

Sliding and sliding-folding doors giving access to a swimming pool

1 THE MATTER TO BE DETERMINED

- 1.1 The matter before the Authority is a dispute about whether a proposed swimming pool in a terrace opening off a house through sliding or sliding-folding doors 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 terrace concerned can properly be described as “the immediate pool surround” as that phrase is used in clause F4.3.5(a) of the building code, and
 - (b) Whether the sliding and sliding-folding doors concerned are required by clause F4.3.5(a) to close and latch automatically.
- 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 owner acting through a firm of architects, the other party was the territorial authority.

3 THE BUILDING

- 3.1 As shown in the plans submitted with the application for determination, the pool is approximately 3 m by 10 m sited on a paved terrace approximately 11 m by 14 m. The terrace is enclosed partly by the exterior walls of the house and partly by walls or fences 1200 mm high. Two living rooms, the kitchen, and a bedroom have doors opening on to the terrace. There are also two gates from the terrace to other parts of the grounds.

- 3.2 The owner applied for a building consent for the house and the pool on the basis that the doors opening onto the terrace from the house would be sliding or folding-sliding doors. The territorial authority duly issued a building consent for the house, but excluded the pool on the grounds that it did not comply with section 8(1) of the Fencing of Swimming Pools Act 1987 and that the proposed fence did not comply with clause F4.3.4(f) of the building code.
- 3.3 The owner subsequently submitted an amended plan showing “conventional” swimming pool fencing and gates between the house and the pool. The territorial authority issued a building consent for the pool and its fencing on the basis of that plan. The owner then applied for this determination in respect of the territorial authority’s decision to refuse to grant a building consent as originally applied for.

4 THE ISSUES

- 4.1 The territorial authority identified two issues, namely:
- “(1) Whether or not the proposed design will enclose areas other than “the immediate pool area” as defined in the Fencing of Swimming Pools Act 1987 and therefore comply with the requirements of section 8(1) of the Fencing of Swimming Pools Act 1987; and
- “(2) Whether or not the sliding and sliding folding doors on the exterior walls of the dwelling comply with the requirements of Clause F4.3.4(f) of the building code.”
- 4.2 The territorial authority considered that compliance with the Fencing of Swimming Pools Act “is not a matter which can be the subject of a determination under section 17 of the Building Act”. The Authority agrees, because section 18 of the Building Act limits the Authority’s jurisdiction to matters of compliance with the building code. Accordingly, this determination addresses the following issues:
- (a) Whether the doors concerned (“the doors”) give access only to “the immediate pool surround” in terms of clause F4.3.5(a) of the building code; and
- (b) Whether the doors are “sliding” doors or “sliding-folding” doors in terms of clause F4.3.5(a) of the building code.
- 4.3 Accordingly, this determination does not consider the requirements of the Fencing of Swimming Pools Act. The relationship between the Building Act and the Fencing of Swimming Pools Act is mentioned in 6.2.1 of Determination 2002/10.

5 THE BUILDING CODE

5.1 The relevant provisions of the building code are:

Provisions	Limits on application
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:	
(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 . . .	

6 DISCUSSION

6.1 General

6.1.1 The territorial authority's submissions apparently repeat the reasons that it gave to the owner for rejecting the original application for a building consent in respect of the pool, and are set out first because the applicant's submissions are written as a rebuttal of those reasons.

6.2 The immediate pool surround

6.2.1 The territorial authority's submissions in respect of the area enclosed by barriers, including the walls of the house, were expressed in terms of the definition of "immediate pool area" in the Fencing of Swimming Pools Act¹. The Authority notes those submissions, but takes the view that, as a matter of law, the Fencing of Swimming Pools Act's definition does not necessarily apply to the slightly different term "immediate pool surround" used in the building code, although the terms obviously both refer to much the same thing.

¹ "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 out in conjunction with the use of the pool.

6.2.2 The territorial authority's submissions on the matter turn on the following aspects of the original design:

- (a) Advice from the owner that the enclosed area is intended to be used for uses other than in conjunction with the pool;
- (b) The number of doors opening from the house on to the enclosed area are "substantially more than are required for access to the pool"; and
- (b) The enclosed area will be "a thoroughfare" between the house and other outside areas otherwise accessible only through the garage.

6.2.3 The applicant contended that the Fencing of Swimming Pools Act's definition of "immediate pool area":

" . . . does not exclude:

- A sensible amount of recreational space for living, sitting, eating, and playing games – all purposes commonly carried out in conjunction with the use of a pool.
- Access through the pool area where self-closing gates are provided and no other route is possible or practical."

6.2.4 The applicant also said:

" . . . we and our clients are concerned that the series of interpretations from the T.A. seems to be markedly different from other areas of the country. Examples of the arrangement shown appear continually in magazines and . . . the discrepancy is plain to see."

6.3 The Authority's view as to the immediate pool surround

6.3.1 The term "immediate pool surround" is not defined in the Building Act or the building code. The Authority accordingly takes the view that the term is to be given its ordinary and natural meaning in context, see 6.2.1 above as to the Fencing of Swimming Pools Act.

6.3.2 The context is that the objective of clause F4 of the building code, set out in clause F4.1, is to "safeguard people from injury due to falling". The Authority takes to include safeguarding small children from falling into swimming pools in accordance with clauses F4.3.4(f) and F4.3.5.

6.3.3 Thus the purpose of swimming pool fencing (including gates) is to prevent small children from going near swimming pools unless someone deliberately opens a gate to let them inside the fence. That someone must be big enough to open the gate and may therefore be assumed to be capable of protecting the child against the risk of falling into the pool with the possible consequences of injury or death. It necessarily follows that when both the person and the child are inside the fence, and therefore in "the immediate pool surround", the person will be close enough to the child to be aware of the child's activities and to protect the child if necessary. It also follows that the person will be inside the fence for the specific

purpose of protecting the child whatever other purposes that person also has for being inside the fence, such as swimming, sunbathing, and so on.

- 6.3.4 The Authority accordingly takes the view that the term “immediate pool surround” in the building code means an area around the pool into which it would be unsafe for young children to go unless someone able to protect them is also in the same area. That is not the case with this terrace, because:
- (a) One or more of the doors from the house could well be opened for various purposes other than allowing a child to go near the pool, and
 - (b) The person opening the door will not necessarily remain where they can see whether a child is near the pool, and
 - (c) Even if someone was where they could see the child, their reasons for being there would not necessarily include protecting the child, and they would not necessarily be aware of the child.

The Authority therefore concludes that the entire terrace cannot properly be called the “immediate pool surround”. It follows that the original design did not comply with clause F4 of the building code.

- 6.3.5 The Authority does not mean any disrespect to the owners of the house, who for all the Authority knows might well be relied on to always ensure that a young child is never on the terrace without someone able to protect the child also being present and aware of the child’s activities. For the reasons set out in Determination 2002/10, the reliability of the present owner is not something that the Authority or a territorial authority is entitled to take into account.
- 6.3.6 As regards what is shown in magazines, the Authority rejects any suggestion that it, or a territorial authority, must accept non-complying arrangements simply because similar arrangements “appear continually in magazines”.
- 6.3.7 The Authority appreciates that many owners will wish to integrate a swimming pool and a house so as to facilitate a pleasant indoor-outdoor lifestyle. The Authority takes that to have been the intention with the original design for this house and its pool. However, that design could be used only if the territorial authority were willing to grant an exemption under the Fencing of Swimming Pools Act. For reasons set out in Determination 2002/10, the Authority itself does not have the power to grant such an exemption, or to grant a waiver or modification of the relevant provisions of the building code.
- 6.3.8 In respect of exclusions, waivers, or modifications the Authority repeats what it said in Determination 2002/10:

“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”². 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.”

6.4 The doors

6.4.1 In respect of the doors, the territorial authority submitted:

- (a) “. . . the number of doors which will lead from the living areas of the dwelling directly to the pool area . . . will allow uninhibited access to the pool.”
- (b) “. . . Clause F4.3.5(a) requires gates and doors forming part of a barrier to a swimming pool to automatically close and latch but it specifically excludes sliding and sliding-folding doors. This exclusion appears to be in direct conflict with the requirements of clause F4.3.4(f). It is however the Council’s view that Clause F4.3.5(a) does not override the requirement of Clause F4.3.4(f). Clause F4.3.4(f) is not expressed to be subject to Clause F4.3.5(a). . . this exclusion for sliding and sliding-folding doors was intended to provide for a door of this type opening into the pool area and accepting that there were no suitable self closing devices for such doors. It was not intended that this should allow unlimited access to the pool through such openings as this would negate the whole purpose of clause F4.3.4(f).”

6.4.2 The applicant submitted that the exemption of sliding and sliding-folding doors under clause F4.3.5(a) of the building code:

“. . . was intended as an indication to T.A’s of the reasonable interpretation of Clause 11 of the Schedule to the Fencing of S. P. Act.”

6.5 The Authority’s view as to the doors

6.5.1 The Authority has concluded that the doors do not come within the clause F4.3.5(a) exclusion because they do not open onto the immediate pool surround but on to a much larger area. That disposes of the matter, and the Authority does not need to consider the submissions as to the doors themselves. In other words, sliding and folding-sliding doors in safety barriers to swimming pools are allowed only if they open on to the immediate pool surround, so that every case will need to be considered on its merits.

6.5.2 The Authority notes the territorial authority’s submission that “the number of doors . . . will allow uninhibited access to the pool”. It is arguable that in some circumstances the opening of a number of sliding or sliding-folding doors would amount to a removal of all or a major part of the safety barrier to a pool. Again, every case will need to be considered on its merits.

² 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.

- 6.5.3 As to the territorial authority's submission to the effect that the exclusion allowed under clause 4.3.5(a) may be ignored as being "in direct conflict with the requirements of clause F4.3.4(f)", the Authority does not agree. It is in the nature of exclusions that they conflict with the requirements from which they are excluded.
- 6.5.4 The Authority places no weight whatever on the applicant's submission that the exemption of sliding and sliding-folding doors "was intended as an indication . . . of the reasonable interpretation" of the Fencing of Swimming Pools Act. The Authority takes the view that one piece of legislation cannot be interpreted on the basis that Parliament intended to drop hints about another piece of legislation.

7 CONCLUSIONS

- 7.1 For the reasons set out above, the Authority concludes:
- (a) That the terrace concerned cannot properly be described as "the immediate pool surround" as that phrase is used in clause F4.3.5(a) of the building code, and
 - (b) That it is not necessary to decide whether any or all of the sliding and sliding-folding doors concerned would be required by clause F4.3.5(a) to close and latch automatically because none of them opens on to the immediate pool surround.

8 THE AUTHORITY'S DECISION

- 8.1 In accordance with section 20 of the Building Act, the Authority hereby confirms the territorial authority's decision not to amend the building consent.

Signed for and on behalf of the Building Industry Authority on this 7th day of April 2003.

Richard Martin
Acting Chief Executive