matter.

“In view of the answer that I have provided to your first question, it is unnecessary for me to answer the question of the criteria to be applied in granting a waiver or modification.”

- 8.2.4 The Authority accepts that advice. However, in case a different view would be taken by the Courts, the Authority records the approach it would have taken to this case if it did have jurisdiction to grant a waiver or modification under the Building Act.
- 8.2.5 The powers of territorial authorities, and of the Authority itself, to grant waivers or modifications of the building code is one example of the flexibility with which the building code may be applied, as mentioned in 6.2.3 above. The Authority takes the view that such waivers or modifications are to be granted only on reasonable grounds.
- 8.2.6 It is important to remember that most buildings never experience the “worst case” fire or earthquake or other event that the building code requires them to withstand. The same applies to a child drowning in an unfenced swimming pool. It is not something that is certain to happen, but it is “something that might well happen”¹. Thus any waiver or modification granted in respect of a particular swimming pool is unlikely to result in a drowning in that pool, but the more waivers or modifications that are granted the more likely it is that such a drowning will eventually result.
- 8.2.7 The Authority takes the view that the granting of a waiver or modification under the Building Act must relate to a particular swimming pool. In other words, it must be location-specific.
- 8.2.8 The Authority considers that the presence of other water hazards, such as the Pacific Ocean, are not relevant to the question of whether a waiver or modification should be granted. Such hazards are not related to buildings or covered by the building code.
- 8.2.9 The essential difference between a pool with a complying safety barrier (ignoring the clause F4.3.5(a) exemption for certain sliding and sliding-folding doors discussed in 7.2.3 above) and a pool with a lockable cover but no safety barrier is that whenever the pool is not in use:

¹ See the use of that phrase in *Auckland CC v Weldon Properties Ltd* 8/8/96, Judge Boshier, DC Auckland NP2627/95, upheld on appeal in *Weldon Properties Ltd v Auckland CC* 21/8/97, Salmon J, HC Auckland HC26/97.

- (a) For the pool with a complying safety barrier, whenever someone goes into or out of the pool surround, the gate or door automatically closes and latches without any action on the part of the person concerned.
- (b) For the pool with a lockable cover but no safety barrier, anyone who leaves the pool (when it is not being used by others) must not only replace the cover but also lock it. That includes occasions when the person concerned is called away for even a short time, whether by the telephone, someone at the door, or any other reason.

8.2.10 For a waiver or modification to be justified, using a lockable cover instead of a complying safety barrier must provide the same level of protection for children under six. That will be the case if:

- (a) The pool is under constant supervision; or
- (b) Children are unlikely to be present; or
- (c) Everybody who uses the pool can be relied on to always replace and lock the cover whenever the pool is not actually being used, no matter how briefly.

8.2.11 As to constant supervision (the situation contemplated by section 5(f) of the Fencing of Swimming Pools Act), the particular pool concerned is visible from the main living area and from the sun porch. That means that someone who is in either of those rooms will be aware of the presence of a child, but it does not amount to constant supervision.

8.2.12 As to children being unlikely to be present, that does not apply in this case because, as the Authority said in Determination 2001/9:

“6.2.1 In general, children are likely to frequent any household unit at some time in its life. That is why the acceptable solution F4/AS1 requires safety barriers that will restrict the passage of children in any building having the classified use “Housing”.”

8.2.13 As to everybody who uses the pool being relied on to always replace and lock the cover, that would require the Authority or a territorial authority to make a personal judgment of everyone likely to use the pool, or at least of the person responsible for managing the use of the pool, in this case the owner. The Authority takes the view that it is not entitled to proceed on that basis. In the absence of any authorisation for such a course in the Building Act, it would be inappropriate for the Authority, or a territorial authority, to be obliged to consider the character, including honesty, reliability, conscientiousness, and other personal qualities of applicants for waivers or modifications under the Building Act. (As it happens, the Authority would not hesitate to accept this particular owner’s undertakings as set out in 8.1.3 above if it had the power to do so.)

8.2.14 The Authority therefore concludes that even if it had the power to do so it would not be justified in granting a waiver or modification in this case because:

- (a) There is nothing about the building itself that justifies a waiver or modification, and

- (b) The Authority takes the view that even if it had the power to grant a waiver or modification, it has no power to do so in reliance on the owner's management of the pool.

9 THE AUTHORITY'S DECISION

9.1 In accordance with section 20 of the Building Act:

- (a) The Authority hereby determines that the use of the proprietary lockable cover to the spa pool does not comply with the provisions of clause F4 of the building code.
- (b) The Authority hereby confirms the territorial authority's decision not to grant a waiver or modification of those provisions.

Signed for and on behalf of the Building Industry Authority on this 30th day of October 2002

W A Porteous
Chief Executive